

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Competition in the Communications Marketplace) GN Docket No. 20-60

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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NCTA – The Internet & Television Association (“NCTA”) submits these comments in response to the Public Notice issued by the Office of Economics and Analytics in the above-referenced proceeding.¹ As demonstrated below, consumers are benefitting from vibrant competition in every segment of the communications marketplace. The Commission should continue to take steps, however, to further modernize regulation of the video marketplace and accelerate the deployment and adoption of broadband so that more consumers can participate in the broadband economy.

INTRODUCTION AND SUMMARY

Pursuant to RAY BAUM’s Act, every other year the Commission is required to publish a report that “assess[es] the state of competition in the communications marketplace,” including voice, video, audio, and data services.² The report is required to consider all forms of competition, including the effect of “intermodal competition” and “competition from new and emergent communications services.”³

As NCTA details below, the broadband and video sectors of the communications marketplace are experiencing robust competition that is delivering substantial benefits to

¹ Public Notice, Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace, GN Docket No. 20-60, DA 20-199 (Feb. 27, 2020) (*Notice*).

² 47 U.S.C. §§ 163(a), (b)(1).

³ 47 U.S.C. § 163 (d)(1).

consumers. Even in the face of the COVID-19 crisis the country is currently experiencing, the networks and services provided by America's communications providers are rising to the challenge and helping to keep the country safe and connected.

Many of the Commission's recent policy decisions have contributed to this success, but more should be done to expand the number of consumers that have access to broadband services. In particular, the Commission should take steps to improve the effectiveness of its universal service programs by forbearing from the Eligible Telecommunications Carrier ("ETC") requirement, which acts as an artificial limit on which providers can participate, and reforming the Lifeline program to better support broadband services that facilitate learning and working from home. It should also continue to foster the deployment of fixed broadband networks by reducing permitting and pole attachment obstacles and the deployment of competitive Wi-Fi offerings by ensuring a sufficient pipeline of unlicensed spectrum to support those services.

Moreover, the Commission should recognize the dramatic ways in which the video marketplace has changed in the nearly three decades since the 1992 Cable Act was passed, and it should fully consider the impact of these changes on the array of regulatory obligations governing cable operators and other participants in the video marketplace. Regulations premised on a lack of competition are unnecessary and unhelpful in today's vibrant, diverse marketplace and should therefore be eliminated, and other regulations should be reevaluated given the need for regulatory parity and the shift in how consumers are accessing video programming.

I. BROADBAND COMPETITION IS DELIVERING SUBSTANTIAL BENEFITS TO CONSUMERS, BUT ADDITIONAL COMMISSION ACTION COULD HELP EXTEND THESE BENEFITS TO MORE CONSUMERS

Spurred by the Commission's light touch approach to broadband regulation, cable operators have been steadily building out and upgrading their networks to provide faster and more reliable broadband to more customers. Providers using a variety of other technologies have

been doing the same, resulting in vibrant competition for most consumers. These continuing improvements in broadband Internet access have enabled an explosion of online options for communications services and delivered substantial consumer benefits. The strong performance of U.S. broadband networks in the face of the COVID-19 crisis demonstrates that the Commission’s light touch regulatory approach has enabled the industry to meet the needs of American consumers when it counts the most.

A. Competition in the Broadband Marketplace Continues to Grow and Foster a Robust Environment for Online Services

Over the last two years, cable operators have expanded the reach and performance of their broadband networks. Cable operators are now offering gigabit services to over 80% of American consumers, up from just 9% in 2016.⁴ Moreover, the current light touch regulatory regime for broadband services has fostered investment and innovation and enabled cable operators to move ahead with implementation of the industry’s 10G initiative. CableLabs recently released the specifications for DOCSIS 4.0, which will enable operators to deliver symmetric, multi-gigabit speeds and decreased latency.⁵ These enhanced network capabilities will power the next era of innovation, with significant improvements possible in telehealth, education, streaming video, and online gaming.⁶ In addition to these capabilities, cable operators also offer residential and business customers the ability to use their fixed connection wirelessly through Wi-Fi networking plus connectivity through millions of cable hotspot access points.

⁴ See CableLabs, *Driving Gigabit Speeds from Lab to Consumer*, <https://www.cablelabs.com/gigabit-internet-speeds>.

⁵ See, e.g., Daniel Frankel, *CableLabs publishes DOCSIS 4.0 Specs*, Multichannel News (Apr. 6, 2020), <https://www.multichannel.com/news/cablelabs-publishes-docsis-4-0-specs>.

⁶ *2020 Progress Update: The 10G Platform*, <https://www.10gplatform.com/news/2020-progress-update-10g-platform>.

Since the *2018 Communications Marketplace Report*, the level of broadband competition has continued to increase. According to the latest statistics from the Commission, nearly 70% of the population lives in an area where two or more providers offer terrestrial service at a 25/3 Mbps level or faster.⁷ Five years ago, only 39% of the population had access to 25/3 Mbps terrestrial service from two or more providers.⁸ With respect to fixed broadband services, cable operators continue to experience increasing competition from providers using fiber-to-the-home, DSL, and fixed wireless. Fiber services are now available to almost 40% of the population, and DSL speeds of 25/3 Mbps or more are available to more than 37% of the population. And cable operators not only are experiencing competition from fixed wireless providers, but operators themselves are using fixed-wireless technology to extend their networks in rural areas with equipment capable of delivering 100 Mbps downstream or more.⁹ More than 73% of the population has access to 25/3 Mbps terrestrial broadband service from a non-cable service provider (fiber, DSL, or fixed wireless).¹⁰

Cable operators also continue to experience “intermodal competition” from mobile wireless providers. As many economists and other observers have recognized, there exists a degree of substitution between wireline and wireless services and, therefore, “the actions of wireline companies . . . influence wireless companies and vice versa.”¹¹ Mobile devices typically contain multiple antennas that allow them to dynamically switch from mobile

⁷ NCTA analysis of June 2019 data from *Fixed Broadband Deployment*, FCC, <https://broadbandmap.fcc.gov/#/> (accessed Apr. 10, 2020).

⁸ *2016 Broadband Progress Report*, 31 FCC Rcd. 699 (2016).

⁹ *See, e.g.*, Comments of Midco, WC Docket No. 19-126, at 3-4 (filed Oct. 21, 2019).

¹⁰ NCTA analysis of June 2019 data from *Fixed Broadband Deployment*, FCC, <https://broadbandmap.fcc.gov/#/> (last accessed Apr. 10, 2020).

¹¹ Declaration of Christian Dippon at 14, attached to Comments of Comcast, WC Docket No. 17-108 (filed July 17, 2017).

broadband to Wi-Fi connections without user intervention. And many of these mobile services are already offering speeds “on par with some” fixed broadband provider services.¹² In the existing marketplace for broadband services, roughly 13.6% of customers have made the choice to rely on mobile services in lieu of purchasing fixed service.¹³ The fact that millions of consumers are making such a choice puts competitive pressure on cable operators, particularly for entry level services.

