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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 17-214
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

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TABLE OF CONTENTS

I. THE POINT OF THE VIDEO COMPETITION REPORT IS TO ASSESS WHETHER IT IS TIME TO REVISE AND DISMANTLE A REGULATORY FRAMEWORK PREMISED ON A LACK OF COMPETITION. 1

II. TODAY'S MARKETPLACE IS CHARACTERIZED BY VIGOROUS COMPETITION AMONG MVPDS, AMONG CONTENT PROVIDERS, AND BETWEEN MVPDS AND ONLINE VIDEO DISTRIBUTORS. 4

CONCLUSION..11

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COMMENTS OF
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NCTA – The Internet & Television Association ("NCTA") hereby submits its comments on the Public Notice in the above-captioned proceeding.[1]

I. THE POINT OF THE VIDEO COMPETITION REPORT IS TO ASSESS WHETHER IT IS TIME TO REVISE AND DISMANTLE A REGULATORY FRAMEWORK PREMISED ON A LACK OF COMPETITION.

Although the Communications Act continues to require that the Commission "annually report to Congress on the status of competition in the market for the delivery of video programming," that status has not, for years, been in doubt. A quarter century ago, when Congress imposed this reporting obligation, the video marketplace largely consisted of local broadcast stations and their program suppliers, cable operators (few of which faced head-to-head multichannel competition within their franchise areas), and cable program networks (the most popular of which were owned by cable operators).

If the point of the annual reports were simply to document the extent to which this marketplace has been radically transformed into one that is characterized by vigorous competition at all levels, they would long ago have outlived any usefulness. Eight years ago, the

[1] FCC, Public Notice, *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming,* DA 17-797 (Aug. 24, 2017).

United States Court of Appeals for the District of Columbia Circuit was already able to conclude that the record was

> 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.[2]

But Congress had a reason for wanting to know if and to what extent competition was taking hold in the video marketplace. In the Cable Television Consumer Protection and Competition Act of 1992, Congress subjected cable operators and satellite-delivered cable-owned program networks to a comprehensive set of regulations, most of which were designed either to jump start competition or to prevent anticompetitive abuse until such competition existed. In a market characterized by competition, it believed that such regulations would not only be unnecessary but would artificially distort and suppress the pro-consumer benefits of such competition:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and development of a competitive marketplace to regulation. The Committee also recognizes, however, that *until true competition develops*, some tough yet fair and flexible regulatory measures are needed.[3]

So, now that the reports have confirmed, year after year, that true competition exists – among multichannel video programming distributors (MVPDs), between MVPDs and online video distributors (OVDs), and among program networks and other programming distributed on MVPDs and online – the charts and numbers documenting that competition are less important than the regulatory implications. Yet, in recent years, the Commission has shied away from

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[2] *Comcast Corp. v. FCC*, 579 F.3d 1, 18 (D.C. Cir. 2009).

[3] Report of the Committee on Energy and Commerce, H.R. Rep. 92-628, 102d Cong. 2d Sess. 30 (1992) ("House Report").

acknowledging, in its reports, the implications of what its charts and numbers show – specifically, that it's time for regulations that are premised on a lack of competition to be repealed. Instead of highlighting this important conclusion for Congress, the Commission has *minimized* the significance of its annual reports, downgrading the initial request for information from a Notice of Inquiry to a Public Notice and delegating the issuance of a report – consisting mainly of a statistical compendium – to the Media Bureau.

This year, in its Video Competition Report, the Commission should not only confirm the prevalence of vigorous competition in the video marketplace – including the competitive effects of online video programming – but also directly address its implications. First, the Commission should identify those statutory and regulatory provisions that served only as a stopgap until competition developed – and take action to eliminate them or, if statutory, recommend that Congress eliminate them. The Commission has taken a good first step in this direction with its Public Notice on Media Modernization, seeking comment on regulations that have outlived their usefulness.[4] NCTA's comments on that Public Notice identified many of those regulations.[5]

Second, to the extent that statutory and regulatory provisions address concerns that are *not* based on a lack of competition in the video marketplace or on unique characteristics of particular competitors, the Commission should take action not only to determine whether the concerns remain valid but also to ensure regulatory parity. Entities that compete in the provision of like services should not face different public interest or consumer service obligations. Besides being arbitrary and capricious, such differential regulatory treatment artificially skews

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4 "Commission Launches Modernization of Media Regulation Initiative," Public Notice, 32 FCC Rcd 4406 (2017).

