Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. Introduction and Summary

The National Association of Broadcasters (NAB)[1] hereby replies to initial comments regarding the *Notice of Proposed Rulemaking* proposing to interpret the statutory term "multichannel video programming distributor" (MVPD) to include certain Internet-based (or online) video distributors (OVDs).[2] NAB's initial comments supported the Commission's proposal to include within the scope of this term 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."[3] NAB agreed with the Commission that both the obligations and benefits of retransmission

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

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

[3] *Id*. at ¶ 1.

consent and good faith negotiation requirements should apply to these OVDs, and offered several practical proposals to implement good faith negotiating procedures. To promote critical congressional and Commission policy goals of competition, diversity and localism, NAB also proposed that certain requirements currently applicable to cable and DBS also apply to OVD operations, including program exclusivity and carriage requirements comparable to the "carry-one, carry-all" model for DBS.

Below, NAB responds to specific comment proposals in the record. Many commenters agree with the Commission's proposals to update its definition of MVPD to include OVDs and apply retransmission consent and good faith negotiation requirements to OVDs. The Commission also should adopt refinements to the retransmission consent process proposed by some commenters, and certain other proposals that will effectuate important congressional and Commission policy goals.

II. Defining MVPDs to Include Certain OVDs Promotes Regulatory Certainty and Ensures that Congressional and Commission Policy Goals Will Be Met

Commission rules and policies affecting OVDs should promote the very same policy goals as those statutes and regulations governing other MVPDs. Clarifying OVDs' regulatory status will promote greater certainty for distributors, broadcasters, and other innovators in the video marketplace, thereby fostering innovation and investment while ensuring that longstanding policy goals of Congress and the Commission continue to be met.

Some commenters believe that clarifying the regulatory status of OVDs will deter or disincentivize the development of OVD services. But these commenters undercut their own contentions. For example, AT&T states that "premature regulation would have

negative consequences" and could "stifle innovation."[4] Yet on the very same page of its comments, AT&T also states that "where it is unclear whether a business model or service feature is permissible under existing or impending regulations, providers will be slower to adopt such innovations."[5] The Commission's steps to clarify what statutory and regulatory provisions apply to OVDs would avoid the uncertainty that AT&T believes could harm development of business models and service features by OVDs.

Similarly, CCIA contends that the FCC should not apply a "static definition" of MVPD status to OVDs on grounds that "[i]mposing regulations that were developed in the last century" on OVD services "could stifle future innovation."[6] This view stands in stark contrast to CCIA's claims throughout the Commission's Open Internet and IP Transition proceedings, where it consistently argued that 20th century Title II regulation was critical to ensuring investment, innovation, and other important public policy objectives.[7] As CCIA has stated elsewhere, "[n]ew network technology does not actually change everything with respect to FCC authority and responsibility for telecommunications in the public interest . . . American consumers and businesses still expect the FCC to ensure the network reliability, affordability, and accessibility

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[4] Comments of AT&T Services, Inc. (AT&T) in MB Docket No. 14-261, at 6 (Mar. 3, 2015) (AT&T Comments).

[5] AT&T Comments at 6.

[6] Comments of the Computer and Communications Industry Association (CCIA) in MB Docket No. 14-261, at 4 (Feb. 27, 2015) (CCIA Comments). CCIA appears to support, however, the "selective" application of good faith negotiation requirements and program access rules to OVDs. CCIA Comments at 4-5.

