

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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**TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY .....1

I. MOST PROPONENTS OF CLASSIFYING OVDS AS MVPDS IGNORE THE  
STATUTORY LANGUAGE THAT BARS SUCH A RULING.....3

II. THE COMMENTS PROVIDE NO SUPPORT FOR THE CONCLUSION THAT  
CLASSIFYING OVDS AS MVPDS WILL HAVE THE PRO-COMPETITIVE  
BENEFITS ASSERTED BY ITS PROPONENTS. ....10

III. OVD SERVICES THAT ARE PROVIDED BY CABLE OPERATORS TO ISP  
CUSTOMERS AND ARE NOT RESTRICTED TO THE OPERATORS’ OWN  
CABLE CUSTOMERS ARE NOT “CABLE SERVICES” AND SHOULD  
HAVE THE SAME REGULATORY STATUS AS NON-CABLE OVDS. ....17

CONCLUSION.....20

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments on the Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

In 1996, Congress established that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Nevertheless, having recently adopted what was once understood to be the “nuclear option” of Title II regulation of broadband Internet access service to address a hypothetical threat to the openness of the Internet, the Commission in this proceeding is proposing to apply an arsenal of regulations from the Cable Consumer Protection and Competition Act of 1992, purportedly to promote competition in the already competitive and well-functioning online video marketplace.

As NCTA showed in its initial comments, interpreting the statutory definition of “multichannel video programming distributor” (“MVPD”) – and the regulations associated with MVPD status – to apply to online video distributors (“OVDs”) is foreclosed as a matter of law. Moreover, there is no sound public policy rationale for extending the benefits and requirements of MVPD status to every OVD that might choose to offer multiple linear programming streams

to subscribers. Many commenting parties agree with that conclusion. But, not surprisingly, a number of interested parties seek to gain for themselves particular competitive advantages that would result from classifying OVDs as MVPDs – while, in many cases, urging that the classification be narrowly tailored so as to relieve them from any *disadvantages* of MVPD status, or that it be accompanied by *additional* regulations to further shield them from marketplace forces.

In most cases, these parties simply disregard the statutory language and act as if the Commission had discretion to adopt any definition that served its policy preferences. Others do confront the statutory construction issues but reach the same erroneous conclusion. The parties who contend that extending the 1992 Act’s program access provisions to OVDs is somehow pro-competitive fail to understand the difference between protecting *competitors* and promoting *competition*. Meanwhile, various broadcast stations are concerned only with the hypothetical matter of ensuring that if OVDs were ever able to offer broadcast programming pursuant to a statutory copyright license, broadcast stations would be entitled to retransmission consent – and pay no attention to the legal *or* real-world policy problems associated with extending MVPD status to OVDs.

Finally, a number of municipalities appear to be concerned only with *their* entitlement to regulate all video services offered online by a franchised cable operator – even if those services are offered, like those of other OVDs, on the Internet to customers other than those subscribing to the operator’s cable service. But just as the statutory definition of an MVPD cannot reasonably be interpreted to apply to OVDs, the statutory definition of a cable service cannot reasonably be interpreted to apply to services generally available to customers via the Internet. And just as extending the benefits of MVPD status to all OVDs that provide multiple linear

programming streams would only distort competition while artificially and unfairly protecting certain competitors in the video marketplace, allowing franchising authorities to regulate online services offered by cable operators when non-cable OVDs are exempt from such regulation would be at odds with sound principles of regulatory parity and would unfairly distort and encumber fair marketplace competition.

**I. MOST PROPONENTS OF CLASSIFYING OVDs AS MVPDs IGNORE THE STATUTORY LANGUAGE THAT BARS SUCH A RULING.**

The term MVPD was created and defined by Congress as part of the Cable Consumer Protection and Competition Act of 1992, and virtually all the statutory provisions of the Communications Act that apply to MVPDs were adopted at the same time. Congress has not subsequently put any further glosses on the term or given any indication that the term is to have any broader meaning than what was intended in 1992. In interpreting the statutory definition of MVPD, the language and the context of that definition is controlling – and both the language and the context confirm that, as the Media Bureau tentatively concluded several years ago, MVPDs are limited to those facilities-based providers that offer consumers a transmission path along with video programming, and do not include OVDs.

