

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

In the Matter of )  
 )  
The State of Competition in the ) GN Docket No. 24-119  
Communications Marketplace )

**COMMENTS OF  
THE FREE STATE FOUNDATION**

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**I. Introduction and Summary**

These comments are offered in response to the Commission’s Notice requesting comments for the agency’s upcoming report on the state of competition in the communications marketplace.<sup>2</sup> The primary focus of these comments is on the broadband Internet and video services markets. As these extensive comments demonstrate with an extraordinary amount of data from 2022 and 2023, the conclusion that the broadband and video services markets are effectively competitive is compelling. Indeed, in the face of the compilation of data included in these comments, it almost would require an act of malfeasance for the Commission to conclude anything other than that the broadband and video services markets are effectively competitive.

Of course, the preparation of the Commission’s Competition Report is not intended to be a theoretical or academic exercise. It’s intended to guide the agency’s actions so that they comport with current marketplace realities, not bygone market realities. In other words, the

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<sup>1</sup> These comments express the views of Randolph May, President of the Free State Foundation and Seth Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The parts of these comments regarding the status of the video services marketplace and the concomitant need for reforming the regulations applicable to that marketplace rely heavily on the data-rich FSF publications authored by FSF Senior Fellow Andrew Long. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

<sup>2</sup> See Public Notice, The State of Competition in the Communications Marketplace, GN Docket No. 24-119 (April 22, 2024).

Competition Report findings, if they are true to what the data herein convincingly demonstrate, dictate that the agency implement market-oriented regulatory reform and actions.

Specifically, the Commission should make more mid-band spectrum available for commercial wireless services and refrain from rate regulation of broadband that harms financial returns and incentives for new network investment and prevent states from doing the same. Also, the Commission should decline to move forward with the agency's proposed restrictions on video service pricing options that undermine market freedom and low-cost opportunities for consumers. Instead, the agency, even if now belatedly, should reduce its legacy regulation of multi-channel video programming distributors (MVPDs) that put those services at a competitive disadvantage relative to dominant online streaming video services.

In 2022 and 2023, overall conditions in the broadband Internet services market were effectively competitive, in many instances even more so than in 2020 and 2021 when this was already the case. Analyst reports indicate that fiber deployments grew 12% last year, with the number of unique homes rising to 69 million in 2023 compared to 54 million in 2020. And 51.5% of primary U.S. homes now have fiber access. Meanwhile, more American households have access to cable broadband than to any other fixed platform. According to the FCC's Broadband Map, as of early January 2024, 100/20 Mbps cable broadband was available to 87% of the U.S. population. Charter Communications added 300,000 new rural passings last year and plans to add 450,000 more this year. DOCSIS 4.0 upgrades to Comcast's Xfinity cable broadband network offer significantly expanded capacity and multi-gigabit speeds.

The broadband market's competitiveness in 2022 and 2023 was further supercharged by 5G, as the three major providers upgraded and expanded significantly their competing nationwide footprints. This year, T-Mobile's Ultra Capacity 5G coverage will grow and its

bandwidth increase by activating 2.5 GHz licensed spectrum, and Verizon as well as AT&T will be activating more C-band spectrum to continue enhancing their 5G services. Additional competition is provided by regional provider C Spire, smaller local providers, and EchoStar DISH Network, which has deployed a 5G network that offers at least 70% of Americans access to 35 Mbps service.

Over the last two years, 5G-enabled fixed wireless access (FWA) broadband subscribership has surged, now posing a strong competitive challenge to cable and fiber in rural areas. T-Mobile announced that it added 405,000 FWA subscribers during the first quarter of 2024, for a subscriber total of over 5 million. T-Mobile had only 338,000 FWA subscribers at the end of the first quarter of 2022. Also, Verizon added 203,000 FWA subscribers during the first quarter, resulting in a total of 3.4 million. Verizon had just 216,000 FWA subscribers two years earlier. And AT&T's FWA service launched in mid-2023 already has over 200,000 subscribers.

Mobile broadband consumers also benefit from competition from cable hybrid mobile virtual network operators (MVNOs). Subscriber counts for Comcast's Xfinity Mobile and Charter's Spectrum Mobile rose every quarter in 2022 and 2023. In the first quarter of 2024, Xfinity Mobile's subscribership grew to 6.9 million, up from 4 million at the end of 2021. Spectrum Mobile subscriptions rose to 8.3 million in the first quarter of 2024, up from 3.5 million subscribers in the fourth quarter of 2021. Furthermore, Cox's MVNO service is being trialed in certain areas. Cable MVNOs are planning to offload more of their traffic from licensed cellular networks by using their own licensed Citizens Broadband Radio Service (CBRS) spectrum, thereby reducing costs and enhancing their competitiveness.

In 2023, fixed satellite broadband options also improved significantly compared to prior years. A December 2023 news article by *PCMag* spotlighted a filing with the FCC indicating

that Starlink serves about 1.3 million subscribers or 59% of the total satellite broadband subscriber base. Last year, competing satellite broadband provider HughesNet began offering residential subscriber services with advertised download speeds of up to 100 Mbps, up from its prior offerings of up to 25 Mbps and 50 Mbps.

Additional indicators of the broadband market's competitiveness include rising speeds for fixed and mobile services, strong investment, and pricing trends that compare better than many other industries in the face of persistent bad inflation:

- For April 2024, Ookla found median fixed broadband download/upload speeds of 249.86/32.81 Mbps and median mobile speeds of 125.14/9.80 Mbps. By comparison, Ookla found that median download/upload speeds for fixed services were 134.10 Mbps/19.45 Mbps and download speeds for mobile were 53.31 in November 2021.
- For U.S. fixed wireline broadband providers, capital expenditures surged to \$102.4 billion in 2022, up from \$86 billion in 2021 and \$79.4 billion in 2020. Cable broadband providers invested a combined \$21.7 billion in 2022. Annual wireless investment climbed to \$39 billion in 2022, up from \$35 billion in 2021.
- Between March 2022 and March 2023, prices for the most popular broadband speed tier offered by fixed wireline broadband providers (DSL, cable, and fiber) decreased by 18.1% and prices for their fastest speed tier option went down by 6.5%. And between 2015 and 2023, inflation-adjusted prices for the most popular and fastest speed tiers declined by 54.7% and 55.8%. Between 2015 and 2023, costs for consumer goods and services rose by 28%, according to the Consumer Price Index. Yet prices for the most popular and fastest speed options went down by 37% and 39%.

Data from 2022 and 2023 indicate that the market for video services is effectively competitive, as consumers have a variety of video service offerings from competing providers using a variety of distribution platform technologies – legacy cable and Direct Broadcast Satellite (DBS) services, market-leading Internet-based streaming services, and over-the-air TV.

The steady and years-long consumer migration from traditional multichannel video programming distributors (MVPDs) to Internet-delivered upstarts continued in force during the last two years. According to analysts, cable subscriber totals dropped from 41.3 million at year-

end 2021 to 40.5 million as of May 2022, over 825,000 lower than just three months prior. Notably, DIRECTV is estimated to have lost 1.8 million video subscribers in 2023 across its DBS, telco TV, and virtual MVPD (vMVPD) offerings. By the third quarter of 2023, Verizon's FiOS video service subscribership dropped below 3 million. And for the first quarter of this year, Charter reported its biggest ever three-month drop: 392,000 subscribers, just under 3% of its total base. Overall, facilities-based MVPDs saw nearly 7 million consumers "cut the cord" in 2023.

As more consumers turn away from traditional MVPD bundles, more consumers turn to streaming services. Netflix, Inc., in the fourth quarter of 2023 reportedly added 2.53 million subscribers in the U.S. and Canada for a total of 82.66 million – which is substantially more than all pay-TV providers combined: 71.24 million. Additionally, YouTube TV, far and away the largest vMVPD serving over 40% of all vMVPD customers, now has more than 8 million subscribers, rendering it larger than DISH TV and potentially the third-biggest MVPD overall. One analyst predicts that YouTube TV will become the largest MVPD by the end of 2026.