[7] Reply Comments of CCIA in GN Docket 14-28 (Sept. 15, 2014); Comments of CCIA in GN Docket No. 14-28 (Jul. 14, 2014); Comments of CCIA in GN Docket No. 14-28 (Mar. 21, 2014); Reply Comments of CCIA in GN Docket No. 12-353 (Feb. 25, 2013).

mandated by the Telecommunications Act ….”[8] The same can be said of the Commission’s obligations to promote the core objectives of the Communications Act in the context of OVD service. Longstanding policies, including promoting competition in the video marketplace, fostering a diversity of voices on various platforms, and ensuring viewer access to news, entertainment and information, including emergency information, all remain critical to the public interest. For these reasons, the Commission should update its MVPD definition and adopt proposals in the record that will establish a workable retransmission consent negotiation process,[9] ensure carriage of smaller, niche broadcast stations as OVDs enter local markets[10] and promote localism and a

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[8] Reply Comments of CCIA in GN Docket No. 12-353, at 1 (Feb. 25, 2013). *See also, id.* at 4 (the Telecommunications Act of 1996 is “technology neutral and contains core statutory principles that can be upheld as we move toward the IP future: universal service, interconnection and competition, consumer protection and public safety”); Reply Comments of CCIA in GN Docket 14-28 (Sept. 15, 2014) at 7-8 (“…some of the most innovative and successful online services, including AOL, Amazon, Yahoo!, eBay and Google were launched within a legal and regulatory framework of nondiscriminatory Title II telecommunications networks many years before the FCC reclassified the transmission portion of Internet access as an unregulated information service. Innovation ran free under Title II, safe in the knowledge that the principles of nondiscriminatory interconnection and traffic exchange applied. These protections in no way inhibited the incumbents from investing in the network.”).

[9] Comments of NAB in MB Docket No. 14-261 at 5-16 (Mar. 3, 2015)(NAB Comments); Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (Affiliates Associations) in MB Docket No. 14-261 at 16-29 (Mar. 3, 2015)(Affiliates Associations Comments); BiggyTV Comments at 23; Verizon Comments at 5; Pluto TV Comments at 6-7; Comments of Syncbak, Inc. (Syncbak) in MB Docket No. 14-261 at 8 (Mar. 3, 2015)(Syncbak Comments); Comments of FilmOn X, LLC (FilmOn) in MB Docket No. 14-261 at 26 (Mar. 3, 2015)(FilmOn Comments).

[10] NAB Comments at 21-25. *See also* BiggyTV Comments at 22 (proposing that once an OVD is offering service to a threshold level of subscribers in a local market, the OVD should begin carrying local commercial and noncommercial stations pursuant to must carry); Comments of the Public Broadcasting Service (PBS) and the Association of Public Television Stations (APTS) in MB Docket No. 14-261 (Mar. 3, 2014) at 3, 7 (FCC must “fully consider” how regulations applied to OVDs and any regulatory gaps will affect public television stations, which do not have retransmission consent rights).

competitive balance to cable and DBS through application of the program exclusivity rules.[11]

III. The Record Supports Application of Retransmission Consent and Related Requirements to OVDs

Several parties agree with NAB that applying the retransmission consent and good faith regimes will promote access to high-quality programming by OVDs and their subscribers.[12] NAB and other commenters propose that the Commission's retransmission consent regime for OVDs reflect both the similarities and differences between OVDs and existing MVPD service. Broadcasters and OVDs alike agree that permitting OVDs to commence local carriage of broadcast stations on a market-by-market basis in a manner similar to DBS providers would allow OVDs "the flexibility to assess whether carriage of local television broadcast stations is feasible, from both a business and operational perspective," and would avoid "onerous and cost-prohibitive" burdens.[13]

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[11] NAB Comments at 16-21; Affiliates Associations Comments at 29-32; Syncbak Comments at 9.