5 *See* NCTA Comments, MB Docket No. 17-105 (July 5, 2017).

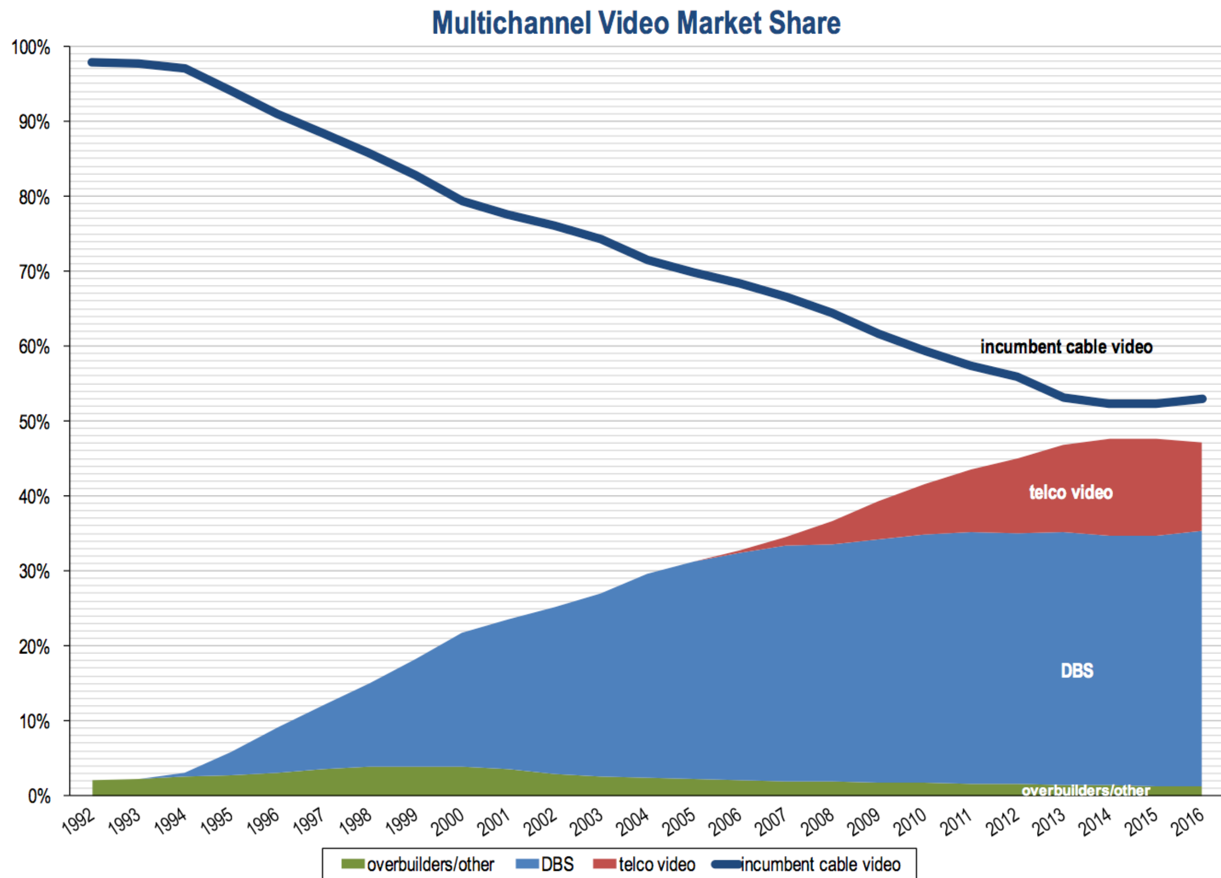
competitive outcomes and prevents consumers from obtaining the service offerings that provide the greatest value.

Third, the Commission should now begin to keep an eye out to ensure that the development of new service providers using new technologies and business models continue to promote and do not adversely affect competition in the video marketplace.

These are the regulatory issues that a report to Congress on video competition should address in 2017 along with presenting the usual data documenting the full extent to which competition is flourishing.

II. TODAY'S MARKETPLACE IS CHARACTERIZED BY VIGOROUS COMPETITION AMONG MVPDs, AMONG CONTENT PROVIDERS, AND BETWEEN MVPDs AND ONLINE VIDEO DISTRIBUTORS.

