**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| 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 COMCAST CORPORATION


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**REPLY COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast") hereby replies to the comments submitted in response to the above-captioned Public Notice.[1] The comments make clear that online video distributors ("OVDs") have fundamentally and irreversibly changed the competitive landscape for the distribution of video programming. The Commission's report must account for these changes; focusing primarily on the legacy multichannel video programming distributor ("MVPD") marketplace would be misleading and anachronistic. Likewise, the report must also account for the changed dynamics in the upstream markets for creation and aggregation of content. Intensive distribution-side competition – providing more programming outlets than ever before – has given increased leverage to rights holders (and to some extent programmers), leading to steeply increasing content costs, as some commenters observe. But, contrary to the calls made by some, these marketplace changes and new dynamics in no way warrant the expansion of outmoded regulations or extension of new regulatory burdens on traditional MVPDs. If anything, the fact that all relevant markets enjoy unprecedented levels of competition and dynamism should

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[1] *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, 30 FCC Rcd. 7114 (2015) ("*Notice*").

compel the Commission to eliminate outdated legacy regulations that hamstring future competition and innovation by all market participants.

## I. INTRODUCTION AND SUMMARY

For the Commission's 17th annual report, commenters in this proceeding describe a video marketplace that is a far cry from the marketplace of 1992. When Congress enacted the 1992 Cable Act, DBS was just getting off the ground, telephone companies were not allowed to provide video programming services, and the Internet was in its infancy.[2] As a consequence, most consumers were limited to receiving over-the-air broadcast television stations and/or subscribing to the video services their local cable company offered.[3] Understandably, then, the 1992 Cable Act was designed to regulate a marketplace perceived by many to be dominated by then near-monopoly cable operators.[4] Today, in sharp contrast, 99 percent of consumers can choose from three or more MVPDs, in addition to traditional broadcast stations, and some consumers even have access to as many as five or more MVPDs.[5] Over the past two decades, cable operators' share of MVPD customers has steadily eroded, from 98 percent to 53 percent,[6] and the overall number of MVPD customers recently shrank for the first time ever. In short, the video distribution marketplace is radically different from what it once was. In these respects

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2 *See* NCTA Comments at 2.

3 *See Notice* at 7115.

4 *See* H.R. Rep. No. 102-628, at 26, 30 (1992) ("House Report") ("Since passage of the [1984] Cable Act, however, competition to cable from alternative multichannel video technologies largely has failed to materialize. . . . While cable passes more than 95 percent of U.S. television households, and presently more than 60 percent of households subscribe to cable, cable's competitors service, in the aggregate, fewer than 5 percent of American households.").

5 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253 ¶¶ 30-31 & n.71 (2015) ("*Sixteenth Video Competition Report*"); *see also* NCTA Comments at 2.

6 *See* NCTA, *Industry Data - Competition*, https://www.ncta.com/industry-data (last visited Sept. 14, 2015).

alone, the goals of the 1992 Cable Act have – for some time – been more than fully achieved, and the annual tallying of the past year's incremental progress remains a relic of a bygone era.

But the past few years have wrought other changes of at least equal importance. Thanks in significant part to the ever-growing capacity of broadband Internet services, *anyone* can distribute video programming, and consumers increasingly can access video programming *anywhere, anytime.* Aspiring artists can acquire funding via Kickstarter and Indiegogo and develop an audience on YouTube. And Netflix, which launched its streaming services just eight years ago, now delivers TV shows and movies to over 42 million U.S. subscribers (plus another 23 million overseas) and, like other OVDs, is able to do so without having to invest the billions of dollars needed to build a local delivery infrastructure. Today, there is now a robust online video distribution marketplace that provides both consumers and content producers even more choice.

As the record reflects, the ascendance of online video and the growing number of video distributors in the marketplace create powerful pressures for *all* market participants, including Comcast, to continue to invest and innovate in services and products that give consumers more choice, more control, and more ease of use. For the most part, these changes bring enormous consumer benefits – the quantity and variety of high-quality programming are undeniably greater than ever before, and, as several commenters report, consumers have unprecedented options for accessing it where and how they choose. Because of the intense competition among MVPDs and other distributors, networks – and more importantly, the underlying rights-holders – have significant and growing bargaining leverage in the video ecosystem today. Networks also face new forms of competition as online and other distributors themselves engage in the creation of original programming.

In these and other ways, the current video marketplace presents new challenges, new points of friction, and new potential controversies. The Commission cannot analyze this marketplace without taking into account these new dynamics. It would be foolhardy to focus solely on traditional players and yesterday's issues and ignore the established reality of new distribution models, or the impact that content pricing and the various constraints placed on content availability have on the state of the marketplace. The point is not that the Commission should intervene with new regulations, as some commenters suggest: to the contrary, this is a marketplace in extreme flux, and the Commission should certainly not interfere as old models are modified and new ones develop. If anything, the Commission should focus on ways to eliminate outdated regulations that constrain cable and other MVPD competitors.

## II. THE RECORD MAKES CLEAR THAT IT WOULD BE ANACHRONISTIC TO FOCUS THE VIDEO COMPETITION REPORT ON THE MVPD MARKETPLACE IN LIGHT OF THE MASSIVE PRESENCE OF ONLINE VIDEO.

The record in this proceeding highlights the undeniable fact that online video distribution has fundamentally changed the video marketplace, and makes clear that a narrow focus primarily on MVPDs is an anachronism in today's video marketplace. It is telling that commenters focused not on competition in the traditional MVPD marketplace (i.e., among cable operators, DBS, and telco providers), which has been highly competitive for many years now,[7] but instead on the impact OVDs have had, and continue to have, on the video marketplace.

[7] *See* NCTA Comments at 2; *see also* Free State Foundation Comments at 4-6 ("Competition . . . has existed in the video marketplace for many years.").

### A. Commenters Observe That the Enormous Growth in Online Video Has Led to Fundamental Marketplace Changes and Has Spurred Competitive Responses from MVPDs and Other Industry Players.