At the same time, Wi-Fi capabilities offered by cable operators complement, and in some cases substitute for, mobile networking. Carrier offload of mobile traffic to Wi-Fi—predicted to hit 70% of traffic in the 5G environment¹⁴—helps manage congestion on mobile networks and lowers costs for carriers and their customers. Moreover, high-speed indoor Wi-Fi deployments complement mobile networks by providing coverage in indoor locations where mobile signals cannot easily penetrate. When mobile broadband customers are at home, in the office, or in public spaces like shopping malls, coffee shops, or stadiums, chances are that their mobile devices rely on Wi-Fi connectivity, not mobile data, as a way to access higher speeds and keep the costs of data consumption low.

Cable operators also anticipate that competition from mobile ISPs will only increase as “new and emergent” services are introduced over the next two years. 5G services that were still on the drawing board two years ago have now been introduced to the marketplace by all the major wireless carriers.¹⁵ The FCC has recognized that the “advent of 5G technologies” will

¹² Comments of USTelecom, Hearings on Competition and Consumer Protection in the 21st Century, Topic 2, Project Number P181201, at 7-8 (filed Aug. 20, 2018), <https://www.ftc.gov/policy/advocacy/public-comment-topics-process#2>.

¹³ U.S. Census Bureau, American Community Survey, 2018.

¹⁴ Broadcom, *Wi-Fi in the 5G Era*, at slide 24 (2019), available at <https://newamericadotorg.s3>.

¹⁵ See Catherine Sbeglia, *T-Mobile adds 10 markets to its 5G Network*, RCR Wireless, Mar. 20, 2020, <https://www.rcrwireless.com/20200320/5g/t-mobile-adds-10-markets-5g-network>; Phillip Michaels and Caitlin

greatly enhance “the pressure mobile exerts in the broadband marketplace.”¹⁶ With the national wireless providers racing to deploy 5G networks and others to follow, the percentage of American consumers with access to multiple services offering next-generation speeds will climb. Indeed, as mobile providers have projected to cover much of the U.S. population within the next five years,¹⁷ more than 90% of Americans should have a choice of four or more providers offering well above 100 Mbps by this time. In addition, T-Mobile has pledged to use the excess capacity of its wireless network in certain markets resulting from its recent merger with Sprint to offer in-home broadband service at a low price and low incremental cost to half the country.¹⁸

Similarly, low earth orbit (“LEO”) satellite services have started to launch satellites and move ahead with their business plans, including ventures backed by Amazon and Elon Musk’s SpaceX.¹⁹ Several providers expect to offer speeds of up to 1 Gbps, with lower latency than previously possible with satellite internet offerings.²⁰ While the ultimate mix of technologies

McGarry, *AT&T 5G network rollout: locations, phones, price, and more*, Tom's Guide (updated Mar. 7, 2020), <https://www.tomsguide.com/us/att-5g-network,news-29855.html>; Aaron Pressman, *Verizon to double the number of cities with its 5G mobile service this year*, Fortune, Feb. 13, 2020, <https://fortune.com/2020/02/13/verizon-5g-mobile-network-double-number-of-cities/>; *Sprint 5G Overview*, Sprint (Feb. 11, 2020), <https://newsroom.sprint.com/sprint-5g-overview-1-2.htm>.

¹⁶ *Restoring Internet Freedom*, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd. 311 ¶ 130 (2018).

¹⁷ Description of Transaction, Public Interest Statement, and Related Demonstrations, Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WTB Docket No. 18-197, at 59 (filed June 18, 2018).

¹⁸ Letter from Nancy J. Victory, Counsel, T-Mobile US, Inc., and Regina M. Keeney, Counsel, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (May 20, 2019).

¹⁹ See Caleb Henry, *SpaceX launches second batch of Starlink broadband satellites*, SpaceNews, Nov. 11, 2019, <https://spacenews.com/spacex-launches-second-batch-of-starlink-broadband-satellites/>; Caleb Henry, *Soyuz launches 34 OneWeb satellites*, SpaceNews, Mar. 21, 2020, <https://spacenews.com/soyuz-launches-34-oneweb-satellites/>; see also Alan Boyle, *Amazon's Project Kuiper and OneWeb raise the curtain higher on their satellite plans*, GeekWire (Oct. 1, 2019 10:11pm), <https://www.geekwire.com/2019/amazons-project-kuiper-oneweb-raise-curtain-higher-satellite-plans/> (discussing filings submitted to the FCC by OneWeb and Amazon's Kuiper Systems regarding their plans for their respective LEO NGSO constellations).

²⁰ Jeremy Horwitz, *Apple's Satellite Project Won't Rival SpaceX's Starlink Anytime Soon*, VentureBeat (Dec. 20, 2019), <https://venturebeat.com/2019/12/20/apples-satellite-project-wont-rival-spacexs-starlink-anytime-soon/>; *Telesat LEO – Why LEO?*, Telesat (2020), <https://www.telesat.com/services/leo/why-leo>.

that succeed in the marketplace remains uncertain, what is certain is that companies providing these services will aggressively try to win new customers and that cable operators will need to respond by continuing to improve their offerings.

B. The Performance of Broadband Networks and Services During the COVID-19 Crisis Demonstrates the Success of the Commission’s Light Touch Regulatory Policies

As a result of the competition described above, cable operators face continual pressure to improve their services so they can retain existing customers and continue attracting new ones. The primary way that cable operators do this is by continually investing in the performance and resiliency of their networks and enabling the efficient delivery of state-of-the-art broadband services. Cable operators have invested over \$290 billion in capital infrastructure over the last 20 years.²¹

These investments are paying off during the current COVID-19 crisis. Even as there have been substantial increases in the amount of traffic on the network and substantial shifts in peak period traffic patterns, cable broadband networks have continued to perform at exceptional levels. As detailed on NCTA’s COVID Dashboard, while network usage has increased substantially since the beginning of March, over 99% of the customers of major cable operators have not experienced any material impact.²² Similarly, Wi-Fi networks continue to perform well even as operators open those networks for use beyond their customer base. The bottom line is that cable broadband networks are delivering exceptional results for American consumers during this unprecedented period.

²¹ See *Broadband by the Numbers*, NCTA, <https://www.ncta.com/broadband-by-the-numbers>.

²² See *COVID-19 – How Cable’s Internet Networks Are Performing*, NCTA, <https://www.ncta.com/COVIDdashboard> (last accessed Apr. 17, 2020).

Cable operators also have stepped up to help current customers stay online and to bring the benefits of broadband to new customers. The vast majority of NCTA member companies have taken Chairman Pai’s Keep Americans Connected pledge,²³ and many have gone above and beyond what the pledge requires. Many cable operators have enhanced their low-income programs or launched new programs and are offering free services to qualifying new customers.²⁴ Cable operators recognize the heightened role that broadband services are playing for American consumers during this crisis, and NCTA’s members’ actions show that they are taking that role to heart.

C. The Commission Should Continue to Take Steps to Promote the Deployment and Adoption of High-Quality Broadband Services

In the last few years, the Commission has taken a number of steps that have made it easier for cable operators and others to deploy broadband services more efficiently, including in unserved rural areas. In particular, the Commission has removed or reduced obstacles to network deployment, such as excessive and duplicative franchise requirements or unreasonable pole attachment practices.²⁵ It also has made meaningful improvements in its distribution of high-cost universal service support, such as increased reliance on competitive bidding.²⁶ While these steps have been tremendously helpful, more can and should be done to address the remaining gaps in ubiquitous broadband deployment and adoption. Some of these steps include:

²³ Federal Communications Commission, *Keep Americans Connected Pledge* (updated Apr. 16, 2020), <https://www.fcc.gov/keep-americans-connected>.