Most of the commenting parties that support the Commission’s proposal to sweep some OVDs into the definition of an MVPD pay little attention to whether such a step is authorized by the statute. They largely limit their comments to the policy reasons that they believe justify treating those OVDs as MVPDs – the same reasons that we showed in our initial comments to be meritless. Those that do acknowledge and attempt to come to terms with the statutory definition treat it as if it could be readily dismissed or as if it were meant to be infinitely flexible and expandable to encompass the Commission’s policy preferences regarding new and completely different means for distributing video programming such as the Internet. For reasons that we

discussed at length in our initial comments, neither the statutory language nor its context – nor the canons of statutory construction – permit any such open-ended interpretation.

To qualify as an MVPD under the statutory definition, an entity must provide multiple “channels” of video programming to subscribers. Public Knowledge, which has long advocated that OVDs be deemed MVPDs,<sup>1</sup> notes that the Communications Act of 1934 uses the term “channel” in various ways – sometimes referring to “a range of frequencies used to transmit programming,” and sometimes “in a ‘linear programming’ sense to refer to the programming itself, or the programmer.”<sup>2</sup> Thus, according to Public Knowledge, “when the term is used in the Act it is necessary to read the word in either the ‘linear programming’ sense, or in the ‘transmission path’ sense, as context demands.”<sup>3</sup>

The obvious problem with this argument is that, while the term “channel” may appear to mean different things in different portions of the Communications Act, Congress has specifically *defined* what it means for purposes of Title VI of the Act. And that definition clearly adopts the “range of frequencies” – and not the “linear programming” – meaning of the term:

*For purposes of this title . . . the term “cable channel” or “channel” means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).’’<sup>4</sup>*

Public Knowledge argues that

*even the 1984 Cable Act’s definition uses both senses of the term ‘channel’ (the container sense and the contents sense) when it speaks of one kind of channel*

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<sup>1</sup> See Testimony of Gigi B. Sohn, President, Public Knowledge, before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Communications and Technology Hearing on “The Future of Video,” June 27, 2012, <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Sohn-CAT-The-Future-of-Video-2012-6-27.pdf>.

<sup>2</sup> Comments of Public Knowledge at 4.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> 47 U.S.C. § 522(4) (emphasis added).

carrying another kind of channel. This demonstrates that the drafters of the 1984 Cable Act saw a channel as both a medium of communication (in this case, the frequency which a communication may use) and the content of a communication itself (a television station, or television channel).<sup>5</sup>

But what it, in fact, demonstrates, is that Congress defined “channel,” for purposes of Title VI, to have *one* meaning while specifically recognizing that the term had a *different* meaning for purposes of the Commission’s regulations, pursuant to Title III, of a “television channel.”

In any event, contrary to Public Knowledge’s assertion, *both* of those two meanings embody the “container” sense of the term channel and *neither* embodies the “content” sense. The Commission’s Title III regulations define “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.”<sup>6</sup> Thus, the term “channel” – whether it refers to broadcast television channels or cable channels – refers to a transmission path throughout the Act and rules, despite any vernacular use of the term (outside the rules and statute) to refer to a particular program source, such as “Channel 4 News,” or “The Tennis Channel.”

Nevertheless, Public Knowledge strains to come up with reasons why the “transmission path” approach that Congress clearly set forth in the definition of “channel” would have all sorts of unintended consequences. First, it argues that “if the Commission finds that an MVPD must provide its subscribers with a transmission path, any programming that is delivered without a fixed transmission path may no longer be viewed as being delivered via a ‘channel.’”<sup>7</sup> In particular, it argues that “[s]witched digital networks on cable systems may no longer count as ‘channels’ since they are not *continually* broadcast on a fixed ‘portion of the electromagnetic

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<sup>5</sup> Comments of Public Knowledge at 7 (emphasis in original).

<sup>6</sup> 47 C.F.R. § 73.681.

