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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 07-269
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

As the National Cable & Telecommunications Association ("NCTA") demonstrated in its initial comments, competition in the video marketplace is flourishing in every respect – among multichannel video programming distributors ("MVPDs"), among program networks and content providers, and among new entrants offering video content over the Internet. Regarding this latter category, cable's investment in an infrastructure that is capable of providing robust, high quality video content over the Internet has made such competition possible.

The record contains no credible contrary view of the competitive landscape, although there is always a small coterie of competition-deniers who refuse, for various reasons, to acknowledge the obvious. In most cases, the reason is transparent: Persuading policymakers that the video marketplace lacks competition increases the likelihood that obsolete regulations reflecting a bygone era will remain in place (or that similar regulatory protectionism will be extended to the online video marketplace). In a vigorously competitive marketplace in which cable operators' share of MVPD customers has dropped below 60%, vertical integration between cable operators and the most popular program networks has virtually disappeared, and high speed broadband Internet access service makes it possible for any video content provider to reach the computers, television sets and handheld devices of anyone with an Internet connection, such regulations only distort the marketplace and disserve consumers.

I. PROTECTIONIST REGULATION IS UNWARRANTED IN THE VIBRANTLY COMPETITIVE MARKETPLACE FOR ONLINE VIDEO DISTRIBUTION.

Some parties contend that Commission regulation may be necessary to protect against potential and hypothetical threats to competition in the flourishing marketplace for *Internet* online video. Netflix, for example, seeks to persuade the Commission that because broadband Internet access services are provided by cable operators and telephone companies that also offer video programming services, those companies have "both the means and motive for discriminating against OVDs [*i.e.*, online video distributors]," and that continued regulatory oversight is necessary to prevent anticompetitive conduct. It identifies several examples of conduct by MVPDs – such as providing "TV Everywhere" services to their customers, refusing to provide video content on reasonable terms, charging transport and content delivery networks for the termination of traffic on their networks, and adopting "usage-based billing" for their Internet access services – that "*could* shield MVPDs from competition from new entrant OVDs" and therefore warrant Commission oversight.[1]

Netflix provides no evidence that any such conduct *has* had, or *would* have, such a result. It's hard to imagine how it could. As Netflix acknowledges, "with more than 23 million subscribers," it has rapidly grown to become "the largest online video subscription service in the United States."[2] And it's not simply that cable operators and telephone companies have not impeded this growth. By continually upgrading the capabilities of their broadband facilities, they have made high-quality Internet video content possible and facilitated its distribution by

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1 Comments of Netflix, Inc. at 6 (emphasis added).

2 *Id.* at 2.

entities like Netflix. And at the same time, they have increased the value of their own MVPD services to their customers with Internet-based enhancements such as TV Everywhere.[3]

Indeed, it's the regulatory constraints suggested by Netflix that would unfairly hamper competition by artificially preventing cable operators from marketing their services in ways that are most fair, efficient and valuable to their customers.

II. WHILE COMPETITION AMONG MVPDs IS FLOURISHING, IT IS UNDERMINED BY CONTINUED PROTECTIONIST REGULATION.

As NCTA pointed out in its initial comments, vigorous competition among cable operators and other MVPDs has been flourishing for years. The provision by telephone companies of cable service – and the bundling of such service, along with telephone, Internet access, and wireless service, in "triple play" and "quadruple play" offerings – has augmented the competition already available from the two large, national DBS providers (currently the #2 and #3 largest MVPDs in the country). With a choice of at least three or four competitive services, more than 40% of all MVPD households now choose a provider other than their incumbent cable operator.

Those providers – the DBS companies and the telephone companies – acknowledge that vigorous competition has firmly taken root in the MVPD marketplace. DIRECTV and Dish Network both note that the ability of wireline cable and telco competitors to offer telephone and high-speed Internet service along with video over their facilities could put them at a disadvantage in this competitive marketplace, but – to their credit – their comments in this proceeding do not seek regulatory protection from such competition. Indeed, DIRECTV states that it "has been

[3] The Notice of Inquiry states that "Comcast offers *proprietary* online video on its XfinityTV.com website exclusively for its MVPD subscribers as part of the industry wide 'TV Everywhere initiative." Notice, ¶ 28, n.68. While the programs being offered are "proprietary" insofar as the distribution rights are separately owned by the participating program networks, the TV Everywhere concept is itself a non-exclusive model being implemented or tested by a wide range of different distributors and programmers and is in no way "proprietary."

