Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 15-158
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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TABLE OF CONTENTS

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments on the Public Notice in the above-captioned proceeding.

I. DESPITE THRIVING COMPETITION IN THE VIDEO MARKETPLACE, SOME PARTIES CONTINUE TO URGE NEW REGULATION DESIGNED SOLELY TO ENHANCE THEIR OWN MARKET POSITIONS.

The initial round of comments in this proceeding confirms the obvious: Choice and competition are now the hallmarks of the market for the delivery of video programming. Not only has vibrant competition among multichannel video programming distributors ("MVPDs") and among cable program networks thoroughly taken hold but also the competitive viewing options offered by online content providers are successfully competing for the viewing time and attention of consumers. And this competition is resulting in technological and marketing innovations by MVPDs *and* online providers that expand both the range of programming available to consumers and the ways in which that programming can be viewed.

These developments are beyond dispute and, indeed, are not disputed by any of the commenting parties. As usual, some parties use this proceeding to reiterate arguments raised (and responded to) in other proceedings, seeking particular regulatory actions intended to enhance their own position in the marketplace. For example, FilmOn X repeats its arguments that online distributors of broadcast and other programming should be deemed MVPDs for purposes of Title VI – arguments that NCTA and others have fully addressed in the Commission's proceeding specifically dealing with that issue.[1] Giving OVDs MVPD status will, according to FilmOn X, correct "competitive balances" between OVDs and facilities-based MVPDs by extending the *benefits* of such status – in particular, the "program access" provisions of Title VI – to OVDs.[2] But when it comes to the statutory and regulatory *obligations* of MVPD status, FilmOn X's concern for competitive balance and regulatory parity disappears. It "urges the Commission to apply a light regulatory touch to Internet-based video services where the provider is not also providing the transmission path."[3] In other words, what FilmOn X is seeking is not regulatory parity but a regulatory thumb on the scale of competition in a marketplace in which competition is quite evidently flourishing.

Netflix, in its comments, confirms the extent to which online video is enhancing the fierce competition that already exists for consumers' attention in the video marketplace:

> Millions of people turn on their TVs every day to watch great content on broadcast and cable networks. But Internet television networks such as Netflix provide additional choice and greater flexibility for consumers. Amazing content is more widely available at any given moment and consumers are bundling different products to create their own package of linear and on-demand content. No longer is "what's on" the only variable when a consumer reaches for the remote. Rather, consumers now consider *how* they want to watch right along with *what* they want to watch.[4]

Nevertheless, Netflix cannot resist using this proceeding as another opportunity to ask for regulatory intervention in the interconnection of "content delivery networks" ("CDNs") – the heretofore unregulated workings of the Internet that have provided the foundation for the

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1 *See* Comments of FilmOn X. *See also* Comments and Reply Comments of NCTA in MB Docket No. 14-261.

2 FilmOn X Comments at i.

3 *Id.* at ii.

4 Netflix Comments at 1-2 (emphasis in original).

"amazing," enormous and ever-expanding array of competitive online services available to consumers – so that it can shift its delivery costs to others.[5]

Meanwhile, the National Association of Broadcasters ("NAB") documents the continuing competitive presence of broadcast television in the video marketplace. But in a transparent attempt to deflect attention from broadcasters' own conduct and regulatory issues, NAB urges the Commission to "carefully examine its statutory obligations to monitor and promote competition in the MVPD market," which it describes as "a web of horizontal and vertical relationships."[6] This tiresome harangue ignores the fact that the Commission has been repeatedly examining horizontal and vertical relationships in the MVPD marketplace, not only in this proceeding but also in rulemaking proceedings to establish limits on horizontal and vertical ownership.

With respect to horizontal ownership, the Commission has twice been unable to convince the United States Court of Appeals for the District of Columbia Circuit that an ownership cap of 30 percent of all MVPD customers was reasonable or necessary to protect competition in the video marketplace.[7] And with respect to vertical integration, the Court, as well as the Commission's annual video competition reports, have established that any threat of anticompetitive conduct that may have resulted from cable ownership of programming at a time when cable operators owned the majority of the most popular cable program networks, has long since disappeared.[8]

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5 *Id.* at 7-8.

