Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY.

The Commission should adopt its proposal to include over-the-top distributors of linear video programming within the definition of Multichannel Video Programming Distributor ("MVPD").[2] There is broad support in the record for the Commission's effort to modernize its MVPD definition. Taking this step would promote the Commission's policy goal of encouraging increased video competition, including from online video providers. Among other things, this step would facilitate online providers' ability to gain access to video programming and enable the Commission to address practices by programmers that stymie greater video competition from online providers and experimentation with these new business models that may better serve consumers. As it extends the protections of the program access and retransmission consent regimes to these new competitors, the Commission should consider additional actions to improve access to must-have programming for all competitive MVPDs.

The record also makes clear that the Commission should not impose outdated and burdensome regulations on over-the-top MVPDs because that would undermine the purposes of

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

[2] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, 29 FCC Rcd 15995 (2014) ("*NPRM*").

this proceeding to promote new online competition in the video marketplace and to create additional competitive choices for consumers. Consistent with the approach outlined in the *NPRM*, the Commission should confirm that legacy cable regulation and franchising rules will not apply to over-the-top video services, regardless of whether the over-the-top provider is also a provider of a managed video service or a broadband service used by subscribers to access the online service. In addition, to provide the maximum flexibility for these emerging over-the-top competitors, the Commission should reject any form of "must-carry" obligations as well as technology mandates for online MVPDs.

II. THE COMMISSION SHOULD RECOGNIZE THAT OVER-THE-TOP DISTRIBUTORS OF LINEAR VIDEO PROGRAMMING MAY QUALIFY AS MVPDS.

The Commission received strong support from diverse quarters for concluding that over-the-top video distributors that provide multiple streams of prescheduled, linear programming may qualify as MVPDs under the statute and thus are entitled to the benefits of that status.[3] The record supports the Commission's legal analysis that a "prescheduled stream[] of video programming" is a "channel of video programming" for purposes of the statutory definition, and that an over-the-top video provider offering multiple streams of such programming falls within the definition of MVPD.[4] Moreover, commenters echoed the Commission's policy goals of granting over-the-top MVPDs the protections of the program access rules and the good faith

[3] *See* Comments of ITTA, at 2-4; Comments of FilmOn X, at 4; Comments of Sky Angel, at 2-7: Comments of Writers' Guild of America, West ("Writers' Guild"), at 2-3; Comments of ABC Television Affiliates Association, *et al.* ("Network Affiliates"), at 4-6; Comments of National Association of Broadcasters ("NAB"), at 2-3; Comments of Public Knowledge, at 3-4; Comments of Consumer Federation of America ("Consumer Federation"), at 6.

[4] *See, e.g.*, Comments of Writers' Guild, at 2-3; Comments of Network Affiliates, at 6-13; Comments of Public Knowledge, at 4-15; Comments of FilmOn X, at 15-20; Comments of Sky Angel, at 2-7. Given that the statutory definitions provide a clear legal basis for the Commission's conclusions regarding online MVPDs, the Commission does not need to invoke Section 706 to accomplish the goals of this proceeding. *Cf.* Comments of Consumer Federation, at 15-18.

obligations as broadcasters negotiate retransmission consent, recognizing that these frameworks will help ensure that over-the-top MVPDs have access to cable-affiliated and broadcast programming.[5]

The Commission must reject statutory interpretations advanced by a few cable incumbents and broadcast groups that would prevent over-the-top providers from invoking these programming protections and thus being better able to compete effectively with these same cable companies and broadcasters.[6] As the Commission explained in its legal analysis, the language of the statute does not require, and the legislative policy goals do not support, classifying as "MVPDs" only those entities that provide subscribers a transmission path to receive video programming.[7] To be sure, one could distort the definition of MVPD to read "multiple channels of video programming" as "multiple *cable channels* of video programming,"[8] but that reading equates MVPDs with cable operators, an outcome directly at odds with the list of video distributors who qualify as MVPDs under the statute.[9] Moreover, the Commission has already found that video programming distributors who have no ownership or management responsibility for the networks over which they deliver service can be MVPDs.[10] The Commission's conclusion with respect to over-the-top video distributors is more consistent with the statute.

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[5] *See, e.g.*, Comments of ITTA, at 4-8; Comments of Writers' Guild, at 6-7; Comments of FilmOn X, at 25-27; Comments of Sky Angel, at 30-37; Comments of NAB, at 5-8; Comments of Consumer Federation, at 10-14; Comments of Public Knowledge, at 19-27.