[12] *See, e.g.,* Comments of BiggyTV, LLC in MB Docket No. 14-261 at 23 (Feb. 27, 2015)(BiggyTV Comments)(compliance with the good faith negotiation requirement "is not overly burdensome" for OVDs and is "essential to provide a pro-competitive market and give consumers access to content of equal quality" to that available via other MVPDs); Comments of Verizon Communications, Inc. (Verizon) in MB Docket No. 14-261 at 5 (Mar. 3, 2015)(Verizon Comments)("[t]he primary benefit to online video providers from qualifying as an MVPD is access to the protections of the Commission's program access rules and the good faith obligations as broadcasters negotiate retransmission consent."); Syncbak at 8 (OVDs "must be willing and able to respect the fundamental rules of program distribution," including retransmission consent and territorial exclusivity). *See also* Comments of Pluto, Inc. (Pluto TV) in MB Docket No. 14-261 at 6 (Mar. 3, 2015) (Pluto TV Comments)("Pluto TV does not oppose conceptually the applicability of the retransmission consent regime – including the obligations of good faith and fair dealing – in the online distribution context").

[13] Pluto TV Comments at 6-7 (Pluto TV supports commencing retransmission consent negotiations on a carry-one, carry-all basis, but does not support elections of mandatory

Multiple commenters recognize the value of local broadcast stations to the video ecosystem, and urge the Commission to ensure that local stations can be carried on OVD systems without risk of piracy, signal quality issues or retransmission beyond the geographic areas served by a particular station. NAB proposed that the Commission adopt a notice requirement—comparable to that for cable and DBS—so that local broadcasters will be aware of an OVD's plans to commence carriage and understand basic technical and operational aspects of the OVD's service.[14] The Affiliates Associations offer similar proposals that an OVD: register with the Commission;[15] provide notices of intent to commence service;[16] and make assurances concerning authentication, signal quality and security, and geographic distribution.[17] Similarly, Syncbak observes that parties negotiating with OVDs "must have a reasonable level of

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carriage by broadcast stations). *See also*, FilmOn Comments at 26 ("the duty to negotiate in good faith in the retransmission consent context should apply only to the extent that the MVPD provides, or attempts to provide, retransmission of local broadcast signals"); Affiliates Associations Comments at 26-28 ("If an OVD does not intend to offer a service that includes broadcast signals within a station's local market, then neither party should be required to negotiate with the other. To prevent discrimination…neither party should be able to "cherry-pick" which other similarly situated OVDs or broadcast stations [to] negotiate with…").

[14] NAB Comments at 10-12. Specifically NAB proposed that OVDs certify the following in their notices: (a) Signal Security/Piracy. The OVD has the technical and operational ability to prevent parties who are not subscribers to its service from accessing the broadcast signal; (b) Geo-Matching. The OVD will ensure that any television broadcast signal it retransmits will be geographically "matched" only with subscribers within the geographic area for which the broadcaster grants retransmission consent; and (c) Material Degradation. The OVD should certify that it will meet a material degradation standard comparable to those in place for cable and DBS.

[15] Affiliate Associations Comments at 26.

[16] Affiliate Associations Comments at 26-27.

[17] Affiliates Associations Comments at 27-28.

comfort" that an OVD's system "protects their content."[18] Syncbak underscores the importance of identifying ways to promote online video distribution "while observing and respecting all of the obligations imposed on MVPDs by programmers under traditional licensing and distribution agreements."[19] NAB agrees.

Because OVD platforms are not governed by technical and operational rules prescribed by the Commission, NAB supported the adoption of *per se* good faith standards permitting broadcasters to avoid protracted negotiations with OVDs unwilling or unable to meet minimum standards to ensure that broadcast signals are secured from potential piracy, are accessed by OVD subscribers only within the broadcaster's geographic market, and are not materially degraded.[20] The Affiliates Associations similarly propose that broadcasters be permitted to "truncate and terminate further negotiations" where an OVD has not taken the steps (discussed above) of registration, notice, and assurances relating to their technical and operational capabilities.[21]

Several parties explain that the program exclusivity rules should apply to OVDs to promote the FCC's longstanding localism goal.[22] Local stations' business models are built upon combining network and syndicated programming with locally-oriented news

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[18] Syncbak Comments at 9 (an OVD must be able to "respect the rules regarding carriage and distribution of programming" by controlling essential elements such as "connects, disconnects, authentication, conditional access and geofencing").