<sup>7</sup> Comments of Public Knowledge at 16.

frequency spectrum.”<sup>8</sup> But there is nothing in the statutory definitions of “channel” and “MVPD” that requires that the video programming be *continually* provided on a *fixed* transmission path. To be an MVPD, all that is required is that the entity provide transmission paths on which video programming is delivered to subscribers.

Second, Public Knowledge asserts that if a channel is defined as a transmission path, “any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation.”<sup>9</sup> But that is not the case. Nothing in the facilities-based definition of an MVPD requires that an MVPD must *own* the transmission paths that carry video programming to their subscribers. What is required is that the service that they sell to their subscribers *includes* the transmission paths – whether those paths are owned, leased or otherwise acquired or controlled by the MVPD. When a customer subscribes to an MVPD’s service, it relies on that MVPD for the *delivery* of the video programming included in the MVPD’s service offering. In contrast, when a customer subscribes to an OVD’s programming, the customer receives the programming via the Internet access service that it has purchased from his or her cable operator, wireless company, or other Internet service provider.

FilmOn X similarly confuses the requirement that an MVPD provide delivery and programming with a requirement that an MVPD *own* the facilities over which it delivers programming. Thus, it cites the Commission’s previous holding that “a qualifying [multichannel video programming] distributor need not own its own basic transmission and distribution facilities,” and the statement in the Notice that an MVPD “may use a third party’s distribution facilities in order to make video programming available to subscribers”<sup>10</sup> as if those statements

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<sup>8</sup> *Id.*, (emphasis in original).

<sup>9</sup> *Id.*

<sup>10</sup> Comments of FilmOn X at 21-22.

confirm that an MVPD need not provide a transmission path at all. An MVPD's status does not depend on whether it owns, or leases from a third party, the transmission path on which programming is provided. What matters is that it is the MVPD – and not a third party – from whom the subscriber purchases the transmission path over which the programming is provided.

A similar confusion is at the heart of the assertions by FilmOn and others that one of the examples of an MVPD that Congress enumerated in the definition – a television receive-only satellite programming distributor – does not provide a transmission path. As NCTA pointed out in its initial comments, the Commission recognized – back in the days when TVRO distributors actually existed – a distinction between entities that sold the programming that they themselves transmitted via satellite for TVRO reception and entities that merely served as marketing agents for such programmers, selling subscriptions and notifying the programmers to “unlock” their encrypted signals for subscribers. It was only the former – those that provided the transmission path along with the programming – that were the TVRO distributors that Congress meant to define as MVPDs.<sup>11</sup>

Public Knowledge also argues that “Congress drew a line between providers of prescheduled video programming on the one hand and providers of on-demand video programming on the other,” and “[s]ince exclusively on-demand video programmers are *not* cable systems and are therefore not MVPDs, it follows that a provider of prescheduled video programming *is* an MVPD.”<sup>12</sup> This syllogism is wrong at each step – wrong in its factual premises and logically unsound.

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<sup>11</sup> See NCTA Comments at 11 (*citing* Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, 2997 (1993)).

<sup>12</sup> Comments of Public Knowledge at 13.

First, the statute does not categorically exclude entities that exclusively provide on-demand programming from the definition of a cable system. When Congress amended the law in 1996 to allow telephone companies to provide video programming in their telephone service areas, it also amended the definition of a “cable system” to provide that the facility of a common carrier subject to Title II would, to the extent that the facility is used to provide video programming to subscribers, be deemed a cable system – “*unless* the extent of such use is solely to provide interactive on-demand services.”<sup>13</sup> In other words, Congress provided only that facilities of *Title II common carriers* that are used to provide exclusively on-demand programming are not cable systems – and nowhere excluded other facilities from the definition of a cable system on that basis.

Second, even if it were true that facilities used exclusively to transmit on-demand programming are not *cable systems*, it still would not follow that they “are therefore not *MVPDs*.” While the statute makes clear that all cable systems are MVPDs, it is obviously not the case that *only* cable systems are MVPDs and nothing in the statute suggests that the exclusion of common carrier facilities that provide exclusively on-demand programming from the definition of a cable system has anything at all to do with the definition of an MVPD.