6 NAB Comments at 16.

7 *See Time Warner Entertainment Co. v. FCC, (Time Warner II)*, 240 F.3d 1126 (D.C. Cir. 2001), *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

8 *See Time Warner II*, 240 F.3d at 1137-39. *See also, e.g.*, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 ¶¶ 33-34 (2015).

When Congress mandated these Commission inquiries and rulemaking proceedings regarding video competition and horizontal and vertical ownership, most consumers had one local provider of MVPD service – the incumbent franchised cable operator. Today, the MVPD marketplace includes at least two national DBS services and often also includes competitive cable service from telephone companies and other overbuilders. Meanwhile, during that period, the Commission's duopoly and multiple ownership rules for broadcasters were significantly loosened, vastly increasing the number of commonly-owned broadcast stations in local markets as well as nationally.[9] NAB's desire to point the finger elsewhere is understandable, but its efforts to portray the MVPD marketplace as anything but vibrantly competitive are at odds with what has been documented in this proceeding year after year.

Finally, we agree with Public Knowledge that, in light of all the changed market conditions that have occurred in the last two decades, the Commission and Congress should clear away the "regulatory underbrush" of rules premised on a lack of marketplace competition.[10] In particular, we have long agreed that cable operators should not be required to include all broadcast stations – including stations that opt for retransmission consent – in a basic tier that all customers are required to buy. None of cable's competitors have such an obligation, and the requirement hampers cable's ability to compete for customers who would prefer not to have to pay for such stations. We also agree with Public Knowledge that this statutory requirement

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9 *See, e.g, In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

10 Public Knowledge Comments at 6.

applies only to cable systems that are not subject to effective competition – a rapidly dwindling number of systems.[11]

Public Knowledge is mistaken, however, in its assertion that the Commission has not acknowledged this limitation and, notwithstanding the statute, continues to apply the requirement to systems subject to effective competition.[12] As long ago as 2002, in its First Report and Order on digital must-carry issues, the Commission specifically found to the contrary:

> We note, however, that if a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier. This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. We believe that the decision in *Time Warner v. FCC* [56 F.3d 151, 192 (D.C. Cir. 1995)] supports this interpretation.[13]

While all cable systems must continue to provide "must-carry" stations to all subscribers, and while there certainly are other outdated regulations and requirements that should be reviewed and eliminated, the inclusion of *all* broadcast stations on a mandatory basic tier is one of those requirements that, at least where effective competition exists, has expired.

II. THE VIDEO DEVICE MARKETPLACE IS VIBRANTLY COMPETITIVE AND CALLS FOR THE COMMISSION TO MANDATE SET-TOP BOX DISAGGREGATION WOULD DISRUPT INNOVATION, NOT SAVE CONSUMERS MONEY.

As we demonstrated in our initial comments,[14] consumers are able to view video programming on an ever-expanding number of video devices. The primary method of doing so

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[11] *Id.* at 7.

[12] *Id.*

[13] *Carriage of Digital Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598 ¶ 102(2001).

[14] NCTA Comments at 15.

is through apps. Indeed, Apple CEO Tim Cook, in introducing the new Apple TV, observed that "the future of TV is apps." We agree. Nevertheless, the self-styled 'Consumer Video Choice Coalition" ("CVCC") urges a different approach – a government-imposed technology mandate on MVPDs. As we briefly show below, the CVCC claims do not hold up to scrutiny.

A. CVCC's Proposal Wouldn't Deliver Lower-Cost Set-top Boxes.

The CVCC suggests that if a new technology mandate were to force MVPDs to disaggregate their services to be picked apart and repackaged by third party retail devices, its members could deliver big price savings for consumers on set-top boxes. But similar promises were offered before to justify the failed CableCARD mandate. Instead, CableCARD televisions were offered at high markup.[15] Retail CableCARD devices require significant up-front and on-going payments from consumers. For example, TiVo charges an up-front equipment purchase, such as $399 for its mid-range device, plus a monthly service fee of $14.99-$19.99, with only a limited warranty and no assurance against obsolescence. When consumers buy the next TiVo, they lose their $500 "lifetime" subscription.

By contrast, consumers can lease a set-top box for a modest monthly fee with no up-front investment, and can return the box at any time if they break or no longer want it. Despite extraordinary cable industry support for retail CableCARD catalogued in Commission records,[16] relatively few consumers opted for retail CableCARD devices, and the integration ban cost consumers more than a billion dollars before it was repealed on a bipartisan basis by Congress.