[19] Syncbak Comments at 3.

[20] NAB Comments at 13-15.

[21] Affiliates Associations Comments at 24-28. *See also* Syncbak Comments at 9 ("a broadcaster's reasonable concerns about the integrity of the online MVPD's system should be an adequate rationale to refuse to grant retransmission consent.").

[22] NAB Comments at 16-21; Affiliates Associations Comments at 29-32; Syncbak Comments at 9.

and public affairs content, and are financed primarily through the sale of advertising time. The system doesn't work if local stations cannot offer their program suppliers and advertisers exclusivity.[23] USTelecom, while taking no position on the Commission's regulation of OVDs, argues that the program exclusivity rules should be eliminated for traditional MVPDs, supposedly to "move the video marketplace towards true and free marketplace negotiations."[24] Like most MVPD proposals relating to broadcast signal carriage, the proposal to eliminate exclusivity enforcement mechanisms would *not* promote free market negotiations or create a more balanced retransmission consent negotiating process. Rather, as discussed in NAB's initial comments[25] and elsewhere,[26] this proposal would *enhance* the already substantial government subsidy provided to cable and DBS operators by the compulsory copyright licenses, unduly place a thumb

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[23] Affiliates Associations Comments at 30-31. As commenters observe, Congress and the FCC recognize that for television programming to be produced, "program producers and distributors must be compensated in such a way that they will have incentives to produce the amount and types of programming that viewers desire." *Id., citing Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, 5308 ¶ 54 (1988); S. Rep. No. 102-92 at 34, reprinted in 1992 U.S.C.C.A.N. 1133, 1168 (1991)(retransmission consent was adopted to correct "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

[24] USTelecom Comments at 6-7.

[25] NAB Comments at 18-20. Compulsory licensing is an exception to a copyright holder's exclusive right to decide whether or not to license at all and to negotiate all terms and conditions of that license. The compulsory copyright system allows cable and DBS to carry the highly-valued, copyrighted content within broadcast signals for free on a local basis and at government-established, sub-market rates on a distant basis, and eliminates MVPDs' transaction costs for such carriage. Without compulsory licenses, MVPDs would have to negotiate in the marketplace for all of the copyrighted content within broadcast signals. Exclusivity enforcement mechanisms partially mitigate this government-granted subsidy.

[26] Comments of NAB in MB Docket No. 10-71 at 4-5 (Jun. 26, 2014)(NAB Exclusivity Comments)("statutory licenses abrogate copyright owners' rights to control distribution of their copyrighted works pursuant to Section 106(3) of the Copyright Act"); *id.* at 50-57 (discussing how exclusivity operates as a counterweight to compulsory copyright licenses).

on the negotiating scales in favor of MVPDs, and interfere with rights broadcasters have privately negotiated in the marketplace with program suppliers. Neither USTelecom nor any other MVPD has demonstrated—or indeed can demonstrate—how a one-sided proposal to eliminate exclusivity enforcement would promote a "true and free" marketplace or serve the public interest.

One commenter contends that the Commission should not apply the program exclusivity rules to OVDs.[27] As several commenters explain, application of the program exclusivity rules to OVDs will provide clear public interest benefits.[28] The Commission should apply these rules to OVDs to ensure that viewers continue to benefit from the locally-oriented broadcast television business model that Congress has long supported.[29]

A. Some Commenters Incorrectly Conflate the Retransmission Consent and Copyright Regimes

Some commenters conflate or confuse the applicability of the retransmission consent and copyright regimes. EFF asserts, for example, that the Commission's proposed definition of MVPD will require OVDs to obtain retransmission consent even if a station is airing "public domain material."[30] The requirement to obtain retransmission

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[27] Comments of the Competitive Enterprise Institute (CEI), the International Center for Law & Economics, and TechFreedom in MB Docket No. 14-261 at 10-11 (Mar. 3, 2015)(CEI Comments).