As several commenters attest, there has been explosive growth in online video distribution,[8] and "[i]t is indisputable that OTT video providers have become major forces in the video marketplace."[9] OVDs are no longer nascent entrants: they are established players that have transformed the marketplace, prompting competitive responses from all industry players, including other OVDs, programming networks, device manufacturers, and MVPDs.

The online video marketplace is growing and thriving. According to Netflix, there are more than 50 OVDs, and at least nine new OVDs have launched this year alone.[10] And, the record demonstrates that consumers have embraced online video;[11] at a time when traditional MVPD subscribership may be beginning to decline overall, a number of established OVDs like Netflix, Amazon, and Google are experiencing tremendous growth and popularity.[12] The number of hours Americans spent watching video over the Internet grew 38 percent in just the

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8 *See* AT&T Comments at 6-13; Free State Foundation Comments at 6-8; NCTA Comments at 9-15; Netflix Comments at 2-5; Verizon Comments at 14.

9 AT&T Comments at 8.

10 Netflix Comments at 2. AT&T also notes that analysts project global OTT video revenues to reach $51.1 billion in 2020, with $19.1 billion coming from the United States. *See* AT&T Comments at 12.

11 *See*, *e.g.*, AT&T Comments at 11-12 (noting that "nearly 60 percent of U.S. broadband households use one or more paid OTT video services" and "52% of all U.S. households subscribe to Netflix, Amazon Prime, and/or Hulu Plus"); Netflix Comments at 2 ("Nearly ten million households added an online video-on-demand subscription in 2014."); Verizon Comments at 14.

12 *See* AT&T Comments at 8-9.

last year,[13] and online video will likely account for 80 percent of all U.S. Internet traffic by 2018.[14]

The comments further show that OVDs are experimenting with various business models in order to meet consumer needs and to distinguish themselves from competitors. OVDs are increasingly blurring the line between networks and distributors, thus contributing to further industry changes. Many OVDs are creating popular original content that competes with traditional networks, while at the same time aggregating and distributing large amounts of content produced by others for consumers to view live and on-demand.[15] A substantial and increasing number of studios, broadcast networks, sports leagues, and programming networks (e.g., CBS, Showtime, HBO, and Nickelodeon) are offering their own standalone online services that include both linear and on-demand content directly to consumers, heralding a marketplace in flux as traditional models are stressed and new ones emerge.[16] In addition, newer OVD services – like Sony's PlayStation Vue and Dish's Sling TV– are aggregating live, linear programming and offering it on both subscription and ad-supported bases.[17] The *Notice* asks

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[13] *See* Nielsen Co., *The Total Audience Report: Q4 2014*, at 12 (Mar. 11, 2015), http://www.nielsen.com/us/en/insights/reports/2015/the-total-audience-report-q4-2014.html (average of ten hours, twenty-nine minutes per month spent watching video over the Internet in Q4 2014 compared to seven hours, thirty-four minutes in Q4 2013). These statistics do not include growth in video watched on smartphones, which increased by 19 minutes per month from Q4 2013 to Q4 2014. *See id.*

[14] *See* Michael O'Rielly, Commissioner, FCC, Remarks at The American Enterprise Institute Luncheon (Jan. 21, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331611A1.pdf.

[15] *See, e.g.*, Netflix Comments at 3-5.

[16] *See* AT&T Comments at 6-7; Netflix Comments at 3; *see also CBS All Access*, CBS, http://www.cbs.com/all-access/?ftag=AAMebd20fb&ttag=mktg_ls_TnL5HPStwNw&siteID=TnL5HPStwNw-MbnkInedP.WIQzmjkIpqZw (last visited Sept. 18, 2015); Mikolo Ilas, *Showtime OTT Service Goes Live*, SNL Kagan (July 7, 2015), https://www.snl.com/interactivex/article.aspx?id=33173947&KPLT=6; HBO Now, https://order.hbonow.com/ (last visited Sept. 11, 2015).

[17] *See* AT&T Comments at 7; *see also* Iyel Rakel Cabanilla, *Sony Expands PlayStation Vue to Los Angeles, San Francisco*, SNL Kagan (June 16, 2015), https://www.snl.com/interactivex/article.aspx?id=32985491&KPLT=6; Sling, https://www.sling.com/package (last visited Sept. 11, 2015); Press Release, Dish, Sling TV to Launch Live, Over-the-Top Service for $20 Per Month; Watch on TVs, Tablets, Computers, Smartphones, Game Consoles (Jan. 5, 2015), http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets.

whether OVD services and MVPD services are complements or substitutes.[18] The answer depends on the nature of the OVD's offering. As OVDs continue to experiment with these new business models and the marketplace becomes more complex, they may serve multiple roles. For example, OVDs pursuing on-demand business models themselves agree that their services are generally complementary to MVPDs' services,[19] while linear OVDs, on the other hand, are closer to substitutes for traditional MVPD services.

But regardless of whether OVDs serve as substitutes or complements, the fact remains that the developments in online video and evolving OVD business models are spurring competitive responses and new offerings from traditional MVPDs and, therefore, any analysis of the state of video competition that ignores or minimizes the impact of OVDs will seriously miss the mark. As Netflix observed, "the proliferation of Internet delivered content is changing and challenging all media to better respond to the needs and demands of consumers. The emergence of OVDs has encouraged competition and innovation among traditional distribution models."[20] MVPDs, like Dish (as noted above), AT&T/DirecTV, and Verizon, have launched OVD services of their own.[21] And given widespread availability of online video content on a variety of IP-enabled retail devices, MVPDs have responded by making their traditional video and TV

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18 *See Notice* at 7121, 7128-31.

19 Netflix itself has commented: "In the USA, MVPDs have remained stable at about 100M subscribers while Netflix has grown to over 37M members. The stability of the MVPD subscriber base, despite Netflix's large membership, suggests that most members consider Netflix complementary to, rather than a substitute for, MVPD video." *See* Letter from Kathryn A. Zachem, Senior Vice President, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57, Response to Question No. 1, at 8 & n.15 (Nov. 26, 2014) (citing Netflix Long Term View from Nov. 2014).