For all the years that the Commission has been conducting these inquiries, the data has shown a consistent decline in the share and number of MVPD customers served by incumbent franchised cable operators. First, it was the two national DBS competitors that played the major role in offering consumers choice in the selection of MVPDs and eliminating any bottleneck power that might have raised anticompetitive concerns. Then, local telephone companies entered the fray and proceeded to take market share from both cable operators and DBS companies. As a result, as the chart below shows, cable's share of MVPD customers, which was 98% at the time of the 1992 Cable Act, has plateaued for the last few years at approximately half – 53% in 2016. Telephone and DBS companies serve most of the other half, at 12% and 34% respectively.



Two years ago, the Commission found that cable operators' MVPD competitors have at least 15% market share (and often significantly more) in *each* of the 210 Designated Market Areas across the nation, warranting a rebuttable presumption that cable systems are subject to "effective competition" – the statutory test for rate deregulation.[6] And these are sturdy and well-established competitors. The merged AT&T and DIRECTV, with their wireline and DBS services, serve more customers than any other MVPD. Three of the top five are DBS and/or telephone companies:

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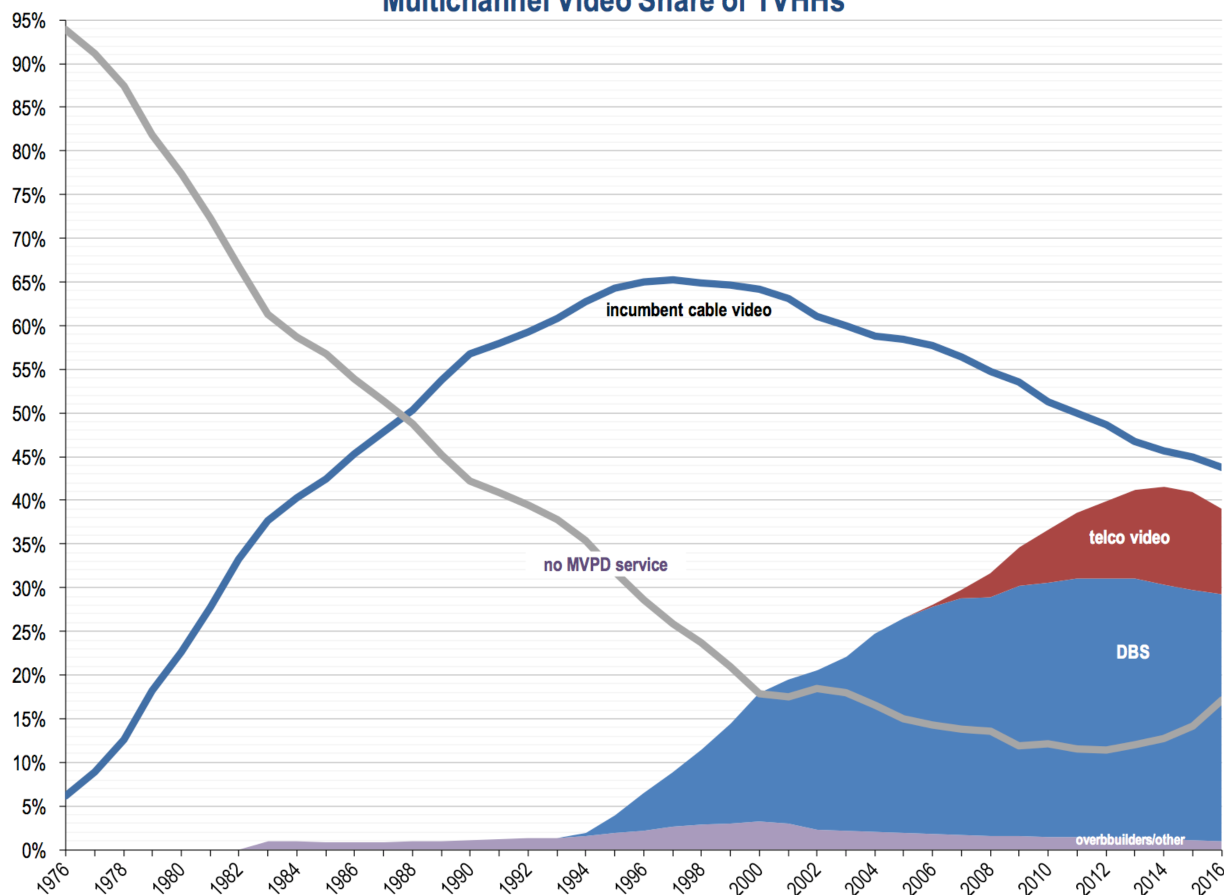
[6] *See In the Matter of Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015).