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[15] CableCARD TVs that only received one-way linear channels retailed for $1,700-$7,000. CableCARD TVs that received full two-way service were offered at a $300 premium over non-CableCARD TVs. All failed in the market.

[16] The extensive support is catalogued at Reply Comments of NCTA on Fourth Further Notice of Proposed Rulemaking, CS Docket No. 97-80 (June 28, 2010), http://apps.fcc.gov/ecfs/document/view?id=7020514104 (Timeline of Cable Industry Support for CableCARDs).

The CVCC does not offer any commitment to actually build and sell retail set-top boxes that would save consumers money. More important, CVCC does not even acknowledge the significant evolution in the marketplace for delivery of video content, particularly rapid advances in the apps approach.

B. Massive Consumer Adoption of Apps is Already Driving Access to MVPD Content on Retail Devices.

As detailed in NCTA's Comments, the downloadable "apps" approach enables consumers to watch content from MVPDs and Online Video Distributors (OVDs) on an array of customer-owned and TV-attached devices, including iOS and Android tablets and smartphones, game consoles, PCs and Macs, streaming devices, and Smart TVs. The success of the apps-based approach is extraordinary. Roku has sold over 10 million of its retail set-top boxes that rely entirely on apps (including a cable operator app with a cable-operator supplied guide). The Apple iOS platform follows the same app-based approach. U.S. viewers used these and other apps and devices to legally access 7.1 billion movies and 66 billion television episodes in 2014 alone, from among the more than 110 lawful online sources. And the CVCC is just wrong in claiming that these app-based solutions do not permit recording.[17] MVPD apps support cloud and other recording, and enable consumers to "download to go" MVPD content to their mobile devices for later viewing. In addition, VidiPath delivers an app with a recordable output, so consumers may record MVPD content on forthcoming VidiPath-capable retail home recording devices.[18]

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[17] CVCC Comments at 9 ("MVPD apps merely allow consumers to view programming on different screens, and do not allow recording of programming.").

[18] Downloadable Security Technology Advisory Committee, Working Group 2 Report, DA-15-982A4 (Apr. 21, 2015) at 18 ("*DSTAC WG2 Report*"); Downloadable Security Technology Advisory Committee, Working Group

The CVCC is equally mistaken in claiming that apps-based solutions do not permit retail devices to differentiate themselves through their own UI. With an apps approach, the device manufacturer can differentiate itself with its own top-level UI and the video service provider can brand itself with the UI it uses to present its service inside the app, a UI that conforms with the expectations of content providers with whom the video service provider has contractual obligations as well as consumers who have purchased the MVPD service. Retail devices can thrive in this environment because, as reported by DSTAC, "[r]etail devices that host the application may continue to differentiate themselves with features, functions, networks, drives, speed, look, feel and price, and may have their own top level user interface, app store, and menu structure."[19] The different video apps all appear as selectable apps that, once clicked, present the branded retail experience of that video provider in the manner selected by that provider. This is how Netflix, Amazon, MVPD apps, and tablets all work today, and the market is clearly thriving. CVCC feebly tries to support its argument for disaggregation with reference to web browsers and smartphones,[20] but browsers and smartphones function in the same way: web browsers display web pages as they are published by the page owner and smartphones present the application as designed by the app owner, and browsers and smartphones compete with their own features.

CVCC member Google's experience with Android TV is telling: Android TV has been designed to display services as desired by the service provider. Its head Thomas Riedl has explained that "what's crucial [for service providers and content owners] is they want to deliver the best user experience and make sure that the content they provide to the user is displayed

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4 Report, DA-15-982A6 (Aug. 4, 2015) at 142 ("*DSTAC WG4 Report*") ("The DLNA VidiPath spec provides a recordable DTCP-IP output, so that a retail DVR can record programming received by VidiPath.").

