Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)))	**MB Docket No. 14-261**
	)	

COMMENTS OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

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ITTA – The Voice of Mid-Size Communications Companies ("ITTA") hereby submits its comments in response to the December 19, 2014 Notice of Proposed Rulemaking ("*NPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] The *NPRM* seeks comment on whether to expand the FCC's definition of "multichannel video programing distributor" ("MVPD") to include services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Modernizing the definition of MVPD to reflect that video services are increasingly being provided online, the Commission contends, will better ensure that nascent, Internet-based video services will have access to the tools they need to compete with facilities-based providers.[2]

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[1] *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, FCC 14-210 (rel. Dec. 19, 2014) ("*NPRM*").

[2] *Id.* at ¶ 1. ITTA urges the Commission to ensure that its actions in this proceeding do not allow broadcasters and other programmers to circumvent any pro-competitive, consumer-focused rules the Commission has in place to preserve access to video content. *See, e.g., id.* at ¶ 26 (suggesting that the definition of MVPD would not apply to entities that make available only programming that they themselves own).

I. INTRODUCTION AND SUMMARY

ITTA's members provide a broad range of communications services to subscribers in predominantly rural areas across 45 states. In addition to voice and high-speed data offerings, all ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure. Collectively, ITTA members pass in excess of 3.9 million homes with video service and serve well over half a million video subscribers in approximately 50 television markets across the United States. As mid-size, incumbent local exchange carriers ("ILECs"), ITTA members are new entrant video providers in nearly every market they serve, competing head-to-head against both DBS providers, at least one (and in some cases multiple) incumbent cable operators, and online video providers such as Netflix, Hulu, Amazon Video, Apple TV, and others.

ITTA does not object to expanding the definition of MVPD to include additional entities that provide video services in competition with facilities-based providers. We have consistently advocated for regulatory parity and supported the notion that providers of similar services should be regulated in a similar manner so as to minimize marketplace distortions arising from government involvement.[3] In a competitive environment such as the video distribution

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[3] *See e.g., In the Matter of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, Comments of ITTA – The Voice of Mid-Size Communications Companies (filed Feb. 5, 2015) (urging the Commission to reject proposals that would single out ILECs for disparate regulatory treatment and place them at a competitive disadvantage in comparison to their cable and wireless competitors; thereby stifling innovation and investment in contravention of the Commission's IP transition and broadband deployment goals); *In the Matter of AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP*

marketplace, the regulatory framework the Commission has in place should not promote or impede one segment of the industry over others.

We also have consistently urged the Commission to proceed cautiously in extending legacy regulations to new technologies and to err on the side of reducing obligations for both new and established providers when growth in competition and other marketplace developments so warrant.[4]

To that end, we see merit to extending certain protections, such as the program access and retransmission consent rules, to any new entities that are appropriately incorporated into the definition of MVPD. However, we believe the Commission should refrain from imposing a host of onerous, legacy regulatory obligations on new providers and should release established providers from outdated regulations that ignore marketplace realities and place them at a competitive disadvantage.

As the Commission points out, the fact that video services are increasingly being provided online is evidence of the broader technology transition as distributors of video programming, both emerging and existing providers, migrate toward Internet Protocol ("IP") transmission.[5] This transition has and will continue to allow new video services and service providers to enter the marketplace. It also will enable facilities-based providers "to untether their

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Evolution, GN Docket No. 12-353, Comments of the Independent Telephone & Telecommunications Alliance (filed Jan. 28, 2013) (arguing that the primary objective that should guide the Commission in evaluating and implementing an appropriate regulatory framework for the technological evolution to all-IP networks is regulatory parity).

[4] *See id. See also* Letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket No. 14-16 (filed June 9, 2014) ("ITTA June 9th Letter") (advocating that in light of increased competition from online and over-the-top video programming sources, the Commission should refrain from applying legacy regulations to such services and level the playing field by relaxing or removing unnecessary regulatory requirements applicable to MVPDs to allow them to operate more nimbly in this new competitive landscape).

[5] *NPRM* at ¶ 2.

video offerings from their current infrastructure" and "encourage them to migrate their traditional services to Internet delivery."[6]

The *NPRM* provides numerous examples demonstrating that not only are consumers increasingly watching video programming online,[7] but also that established video content owners and distributors are exploring new business models involving Internet delivery to provide new and innovative products to consumers.[8] Companies such as DISH, Sony, and Verizon are not alone in entering the Internet-based video distribution realm.[9] ITTA member companies also are actively exploring such options as the marketplace evolves.