And, third, even if it were true that exclusively on-demand video program providers are *never* MVPDs, it certainly would not logically follow that a provider of prescheduled video programming is, as Public Knowledge contends, *always* an MVPD. It would still be possible that in *some* circumstances, neither a provider of on-demand programming *nor* a provider of prescheduled video programming is an MVPD. That is precisely the case where, as we have shown, the providers offer their programming online and do not include a transmission path in

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<sup>13</sup> 47 U.S.C. § 522(7) (emphasis added).

their service offering. Nothing in Public Knowledge’s illogical argument demonstrates otherwise.

Finally, the extent to which the Commission and the proponents of extending MVPD status to OVDs are forced to offer all sorts of caveats, exceptions and corollaries to their proposed approach is itself a good indication that the “linear programming stream” approach is not what the statute contemplates. How many linear programming streams are necessary to constitute “multiple channels”? Two? Twenty?<sup>14</sup> Should an entity that offers only programming that it owns be excluded from the definition?<sup>15</sup> Should entities that provide exclusively on-demand programming be excluded?<sup>16</sup> Should we somehow require broadcast stations and cable program networks to obtain online distribution rights that they may not already have in order to make their services available to OVDs?<sup>17</sup>

None of this slicing and dicing of the definition of an MVPD is or has been necessary so long as the definition has been limited, as Congress intended, to the marketplace of facilities-based providers – the marketplace in which competition seemed to be lacking and in need of a jump-start in 1992. The questions identified above illustrate just some of the ways in which the OVDs to which the Commission proposes extending MVPD status are fundamentally different from the range of entities to which the definition has heretofore applied, and to which Congress

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<sup>14</sup> See, e.g. Notice, ¶ 25; Comments of Biggy TV, LLC at 13 (proposing seven channels of linear streaming video content not including any retransmission channels to qualify as an “MVPD-OTT”).

<sup>15</sup> See, e.g., Comments of the ABC Television Affiliates Association, *et al.* (“Affiliates Associations”) at 14-15 (arguing that “a television broadcast station that only distributes its own channels should not be classified as an ‘MVPD,’” while any other distributor of more than one channel should be).

<sup>16</sup> See, e.g., Notice, ¶ 14.

<sup>17</sup> *Id.*, ¶ 69; Comments of Affiliate Associations at 33 (arguing that television stations “should not be required to negotiate further when the extent of the rights that the broadcast station can grant is insufficient and the retransmission of only portions of the signal does not make business sense”).

intended it to be applied. Moreover, the video marketplace of facilities-based *and* online providers is, unlike the case in 1992, flourishing and in no need of regulatory intervention.

In short, as we demonstrated in our initial comments, Congress did not define MVPD in an open-ended way that was intended to apply, in perpetuity, to whatever new technologies might arise, regardless of marketplace circumstances. To the contrary, the meaning of the term is constrained by the specific statutory definition of the term “channel” and by the specific context and marketplace circumstances that existed when the term and its associated provisions were introduced into law in 1992.

**II. THE COMMENTS PROVIDE NO SUPPORT FOR THE CONCLUSION THAT CLASSIFYING OVDs AS MVPDs WILL HAVE THE PRO-COMPETITIVE BENEFITS ASSERTED BY ITS PROPONENTS.**

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As NCTA noted in its initial comments, today’s video marketplace – unlike the marketplace that existed when Congress enacted the various benefits and obligations associated with MVPD-status – is already vibrantly competitive. Competition has firmly taken hold among traditional MVPDs, including cable operators, telephone companies and satellite providers. The online video marketplace is already characterized by a stunning multitude of diverse services, and there is no indication that the explosive growth of these services will ever slow down, much less come to a halt.

