BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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

COMMENTS OF ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF BOSTON, MASSACHUSETTS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF ONTARIO, CALIFORNIA; THE CITY OF TACOMA, WASHINGTON; THE MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY; THE MICHIGAN MUNICIPAL LEAGUE; THE MICHIGAN TOWNSHIPS ASSOCIATION; THE MT. HOOD CABLE REGULATORY COMMISSION; THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN; AND THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES

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TABLE OF CONTENTS

SUMMARY

Members of the Coalition—with certain important caveats—support classifying over-the-top ("OTT") providers of live programming as multichannel video programming distributors ("MVPDs"). As the Commission recognizes, the definition of video programming in the Cable Act is primarily based upon the nature of the programming provided, and not the technology that delivers it. The Cable Act is technology-agnostic—and the Commission is correct when it says "IP-based service provided by a cable operator over its facilities and within its footprint must be regulated as a cable service not only because it is compelled by the statutory definitions [but also because it is] good policy, as it ensures that cable operators will continue to be subject to the pro-competitive, consumer-focused regulations that apply to cable even if they provide their services via IP."

Nevertheless, the Commission errs in its tentative conclusion "that video programming services that a cable operator may offer over the Internet should not be regulated as cable services." When those services are provided over a cable operator's system, or as an enhancement to the operator's cable service offered exclusively to cable subscribers, they are properly defined as "cable services."

As the Commission is aware, current, cable operator provided OTT services are not different in any legally significant way from any other video service provided by a cable operator. There is no legal distinction between operator-controlled IP-based services delivered over a cable system and traditional cable. The cable operator chooses the bandwidth to use for the transmission. Whether that bandwidth (or data bits) is carried on the portion of the cable system wire that is dedicated to "Internet" is irrelevant, both practically and legally. Both are viewable on traditional television and on other devices. Both have competitive advantages over

competing service providers, such as bundling of products, favored treatment of the cable operator's video product, and zero-rating schemes (where the cable operator does not count usage against data limits).

As a result, operator-delivered Internet video within the operator's footprint or provided exclusively to the operator's subscribers remains a cable service. The Commission should avoid encouraging regulatory arbitrage, where legal classification creates a regulatory difference that allows cable operators to avoid important public obligations of constitutional dimensions. Cable operators use and occupy valuable public property, and law, precedent, and fairness demand they pay fair compensation for use and occupancy of public rights-of-way.

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I. INTRODUCTION

Commenters, Anne Arundel County, Maryland; the City of Boston, Massachusetts; Montgomery County, Maryland; the City of Ontario, California; Tacoma, Washington; the Michigan Coalition To Protect Public Rights-Of-Way[1]; the Michigan Municipal League[2]; the Michigan Townships Association[3]; the Mt. Hood Cable Regulatory Commission[4]; the Public

[1] The Michigan Coalition to Protect Public Rights-Of-Way is a coalition of more than 80 Michigan municipalities, townships, and organizations that protect citizens' control over public right-of-way, and the right to receive fair compensation from companies that use public property.

[2] The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

[3] The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues.

Corporation Law Section of the State Bar of Michigan[5]; and the Texas Coalition of Cities for Utility Issues[6] are cities, counties and associations of local governments (the "Coalition"), which directly or through their members, seek to foster broadband and cable competition while protecting local consumers and public property from harm.

The Coalition supports the Commission's exploration of technological advances to provide consumers with increased video competition consistent with the Communications Act.[7] The Coalition supports the Commission's efforts to redefine multichannel video programming distributors ("MVPDs") to include Internet-based distributors, as these new entities have the potential to provide expanding choices for the citizens of our communities. The Coalition does ask that the Commission require these new providers to meet the important safeguards and obligations that Congress and the Commission have established in exchange for the benefits of MVPD status.

Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships.

[4] The Mt. Hood Cable Regulatory Commission (MHCRC) negotiates and enforces cable service franchise agreements, manages the public benefit resources and assets derived from the franchises, and advocates on behalf of the public interest on communications policy issues at local, state and federal levels. The MHCRC serves the communities, residents and local governments of Portland, Fairview, Gresham, Troutdale, Wood Village, and Multnomah County, Oregon.

[5] The Public Corporation Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 20 members, with one current vacancy on the 21 member Council. The filing of this Comment was authorized at the February 13, 2015 regular meeting of the Council. 11 members of the Council were present at the meeting, and the motion passed on a vote of 10-0 with 1 abstention. The position expressed in this Comment is that of the Public Corporation Law Section only and is not necessarily the position of the State Bar of Michigan.