As the Commission wisely observes, however, the benefits to be derived from technology transitions in the video distribution marketplace are only possible if its rules "apply sensibly and in a way that encourages innovation regardless of how service is delivered."[10] As ITTA explains below, this calls for a regulatory framework that ensures reasonable and affordable access to content for both providers and consumers of video programming without creating or perpetuating an unlevel playing field among competing video programming distributors.

II. THE COMMISSION MUST ENSURE REASONABLE ACCESS TO CONTENT FOR VIDEO PROGRAMMING DISTRIBUTORS AND THEIR CUSTOMERS

One of the topics the Commission explores in the *NPRM* is application of what it refers to as the regulatory "privileges" of MVPD status to Internet-based video distributors in order to

[6] *Id.* at ¶ 3.

[7] *See, e.g., id.* at ¶ 13 (identifying various Internet-based distributors of linear and on-demand video services, such as Aereo, Netflix, Google Play, iTunes Store, FilmOn, and YouTube).

[8] *See, e.g., id.* at n. 1 (noting that Comcast, DirecTV, DISH, Sony, and Verizon have each announced plans to launch Internet-delivered streaming video services).

[9] *See id*.

[10] *Id.* at ¶ 3.

foster competition and better reflect current marketplace and consumer preferences.[11] ITTA agrees that as more distributors transition to Internet-based video delivery, it makes sense for the Commission to continue to apply certain protections to ensure reasonable and affordable access to content for all video programming distributors and their customers.

Such protections would include Commission rules relating to program access, retransmission consent, and video programming accessibility. Extending the program access rules to additional entities that meet the definition of MVPD would allow those providers access to critical programming needed to attract and retain subscribers. Extending the retransmission consent rules to such providers would allow them to negotiate for carriage of broadcast television signals. Application of both the program access and retransmission consent rules, therefore, would enable Internet-based video providers to offer both cable-affiliated and broadcast programming that customers may wish to view over a broadband connection.[12] Extending pro-consumer protections, such as certain FCC rules relating to video programming accessibility, would ensure viewers are not denied the benefits of those provisions simply because they are viewing video programming via the Internet rather than traditional video distribution platforms.

The program access rules, among other things, require cable-affiliated programmers to make their programming available to MVPDs on nondiscriminatory rates, terms, and conditions.[13] Although these protections have been diluted by the Commission's decision to allow the contract exclusivity prohibition to sunset, it is nonetheless important that these rules continue to apply so that MVPDs have access to cable-affiliated programming desired by

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[11] *Id.* at ¶¶ 39-45.

[12] *See id.* at ¶ 5.

[13] *See* 47 U.S.C. § 548; 47 C.F.R. §§ 76.1001-03.

consumers.[14] The Commission has repeatedly concluded over the past several years that vertically-integrated cable companies continue to have the incentive and ability to withhold valuable video programming to the detriment of competition and consumers.[15] The program access rules are even more important today, given ongoing consolidation in the cable industry.

This trend recently led the Commission to expand the scope of its program access protections to additional types of content to ensure non-affiliated MVPDs have access to programming that is vital for them to compete. Rather than limiting application of the program access conditions adopted in the Comcast/NBCU merger proceeding to regional sports networks ("RSNs"), which the Commission has recognized "have no good substitutes, are important for

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[14] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket Nos. 12-68, 07-18, 05-192, 07-29, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 12-123 (rel. Oct. 5, 2012).

[15] *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶ 60-61 (2007), *aff'd sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010); *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011); *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011), *affirmed*, *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.); *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011), *affirmed*, *AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2nd Cir.). Moreover, ITTA observes that in each case, the Commission's findings have been affirmed by the courts.

competition, and are non-replicable,"[16] the Commission applied the conditions to *all* Comcast/NBCU content. For the first time, the Commission recognized that certain national cable programming networks constituted "marquee programming" for which subscribers would switch to a different MVPD if that programming became unavailable or too expensive.

To preserve and promote competition in the video distribution marketplace, the Commission must ensure that its rules permit all MVPDs to obtain access to vertically integrated programming, including RSNs, on reasonable terms and conditions. Without access to such programming, competitive providers cannot offer a meaningful alternative for consumers. Consumers should not be denied the benefits of increased retail competition in the video distribution marketplace because incumbent cable operators withhold access to valuable, must-have programming.