Video Customers - June 2017 (in millions)	
AT&T/DTV	25.2
Comcast	22.5
Charter	17.1
DISH	13.3
Verizon	4.7
Cox	3.9
Altice USA	3.6
Frontier	1.0
Mediacom	0.8
WOW!	0.5

But this year there's a new twist. Look what's happened to MVPDs' shares of *all* television households:



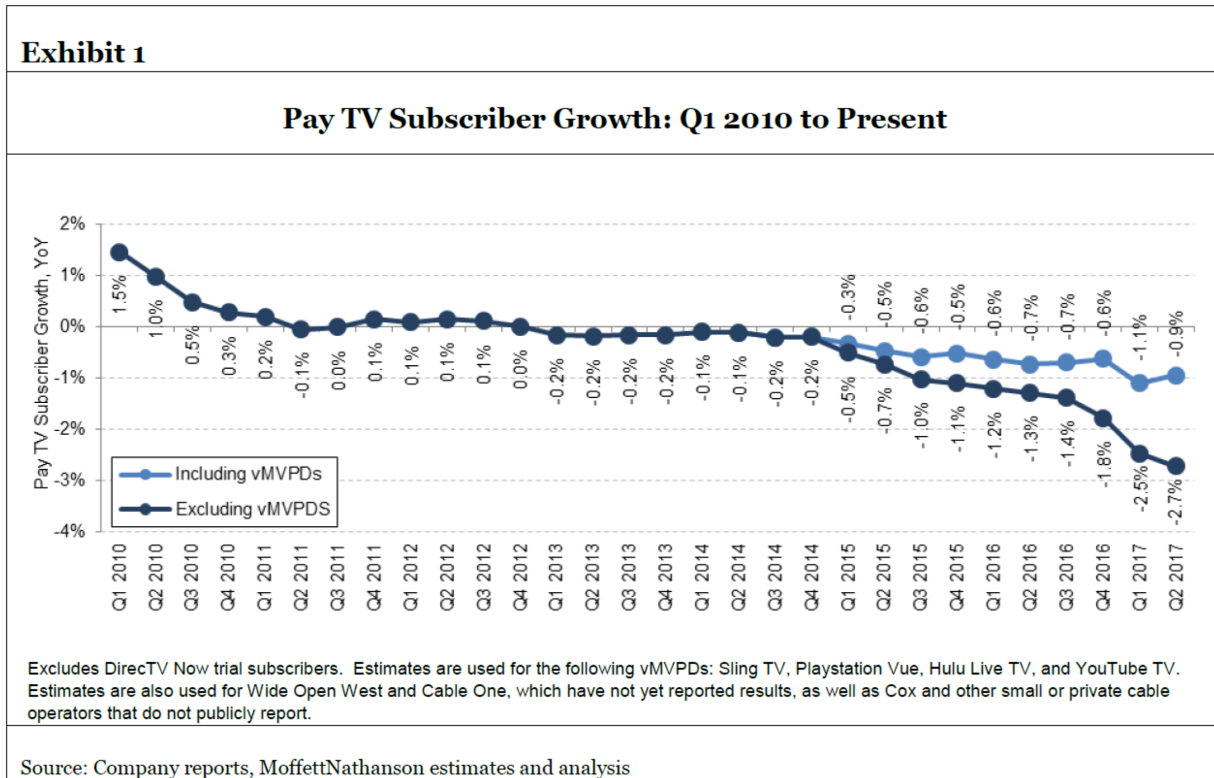
Those shares have not plateaued at all. They are continuing to decline, as the share of television households with no MVPD service – a statistic in steady decline for almost four decades – has suddenly begun to increase. Between 2012 and 2016, the number of households without MVPD service increased from 11.4% to 17.1%. This reversal coincides with the explosive growth in video content available for viewing online without an MVPD subscription. There is no corresponding reversal in the constantly increasing number of households with Internet connections, and consumers are increasingly using those Internet connections instead of (as well as along with) MVPD subscriptions.