Furthermore, direct-to-consumer (DTC) offerings, including several sports-team-specific streaming services – Jazz+, ClipperVision, Monumental Sports Network – bypass traditional distribution mechanisms to achieve wider reach. And even virtual MVPDs (vMVPDs), a subset of streaming services that offer bundles comparable to traditional MVPDs – but without the responsibilities of maintaining physical distribution facilities or complying with the MVPD regulatory strictures – are facing flat or declining subscription totals. Losses by three leading vMVPDs – Hulu + Live TV, Sling TV, and fuboTV – exceeded a half million subscribers, representing 6.4% of their collective base. However, vMVPDs indisputably do offer a competitive alternative for video consumers.

In sum, the data from the last two years reaffirms what already is widely acknowledged: traditional MVPDs are not the video marketplace titans that they once were. Internet-based video providers have wrested away that role. Consequently, the current regulatory landscape bears no resemblance to the marketplace that existed when the currently applicable legacy MVPD regulations were adopted. Today's video marketplace has been transformed by the relentless trend by which consumers reject traditional MVPD offerings in favor of a dynamic, self-curated mix of subscription streaming services accessed on consumer-owned connected hardware, ad-supported web-based video platforms, social media smartphone apps, and so on.

To further promote competition, innovation, and investment in the broadband marketplace, the Commission should work proactively to make more spectrum available for commercial use and by removing regulatory barriers to broadband deployment. Although proposals for repurposing different bands are at different stages of development and each faces unique challenges, the Commission should advance every proposal for spectrum that may realistically be suitable for commercial uses – whether on a licensed or unlicensed basis.

Continuing intensive private capital market investment is critical to ensure timely advancements, including fiber deployments, DOCIS 4.0 upgrades, and the launch of direct-to-device (D2D) connectivity between standard wireless handsets and satellite networks. However, private market investment is under threat from imposition of Title II mandates, including regulation of rates, that will restrict broadband providers' ability to generate financial returns. This will disincentivize future investment and innovation that is needed to provide all Americans timely access to next-generation broadband services.

In his recent conversation with Free State Foundation Adjunct Senior Fellow Michael O'Rielly on the [“TMT With Mike O’Rielly” videocast](#), former FCC Chairman Ajit Pai, speaking



now from his perspective and experience as a private equity investor, emphasized that the regulation of rates for broadband service will prove counterproductive and an obstacle to achieving deployment objectives. Mr. Pai stated: “[R]egulatory and legislative decisions can have a very significant impact. Price regulation is the easiest example of that... But I can tell you that to the extent that there is the prospect of federal or especially state price regulation, that significantly deters us from wanting to make investments in some cases.” To avert the threat to future investment and innovation, the Commission should not implement its April 2024 decision to reimpose Title II regulation on broadband Internet services.

And to modernize the FCC’s video policy, the Commission must come to terms with the fact that whatever hypothetical consumer benefit it conjectures might justify further regulatory meddling with MVPD services, any such actions would be far outweighed by the damage inflicted upon the ability of cable operators and DBS providers to provide a competitive counterweight. Although the Commission consistently concedes that the competitive landscape has been turned on its head, it nevertheless has barreled forward with more and more one-sided regulations that beleaguer cable operators and DBS providers and unfairly skew what otherwise would be a robustly competitive marketplace for Internet-based providers.

To promote stronger competition for video services, the Commission should shelve its pending rulemakings regarding MVPD services. These rulemakings include the agency’s proposed bans on Most Favored Nation (MFN) and Alternative Distribution Method (ADM) provisions in contracts between MVPDs and consumers, its proposed TV blackout rebate requirement, and its proposed ban on long-term contracts that offer discounted monthly rates or no up-front service or equipment fees in exchange for graduated early termination fees (ETF). Instead, the Commission should focus intently on *eliminating* legacy one-sided regulations –

such as its program access and carriage requirements, network non-duplication and syndicated exclusivity rules, as well as its “unlock the box” navigation device proceeding and remaining Section 629(e) set-top box rules – to allow competitive forces in the marketplace to do their job.

## **II. The Broadband Services Market Is Effectively Competitive**

Available data for 2022 and 2023 show that overall conditions in the broadband Internet access services market as well as service sectors within it were effectively competitive. During those years, the competitive environment remained strong or improved compared to 2021. Consumers benefitted from significant capital investment-backed next-generation network infrastructure deployments and significantly improved capabilities as well as better pricing options. And evidence shows that intermodal competition for broadband services continued to increase.

### **A. There Is Effective Competition Among Broadband Technology Platforms**

#### **1. Fiber Broadband Competition**

Analysts’ reports indicate that fiber broadband expanded significantly in 2022 and 2023. According to research by RVA, LLC, fiber deployment to U.S. homes grew 12% or 9 million in 2023.<sup>3</sup> Unique homes with broadband access rose to 69 million, compared to 54 million in 2020. RVA, LLC, also found that 51.5% of primary homes in the U.S. now have access to fiber.<sup>4</sup> Additionally, BroadbandNow found that the average fiber access rate was about 55.6% of U.S. households in June 2023, up from about 45.9% of households in December 2021.<sup>5</sup>

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<sup>3</sup> See Fiber Broadband Association, “Fiber Broadband Association Reports North America Hit Highest Annual FTTH Growth Record” (December 11, 2023), (citing research by RVA, LLC), at: <https://fiberbroadband.org/2023/12/11/fiber-broadband-association-reports-north-america-hit-highest-annual-ftth-growth-record/>.

<sup>4</sup> See Fiber Broadband Association, “Fiber Broadband Association Reports North America Hit Highest Annual FTTH Growth Record.”

<sup>5</sup> Tyler Cooper, “Over Half of America Now Has Access to Fiber,” BroadbandNow (November 14, 2023), at: <https://broadbandnow.com/research/fiber-penetration-trends>.

## 2. Cable Broadband Competition

It is widely conceded that more American households have access to cable broadband than to any other fixed platform. According to the FCC's Broadband Map, as of early January 2024, 100/20 Mbps cable broadband was available to 87% of the U.S. population.<sup>6</sup> During 2022 and 2023, Charter Communications expanded its gigabit cable footprint, reportedly adding 200,000 rural passings in 2022.<sup>7</sup> In February of this year, Charter reported approximately 300,000 new rural passings in 2023, and it projected to add about 450,000 in 2024.<sup>8</sup> In an April 2024 announcement, Charter reported that it added 73,000 rural passings in the first quarter of this year.<sup>9</sup> Also, ongoing DOCSIS 4.0 upgrades to Comcast's Xfinity cable broadband network offer significantly expanded capacity and symmetrical or near-symmetrical multi-gigabit speeds. Other cable providers plan to launch DOCSIS 4.0 within the next three years.

## 3. 5G Mobile Wireless Broadband Competition

The broadband market's competitiveness in 2022 and 2023 was supercharged by 5G wireless network deployment and consumer adoption. At the end of 2023, 5G connections in North America (U.S. and Canada) totaled 197 million, the result of 77 million new 5G connections last year.<sup>10</sup> That amounted to a 64% year-over-year increase. By comparison, there were 56.5 million total 5G connections in North America in September 2020, and only about

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<sup>6</sup> FCC National Broadband Map, at: <https://broadbandmap.fcc.gov/home> (last checked May 30, 2024).

<sup>7</sup> Diana Goovaerts, "Cable giant Charter is building hundreds of thousands of fiber passings this year," Fierce Network (March 1, 2023), at: <https://www.fierce-network.com/broadband/cable-giant-charter-building-300000-fiber-passings-year>.

<sup>8</sup> Charter Communications, "Fourth Quarter and Full Year 2023 Results" (February 2, 2024), at 4, at: <https://ir.charter.com/static-files/ba52d4ff-3a83-415b-8c1a-1f0a9a12df8b>.

<sup>9</sup> Charter Communications, Earnings Release: "Charter Announces First Quarter 2024 Results" (April 26, 2024), at 1, at: <https://ir.charter.com/static-files/82ac17e1-3415-407a-a861-15a6e9207cdc>.

<sup>10</sup> 5G Americas, Press Release: "Global 5G Connections Surge to 176 Billion, 66 Percent Growth Year over Year as North America Leads Charge," (March 28, 2024), at: <https://www.5gamericas.org/global-5g-connections-surge-to-1-76-billion-66-percent-growth-year-over-year-as-north-america-leads-charge/>.