[28] Affiliate Associations Comments at 31 (applying the program exclusivity rules to "non-cable MVPDs," including OVDs would enhance localism and "foster the continued investment in local programming, particularly news, weather, and emergency reporting.").

[29] At a minimum, if the Commission declines to apply exclusivity rules to OVD operations at this time, it must make clear that such obligations will be applied in the event OVDs become eligible for compulsory copyright licenses. NAB Comments at 20.

[30] Comments of the Electronic Frontier Foundation (EFF) in MB Docket No. 14-261 at 3 (Mar. 3, 2015) (EFF Comments).

consent for carriage of a broadcast signal does not have any relationship to the program content a station airs. A station's right to consent to the retransmission of its signal is a right separate and apart from the intellectual property rights in programs that a station may broadcast. In establishing retransmission consent, Congress intended "to allow broadcasters to control the use of their signals *by anyone engaged in retransmission by whatever means*."[31] Any party retransmitting broadcast signals must obtain the consent of the station broadcasting those signals, as well as licenses and approvals associated with the content that a station airs. The fact that a broadcaster sometimes airs content in the public domain may reduce the number of rights holders that must grant necessary approvals for OVD carriage, but it does not alter retransmission consent requirements.[32]

Relatedly, as NAB and others explained in initial comments, the statutory good faith standard applies only to negotiations for the right to retransmit broadcast signals.[33] Thus, the Commission's good faith rules and complaint processes implementing the Communications Act must remain confined to retransmission consent, and cannot be

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[31] S. Rep. No. 102-92 at 34, reprinted in 1992 U.S.C.C.A.N. 1133, 1167 (1991)(emphasis added); Affiliate Associations Comments at 14-15. Thus, an OVD that offers subscription on-demand service, transactional on-demand service, or ad-based linear or on demand service, must obtain retransmission consent even if MVPD status does not attach as a result of this proceeding.

[32] EFF's "fear" that including within the definition of MVPD services that stream transmissions of broadcast signals containing public domain materials could result in implementing the proposed World Intellectual Property Organization Broadcast Treaty "on the sly" is without substance or merit for the reasons set forth above. EFF Comments at 3. That treaty, like retransmission consent, concerns rights to carriage of a broadcaster's *signal* and has nothing whatever to do with programming rights within the signal.

[33] NAB Comments at 15-16; Comments of the Walt Disney Company, 21st Century Fox, Inc. and CBS Corporation in MB Docket No. 14-261 at 15 (Mar. 3, 2015).

applied to negotiations between OVDs, broadcasters and others for the rights to copyrighted material within broadcasters' signals.[34]

B. The Commission Should Not Adopt Retransmission Consent Proposals that Place a Thumb on the Scales in Favor of MVPDs

Some parties use the opportunity for comment here to re-hash their requests for the Commission to tilt the retransmission consent and good faith negotiation regimes in their favor,[35] in some cases regardless of their potential application to OVDs.[36] NAB and others have refuted these proposals as unlawful and contrary to public policy in many