20 Netflix Comments at 3; *see also* NCTA Comments at 15 ("[C]ompetition resulting from the Internet is driving operators to innovate, enhance and ensure the continued success of the cable model that has proven so successful in providing value to subscribers.").

21 *See* AT&T Comments at 7-8 (describing Dish's Sling TV service, DirecTV's Spanish-language Yaveo service, and forthcoming OTT offerings from AT&T/DirecTV and Verizon); Verizon Comments at 14; *see also* Joan Solsman, *Verizon's Go90 To Deliver Free Mobile TV Service*, CNET (Sept. 8, 2015), http://www.cnet.com/news/verizon-launches-free-mobile-tv-service-go90/.

Everywhere services available on these devices via applications, enabling customers to watch linear and on-demand programming at home and on the go.[22]

In fact, MVPD apps are by far the most widespread method for delivering MVPD service to retail devices today.[23] NCTA pointed out that there are over 460 million IP-enabled retail devices (which is twice the number of set-top boxes in use), and that 96 percent of those devices can be served by one or more MVPD apps.[24] And MVPDs are devising still more ways to expand the range of devices and platforms that can support MVPD apps, such as DLNA VidiPath (which is supported by Comcast and other cable operators) and DLNA RVU (which is developed and maintained by the RVU Alliance and supported by DirecTV).[25] MVPDs are also investing in advanced equipment innovations[26] and experimenting with new video options, such as viewing *only* on IP-enabled devices and smaller optional programming packages.[27]

### B. In Response to This New Marketplace Dynamic, Comcast Continues To Innovate and Invest in Its Products and Services To Provide Its Customers with an Unparalleled Experience.

Like other MVPDs responding to the radically changed video marketplace, Comcast recognizes that it must innovate and deliver higher quality and more valuable services to its customers if it hopes to attract new customers and retain existing customers. Given the number

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22 *See* NCTA Comments at 14; *see also* AT&T Comments at 12 ("The combined AT&T/DirecTV is embracing this video upheaval, working to expand subscribers' ability to access content from as many other sources and on as many devices as economically and technically practical . . . .").

23 To put this in context, there have been over 620,000 CableCARDs deployed in retail devices. *See* Letter from Neal Goldberg, NCTA, to Marlene Dortch, FCC, CS Docket No. 97-80, at 1 (May 11, 2015). In contrast, as NCTA notes, there have been over 56 million downloads of MVPD apps to tablets, smartphones, and other IP-enabled devices as of July 2015, with millions more occurring every month. *See* NCTA Comments at 16.

24 NCTA Comments at 16.

25 *See id.* at 19.

26 *See* AT&T Comments at 12-13 (describing DirecTV's advanced set-top box technology that will be integrated in the combined AT&T/DirecTV MVPD offerings); NCTA Comments at 6-7 (describing operators' device innovations like cloud-based DVRs that offer more capacity).

27 *See* NCTA Comments at 14-15.

of competitive choices and devices available in the market today, as well as consumers' constantly-evolving demands and expectations, Comcast continually looks for ways to delight customers and serve their diverse entertainment needs. Comcast has invested in cutting-edge technologies that enable consumers to access and enjoy video content in more ways – and more conveniently – than ever before, and has developed new features that enhance the customers' viewing experience and enhance the value proposition of their video service.

*New Video Offerings*. Comcast is experimenting with new video offerings that are aimed at giving customers more flexibility in how they experience Comcast's video service. In an effort to accommodate the changing preferences of its customers, particularly its younger customers, who may want a more limited linear cable package, Comcast recently announced the introduction of Stream, a cable service delivered to customers' homes in IP over Comcast's managed network.[28] The service will be available for $15 a month and will let customers who purchase standalone Xfinity Internet service add a slim cable package and watch live TV from around a dozen networks – including all major broadcast networks, PEG channels, and a premium network – on laptops, tablets, and smartphones in their home without the need for a Comcast-supplied set-top box.[29] Comcast also launched Xfinity on Campus last fall on five college campuses (with trials at several additional schools) and this fall grew the number of participating schools to 27, almost quadrupling the number of schools in less than a year. Like

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[28] Because Stream is delivered over Comcast's managed IP network and not over the public Internet, NATOA's recent characterization of Stream in another proceeding as an "Internet streaming video service" is not accurate. *See* Letter from Stephen Traylor, Executive Director/General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261 (Sept. 10, 2015).

[29] Matt Strauss, *Introducing a New Streaming TV Service from Comcast*, Comcast Voices (July 12, 2015), http://corporate.comcast.com/comcast-voices/a-new-streaming-tv-service-from-comcast. In addition, Stream customers will have access to a robust library of movies and shows on demand, as well as access to TV Everywhere and cloud DVR services. The Stream sign-up process is designed to be frictionless and simple. Standalone Xfinity Internet customers will be able to easily sign up for the service online; no phone call or technician visit will be required.

Stream, Xfinity on Campus is a box-free cable service delivered in IP over Comcast's managed network.[30]

*Expanded X1 Features*. Because of the number of competitive choices and devices available in the market today, Comcast is always looking for ways to give customers more. To that end, Comcast continues to develop new features for its Emmy-award winning cloud-based X1 entertainment operating system, including:

- The first-of-its-kind "talking guide" feature, which assists blind and visually-impaired customers in navigating the X1 TV user interface and selecting particular services for use;[31]
- Voice-controlled remotes, which enable X1 viewers to search, set recordings, receive video recommendations using natural speech, and access menus for setting closed captioning and video description, among other things;[32]
- The newly launched Kids Zone, a safe and secure space where kids can independently explore kid-friendly content;[33]
- Enhancements to its DVR service like the "Auto Extend" feature for live events;[34]
- Even more in-depth sports coverage and data available on the Baseball Extras feature;[35] and

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30 Press Release, Comcast Corp., Bringing TV to Every Screen for Colleges and Universities (Aug. 21, 2014), http://corporate.comcast.com/news-information/news-feed/comcast-brings-tv-to-every-screen-for-colleges-and-universities; Marcien Jenckes, *Students at These College Campuses Will Stream TV for Free This Semester*, Comcast Voices (Sept. 9, 2015), http://corporate.comcast.com/comcast-voices/xfinity-on-campus-expands-comcast-now-brings-streaming-tv-to-24-colleges-and-universities. As part of Xfinity on Campus, the universities and their students have access to approximately 80 channels of live TV as well as on-demand content that they can watch on their IP-enabled devices while on the campus network. Also included in this offering is access to a robust amount of TV Everywhere content that students can watch over the Internet when they are away from campus.