able to provide compelling video service that has overcome these challenges, and it intends to continue meeting them with the spirit of innovation and customer-first orientation that has been a DIRECTV hallmark. . . . *So long as such challenges result from vigorous and fair competition, regulatory intervention is likely unnecessary, and even counterproductive in such a dynamic and quickly-evolving market*."[4]

This is the right approach. When DBS emerged as a competitor to cable, it had certain characteristics – in particular, the ability to provide many more channels of programming than cable could then offer, and to provide them with digital clarity – that could have permanently put cable at a competitive disadvantage. In addition, DBS sought to compete by acquiring exclusive distribution rights to a highly popular programming innovation – the NFL's "Sunday Ticket" service. Cable operators responded to this competition by upgrading and entirely rebuilding their facilities to offer a competitive array of digital-quality programming – a response that serendipitously also made possible the provision of high-speed Internet access service as well as high-quality telephone service – and, in some cases, by investing in their own innovative programming services, such as local news and sports channels.

As DIRECTV and Dish Network point out, the telephone companies have an advantage that DBS companies do not share – the ability to offer integrated triple-play services. And Verizon and AT&T even have an advantage that most cable operators do not share – the ability to include wireless service in their bundled offerings. Yet, unlike the DBS companies, they continue to seek regulatory protection in lieu of innovating and competing with cable operators. Specifically, both AT&T and Verizon insist that the exclusive program access requirements in

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4 DIRECTV Comments at ii-iii (emphasis added).

Section 628 of the Communications Act remain in place to protect them against a broad array of competitive practices by cable operators that they deem unfair.[5]

From the perspective of an industry that has responded to satellite and telco competition by spending more than $170 billion to improve its own product, the plea of Verizon and AT&T for such extensive and intrusive regulatory protectionism ring hollow. Verizon and AT&T are sturdy competitors with a large base of telephone and wireless customers upon which to grow their triple- or quadruple-play subscribership. The fact that certain programming may be "nonreplicable" and may be "must-have content for *many* consumers"[6] does not mean, as Verizon and AT&T persistently suggest, that such programming is essential to the ability of any MVPD to compete.

The NFL's "Sunday Ticket" is undoubtedly "must-have content for many consumers," and, as a result, DIRECTV is the service of choice for those consumers. In response, cable operators have invested in or acquired rights to provide local news channels and other unique programming that give customers a reason to select their service – and that, in some cases, would not have been created or provided at all if not for the competitive marketing advantage. That's how competition works, and there's no sign that such exclusive arrangements have done anything to reverse the growth of vigorous competition among MVPDs.

III. MARKETPLACE COMPETITION IS PROMOTING THE ABILITY OF CONSUMERS TO VIEW VIDEO CONTENT FROM ALL SOURCES ON ALL DEVICES AND SCREENS WITHOUT THE NEED FOR A GOVERNMENT "SOLUTION."

Similarly, there is nothing pro-competitive about the suggestions by other parties that the Commission adopt rules in its pending "All-Vid" proceeding to mandate a standardized gateway

[5] *See* Comments of AT&T Inc. at 7-8; Comments of Verizon at 16-18.

[6] Verizon Comments at 2 (emphasis added).

interface for ISPs and other providers of Internet services.[7] Google's comments, while advocating such rules, effectively show why this is the case. Google spends the first two-thirds of its short comments discussing the "explosive growth, dynamic innovation, fierce competition, and low barriers to entry" that have characterized the Internet generally – and online video content, specifically – in recent years.