The Commission's retransmission consent rules also should be applied to online video distributors that the Commission appropriately categorizes as MVPDs. Among other things, these rules require broadcasters to negotiate in good faith with MVPDs for retransmission of broadcast television signals[17] and prohibit broadcasters from negotiating exclusive retransmission consent agreements with any MVPD.[18] Although the retransmission consent regime is in dire need of reform, these rules could provide a baseline from which to establish expectations for online video distributors' access to broadcast programming that consumers

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[16] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Notice of Proposed Rulemaking, FCC 12-30, ¶ 28 (rel. Mar. 20, 2012) (internal citations omitted).

[17] *See* 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65.

[18] *See* 47 U.S.C § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(l).

desire. Without such protections, broadcasters could potentially refuse to negotiate with and thereby withhold their signals from online video distributors that wish to carry those stations.

As indicated above, the existing retransmission consent framework suffers from a number of major flaws because it has not kept pace with industry developments over the past two decades. The video distribution marketplace has undergone sweeping changes since Congress enacted the 1992 Cable Act, changes that have produced an environment in which MVPDs, particularly smaller providers and new entrants, have little to no bargaining power for required inputs despite increased retail competition.

Although the Commission has taken some initial steps to revise its rules to account for this drastically altered competitive landscape,[19] it must do more to ensure that the retransmission consent rules are in sync with the realities of the current marketplace. Among other things, the Commission should move forward to eliminate the syndicated exclusivity and network non-duplication rules.[20] These rules are no longer necessary in today's marketplace, and suspending them would give all MVPDs the flexibility to offer alternative broadcast programming desired by consumers. The Commission also should adopt a standstill provision to prevent signal loss for consumers during retransmission consent negotiation impasses.[21] Doing so would ensure that a stall in negotiations does not disrupt viewers' access to desired programming.

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[19] *See In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-29 (rel. Mar. 31, 2014). In accordance with the passage last fall of the STELA Reauthorization Act, the ban now applies to all same-market television stations that are not commonly owned. *See In the Matter of Implementation of Sections 101, 103, and 105 of the STELA Reauthorization Act of 2014,* MB Docket No. 15-37, Order, FCC 15-21 (rel. Feb. 18, 2015). *See also In the Matter of Sports Blackout Rules*, MB Docket No. 12-3, Report and Order, FCC 14-141 (rel. Sept. 30, 2014).

[20] *See In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of ITTA (filed June 26, 2014).

[21] *See* ITTA June 9th Letter at 5.

Additionally, the Commission should take steps to address problematic conduct by broadcasters, such as wholesale bundling and the blocking of online content, during retransmission consent negotiations.[22] To be sure, the harms caused by the outdated retransmission consent regime are not limited to soaring retransmission consent fees. ITTA members and other MVPDs commonly encounter and are forced to accept program tying, where retransmission of broadcast stations is conditioned upon carriage of less popular multicast channels or affiliated non-broadcast content. Broadcasters also engage in broadband tying, where they require MVPDs to pay per-subscriber fees for broadband customers, regardless of whether the customers subscribe to video service or access the subject video programming online. More recently, broadcasters have begun to force MVPDs to accede to their unreasonable demands by blocking online access to content for MVPDs' broadband subscribers, including non-video subscribers, during impasses in negotiations. The Commission can and should modify its rules to address these and other practices that lead to less marketplace competition and higher prices for consumers of video services.

Another area that is ripe for reform is the Commission's complaint process for retransmission consent and program access disputes.[23] As the Commission notes in the *NPRM*, entities that believe programmers have violated either the retransmission consent or program access rules may file a complaint at the FCC.[24] Unfortunately, the Commission's existing complaint processes, which are inadequate even for large, well-financed MVPDs, are virtually unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief. For such providers, the time and financial burden

[22] *See id*. at 3, 6.

[23] *See id*. at 4.

[24] *NPRM* at ¶¶ 40, 43.

involved in bringing a retransmission consent or program access complaint to remedy the immediate harm from lack of access to programming make pursuing such remedies infeasible.[25] The Commission must take action to address this issue in a manner that would give such providers meaningful relief.