²⁴ A full listing of member company efforts is available on NCTA’s website at *Responding to the COVID-19 Outbreak*, <https://www.ncta.com/response>.

²⁵ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, 34 FCC Rcd. 6844 (2019) (*Section 621 Order*).

²⁶ *Rural Digital Opportunity Fund*, Report and Order, 35 FCC Rcd. 686 (2020).

Forbear From The ETC Requirement. The requirement that a provider be designated as an ETC by the *state* agency that regulates *telephone* service as a condition of receiving *federal* support to build *broadband* networks is obsolete and a perfect candidate for forbearance. Like unbundling and many of the other requirements imposed as part of the Telecommunications Act of 1996, the ETC requirement was adopted at a time when incumbent local exchange carriers were monopoly providers of voice service and no other providers had a track record of providing voice service. In that context, there was some logic in having state commissions perform this statutory vetting function, particularly since it was assumed that competitive providers would be subject to state regulation for voice services.

Over two decades later, the landscape is completely different because the universal service program is focused primarily on broadband, voice calls are primarily made via mobile wireless, and many of the leading broadband providers (including many NCTA members) do not offer retail telecommunications services that are subject to state regulation. Moreover, application of the ETC requirement does not seem to have produced benefits that outweigh the costs of keeping qualified providers from participating in the high-cost support program. For example, the fact that some major telephone companies are longstanding ETCs that have received billions of dollars in deployment subsidies has not protected regulators and customers from performance that falls well short of expectations, including slow speeds, missed construction deadlines, and bankruptcy.²⁷ Meanwhile, companies with superior networks are left on the sidelines due to this unnecessary requirement.

²⁷ See, e.g., Jon Brodtkin, *Frontier files for bankruptcy, says its service won't get any worse*, Ars Technica (Apr. 15, 2020) ("Frontier is widely reviled for its bad customer service, and it has done a poor job maintaining its copper phone and broadband network, leading to investigations and complaints of chronic outages in New York, Minnesota, Ohio, and West Virginia."), <https://arstechnica.com/tech-policy/2020/04/frontier-files-for-bankruptcy-says-its-broadband-service-wont-get-any-worse/>; Jon Brodtkin, *Frontier bungles redaction of network audit that it doesn't want you to see*, Ars Technica (Apr. 9, 2020) ("For example, one redacted sentence says that 'Frontier WV's copper network has at least 952,163 connection points that are susceptible to moisture,

Accordingly, the Commission should forbear from the ETC requirement for all future support programs where it otherwise would apply. Each of the three statutory criteria for forbearance is met here.²⁸ First, the ETC requirement is “not necessary to ensure” that “charges, practices, and classifications are just and reasonable and not unjustly or unreasonably discriminatory.”²⁹ In fact, forbearing from the requirement would allow more providers to participate in programs to deploy broadband to unserved households and provide service to low-income consumers as quickly as possible. Second, the ETC requirement is not “necessary for the protection of consumers.”³⁰ No such requirement exists for service providers participating in the federal universal service E-rate or rural health care programs and the Commission is able to ensure that consumers are fully protected in these programs. The same is true for many state-level broadband deployment programs. And third, allowing non-ETC broadband providers into these programs “is consistent with the public interest” because it furthers the statutory goal of providing unserved and low-income households with access to advanced services.³¹

Continue to Facilitate Network Deployment Efforts. As the Commission has addressed previously, the requirement to obtain construction permits from a local government or permission from an electric utility for pole attachments can sometimes become an obstacle to timely deployment of new broadband services. Although the Commission has taken steps that

corrosion, loose connections, etc. that may cause interruptions of service to customers.”), <https://arstechnica.com/tech-policy/2020/04/frontier-botches-redaction-reveals-952000-potential-network-problems/>; Joan Engebretson, *CenturyLink, Frontier miss CAF II deployment milestones for rural broadband*, Telecompetitor (Jan. 21, 2020), <https://www.telecompetitor.com/frontier-centurylink-miss-caf-ii-deployment-milestones-for-rural-broadband/>.

²⁸ 47 U.S.C. §160(a)(1)-(3).

²⁹ *Id.*, §160(a)(1).

³⁰ *Id.*, §160(a)(2).

³¹ 47 U.S.C. §254(b)(2).

are helpful in reducing these types of barriers,³² the COVID-19 crisis has added a new wrinkle to the situation because permitting officials for the local government or utility may be delayed or precluded from responding to permit requests in a timely manner because of the crisis. While no formal action by the Commission is necessary at this time, the Commission should consider using its persuasive powers to remind local governments and pole owners that broadband providers are actively working to ensure that all consumers can work and learn from home and that flexibility would be helpful in situations where normal processes have been disrupted.

Increase the Effectiveness Of Lifeline Support. The current COVID-19 crisis has highlighted the fact that the current Lifeline program is not optimal for the task of enabling low-income consumers to obtain the type of broadband services that would enable them to work and learn from home. To address this problem, NCTA supports the creation of an emergency broadband program for consumers, though, given the amount of funding that will be needed for such a program, it would be preferable for Congress to create and fund such a program.

Such a program should not have an ETC requirement and instead should include a streamlined qualification process. Companies that already have programs focused on low-income customers should be permitted to use their existing validation processes during this emergency period. Without such a provision, some companies may choose not to participate in this important program because of the upfront costs and delay associated with switching to a new qualification and validation process.

Continue to Add Frequencies To The Unlicensed Spectrum Pipeline. As noted above, broadband providers continue to invest heavily to deliver gigabit speed capabilities to homes and

³² See, e.g., *Section 621 Order* at ¶ 88 (“Today, we make clear that, under section 636(c), states, localities, and franchising authorities may not impose fees or restrictions on cable operators for the provision of non-cable services in connection with access to such rights-of-way, except as expressly authorized in the Act.”).

businesses across their footprints. But for consumers to experience the full benefits of those investments, Wi-Fi must be able to keep up with these speeds and with the increasing demands that will be placed on Wi-Fi going forward. Wi-Fi carried half of all Internet traffic in the United States in 2017, and this number is expected to grow to 56.6% by 2022.³³ With the anticipated growth in Internet traffic over that 5-year period, Wi-Fi networks in 2022 will carry more than the total traffic *any medium* carried in 2017.³⁴ Demands on Wi-Fi capacity will become even more acute as the United States continues to progress into a 5G world.³⁵

Recognizing the pressing need for additional unlicensed spectrum to support growing demand and next-generation technologies, the Commission adopted an Order this month enabling unlicensed sharing in all 1200 megahertz of the 6 GHz band while protecting existing users.³⁶ NCTA thanks the Commission for its tremendous effort in that proceeding, which will go a long way toward advancing next generation Wi-Fi connectivity.

