Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
The Status of Competition in the Market For the Delivery of Video Programming	)	MB Docket No. 17-214
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test	)	MB Docket No. 15-216
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)	MB Docket No. 14-261

COMMENTS OF VERIZON

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COMMENTS OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

Consumers of video programming are reaping the benefits of a dizzying array of choices from TV broadcasters, Multichannel Video Programming Distributors (MVPDs), and online video distributors (OVDs). In response to the rising popularity of online video services, traditional MVPDs and broadcast TV are fighting back with more content, more choices in how consumers view that content, and their own online services. Competitive providers, like Verizon, face competition from a variety of online video providers, such as Netflix, Hulu,

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

iTunes, Amazon Video, Apple TV, YouTube, and others, for some or all of their video programming, as well as traditional cable operators who are offering consumers Internet-based applications to watch video content. This frenzy of competition has put consumers in the enviable position of enjoying increased choices and capabilities to mix and match from all three types of providers, choosing what they watch, how much they pay to watch, and where and when they watch their preferred content.

While consumers have more viewing options than ever before, the Commission should still address a number of issues to ensure that competition in the video market continues to thrive and grow. First, the rapidly rising cost of acquiring must-have video programming – especially broadcast programming and regional sports – makes it increasingly difficult for MVPDs to offer consumers the programming they want at prices they are willing to pay. Large programmers and other MVPDs own much of the most popular content and use their bargaining power to collect ever-higher sums for carriage. Competitive MVPDs, particularly those who do not own content, have no choice but to raise their prices, harming consumers and competition. Verizon has frequently pointed to the principal sources of these rising costs – the broken retransmission consent regime and unreasonable programmer practices such as forced bundling of desired with undesired content. The Commission can address rising programming costs through its rules governing retransmission consent and program access.

Further, the Commission should confirm that OVDs are not subject to legacy cable regulation, such as franchising. Such regulations do not make sense for over-the-top providers that offer programming over the Internet and do not disturb public rights-of-way. The Commission has already tentatively concluded that "video programming services that a cable operator may offer over the Internet should not be regulated as cable services," and it should affirm that decision.[2]

The Commission can preserve the current competition brought by competitive providers like Verizon by pursuing commonsense policies that promote competition among video distributors and increase consumer choice.[3] To ensure consumers' continued enjoyment of competition in the market for video distribution, the Commission should take at least the following steps:

- Reform the current retransmission consent regime to put an end to actions that harm consumers, such as ballooning rates for carriage of broadcast TV signals and multiple blackouts of broadcast programming;
- Strengthen the program access rules to ensure they remain available and useful as competitive video distributors offer additional choices for consumers; and
- Affirm that over-the-top video distributors are not subject to legacy cable regulation.

II. VIDEO PROVIDERS ARE OFFERING INNOVATIVE SERVICES THAT BENEFIT CONSUMERS.

Consumers saw increased competition in 2016 among video distributors who continued to roll out new content, create new distribution sources, and offer new options for when and on what devices consumers can access video services. For example, since its initial deployment in

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[2] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, ¶ 78 (2014).

[3] *See* Public Notice, "Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming," 32 FCC Rcd 6654 (MB 2017) (seeking information on market conditions and regulations affecting competition in the video marketplace, focused on calendar year 2016).

2005, Verizon has invested billions of dollars to deploy its all-fiber-optic, Fios broadband network and to offer consumers the triple play of video, broadband, and telephone services. At the end of 2016, subscribers to Verizon's Fios video service numbered 4.7 million, and there were 5.7 million Fios broadband subscribers.[4]

Consumers of MVPD services can now access hundreds of linear video channels and tens of thousands of movie and TV titles on demand. Fios subscribers can choose from English-language and Spanish-language programming in traditional cable packages. Consumers who want more control over their programming can select Verizon's consumer-friendly "Custom TV" service.[5] Currently, Verizon offers seven separate Custom TV packs, ranging from "Sports and News" to "Infotainment and Drama." Custom TV allows consumers to pay for those sets of channels that most interest them and avoid paying for those they do not want. During 2016, more than a third of new Fios customers subscribed to Custom TV packages.[6]

To meet the demand for video services – via both traditional cable and over-the-top platforms – broadband providers continue to increase the speeds available to consumers. Verizon subscribers with Fios Quantum equipment can obtain download speeds ranging from 50 Mbps to 940 Mbps ("Fios Gigabit Connection"). These speeds easily support consumers' increasing consumption of video services, including online programming, over multiple devices in the home.