19 DSTAC WG4 Report at 141.

20 CVCC Comments at 5.

exactly as they broadcast it," and that "they need to be able to completely control the experience. Android TV allows them to do all of these things."[21] Likewise, when viewers click on an MVPD app on their tablet, smartphone, or other retail device, they receive a common, familiar MVPD experience across devices, such as the ability to navigate and see recent tuning history regardless of which device was used. When they click on another app on the same device, they can enjoy Netflix, Amazon, You Tube or any of the other apps-based video providers. This is the experience that has won over consumers on their smartphones, and that consumers have chosen 56 million times for pay-TV by downloading MVPD apps to their devices. This is why Apple CEO Tim Cook recently declared in unveiling its next-generation Apple TV that "the future of TV is apps."[22]

CVCC claims that disaggregating MVPD service, stripping out the MVPD's UI and replacing it with a third-party guide is necessary for retail success. But as DSTAC reported: "no evidence whatsoever has been presented to the DSTAC to indicate that such a guide is the recipe for success of competitive navigation devices, or that customers want the device maker to block available MVPD services."[23] Instead, such an approach would force pay-TV providers to re-architect their networks, rip up their programming contracts, and be subjected to another costly

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[21] DSTAC WG4 Report at 141 (quoting Thomas Campbell, *Google: "Google TV has evolved into Android TV,"* IP&TV News (Apr. 21, 2015), http://www.iptv-news.com/2015/04/google-google-tv-has-evolved-into-android-tv/).

[22] Cat Zakrzewski, *Apple's Tim Cook: "We Believe the Future of TV Is Apps"*, WALL STREET JOURNAL (Sept. 9, 2015), http://blogs.wsj.com/personal-technology/2015/09/09/apples-tim-cook-we-believe-the-future-of-tv-is-apps/. *See also* http://www.apple.com/tv ("It's all about apps. Apps are the future of television. Think about it. On your mobile devices and computers, you already use apps such as Netflix, Hulu, WatchESPN, and iTunes to watch TV shows. And that's exactly where TV in the living room is headed. Apps have liberated television. They allow you to make individual choices about what you want to watch. And when and where you want to watch it.") (viewed Sept. 11, 2015).

[23] DSTAC WG4 Report at 148.

and counterproductive technology straightjacket – the sort of thing usually decried by Silicon Valley innovators.

Lastly, the CVCC claims that it has offered a "detailed and practical solution" in DSTAC. On the contrary, the proposal presented to DSTAC by CVCC members Hauppauge and Google was thoroughly critiqued as lacking in crucial detail and technically infeasible.[24] Nor may the CVCC's proposal be justified by *Carterfone*. Rather than trying to prevent competition from CE manufacturers, cable operators are supporting many more retail devices than they are their own set-top boxes, are continuing to expand service to more devices, and are supplied by a growing number of consumer electronics manufacturers (including TiVo).[25] From the beginning of Section 629, the Commission has correctly recognized that "the telephone networks do not provide a proper analogy to the issues in this proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks."[26] And even under *Carterfone,* handset manufacturers could not choose their carrier's software or force a rebuild of central office switching equipment, which is effectively what CVCC proposes for MVPDs, and MVPDs alone among all video providers.

The success of apps and app-ready retail devices belies the CVCC's claim that apps cannot support a market for retail devices for pay-TV content and that the government must therefore intervene to force some other approach upon the market. There is no need for

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[24] *See, e.g.*, DSTAC WG4 Report at 146,151 n.58, 148, 152, 144; Application-Based Service Advocates' Response to Competitive Navigation System Interoperability Additional Material, MB Docket No. 15-64 (Aug. 7, 2015).

[25] Cable operators now constitute TiVo's fastest growing market, and comprise approximately 80% of TiVo's customers.

[26] *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, First Report and Order, 13 FCC Rcd. 14775, ¶ 39 (June 24, 1998).

technology mandates in a marketplace where consumers can access MVPD and OVD content on a wide and growing array of retail devices.

CONCLUSION

While it became apparent many years – and many video competition reports – ago that competition had taken hold and was here to stay in the video marketplace, the Commission's regulations have yet to account for the significant changes in the marketplace. Meanwhile, the vitality and abundance of competitive viewing options for consumers continues to grow. Indeed, the innovations made possible by IP technology and the Internet have, if anything, served as a booster rocket, accelerating the choices of what to watch, and how and where to watch it. In such a competitive marketplace, the role for regulators is not, as some urge, to extend the scope of new and existing regulations but to ensure regulatory parity by eliminating rules and requirements designed to address circumstances that no longer exist.

Respectfully submitted,

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