The Commission also examines in the *NPRM* whether to require Internet-based video distributors to comply with the various regulatory obligations (as opposed to "privileges") applicable to established MVPDs.[26] As with the retransmission consent and program access rules, some of these requirements may help ensure reasonable access to programming for consumers such that it may make sense for them to apply to Internet-delivered video programming.

For instance, the Commission may wish to expand its rules relating to closed captioning to ensure consumers have greater access to video programming made available directly to end users online. Currently, the FCC's rules only require closed captioning of IP-delivered video programming if it is published or exhibited on television with captions.[27] Should the Commission extend the closed captioning rules to Internet-delivered programming, however, it seems most logical for it to continue to apply the approach embodied in the current IP captioning

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[25] The ability to pursue relief through the complaint process is further hampered by mandatory non-disclosure provisions typically found in retransmission consent and other programming agreements. These provisions prohibit MVPDs from revealing the contract rates, terms, and conditions that are subject to dispute. This lack of transparency has become a valuable tool in the broadcaster's arsenal to silence smaller MVPDs through the threat of litigation.

[26] *NPRM* at ¶¶ 46-63.

[27] *See* 47 U.S.C. § 613(c)(2)(A); 47 C.F.R. § 79.4(b). *See also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, ¶ 25 (2012) (the IP closed captioning requirement "is triggered only after the programming has been shown on television with closed captions").

rules, which places the captioning responsibility on the video programmer and generally limits the programming distributor's responsibility to pass-through obligations.[28]

It also may be useful to require Internet-based video providers to pass through any video description and emergency information provided with video programming they deliver, to the extent it is technically feasible for them to do so.[29] Such requirements are important to provide access to programming for consumers who are blind or visually impaired and ensure consumer safety in times of emergency. However, ITTA cautions the Commission not to expand these requirements beyond the obligation to pass through the relevant information to viewers, as the burdens associated with other obligations in these areas could deter market entry.[30]

With respect to many of the remaining obligations applicable to MVPDs today, there are valid public policy justifications for declining to apply them to the Internet-based distribution of video programming. The signal leakage rules, for instance, have no application in the context of Internet delivery of video programming.[31] As the Commission observes, MVPDs that distribute video programming online will not utilize aeronautical frequencies to which the signal leakage

[28] *See* 47 C.F.R. § 79.4(c).

[29] *See* 47 C.F.R. §§ 79.3(b)(5), 79.2.

[30] For instance, the FCC's rules require MVPD systems that serve 50,000 or more subscribers to provide 50 hours per quarter of video description for each of the five most popular non-broadcast networks, which could be cost prohibitive for emerging online video services. 47 C.F.R.§ 79.3(b)(4).

[31] *See* 47 C.F.R. § 76.610; *see also* 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.612, 76.613, 76.614, 76.616, 76.617, 76.1803, 76.1804, and 1.1705(a)(1).

rules relate.[32] The inside wiring rules also have no application since online video distributors typically do not control the facilities over which such services are provided.[33]

Other requirements, such as the navigation device rules (both with respect to commercial availability of such devices and accessibility of user interfaces, guides, and menus accessed through such devices),[34] would potentially impose substantial burdens without any countervailing public benefit.[35] Because extending such legacy requirements or other technology mandates to online video distribution could undermine the Commission's objectives to incentivize entry by new providers and increase competition, it would appear to be inappropriate for the Commission to apply such requirements to the Internet-based distribution of video programming.

III. THE COMMISSION SHOULD REFRAIN FROM UNNECESSARY REGULATION THAT IMPEDES VIDEO COMPETITION

A. The Commission Should Pursue a Light-Touch Regulatory Approach for Facilities-Based MVPDs That Offer Video Programming Services Over the Internet.

As indicated above, some MVPDs that currently deliver video programming as a managed service over their own facilities have announced plans to expand those video offerings to the Internet. The migration to over-the-top ("OTT) delivery of video programming is the way of the future, and ITTA member companies are among those entities that are actively exploring Internet-based video distribution business models.

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[32] *NPRM* at ¶ 60.

[33] *See* 47 C.F.R. §§ 76.802(l), 76.804(f), 76.805, 76.806(d); *see also* 47 U.S.C. § 544(i). To the extent Internet-based video distributors control the last mile of the transmission path, they would be facilities-based MVPDs to which the rules already apply.