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[4] *See* Verizon, "Building a Connected World: 2016 Annual Report," at 6, 20 (2017), http://www.verizon.com/about/sites/default/files/annual_reports/2016/downloads/Verizon-AnnualReport2016.pdf. On April 1, 2016, Verizon completed the transfer of 1.2 million Fios video and 1.6 million Fios Internet subscribers in California, Texas, and Florida to Frontier Communications. *See id.* at 11.

[5] For more information about Fios Custom TV, see https://www.verizon.com/home/fiostv/.

[6] *See* Verizon, "2016 Investor Quarterly 2Q," at 6 (July 26, 2016), http://www.verizon.com/about/file/16911/download?token=X_m-LGWe.

In addition to the options available for home viewing, Fios video subscribers can use the Fios Mobile app to watch live and on-demand programming on mobile tablets and smartphones inside and outside the home. Fios Mobile subscribers can watch 245 channels of live TV at home, including Disney, HBO, TBS, The History Channel, and The NFL Network, and access over 80,000 movie and TV titles from the Fios library – all on the mobile devices of their choice.[7] Fios video subscribers can also access over 140 channels outside the home. Subscribers with both Fios Quantum equipment and Internet services can access in-home recorded programs through the Fios Mobile app, giving customers even more flexibility in watching their preferred video content.[8]

Since 2015, Verizon has competed in the online video distribution market with its own go90 service, a free, ad-supported application, which targets mobile consumers, particularly millennials. Available to all mobile consumers, go90 offers live sports, original programming, and a variety of cable network programming. The go90 app also makes available innovative video-viewing features such as sharing content via social media.

III. LARGE BROADCAST AND CABLE PROGRAMMERS ENGAGE IN PRACTICES THAT HARM CONSUMERS AND COMPETITION.

As the Commission has noted, the rapidly rising cost of video programming is a significant barrier for MVPDs offering a competitive video distribution service to consumers.[9]

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[7] For more information on the Fios Mobile app, see https://www.verizon.com/home/fiosmobileapps.

[8] *See* Verizon, "Verizon Expands Fios Mobile App to Include Remote DVR Streaming," (Dec. 14, 2015), http://www.verizon.com/about/news/verizon-expands-fios-mobile-app-include-remote-dvr-streaming.

[9] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 3 (2015) ("*STELA TOC NPRM*"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, ¶¶ 48-50, 72 (2017) ("*Eighteenth Report*").

Several factors contribute to the rising rates for video programming carriage, principally: (1) ever-increasing retransmission consent fees; and (2) forced bundling, the practice of packaging must-have programming with less desired programming.[10]

For more than 20 years, MVPDs have had to pay for carriage of over-the-air broadcast programming, through compulsory copyright license fees and through payments negotiated with stations opting for the retransmission consent regime.[11] MVPDs face significant difficulties when negotiating retransmission consent agreements because of the various regulatory preferences broadcasters enjoy under the statute and the Commission's rules. Broadcasters are the sole source for much of the most desired current video programming, and the Commission has heightened their advantage at the bargaining table through regulatory preferences such as the network non-duplication and syndicated programming exclusivity rules.

By virtue of broadcasters' market position, normal marketplace dynamics often do not function as they would when the parties have relatively equal bargaining power. For example, an MVPD cannot pursue effective alternative arrangements to carrying broadcast programming because of the TV station's network non-duplication and syndicated programming exclusivity rights. If a local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can also block carriage of out-of-market stations with the same programming. An MVPD is thus generally limited to a single input for the broadcast network or syndicated programming that consumers expect to receive.

When faced with such negotiating leverage, MVPDs essentially have two choices. They can pay the higher fees demanded, resulting in skyrocketing retransmission consent fees. The

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[10] *See*, *e.g.*, *Eighteenth Report* ¶¶ 33, 125.

