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June 29, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services; MB Docket No. 14-261

Dear Ms. Dortch:

On June 9, 2015, Rick Chessen (Senior Vice President, Law & Regulatory Policy), Diane Burstein (Vice President & Deputy General Counsel), Jill Luckett (Senior Vice President, Program Network Policy), and I met with Maria Kirby and Gigi Sohn of the Chairman's Office to discuss matters at issue in the above-referenced proceeding.

During the meeting, we summarized the arguments and positions set forth in NCTA's comments and reply comments. Specifically, we explained that the Commission's proposal to interpret the term "multichannel video programming distributor" ("MVPD") to apply to online video distributors that provide subscribers with multiple linear streams of video programming was inconsistent with the specific language of the definition of that term, as well as its legislative history and context – all of which make clear that the term applies only to *facilities-based* entities that provide subscribers not only video programming but also the *transmission path* on which such programming is delivered.[1] Moreover, interpreting the term, and therefore, the scope of the "program access" provisions of Section 628 of the Communications Act, to extend to online video distributors ("OVDs") would raise serious constitutional issues under the First Amendment, which the Commission is obligated to avoid where an alternative reasonable interpretation – in this case, the *most* reasonable interpretation – exists.[2]

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[1] *See* NCTA Comments at 5-12; Reply Comments at 3-10.

[2] *See* NCTA Comments 12-15.

We also reiterated our position that there are no sound public policy rationales – least of all, those set forth in the Commission's Notice of Proposed Rulemaking – for classifying OVDs as MVPDs. First, while the Notice suggests that affording OVDs the privileges of the program access rules will promote competition and pro-competitive outcomes in the video marketplace, vigorous competition is already flourishing not only among traditional facilities-based MVPDs but also among online providers of video programming. Forcing certain program networks to make their programming available to certain OVDs on terms and conditions that would not otherwise result from marketplace negotiations is not pro-competitive.[3] Moreover, we noted that program networks often do not have the rights to distribute content online and that the Commission cannot and should not mandate that program networks negotiate with content owners for the ability to do so.[4] Second, giving OVDs the right to insist on good faith retransmission consent negotiations with broadcasters serves no significant public policy since OVDs are unable to retransmit programming on broadcast signals without consent of the copyright owner of each retransmitted program and have no statutory license to do so.[5]

We also noted that, as discussed in our comments, classifying OVDs as MVPDs will impose serious administrative burdens on the Commission and on marketplace participants. There are statutory obligations as well as benefits associated with MVPD status, and OVDs cannot, as a matter of law and for sound reasons of regulatory parity, be exempted from those obligations. Determining how to enforce the responsibilities of online MVPDs as well as determining how program access obligations of cable operators apply to OVDs will be a complex regulatory task, involving arbitrary line-drawing, which runs directly contrary to the express statutory policy of allowing the Internet to continue to grow and develop "unfettered by Federal or State regulation."[6]

Finally, we confirmed our agreement with the Notice's tentative conclusion that when cable operators offer video programming services to ISP customers via the Internet, they should not be treated as cable operators with respect to the offering of such services but should be treated the same as other OVDs. [7]

Respectfully submitted,

/s/ Michael S. Schooler

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[3] *See* NCTA Comments 15-21; Reply Comments at 10-14.

[4] *See* NCTA Comments at 26-28.

[5] *See* NCTA Comments 21-24; Reply Comments at 14-17.

[6] *See* NCTA Comments at 24-33.

[7] *See* NCTA Comments at 33-36; Reply Comments at 17-19.

cc: Maria Kirby
Gigi Sohn