In its recently released “Open Internet” order, the Commission described this vibrantly competitive landscape:

[I]nnovation at the edge moves forward unabated. . . . In the video space alone, in just the last six months, CBS and HBO have announced new plans for streaming their content free of cable subscriptions; DISH has launched a new package of channels that includes ESPN, and Sony is not far behind; and Discovery Communications founder John Hendricks has announced a new over-the-top service providing bandwidth-intensive programming.<sup>18</sup>

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<sup>18</sup> *In re Protecting and Promoting the Open Internet*, Report and Order, GN Dkt. No. 14-28, FCC No. 15-24 (rel. Mar. 12, 2015) ¶ 3. *See also* NCTA Comments at 16-17; Comments of AT&T Services, Inc. at 2-4.

These are salient facts because they call into question the primary policy objective of the Commission’s proposal, which is to promote, as the Chairman has stated, “competition, competition, competition.”<sup>19</sup> In our comments, we explained that forcing cable-affiliated program networks – among the most popular networks at the time of the 1992 Cable Act – to deal with cable’s competitors at a time when it was unclear whether any competitors to cable could survive without such programming at least arguably promoted competition. No such pro-competitive rationale applies today. To the contrary, in today’s strongly competitive environment, requiring cable-affiliated networks to deal with OVDs on terms that they would not otherwise choose would only serve to *distort* competition in the video marketplace.

This would be true as a matter of sound competition policy even if it were the case that some new competitors in the online marketplace would have difficulty surviving without the benefits of MVPD status. Protecting competition is different from protecting *competitors* from the vicissitudes of a vibrantly competitive marketplace. But what is striking about the comments of the proponents of the Commission’s proposals is that they nowhere even suggest that online providers of multiple linear programming streams would be unable to compete without the program access rules.

Only a small handful of companies offering or planning to offer such service submitted comments. One such company is Pluto, Inc., which is an advertiser-supported aggregator of linear video programming. Pluto recognizes that wholly advertiser supported services are outside the scope of the Commission’s proposal, and it urges the Commission to expand its

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<sup>19</sup> Official FCC Blog, “Tech Transitions, Video, and the Future” by Tom Wheeler, FCC Chairman, Oct. 28, 2014, available at <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

proposed definition to include such services.<sup>20</sup> What Pluto apparently does not recognize is that the statutory definition of MVPD unambiguously includes within its scope only entities that make channels of video programming available “for purchase” by subscribers. Thus, even if there were a policy rationale for doing so, the Commission could not, as a matter of law, extend the protections and the obligations of MVPD status to Pluto.

Not that Pluto wants both the protections *and* obligations of MVPD status. To the contrary, it wants only the protections and urges the Commission to exempt OVDs from the obligations.<sup>21</sup> In other words, Pluto urges the Commission to rewrite the statute, first, to extend the benefits of MVPD status to it and other advertiser-supported entities, and second, to relieve it of the requirements that the statute imposes on all MVPDs.

Meanwhile, Pluto provides absolutely no evidence that its successful entry into the online video marketplace depends on its ability to obtain cable-affiliated programming. To the contrary, it describes itself as “a fast-growing” service “offering more than one hundred channels devoted to news and information, arts and entertainment, educational, lifestyle, children’s and other programming,” which already “licenses and curates myriad content,” including “video clips, viral content, full-length series episodes and movies, and full linear network programming.”<sup>22</sup> Nowhere does it suggest that it has had any difficulty obtaining programming, nor does it provide any evidence that, even if it were unable to obtain access, on nondiscriminatory terms, to any of the small percentage of cable-affiliated networks, its ability to compete with its mixture of program types would be seriously impacted.

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<sup>20</sup> Comments of Pluto, Inc. at 3-4.

<sup>21</sup> *Id.* at 7-10.

<sup>22</sup> *Id.* at 1.

Biggy TV, another small provider of online video streaming, proposes a different approach to rewriting the statute. It would not only extend MVPD privileges to OVDs but it would impose a restrictive set of rules solely on OVDs that are owned by cable operators, DBS companies and other traditional facilities-based MVPDs.<sup>23</sup> Although the proposed restrictions are not described with clarity, they appear to be intended to prevent such MVPDs from taking advantage of any efficiencies that might result from negotiating rights agreements with programmers for facilities-based and online distribution.