[6] *See, e.g.*, Comments of National Cable & Telecommunications Association ("NCTA"), at 5-9; Comments of Cox Communications, at 5-9; Comments of Discovery Communications, at 16-18; Comments of Consumer Electronics Association, at 4-6; *cf.* Comments of the Walt Disney Company, *et al.*, at 6 (Commission should not expand definition of MVPD).

[7] *See NPRM*, ¶¶ 18-23.

[8] *See, e.g.*, Comments of NCTA, at 7 (citing "cable channel" as definition of "channel").

[9] *See* 47 U.S.C. § 522(13).

[10] *See Implementation of Section 302 of the Telecommunications Act of 1996,* Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, ¶ 171 (1996).

Based on support for flexibility in imposing MVPD regulations on over-the-top providers and concerns with the unintended consequences regarding automatic reclassification, the Commission should allow qualifying online providers the option of determining whether to offer their services as an MVPD.[11] Online MVPDs likely will experiment with a variety of business models as they develop their programming packages. Therefore, the Commission should allow online providers to determine whether the benefits that come with MVPD status are justified in light of their business plans, technical limitations, ability to acquire content, and the regulatory requirements identified in this proceeding. Consistent with this opt-in approach, the Commission should establish a registration process for online providers who believe they qualify as MVPDs and are interested in assuming the related rights and responsibilities.

III. THE COMMISSION SHOULD CONSIDER ADDITIONAL ACTIONS TO FACILITATE ACCESS TO MUST-HAVE VIDEO PROGRAMMING FOR COMPETITIVE MVPDS.

As the Commission expands the protections of its program access and retransmission consent rules to over-the-top video distributors, it should consider taking additional steps to improve the ability of competitive MVPDs to gain access to and distribute desired programming on reasonable terms. Market forces are producing new choices for consumers in how, where and from whom they can obtain video programming, but the primary concern for competitive MVPDs remains obtaining access to desirable programming and doing so on terms that let them assemble attractive offerings for consumers.[12] Including over-the-top video distributors within the definition of MVPD will give them the right to negotiate with broadcast stations and cable-

[11] *See* Comments of the Wireless Internet Service Providers Association ("WISPA"), at 3-4; Comments of Electronic Frontier Foundation, at 2-3; Comments of Supercloud, at 1-2; Comments of Digital Media Association, at 5-7.

[12] *See, e.g.*, Comments of Consumer Federation, at 10-14; Comments of ITTA, at 4-8; Comments of Sky Angel, at 8; Comments of FilmOn X, at 3; Comments of The United States Telecom Association ("USTelecom"), at 3-4.

affiliated programming vendors for competitive distribution options and program lineups that consumers want and demand in the same ways that these rules have benefited competitive, facilities-based MVPDs.[13] Yet, even with the protections of these rules, competitive MVPDs are frequently not able to obtain distribution rights on reasonable terms.[14]

Broadcast programming channels remain popular with many consumers, and television broadcast stations have substantial leverage in retransmission consent negotiations over MVPDs as they are the only source for this must-have content. These broadcasters have leverage in part due to the regulatory preferences and protections they enjoy, many dating from an earlier, less competitive, time period. The Commission can help rectify this imbalance for competitive video providers. For example, the Commission should exercise its authority over retransmission consent negotiations to provide for continuing carriage of broadcast television signals when retransmission consent negotiations break down in order to avoid a black-out for consumers.[15] The Commission can also address more recent negotiating tactics by television station owners by adding to the list of practices deemed not negotiating in good faith to include a broadcaster blocking Internet access to its programming for an MVPD's subscribers during retransmission consent negotiations.[16] Other actions to restore balance in negotiating positions between competitive MVPDs and broadcasters include eliminating the network programming non-duplication and syndicated programming exclusivity rules.[17]

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[13] *See* Comments of Writers' Guild, at 6-7; Comments of WISPA, at 4-5.
[14] *See* Comments of USTelecom, at 3-9.
[15] *See id.* at 5-6; Comments of ITTA, at 8-10; *cf.* 47 U.S.C. § 325(b) (directing Commission to adopt regulations "to govern the exercise by television broadcast stations of the right to grant retransmission consent").
[16] *See* Comments of ITTA, at 8-10.
[17] *See* Comments of USTelecom, at 6-7.