587,000 connections at the end of 2019.<sup>11</sup> According to CTIA, at year's-end 2022, there were about 523 million connected wireless devices and 162 million active 5G devices.<sup>12</sup> Those numbers are up significantly from 2021 when connected wireless devices totaled 499 million and active 5G devices totaled 86 million.<sup>13</sup> Between the end of 2021 and 2022, there was a near doubling of 5G connected devices.<sup>14</sup>

During 2022 and 2023, AT&T, T-Mobile, and Verizon upgraded and expanded significantly their U.S. nationwide 5G footprints. In October 2023, T-Mobile announced that its Ultra Capacity 5G service covered 300 million people and that its overall 5G footprint covered more than 330 million people, or 98% of the population.<sup>15</sup> AT&T touts that its low-band 5G network covers more than 295 million people and that its mid-band 5G+ network covers more than 210 million.<sup>16</sup> Also, in December 2023, Verizon announced that its 5G network was available to more than 230 million people.<sup>17</sup>

Additional competition is provided by regional provider C Spire, smaller local providers, and by EchoStar (which recently merged with DISH Network). On March 14 of this year,

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<sup>11</sup> See 5G Americas & Omdia, "North America Statistics," (Sept. 2021), at: <https://www.5gamericas.org/resources/charts-statistics/north-america/>; 5G Americas, Press Release: "5G Network Rollouts Accelerate as LTE's Long Tail Extends," (September 19, 2019), at: <https://www.5gamericas.org/5g-network-rollouts-accelerate-as-ltes-long-tail-extends/>.

<sup>12</sup> CTIA, "2023 Annual Survey Highlights" (July 25, 2023), at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>13</sup> CTIA, "2023 Annual Survey Highlights" (July 25, 2023), at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>14</sup> CTIA, "2023 Annual Survey Highlights" (July 25, 2023), at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>15</sup> T-Mobile, Press Release: "T-Mobile's Ultra Capacity 5G Covers 300 Million People Months Ahead of Schedule" (October 24, 2023), at <https://www.t-mobile.com/news/network/t-mobiles-ultra-capacity-5g-covers-300-million-people-months-ahead-of-schedule>.

<sup>16</sup> AT&T, "5G Coverage Map," at: <https://www.att.com/5g/coverage-map/> (last checked May 29, 2024).

<sup>17</sup> Verizon, Press Release: "Verizon continues gift-giving season with new 5G service in Kennesaw, GA" (December 21, 2023), at: <https://www.verizon.com/about/news/verizon-continues-gift-giving-season-new-5g-service-kennesaw-ga>.

EchoStar certified to the FCC that it has deployed a 5G network with at least 70% having access to download speeds of at least 35 Mbps.<sup>18</sup>

And competitive 5G network improvements are ongoing in 2024. In March of this year, T-Mobile announced that its Ultra Capacity 5G coverage will expand and its bandwidth increase by activating 2.5 GHz licensed spectrum that it won in FCC Auction 108.<sup>19</sup> It also appears that, shortly, Verizon and AT&T will be activating additional C-band spectrum to expand and improve their nationwide 5G network capabilities.<sup>20</sup>

#### **4. 5G Fixed Wireless Access (FWA) Broadband Competition**

Over the last two years, the number of FWA broadband subscribers has continued to climb. FWA reportedly is posing a strong competitive challenge to cable and fiber in rural areas, and the technology platform offers a cost-effective way to reach subscribers in lower-density geographic areas.

On April 25, T-Mobile announced that it added 405,000 FWA subscribers during the first quarter of 2024, bringing its overall FWA subscriber total to over 5 million.<sup>21</sup> That is up from 338,000 at the end of the first quarter of 2022.<sup>22</sup> Verizon announced that it added 203,000 FWA

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<sup>18</sup> DISH Network, Press Release: “EchoStar Completes Nationwide Test Drive for Boost Wireless Network, Completing All 2023 FCC Commitments” (March 14, 2024), at: <https://about.dish.com/2024-03-14-EchoStar-Completes-Nationwide-Drive-Test-for-Boost-Wireless-Network,-Completing-All-2023-FCC-Commitments>.

<sup>19</sup> T-Mobile, Press Release: “From Big Towns ...” (March 4, 2024), at: <https://www.t-mobile.com/news/network/from-big-cities-to-small-towns-and-places-in-between-t-mobile-customers-are-getting-a-massive-5g-boost>.

<sup>20</sup> Verizon, Press Release: “Verizon begins 2024 with strong wireless service revenue growth, solid cash flow and continued momentum in broadband,” (April 22, 2024), at: <https://www.verizon.com/about/news/verizon-begins-2024-strong-wireless-service-revenue-growth-solid-cash-flow-and-continued>; AT&T, Press Release: “AT&T Delivers Strong 2023 Results, Cash from Operations and Free Cash Flow Driven by 5G and Fiber Growth” (January 24, 2024), at: <https://about.att.com/story/2024/q4-earnings-2023.html>.

<sup>21</sup> T-Mobile, Press Release: “T-Mobile Delivers Industry-Leading Customer, Service Revenue and Profitability Growth in Q1 2024, and Raises 2024 Guidance,” (April 25, 2024), at: <https://www.t-mobile.com/news/business/t-mobile-q1-2024-earnings>.

<sup>22</sup> T-Mobile, Press Release: “T-Mobile Delivers Industry-Leading Growth in Postpaid Accounts and Customers in Q1 2022 Fueled by 5G Network Leadership” (April 27, 2022), at: <https://www.t-mobile.com/news/business/t-mobile-q1-2022-earnings>.

subscribers during the first quarter of 2024, resulting in a total of 3.4 million.<sup>23</sup> Verizon's total is up from 216,000 at the end of the first quarter of 2022.<sup>24</sup> AT&T announced that it added 110,000 subscribers to its new FWA service during the first quarter of 2024, increasing its total FWA subscriber count to more than 200,000.<sup>25</sup> AT&T's service was launched in mid-2023.

It is reported that T-Mobile set an initial target of having 7-to-8 million FWA subscribers in 2025 and that Verizon has set a target of 4-to-5 million FWA subscribers for next year.<sup>26</sup> Additionally, New Street Research reportedly has predicted that AT&T will be adding approximately 180,000 FWA subscribers per quarter during the remainder of 2024, with potential increases over the quarters that follow.<sup>27</sup>

## **5. Cable Mobile Wireless Broadband Competition**

Mobile broadband consumers also benefit from competition from cable hybrid mobile virtual network operators (MVNOs) that combine Wi-Fi networks with leased spectrum. Subscriber counts for Comcast's Xfinity Mobile and Charter's Spectrum Mobile rose every quarter in 2022 and 2023. In the first quarter of 2024, Xfinity Mobile's subscribership grew to 6.9, up from nearly 4 million at the end of 2021.<sup>28</sup> Spectrum Mobile subscriptions rose to 8.3 million in the first quarter of 2024, up from about 3.5 million subscribers in the fourth quarter of

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<sup>23</sup> Verizon, News Release: "Verizon begins 2024 with strong wireless service revenue growth, solid cash flow and continued momentum in broadband" (April 22, 2024), at 2, at: <https://www.verizon.com/about/sites/default/files/1Q2-2024-Earnings-News-Release.pdf>.

<sup>24</sup> Verizon, Press Release: "Verizon reports 1Q earnings for 2022" (linked "1Q Financials" document) (April 22, 2022), at: <https://www.verizon.com/about/news/verizon-reports-1q-earnings-2022>.

<sup>25</sup> AT&T, "2024 1<sup>st</sup> Quarter Earnings" (April 24, 2024), at: [https://investors.att.com/~media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2024/1Q24/1Q24\\_ATT\\_Earnings.pdf](https://investors.att.com/~media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2024/1Q24/1Q24_ATT_Earnings.pdf).

<sup>26</sup> See Julia King, "Oh, the places FWA will go," *Fierce Network* (April 2024), at: <https://www.fierce-network.com/broadband/oh-places-fwa-will-go>.

<sup>27</sup> See Diana Goovaerts, "Buck up cable – AT&T just gave FWA fresh legs," *Fierce Network* (February 26, 2024), at: <https://www.fierce-network.com/broadband/buckle-cable-fwa-growth-shows-no-signs-slowng>.

<sup>28</sup> Comcast, "Comcast Reports 4th Quarter and Full Year 2021 Results" (Jan 27, 2022), at: <https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-4th-quarter-and-full-year-2021-results>.

