Comments of the

Competitive Enterprise Institute

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and

TechFreedom

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In the Matter of

Commission Launches Modernization of Media Regulation Initiative

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I. Introduction

On behalf of the Competitive Enterprise Institute (CEI) and TechFreedom, we respectfully submit these comments in response to the Commission's May 2017 public notice regarding its modernization of media regulation initiative.[4] CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. CEI and TechFreedom have each regularly participated in FCC proceedings involving media regulation and mergers, such as the Commission's proposed set-top box rule,[5] its proposal to regulate online video distributors,[6] and the merger of Charter Communications, Time Warner Cable, and Bright House Networks.[7]

II. Cable Ownership Limits

In the 1992 Cable Act, Congress instructed the Commission to issue multiple rules governing cable programmers, which generally aimed to promote the development of satellite-based MVPD service, and to strike a balance as between cable distributors and broadcasters. Among these were, *inter alia*, "must-carry" obligations and two kinds of ownership restrictions:

- **"Horizontal" limits** on nation-wide ownership of cable systems (47 U.S.C. § 533 (f)(1)(A));[8] and
- "**Vertical" limits** on ownership by cable systems of, or their affiliation with, cable programmers (47 U.S.C. § 533 (f)(1)(B)).

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[4] Commission Launches Modernization of Media Regulation Initiative, Public Notice, MB Docket No. 17-105, 32 FCC Rcd 4406 (rel. May 18, 2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-58A1_Rcd.pdf.

[5] Comments of the Competitive Enterprise Institute and TechFreedom, Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42 (2016), *available at* https://ecfsapi.fcc.gov/file/60001690832.pdf.

[6] Comments of CEI, the International Center for Law & Economics, and TechFreedom, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261 (2015), *available at* https://ecfsapi.fcc.gov/file/60001039178.pdf.

[7] Comments of CEI, ICLE, and TechFreedom, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149 (2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001329147.

[8] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 11(c), 106 Stat. 1460 (amending Communications Act § 613, 47 U.S.C. § 533).

All these rules single out cable operators for special treatment, imposing upon them obligations not applicable to satellite MVPDs or telephone MVPDs (which were illegal at the time of the 1992 Act). Cable operators quickly challenged these provisions on First Amendment grounds. The Supreme Court upheld the must-carry statute as "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[9]

The D.C. Circuit has twice struck down the horizontal ownership rule as arbitrary and capricious — in 2001 and 2009.[10] In 2009, the Court went so far as to vacate the rule. The Court's rationale for granting *vacatur* is worth reprinting in full:

> The Commission's dereliction in this case is particularly egregious. In the previous round of this litigation we expressly instructed the agency on remand to consider fully the competition that cable operators face from DBS companies. *Time Warner II*, 240 F.3d at 1134. The omission of this consideration was a major failing of the FCC's prior attempt to justify the 30% cap. The Commission nonetheless failed to heed our direction and we are again faced with the same objections to the rationale for the cap. It is apparent that the Commission either cannot or will not fully incorporate the competitive impact of DBS and fiber optic companies into its open field model [for justifying the 30% figure]. We have no trouble concluding, therefore, that vacatur is indicated by the first factor in Allied-Signal, "the seriousness of the [Rule's] deficiencies…"[11]

Given the weakness of the FCC's substantive arguments for setting the cap at 30%, the court simply did not reach the First Amendment issues. Unfortunately, that decision has allowed the Commission to continue exactly the same "egregious" behavior: continuing to enforce the same 30% cap, not on a *de jure* basis but on a *de facto* basis.[12] Each cable merger proposed

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[9] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661(1994).

[10] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) ("On the record before us, we conclude that the 30% horizontal limit is in excess of statutory authority."); *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("In light of the changed marketplace, the Government's justification for the 30% cap is even weaker now than in 2001 when we held the 30% cap unconstitutional.").

[11] *Comcast Corp*, 579 F.3d at 9.