The Commission should also be vigilant in maintaining the competitive dynamic in negotiations between cable-affiliated programming vendors or other large programmers and competitive MVPDs. Even as more competitive MVPDs emerge, video programming vendors still have substantially more leverage in negotiations, resulting in increased programming costs and bigger bundles of channels that MVPDs – and their subscribers – are essentially forced to purchase.[18] In these situations, programming vendors frequently decline to consider alternative arrangements to pricing or channel selection – such as viewer-based, rather than subscriber-based pricing. Such alternative pricing arrangements could allow distributors to offer more flexible and slimmed down packages to consumers, which could reduce subscription prices, and/or allow smaller tiers of programming at reduced rates.

The ultimate effects of these practices are to reduce choice and increase prices for consumers and to harm competition in the video distribution marketplace.[19] To alleviate such harms to consumers and to the market for video programming, the Commission should consider not only expanding the class of providers that are eligible to invoke the protections of the program access and retransmission consent frameworks but also completing rulemakings to adopt stronger protections for competitive MVPDs in negotiations for distribution of video programming.

IV. THE COMMISSION SHOULD REJECT ILL-FITTING AND BURDENSOME REGULATIONS ON OVER-THE-TOP MVPDS.

In adopting a regulatory framework for online MVPDs, the Commission should encourage, rather than impede, further development of these emerging video services. To accomplish that goal, the Commission must reject calls to impose outdated and burdensome regulations on over-the-top MVPDs and, indeed, consider eliminating certain outdated regulatory

[18] *See id.* at 9; *cf.* Comments of Tennis Channel, at 7-10.
[19] *See* Comments of ITTA, at 8-10; Comments of Consumer Federation, at 24-26.

and technology mandates for all MVPDs to recognize the competitive developments that are bringing consumers new choices to view video content.

A. Over-the-Top MVPDs Should Not Be Subject to Legacy Cable Regulation.

The Commission should confirm that over-the-top video distributors are immune from legacy cable regulations because they do not provide "cable services" on "cable systems."[20] Moreover, the Commission should consider the regulatory status of an online MVPD independently of the provider's other offerings, including broadband facilities and/or a managed video service. The owner or manager of a broadband network is not offering a "cable service" simply because subscribers to its broadband service also sign up for its online video service.[21] And, since the online service does not require "signal generation, reception, and control equipment" in the network, offering an over-the-top video service does not convert broadband facilities into a "cable system."[22]

The Commission should explicitly reject contrary analyses of the statutory definitions of "cable service" and "cable system" designed solely to burden over-the-top video services with legacy cable regulation. These analyses blur the distinctions between over-the-top and managed video services, and equate "transmission" in the definition of cable service with simply acting as the source for online content to reach the incorrect conclusion that any video service is a "cable service" if offered by a cable operator.[23] Moreover, the Commission has already determined that an Internet access service that consumers – rather than the operator – use to decide what content to retrieve is not a cable service and is not the type of "subscriber interaction" mentioned in the

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[20] *See* Comments of Verizon, at 8-10; Comments of Charter, at 7-9.
[21] *See* Comments of ITTA, at 13-14; Comments of NCTA, at 35-36.
[22] *See* 47 U.S.C. §522(7).
[23] *See* Comments of Anne Arundel County, Maryland, *et al.*, at 5-9; Comments of Public Knowledge, at 37-38; Comments of Alliance for Community Media, at 3-4; *cf.* 47 U.S.C. § 522(6) ("cable service" requires "the one way transmission to subscribers of (i) video programming").

definition of "cable service."[24] Interpretations to the contrary simply conflict with the language of the statute and Commission precedent. They would also undermine the Commission's goal of encouraging more competition from online video sources.

Similarly, the Commission should confirm that an over-the-top video service offered by a cable operator independent of its managed video 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 cable operator's franchise footprint.[25] First, the Commission has already determined that the jurisdiction of an LFA does not extend to non-cable services offered to an operator's subscribers on the cable system facilities.[26] So, the LFA's jurisdiction does not reach over-the-top video services at all. Moreover, there is no law supporting or policy reason mandating that a service – over-the-top or otherwise – accessed outside a franchise territory somehow "relates back" to the franchising authority within whose rights-of-way an affiliated cable operator built cable facilities.[27] That theory leads to the impossible result that the over-the-top service would be subject to multiple cable franchises because subscribers to cable systems in multiple franchise territories could use the over-the-top service outside any one LFA's territory. And, in direct conflict with Title VI, that theory extends the jurisdiction of the LFA to offerings that have no actual connection to – and place no additional burden on – use of the public rights-