[6] The Texas Coalition of Cities for Utility Issues is a coalition of more than 110 Texas cities dedicated to protecting and supporting the interests of the citizens and cities of Texas.

[7] Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210 (Dec. 19, 2014) ("NPRM") ¶ 4.

The Coalition agrees with the Commission's assessment that the provision of IP video over a cable system, within the footprint of that cable system, is a cable service.[8] This includes over-the-top ("OTT") services provided by a franchised cable operator within the cable franchise area, as such services are video programming provided over a cable system. The Cable Act defines these as cable services and the Commission should avoid characterizing them inconsistently with the Act, which could have unintended and ultimately harmful consequences.

The Coalition primarily files, however, to respond to the Commission's question "to the extent a consumer located within a cable operator's footprint may access the cable operator's OTT service using that cable operator's broadband facilities for Internet access, how should this arrangement be classified"?[9] The Coalition believes that over-the-top ("OTT") services provided by a franchised cable operator within the cable franchise area are "cable services" as they are "video programming" provided over a cable system.[10] Such services are captured by the definitions of the Act as cable services and to characterize them as anything else is inconsistent with the Act and will lead to unintended, and ultimately harmful, consequences.

II. THE COMMISSION CORRECTLY CONCLUDED IP VIDEO SERVICE IS A CABLE SERVICE

The Commission is correct in its conclusions that "merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator."[11] Linear IP video service meets the definition of "cable service" under the Act, because it in fact involves "the one-way transmission to subscribers of […] video programming […] and subscriber interaction […] required for the selection or use of such video

[8] *Id.* at ¶ 71.

[9] *Id.* at ¶ 78.

[10] 47 U.S.C. § 522(6, 7, 20).

[11] NPRM ¶ 71.

programming."[12] Because the definition of cable system[13] is not dependent on the transmission technology used to deliver cable service, it follows that the transmission technology used does not alter the classification of a facility as a cable system.[14] Among the possible means of transmission are IP, proprietary digital, and analog. Indeed, the Act presumes video signals may be delivered on a cable system using a variety of transmission technologies – that is why the act provides that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."[15] As the Commission states, the "IP transition will enable cable operators to untether their video offerings from their current infrastructure, and could encourage them to migrate their traditional services to Internet delivery."[16] This possibility of such beneficial changes are exactly what the Cable Act recognizes in 47 USC § 544 when it refers to "any transmission technology."[17]

III. IP VIDEO PROGRAMMING SERVICES OFFERED BY A CABLE OPERATOR ARE CABLE SERVICES WHEN DELIVERED OVER THE CABLE SYSTEM

Having correctly determined that "merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator,"[18] the Commission proceeds to tentatively conclude that, nonetheless, a consumer who obtains prescheduled video programming from their cable operator via the cable system but "over-the-

[12] *Office of Consumer Counsel v. Southern New England Telephone Co.*, 515 F. Supp. 2d 269, 276 (D. Conn. 2007), *vacated on other grounds,* 368 Fed.Appx. 244 (2d Cir. 2010) , *citing* 47 U.S.C. § 522(6).

[13] "The term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community…" 47 U.S.C. § 522(7).

[14] NPRM ¶ 73.

[15] 47 U.S.C. § 544.

[16] NPRM ¶ 3.

[17] *Supra,* at note 15.

[18] *Id*. at ¶ 71.

top" should not be treated as obtaining a cable service over a cable system.[19] The Commission suggests that a cable operator's video programming services should be divided into two categories, one a "managed video service" and the other service by "a non-cable MVPD," even if those services are accessed over the same cable system.[20] But there is no meaningful legal distinction between video services delivered over a cable system under the Cable Act's definitions, and as importantly, there is no practical distinction that can be safely drawn.

A. IP Transmission of Video Is Within the Definitions of Cable System and Cable Service

The term "cable system" applies to "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming,"[21] which uses the public right-of-way, is not owned by a common carrier (with exceptions), is not an open video system under section 573, and is not used solely to retransmit broadcast stations or operate an electric utility system.[22] Not all cable services are provided by a cable system—for example, cable services provided by a telephone company through an open video system. But if cable service is provided by a cable operator over a cable system, there is no basis for different regulatory treatment based on whether or not the signal in whole or in part transits the frequencies the cable operator uses to provide Internet service.[23] The Commission appeared to recognize this in the NPRM when it stated that "IP-based service provided by a cable operator over its facilities and within its

[19] NPRM at ¶ 78.