The next-generation Wi-Fi standard, Wi-Fi 6, has made significant speed and spectrum efficiency advancements, but relies on wide 160-megahertz channels, such as those recently made available in the 6 GHz band. The Commission can continue to make near-term progress on the unlicensed mid-band spectrum pipeline, and support the benefits of Wi-Fi 6 in existing equipment, by issuing an Order this year adopting its proposal to authorize unlicensed use of the

³³ Comments of Cisco Systems, Inc., ET Docket No. 18-295, GN Docket No. 17-183, at 4 (filed Feb. 15, 2019) (Cisco 6 GHz Comments) (citing Cisco Systems Inc., VNI Forecast Highlights Tool, https://www.cisco.com/c/m/en_us/solutions/service-provider/vni-forecast-highlights.html).

³⁴ *Id.*

³⁵ Wireless Infrastructure Association, *The 5G Paradox: The Need for More Offloading Options in the Next-Generation Wireless Era 2* (Feb. 8, 2019), https://wia.org/wp-content/uploads/WIA_Offload-web.pdf; Broadcom, *Wi-Fi in the 5G Era*, at slide 24 (2019), available at https://newamericadotorg.s3.amazonaws.com/documents/Wi-Fi_in_the_5G_Era_-_Broadcom_presentation.pdf (noting Cisco prediction that more than 70% of 5G traffic will be offloaded to Wi-Fi).

³⁶ *Unlicensed Use of the 6 GHz Band; Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 18-295; GN Docket No. 17-183, FCC 20-51 (rel. Apr. 24, 2020).

lower 45 megahertz of the 5.9 GHz band.³⁷ The 5.9 GHz band is uniquely positioned to meet Wi-Fi needs now because its location adjacent to existing Wi-Fi spectrum would allow some existing equipment to use the spectrum very quickly through firmware/software upgrades, and allow new equipment to access 5.9 GHz spectrum with minimal additional expense.

II. THE COMMISSION SHOULD RECOGNIZE THAT COMPETITION IN THE VIDEO MARKETPLACE IS ROBUST AND REVISE ITS REGULATIONS ACCORDINGLY

Consumers today have more choices than Congress could ever have envisioned when it first mandated regular collection of data on the state of competition in the video marketplace in 1992. Consumers can now choose among a multitude of traditional and online video service providers, access vast quantities of linear and on-demand programming, and view all of this content using TVs, TV-connected-devices, computers, tablets, smartphones, and other devices they own. In addition to traditional and new media options, content producers are vying for consumers' attention with an increasingly broad universe of content and immersive options, including video games, virtual reality, and others.

A. The Marketplace for Video Programming Is Vibrant and Continues to Grow

In 1992, consumers generally had just three options for watching video programming: video cassette rentals and purchases, over-the-air broadcast television, and a single multichannel video programming distributor (“MVPD”)—typically a cable operator authorized to serve the consumer’s local area.³⁸ Today, the marketplace looks dramatically different, as consumers can access linear and on-demand video programming from an ever-increasing variety of sources and networks compete for consumers’ eyeballs in the attention economy.

³⁷ See *Use of the 5.850-5.925 GHz Band*, Notice of Proposed Rulemaking, 34 FCC Rcd. 12,603 (2019).

³⁸ Of the 54.3 million subscribers to MVPD service in 1991, more than 95% subscribed to cable service. See S. Rep. No. 102-92, at *7 (1991) (“Senate Report”) (finding that cable did not face “significant competition from other multichannel video providers”).

To start, there is robust competition among MVPDs, and nearly all consumers can choose from at least three—and many from at least four—competing MVPDs.³⁹ Since the entry of DBS and overbuilders (including many of the telephone companies) into the MVPD marketplace in the 1990s and 2000s, respectively, cable’s share of the marketplace has steadily declined. Telephone and DBS companies now comprise three of the top five traditional MVPDs,⁴⁰ and the FCC has found that cable operators are subject to effective competition in nearly every community in the United States.⁴¹ That said, this strong competition among MVPDs is not the driver of the most recent significant shift in the marketplace.

As the Commission has recognized, the Internet has transformed the way that we access and consume video content.⁴² The Internet supports a broad array of platforms through which

³⁹ See *Communications Marketplace Report et al.*, Report, 33 FCC Rcd. 12558, ¶ 51 (2018) (“*First Communications Marketplace Report*”).

⁴⁰ AT&T/DIRECTV is second, DISH is fourth, and Verizon Fios is fifth, based on subscribership. See *Comcast Reports 4th Quarter and Full Year 2019 Results*, Comcast (Jan. 23, 2020), <https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-4th-quarter-and-full-year-2019-results>; *AT&T Reports Fourth-Quarter and Full-Year Results*, AT&T (Jan. 29, 2020), <https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/quarterly-earnings/2019/4q-2019/ATT%204Q19%20Earnings%20Release.pdf>; *Charter Announces Fourth Quarter 2019 Results*, Charter (Jan. 31, 2020), <https://charter.gcs-web.com/news-releases/news-release-details/charter-announces-fourth-quarter-2019-results>; *DISH Network Reports Fourth Quarter, Year-End 2019 Financial Results*, DISH (Feb. 19, 2020), <https://ir.dish.com/news-releases/news-release-details/dish-network-reports-fourth-quarter-year-end-2019-financial>; *Financial and Operating Information as of December 31, 2019*, Verizon, <https://www.verizon.com/about/file/40151/download?token=E5UU4vx8> (last accessed Apr. 14, 2020).

⁴¹ See *Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 (2015) (adopting a rebuttable presumption that cable operators are subject to “competing provider” effective competition in all franchise areas); *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, Memorandum Opinion and Order, 34 FCC Rcd. 10229, ¶ 1 (2019) (“*Charter Effective Competition Order*”) (finding that Charter is subject to effective competition in Kauai, Hawaii and in its franchise areas in Massachusetts, and finding that “in today’s video marketplace consumers have a choice of multiple delivery systems to access video programming via means other than traditional cable television”); see also CoxCom, LLC d/b/a Cox Communications Petition for Determination of Effective Competition, MB Docket No. 20-10, CSR-8985-E (filed Dec. 18, 2019); Petition of Comcast Cable Communications, LLC, on Behalf of Its Subsidiaries and Affiliates for a Determination of Effective Competition in Massachusetts Communities Listed in Appendix A, MB Docket No. 19-385, CSR 8984-E (filed Dec. 16, 2019).

