Before the

**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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| 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 THE ALLIANCE FOR COMMUNITY MEDIA

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**REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA**

The Alliance for Community Media ("ACM"), submits these reply comments in response to the comments of other parties in this docket.

## I. COMMENTERS AGREE THAT LINEAR IP VIDEO SERVICE IS A "CABLE SERVICE"

We are pleased that many of the commenters agree with the conclusion in the NPRM that linear IP video service falls within the Cable Act's definition of "cable service," 47 U.S.C. § 522(6), and therefore that any entity that provides such services over landline, ROW-crossing facilities that it owns or in which it or its affiliates have a significant interest is a "cable operator," 47 U.S.C. § 522(5), providing such a "cable service" over a "cable system. Among the commenters supporting this position are local government commenters Anne Arundel County, Maryland, et al., the District of Columbia and the Public Access Corporation of the District, American Community Television, and the City of San Antonio, Texas. Also cable industry commenters NCTA and Cox Communications agree with this position. Cox (Page 16) emphasizes that services such as AT&T's U-Verse and Google Fiber and other such systems "must be classified as cable services" under the Cable Act (see also Anne Arundel, et al, Page 6, and San Antonio, Page 3).

The only cable industry commenter that challenges the NPRM's conclusion that linear IP video service falls within the Cable Act's definition of "cable service" is CenturyLink (Pages 4 – 7). CenturyLink's comments, however, merely try to disagree with that conclusion by contending

that the "Commission presumably does not reference a Commission order or Commission rule to support its assertion that it has previously concluded that 'cable service' includes linear IPTV service, because there is none to reference" (CenturyLink, Pages 6-7). What CenturyLink fails to recognize, and ignores, is the plain language of Section 602(6) of the Cable Act that defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."

Further, several commenters express the notion of balancing benefits and obligations of new services nicely, particularly as they relate in our opinion to the treatment of PEG channels and PEG support. "If the Commission decides to give OVD's statutory benefits of MVPD status, it cannot avoid giving the statutory obligations as well" (NCTA, Page 33). This fits squarely with NATOA's public interest position that any advantage of such classification demands the imposition of "various legal obligations associated with the classification…. (NATOA, Page 2). Anne Arundel, et al, (Pages 9 – 10) likewise notes that the cable operator's responsibility to provide public, educational, and governmental access does not change because of what it calls its "programming" and that "[any] other interpretation will allow a cable operator to use over-the-top technology to evade requirements for consumer protection, service availability, PEG programming, and franchise fees." Also, San Antonio observes that the NPRM recognizes the PEG access channel and facilities requirements as important public interest obligations (San Antonio, Page 3).

Such is the case with PEG, which as NATOA rightly observes promotes both localism and diversity for communities across America (NATOA, Page 4). We agree with NATOA that any consideration of the question of how to intervene in the marketplace must preserve PEG as a mechanism to reach such goals. As we stated in our original comments, our concern is the classification of MVPD services will provide further incentive to *diminish* public benefits rather than maintain and strengthen them. This is squarely in line with the position of NAB, which in its comments expresses its own concerns about the diminution of diversity and localism. "By cutting out stations that serve niche audiences from the developing OVD platform, the commission would all but guarantee that these audiences will not find them elsewhere" (NAB, Page 29). And Consumer Federation of America, which supports measures "to encourage the development of non-traditional MVPDs," recognizes that "local public access, educational, and governmental programs face challenges in transitioning to providing content over the Internet." CFA, Page 28)

## II. CABLE INDUSTRY COMMENTERS INCORRECTLY ARGUE THAT OTT VIDEO PROGRAMMING PROVIDED BY CABLE OPERATORS IS NOT A "CABLE SERVICE"

In contrast to their position on the NPRM's conclusion that linear IP video service falls within the definition of "cable service," cable industry commenters uniformly argue that cable operator provided OTT video programming would not be a "cable service" and express their agreement with the NPRM's tentative conclusion to this effect. See NCTA (Pages 35-36); Cox (Page 16); Charter (Pages 6-7); Verizon (Pages 8-10); and AT&T (Pages 1 and 8). But, with the exception

of Verizon, none of these commenters even attempt to base their arguments in language in the Cable Act or its legislative history. Rather, their arguments are based on policy assertions, describing the Cable Act's provisions as "anachronistic" or "legacy" requirements. In contrast to these arguments are the discussions in the comments of ACM (Pages 3-4), Anne Arundel County et al. (Pages 7-11, San Antonio (Pages 4-6), and the District of Columbia et al. (Pages 8-11), all of which are anchored in the language of the Cable Act and its legislative history.

Only Verizon attempts to deal with the language in the Cable Act, but its arguments do not stand up under scrutiny. Verizon claims (Page 9) that "a broadband network does not include 'associated signal generation, reception, and control equipment that is designed to provide a cable service' for the over-the-top video distribution service." This argument ignores that a cable operator providing OTT programming engages in the "active participation in the selection and distribution of video programming."[1] Verizon next claims (Id.) that delivery of OTT does not use any public right-of-way. Again Verizon is wrong. The delivery of OTT services uses the cable operator's system including facilities that traverse the public rights-of-way. Finally, Verizon argues (Page 10) that an OTT distributor is not a "cable operator." This argument rests on the same fallacy as Verizon's "cable service" argument by assuming, contrary to the Cable Act's specific language, that only a "cable operator" can provide "cable service" over a cable system. Verizon overlooks that, with respect to cable operator-provided OTT, the OTT provider by definition has an "ownership and management responsibility" with respect to the system over which the OTT is delivered, and with respect to "the broadband connection used by its

[1] *Internet over Cable Declaratory Ruling*, 17 FCC Rcd 4798, 4834 (¶ 62) (2002), *review denied sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. NTCA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (quoting *Video Dialtone Reconsideration Order*, 7 FCC Rcd 5069, 5071 (¶ 16) (1992), *review denied sub nom. NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

subscribers" to access that OTT video programming. The Commission must ensure it doesn't open the door for the cable industry to walk away from its lawful obligations, in the guise of "competitive neutrality" (Charter, Page 6), it must not be lured into the idea that any requirement is a "legacy" requirement as Cox would suggest (Page 16).

So for example, the notion of a "skinny bundle" being provided by a cable operator to consumers is an attractive one; but there is no reason why such an offering should not be paired with broadcast and PEG carriage requirements to ensure the goals of promoting local information that Americans need. Such a paired offering would seem to meet the test implied by NCTA and NATOA of a balance of benefits and obligations to the MVPD operator. Further, such a bundle must by necessity ensure support fees back to the PEG provider as we outline in our earlier comments. The goal of localism would be defeated if the NPRM were to create conditions where the cable operator has an incentive to promote a PEG product which provides no revenue back to the PEG operator, while its other cable products lose market share.

And finally, while we agree with Cox on a different earlier item, we disagree with its claim about PEG requirements leading to higher prices for consumers, for which it has no evidence of rising costs due to regulation (Page 10). Indeed, industry analysis consistently shows commercial channels costs driving up cables bills for consumers, not regulation. We can't help but observe that such claims themselves are simply "over the top."

Respectfully submitted,

/s/

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