[20] *Id*.

[21] 47 U.S.C. § 522(7).

[22] *Id.*

[23] *See Cable Modem Declaratory Ruling* at ¶ 35, stating that in the absence of definitions that relied on the type of facilities used, the status of cable modem service was based on "the functions [it] makes available to its end users."

footprint must be regulated as a cable service."[24] But the Commission later introduced the concept of a cable company offering services as a "non-cable MVPD."[25]

These video services offered by a cable company are "cable services" under the Cable Act, which gives the Commission no discretion to treat them any other way than as cable services. A cable service is "(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."[26] "The essence of cable service ... is one-way transmission of programming to subscribers generally."[27] Video programming is "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[28] "The Act's definition of video programming […] 'refers to the nature of the programming offered on a cable service, not the means of transmission.'"[29] The term "video programming" therefore applies to all programming provided by, or generally considered comparable to programming provided by, a television broadcast station.[30] It was argued that "[s]treaming video" was "not consistent with the definition of video programming" in 2002 "because it ha[d] not yet achieved television quality,"[31] but in 2015 it has achieved television quality, the fact that provides the impetus for this proceeding. Streaming video is thus "video programming."[32]

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[24] NPRM ¶ 75.

[25] *Id*. at ¶ 78.

[26] 47 U.S.C. § 522(6).

[27] *AT&T v. City of Portland,* 216 F3d 871, 876 (9th Cir. 2000).

[28] 47 U.S.C. § 522(20).

[29] *American Scholastic TV Programming Foundation v. FCC*, 77 RR2d 355 (1995), *citing Botetourt County School Board*, 8 FCCR 6265 (1993).

[30] 47 U.S.C. § 522(20).

[31] 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,

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 debate. 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."

The pathway that transmits IP signals is part of the cable system. The closed transmission paths remain a cable system regardless of how particular channels or frequencies may be used at a particular moment in time.

It would be difficult to draw any meaningful legal distinction between operator-controlled IP-based services delivered over a cable system based on whether those are "Internet" or not Internet services. Both may be receivable at a television set or a computer. Both may be viewable (via in-home wireless networks) on traditional television or on other devices. Both may enjoy delivery advantages over independent competing products as a result of the cable operator's marketing (bundling of products), technical advantages (treatment of the favored video product as a special service) or zero-rating schemes (where a favored product does not count against data limits). It would make no sense to allow a cable operator to change the legal character of its video programming simply by arbitrarily calling it "OTT" rather than "cable service." As a result, operator-delivered Internet video, at least within the operator's footprint,

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Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, n. 236 (2002) (*Cable Modem Declaratory Ruling*), aff'd, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (NCTA v. Brand X).

[32] NPRM ¶ 1.

also "must be regulated as a cable service not only because it is compelled by the statutory definitions [but also because] it is also good policy…"[33]

B. Control of the Pathway Makes Important Legal and Factual Differences in a Cable Operator's OTT Offerings

The conclusion that OTT services controlled by a cable operator are cable services makes common sense and meets the mandate of the Commission to serve the public interest. Any other conclusion creates substantial legal arbitrage and consumer protection risks. The Commission should never opt to create a legal exception to a Congressional mandate. And here the Congressional mandate serves the public interest. The cable operator is in control of every aspect of the broadband pathway. This creates substantial risks that the operator will have marketplace incentives to discriminate against unfavored programmers and shape consumer behavior to favor other programmers.

A cable operator has the ability to treat its own OTT services in distinct ways that favor them over another MVPD's OTT services. Bundling, zero-rating, designation of special IP capacity and specialized consumer interfaces that make it simpler for a consumer to view the "OTT" product on a television set—each of these techniques can give the cable operator a significant opportunity to discriminate against programmers and video programming not controlled by the cable operator. For example, Comcast places data caps on subscribers on some of its systems. But Comcast's Xbox 360 FAQ page states that "similar to traditional cable television service that is delivered to the set-top box, [Comcast-provided video programming delivered over-the-top] doesn't count toward our data usage threshold. The Xbox 360 running our XFINITY TV app *essentially acts as an additional cable box for your existing cable service,*

[33] *Id.* at ¶ 75.

and our data usage threshold does not apply."[34] Comcast itself thus characterizes its OTT-type service as "cable service," the equivalent of the service the subscriber already receives; and Comcast treats this Xbox-delivered service under a different set of rules from other providers' OTT service—like cable service, not OTT.