[12] Although the FCC does not have general authority to review cable mergers, in practice, the Commission reviews such mergers in their entirety based on provisions such as Section 214 of the Communications Act, 47 U.S.C. § 214, regarding transfers of authorizations to operate telecommunications lines, and Section 310, 47 U.S.C. § 310, regarding transfers of radio station licenses. *See*, *e.g.,* Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd 6327, 6329, para. 1 & n.2 (2016).

since then has been crafted to fall below the 30% limit — a clear indication that regulated parties believe the Commission will continue to enforce the 30% limit.[13] But, by avoiding a new rulemaking, the Commission has also been able to avoid a First Amendment challenge. Thus has the constitutionality of these provisions of the Cable Act gone untested since the Supreme Court last considered them in 1997.[14]

We believe the "special characteristic" justifying special burdens on cable (or more precisely, the application of intermediate, rather than strict, scrutiny) disappeared long ago. Indeed, the idea that cable continues to exert unique "bottleneck monopoly power" over programming is nothing short of laughable. In 1992, cable operators had a 95% share of the MVPD market; by 2009, that figure had fallen to 64%;[15] and by the end of 2015, cable's market share had declined continually, down to 53.1%, with DBS at 33.2% and telcos at 13.4%.[16] In other words, from having nearly 100% of the MVPD market when Congress wrote the cable ownership limits, cable's market share has now effectively dropped to *half* the market.[17]

Even this remarkable contrast understates the true decline in the "gatekeeper" power of cable operators vis-à-vis programmers seeking carriage on cable networks: that paradigm has become increasingly obsolete as more and more Americans have cut the cord completely.[18] As the Commission notes in its 2017 Video Competition Report: "Total MVPD subscribers

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[13] *See*, *e.g.,* APPLICATIONS OF COMCAST CORP. AND TIME WARNER CABLE INC. FOR CONSENT TO ASSIGN OR TRANSFER CONTROL OF LICENSES AND AUTHORIZATIONS, APPLICATIONS AND PUBLIC INTEREST STATEMENT, at 6 (Apr. 8, 2014), *available at* https://ecfsapi.fcc.gov/file/7521122731.pdf.

[14] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

[15] Brief of Amicus Curiae Progress & Freedom Foundation in Support of Petitioner, *Comcast Corp. v. FCC*, no. 08-1114 (2009), *available at* https://www.scribd.com/document/8630011/PFF-Amicus-Brief-Cable-Ownership-Cap.

[16] EIGHTEENTH ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING, *Eighteenth Report*, 32 FCC Rcd 568 (2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1_Rcd.pdf [hereinafter Video Competition Report].

[17] This is not just a matter of rounding: even the FCC's most recent Video Competition report, issued in January 2017, relies on data from late 2015. And that report notes that cable's market share had dropped from 53.4% to 53.1% between late 2014 and late 2015. Given the consistent, long-term trend of cable's decline in market share, it is reasonable to assume that the current figure, in mid 2017, is actually closer to 52%.) Video Competition Report at ¶ 2.

[18] JOHN B. HORRIGAN & MAEVE DUGGAN, PEW RESEARCH CTR., HOME BROADBAND 2015 (2015), *available at* http://www.pewinternet.org/2015/12/21/4-one-in-seven-americans-are-television-cord-cutters/ ("A shift in how people watch TV is underway, as the new Pew Research Center data suggest 15% of American adults are now "cord cutters" – that is, they indicate that they once had a cable or satellite TV connection, but no longer subscribe.").

declined in 2013, 2014, and 2015. MVPDs lost about 1.1 million video subscribers in 2015."[19] A growing number of Americans are taking advantage of free over the air broadcasts of broadcast content in high-definition:

> The number of households relying on over-the-air broadcast service exclusive of any MVPD service increased since the last report. Nielsen reports that this figure increased from 11.4 million television households in 2014 to 12.4 million television households in 2015, representing an increase from approximately 10 percent to 11 percent of all television households. Figures from NAB indicate that 26.7 million television households, or approximately 23 percent of all television households, rely exclusively on over-the-air television service on at least one television in the home.[20]

Underlying these data is a crucial point: the Digital Television Transition broke the dependence of programmers upon MVPDs — cable, satellite or otherwise. Consumers are now free to mix and match video programming to fit their needs, and at a price point that makes sense for them. New services like Dish's Sling (1.3 million subscribers in early 2017[21]) do not even bother to offer local channels to most customers, telling consumers:

> Your favorite live local channels on Sling TV: FOX, NBC, ABC, Univision, and Unimas, are only available in select markets. If you're looking for broadcast network content that Sling TV does not offer, try using an over-the-air antenna to enjoy that channel.[22]

Roku's current model, the Roku 4, includes an input for an HD antenna, which Roku advertises as a key feature:

> Today's antennas can pull in broadcasts from over 50 miles away, depending on which model you choose. Generally speaking, you'll be able to receive broadcasts from all of the major networks like ABC, CBS, FOX, NBC, and PBS. This means that

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[19] Video Competition Report at ¶ 5.

[20] *Id*. at ¶ 7.

[21] Dan Rayburn, *Sling TV Had 1.3M Paying Subscribers In Q1*, STREAMING MEDIA BLOG, (April 26, 2017, 11:57 AM), http://blog.streamingmedia.com/2017/04/sling-tv-subscriber-count-2.html

[22] Sling Television Help Desk, How do Local Channels Work on Sling TV?, http://help.sling.com/articles/en_US/FAQ/How-do-local-channels-work-on-Sling-TV (last visited July 5, 2017).

> you'll be able to watch your local news and the majority of the top-rated prime-time TV shows. Oh, and you can also use it to watch the NFL free, which is pretty important with the regular season about to begin.
>
> I know what you're saying… "But there are news channels available on my Roku device!" And that's true. The NewsON channel, for example, can give you live local news. But a TV antenna will give you access to other versions of local news, so you can take your pick.[23]

Roku also advises consumers on how to pick which antenna will work best for them.[24] The article concludes by recommending Digital Video Recorders that can, like the external HD antenna, be connected to the Roku. Effectively, Roku advertises the overall package as a substitute for the traditional MVPD service, and the set top box that goes with it:

> **Roku + Antenna + OTA DVR = The Complete Cord Cutting Setup**
>
> There you have it. Get an antenna to watch local live TV. Couple it with a Tablo to record. Then stream it to your TV through your Roku player or Roku TV. If you're looking to cut the cord, this is as good as it gets![25]

The Roku 4 retails for $89.99 on Amazon,[26] while the Mohu Leaf, recommended by Roku, retails for $29.99.[27] At a total cost of $119.98, amortized over two years, that works out to just $5/month.

TechHive tells readers, "For cord cutters, 2017 will be the year of the antenna: Antenna technology surged at CES 2017, making free over-the-air broadcasts easier to watch on your own

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[23] Chris Brantner, *How an Antenna Can Complement Your Roku Experience*, ROKU STREAM BLOG (Sept. 6, 2016), https://blog.roku.com/blog/2016/09/06/antenna-can-complement-roku-experience-guest-post/.

[24] *Id.*

[25] *Id.*

[26] Product Search for Roku 4, AMAZON, https://www.amazon.com/Roku-Streaming-Headphone-Quad-Core-Processor/dp/B015YF5YIS/ref=sr_1_3?s=tv&ie=UTF8&qid=1499305949&sr=1-3&keywords=roku+4 (search within "Electronics" and enter "Roku 4" in the search bar and press enter).

[27] Product Search for Mohu Leaf, AMAZON, https://www.amazon.com/1byone-Amplified-Adjustable-Performance-Cable-Shiny/dp/B00RFLXE0A/ref=sr_1_7?s=electronics&ie=UTF8&qid=1499306069&sr=1-7&keywords=mohu+leaf (search within "Electronics" and enter "Mohu Leaf" in the search bar and press enter).

terms."[28] That article highlights a number of streaming devices with integrated HD antennas, and notes

> we're starting to see the integration of over-the-air content with streaming video. Sling TV, for example, is now encouraging streaming-device makers to support antenna input, and it has created a unified guide for streaming cable channels and over-the-air broadcasts. The first device to support this will be AirTV, an Android-based streaming box with an optional USB antenna tuner...
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> Amazon is also blurring the lines between streaming and broadcast with a slew of Fire TV Edition televisions from Seiki, Element, and Westinghouse. Antenna channels get a dedicated row on the Fire TV home screen, and recently watched channels appear alongside apps and other content in the "recent" menu. The TVs also allow pausing and rewinding live channels using internal storage or a USB thumb drive. Given all the work Amazon put into these integrations, perhaps USB tuner support for Amazon's Fire TV set-top box won't be far behind.[29]

Expect to see increasing numbers of consumers take advantage of this option to bypass traditional MVPDs. In short, cable has a falling share of a shrinking subset of the market for video programming.