31 *See* Press Release, Comcast Corp., X1 Talks: Comcast Launches Industry's First Voice Guided TV Interface (Nov. 12, 2014), http://corporate.comcast.com/news-information/news-feed/x1-talks-comcast-launches-industrys-first-voice-guided-tv-interface.

32 *See* Press Release, Comcast Corp., Comcast Introduces Voice Controlled TV Remote (May 5, 2015), http://corporate.comcast.com/news-information/news-feed/comcast-introduces-voice-controlled-tv-remote. Voice-controlled remotes also help provide a new level of independence to customers who have limited mobility or dexterity, or have a visual disability.

33 Jennifer Musser Metz, *Welcome to The Kids Zone*, Comcast Voices (May 5, 2015), http://corporate.comcast.com/comcast-voices/welcome-to-the-kids-zone.

34 Peter Nush, *New on X1: Sports Enhancements and Troubleshooting Made Simple*, Comcast Voices (July 30, 2015), http://corporate.comcast.com/comcast-voices/new-this-month-on-x1-elevating-sports-programming-and-simplifying-troubleshooting.

- Ongoing efforts to expand Internet features such as the new Electronic Arts gaming service[36] and the X1 Share App.[37]

*More Device Choices.* Comcast has undertaken a number of efforts to increase customers' device options for accessing video. Comcast delivers both cable service over Comcast's managed network and over-the-top content to tablets, smartphones, and other customer-owned IP-enabled devices via the Xfinity TV app,[38] and also authenticates a large number of programmer apps on such devices.[39] In addition, Comcast continues to be a strong supporter of CableCARD-enabled devices, and is also working on a "cardless" solution that will allow retailers to build devices designed to access the full Comcast cable service using software-based downloadable security.[40] And, as noted above, Comcast is collaborating with others in the industry on the Digital Living Network Alliance's VidiPath initiative. VidiPath, which Comcast

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35 Preston Smalley, *Watch a Game Like Never Before With Baseball Extras for the X1 Platform*, Comcast Voices (June 29, 2015), http://corporate.comcast.com/comcast-voices/watch-a-game-like-never-before-with-new-baseball-extras-for-the-x1-platform. Comcast added Baseball Extras to the X1 guide as part of the Xfinity Sports App, giving X1 baseball fans one of the most in-depth TV sports companion tools with more data and statistics like pre-game matchups, live batter-by-batter stats, and full post-game analysis.

36 Xfinity Games, which is currently in beta, can be streamed in HD over the Internet to the TV via X1 set-top boxes, and players use their smartphones or tablets as controllers. Sam Schwartz, *Game On: Experience a New Way to Play on Your TV*, Comcast Voices (July 14, 2015), http://corporate.comcast.com/comcast-voices/game-on-experience-a-whole-new-way-to-play-on-your-tv.

37 With the new Xfinity Share App, all Xfinity customers can now live stream or send photos and recorded videos over the Internet to their TV or to the TV of another X1 customer, who has the option to accept or reject the video. Press Release, Comcast Corp., Comcast Customers Can Now "Share" Live Streams to the TV (May 4, 2015), http://corporate.comcast.com/news-information/news-feed/comcast-customers-can-now-share-live-streams-to-the-tv; Patti Loyack, *Comcast's Live Streaming App Now Available to All Customers*, Comcast Voices (Aug. 20, 2015), http://corporate.comcast.com/comcast-voices/comcasts-live-streaming-app-now-available-to-all-customers.

38 Matt Strauss, *Bringing More Video on Demand Choices to More Customers Through The Comcast-TWC Transaction*, Comcast Voices (Apr. 6, 2015), http://corporate.comcast.com/comcast-voices/bringing-more-video-on-demand-choices-to-more-customers-through-the-comcast-twc-transaction; Comcast Corp., X1 DVR with Cloud Technology: Available Features, http://customer.xfinity.com/help-and-support/cable-tv/x1-dvr-with-cloud-technology-available-features (last updated Sept. 11, 2015).

39 Matt Strauss, *HBO GO, Showtime Anytime Now Available for Xfinity TV Customers on Amazon Fire TV Devices*, Comcast Voices (May 20, 2015), http://corporate.comcast.com/comcast-voices/hbo-go-showtime-anytime-now-available-for-xfinity-tv-customers-on-amazon-fire-tv-devices. Currently, Comcast authenticates more than 90 networks such as ESPN, Disney, NBC, Telemundo, HBO, and Showtime across 18 devices like the iPad, Roku, Xbox, and smartphones, among others.

40 *See* Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 8 (Apr. 13, 2015).

has already implemented in its X1 boxes, enables customers to stream cable service from an operator-supplied set-top box or gateway device to VidiPath-compatible customer-owned devices over the home network without the need for additional set-top boxes.

*Customer Service Benefits of an IP Network.* The migration to a cloud-based platform and ongoing transition to an IP network allow Comcast to innovate far more rapidly than ever before. In particular, this transition facilitates innovations that help improve the customer experience, which is a pressing concern for the company. In addition to announcing a multi-year plan to reinvent the customer experience,[41] Comcast has started trialing a new X1 tool, Co-Pilot, that allows customers to share their TV screen with a Comcast tech support representative and give the tech control, allowing the tech to walk customers through the features that come with their service.[42] X1 customers can also access My Account features on their TV, giving them the ability and convenience to access account information, pay their bills, and troubleshoot service issues without having to speak with an agent.[43]

## III. THE REPORT MUST TAKE ACCOUNT OF TODAY'S CHANGED DYNAMICS IN THE CONTENT MARKETPLACE.

As multiple commenters point out, consumers are living in a "Golden Age" of video with a wide and growing array of quality content available from both traditional and online distributors.[44] But the Commission must recognize that OVD competition has not simply expanded the number of buyers of programming – it has also created new realities in the content

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41 Press Release, Comcast Corp., Comcast Creates More Than 5,500 New Jobs as Part of Multi-Year Customer Experience Transformation (May 5, 2015), http://corporate.comcast.com/news-information/news-feed/customer-experience-transformation.