[34] *See* 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210, 79.108.

[35] *See* Letter from Leora Hochstein, Verizon, to Marlene H. Dortch, FCC, MB Docket No. 12-83 (filed Nov. 13, 2015).

In situations where a wireline facilities-based provider launches an OTT video service, the Commission proposes to regulate the provider as a cable operator with respect to its managed video service, and as a non-cable MVPD with respect to its OTT video service.[36] In other words, the Commission would treat the facilities-based provider, with respect to its OTT video offering, in the same manner as other Internet-based video distributors and apply any MVPD regulations it extends to Internet-based video distributors in this proceeding to facilities-based providers in the same manner.[37] Moreover, the wireline facilities-based provider's OTT service, if provided to consumers without regard to whether they subscribe to the provider's managed video service, would be considered a non-cable MVPD service both inside and outside the provider's footprint, even if it is accessible over that provider's broadband facilities.[38]

ITTA supports this approach insofar as it treats facilities-based providers, with respect to the OTT services they offer, like other Internet-based video programming distributors. We agree that video programming services that a wireline facilities-based provider offers over the Internet should not be regulated as cable services. Regulatory parity for providers of similar services is essential to promoting robust competition and the transition to next-generation services. We disagree, however, with the Commission's assumption that continued application of the full panoply of existing cable regulations to wireline facilities-based providers of managed video service is warranted in this new environment.

As explained below, applying a light-touch regulatory approach only with respect to OTT delivery of video programming does not go far enough because it ignores the plethora of legacy

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[36] *NPRM* at ¶ 78. Likewise, where a DBS provider offers video programing services over the Internet, the Commission proposes that those services should not be regulated as DBS services, but rather as a non-DBS MVPD services. *Id.* at ¶ 79.

[37] *NPRM* at ¶ 78.

[38] *Id*.

obligations that remain in place for facilities-based providers that are already competing with Internet-based video programming distributors today. If the Commission's goal in this proceeding is to bring its rules into alignment with consumer expectations and the realities of the current marketplace where video is no longer tied to a particular transmission technology,[39] any legacy rules that are deemed unnecessary or inappropriate for new platforms such as Internet-delivered video services should be carefully reexamined as to their validity for facilities-based MVPDs and should be removed where appropriate.

B. The Commission Should Ensure a Level Playing Field Among Competing Video Programming Distributors By Removing Legacy Obligations That Are No Longer Warranted Based on Current Marketplace Realities.

The Commission has recognized on numerous occasions that technology transitions and the migration to IP-based technologies and infrastructure should not be impeded by outdated technological distinctions. As the *NPRM* observes, "innovation must be encouraged, but not at the expense of technology-neutral public policies."[40] More recently, Chairman Wheeler stated that he "continue[s] to believe that technology transitions will be speeded by technology-neutral rules that promote, preserve, and protect the competitive choices that consumers expect."[41] The Commission can "help maintain those competitive choices through [decisions that promote] symmetrical treatment of like services…"[42]

Unfortunately, the approach suggested in the *NPRM*, if adopted, would do the opposite since the result would be to create one class of facilities-based MVPDs that have multiple legal

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[39] *See id.* at ¶ 4.

[40] *Id.* at ¶ 3.

[41] Statement of Chairman Tom Wheeler, *In the Matter of Connect America Fund; Developing a Unified Intercarrier Compensation Regime,* WC Docket No. 10-90, CC Docket No. 01-92, *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0211/FCC-15-14A2.pdf.

[42] *Id*.

obligations and another class of Internet-based MVPDs that have scaled back regulatory requirements. Should the Commission continue to subject wireline MVPDs to legacy cable regulations, Internet-based video distributors would be required to comply with one regulatory framework, while facilities-based MVPDs like ITTA member companies would be required to continue to adhere to a separate regulatory framework that entails numerous additional obligations.