Without the "special characteristic" that was crucial to the *Turner I* and *Turner II* decisions, no ownership cap, either horizontal or vertical, could survive a First Amendment challenge. We urge the Commission to accept this reality, and disclaim any authority under these provisions of the 1992 Cable Act.[30]

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[28] Jared Newman, *For Cord Cutters, 2017 Will Be the Year of the Antennae*, TECHHIVE, (Jan. 12, 2017), http://www.techhive.com/article/3156772/streaming-hardware/for-cord-cutters-2017-will-be-the-year-of-the-antenna.html.

[29] *Id.*

[30] In addition to 47 U.S.C. §§ 533 (f)(1)(A) and (B), we would include here 47 U.S.C. § 548, which prohibits cable providers from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." All three sections single out cable providers for special treatment that would not apply to DBS or telco MVPDs. Thus, without a special characteristic to justify such a special burden, Section 548 is also constitutionally suspect. In addition, Section 548 clearly requires the issuance of implementing rules. We cannot see what would be served by bothering such a rulemaking when the FTC already has "unfair methods of competition" authority over cable providers. In our view, UMC authority, whether exercised by the FTC or FCC, should be exercised consistent with the antitrust laws themselves — as the FTC itself declared it would do in its recent Policy Statement. FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS

This is not as radical a position as it might sound. As the D.C. Circuit said in 2009: "Although *vacatur* will eliminate the subscriber limit, cable operators will remain subject to, and competition will be safeguarded by, the generally applicable antitrust laws."[31]

In addition, the FCC would have to review any merger of cable operators that involved the transfer of radio spectrum licenses under Section 310(d). As we have done in the past, we urge the Commission to clarify that it understands the term "public interest" in Section 310(d) to be consistent with the consumer welfare standard of antitrust law.

III. Competitive Availability of Navigation Devices

The Commission has regulated (or proposed to regulate) navigation devices—also known as set-top boxes—that consumers use to access programming from multichannel video programming distributors since the 1996 Telecom Act.[32] But in that Act, Congress also included a sunset provision, requiring that the set-top box rules "shall cease to apply" when:

> (1) the market for the multichannel video programming distributors is fully competitive;
>
> (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and
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> (3) elimination of the regulations would promote competition and the public interest.[33]

We believe that the first of these conditions has clearly been met — and that, given intensifying competition from online video providers, the public interest would likely be served by allowing these statutory provisions to sunset. But whether the Commission can actually do that under Section 629 would, of course, depend on the second prong. This is a much harder question: one might argue that the apps-based proposal is necessary to make fully competitive the "market for converter boxes, and interactive communications equipment, used in conjunction with [MVPD] service." But one might also argue that the entire premise of the statute has proven flawed, that Congress simply failed to anticipate there would come a day when consumers annoyed by having to get a set top box from their MVPD (even if they can, once they have that box) access all the content they desire on their own smart TVs, etc., and

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OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[31] *Comcast Corp*, 579 F.3d at 9.

[32] Communications Act § 629, 47 U.S.C. § 549.

[33] *Id*. § 629(e), 47 U.S.C. § 549(e).

that consumers are no longer served by trying to mandate a vertical separation between the "MVPD market" and the "set top box market." This, of course, is an argument best directed to Congress. But that should not stop the FCC from recommending such a reconsideration of the text of the Act.