[24] *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 64-68 (2002); 47 U.S.C. § 522(6) ("cable service" requires "the one way transmission to subscribers of (i) video programming . . . and subscriber interaction, if any, which is required for the selection or use of such video programming").
[25] *See* Comments of Anne Arundel County, at 9-12.
[26] *See* Comments of Verizon, at 10-12.
[27] *See* Comments of Anne Arundel County, at 10-12.

of-way.[28] While LFAs may desire to expand their sources of revenue as competitive video services emerge, they simply have no statutory basis for creating a jurisdictional hook for online MVPDs.

These attempts to impose cable regulation on online video services will thwart a thriving market for competitive video services. Over-the-top services 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 such requirements would deter innovation and investment, whether the over-the-top video distributor 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. As the Commission has concluded, and should confirm in this proceeding, over-the-top video distribution services are not subject to legacy cable regulation.[29] This result is true without regard to whether the online MVPD also provides a separate, managed video service and/or broadband Internet access service.

B. Over-the-Top MVPDs Should Not Be Subject to Must-Carry Obligations.

In its effort to promote these nascent online video distributors, the Commission should reject proposals to require mandatory carriage of specific programming.[30] Over-the-top video distributors differ from traditional cable operators not only in the technology their subscribers use to view content but also in their ability to access certain content, such as broadcast television signals. Online providers are just developing their business models and may target subscribers interested in niche or specialized program packages. Imposing cable-like must-carry obligations for commercial or noncommercial broadcast television signals, or public, educational and

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[28] *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").
[29] *See NPRM*, ¶ 78.
[30] *See* Comments of NAB, at 21-25; *cf.* Comments of Public Broadcasting Service, *et al.*, at 2-7.

governmental programming channels would conflict with these business models and the Commission's policy goals, and could frustrate the emergence of these new choices for consumers.

The portable nature of online MVPD services also makes any must-carry obligation a bad regulatory fit. The Commission should reject such obligations. First, to promote diverse business models, online MVPDs should have the freedom not to carry any broadcast station signals at all. Second, they should not have to negotiate for and add technology to implement restrictions on geographic distribution for channels they do not want to carry in the first instance.[31] The must-carry obligations of cable operators were developed in a different time for different policy reasons and under a different set of technical assumptions for facilities-based, managed video services. Whatever benefit they still serve today, the Commission should not apply such mandates to online MVPDs at this early stage in their development.

Finally, applying must-carry obligations to emerging online video providers could not be justified under the First Amendment. Even in the case of traditional cable, the existence of bottleneck monopoly control was central to the Supreme Court's upholding of must-carry requirements.[32] No such justification exists to force online providers to carry programming that they do not wish to carry.

C. Over-the-Top MVPDs Should Not Be Subject to Technology Mandates.

The Commission should confirm that technology mandates, such as its various navigation device rules, do not apply to over-the-top MVPDs. The record reflects that CableCARDs are

[31] *See* Comments of NAB, at 12, 14-15 (discussing online video distributors implementing "geo-matching" for broadcast signals).
[32] *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 196-213 (1997).

irrelevant to online MVPDs.[33] The Commission should not now adopt some new requirement to require online MVPDs to create a CableCARD-replacement interface that will work with any retail set-top box.[34] Moreover, online MVPDs can generally provide subscribers with connectivity through an application-based solution for any broadband Internet access service, which allows consumers to readily use their own equipment to access online MVPD services – the goal of Section 629 and the Commission's integration ban for MVPD-supplied navigation devices. In any event, eliminating existing technology mandates – not creating new ones – should be the goal of this proceeding to promote competition and consumer choice. Given these competitive possibilities, the Commission should waive or sunset all navigation device mandates for all MVPDs.

[33] *See* Comments of Public Knowledge, at 29; Comments of ITTA, at 12 (navigation device rules would potentially impose "substantial burdens without any countervailing public benefit"); Comments of Verizon, at 12-14.

[34] *See* Comments of TiVo, at 6-8.

V. CONCLUSION.

For the reasons set forth in Verizon's comments and these reply comments, the Commission should expand the definition of Multichannel Video Programming Distributor to include over-the-top video distributors and implement that definition consistently with Verizon's recommendations.

Respectfully submitted,

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