As indicated in the *NPRM*, these obligations include must carry obligations; various franchising requirements; regulatory fees payments; emergency alert system obligations; V-chip requirements; children's television commercial limits; program exclusivity rules; numerous notice and reporting requirements; rules relating to political programming, sponsorship identification, and lotteries; public inspection file requirements; PEG and leased access obligations; cross ownership rules and buy-out restrictions; national subscribership limits; limitations on carriage of vertically integrated programming; rate regulation (e.g., basic service tier, tier buy-through, and other requirements); regulation of services, facilities, and equipment, including minimum technical standards; customer service rules; equipment compatibility requirements; plug and play rules; privacy protections; and rules relating to transmission of obscene programming.[43]

While some of these obligations are tied to facilities-based delivery platforms that may not have direct application in the Internet ecosystem, they nonetheless are significant and entail substantial burdens. For example, franchise fees that wireline MVPDs must pay typically account for 3-5% of their revenues for video services and related equipment. These fees can translate to millions of dollars per year in costs for a facilities-based MVPD that are passed on to

[43] *See NPRM* at ¶¶ 76-77.

their customers while OTT competitors do not have a similar obligation to pay. Moreover, franchise fees are not linked to the facilities over which wireline MVPDs provide video service. Rather, governmental authorities collect separate rights-of-way fees in connection with the facilities such providers deploy in a particular jurisdiction. As such, maintaining franchise fee obligations for facilities-based providers when their OTT competitors do not face similar requirements results in regulatory and competitive disparities that have no rational basis.

Similarly, MVPDs that are regulated as cable operators must comply with PEG obligations that involve meaningful costs for consumers. It is not uncommon for subscribers to pay $1.25 a month or more in PEG-related fees, while subscribers to OTT services do not pay similar fees. Indeed, these requirements and their associated expense for consumers are becoming increasingly unjustified as the marketplace transitions to Internet-delivered video distribution. The Internet has provided communities and local public interest groups a platform to distribute their own programming, diminishing the need for facilities-based MVPDs to set aside valuable channel capacity for such programming. And to the extent that a local franchising authority still requires facilities-based MVPDs to collect PEG fees from consumers on the municipality’s behalf even when the municipality does not provide the MVPD with PEG content, this practice effectively enacts a local tax on consumers with no associated public interest benefit.

Subjecting facilities-based MVPDs to these and other obligations while allowing their OTT competitors to operate without similar regulatory constraints is fundamentally inconsistent with the principle of technological neutrality. Rather, it creates an unlevel playing field that distinguishes among MVPDs precisely based on the method they use to deliver similar video programming services.[44] The Commission's proposed interpretation clearly is not "consistent with Congress's intent to define 'MVPD' in a broad and technology-neutral manner."[45]

It is incumbent on the Commission to ensure "that legacy regulations and services [do] not become a drag on the transition to a more modern and efficient use of resources… or make it difficult to achieve certain public policy goals."[46] Requiring facilities-based providers, especially smaller, new entrant MVPDs, to continue to comply with burdensome video regulations when the industry is moving to next-generation platforms will discourage investment and undermine technological progress.

The Commission has an established policy of eliminating unnecessary and outdated requirements when it makes sense to do so.[47] The marketplace transformation that is currently underway provides an appropriate opportunity for the Commission to exercise that policy to identify and remove the outdated regulations that have resulted in an unequal playing field among providers of similar services. To allow one class of competitors to operate largely unfettered by regulatory requirements while another class of competitors is burdened with costly, outmoded, and unnecessary regulatory obligations chills investment and stifles further

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[44] Under the Commission's existing regulatory framework, ILECs like ITTA members already operate at a competitive disadvantage vis-à-vis their cable and wireless competitors with respect to the provision of Internet and voice services because ILECs must comply with legacy obligations tied to their former dominant position in the TDM-based world while their competitors are free to transition to IP-enabled platforms without such burdensome regulatory constraints.

[45] *NPRM* at ¶ 23.

[46] "Connecting America: The National Broadband Plan," p. 59 (2010), *available at*: http://www.broadband.gov/.

[47] *See* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011) ("EO 13579"); Federal Communications Commission, *Final Plan for Retrospective Analysis of Existing Rules*, May 18, 2012, *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf (last visited: Feb. 20, 2014).

innovation. ITTA urges the Commission to scale back those regulations that would undermine its goals of promoting competition and facilitating the transition to IP-based services.

IV. CONCLUSION

The Commission's regulatory policies should be technology neutral. As such, any legacy rules that are deemed unnecessary or inappropriate for new platforms such as Internet-delivered video services should be carefully reexamined as to their validity for facilities-based MVPDs. Additionally, the Commission must continue to preserve policies that ensure all MVPDs and their customers have access to programming on reasonable rates, terms, and conditions regardless of the delivery platform.

Respectfully submitted,

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