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[34] *Id.*

[35] *See, e.g.,* Comments of the United States Telecom Association (USTelecom) in MB Docket No. 14-261 at 4-7 (Mar. 3, 2015)(USTelecom Comments); Comments of ITTA-The Voice of Mid-Size Communications Companies (ITTA) in MB Docket No. 14-261 at 7-9 (Mar. 3, 2015)(ITTA Comments)(both proposing changes including carriage of signals without broadcaster consent). As the Commission has repeatedly held, mandating carriage without broadcaster consent under any circumstances would be unlawful under Section 325. *See, e.g., Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-28 ¶ 18 (2011) (the FCC concludes that it lacks "authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations"); NAB Comments in MB Docket No. 10-71 (May 27, 2011) at 17-19. Charter Communications, Inc. (Charter) complains of "forced" tier placement. Comments of Charter in MB Docket No. 14-261 at 7-9 (Mar. 3, 2015)(Charter Comments). Of course, cable operators' obligation to place certain material on the basic tier is statutory and cannot be modified by the Commission. 47 U.S.C. § 543(b)(7)(a). Aside from this statutory obligation, there is nothing "forced" or otherwise nefarious about broadcasters and MVPDs negotiating placement of broadcast stations in the MVPD's channel lineup. Reply Comments of NAB in RM-11728 (Oct. 14, 2014) at 6-7; Comments of NAB in RM-11728 (Sept. 29, 2014) ("the Commission has found 'carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights' to be presumptively consistent with good faith negotiation obligations" and quoting *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 at ¶ 56 (2000) (*Good Faith Order*)). Claims of so-called "tying" or "bundling" are similarly unfounded. Charter Comments at 7-8; ITTA Comments at 9. FCC interference with the ability of MVPDs and broadcasters to negotiate retransmission consent compensation would be contrary to statute, Congress' intent, and Commission precedent. *See, e.g.,* Reply Comments of NAB in MB Docket No. RM-11728 (Oct. 14, 2014) at 3; *Good Faith Order* at ¶ 56 (the prices, terms and conditions of retransmission consent "may include an MVPD's agreement to provide consideration in part through carriage of a broadcaster's other programming").

[36] USTelecom "takes no formal position on the specific proposals as to how to address OTT services." USTelecom Comments at 10.

previous filings and will not reiterate those points here. NAB emphasizes, however, that MVPDs' meritless proposals to tip the balance of retransmission consent negotiations in their favor to further line their pockets have no greater merit as applied to OVDs.

IV. Proposals for Self-Classification Are Inconsistent with the Statute

NAB supports a regulatory regime that does not unduly burden OVDs, and has advanced certain proposals that would offer flexibility and minimize their burdens within the scope of the statutory scheme. As discussed below, however, the statutory definition of MVPD would not permit OVDs to simply opt-in or opt-out of MVPD status at will. Additionally, should the Commission determine that advertising-supported OVDs fall within the statutory definition of MVPD, the Commission should adopt certain modifications to its good faith negotiation standard.

"Choose Your Own Adventure." A few commenters believe that OVDs should be able to select their own regulatory classification—they could either "elect" to be MVPDs and fall within the scope of both the obligations and privileges of MVPD status, or they could choose to remain unregulated.[37] Although NAB takes no position on the relative value of an "opt-in" regime, such a regime is not permitted by the statute.[38] If the Commission determines that subscription linear OVDs fall within the definition of entities

[37] *See, e.g.,* EFF Comments at 3 ("we would go further and allow Internet-based services that offer multiple channels of programming in a linear prescheduled format to 'opt in' to MVPD status, but not be required to assume that status."); Comments of the Digital Media Association in MB Docket No. 14-261 at 6-7 (Mar. 3, 2015)(the Commission should use a flexible approach that "leaves the decision" of whether to accept the benefits and burdens of being an MVPD "to the OVDs themselves."); Comments of the Wireless Internet Service Providers Association in MB Docket No. 14-261 (Mar. 3, 2015).

[38] *Notice* at ¶ 37 ("…does the statute permit us to allow these entities to choose whether they wish to be classified as MVPDs?").

that "make[] available for purchase, by subscribers or customers, multiple channels of video programming,"[39] then they are in fact MVPDs. OVDs would only be able to lawfully make an "election" regarding their regulatory status if the statute provided for such elections by all MVPDs. Since there is no election provided by statute, an entity that meets the definition of MVPD must comport with the regulations (and enjoy the regulatory benefits) associated with that classification.[40] The Commission can certainly waive its rules, but it cannot waive statutory provisions that govern MVPDs. Accordingly, under the Commission's proposed interpretation of the term MVPD, we see no means by which an OVD offering a subscription linear service could, for example, decide to negotiate retransmission consent without complying with the good faith negotiation standards,[41] or require a financial interest in a network as a condition of carriage on the OVD's system in contravention of the program carriage requirements.[42]

Ad-Supported OVDs. Some commenters urge the Commission to bring advertiser-supported OVD services within the scope of the MVPD definition.[43] NAB

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[39] 47 U.S.C. § 522(13).