Meanwhile, like Pluto, Biggy TV proposes that OVDs other than those owned by facilities-based MVPDs be relieved from any legacy MVPD obligations. Also, like Pluto, it provides no concrete evidence that access to programming threatens its ability to compete. Indeed, it appears that restricting and burdening the marketplace dealings of its facilities-based competitors is much more important to it than any benefits that might accrue from the statutory privileges of MVPD status, such as the program access rules. But singling out the OVD services of cable and DBS operators for additional restrictions – besides having no statutory basis – is exactly the opposite of what the Commission should do in this proceeding. Whether or not OVDs are given MVPD status, the Commission should, in a competitive marketplace, be guided by principles of regulatory parity. There is no basis for imposing special burdens on the OVD services of facilities-based MVPDs.

Neither Sony nor DISH, the two announced providers of OVD service mentioned in the Commission's Open Internet Order, filed initial comments in this proceeding. Verizon, however, has weighed in seeking the protections of the program access rules for OVDs. It nowhere suggests, however, that access to the small percentage of cable-affiliated networks is crucial to

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<sup>23</sup> See Comments of Biggy TV, LLC at 9-10.

its own or any other OVD's potential plans to offer online packages of video programming. It argues only that "[c]ompetitive and start-up video distributors – as MVPDs – *can benefit* from being able to invoke these rules to include in their channel lineups the programming consumers desire."<sup>24</sup> No doubt they can benefit from rules that give them access to that relative handful of programming on terms more favorable than might otherwise be the case. But there is no reason to believe that such a regulatory advantage would be the determinant of whether Verizon or any other entity chooses to enter the fiercely competitive video marketplace.

Even more attenuated than the benefits of extending the program access rules to OVDs are the supposed benefits of extending the obligations and benefits associated with retransmission consent. This is because, as NCTA explained, OVDs cannot retransmit broadcast stations – with or without broadcasters' retransmission consent – unless they have also obtained the consent of the copyright owners of all the programs carried by the broadcast station.<sup>25</sup> This may not have been clear when various commenting parties first addressed this issue in the response to the Media Bureau's Public Notice in connection with the *Sky Angel* proceeding. But the Supreme Court's subsequent decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014), removed any doubt. And, in the absence of a statutory copyright license to carry such programming, the right to insist on good faith negotiations with broadcasters for consent to carry their stations would be a wholly illusory benefit.

Nevertheless, virtually all the parties that argued, pre-*Aereo*, that OVDs should be classified as MVPDs for reasons related to retransmission consent repeat their arguments here – just in case there might ever come a time when the carriage of broadcast stations by OVDs

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<sup>24</sup> Comments of Verizon at 5 (emphasis added).

<sup>25</sup> See NCTA Comments at 21-24. As the Comments of the Walt Disney Company, *et al.* ("Broadcast Network Comments") show, online viewers have access to a wide range of television programming governed by privately negotiated copyright licenses. Broadcast Network Comments at 2-6.

pursuant to a statutory copyright license becomes something other than hypothetical.

Broadcasters, for example, want to be sure that if OVDs are ever able to retransmit the signals of broadcast stations, the OVDs will be required to obtain retransmission consent from (*i.e.*, compensate) the broadcast stations.<sup>26</sup> They also implicitly acknowledge (and want to be certain) that this is, in the absence of a statutory copyright license for OVDs, a purely hypothetical matter by urging the Commission to clarify that the requirement to negotiate in good faith would apply only to the negotiations between broadcasters and OVDs over retransmission consent – and *not* to negotiations between broadcasters and copyright owners over the rights to online distribution of the programming carried on broadcast stations.<sup>27</sup> In addition, the network affiliate associations contend that their obligation to negotiate such consent in good faith should be conditioned on rules and requirements that prevent the online distribution of signals outside the broadcaster’s local market and that extend the network non-duplication and syndicated exclusivity rules to the online video marketplace.<sup>28</sup>

Meanwhile, OVDs that seek MVPD status, as well as some “public interest” commenters, repeat their arguments that the right to good faith retransmission consent negotiations will help them gain access to broadcast stations. In light of the *Aereo* decision, they generally acknowledge that right to good faith negotiations will be largely meaningless without a copyright license. But they cling to the notion that a Commission decision to classify OVDs as MVPDs might somehow cause the Copyright Office to reverse its determination that OVDs are not “cable systems” entitled to the statutory copyright license.<sup>29</sup> As NCTA showed in its initial comments,

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<sup>26</sup> See Comments of National Association of Broadcasters (“NAB”) at 5-9; Comments of Affiliates Associations at 16-24.