42 Charlie Herrin, *Co-Pilot: A Picture Is Worth a Thousand Words*, Comcast Voices (July 8, 2015), http://corporate.comcast.com/comcast-voices/co-pilot-a-picture-is-worth-a-thousand-words. Comcast plans to make Co-Pilot available to all X1 customers later this year.

43 Charlie Herrin, *Now Playing: My Account on the X1 Platform*, Comcast Voices (Feb. 23, 2015), http://corporate.comcast.com/comcast-voices/now-playing-my-account-on-x1.

44 *See* NCTA Comments at 8; *see also* NAB Comments at 13-14, 23; Netflix Comments 4-5, 8.

marketplace. In contrast to the traditional MVPD marketplace, where consumers generally can buy packages containing the same or similar programming from a variety of distributors, certain OVDs are increasingly procuring exclusive rights to distribute programming, not to mention their own original programming, and as a result, consumers may need multiple OVD subscriptions to access all of the programming they seek. In addition, as the record makes clear, the costs of programming for *all* buyers continues to increase significantly, largely due to the underlying cost of the programming rights (particularly for sports programming). Comcast disagrees with other commenters that urge the Commission to intervene in this fast-evolving marketplace, but certainly believes that the next video competition report needs to account for these changes.

### A. There Continues To Be Explosive Growth in Video Choice and Quality.

Notwithstanding the profound changes in the marketplace, one thing has remained constant: there continues to be explosive growth in the amount of video programming in the marketplace. From 1994 to 2014, the number of national programming networks increased from just over 120 to approximately over 900.[45] And the vast majority of this programming is being provided by entities that are not affiliated with cable operators. As NCTA noted, vertical integration of programming networks and cable operators is at an historic low, with little change in the number of networks owned by the largest cable operators as of the end of 2014.[46] In fact, at the time the Cable Act was passed in 1992, 57 percent of national cable networks – 39 of only 68 – were affiliated with a cable operator.[47] Today, only about 11 percent of national cable

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45 *See* NCTA, Industry Data, https://www.ncta.com/industry-data (last visited Sept. 18, 2015) (citing FCC Video Competition and industry data); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd. 2060, App. B, tbl. 5 (1995) (providing data for 1994).

46 NCTA Comments at 7-8.

47 *See* House Report at 41.

networks are affiliated with a cable operator.[48] And the Commission has previously noted that only one of the top 20 most viewed cable networks is wholly owned by a cable operator.[49]

As multiple commenters noted, the "result of the fierce competition that exists among all these networks to entice viewers to choose to watch their programming has been a new Golden Age of television."[50] The abundance and diversity of programming have never been greater, and the quality of programming has never been higher.[51] Broadcast and cable networks are showing highly praised original programming, which provides a "cinematic experience in terms of the sheer quality of the content."[52] As SNL Kagan observed, "A network such as AMC, for example, once carried classic movies, but is now home to series including 'Mad Men' and 'The Walking Dead.' Broadcast networks such as CBS once relied on repeats and reality shows to get through the summer, but are now moving toward year-round original scripted programming."[53] For its part, NBCUniversal continues to develop quality programs and a balanced lineup which have earned its networks critical acclaim.[54] All told, there were 371 original scripted series in

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[48] There are 98 national programming networks affiliated with a cable operator (down from 127 networks in 2012). *Sixteenth Video Competition Report* ¶¶ 34, 39; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd. 10496 ¶ 39 (2013). Counting both HD and SD feeds, less than 5 percent of national cable networks are affiliated with Comcast. *See Sixteen Video Competition Report* ¶ 34 & App. B., tbl. B (FEARnet and G4 have since ceased operations).

[49] *See Sixteenth Video Competition Report* ¶ 34.

[50] *See* NCTA Comments at 8; *see also* NAB Comments at 13-14, 23; Netflix Comments 4-5, 8.

[51] *See also* NCTA Comments at 8 ("[C]ontent providers offer a diversity of viewpoints, and a dizzying array of niche programs for smaller yet passionate audiences.").

[52] *See* Mark Hughes, *How Cable's Emmy Wins Signal the Future of Television Programming*, Forbes (Sept. 23, 2013), http://www.forbes.com/sites/markhughes/2013/09/23/how-cables-emmy-wins-signal-the-future-of-television-programming/; *see also* Julie Liesse, *How Cable's New Golden Age of Content is Changing the Game*, Advertising Age (May 1, 2015), http://adage.com/lookbook/article/cable-broadcast/cable-s-golden-age-content-changing-game/298363/.

[53] *See* Sarah Barry James, *Choosing Between Netflix Dollars and Ratings Declines*, SNL Kagan (Dec. 11, 2014), https://www.snl.com/interactivex/article.aspx?id=30134019&KPLT=6.

[54] *See* NBCUniversal, http://www.nbcuniversal.com/business/nbc-entertainment (last visited Sept. 14, 2015). The NBC broadcast network has earned more Emmy Awards than any network in television history. *Id.*

2014 – a 75 percent increase from just five years before – and it is estimated that there will be over 400 original series this year.[55]

Beyond these traditional cable and broadcast networks, a significant and growing amount of original programming is being created to be distributed online in the first instance. OVDs are providing popular, critically-acclaimed programming that is initially distributed on an exclusive basis. In 2014, Netflix won seven Emmy awards – three for the documentary "The Square," three for the comedy series "Orange is the New Black," and one for the drama series "House of Cards."[56] Netflix was nominated for 34 Emmy awards this year, and won four.[57] Likewise, Amazon's "Transparent" received three Emmy awards after having received eleven nominations this year.[58] Much of this programming (whether created in-house or purchased from third-party studios) is exclusive to the OVD once it premiers on the service, though some of these series have been so successful that MVPDs have licensed them for on-demand viewing after the series have premiered online.[59] And, as CEA noted, the growth of streaming and the increased demand for original, scripted content offers new distribution opportunities for content creators.[60]

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[55] *See* John Landgraf, *Television 2015: Is There Really Too Much TV?*, NPR (Aug. 16, 2015), http://www.npr.org/sections/monkeysee/2015/08/16/432458841/television-2015-is-there-really-too-much-tv.