2021.<sup>29</sup> Cox’s MVNO service is being trialed in certain areas, and cable MVNOs are planning to use their licensed CBRS spectrum to increase Wi-Fi offloading of network traffic. Cable MVNOs are supported by as many as 22 million Wi-Fi hot spots located across the nation.<sup>30</sup> Those Wi-Fi hot spots also provide Internet connectivity to fixed cable broadband subscribers.

## 6. Satellite Broadband Competition

In 2023, fixed satellite broadband options also improved significantly compared to prior years. A December 2023 news article by *PCMag* spotlighted a filing with the FCC indicating that Starlink serves about 1.3 million subscribers or 59% of the total satellite broadband subscriber base, with 2.2 million subscribers globally.<sup>31</sup> Its U.S. subscribership likely has increased since then, as a March 2024 study released by Starlink indicates that its global subscribership is now over 2.6 million. That is far more than Starlink’s reported global subscribership of only 250,000 in March 2022.<sup>32</sup> *PCMag* also reported late last year that satellite broadband provider HughesNet began offering residential subscriber services with advertised download speeds of up to 100 Mbps.<sup>33</sup> That is up from HughesNet’s prior offerings of up to 25 Mbps and 50 Mbps. The improved capabilities are enabled by the deployment of HughesNet’s high geostationary orbit Jupiter 3 satellite.

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<sup>29</sup> Charter Communications, "Charter Announces Fourth Quarter and Fully Year 2021 Results" (Jan. 28, 2021), at: <https://corporate.charter.com/newsroom/january-28-2022/charter-announces-fourth-quarter-and-full-year-2021-results>.

<sup>30</sup> NCTA, "Broadband Facts & Stats," at <https://www.ncta.com/broadband-facts> (last checked May 28, 2024).

<sup>31</sup> Michael Kan, "SpaceX: Starlink Now Has 1.3 Million Customers in the US," *PCMag* (December 13, 2023), at: <https://www.pcmag.com/news/spacex-starlink-now-has-13-million-customers-in-the-us> (citing SpaceX, "Improving Starlink’s Latency," at: <https://api.starlink.com/public-files/StarlinkLatency.pdf>).

<sup>32</sup> Michael Sheetz, "SpaceX’s Starlink sees the in-flight internet market as ripe for an overhaul, executive says," CNBC (March 21, 2022), at: <https://www.cnbc.com/2022/03/21/spacex-starlink-vp-aviation-internet-market-ripe-for-overhaul.html>.

<sup>33</sup> Michael Kan, "SpaceX: Starlink Now Has 1.3 Million Customers in the US," *PCMag* (December 13, 2023), at: <https://www.pcmag.com/news/spacex-starlink-now-has-13-million-customers-in-the-us>.

## **B. Additional Evidence of Effective Competition in the Broadband Market**

### **1. Fixed and Mobile Broadband Speeds Continue to Improve**

During 2022 and 2023, Ookla observed a consistent trend of monthly increases in *median* U.S. broadband speeds. That trend continues to be strong. For April 2024, Ookla found median fixed broadband upload/download speeds of 249.86/32.81 Mbps and median mobile speeds of 125.14/9.80 Mbps.<sup>34</sup> Those media speed figures are up from December 2023, when Ookla’s Global Speed Index, found median upload/download speeds of 227.27/26.59 Mbps for fixed services and 111.01/9.68 Mbps for mobile services.<sup>35</sup> Such figures are a significant improvement over Ookla’s findings from March 2023 of 197.84/23.02 Mbps for fixed services and 81.26/9.44 Mbps for mobile services.<sup>36</sup> By comparison, Ookla found that median download/upload speeds for fixed services were 134.10 Mbps/19.45 Mbps and download speeds for mobile were 53.31 in November 2021.<sup>37</sup>

Opensignal has examined *average* speeds in early 2024 offered by major fixed service providers that have nationwide footprints and that pass more than one-third of U.S. homes. It found that, between early February and early May of this year, average download/upload speeds of 169.2/14 Mbps for Spectrum, 158.2/23.3 Mbps for Xfinity, 142.9/68.1 Mbps for Verizon, 121.5/81.4 Mbps for AT&T, and 99.99/22.6 Mbps for T-Mobile.<sup>38</sup> And in an examination of average 5G mobile speeds between mid-September and mid-December 2023, Opensignal found

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<sup>34</sup> Ookla, “Speedtest Global Index: United States Median Country Speeds April 2024,” at <https://www.speedtest.net/global-index/united-states> (last checked May 29, 2024).

<sup>35</sup> See Ookla “Speedtest Global Index: Market Analysis” (Q4 2023 for Fixed and Mobile), at: <https://www.speedtest.net/global-index/united-states#market-analysis> (last checked May 29, 2024).

<sup>36</sup> For further discussion, *see* Seth L. Cooper, “Ookla Reports Rising Fixed and Mobile Broadband Speeds in Early 2023,” *FSF Blog* (April 19, 2023), at: <https://freestatefoundation.blogspot.com/2023/04/ookla-reports-rising-fixed-and-mobile.html>.

<sup>37</sup> Ookla, “Speedtest Global Index” (United States) (Nov. 2021), at: <https://www.speedtest.net/global-index/united-states#fixed>.

<sup>38</sup> Robert Wyrzkowski, “USA Fixed Broadband Experience – National View – May 2024,” Opensignal (May 20, 2024), at: <https://www.opensignal.com/2024/05/20/usa-fixed-broadband-experience-national-view-may-2024>.



speeds of 204.9/17.6 for T-Mobile, 123.5/14.1 Mbps for AT&T, and 135.3/19.9 Mbps for Verizon.<sup>39</sup> Those average figures are up from mid-March to mid-June 2023, when Opensignal found average 5G mobile upload/download speeds of 195.5/18.2 for T-Mobile, 96.3/18.5 for Verizon, and 80/12.1 for AT&T.<sup>40</sup> According to Opensignal, year-end 2023 increases in speeds “are driven by the additional C-band spectrum both AT&T and Verizon gained access to in August 2023.”<sup>41</sup>

## **2. Private Market Investment in Broadband Networks Has Been Strong**

The competitive conditions and trends in the broadband market in 2022 and 2023 were made possible by strong private market investment that will lead to further improvements in 2024 and beyond. For fixed wireline providers, capital expenditures by U.S. broadband providers surged to \$102.4 billion in 2022, according to USTelecom’s “2022 Broadband Capex Report.”<sup>42</sup> Those investment totals were up from \$86 billion in 2021 and \$79.4 billion in 2020. Collectively, cable broadband providers invested \$21.7 billion in 2022 alone to build and expand their networks.<sup>43</sup> According to one analyst’s report, 5-year capital investment in fiber-to-the-home (FTTH) technology and services made between 2022 and 2026 “will exceed all investment in FTTH to date, surpassing \$125 billion in the reporting period.”<sup>44</sup>

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<sup>39</sup> Robert Wyrzkowski, “USA Mobile Network Experience Report” (January 2024), at: <https://www.opensignal.com/reports/2024/01/usa/mobile-network-experience>.

<sup>40</sup> Robert Wyrzkowski, “USA 5G Experience Report” (July 2023), at: <https://www.opensignal.com/reports/2023/07/usa/mobile-network-experience-5g>.

<sup>41</sup> Robert Wyrzkowski, “USA Mobile Network Experience Report” (January 2024).

<sup>42</sup> USTelecom, “2022 Broadband Capex Report” (September 8, 2023), at: <https://www.ustelecom.org/research/2022-broadband-capex/>.

<sup>43</sup> NCTA, “Broadband Facts & Stats,” at <https://www.ncta.com/broadband-facts> (last checked May 28, 2024).

<sup>44</sup> Matt Vincent, “5-year U.S. fiber investment to surpass all previous years combined: RVA,” Lightwave (March 14, 2022), at: <https://www.lightwaveonline.com/broadband/article/55031628/5-year-us-fiber-investment-to-surpass-all-previous-years-combined-rva>.