A. The Market for MVPDs Is Fully Competitive

Every U.S. household with an obstructed view of the southern sky can subscribe to DIRECTV and DISH Network, direct broadcast satellite MVPDs.[34] And nearly every household has access to one, two, or three wireline MVPDs, typically including a cable company (*e.g.*, Comcast), sometimes a telephone company (*e.g.*, Verizon FiOS), and occasionally an overbuilder (*e.g.*, RCN).[35] As the Commission found in its seventeenth video competition report issued last year, 99% of U.S. households have access to three or more MVPDs, while nearly four in ten U.S. households have access to four MVPDs.[36] And, as noted above, the MVPD market is becoming increasingly competitive, with cable losing market share steadily to DBS and/or telco operators.[37]

Much as explained above, these figures actually understate the nature of MVPD competition, as online video distributors (OVDs)[38]—which are not themselves MVPDs—discipline MVPD behavior and encourage MVPDs to compete more aggressively. As the Commission has noted, "[w]hen the same program is offered by both an OVD and an MVPD, an OVD may be perceived as a substitute" to the MVPD.[39] In 2017, virtually no television programming is exclusively available to MVPD subscribers: Nearly all network television programming is distributed through multiple Internet platforms,[40] most live sporting events are available

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[34] U.S. GOV'T ACCOUNTABILITY OFC., DIRECT BROADCAST SATELLITE SUBSCRIBERSHIP HAS GROWN RAPIDLY, BUT VARIES ACROSS DIFFERENT TYPES OF MARKETS, at 5, GAO-05-257 (2005), available at https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-05-257/pdf/GAOREPORTS-GAO-05-257.pdf.

[35] 32 FCC Rcd at 576, para. 21 (discussing overbuilding).

[36] *Id*. at 577, Table III.A.2.

[37] *See infra* note 16.

[38] *Id*. at 619–620, paras. 128–129 (describing OVDs).

[39] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventeeth Report*, 31 FCC Rcd 4472, 4526–4527, para. 132 (2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-16-510A1_Rcd.pdf.

[40] Netflix, *Netflix's View: Internet TV is replacing linear TV*, (Jan. 18, 2017), *available at* https://ir.netflix.com/long-term-view.cfm.

through online subscription services,[41] and major premium channels offer standalone streaming services.[42] By the end of 2017, it is estimated that one in four U.S. households will lack an MVPD subscription, and that OVD revenues will continue to grow rapidly every year.[43]

OVD services have thrived in an unregulated environment, relying on licensing copyrights directly with content owners on a voluntary basis—and operating outside the Communications Act's 23-year-old MVPD framework. Many OVDs offer essentially the same network and cable programming that traditional MVPDs also distribute—but, increasingly, firms are producing popular, high-quality original video programming for purely online distribution. Their success is an example of positive impact on an industry by a lenient regulatory regime.

B. Does the Market for "Converter Boxes" and "Interactive Communications Equipment" Even Matter?

Although most MVPD subscribers still rent a set-top box from their provider, a growing share of MVPD viewing happens without traditional set-top boxes.[44] Mobile apps from major MVPDs such as Comcast allow subscribers to watch live and recorded content on their smartphones, tablets, and computers.[45] And several MVPDs are developing options for subscribers to access their programming without renting a set-top box. As Chairman Pai noted in 2016, "[i]f you are a cable customer and you don't want to have a set-top box, you shouldn't

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[41] Ap, A Guide to Watching Sports without a Cable Subscription, CBS News. CBS INTERACTIVE (Oct. 07, 2015), http://www.cbsnews.com/news/a-guide-to-watching-sports-without-a-cable-subscription/.

Willcox, James K., *Guide to Streaming Video Services*, CONSUMER REPORTS, (July 5, 2017), http://www.consumerreports.org/streaming-video-services/guide-to-subscription-streaming-video-services/.

[43] Nathan McAlone, Services Like Netflix And Amazon Prime Video Are Growing Much Faster Than Traditional TV — Here's How Much, BUSINESS INSIDER (Apr. 24, 2017, 11:29 AM), http://www.businessinsider.com/number-of-cord-cutters-in-2017-according-to-the-convergence-research-group-2017-4.

[44] Randolph J. May, *NO: Competition Is Coming Without New Regulations*, (May 23, 2016), *available at* https://www.wsj.com/articles/should-consumers-be-permitted-to-provide-their-own-set-top-cable-and-satellite-boxes-1463968803.