[11] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 5 (2011).

results of the Commission's most recent cable rate survey confirm this trajectory, finding that the "average annual total amount paid for retransmission consent by a cable system was nearly $7.8 million in 2013 and $12.7 million in 2014, an increase of 63.2 percent" in just one year.[12] And these fees have increased at least 40 percent annually over the last three years.[13]

The only alternative to paying the increased rates for retransmission is for MVPDs to risk exposing their customers to a loss of desired programming through a blackout. In the case of competitive MVPDs like Verizon, the risk of program disruptions is especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers.[14]

Large media conglomerates also encumber distribution rights for specific programming with demands to carry channel bundles, increasing the rates paid for distribution rights of the desired content and resulting in carriage of programming that is often of little interest to most consumers. Holding sole-source rights to must-have programming, such as popular sports programming, can significantly strengthen the bargaining position of programmers in negotiations with an MVPD that wants to field a competitive offering, essentially forcing an MVPD to purchase bloated bundles of programming. As Verizon has experienced, some undesired programming may include channels that the programmer has not yet even launched. The result is that MVPDs and consumers pay for channels they do not want and do not watch, and MVPDs have limited ability to offer targeted programming that better addresses consumers'

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12 *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 31 FCC Rcd 11498, ¶ 28 (MB 2016).

13 *See* American Television Alliance, "As Football Season Kicks Off, TV Blackout Season Kicks into High Gear" (Sept. 7, 2017), http://www.americantelevisionalliance.org/as-football-season-kicks-off-tv-blackout-season-kicks-into-high-gear/.

14 *See STELA TOC NPRM* ¶ 3.

needs and preferences. Verizon has tried to meet consumer demand for more tailored programming through the Custom TV packages, which are popular. But content providers, through forced bundling practices, restrict our ability to provide customers even greater choice.[15]

IV. THE COMMISSION SHOULD REFORM RETRANSMISSION CONSENT.

The current retransmission consent regime remains broken and needs reform. Consumers continue to suffer harm through increases in pay-TV rates resulting from escalating retransmission consent fees and increasing instances of threatened and actual blackouts of broadcast programming.[16] Congress should enact needed reforms by overhauling the statutory scheme in Section 325 of the Communications Act. The Commission can also adopt additional protections for MVPDs and consumers as recommended by Verizon and other MVPDs.[17] Congress directed the Commission to reexamine its "totality of the circumstances" test for retransmission consent negotiations.[18] But the Commission has yet to act.[19] Now is the time for

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[15] *Cf.* D. Frankel, "Verizon's McAdam: We would sell skinny bundles 'exclusively' if programming deals would allow it," Fierce Cable (Oct. 11, 2016), http://www.fiercecable.com/cable/verizon-s-mcadam-we-would-sell-skinny-bundles-exclusively-if-programming-deals-would-allow-it.

[16] The American Television Alliance reports that broadcasters have engaged in more than 150 blackouts in 2017 alone and that retransmission consent fees have risen 40% in each of the last three years. *See* American Television Alliance, *supra*, note 13.

[17] *See*, *e.g.*, Comments of Verizon, *Implementation of Section 103 of the STELA Reauthorization Act of 2014,* MB Docket No. 15-216 (filed Dec. 1, 2015) ("Verizon STELA Comments"); Comments of the American Television Alliance, *Implementation of Section 103 of the STELA Reauthorization Act of 2014,* MB Docket No. 15-216 (filed Dec. 1, 2015).

[18] *See* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (directing Commission to initiate rulemaking to reexamine its totality of the circumstances test); *STELA TOC NPRM* ¶ 1.

[19] *See* FCC Chairman Tom Wheeler, "An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules," FCC Blog (July 14, 2016), https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules.

the Commission to consider bolstering its rules to restore some balance to broadcaster-MVPD negotiations and ensure consumer access to broadcast station programming.

A. The Commission Should Apply its Existing Rules to Protect Consumers from Rising Costs and Blocked Programming.

The Commission should address the ballooning fees for, and increasing blackouts of, broadcast signals through robust enforcement of the existing rules for good faith negotiations. The Commission has broad authority to prohibit a broadcast station from "failing to negotiate in good faith."[20] The Commission should apply its rules to ensure broadcasters and MVPDs negotiate on relatively equal footing, thereby discouraging stalemates and reducing the likelihood of consumer harm in the event negotiations are unsuccessful.