Annual wireless investment climbed to an industry record \$39 billion in 2022, up from \$35 billion in 2021.<sup>45</sup> This marks the continuation of a series of annual increases in capital investment going back to 2017 when annual investment totaled \$26 billion. According to CTIA, over its history (presumably dating back to the early 1990s), the wireless industry has invested over \$675 billion.<sup>46</sup> WIA reports that “[t]he U.S. cellular industry spent \$11.6 billion building additional capacity and coverage into the nation’s wireless networks in 2023.”<sup>47</sup>

### **3. Broadband Pricing Trends Continue to Favor Consumers**

The broadband market’s effectively competitive conditions in 2022 and 2023 have maintained the affordability of services, as broadband retail price trends have outperformed other service sectors amidst persistent high inflation. According to USTelecom’s “2023 Broadband Pricing Index,” between March 2022 and March 2023, inflation-adjusted prices for the most popular broadband speed tier offered by fixed wireline broadband providers (DSL, cable, and fiber) decreased by 18.1% and prices for their fastest speed tier option went down 6.5%.<sup>48</sup> And between 2015 and 2023, inflation-adjusted prices for the most popular speed tier declined by 54.7% and prices for the highest speed tier option dropped by 55.8%. Moreover, the broadband sector outperformed most other sectors of our economy in the face of persistent bad inflation. USTelecom’s report also shows Consumer Price Index (CPI) trends for broadband Internet

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<sup>45</sup> CTIA, “2022 Annual Survey Highlights” (September 13, 2023), at 4, at: <https://www.ctia.org/news/2022-annual-survey-highlights>.

<sup>46</sup> CTIA, “2023 Annual Survey Highlights” (July 25, 2023), at 8, at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>47</sup> WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics” (April 16, 2023), at: [https://go.wia.org/wp\\_2023](https://go.wia.org/wp_2023). See also WIA, “Connectivity Enables Innovation: Wireless Infrastructure Association Report Reveals Industry’s Critical Role in Fueling Economic Growth,” WIA Blog (April 16, 2024), at: <https://wia.org/wireless-infrastructure-association-report-reveals-industrys-critical-role-in-fueling-economic-growth/>.

<sup>48</sup> Arthur Menko, Business Planning, Inc., “2023 Broadband Pricing Index: Broadband Prices Continue to Decline,” USTelecom (October 11, 2023), at: <https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf>.

services compared to other goods and services. Between 2015 and 2023, costs for consumer goods and services rose by 28%, according to the CPI-U (a barometer of overall urban inflation). Still, consumer prices for the most popular and fastest speed options went down by 37% and 39%, respectively.

Also, CTIA reports findings by Econ One that per-megabit prices for wireless services decreased from \$.004 per MB in 2020 and 2021 to \$.003 per MB in 2022, and that per-MB prices declined 98% between 2012 and 2022.<sup>49</sup>

It would not be surprising if continued economy-wide high inflation prompts small price increases for wireline and wireless broadband services in late 2023 and 2024. However, strong market competition in the market will continue to put downward pressure on prices.

#### **4. Continued Wireless Infrastructure Deployment**

Rapid deployment of 5G networks and observable mobile broadband speed increases are indicators of strong infrastructure deployments and facilities upgrades. WIA reported that as of 2023, 153,400 purpose-built cell towers were operating, up from 142,100 in 2022.<sup>50</sup> It also reported that 244,800 macrocell sites were operating in 2023, up from 209,500 in 2022.<sup>51</sup> CTIA reported that the number of small cells supporting 5G networks increased from 125,000 in 2021 to 142,000 in 2022.<sup>52</sup> Additionally, WIA found that there were 202,100 outdoor small cells in 2023.<sup>53</sup> WIA also reported 775,800 indoor small cell nodes in use (encompassing DAS, small

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<sup>49</sup> CTIA, “2023 Annual Survey Highlights” (July 25, 2023), at 8, at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>50</sup> WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics” (April 16, 2023), at: [https://go.wia.org/wp\\_2023](https://go.wia.org/wp_2023). See also WIA, “Connectivity Enables Innovation: Wireless Infrastructure Association Report Reveals Industry’s Critical Role in Fueling Economic Growth,” WIA Blog (April 16, 2024), at: <https://wia.org/wireless-infrastructure-association-report-reveals-industrys-critical-role-in-fueling-economic-growth/>.

<sup>51</sup> WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics.”

<sup>52</sup> CTIA, “2023 Annual Survey Highlights” (July 25, 2023), at: <https://www.ctia.org/news/2023-annual-survey-highlights>.

<sup>53</sup> WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics.”

cells, private CBRS networks, and licensed frequency bands) compared to 747,400 indoor small cell nodes operating in 2022.<sup>54</sup>

### **C. Better FCC Policies Would Promote Competition in the Broadband Market**

#### **1. More Spectrum Availability Would Improve Broadband Access and Capabilities**

To further promote competition, innovation, and investment in the broadband marketplace, the Commission should work proactively to make more spectrum available for commercial use and by removing regulatory barriers to broadband deployment.

There is particularly strong demand for additional mid-band spectrum. The Commission ought to prioritize the lower 3.1-3.45 GHz band for study and prompt repurposing.<sup>55</sup>

Although proposals for repurposing different bands are at different stages of development and each faces unique challenges, the Commission should advance every proposal for spectrum that may realistically be suitable for commercial uses – whether on a licensed or unlicensed basis. A larger spectrum supply will enable more competitors to serve more Americans with next-gen services.

#### **2. Unequivocal Rejection of Commission Rate Regulation of Broadband Services Would Promote Continued Strong Private Market Investment**

Continuation of intensive private capital market investment is critical to ensure timely technological advancements, including cable broadband DOCSIS 4.0 upgrades that will offer significantly expanded capacity and symmetrical or near-symmetrical multi-gigabit speeds, the rollout of fast and capacious Wi-Fi 7 technology, and the launch of direct-to-device (D2D) capability that will enable connectivity between standard wireless handsets and satellite networks

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<sup>54</sup> WIA, “Wireless Infrastructure By The Numbers: 2023 Key Industry Statistics.”

<sup>55</sup> See Seth L. Cooper, "Fast Action on the Lower 3 GHz Band Will Secure America's 5G Future," *Perspectives from FSF Scholars*, Vol. 16, No.9 (Feb. 18, 2021), at: <https://freestatefoundation.org/wp-content/uploads/2021/02/Fast-Action-on-the-Lower-3-GHz-Band-Will-Secure-Americas-5G-Future-021821.pdf>.

to ensure continuous coverage in the most difficult-to-reach areas of the country. However, private market investment is now under threat from Title II regulation of rates that will restrict broadband providers' ability to generate financial returns on their investment, thereby disincentivizing future investment that is needed to provide all Americans with timely access to next-generation broadband Internet services.

In his recent conversation with Free State Foundation Adjunct Senior Fellow Michael O'Rielly on the "TMT With Mike O'Rielly" videocast," former FCC Chairman Ajit Pai, speaking now from his perspective and experience as a private equity investor, stated: "[R]egulatory and legislative decisions can have a very significant impact. Price regulation is the easiest example of that... But I can tell you that to the extent that there is the prospect of federal or especially state price regulation, that significantly deters us from wanting to make investments in some cases."<sup>56</sup> As Mr. Pai emphasized, the regulation of rates for broadband service will prove counterproductive and an obstacle to achieving deployment objectives.

To avert the threat of rate regulation to future investment in broadband infrastructure, the Commission should not implement its decision, made in the *Safeguarding and Securing the Open Internet Order*, to reimpose Title II classification of broadband Internet access services.

Although the new Title II order purports to forbear from Sections 201 and 202 for purposes of *ex ante* and *ex post* rate regulation,<sup>57</sup> the order does support rate regulation of broadband Internet access services in other ways.<sup>58</sup> Notably, the order declined to preempt state-

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<sup>56</sup> MT with Mike O'Rielly, "Episode 3: Private Equity & Federal Broadband Funding" (June 4, 2024), at: <https://www.youtube.com/watch?v=F23S4XJT8I8>.

<sup>57</sup> Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration (released May 7, 2024).