[40] *See* Comments of Cox Communications, Inc. in MB Docket No. 14-261 at 12 (Mar. 3, 2015) ("A provider may structure its business model to include the relevant attributes or not, but if it *does* elect to provide a service that meets the definition as construed by the Commission, then its mere preference to avoid regulation is beside the point.")(emphasis in original).

[41] 47 U.S.C. § 325(b)(3)(C)(iii).

[42] 47 U.S.C. § 536(a); 47 C.F.R. §§ 76.1300-1302.

[43] Pluto TV Comments at 3-4; BiggyTV Comments at 12. BiggyTV also proposes that free over-the-air television broadcast stations be regulated as MVPDs with "direct transmission paths," which should be limited to offering nothing more than simulcasts of their over-the-air programming via the Internet unless they create an "independent entity" to operate their Internet-based video service. BiggyTV Comments at 9-10. BiggyTV further asserts that MVPDs with direct transmission paths be prohibited from negotiating licensing for online delivery with program suppliers (such as networks or syndicators). *Id.* at 15. NAB opposes classifying television broadcast stations as MVPDs. Television broadcast stations are defined elsewhere in the Communications Act. *See, e.g.,* 47 U.S.C. §§153(6)(defining "broadcast station");

takes no position on this proposal, but observes that if the Commission includes ad-supported OVDs within its MVPD definition, it should modify its retransmission consent good faith negotiation standards. Specifically, the Commission's rules should provide that it is *per se* consistent with the good faith standard for a broadcast station to refuse to negotiate with an OVD that uses banner, crawl, overlay or other advertising shown on the screen/user interface displaying a television station's programming.[44] Broadcast station advertisers expect to reach audiences without the impediment of advertising for different–and possibly competing–products and services. Particularly in light of broadcasters' reliance on advertising revenue for their operations,[45] stations should not be required to negotiate retransmission consent with parties that will, by nature of their business model, dilute the value of the advertising time broadcasters sell to local businesses.

V. Conclusion

Congressional and Commission policy goals, including promoting competition in the video marketplace, fostering a diversity of voices on various platforms, and ensuring

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325(b)(7)(B) (defining "television broadcast station"); 614(h)(1)(A)(definining "local commercial television station"). Biggy presents no explanation or legal rationale for treating stations as MVPDs. Moreover, mandating that a station create a separate entity for purposes of developing an online presence is beyond the scope of Commission authority and would harm the public interest by deterring stations from providing additional content to the public. Finally, there is no legal authority or rationale for BiggyTV's proposal that stations be prohibited from negotiating for rights to offer content online.

[44] BiggyTV states that certain "Internet-based distributors … provide video programming available in a continuous linear stream that includes advertising." BiggyTV Comments at 12. Such advertising "includes but is not limited to video commercials placed within the linear video stream; banner ads included around the linear video stream or overlay ads that appear over the linear video stream." *Id*.

[45] *Amendment of the Commission's Rules Related to Retransmission Consen*t, Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3388 ¶ 59 (2014) (on-air advertising revenues constitute about 85% of television broadcasters' total revenues).

viewer access to news, entertainment and information, including emergency information, all remain critical to the public interest. For these reasons, the Commission should update its MVPD definition and adopt proposals in the record that will establish an efficient retransmission consent negotiation process, ensure carriage of smaller, niche broadcast stations as OVDs enter local markets, and promote localism and a competitive balance to cable and DBS through application of the program exclusivity rules.

Respectfully submitted,

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