<sup>27</sup> See Comments of NAB at 15.

<sup>28</sup> See Comments of Affiliates Associations at 29-32.

<sup>29</sup> See, *e.g.*, Comments of Pluto, Inc. at 6, n.15; Comments of Consumer Federation of America at 20, n.40.

there is no basis for such speculation – and there is no reason why the Commission’s interpretation of the definition of an “MVPD” in Title VI should affect the Copyright Office’s interpretation of the definition of a “cable system” in the Copyright Act.<sup>30</sup>

While the supposed pro-competitive benefits of extending MVPD status to OVDs are, in the case of retransmission consent negotiations, illusory, and in the case of program access, actually *anti*-competitive, there are also, as several parties have shown, serious practical costs associated with extending MVPD regulation to the Internet. Thus, as AT&T explains:

Regulations impose costs and risks on businesses, which can stifle innovation and distort the marketplace through their disparate impact. Regulations can also cement business models that may be inefficient or otherwise inferior, as well as invite arbitrage, leading companies to design to regulations instead of customer preferences.<sup>31</sup>

At the same time, as other parties have shown, extending MVPD status to OVDs necessarily requires conferring both the benefits *and* the obligations associated with such status – not only because they are imposed by statute but also because to do otherwise would violate important marketplace principles of regulatory parity and would artificially and unfairly skew competition between facilities-based and Internet-based providers.<sup>32</sup> Even parties that see (or might enjoy) potential benefits from MVPD status for OVDs recognize the risks and conclude that a cautious wait-and-see approach by the Commission is more prudent than extending such status at this time.<sup>33</sup>

With no significant benefits to be expected from extending MVPD status to OVDs on the one hand, and substantial costs and adverse effects on the other, the policy balance comes out the

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<sup>30</sup> See NCTA Comments at 22-23.

<sup>31</sup> Comments of AT&T Services, Inc. at 4-5.

<sup>32</sup> See, e.g., Comments of Cox Communications, Inc. at 11-13; Comments of National Association of Telecommunications Officers and Advisors at 2-3.

<sup>33</sup> See, e.g., Comments of Consumer Electronics Association at 6-10; Comments of DIRECTV at 2.

same as the legal analysis. Even if the statute could be construed to permit it, sound public policy weighs heavily against classifying OVDs as MVPDs.

**III. OVD SERVICES THAT ARE PROVIDED BY CABLE OPERATORS TO ISP CUSTOMERS AND ARE NOT RESTRICTED TO THE OPERATORS' OWN CABLE CUSTOMERS ARE NOT "CABLE SERVICES" AND SHOULD HAVE THE SAME REGULATORY STATUS AS NON-CABLE OVDs.**

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Several municipalities and municipal organizations have weighed in on the Notice's questions about the extent to which the provision of video programming in IP format or over the Internet affects the status of franchised cable operators. The Notice tentatively concludes that the format in which programming is provided does not determine or affect whether or not an entity is a cable operator, and, in its comments, NCTA agreed with that conclusion. The Notice also tentatively concluded that when cable operators offer video programming services to ISP customers – their own and others' – via the Internet, they would not be treated as cable operators with respect to the offering of such services but would be treated the same as other OVDs. NCTA also agreed with that conclusion, both as a matter of law (based on the statutory definitions of cable system, cable operator, and cable service), and as a matter of sound public policy (based on important principles of regulatory parity).

While the municipalities agree that the definition of a cable system does not turn on whether services are offered in IP format, they have a different view with respect to the delivery of OVD service over a facilities-based ISP's plant. They would treat virtually all such Internet-based services as cable service, and they would treat all such ISPs as cable operators with respect to the provision of OVD services. It is not surprising that the cable franchising authorities would seek to extend their Title VI authority to such Internet-based services, but the statute does not permit it.