[56] *See* Haseeb Ali, *Monday, M&C Edition*, SNL Kagan (Aug. 18, 2015), https://www.snl.com/interactivex/article.aspx?id=28927736&KPLT=6.

[57] Brian Stelter, *34 Emmy Nominations for Netflix, 12 Nominations for Amazon*, CNN Money (July 16, 2015), http://money.cnn.com/2015/07/16/media/emmys-amazon-netflix-streaming-nominations/; Tom Huddleston, Jr., *Amazon Wins Battle of the Streaming Services over Netflix at the Emmys*, Fortune (Sept. 21, 2015), http://fortune.com/2015/09/21/amazon-netflix-emmys/.

[58] *See* Stelter, *supra* note 57; Huddleston, *supra* note 57.

[59] *See* Jason Hirschhorn, *The State and Future of Netflix v. HBO in 2015*, Redef (Mar. 5, 2015), http://redef.com/original/the-state-and-future-of-netflix-v-hbo-in-2015; Matt Wilstein, *You Can Now Watch House of Cards Without Netflix Subscription*, Mediaite (Mar. 10, 2014), http://www.mediaite.com/tv/you-can-now-watch-house-of-cards-without-netflix-subscription/.

[60] *See* CEA Comments at 7-8.

### B. Programmers Are Making Their Content Available to OVDs.

In addition to competing more directly with MVPDs for consumers' attention, OVDs are increasingly important and powerful buyers of content, as studios and programmers recognize. Netflix, Amazon Prime, and Hulu Plus will spend a collective $6.8 billion on programming in 2015. This represents a $1.6 billion increase over the $5.2 billion spent in 2014, with further double digit year-to-year increases expected in years to come.[61] Netflix alone plans to spend over $3 billion on programming in 2015,[62] and in its comments said it plans to spend close to $5 billion in 2016.[63] Given this, it goes without saying that OVDs have access to (and have obtained) ample content from multiple sources. As the Commission recognized in the *AT&T/DirecTV Order*, not even an MVPD the size of AT&T/DirecTV (the nation's largest MVPD) has the bargaining leverage with programmers to constrain programming from flowing to OVDs (even if it had the theoretical incentive to do so).[64]

This clear evidence of OVDs thriving in today's fast-changing marketplace means that there is no need for government intervention in the commercial dealings between programmers and distributors. Willing buyers are having no trouble finding willing sellers.[65] For its part,

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[61] Andrew Wallenstein, *Studios to Reap $6.8 Billion From SVOD Syndication in 2015*, Variety (Oct. 23, 2014), http://variety.com/2014/digital/news/svod-syndicationto-pump-6-8-billion-into-studios-in-2015-1201337738/.

[62] *See* Janko Roettgers, *Netflix Wants To Expand to 200 Countries Within the Next Two Years*, Gigaom (Jan. 20, 2015), https://gigaom.com/2015/01/20/netflix-wants-to-be-everywhere-in-the-world-in-the-next-two-years/ (providing highlights from Netflix's Q4 2014 earnings release).

[63] Netflix Comments at 1; Netflix, *Netflix's View: Internet TV Is Replacing Linear TV*, http://ir.netflix.com/long-term-view.cfm (last updated July 15, 2015).

[64] *See Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, FCC 15-94, ¶¶ 187, 237 (July 28, 2015) ("*AT&T/DirecTV Order*").

[65] There may be some limitations on the licensing of content to online distributors given that certain rights-holders may not grant online distribution rights and that online distribution can involve complex technical and business issues like content security, geo-filtering, and branding. Nonetheless, the bottom line is that enormous amounts of content – including movies, past season and current season shows, broadcast television, and sports – are being licensed to OVDs.

NBCUniversal has successfully licensed programming to dozens of OVDs – including Amazon, Netflix, and YouTube – pursuing a variety of different business models on mutually agreeable commercial terms.[66] OVDs have become, and will remain, an important part of the buyer market for NBCUniversal's content.[67] In fact, NBCUniversal's revenues from OVD deals increased nearly six-fold between 2009 and 2013.[68] Other programmers are experiencing similar growth in online business opportunities.[69]

Indeed, contrary to Public Knowledge's claims, it is *OVDs* (not MVPDs) that are engaging in contracting practices that limit the ability of rivals to offer consumers certain programming when, where, and how they want to watch it.[70] Netflix and Amazon Prime, for example, both license certain content on an exclusive basis – ensuring that MVPDs or other OVDs cannot access this content during the same window.[71] Netflix also reportedly

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66 *See* Comcast Corp. & Time Warner Cable Inc., Opposition to Petitions to Deny & Reply to Comments, MB Docket No. 14-57, at 89 (Sept. 23, 2014) ("Opposition and Response"). Other OVDs with which NBCUniversal has licensed programming include: Apple, Barnes and Noble, CinemaNow, Google, Grab Media, Hit Bliss (formerly Project Concord), Hulu, Media Navi, Microsoft, MovieLink, Reliance Majestic, Samsung, Sony, Target, VDIO, and Vudu. *Id.* at 243-44.

67 *See id*; *see also* Comcast Corp., Fourth Annual Report of Compliance with Transaction Conditions, MB Docket No. 10-56, Part One, § IV.A (Feb. 27, 2015) ("Agreements with online video distributors . . . continue to be a regular part of the Company's program licensing business, as they were before the Transaction. NBCUniversal entered into or renewed agreements with several OVDs during the Reporting Period, including deals with Amazon, Crackle, Hulu, Netflix, and others, as well as deals with several MVPDs that include access to linear channels across multiple platforms. NBCUniversal also entered into a linear OVD agreement with Sony. Separate from these content distribution deals, NBCUniversal has contracted to produce original programming for Amazon.").