<sup>58</sup> Seth L. Cooper, "The FCC's New Title II Order Allows Harmful Rate Regulation," *Perspectives from FSF Scholars*, Vol. 19, No. 19 (May 21, 2024), at: <https://freestatefoundation.org/wp-content/uploads/2024/05/The-FCCs-New-Title-II-Order-Allows-Harmful-Rate-Regulation-052124-1.pdf>.

level rate regulation of broadband services, specifically including those termed “broadband affordability programs.” New York’s Affordable Broadband Act of 2021 (ABA), for instance, requires broadband service providers operating in the state to offer Internet access plans for \$15-per-month or \$20-per-month, depending on the speeds provided. By some estimates, the law’s mandated price-controlled offerings to certain lower-income households apply to over one-third of New York households. The new Title II Order found that “the mere existence of a state affordability program is not rate regulation” and therefore *not* preempted.<sup>59</sup> It is conceivable that some affordability programs, including subsidy programs, may be able to help make broadband more affordable for low-income households without setting prices. But state laws setting maximum rate limits or mandating prices certainly constitute rate regulation. To the extent the Commission puts its Title II regulation into effect, it should preempt those state rate controls.

### **III. The Video Services Market Is Effectively Competitive**

Data from 2022 and 2023 indicate that the market for video services is effectively competitive, as consumers have a variety of video service offerings from competing providers using a variety of distribution platform technologies – legacy cable and Direct Broadcast Satellite (DBS) services, market-leading Internet-based streaming services, and over-the-air TV. Moreover, it is widely acknowledged that these traditional multichannel video programming distributors (MVPDs) are not the video marketplace titans that they once were. Internet-based video providers are now the market leaders. Consequently, the current regulatory framework is a mismatch with the current marketplace in which consumers increasingly reject traditional MVPD offerings in favor of a dynamic, self-curated mix of subscription streaming services accessed on

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<sup>59</sup> Safeguarding and Securing the Open Internet, WC Docket No. 23-320, at ¶ 275.

consumer-owned connected hardware, ad-supported web-based video platforms, and social media smartphone apps.<sup>60</sup>

## **A. There Is Effective Competition Among Broadband Technology Platforms**

### **1. Traditional MVPDs Continue to Lose Subscribers to Internet-Based Alternatives**

The steady and years-long consumer migration from traditional MVPDs to Internet-delivered upstarts continued in force in 2022 and 2023<sup>61</sup>:

- According to Leichtman Research Group data, cable subscriber totals dropped from 41.3 million at year-end 2021<sup>62</sup> to 40.5 million as of May 2022, over 825,000 lower than just three months prior.<sup>63</sup>
- In 2023, traditional MVPDs (cable, Direct Broadcast Satellite (DBS), telco TV) crossed a highly significant subscriber threshold: they now serve less than half of U.S. households, compared to 74% just five years earlier.<sup>64</sup>
- DIRECTV, which does not publicly report earnings, is estimated to have lost 1.8 million video subscribers in 2023 across its DBS, telco TV, and virtual MVPD (vMVPD) offerings.<sup>65</sup>
- Publicly available data reveals that subscribers to DISH TV, the number two DBS service, declined from 9.4 million at year-end 2019 to 8.2 million two years later – a 13%

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<sup>60</sup> The analysis contained in this section regarding the video service market and implications for video policy draws heavily on the work of FSF Senior Fellow Andrew Long. See Andrew Long, “The FCC Is Complicit in the Decline of Traditional MVPDs,” *Perspectives from FSF Scholars*, Vol. 19, No. 17 (May 8, 2024), at: <https://freestatefoundation.org/wp-content/uploads/2024/05/The-FCC-Is-Complicit-in-the-Degradation-of-Traditional-MVPDs-050824.pdf>; Andrew Long, “Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations,” *Perspectives from FSF Scholars*, Vol. 19, No. 47 (October 23, 2023), at: <https://freestatefoundation.org/wp-content/uploads/2023/10/Ever-Expanding-Video-Competition-Undercuts-Calls-for-More-Rules.pdf>. See also Comments of the Free State Foundation, The State of Competition in the Marketplace, GN Docket No. 22-203, (July 1, 2022), at 17-25, at: <https://freestatefoundation.org/wp-content/uploads/2022/07/FSF-Comments-%E2%80%93-The-State-of-Competition-in-the-Communications-Marketplace-070122.pdf>.

<sup>61</sup> These data points are drawn from Andrew Long, “Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations,” *Perspectives from FSF Scholars*, Vol. 19, No. 47 (October 23, 2023).

<sup>62</sup> Leichtman Research Group (LRG) Press Release, “Major Pay-TV Providers Lost About 44,700,000 Subscribers in 2021” (Mar. 8, 2022), at: <https://www.leichtmanresearch.com/wp-content/uploads/2022/03/LRG-Press-Release-3-8-2022-1.pdf>.

<sup>63</sup> LRG Press Release, “Major Pay-TV Providers Lost About 1,950,000 Subscribers in 1Q 2022” (May 17, 2022), at: <https://www.leichtmanresearch.com/wp-content/uploads/2022/05/LRG-Press-Release-5-17-2022.pdf>.

<sup>64</sup> David Frankel, “Less Than Half of U.S. Homes Have Linear Pay TV,” *NextTV* (October 5, 2023), at: <https://www.nexttv.com/news/less-than-half-of-us-homes-have-linear-pay-tv>.

<sup>65</sup> <https://leichtmanresearch.com/research/>.

drop. The number of subscribers to DISH TV fell again by 249,000 between October and December 2023, from 6.72 million to 6.471 million, nearly 4%.<sup>66</sup>

- In the first quarter of 2021, Verizon’s FiOS video service subscribership declines continued, with its subscriber count going to a decade-low of 3.77 million.<sup>67</sup> Its video subscriber totals dropped below 3 million in the third quarter of 2023.<sup>68</sup>
- Overall, facilities-based MVPDs saw nearly 7 million subscribers “cut the cord” in 2023.<sup>69</sup>

Data points from the first quarter of 2024 clearly show that the video marketplace trends during the two previous calendar years continue<sup>70</sup>:

- Charter Communications, which in the last year became the largest cable operator due to its relatively stronger immunity to “cord cutting” (that is, it has been losing customers at a slower rate than Comcast Corporation, the former number one), just reported its biggest ever three-month drop: 392,000 subscribers, just under 3% of its total base.<sup>71</sup>
- Comcast continues to shed customers at an impressive pace, losing 487,000 subscribers in the first quarter of 2024, a 3.5% overall decline.<sup>72</sup>
- Further contraction of the total MVPD subscriber base is expected. According to Parks Associates, “pay-TV subscriptions and revenues are on a continuous decline as consumers embrace OTT services” – resulting in an anticipated 27% decrease in subscribers over the ten years ending in 2024.<sup>73</sup> By comparison, subscription video-on-demand (VOD) services are expected to increase revenues by 13% this year and enjoy a compound annual growth rate of 8.5% between 2021 and 2026.<sup>74</sup>

To be sure, the Commission is aware of the existing state of affairs. By way of example, a

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<sup>66</sup> EchoStar Corporation, Form 10-K (February 24, 2029), <https://ir.echostar.com/static-files/c0c6367b-a6dc-455c-87c4-5d30a5127048>.

<sup>67</sup> Todd Spangler, “Verizon Fios TV Subscribers Drop to 10-Year Low, as Broadband and Media Segments Post Q1 Gains,” *Variety* (April 21, 2023), at: <https://variety.com/2021/digital/news/verizon-q1-2021-fios-tv-decline-broadband-media-1234956605/>.

<sup>68</sup> Georg Szalai, “Verizon Loses 75,000 TV Subs in Third Quarter, Adds Broadband Users,” *The Hollywood Reporter* (October 24, 2023), at: <https://www.hollywoodreporter.com/business/business-news/verizon-tv-subscribers-third-quarter-earnings-broadband-1235621641/>.

<sup>69</sup> <https://leichtmanresearch.com/>.

<sup>70</sup> These data points are drawn from Andrew Long, “The FCC Is Complicit in the Decline of Traditional MVPDs,” *Perspectives from FSF Scholars*, Vol. 19, No. 17 (May 8, 2024).

<sup>71</sup> See Daniel Frankel, “Serious, Big-Boy Cord-Cutting Finally Catches Up to Charter – Top Pay TV Provider Just Had Its Worst Quarterly Customer Losses Ever,” *NextTV* (April 26, 2024), at: <https://www.nexttv.com/news/serious-big-boy-cord-cutting-finally-catches-up-to-charter-top-pay-tv-provider-just-had-its-worst-quarterly-customer-losses-ever>.

<sup>72</sup> Jon Lafayette, “Comcast Earnings Flat as Video, Broadband Subscriber Losses Continue,” *NextTV* (April 25, 2024), at: <https://www.nexttv.com/news/comcast-earnings-flat-as-video-broadband-sub-losses-continue>.