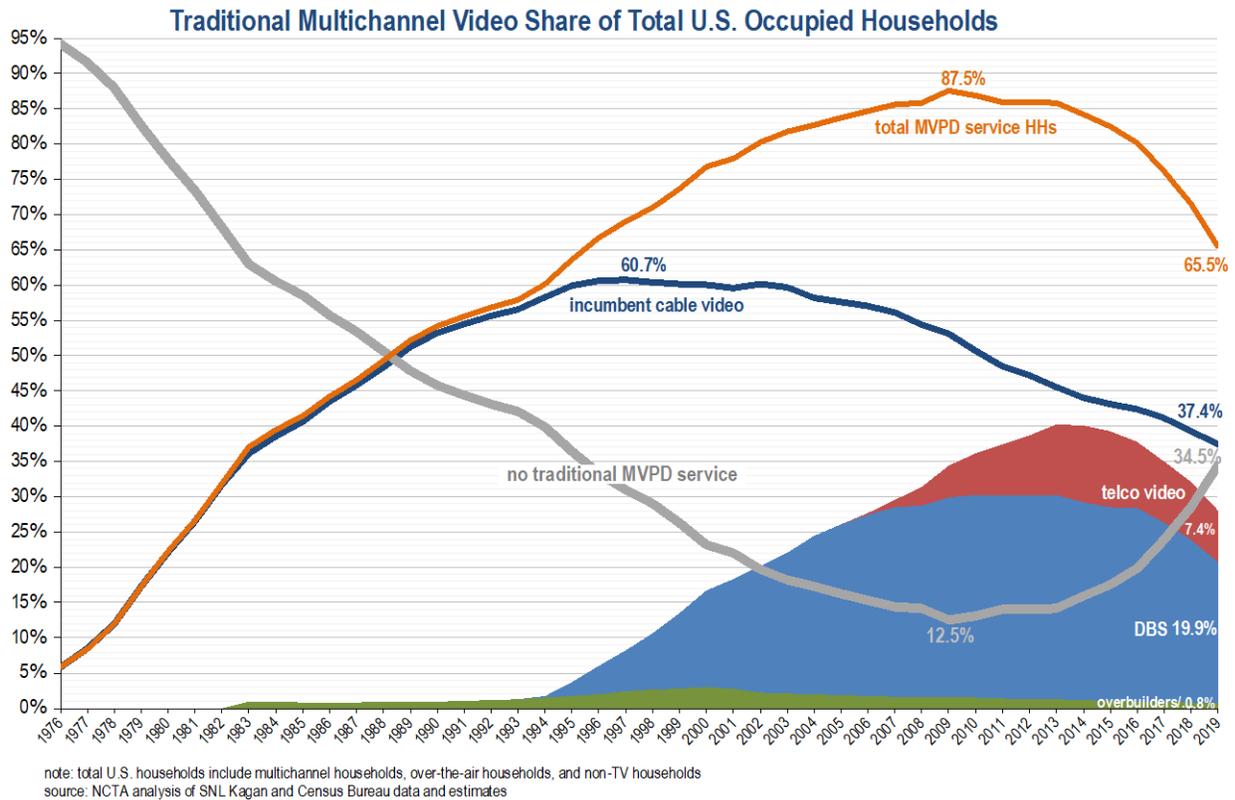
⁴² See *Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd. 4934, 4938, 4952 ¶¶ 10, 40 (2019) (“*Leased Access Order*”) (discussing the growth and impact of online video platforms).

consumers can view video programming without a subscription to a traditional MVPD service, and the number of consumers accessing content in this way has grown and continues to grow at an astronomical pace. Likewise, new Internet-based entrants have increased competition in the marketplace for content creation, as programming networks must battle with a wide array of deep-pocketed new competitors to attract both production talent and viewers.

As shown in the Figure below, traditional MVPD penetration in occupied households has fallen by 22 percentage points over the last ten years, from 87.5% in 2009 to 65.5% in 2019—and only 38% of occupied households had cable video service as of December 2019.

Correspondingly, as shown below, the percentage of households without traditional MVPD service has almost tripled in the past ten years, going from just 12.5% in 2009 to 34.5% as of December 2019, and it is expected to continue to grow.⁴³

⁴³ In fact, declining MVPD subscribership and growing consumer use of online video services have already driven some small traditional MVPDs out of the MVPD market entirely. *See, e.g., 3 Rivers Communications terminating TV services by end of October*, KRTV Great Falls (June 11, 2019), <https://www.krtv.com/news/montana-and-regional-news/2019/06/11/3-rivers-communications-terminating-tv-services-by-end-of-october/>.



Consumers now watch substantial amounts of video content online, and online video distributors (“OVDs”) have become enormously successful. The top two subscription video on demand (“SVOD”) services in the United States—Netflix and Amazon Prime—outrank every traditional MVPD in subscribership. Netflix had 61 million domestic video subscribers as of December 2019, nearly as many as the four largest MVPDs *combined*,⁴⁴ and Amazon Prime is estimated to have 60 million domestic customers who use the video service.⁴⁵ Moreover, both

⁴⁴ See *supra* note 30; Netflix, *Netflix Q4 2019 Letter to Shareholders* (Jan. 21, 2020), https://s22.q4cdn.com/959853165/files/doc_financials/2019/q4/FINAL-Q4-19-Shareholder-Letter.pdf.

⁴⁵ See *Amazon’s Prime Video Channels Biz to Generate \$1.7 Billion in 2018 (Analysts)*, Variety (December 7, 2018), <https://variety.com/2018/digital/news/amazon-prime-video-channels-tv-revenue-estimates-1203083998/> (noting that Bank of Montreal estimates 40 million Prime Video users in the United States in 2018 out of 100 million total Prime subscribers in 2018, *i.e.* 40% of total Prime subscribers are U.S. Prime users); *Amazon.com 4th Quarter 2019 Earnings Release*, Amazon.com (January 30, 2020), <https://ir.aboutamazon.com/news-release/news-release-details/2020/Amazoncom-Announces-Fourth-Quarter-Sales-up-21-to-874-Billion/default.aspx> (announcing over 150 million paid Prime members worldwide). For 2019, our analysis assumes that 40% of 150 million total Prime subscribers equates to approximately 60 million Prime Video users in the United States.

Netflix and Amazon compete on a global scale. Netflix, for example, has at least an additional 113 million international subscribers.⁴⁶ Other SVOD services also have substantial numbers of subscribers. Hulu recently announced that it has over 30 million subscribers for its service,⁴⁷ and Disney+, which launched in November 2019, had gained 28.6 million subscribers by February 2020 alone—more than any individual MVPD.⁴⁸ Apple also debuted its own SVOD service in November 2019, Apple TV+. These are just a few of the myriad SVOD services available today, and new ones continue to launch—for instance, Quibi just launched an SVOD service targeted to consumers who watch content on mobile devices, and NBCUniversal and WarnerMedia are also launching their own streaming services.

Consumers can also view video programming online through streaming services that provide linear video channels (*i.e.*, virtual MVPDs or vMVPDs), such as SlingTV, Hulu + Live TV, YouTube TV, AT&T TV NOW, and FuboTV.⁴⁹ In just five years, so-called vMVPDs have gone from no customers at all to millions; as of December 2019, the six leading vMVPDs had an

⁴⁶ Netflix, *Netflix Q1 2020 Letter to Shareholders*, (Apr. 21, 2020), https://s22.q4cdn.com/959853165/files/doc_financials/2020/q1/FINAL-Q1-20-Shareholder-Letter.pdf?mod=article_inline. Netflix gained more than 15.7 million subscribers globally in the first quarter of 2020 alone. *Id.*

⁴⁷ See The Walt Disney Company, *The Walt Disney Company 1st Quarter Earnings Report for Fiscal 2020*, (February 4, 2020) (“Walt Disney Company 1st Quarter Earnings Report FY 2020”), <https://thewaltdisneycompany.com/app/uploads/2020/02/q1-fy20-earnings.pdf>. This number includes the 3.2 million Hulu subscribers who subscribe to Hulu + Live TV.

⁴⁸ The vast majority of these subscribers are domestic. See The Walt Disney Company, *Transcript of Q1 FY20 Earnings Conference Call* (February 4, 2020), <https://thewaltdisneycompany.com/app/uploads/2020/02/q1-fy20-earnings-transcript.pdf>. Disney recently announced that it now has more than 50 million subscribers worldwide. See *Disney+ Paid Subscriber Count Surpasses 50 Million Milestone*, The Walt Disney Company (April 8, 2020), <https://thewaltdisneycompany.com/disney-paid-subscriber-count-surpasses-50-million-milestone>.