The municipalities argue that as long as Internet-based services “travel over” a cable system in reaching an ISP’s customers, those services are “cable services” for purposes of Title VI:

The fact the services travel outside the cable system at some point does not change their character. The same was true of cable programming services supplied by traditional satellite downlinks. If services are video programming and they travel over the cable system, end of story. So-called OTT services offered by cable operators are transmitted over the cable system, either to a Wi-Fi router, or back to the headend for Slingbox-style service. This makes them “cable services.”<sup>34</sup>

But there is a fundamental difference between online services accessed by an ISP’s customers and satellite-delivered cable networks and other programming services accessed by cable service customers. In the latter case, the cable operator receives the signals on its own receiving antenna on its own premises and then *retransmits* the signals from the cable headend to its customers over the set of “closed transmission paths” that constitute its cable system. In the former case, the customer requests data that resides on servers outside the cable system, and the data travels directly from the servers to the customer over the open Internet, over a pathway that only at its final stages includes a portion of the cable system.

This is a material distinction. The Commission has made clear that the role that an ISP plays in facilitating the ability of its broadband customers to select and retrieve data from the entire set of endpoints available on the Internet is fundamentally different from the role that a cable operator plays in transmitting a managed set of programming selections to its cable customers. This is the case even where one of those Internet endpoints available to ISP customers is a website owned by the cable operator itself, on which the operator makes available video programming to broadband customers, including its own broadband customers.

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<sup>34</sup> Comments of Anne Arundel County, Maryland, *et al.* at 7.

When the Commission, in 2002, classified cable modem service as an interstate information service, it specifically rejected arguments that the service should be deemed a cable service. It noted, first, that it had “previously interpreted the term ‘transmission’ in the cable services definition ‘as requiring active participation in the selection *and distribution* of video programming’ . . . .”<sup>35</sup> And it found that the provision of broadband Internet access service by a cable operator did not involve such active selection and distribution of programming:

[W]e believe that the one-way transmission requirement in that definition continues to require that the cable operator be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally. Based on the record before us, we find that cable modem service does not have the characteristics required for a cable service. The record shows cable modem service to be a service built around Internet access, which, among other things, allows subscribers to define searches for information throughout the World Wide Web, query web sites for information, engage in transactions, receive individually tailored responses to their requests, generate their own information, and exchange e-mail. That the cable operator makes subscriber access to the Internet possible does not establish the operator’s control over the selection of the information made available to subscribers via the Internet.<sup>36</sup>

The Commission recognized, even then, that cable operators might include content of their own selection on a website accessible by high-speed Internet access customers, but the inclusion of such a website among the practically infinite multitude of endpoints available on the Internet would not, it concluded, inject any element of “cable service” into the operator’s ISP service offering: “Including proprietary information or packages of pre-selected web site links in the service does not change the classification. Even if discrete parts of cable modem service have characteristics of cable service, that does not require classification of the service as a cable

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<sup>35</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 62 (2002) (emphasis added).

<sup>36</sup> *Id.* ¶ 67.

service when it is predominantly Internet access.”<sup>37</sup> Nothing in the Commission’s recent determination to reclassify cable modem service as a “telecommunications service” alters its holding that cable modem service is *not* cable service, even if cable modem customers can access a cable operator’s generally available online content.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in NCTA’s initial comments, neither the statutory definition of an “MVPD” nor sound public policy support the Commission’s proposal to classify OVDs that offer multiple linear programming streams as MVPDs, and the Commission should reject that proposal.

The Commission should also confirm that the definition of a “cable operator” does not depend on the format in which video programming is delivered to subscribers, so that merely offering programming in IP format does not alter a cable operator’s regulatory status. But an entity that offers video programming online to customers of broadband Internet access service is not, with respect to that service, a cable operator providing cable service, and its service should be treated in the same manner as the similar online services of other OVDs.

Respectfully submitted,

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<sup>37</sup> *Id.* ¶ 68.