Indeed, as this chart from MoffettNathanson illustrates, adding just four of the most prominent multichannel online video distributors – SlingTV, Playstation Vue, Hulu Live TV,

and YouTube TV – to the mix erases most of the decline in multichannel subscribers in the last two years:

Exhibit 1

Pay TV Subscriber Growth: Q1 2010 to Present



Excludes DirecTV Now trial subscribers. Estimates are used for the following vMVPDs: Sling TV, Playstation Vue, Hulu Live TV, and YouTube TV. Estimates are also used for Wide Open West and Cable One, which have not yet reported results, as well as Cox and other small or private cable operators that do not publicly report.

Source: Company reports, MoffettNathanson estimates and analysis

Moreover, it is not necessary to subscribe to an online multichannel service to watch video programming via the Internet. Many programming services – including program networks carried by cable systems and other MVPDs – offer programming directly to consumers on their own websites, while local broadcast stations remain available over the air.

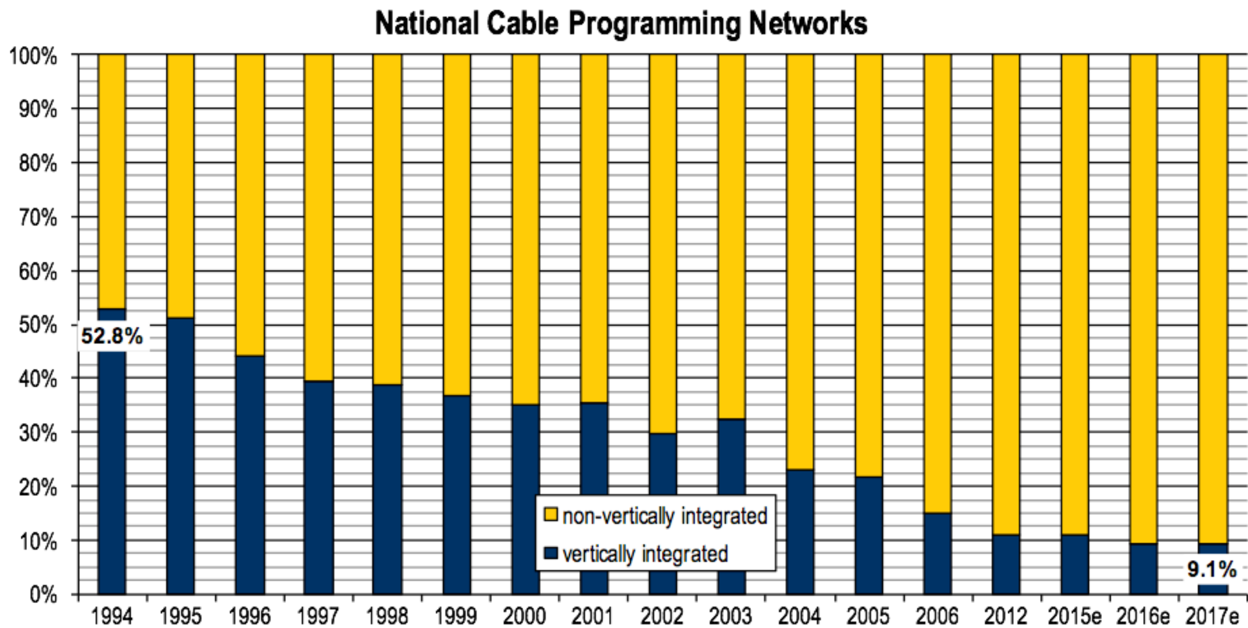
The devices that enable households to view such online alternatives to MVPD service – with or without also subscribing to MVPD service – have become ubiquitous and inexpensive. Those "devices" include the television set itself. Many manufacturers offer "smart" TVs that, when connected by Wi-Fi to a household's Internet service, can select programming from an array of online service "apps." Those services are also available using Google's Chromecast, Apple TV, Amazon's FireTV and FireStick, Sony's PlayStation, Microsoft's Xbox, and Roku's

streaming devices, some of which enable the casting of any video programming viewed on a mobile phone or tablet directly to the television screen. Moreover, cable operators are increasingly enabling their subscribers to access their cable service on these devices, while also enabling them to view online services such as Netflix and YouTube directly from their on-screen menu of services without the use of *any* of these devices.