As Google correctly points out, "The increasing speed and availability of consumer broadband combined with falling costs of backbone Internet transit and a competitive marketplace for content delivery networks has created an uncharted opening for online video that businesses and users have rushed to fill."[8] As a result, "Numerous online video services have launched, including Netflix, Amazon Instant Video, Hulu, iTunes, Vudu, Sezmi, Vimeo, Cinema Now, Blockbuster On Demand, and, of course, YouTube. Competition is flourishing and the top video sites are constantly shifting as the online video arena grows and changes."[9]

Does this sound like a problem that needs fixing? None of this was driven or dictated by a regulatory master plan. The "increasing speed and availability of consumer broadband" that Google cites as the underlying booster rocket for online video was driven by cable's own (unregulated) efforts and investments. And, as discussed in our initial comments, the rapid explosion of online video is itself continuing to produce a broad array of technologies and equipment enabling consumers to watch online video – at home and on the road – on their desktop and laptop computers, their wireless phones and tablets, and their high definition television sets. There is no reason to expect these developments to cease – and there is especially no reason to supplant them with a government-imposed AllVid regime that cannot

[7] *See, e.g.*, Comments of Google, Inc. at 7-9; Comments of Consumer Electronics Association at 12-13; Comments of the AllVid Tech Company Alliance.

[8] Google Comments at 2.

[9] *Id.*

possibly anticipate and replicate the technologies that the marketplace would otherwise provide to meet consumer demand.[10]

IV. THE COMMISSION SHOULD TAKE CARE NOT TO ADOPT LANGUAGE, CLASSIFICATIONS, OR CONCLUSIONS THAT HAVE UNWARRANTED REGULATORY IMPLICATIONS.

While the Commission is right to recognize the emerging role of the Internet in the video marketplace, it is unnecessary, premature, and inappropriate to attempt to classify or pigeonhole these new developments in ways that could have unwarranted regulatory implications. The Commission's Notice of Inquiry takes some steps in this direction, suggesting several new or altered regulatory definitions, classifications, and terminology relevant to online video that should not find their way into the final report.

For example, the term "video programming" has multiple definitions in the Communications Act and various FCC regulations, each with its own specific meaning, purpose, and associated obligations.[11] The Notice inexplicably appears to use a definition of "video programming" taken from the Commission's closed captioning rules,[12] but the point is that online video content varies greatly in terms of its quality and format, and it is premature and potentially misplaced to suggest that any or all of such content meets – and should be subject to

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[10] These points are discussed more fully in a letter from NCTA's President and CEO Michael Powell to Chairman Genachowski, which was filed on July 7, 2011 in this proceeding and in the Commission's "AllVid" proceeding. A copy of that letter is attached to these reply comments.

[11] For example, definitions of "video programming" include those within Section 602 of the Communications Act, as amended, which does not refer to residential use, or within the Twenty-First Century Communications and Video Programming Accessibility Act, which expressly exempts forms of online video. 47 U.S.C. § 522(20); 47 U.S.C. § 613(h) (defining video programming in context of video description).

[12] NOI, ¶ 1 n. 2 (quoting, only *in part*, 47 C.F.R. § 79.1(a)(1)). "Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use." The NOI omits that definition's next sentence, which expressly excludes advertising "of five minutes' duration or less" from "video programming." *See id.*

the rules that apply to – any of the varying definitions of "video programming."[13] In short, the report should not use the term "video programming" as a synonym for online video content.

Similarly, the Commission should not simply borrow the distinct classification of Online Video Distributors ("OVDs") that it adopted in the Comcast-NBCUniversal transaction proceeding.[14] During that proceeding, the Commission was looking at specific facts and circumstances related to the transaction at issue. In contrast, in the Notice of Inquiry in this proceeding, the Commission is, for the first time, seeking data on a new and incredibly diverse group of video marketplace participants. There are already a wide variety of entities and business models distributing video content on the Internet, and it is premature to suggest that all such providers and distribution approaches should be viewed, whether for regulatory purposes or otherwise, as comprising a coherent and distinct category. If the Commission does attempt to define a category of OVDs in its report to Congress, it should at a minimum do so in a manner that does not encompass all websites with video content, including those owned or operated by content creators and/or other programmers.

Any premature conclusions or recommendations in this rapidly evolving space would also create regulatory uncertainty, chill investment and innovation, and ultimately distort or skew the development of new distribution models that will promote the availability of high-quality content for consumers. Because the broad scope and abbreviated timeline of this proceeding are unlikely to yield sufficient information to develop any reliable sense of the evolving video

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[13] As noted in prior video competition reports, the quality of online video content fluctuates significantly from website to website, and may depend on many factors, including a user's online connection. *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, 10932 (2004) (citation omitted). While the recent *Open Internet Order* noted that 'intervening improvements in streaming technology and broadband availability enable such programming to be 'comparable to programming provided by…a television broadcast station,'" this speculative statement falls short of a conclusive determination. *Open Internet Order,* 25 FCC Rcd at 17976. As noted above, this *Order* remains subject to reconsideration or court review.