⁴⁹ Although vMVPD is commonly used to refer to OVDs that deliver linear programming networks, OVDs—including so-called vMVPDs—do not meet the statutory definition of an MVPD under Title VI of the Communications Act.

estimated total of 10 million video subscribers,⁵⁰ and the three largest vMVPDs had more than 2 million subscribers each.⁵¹ In fact, Hulu’s 3.2 million Live TV subscribers⁵² are just shy of the number of subscribers—3.4 million—served by the sixth largest MVPD, Cox Communications.⁵³ Nearly half of these subscribers switched directly from an MVPD, while another 25% subscribe to both an MVPD and a vMVPD.⁵⁴

Online video programming content is also available to consumers without an SVOD or vMVPD subscription. Many programming services—including program networks carried by cable systems and other MVPDs—offer programming directly to consumers via their own websites or apps or through platforms such as Apple, Amazon, and Roku, enabling them to reach viewers directly without having to rely on traditional MVPD distribution. In addition, consumers can access many popular programs on a growing number of free, ad-supported services including Pluto TV, IMDbTV, TubiTV, and NBCUniversal’s Peacock streaming service, which is launching this year. Consumers not only have an abundance of choice for sources of video programming—many of which resemble traditional MVPD services—but they can also watch this programming nearly everywhere and on any screen. As is discussed in more detail below, consumers can view video content—whether provided by an MVPD, vMVPD,

⁵⁰ See Ben Munson, *U.S. vMVPD market nears 10M total subscribers: analyst*, FierceVideo, Feb. 19, 2020, <https://www.fiercevideo.com/operators/u-s-vmvdp-market-nears-10m-total-subscribers-analyst-says>.

⁵¹ NCTA analysis of company reports.

⁵² See Walt Disney Company 1st Quarter Earnings Report FY 2020.

⁵³ S&P Global Market Intelligence-Kagan estimate. Notably, another new technology—ATSC 3.0—may also soon become a platform for the provision of linear programming bundles. For instance, Edge Networks currently plans to use ATSC 3.0 to offer more than 80 linear channels in Boise, Idaho. See Cablefax Daily, vol. 31, no. 065, at 1 (Apr. 3, 2020).

⁵⁴ Leichtman Research Group (2020), <https://www.leichtmanresearch.com/44-with-a-vmvdp-switched-from-a-traditional-pay-tv-service>.

SVOD service, or other online platform—on an array of wired and wireless devices, including smart TVs, tablets, and mobile devices.⁵⁵

Perhaps unsurprisingly given the proliferation of new outlets, the amount of video programming available to consumers has also increased over the years, which is another indicator of a competitive marketplace. When the 1992 Act was enacted, cable systems mainly offered a small number of linear programming networks. Today, the amount and diversity of content available to consumers even via cable alone is exponentially larger. As the Commission has recognized, cable systems now typically offer hundreds of linear programming networks and tens of thousands of on-demand programs.⁵⁶ In addition, in response to the evolving and fierce competition discussed above, programming networks have been compelled to invest more in programming in an effort to remain competitive. Programming networks not only battle with other networks today, but with Netflix, Amazon, Apple, and others in an arms race for the best writers, directors, producers, and on-screen talent necessary to create the high-quality programming that audiences demand. This is especially true when it comes to the veritable explosion in investment in new, high-quality, original programming. For instance, basic cable networks' investments in programming increased from around \$17 billion in 2008 to nearly \$33 billion in 2018.⁵⁷ This increase came in direct response to the emergence of online video providers that are also investing billions of dollars in programming, including original, exclusive content. Netflix alone boosted its annual programming expenditures to \$15 billion by the end of 2018, a 34% year-over-year increase since 2015. When the other major platforms, such as

⁵⁵ In addition, local broadcast stations remain available over the air.

⁵⁶ See *First Communications Marketplace Report* ¶¶ 57, 59 (discussing channel packages provided by major MVPDs, including cable operators); *id.* ¶ 58 (“The average number of VOD movies and TV episodes offered by major MVPDs reached 77,570 selections per month at the end of 2017[.]”).

⁵⁷ SNL Kagan, S&P Global Market Intelligence, *Economics of Basic Cable: 2019 Edition*.

Amazon and Apple TV+, are included, spending on streaming content totaled billions more in 2019.⁵⁸ In fact, “Peak TV” reached a major milestone last year. In 2019, more than 500 original scripted television series were shown on television or streamed in the United States, representing a 52% increase in scripted series from 2013 and a 153% increase since 2009.⁵⁹ Programming networks that want to continue to offer viewers the highest quality content have had no choice but to boost their own investments to attract the kinds of talent—both behind-the-scenes and in front of the camera—needed to remain competitive.

Vertical integration in the cable industry also continues to decline. The percentage of national cable programming networks in which cable operators have an ownership interest is currently a mere 7%, down from 9.1% in 2017 and dramatically less than the 52.8% reported in 1994.⁶⁰ As NCTA has previously explained—and as is reinforced by the sheer quantity and diversity of video programming available—Congress’s concern in 1992 that vertical integration between cable operators and cable program networks might pose an anticompetitive threat to the development and availability of non-cable-owned programming no longer justifies the existing regulatory scheme.⁶¹ Indeed, as is discussed in Section II.C below, given the competition in the

⁵⁸ See Brandon Katz, *How Much Does it Cost to Fight in the Streaming Wars?*, *Observer* (Oct. 23, 2019), <https://observer.com/2019/10/netflix-disney-apple-amazon-hbo-max-peacock-content-budgets/>.

⁵⁹ John Koblin, *Peak TV Hits a New Peak, With 532 Scripted Shows*, *New York Times* (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/business/media/tv-shows-2020.html>.

⁶⁰ NCTA internal analysis of FCC data. Moreover, given that Commission rules utilize a low threshold for determining when an interest is attributable, this percentage overestimates the actual number of networks that have meaningful connections with cable distributors, as networks that have virtually no connections with distributors can, under the rules, be deemed “affiliated.” See also Comments of NCTA – the Internet & Television Association, MB Docket No. 17-105, at 17-18 (filed July 5, 2017).

⁶¹ Comments of NCTA – the Internet & Television Association, MB Docket No. 17-214, at 10 (filed Oct. 10, 2017); see also *U.S. v. AT&T Inc.*, 310 F. Supp. 3d 161, 164, 254 (D.D.C. 2018) (noting that the growth of online video providers has led to “tectonic changes” in the video marketplace and explaining that it would be wrong for the court “to ignore those industry trends—trends that are transforming how consumer view video content and blurring the lines between programming, distribution, and web-based competitors”).

video programming marketplace, the Commission should take action to eliminate all regulations premised on concerns regarding the cable industry's once-dominant position in the market.