Such direct access to online services via cable is just one example of the innovative consumer benefits that are resulting from the fierce competition that now exists among MVPDs and between MVPDs and online services. The visual program guides and voice remotes that consumers now routinely use to find and view or record the hundreds of real-time channels or thousands of programs available on-demand are a far cry from the inelegant and time-consuming menus of only a few years ago. Cable customers can watch programming on mobile devices using Wi-Fi in their homes or, in many cases, outside their homes, and can also record and download programming on their devices for offline viewing.

Meanwhile, the *amount* of video programming available to consumers has expanded geometrically over the years. At the time of the 1992 Act, cable systems mainly offered multiple channels of linear program networks to be viewed in real time or time-shifted using video cassette recorders. Today, the amount and diversity of content as well as delivery mechanisms has increased exponentially. Responding to evolving competition, program networks are spending more on programming – especially, original and unique programming – in order to attract and retain viewers. Programmers are also finding new ways to reach consumers, using on-demand services and “apps” to enable viewing on computers and mobile devices, “smart” TVs, and TV sets connected to Internet streaming devices marketed by Roku, Amazon, Google, and others. Competition is fiercer than ever.

Also, these developments have been accompanied by a dramatic reduction in vertical integration. As we noted last year, with the hundreds of programming networks and the rapidly expanding array of online channels, networks, and programs, Congress's concern in 1992 that vertical integration between cable operators and cable program networks might pose an anticompetitive threat to the development and availability of non-cable-owned programming should by now have evaporated. In 1992, most the most popular cable networks (provided on systems with a much smaller number of channels than the hundreds offered on today's digital platforms) were owned by cable operators. Today, there are more programming networks than the Commission can count and keep track of – approximately 800 by the Commission's last estimate, five years ago.[7] And only a small handful – including only *one* of the top 20 most viewed networks – are affiliated with cable operators.



Meanwhile, although the vertical integration that Congress perceived as a threat to

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[7] *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, 8628 n.96 (2012).

competition among MVPDs has substantially disappeared, it is noteworthy that vertical integration of a different sort is emerging in the *online* video marketplace. In particular, several of the platforms and search engines that consumers use to search for and view video programming – such as Google, YouTube, Amazon, and Facebook – are beginning to offer their own programming.[8] The number of households using each of these gateways nationwide (and worldwide) far exceeds the number that subscribe to any cable operator or other MVPD, raising potential questions that supersede the cable-centric issues that seemed relevant to Congress a quarter century ago and that may become relevant to future assessments of the status of competition in the video marketplace.

CONCLUSION

For several years, the Commission's annual reports have displayed data confirming that today's video marketplace differs dramatically from the marketplace that existed at the time of the 1992 Cable Act. The factors that gave rise to Congress's concerns about potential anticompetitive conduct by cable operators – a lack of MVPD competitors to cable and vertical integration of cable operators and most of the most popular cable program networks – no longer exist. Consumers have more choices than Congress could ever have envisioned. They can choose among cable operators, DBS services, and telephone companies for multichannel service that offers hundreds of channels of programming along with thousands of on demand programs, which they can record and view on every screen and every device inside and outside their homes.

[8] *See*, *e.g.*, "YouTube is spending millions to make new original shows you can watch for free," *The Verge*, May 4, 2017, https://www.theverge.com/2017/5/4/15552204/youtube-original-tv-shows-kevin-hart-ellen-degeneres. YouTube is, of course, owned by Google. *See also*, *e.g.*, "Amazon's content push faces bumps in the road," *Business Insider*, Oct. 9, 2017, http://www.businessinsider.com/amazons-content-push-faces-bumps-in-the-road-2017-10 ("Amazon is set to spend around $4.5 billion on Prime Video programming in 2017, per JPMorgan estimates."); "Facebook plans to spend up to $1B on original shows in 2018," *TechCrunch*, Sept. 8, 2017, https://techcrunch.com/2017/09/08/facebook-plans-to-spend-up-to-1b-on-original-shows-in-2018/.

And they can choose to watch online programming on services owned by very large companies, as well as by tiny companies and, indeed, anyone who chooses to offer content on the Internet.

These facts have important regulatory implications, which the 19th annual report should identify for Congress. Regulations premised on a lack of competition in the video market have no place in a market that is vigorously competitive. Regulatory parity should ensure that marketplace competition is not distorted by disparate regulatory treatment of competitors. And new gatekeepers in the online marketplace should be monitored to ensure that the vigorous video competition that currently exists among MVPDs, between MVPDs and online video distributors, and among program networks and suppliers continues to flourish.

Respectfully submitted,

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