For example, the Commission should consider finding a lack of good faith when a broadcaster demands that an MVPD carry a bundle of affiliated programming channels to obtain retransmission consent for the broadcast station signal. These demands usually do not include an economically viable alternative for carrying just the broadcast station signal, resulting in increased costs for retransmission consent generally, increased costs to consumers, and prolonged bargaining between the parties. Similarly, the Commission should find a broadcaster is not negotiating in good faith if it expands a programming blackout to customers of an MVPD's affiliated Internet access services. These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market that does not receive the broadcast station.

The Commission can address these abuses under the existing rules by finding that in these cases the broadcaster is simply not negotiating retransmission consent for the broadcast

[20] 47 U.S.C. § 325(b)(3)(C)(ii).

station signal,[21] or is "acting in a manner that unreasonably delays retransmission consent negotiations."[22] The Commission should also consider whether such negotiating tactics reflect a lack of good faith under the "totality of the circumstances" test, particularly when a broadcaster simply does not grant an MVPD the opportunity to obtain solely the broadcast station programming at reasonable rates and conditions.[23] In short, the Commission should ensure that broadcasters act in the public interest by making their programming available to all consumers, whether over-the-air or through the MVPD of their choice.

As the Commission has recognized, retransmission consent negotiations have grown more complicated since it adopted the current negotiating framework.[24] Increased competition among MVPDs means increased rivalry for consumers switching from one provider to another if must-have programming is not available. Many broadcasters are now affiliated with cable networks, and a failed negotiation may result in multiple channels going dark. In these circumstances, the Commission must recognize that tactics such as forced bundling and blocking Internet access impede reaching fair carriage agreements as much as "refus[ing] … to meet and negotiate … at reasonable times and locations."[25]

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[21] 47 C.F.R. § 76.65(b)(1)(i).
[22] *Id.* § 76.65(b)(1)(iii).
[23] *See* 47 C.F.R. § 76.65(b)(2).
[24] *See STELA TOC NPRM* ¶ 3.
[25] 47 C.F.R. § 76.65(b)(1)(iii).

B. The Commission Should Inject Some Competition into Negotiations by Eliminating the Network Non-Duplication and Syndicated Programming Exclusivity Rules.

The Commission can also restore some balance to negotiations by eliminating its network non-duplication and syndicated programming exclusivity rules, as it has proposed.[26] These rules grant a broadcast station territorial rights to transmit network or syndicated programming – rights that they can also ensure by contract with the source of programming. By giving broadcast stations an "extra-contractual" method to enforce their territorial rights against MVPDs, the Commission's rules have the effect of reducing the costs and burdens of pursuing whatever territorial rights a television station may hold. The station simply has to notify the MVPD of its contractual rights, without having to present a case against carriage of out-of-market programming, or to justify denying consumers access to the network or syndicated programming altogether.[27]

This intrusion into the market-based remedies available to the broadcast station primarily disadvantages MVPDs by making it easy for the broadcast station to enforce its contractual rights with a network or syndicator without even turning to its contractual remedies. And it provides a regulatory advantage for broadcasters in retransmission consent negotiations. Instead of potentially negotiating with another station for the same programming, an MVPD generally has to accede to whatever demands the local broadcast station makes or face a potential programming blackout. Eliminating the network non-duplication and syndicated programming

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[26] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014); 47 C.F.R. §§ 76.92, 76.101.

[27] *See* 47 C.F.R. §§ 76.94, 76.105.

exclusivity rules would give MVPDs an opportunity to pursue alternative sources and thereby help achieve more balanced negotiations.

C. The Commission Should Adopt a Standstill Procedure to Protect Consumers from Signal Blackouts.

To protect consumers from programming disruptions, the Commission should adopt a standstill requirement that maintains the *status quo* and allows continued carriage of a broadcast station signal as long as the parties are engaged in good-faith negotiations for renewal of a retransmission consent agreement. A standstill requirement ensures that consumers will not lose access to desired broadcast station programming while the parties continue to negotiate.[28]

The Commission has recognized the benefits of a standstill requirement in the context of program access complaints. It noted that a standstill requirement has "several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint," and "limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations)."[29] The Commission has also found it appropriate to allow MVPDs to invoke a standstill requirement in program access disputes with a broadcaster with newly increased market power to ensure continued carriage of programming while the parties continue to negotiate.[30] This reasoning applies with equal force to retransmission consent negotiations, and the Commission should adopt a similar requirement in that context.