B. The Marketplace for Equipment Used to Access MVPD and Other Video Services Is Fully Competitive

Not only has the video programming marketplace been radically transformed, but consumers also have many more choices of equipment capable of accessing MVPD and other video programming than anyone could have imagined decades ago. Section 629 of the Communications Act directed the Commission to ensure that consumers have the option to purchase set-top boxes capable of accessing multichannel video programming from manufacturers, retailers, and other vendors not affiliated with their MVPD. At the time this provision was enacted in 1996, most consumers considered their incumbent cable operator to be their sole option for multichannel video services and set-top box equipment. Congress's primary objective was to give consumers one new option: to buy from retail stores a device that could take the place of the device they otherwise rented from their incumbent cable operator. Today, consumers have numerous retail equipment options for accessing MVPD service.

All of the nation's largest MVPDs⁶² support apps that can be used to watch their content on hundreds of millions of consumer-owned devices, such as smart TVs; tablets; streaming sticks and devices such as Apple TV, Roku, Google Chromecast, and Amazon Fire; smartphones; game consoles; and personal computers. Nearly all TV households own at least one of these devices, and the average household has twelve of them, including an average of one smart TV and one streaming device.⁶³ Consumers used more than 36.5 million of these devices to watch MVPD

⁶² Comcast, AT&T/DIRECTV, Charter, DISH, Cox, Altice, Verizon, Mediacom, and Frontier.

⁶³ Kagan Market Intelligence, *US Ownership of Smart TVs, SMPs, Smart Speaker Devices Continues to Climb* (Jan. 17, 2020). Kagan estimates U.S. households owned 962 million of these devices in 2020, 32 million of which were Blu-ray players that do not support any MVPD apps. Kagan Market Intelligence, *US Connected Video Device Projections through 2022* (Nov. 2018).

video in 2018 without using an MVPD leased set-top box, up by 35% from 27 million in 2017, and this figure is expected to continue to sharply increase.⁶⁴

For example, Comcast's Xfinity TV Partner Program supports its app on Roku devices and Samsung and LG Smart TVs.⁶⁵ Charter and Altice sell Apple TVs as an alternative to their leased set-top boxes,⁶⁶ and Charter offers apps for Roku and Samsung Smart TVs. All large MVPDs support apps for iOS and Android tablets and smartphones, and the popularity of these options is driving a reduction of reliance on leased set-top boxes altogether. A majority of adults now reports watching video on a non-TV device daily, most often in their home.⁶⁷ As a result of all of these new options, the total number of set-top boxes deployed by MVPDs has fallen by more than 20% since 2016,⁶⁸ and is projected to decline by another 25-30% by 2023.⁶⁹ In 2019, only 47% of all TV sets in use were connected to an MVPD leased set-top box, the lowest figure ever in the era of all-digital cable television.⁷⁰

⁶⁴ These figures are published by the independent auditor of the Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes based upon review of actual confidential usage data from each of the signatories. D+R International Ltd., *2018 Annual Report, Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes* at 20-22 (Aug. 13, 2019), <https://www.energy-efficiency.us/library/pdf/STB2018AnnualReport.pdf>.

⁶⁵ Comcast, *Xfinity Stream App on Xfinity TV Partner Devices FAQs*, Xfinity.com, <https://www.xfinity.com/support/articles/xfinity-stream-beta-app-faqs>.

⁶⁶ Press Release, Charter Communications, *Spectrum Launches on Apple TV, Offers Apple TV 4K to Customers* (Jan. 4, 2019), <https://corporate.charter.com/newsroom/Spectrum-Launches-on-Apple-TV-Offers-Apple%20TV-4K-to-Customers>; Press Release, Altice USA, *Optimum and Suddenlink's Altice One Entertainment Experience Now Available on Apple TV* (Feb. 26, 2020), <https://www.alticeusa.com/news/articles/press-release/products-services/optimum-and-suddenlink%E2%80%99s-altice-one-entertainment-experience-now-available-apple-tv>.

⁶⁷ Leichtman Research Group, *The 2010s in Hindsight* (Jan. 2020), <https://www.leichtmanresearch.com/wp-content/uploads/2020/01/LRG-Research-Notes-4Q-2019.pdf>.

⁶⁸ See D+R International Ltd., *2018 Annual Report, Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes*, <https://www.energy-efficiency.us/library/pdf/STB2018AnnualReport.pdf> (indicating 20% decline from 2016 to 2018).

⁶⁹ Kagan Market Intelligence, *Cable, Telco and DBS Set-Tops Dwindle in US Installed Forecast* (July 16, 2019).

⁷⁰ Leichtman Research Group, *The 2010s in Hindsight* (Jan. 2020), <https://www.leichtmanresearch.com/wp-content/uploads/2020/01/LRG-Research-Notes-4Q-2019.pdf>.

Consumers not only have many choices for equipment to watch MVPD service, but their equipment options also deliver a host of other competitive video streaming services, many of which resemble or can otherwise replace traditional MVPD services. In the United States, there are now *50 million more* smart TVs, streaming sticks and streaming devices than all of the set-top boxes deployed by MVPDs combined.⁷¹ Each of these devices provides access to an ever-growing list of Internet-delivered platforms and video services. Nearly 80% of U.S. consumers watch Internet-delivered video on their televisions, and in 2019, for the first time, the most popular means of access to online video content was through their smart TVs with no set-top box at all.⁷² Given the foregoing, it is clear that devices used to access MVPD and OVD services are readily available in the market.

C. The Commission Should Revise Its Cable Regulatory Framework in Light of Market Changes

The Commission has made laudable efforts in recent years to modernize its media regulations by eliminating or modifying outdated, unnecessary, or burdensome regulations. The Commission should continue this important work by expeditiously completing ongoing media

⁷¹ Kagan's projections for 2020 are that U.S. consumers will own 121 million smart TVs, 71 million streaming sticks, and 62 million streaming media players. Kagan Market Intelligence, *US Connected Video Device Projections through 2022* (Nov. 2018). The independent auditor of the Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes estimates that there are now fewer than 200 million deployed MVPD set-top boxes. D+R International Ltd., *2018 Annual Report, Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes* at 13 (Aug. 13, 2019), <https://www.energy-efficiency.us/library/pdf/STB2018AnnualReport.pdf>. In addition, the vast majority of American adults—81%—carry on their person a smartphone capable of connecting to the Internet. See *Mobile Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewinternet.org/factsheet/mobile/>.

⁷² Kagan Market Intelligence, *Smart TVs Surpass SMPs for TV Streaming* (Oct. 16, 2019). When asked their primary means of accessing Internet-delivered content, 35% identified the smart TV platform, while 32% named streaming devices (Roku, Apple TV, Chromecast, Amazon Kindle Fire), followed by an HDMI connection to a personal computer at 29%, with pay-TV set top boxes a distant fourth place at only 22%. *Id.* Nearly all new TV purchases are now smart TVs, and a recent study found that 82% of smart TVs are used to access video directly without a set-top box or streaming device. Kagan Market Intelligence, *US Ownership of Smart TVs, SMPs, Smart Speaker Devices Continues to Climb* (Jan. 17, 2020).

modernization proceedings and further revising its video regulations in light of the dramatic changes to the video marketplace.