68 *See* Opposition and Response at 89.

69 *See, e.g.*, Deborah Yao, *CBS CEO Downplays Viacom Merger Rumors*, SNL Kagan (Feb. 12, 2015), https://www.snl.com/interactivex/article.aspx?id=31142844&KPLT=6 (quoting CBS CEO Les Moonves' statement that "[d]igital distribution services are allowing us to build new and younger audiences, all of which we are beginning to monetize. . . . These new [online video] deals represent an extension of our evolving strategy in terms of how we monetize our content. . . . [Y]ou can imagine how lucrative this will be."); Amol Sharma, *21st Century Fox Scores With Super Bowl*, Wall St. J. (May 7, 2014), http://www.wsj.com/articles/SB100014240527023037013045795481217733336640 ("Television production drove profit growth [in first quarter 2014] at 21st Century Fox's filmed entertainment division. . . . The company increased revenue from sales of programming to subscription online-video services like Amazon.com Inc's Prime Instant Video.").

70 *See* Public Knowledge Comments at 5-6.

71 For example, Netflix reportedly let its deal with Epix expire because it "is looking to make more of the content it streams exclusive." John Lafayette, *Netflix Says It Will Let Epix Deal Expire*, Multichannel News (Aug.,

dis-incentivizes programmers with which it has deals for prior-season content from allowing their MVPD partners to "stack" current-season content of the same shows licensed to Netflix – i.e., making an entire current season of a show (instead of just a handful of rolling episodes) available through MVPD on-demand services.[72] As a result, there are complete blackouts of certain programming to consumers through any subscription outlet for most of the current season (and beyond). This fragmentation of the content experience is creating a new dynamic where no single distributor can provide a customer with the comprehensive entertainment experience that was the hallmark of traditional MVPDs. Instead of relying on a single MVPD of their choice (who would enter into agreements with various programmers), consumers are left to cobble together their own programming suite from a variety of sources and must subscribe to or purchase multiple OVD services to access the programming they desire.[73] And because of certain OVDs' exclusive contracts, even consumers that subscribe to an MVPD service may still need one or more OVD services to receive all of the content they want. These are substantial changes in the video landscape that the Commission would be remiss to ignore.

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30, 2015), http://www.multichannel.com/news/verizon-perspectives/netflix-says-it-will-let-epix-deal-expire/393334 (quoting Ted Sarandos, Netflix Chief Content Officer, who stated that Epix films are "widely available on cable and other subscription platforms at the same time as they are on Netflix and subject to the same drawn out licensing periods").

[72] *See* Keach Hagey & Shalini Ramachandran, *Hulu Steps Up its Fight Against Netflix*, Wall St. J., (June 16, 2015), http://www.wsj.com/articles/hulu-steps-up-its-fight-against-netflix-1434497311 ("Netflix believed Fox had devalued ["Empire"] by already making the entire first season available through cable video-on-demand services, instead of just a handful of episodes. Netflix wanted a discount if the TV network continued that practice, which is known as 'stacking' episodes. Rival streaming service Hulu LLC stepped in and not only agreed to pay more than Netflix but indicated it was fine with episode-stacking, which Fox says helped build the show's audience by allowing viewers to catch up.").

[73] *See* Anick Jesdanun, *Is Online TV Really Cheaper Than Cable*, Christian Sci. Monitor (Mar. 9, 2015), http://www.csmonitor.com/Technology/2015/0319/Is-online-TV-really-cheaper-than-cable-video (noting that "no single streaming service offers everything" and that "you'll need to pick and choose multiple services if you want to replicate your cable or satellite package").

### C. Changing Dynamics Have Led to Increasing Content Costs.

As numerous commenters noted, the changing dynamics in today's marketplace have led to dramatic increases in programming costs.[74] Indeed, in large part because of the intense competition among MVPDs and other distributors, programmers – and more importantly, the underlying rights-holders – have significant and growing bargaining leverage in the video ecosystem today. ACA and others are incorrect to suggest that increased programming costs are a concern for only small and mid-sized MVPDs.[75] In fact, Comcast's per-subscriber programming costs (whether from cable networks or broadcast stations) increased by over 120 percent between 2004 and 2013, significantly outpacing increases in Comcast's retail prices to customers.[76] While Comcast negotiates vigorously on price and economic issues to try to shield its customers from inordinate price increases, programming costs are nonetheless still going up dramatically.[77] Intense competition among networks to acquire key programming rights will likely drive costs still higher.

Moreover, certain rights-holders – sports leagues and teams, in particular – can define how their content gets distributed, thus limiting programming networks' ability to sell creatively to MVPDs and, in turn, MVPDs' ability to experiment with new service models and consumers' ability to enjoy the fruits of such experimentation. The Commission cannot effectively evaluate this marketplace or how distributors (traditional and otherwise) are serving customers and responding to competition without focusing on these key marketplace realities in its next video competition report.

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[74] *See*, *e.g.*, ACA Comments, Research Paper at 5-8; FilmOn Comments at 5; NTCA Comments at 6-7.

[75] *See* ACA Comments, Research Paper at 5; NTCA Comments at 11; WTA Comments at 5-7.

[76] *See* Opposition and Response at 292.

[77] *See* Public Interest Statement at 148-49; Opposition and Response 158-59, 291-92.

## IV. GIVEN THE SIGNIFICANT MARKETPLACE CHANGES, THE COMMISSION SHOULD RESPOND BY ELIMINATING OUTDATED LEGACY REGULATIONS, NOT IMPOSING NEW REGULATORY CONTRAINTS ON COMPETITION.