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[28] *See* Verizon STELA Comments, at 5-6.

[29] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 71 (2010) ("*Program Access Order*").

[30] *See Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238 at App. A § VII(A)(5) (2011).

V. THE COMMISSION SHOULD ENSURE THE REASONABLE AVAILABILTY OF CABLE-AFFILIATED PROGRAMMING TO COMPETITIVE MVPDS.

The program access protections in Section 628 of the Communications Act (47 U.S.C. § 548) have proven invaluable in ensuring that competitive video providers gain access to the programming they need – much of which fell under the control of cable incumbents at a much less competitive time – in order to offer truly alternative services to consumers. Protecting access to such programming, especially must-have content like regional sports networks (RSNs), remains critical to facilitate today's growing competition among video programming distributors.

Vertically-integrated cable companies may have a strategic incentive to deprive competitors of access to popular and must-have programming on reasonable terms and conditions by discriminating in pricing of affiliated content or depriving competitors of access to such content, for example, during the pendency of a program access complaint.[31] As the Commission has noted, an "integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete."[32]

Cable programmers can use strategic withholding, for example, to leverage better contract terms in tough negotiations or to cause irreparable harm to competitors. Just like broadcasters, cable programmers also bundle desired programming with less desired channels, making it difficult for competitive video providers to offer smaller and more tailored video packages, and forcing consumers to pay for large packages that may include programming they

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[31] *Program Access Order*, ¶¶ 26, 71 n.258.

[32] *Id.* ¶ 26 (quoting *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 117 (2006)).

do not want to watch. The Commission should apply its program access rules to address such practices and facilitate MVPDs' ability to offer differentiated packages of programming to consumers, such as Verizon's Custom TV packs.

Cable-affiliated programmers can also harm competitive MVPDs by withdrawing access to programming that the MVPD distributes, because either a cable-affiliated network enters a new exclusive deal with its affiliate or a cable company acquires control of a formerly independent RSN. Even if a competitive MVPD ultimately prevails in a program access complaint, it could still suffer from the temporary (and potentially long-term) loss of access to RSN programming that is "both non-replicable and highly valued by consumers."[33] The Commission has consistently recognized that withholding cable-affiliated RSN programming significantly hinders competitors and thereby "harm[s] consumers by limiting competition in the video distribution market"[34] and by "imped[ing] the ability of an MVPD to provide broadband services" in the market.[35] These findings strongly support adopting – as the Commission has proposed – rebuttable presumptions that an exclusive contract for a cable-affiliated RSN is an "unfair act" under Section 628(b) (whether it is terrestrially-delivered or satellite-delivered) and that complainants challenging an exclusive contract for a cable-affiliated RSN are entitled to a standstill of the existing contract for that RSN.[36]

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[33] *Program Access Order* ¶ 52.

[34] *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 32 & n.159 (2011).

[35] *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13145, ¶ 38 (MB 2011).

[36] *See Revision of the Commission's Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18, 05-192; Further Notice of Proposed Rulemaking in MB Docket No. 12-68; and Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605, ¶¶ 74-79 (2012).

The Commission must effectively implement and enforce the program access rules to help curb abuses by cable-affiliated programmers and to facilitate additional choices that benefit consumers. The Commission should consider expanding the rules to ensure competitive MVPDs have access to must-have programming such as RSNs.

VI. THE COMMISSION SHOULD CONFIRM THAT ONLINE VIDEO DISTRIBUTORS ARE NOT SUBJECT TO CABLE REGULATION.

The Commission should confirm that online video distributors (OVDs) are immune from legacy cable regulations. The Commission has already tentatively concluded that over-the-top video services provided by a cable operator are not subject to cable regulation.[37] This would be true even if the over-the-top service were accessible over the cable operator's own broadband facilities, provided that it is available to consumers without regard to whether they subscribe to the cable operator's managed video service.[38] The Commission should confirm these initial conclusions.