[45] *See, e.g.*, Sarah Perez, *Comcast rolls out a new Stream TV app for its cable and Internet TV customers*, TECHCRUNCH (Feb. 15, 2017), https://techcrunch.com/2017/02/15/comcast-rolls-out-a-new-stream-tv-app-for-its-cable-and-internet-tv-customers/.

be required to have one."[46] He noted that "[t]his goal is technically feasible, and it reflects most consumers' preferences—including my own."[47]

C. Elimination of These Rules Would Serve the Public Interest

Regardless of the particular wording of Section 629 as written, the case for ongoing FCC regulation of set-top boxes is dubious, at best. In light of the intensity of competition among MVPDs — and between MVPDs and OVDs — MVPDs have little incentive not to offer their subscribers competitively priced set-top boxes. If a consumer would rather not rent a set-top box, that consumer can simply cut the cord and access the same programming through myriad devices. Meanwhile, the Commission's set-top box rules impose a nontrivial cost on MVPDs[48] — which, in turn, pass along these costs to consumers.

D. In the Alternative, the Commission Should Adopt the Apps-Based Proposal of the DSTAC

The Downloadable Security Technology Advisory Committee ("DSTAC"), established by the Commission pursuant to instructions from Congress, was unable to reach consensus, and therefore made two alternative recommendations.[49] The "Apps-Based Proposal"[50] would have ensured that consumers could access the programming they pay for on devices of their choosing (*e.g.*, smart televisions, smart phones, streaming media players like the Roku box or small dongles that attach to TVs, like Google's Chromecast) — via an app provided by their Multichannel Video Programming Distributor ("MVPD"). The FCC has ample legal authority to implement this proposal and to address the primary objection raised to it: that MVPDs would drag their feet in approving the use of their app on third party devices. Meanwhile, the market has mooted the other principal objection: that such apps simply will not be developed at all. Time Warner Cable launched such an app last November and Comcast

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[46] Expanding Consumers' Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC at, 1604 (2016) (Pai, Comm'r, dissenting), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.

[47] *Id.*

[48] *Cf.* Anthony Wood, *How the FCC's 'Set-Top Box' Rule Hurts Consumers*, WALL ST. J., Apr. 22, 2016, available at https://www.wsj.com/articles/how-the-fccs-set-top-box-rule-hurts-consumers-1461279906.

[49] Final Report of the DSTAC (Aug. 28, 2015) ["DSTAC Report"], *available at* https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf.

[50] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking, 31 FCC Rcd 1544 (2016) [hereinafter NPRM], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.

launched its own on Wednesday, April 20, 2016, as part of a larger program to enable third party equipment makers to offer Comcast programming on their devices without a standalone box.[51] If the Commission believes it is necessary to update its set-top box rules, the Apps-Based proposal is a superior approach to the regime that the agency proposed in February 2016.[52]

IV. Conclusion

These are just a few of the many rules the Commission should reconsider as it attempts to catch up with massive changes in the media landscape. A more thorough-going review of the FCC's rules, and the transformation of the media landscape, cannot come soon enough.

In the meantime, we urge the Commission (1) to declare that principles of antitrust law, not the 1992 Cable Act, will govern cable ownership going forward; and (2) to reconsider, or ask Congress to reconsider, the logic of the set top box requirements of the 1996 Telecommunications Act.

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[51] Andrew Russell, Sr. Director, Corp. Comms., Time Warner Cable, *Time Warner Cable Launches TWC TV Roku Trial in NYC* (Nov. 9, 2015), *available at* http://www.twcableuntangled.com/2015/11/time-warner-cable-launches-twc-tv-roku-trial-in-nyc/; Comcast, *Comcast Launches Xfinity TV Partner Program; Samsung First TV Partner to Join: New Xfinity TV Partner App will Leverage Open Standard Technologies to Provide Access to Xfinity TV Content and Guide on Smart TVs and Other IP-Enabled Devices* (Apr. 20, 2016), *available at* http://corporate.comcast.com/news-information/news-feed/comcast-launches-xfinity-tv-partner-programsamsung-first-tv-partner-to-join.

[52] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking, 31 FCC Rcd 1544 (2016), *available at* https://apps.fcc.gov/ edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.