Comcast agrees with other commenters that the Commission should reexamine and remove antiquated cable and, more generally, MVPD regulations to more accurately align with today's competitive marketplace.[78] Comcast further concurs that the Commission should likewise resist calls for new regulations that could undermine innovation and investment, and hinder further marketplace developments and competition.[79]

Even Public Knowledge acknowledges that, in today's dynamic marketplace, there is no place for "rules that were adopted in response to market conditions that no longer apply."[80] Nevertheless, cable operators continue to labor under regulations that do not apply to their DBS competitors,[81] and both operate under rules that do not apply to OVDs. The record makes clear that this special regulatory burden is no longer justifiable, and bearing it becomes heavier as traditional cable in many cases loses customers and associated revenues.[82] In particular, the Commission should review whether regulations that apply solely to cable operators but not to other MVPDs – like program access, leased access, channel occupancy, and multiple dwelling unit-related requirements – need to be rescinded. At the very least, because OVD growth and

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78 *See* CenturyLink Comments at 4; Free State Foundation Comments at 8-12.

79 *See* AT&T Comments at 13; CenturyLink Comments at 4-6; NCTA Comments at 9.

80 Public Knowledge Comments at 6.

81 These include the same cable-specific regulations the Commission declined to apply to the largest DBS provider when it was acquired by a telco MVPD, despite noting commenters' "dissatisfaction with the disparate public interest programming obligations imposed on different types of MVPDs." *AT&T/DirecTV Order* ¶ 244.

82 *See* CenturyLink Comments at 4; Free State Foundation Comments at 8-12. In fact, the U.S. Court of Appeals for the D.C. Circuit observed *over five years ago* that: "the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. *Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992*." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

competition are increasingly challenging the assumptions behind the public interest goals historically served by cable operators, the Commission should reconsider how these goals would be best served in light of marketplace changes.

The Commission must also be particularly skeptical about entreaties that it regulate in new ways to foster the further development of OVDs,[83] a number of which have candidly told the Commission that OVDs are in no need of such regulatory involvement,[84] especially given the enormous success OVDs currently enjoy in the absence of any such rules. Rather, as noted by NCTA, in a vibrantly competitive marketplace where new entrants are adding to the innovation and diversity of options and stimulating competitive responses, "it is competition itself – and not government intervention – that best determines which entrants, which innovations and which options succeed in providing . . . greater value to consumers."[85]

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83 *See* FilmOn Comments at 5-11; Public Knowledge Comments at 9; Verizon Comments at 14-15.

84 *See*, *e.g.*, Reply Comments of MLB Advanced Media, MB Docket No. 14-261, at 2 (Apr. 1, 2015) ("There is no market failure to address through regulation, and imposition of additional regulation may limit, rather than increase, consumer choice."); Letter from Gerard J. Waldron, Covington & Burling LLP, Counsel for Amazon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 1 (Sept. 8, 2015) ("[C]ompetition and innovation in all sectors of the video content and distribution industry, including [OTT] services, today is vibrant and growing, with many companies offering content through multiple devices and delivery technologies and investing in high quality programming, all to the benefit of consumers. . . . [T]his investment in new creative and award-winning content by multiple companies, which is attracting a large and growing viewership, is occurring naturally in the marketplace, with little or no government involvement. In view of this dynamic, healthy, and rapidly changing technological and competitive environment, we questioned the need for government intervention in this market segment, expressing concern that the rules proposed by the Commission would inhibit innovation by imposing on OTT services regulatory burdens created long ago that are neither relevant to nor tailored to address this new vibrant industry, without any of the competitive benefits . . . that were envisioned when the rules were originally drafted decades ago."); Letter from Gregory Alan Barns, General Counsel, Digital Media Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 1 (Sept. 11, 2015) ("[S]everal of the nation's leading [OVDs] currently make available millions of movies and television shows to be streamed or downloaded instantly by consumers; and . . . much of that programming is of exceptional quality. In light of such developments, we questioned the need for government regulation at the present time.").

85 NCTA Comments at 9. Congress itself recognized when enacting 1992 Cable Act that "competition ultimately will provide the best safeguard for consumers in the video marketplace." House Report at 30 (emphasis added).

The Commission should also resist calls for new regulations of video devices.[86] The Consumer Video Choice Coalition and Public Knowledge suggest that MVPDs are somehow limiting device options for consumers, but these claims ignore marketplace realities.[87] As NCTA explained, consumer access to MVPD content over retail devices has increased dramatically over the last few years and in ways unforeseen by the drafters of the device requirements in Section 629 of the Communications Act.[88] As noted above, all major MVPDs have developed apps that enable consumer access to MVPD video services on IP-enabled devices, and the device marketplace is evolving in other new directions as program networks, OVDs, and other content providers are entering into distribution contracts directly with CE device manufacturers.[89] As Verizon aptly explained, "the video marketplace exhibits rampant innovation that is providing consumers new choices in how, where, and from whom they will receive and watch video programming" and "[t]he result of these efforts is that consumers are increasingly using viewing platforms that do not require an MVPD-supplied set-top box."[90] Imposing new technology mandates in this environment, as advocated by certain commenters,[91] is entirely unnecessary and would risk repeating the expensive failures of the CableCARD regime and chilling further investment and innovation in the device marketplace.[92]

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86 *See* Consumer Video Choice Coalition Comments at 8-9; Public Knowledge Comments at 2.

87 *See* Consumer Video Choice Coalition Comments at 2-3; Public Knowledge Comments at 2.

88 NCTA Comments at 16-17; *see also* Verizon Comments at 11-14.

89 *See* NCTA Comments at 19.

90 Verizon Comments at 12-13.

91 *See* Consumer Video Choice Coalition Comments at 8-9; Public Knowledge Comments at 2.

92 As Verizon pointed out, "although the Commission intended the CableCARD mandate to increase the availability of commercial navigation devices . . . consumer demand for retail devices with CableCARDs never reached significant levels, hovering around just 1% of subscribers for the nine largest cable systems." Verizon Comments at 12.

## V. CONCLUSION

For the foregoing reasons, the Commission's report to Congress must reflect and account for the new marketplace dynamics brought about by the rise of online video. And, in light of these changes, the Commission should remove legacy regulations, not impose new ones.

Respectfully submitted,

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