OVDs are expanding consumer options and offering increased competition to traditional video distributors.[39] They should continue this trajectory unhampered by legacy regulations designed for monopoly cable systems. A contrary result – such as requiring OVDs to negotiate franchise agreements across the country or otherwise subjecting these providers to burdensome

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[37] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, ¶ 78 (2014).
[38] *See id.*
[39] *See*, *e.g.*, Consumer Technology Association (CTA), *Content Consumption Milestone: Number of Streaming Video Viewers Now Equal To Paid TV Subscribers, Says CTA* (Mar. 7, 2017) (noting that the time consumers spend watching content on television sets is now roughly equal to time spent watching content on other consumer devices), https://cta.tech/News/Press-Releases/2017/March/Content-Consumption-Milestone-Number-of-Streaming.aspx.

regulations – would be inconsistent with law and the Commission's goal of facilitating the entry and growth of new competitors to traditional pay TV services.

Exempting OVDs from legacy cable regulation isn't just good policy – it follows squarely from the Cable Act. Cable regulation, including franchising, simply cannot apply to OVDs because the Internet is not a "cable system."[40] The definition of "cable system" requires "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service…."[41] Consumers access over-the-top video content through the public Internet, rather than a provider's "closed transmission paths." And a broadband network does not include "associated signal generation, reception, and control equipment that is designed to provide a cable service" for an OVD.[42]

Confirming that over-the-top video services are not subject to cable regulation would also help, as a matter of policy, to ensure that OVDs thrive. While some may see a competitive or financial benefit to subjecting online video services to cable regulation, those regulations serve a much different purpose. The Commission adopted its cable regulations to protect consumers from monopolistic behavior and pricing at a time when there were few video distributors and consumer choice was limited to a single local cable incumbent and broadcast TV.[43]

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[40] *See* Comments of Verizon, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, at 8-12 (filed Mar. 3, 2015).

[41] 47 U.S.C. § 522(7).

[42] The Commission has referred to such equipment as including "headend equipment." *See Telephone Co.-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶ 24 (1992).

[43] *See*, *e.g.*, *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574, ¶ 3 (2015) ("In 1993, when the Commission implemented the [1992 Cable Act's] Effective Competition provisions, the existence of Effective Competition was the exception rather than the rule. Incumbent cable operators had captured approximately 95 percent of MVPD subscribers."); *Implementation of Sections of the Cable Television Consumer Protection*

Today, OVDs have emerged as key players in the video marketplace, and consumer adoption of their services is surging. Over-the-top providers are innovating and flourishing in part because they do not have to seek franchises and comply with local, state, and federal cable requirements. Even the threat of having to meet cable regulatory requirements would deter innovation and investment, whether the OVD simply provides streaming video online or also owns the broadband connection used by some subscribers and provides a managed video service over the same facilities.

The Commission should therefore confirm that an over-the-top video service offered by a cable operator independent of its "cable service" is not subject to regulation by a local franchising authority (LFA) regardless of whether the online subscribers access the service within or outside of the provider's franchise footprint.[44] The Commission has already determined for competitive cable entrants that an LFA's jurisdiction "applies only to the provision of cable services over cable systems."[45] And "the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, *or any services beyond cable*

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and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 5631, ¶ 7 (1993) (Congress enacted the 1992 Cable Act because prior legislation "was not successful in creating a competitive multichannel video distribution marketplace as cable systems continued to develop without direct multichannel video competitors.").

[44] Some LFAs have suggested they can extend their jurisdiction to OVD services offered by cable operators. *See* Comments of Anne Arundel County, Maryland, *et al.*, *Promoting Innovation and Competition in the Provision of Multichannel Video Distribution* Services, MB Docket No. 14-261, at 9-12 (filed Mar. 3, 2015).

[45] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 121 (2007) ("*2007 Franchising Order*"), *pet. for review denied, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

services."[46] The LFA's jurisdiction does not reach true over-the-top video services at all. A contrary conclusion would extend the jurisdiction of an LFA to video offerings that have no actual connection to – and place no additional burden on – use of the public rights-of-way.[47] While LFAs may desire to expand their sources of regulatory reach as competitive video services emerge, the Commission should make clear that they have no basis for regulating online video services offered by MVPDs.

VII. CONCLUSION.

The Commission should take the actions outlined above to ensure sustained and increased competition in the market for distribution of video programming.

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[46] *2007 Franchising Order*, ¶ 122 (emphasis supplied).

[47] *See* 47 U.S.C. § 522(7)(B) (exempting from "cable system" definition "a facility that serves subscribers without using any public right-of-way").