<sup>73</sup> Parks Associates, Blog Post, “By 2024, traditional pay-TV services will decline to 76.7 million households, a 27% drop since 2014” (Jun. 21, 2022), at: <https://www.parksassociates.com/blog/article/06212022>. [link didn’t work]

<sup>74</sup> See Todd Spangler, “U.S. Subscription VOD Revenue Growth Slowing to 13% in 2022, Hitting \$25 Billion: PwC Report,” *Variety* (Jun. 20, 2022), at: <https://variety.com/2022/digital/news/us-subscription-vod-revenue-pwc-forecast-1235298797/>.



footnote in the agency’s *Fostering Independent and Diverse Sources of Video Programming* Notice of Proposed Rulemaking (NPRM) released in April of this year paints a clear picture of the plight of traditional – and, more to the point, regulated – MVPDs, citing an August 2023 report that 8 million homes dropped MVPD bundles in the prior 12 months, with the year-over-year-decline in MVPD subscribership increasing from 8.1% in the second quarter of 2022 to 13.3% in the second quarter of 2023.<sup>75</sup>

## 2. Dominant Streaming Services Continue to Increase Video Market Share

It is unmistakable that Americans no longer choose one and only one source of video as they did during the early 1990s era of analog cable services. Today, consumers instead actively curate personalized “bundles” by subscribing to multiple, hand-selected subscription services.<sup>76</sup>

Data points for 2022 and 2023 show that as more and more consumers turn away from traditional MVPD bundles, more and more consumers turn to streaming services<sup>77</sup>:

- Netflix, Inc., in the fourth quarter of 2023 added 2.53 million subscribers in the U.S. and Canada for a total of 82.66 million<sup>78</sup> – which is substantially more than all pay-TV providers combined: 71.24 million.<sup>79</sup>

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<sup>75</sup> *8 Million Homes Dump Big TV Channel Bundle In Last 12 Months*, nScreenMedia.com (Aug. 15, 2023), at: <https://nscreenmedia.com/8-m-homes-dump-big-tv-channel-bundle-q2-2023/> (noting that the decline in MVPD subscribership continues to accelerate, with a year-over-year decline from 8.1 percent in Q2 2022 to 13.3 percent in Q2 2023); *Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, paras. 218-21 (Dec. 30, 2022) (*2022 Communications Marketplace Report*) (noting that MVPD subscribership has been declining since 2013, including a loss of 6.7 million video subscribers between the end of 2020 and 2021).

<sup>76</sup> See Andrew Long, “Pixel by Pixel, Video Streaming’s Ascension Comes Into Focus,” *Perspectives from FSF Scholars*, Vol. 16, No. 52 (Sept. 29, 2021), at: <https://freestatefoundation.org/wp-content/uploads/2021/09/Pixel-by-Pixel-Video-Streamings-Ascension-Comes-Into-Focus-092921.pdf>, at 3-4 (drawing a sharp contrast between consumer behavior at the time when the 1992 Cable Act was passed, at which point “Congress perceived significant technological challenges preventing consumers from even watching over-the-air broadcast signals and cable television service on the same device,” and today, when, as discussed herein, broadband households on average subscribe to five or more streaming services).

<sup>77</sup> These data points are drawn from Andrew Long, “The FCC Is Complicit in the Decline of Traditional MVPDs,” *Perspectives from FSF Scholars*, Vol. 19, No. 17 (May 8, 2024).

<sup>78</sup> Netflix, “Letter to Shareholders” (2024 Quarterly Earnings, First Quarter Earnings) (April 18, 2024), at: [https://s22.q4cdn.com/959853165/files/doc\\_financials/2024/q1/FINAL-Q1-24-Shareholder-Letter.pdf](https://s22.q4cdn.com/959853165/files/doc_financials/2024/q1/FINAL-Q1-24-Shareholder-Letter.pdf)

<sup>79</sup> Leichtman Research Group (LRG), Press Release: “Research: US sheds 5m pay-TV subs in 2023,” *Advanced Television* (March 11, 2024), at: <https://advanced-television.com/2024/03/11/research-us-sheds-5m-pay-tv-subs-in-2023/>.

- YouTube TV, far and away the largest vMVPD serving over 40% of all vMVPD customers, now has more than 8 million subscribers,<sup>80</sup> rendering it larger than DISH TV and potentially the third-biggest MVPD overall.<sup>81</sup> One analyst predicts that YouTube TV will become the largest MVPD by the end of 2026.<sup>82</sup>
- A generational gap exists concerning video consumption. Older Americans are more likely to purchase traditional pay-TV packages: “[t]he mean age of traditional pay-TV subscribers is 49.3 vs. 42.5 among non-subscribers, and 40.8 with vMVPD-only.”<sup>83</sup> Conversely, teenagers are more likely to watch YouTube than Netflix<sup>84</sup> – and more likely to watch TikTok than YouTube.<sup>85</sup>
- Direct-to-consumer (DTC) offerings, including several sports-team-specific streaming services – Jazz+, ClipperVision, Monumental Sports Network – bypass traditional distribution mechanisms altogether to achieve “greater reach as traditional pay TV subscribers continue to decline.”<sup>86</sup>
- Even virtual MVPDs (vMVPDs), a subset of streaming services that offer bundles comparable to traditional MVPDs – but without the responsibilities of maintaining physical distribution facilities (fiber, coaxial cable, satellites) or the regulations that attach to it – are facing flat or declining subscription totals. Some, such as YouTube TV and DIRECTV Stream, do not regularly release such data.<sup>87</sup> Of those that do, Hulu + Live TV, Sling TV, and fuboTV all experienced significant subscriber losses during the first quarter of this year: Hulu + Live TV shed 200,000 subscribers, a 4.7% change, Sling TV’s total subscribers fell by 234,000, a 4.7% drop, and fuboTV lost nearly 74,000 subscribers, a 6.5% decline.<sup>88</sup> All told, losses by these three leading vMVPDs exceeded a half million subscribers, representing 6.4% of their collective base. However, vMVPDs

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<sup>80</sup> Neal Mohan, “Letter from the YouTube CEO: 4 Big bets for 2024” (February 6, 2024), at: <https://blog.youtube/inside-youtube/2024-letter-from-neal/>.

<sup>81</sup> Jeff Baumgartner, “YouTube TV exceeds 8M subs, jumps past Dish,” *LightReading* (February 7, 2024), at: <https://www.lightreading.com/video-streaming/youtube-tv-exceeds-8m-subs-jumps-past-dish>.

<sup>82</sup> Brad Adgate, “YouTube Is Forecasted To Be The Largest Pay-TV Distributor In 2026,” *Forbes* (April 7, 2024), at: <https://www.forbes.com/sites/bradadgate/2024/04/07/youtube-tv-is-forecast-to-be-the-largest-pay-tv-distributor-in-2026/?sh=3d628d123805>.

<sup>83</sup> Daniel Frankel, “Less Than Half of U.S. Homes Have Linear Pay TV,” *NextTV* (October 5, 2023), at: <https://www.nexttv.com/news/less-than-half-of-us-homes-have-linear-pay-tv>.

<sup>84</sup> Kif Leswing, “YouTube passes Netflix as top video source for teens,” *CNBC* (October 11, 2023), at: <https://www.cnn.com/2023/10/11/youtube-passes-netflix-as-top-video-source-for-teens.html>.

<sup>85</sup> Daniel Frankel, “Less Than Half of U.S. Homes Have Linear Pay TV,” *NextTV* (October 5, 2023), at: <https://www.nexttv.com/news/less-than-half-of-us-homes-have-linear-pay-tv>.

<sup>86</sup> Bevin Fletcher, “NBA Utah Jazz launches direct-to-consumer streaming service,” *StreamTV Insider* (September 29, 2023), at: <https://www.streamtvinsider.com/video/nbas-utah-jazz-launches-jazz-direct-consumer-streaming-service>.

<sup>87</sup> See Phil Nickinson, “How many subscribers does YouTube TV have?” *Variety* (Feb. 2, 2022), at: <https://www.digitaltrends.com/home-theater/how-many-youtube-tv-subscribers/> (pointing out that “[it]s now been a year since YouTube last released any sort of subscriber numbers” and what it put out a year ago was, at best, vague”). See also *id.* (reporting that DIRECTV Stream’s subscriber base shrank by 64 percent between the third quarter of 2018 and the fourth quarter of 2020, the most recent period for which reliable data is available).