As detailed above, when Congress enacted the 1992 Cable Act, the video marketplace options were far more limited. At the time, Congress was concerned that a lack of competitors to cable and vertical integration of cable operators and the majority of the most popular cable program networks could potentially give rise to anticompetitive conduct by cable operators. Congress therefore subjected cable operators and program networks to a comprehensive set of regulations, most of which were designed either to promote competition or to prevent anticompetitive conduct *until such competition arose*. In a market characterized by competition, Congress rightly believed that these regulations would not only be unnecessary, they would artificially distort and suppress the pro-consumer benefits of competition.⁷³

As the Commission’s prior video competition analyses have made clear—and the data above confirms—there is robust competition among MVPDs, between MVPDs and OVDs, and among program networks and other programming distributed online and by MVPDs.⁷⁴ It is therefore time for regulations that are premised on a lack of competition in the video marketplace

⁷³ See H.R. Rep. No. 102-628, at 30 (1992) (“The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.”).

⁷⁴ The Commission has also acknowledged that the video marketplace is highly competitive in other contexts. See, e.g., *Leased Access Order* ¶ 10 (noting that in 1984 “consumers had access only to a single pay television service, and Congress and the courts recognized cable’s monopoly power in this regard” and finding that “[t]oday, in contrast, the marketplace has become far more competitive.”); *Modernization of Media Regulation Initiative: Revisions to Cable Television Rate Regulations*, Further Notice of Proposed Rulemaking and Report and Order, 33 FCC Rcd. 10549 ¶ 10 (2018) (“Moreover, as the Commission recognized in its 2015 [effective competition] decision, cable operators face considerably more competition today than they did when our rate regulations were put in place”); *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610 ¶ 1 (2016) (“[C]onsumers today can access video programming over multiple competing platforms, and the dominance of incumbent pay TV distributors has eroded.”); *Charter Effective Competition Order* ¶ 1 (finding that “in today’s video marketplace consumers have a choice of multiple delivery systems to access video programming via means other than traditional cable television”).

to be repealed, as Congress intended. These regulations have no place in a market that is vigorously competitive and may no longer withstand First Amendment scrutiny given the competitive dynamics of today’s video marketplace.⁷⁵ Indeed, as the Commission has recognized, “unnecessary requirements . . . can *impede* competition and innovation in the media marketplace.”⁷⁶ Therefore, in the upcoming marketplace competition report, the Commission should identify those statutory and regulatory provisions that served only as a stopgap until competition developed and explore eliminating or modifying them or, if statutory, recommend that Congress consider eliminating them.⁷⁷ At minimum, the Commission should complete its existing media modernization efforts, including its leased access and rate regulation rulemakings,⁷⁸ clarifications of the cable service change notification procedures,⁷⁹ modifications

⁷⁵ See, e.g., *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“In today’s highly competitive market, . . . [no] video programming distributor possesses market power in the national video programming distribution market. . . In light of the Supreme Court’s precedents interpreting the First Amendment and the massive changes to the video programming distribution market over the last two decades, the FCC’s interference with Comcast’s editorial discretion cannot stand. In restricting the editorial discretion of video programming distributors, the FCC cannot continue to implement a regulatory model premised on a 1990s snapshot of the cable market.”); cf. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (“Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.”).

⁷⁶ *Leased Access Order* ¶ 1 (emphasis added). Note also that the RAY BAUM’S Act directs the Commission to consider whether laws, regulations, or *regulatory* practices “pose a barrier to . . . the competitive expansion of existing providers of communications services.” Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 (RAY BAUM’S Act), Pub. L. No. 115-141, § 401, 132 Stat. 348, 1087-1088 (codified at 47 U.S.C. § 163); see also *Notice* at 4 (seeking comment “on whether laws, regulations, regulatory practices, or demonstrated marketplace practices pose a barrier to competitive entry into the video marketplace, or to the competitive expansion of existing providers”).

⁷⁷ See, e.g., Comments of NCTA – the Internet & Television Association, MB Docket No. 17-105, at 17-18 (filed July 5, 2017) (advocating for repeal or modification of various rules, including those governing program access, program carriage, leased access, and rate regulation). As with other entities in today’s flourishing video marketplace, cable operators would remain subject to Department of Justice and the Federal Trade Commission oversight on competition and antitrust issues.

⁷⁸ See *Leased Commercial Access; Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, 34 FCC Rcd. 4934 (2019); *Revisions to Cable Television Rate Regulations*, Further Notice of Proposed Rulemaking and Report and Order, 33 FCC Rcd. 10549 (2018).

⁷⁹ See *Cable Service Change Notifications et al.*, *Notice of Proposed Rulemaking*, 34 FCC Rcd. 12709 (2019).

to public inspection file requirements regarding cable operators' attributable video programming interests,⁸⁰ and revisions to the program carriage complaint procedures.⁸¹

To the extent that statutory and regulatory provisions address concerns that are not based directly on a lack of competition or on unique characteristics of particular competitors, the Commission should review whether the concerns remain valid. For instance, entities that compete in the provision of like services should not face different public interest or customer service obligations. Besides being arbitrary and capricious, differential regulatory treatment of like services skews the marketplace and prevents consumers from obtaining the service offerings that provide the greatest value.⁸² For example, the Commission should take a fresh look at its children's television advertising rules, which should at the least be revised consistent with NCTA's prior recommendations.⁸³ The Commission's current rules create an unlevel playing field. None of the myriad new online video providers that target children—such as YouTube, Netflix, or Amazon—are burdened by FCC restrictions on advertising. This disparity negatively impacts competition in children's television on linear programming networks available via cable.

⁸⁰ See *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming; Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, MB Docket Nos. 20-35, 17-105, FCC 20-19 (rel. Mar. 2, 2020).

⁸¹ See *Revisions of the Commission's Part 76 Review Procedures; Modernization of Media Regulation Initiative; Revision of the Commission's Program Carriage Rules*, Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70, MB Docket Nos. 20-70, 17-105, 11-131, FCC 20-39 (rel. Apr. 1, 2010).

⁸² Cf. Commissioner Michael O'Rielly, *FCC Regulatory Free Arena*, FCC Blog (July 1, 2018), <https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena> (“[C]urrent law prevents the Commission from having any role or oversight over numerous modern technologies central to many Americans’ communications habits. This universe is often called the app economy or gig environment, but we should also call it for what it really is: an FCC regulatory free arena. . . . [I]t should be impossible for policymakers to ignore their immense popularity, the substitutability of services with those offered by Commission regulatees, and the disruptive force non-regulated services are having with regards to the Commission’s activities. That is, the need for the Commission's regulatory structures (and therefore its relevance and function) are fading like that of a snowman in springtime . . .”).

⁸³ See Comments of NCTA – The Internet & Television Association, MB Docket Nos. 18-202, 17-105 (filed Sept. 24, 2018).

This is particularly detrimental given that cable networks have invested countless hours and billions of dollars in developing trusted brands that serve the programming needs of parents and children.

In sum, today's video marketplace is intensely competitive, providing consumers access to an incredible amount of linear and on-demand video programming from an array of sources that they can view on practically every connected device they own. The Commission should recognize these facts in its second Communications Marketplace Report and fully consider their impact on the regulatory obligations governing cable and its competitors in the video marketplace.

CONCLUSION

NCTA appreciates the opportunity to provide comment on the robust state of competition in the broadband and video sectors of the communications marketplace. Given the competitiveness in these markets, the Commission should ensure that its regulations help encourage continued growth and deployment by reevaluating and revising them as discussed above.

Respectfully submitted,

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