[14] *See* Further Notice, ¶ 2, n.9 (citing *Comcast-NBCU Merger Order* as basis for term).

marketplace,[15] the Commission should exercise restraint in making any predictive judgments and instead continue monitoring ongoing developments.[16]

V. SUBSTITUTING PRESCRIPTIVE REGULATION FOR THE DICTATES OF A COMPETITIVE VIDEO MARKETPLACE FRUSTRATES THE ABILITY OF THAT MARKETPLACE TO MEET THE NEEDS AND DEMANDS OF CONSUMERS.

Finally, while the marketplace continues to provide more and more viewing options for consumers – more choices among MVPDs, more programming channel, packages, and on-demand programming offered by each MVPD, and an infinite array of online video content – the New Jersey Division of Rate Counsel ("the Division") continues to believe that "effective competition is absent in most relevant markets" and that regulation will do a better job than the marketplace in maximizing consumer welfare and satisfaction.[17] Oblivious not only to the burgeoning marketplace competition but also to the devastating impact on investment that resulted from prior efforts to regulate rates and packaging of cable services, the Division urges the Commission to impose on cable operators and other MVPDs the burdensome data collection and rate regulation approaches applied in another era to monopoly telephone companies.

Thus, the Division maintains that "[t]he FCC should require companies to provide 'ARMIS-like' cost and revenue data so that the FCC can protect consumers and competitors from unfair rates and the misallocation of joint and common costs."[18] In addition to regulating rates, the Division would have the Commission regulate the manner in which services are

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[15] Likewise, the *Open Internet Order* and *Comcast-NBCU Merger Order* do not study or analyze online video in any way that can support broader conclusions on the topic.

[16] The Notice also inappropriately uses the term "tying" with reference to online access to subscription programming provided by MVPDs. Tying has a very specific and well-known meaning under the antitrust laws and precedent that is premised on a finding of market power, which is not present in either the traditional MVPD or online video contexts. Use of this word in the NOI thus mistakenly suggests that an antitrust law analysis has been performed and, to avoid confusion, it should therefore be avoided.

[17] Comments of New Jersey Division of Rate Counsel at 14.

[18] *Id.* at 4.

packaged and marketed to customers by “requir[ing] all video programming providers to offer consumers à la carte options so that consumers can customize their viewing options.”[19] And it expresses “misgivings” about whether the comprehensive conditions that the Commission imposed on Comcast in approving the Comcast/NBC-Universal merger will adequately “protect the nascent OVD industry” – suggesting that the Commission should stand at the ready to regulate that marketplace as well.[20]

All the evidence in the record of this proceeding – and in the 13 reports on video competition that have been issued since the 1992 Act mandated such inquiries – unambiguously suggests precisely the opposite course. Even at a time when there was little competition in the MVPD marketplace and no competition among local exchange carriers, comprehensive regulation was a flawed and misguided option, imposing burdensome costs on both the regulators and the regulated companies and causing distortions and unintended adverse consequences in investment and in the offering of services to consumers. The competitive structure and behavior of today’s marketplace warrants not more regulation but the assiduous pruning and elimination of those rules and regulations aimed at remedying the perceived lack of competition in a world that no longer exists.

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That should be the theme of the 14th report. During the 4-year hiatus in reporting, the explosion of video options available to consumers from an array of cable, telco and DBS providers of MVPD service and from all corners of the Internet, the vastly diminished amount of vertical integration between cable operators and cable program networks, and the vastly increased pathways by which video content providers can reach consumers confirm beyond

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[19] *Id.* at 8.

[20] *Id.* at 12.

doubt that competition is here to stay. Rules adopted to remedy a perceived lack of competition in 1992 are, in today's competitive marketplace, likely to do more harm than good. And rules adopted to ensure the flourishing of competition in the online video marketplace are aimed at a potential problem that shows no signs of occurring.

The Commission should seek authority, either through elimination of the provisions of Title VI that are no longer necessary or through a forbearance provision, to repeal or no longer enforce such rules. And it should report to Congress that competition in the video marketplace – among MVPDs and online – is alive and well.

Respectfully submitted,

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