<sup>88</sup> See LRG, Press Release: “Major Pay-TV Providers Lost About 44,700,000 Subscribers in 2021” (Mar. 8, 2022), at: <https://www.leichtmanresearch.com/wp-content/uploads/2022/03/LRG-Press-Release-3-8-2022-1.pdf>, LRG, Press Release” “Major Pay-TV Providers Lost About 1,950,000 Subscribers in 1Q 2022” (May 17, 2022), at: <https://www.leichtmanresearch.com/wp-content/uploads/2022/05/LRG-Press-Release-5-17-2022.pdf>.

do offer a competitive alternative to the dwindling number of consumers still drawn to your parents' TV viewing experience.

### **B. Competition Compels Reassessment of the MVPD Regulatory Model and Elimination of Outdated Regulations**

The marketplace significance of MVPDs has diminished to an extent that Commission's existing framework for one-sided regulation can no longer be justified. However, on four separate occasions during the last year, the Commission has taken steps to increase the regulatory obligations that cable operators and DBS providers alone must bear – without once seriously considering how those new rules will affect competition. The most notable recent example is from March 2024, when the Commission voted 3-2 to adopt an order imposing “all-in” pricing obligations solely upon traditional MVPDs.<sup>89</sup> Under the agency's proposal, cable and direct broadcast satellite (DBS) providers – but not vibrant competitors that stream their content over the public Internet – would be required to present an “all-in” price on their customer bills and in advertising materials. However, other proposals are still pending that would saddle MVPDs alone with regulatory burdens, thereby putting MVPDs at a further disadvantage compared with dominant Internet streaming video services.

It is time for the Commission to acknowledge at long last that the regulatory model applied to video, writ large, is premised upon assumptions that simply do not match reality. A fresh look is required, and the Commission should halt its pending one-sided MVPD rulemakings as initial steps in a prompt transition to a free-market approach that embraces an

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<sup>89</sup> All in Pricing for Cable and Satellite Television Service, MB Docket No. 23-203, Report and Order (released March 19, 2024), at: <https://docs.fcc.gov/public/attachments/FCC-24-29A1.pdf>. This section's discussion of the April 2024 NPRM as well as the Commission's other proposed one-sided regulation of MVPDs is based on Andrew Long, “The FCC Is Complicit in the Decline of Traditional MVPDs,” *Perspectives from FSF Scholars*, Vol. 19, No. 17 (May 8, 2024).

efficient, pro-consumer reliance on the vibrant competitive forces that unquestionably define today's video marketplace.

### **1. The Commission Should Not Adopt Its MVPD-Only Proposed Rules**

In its April 2024 *Fostering Independent and Diverse Sources of Video Programming* NPRM, the Commission suggested that possible “marketplace *obstacles*” – not “market failures,” a well-defined concept in the economic literature that under certain circumstances can justify government intervention, but merely *obstacles* – might warrant infringements upon traditional MVPDs’ freedom to contract with programming providers, despite the multitude of ways that programmers today can reach consumers with their content. The Commission appears to have suggested “marketplace obstacles” because cable operators and DBS providers cannot credibly be called gatekeepers when programmers market their content directly to consumers. Nevertheless, and based upon an outdated record from 2016, the NPRM proposes to ban: (1) all Most Favored Nation (MFN) provisions, including those in existing contract provisions that may not be severable from the broader agreement; and (2) “unreasonable” Alternative Distribution Method (ADM) provisions, a line-drawing endeavor that inescapably and inappropriately injects the FCC into arms’ length negotiations. Dominant Internet streaming services would be unencumbered by such restrictions, but the competitiveness of MVPDs would suffer if the proposal is adopted.

In a January 2024 rulemaking, the Commission proposes to require that cable operators and DBS providers “give their subscribers rebates when those subscribers are deprived of video programming they expect to receive during programming blackouts that result from failed

retransmission consent negotiations or failed non-broadcast carriage negotiations.”<sup>90</sup> This is administratively unworkable, tips the scales further in the direction of programmers, and ultimately will lead to higher prices for consumers.<sup>91</sup>

Additionally, in December 2023, the FCC adopted an NPRM that would prohibit cable operators and DBS providers from offering consumers long-term contracts enforceable via early termination fees (ETFs) and from offering service in monthly increments.<sup>92</sup> The offering of those contract terms is a common practice across many industries. MVPDs typically offer ETFs as a more affordable choice, with non-ETF pricing also available to those would do not want long-term contracts. Yet the Commission’s proposal would restrict MVPDs’ freedom to contract and curtail potentially attractive pricing options to consumers.

In view of the competitive realities of the video market, the Commission should not move forward with those proposed rulemakings.

## **2. The Commission Should Eliminate Legacy MVPD Regulations That Harm Competition and Confer No Benefit in Today’s Video Market**

Rather than extending outdated regulatory classifications to new platforms (such as vMVPDs,<sup>93</sup> or imposing new regulations that pick winners and losers such as the Commission’s blackout-related proposals), the FCC should abide by congressional intent by eliminating marketplace-distorting rules and allowing competitive forces to do their job. The reality that

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<sup>90</sup> Customer Rebates for Undelivered Video Programming During Blackouts, MB Docket No. 24-20, Notice of Proposed Rulemaking (released January 17, 2024), at: <https://docs.fcc.gov/public/attachments/FCC-24-2A1.pdf>.

<sup>91</sup> For further background and analysis, see Andrew Long, “Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations,” *Perspectives from FSF Scholars*, Vol. 18, No. 47 (October 23, 2023), at: <https://freestatefoundation.org/wp-content/uploads/2023/10/Ever-Expanding-Video-Competition-Undercuts-Calls-for-More-Rules.pdf>.

<sup>92</sup> Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices, MB Docket No. 23-405, Notice of Proposed Rulemaking (released December 14, 2023), at: <https://docs.fcc.gov/public/attachments/FCC-23-106A1.pdf>.

<sup>93</sup> See Andrew Long, “With Pay-TV on the Wane, Legacy Regulations Should Follow,” *Perspectives from FSF Scholars*, Vol. 18, No. 25 (July 9, 2023), at: <https://freestatefoundation.org/wp-content/uploads/2023/07/With-Pay-TV-on-the-Wane-Its-Regulations-Should-Follow-070623.pdf>.

streaming services today enjoy all of the momentum and – appropriately – face none of the legacy regulations that burden traditional MVPDs demands the elimination of any existing rule predicated upon the notion that traditional MVPDs possess undue power.

Accordingly, the Commission should act promptly to eliminate its program access and carriage requirements, along with its network non-duplication and syndicated exclusivity rules. In addition, the Commission should follow its sound decision in September 2020 to terminate the “unlock the box” navigation device proceeding<sup>94</sup> and announce that the sunset provision set forth in Section 629(e) of the 1996 Act has been satisfied.<sup>95</sup> Consumers today purchase a range of devices – TVs, dedicated streaming boxes, smartphones, video game consoles, computers, and more – upon which they access video content, including the services of traditional MVPDs, in ways well beyond the wildest dreams of the lawmakers who passed Section 629 over a quarter-century ago. Another attempt to create out of thin air a retail marketplace for hardware able to access MVPD services would, like those that preceded it, fail miserably and waste limited agency resources.

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<sup>94</sup> See Expanding Consumers’ Video Navigation Choices, MB Docket No. 16-42; Commercial Availability of Navigation Devices, CS Docket No. 97-80, Report and Order, FCC 20-124 (Sept. 4, 2020), at: <https://docs.fcc.gov/public/attachments/FCC-20-124A1.pdf>.

<sup>95</sup> See 47 U.S.C. § 549(e). See also Andrew Long, “Closing the Lid on ‘Unlock the Box’ Should End Video Device Regulation,” *Perspectives from FSF Scholars*, Vol. 15, No. 50 (Sept. 25, 2020), at 10-11, at: <https://freestatefoundation.org/wp-content/uploads/2020/09/Closing-the-Lid-on-Unlock-the-Box-Should-End-Video-Device-Regulation-092520.pdf>.

#### **IV. Conclusion**

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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