IV. USE OF THE RIGHT-OF-WAY JUSTIFIES TREATMENT OF CABLE COMPANIES' OTT OFFERINGS AS CABLE SERVICES, SUBJECT TO CABLE FRANCHISE OBLIGATIONS

The privileges that the franchise holder maintains in its use of the right-of-way further distinguish its services from programming services provided by those who do not use and occupy the right-of-way.[35] The fact that the holder of a cable franchise offers a package of prescheduled video programming to the public over-the-top in a franchise area makes the video programming subject to the franchise, and there is good reason to hold the cable operator to a different standard than that of genuine OTT providers.[36]

A few examples of typical franchise requirements demonstrates the benefits to the public interest of requiring comparable treatment for all video programming controlled by the cable operator. A cable operator's responsibility to provide public, educational, and governmental access does not change because of what it calls its programming. Similarly, the customer service standards that apply to an operator—telephone availability, meeting service appointments, and the like—are valid for the system owner regardless of whether it classifies its service as OTT. Conversely, different standards are appropriate for programmers that do not own the facilities. A person who leases capacity under Section 612 does not require a franchise;[37] operators and those

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[34] Comcast, "FAQs: Xbox 360," *available at* http://xbox.comcast.net/faqs.html (emphasis added).

[35] *See In the Matter of Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 14277 (1998), aff'd, *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), cert. denied (2000) (*ICE*).

[36] *See ICE, supra.*

[37] 47 U.S.C. § 532.

who deliver services via the cable system may be subject to different fees;[38] and a person who owns an open video system ("OVS") may be subject to different requirements than the entities that lease capacity from the OVS provider.[39]

The line drawn by the statute is tied directly to whether the video programming is travelling over a closed transmission system that is controlled by the programmer. If it is, and it uses the public rights-of-way, the system operator is subject to franchise obligations related to its video programming services.[40] 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.[41]

V. CABLE SERVICES OFFERED BY A CABLE COMPANY TO ITS CABLE SYSTEM SUBSCRIBERS REMAIN CABLE SERVICES EVEN WHEN ACCESSED OUTSIDE THE FRANCHISE AREA

The Commission concludes in paragraph 74 that "an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint."[42] Among the potential implications of this conclusion indicated in paragraph 78 are that when a cable company provides cable services over IP, the same video programming may not be "cable services" if accessed by cable system subscribers outside the cable company's franchised area.[43]

The Commission thus appears to be suggesting that the cable franchise boundary is a new restriction on the definition of "cable services over a cable system." An example illustrates the

[38] 47 U.S.C. § 542(h).

[39] 47 U.S.C. § 573.

[40] 47 U.S.C. § 541.

[41] 47 U.S.C. § 542.

[42] NPRM ¶ 74.

[43] *Id*. at ¶ 78.

flaws of this approach: A woman regularly travels on business to a distant city and eventually becomes a cable subscriber at her place of work, but then goes home periodically and obtains OTT services over her mobile tablet from the cable operator she subscribed to at her place of work. Those services would not be available to the businesswoman but for the local franchise given the cable operator, and the cable operator would not have access to video programming at preferred prices but for its status as a cable operator. Yet would the Commission conclude that viewing a movie while on business travel is a "cable service," while viewing a movie on a tablet at home is not a "cable service"? The key fact is that the subscriber would not have service but for the local cable franchise. The subscriber is using modern technology to get full benefit from the cable services she is paying for. But there is no reason to allow the cable operator to escape its franchise obligations because of the subscriber's creative use of the cable services.

The Act does not indicate that one is a cable operator only to the extent that one provides a cable service over its own facilities and within its own footprint. Of course, if there were no cable footprint there would be no franchise agreement or "community" referred to in the definition of a cable system, and if there were no cable facilities there would be no cable system. The existence of these facilities is a *sine qua non*, but does not limit the definition to arbitrary boundaries unrelated to how consumers are actually using the cable services.

Over-the-top services may be offered by a cable operator independent of cable services provided over a cable system, or in conjunction with them. To the extent that cable services may be usable by subscribers temporarily outside of the franchise area, there remains a relevant cable system located within the right-of-way, and therefore the operator meets the definition of a cable operator.[44]

[44] *See* 47 U.S.C. § 522, defining cable operator in relationship to a cable system.

The ability of a subscriber to access these services using new technology inside or outside the franchise area does not change the legal character of the video programming services—they are still cable services being offered by a cable operator and dependent on the cable system. "The essence of cable service ... is one-way transmission of programming [over a cable television system] to subscribers generally."[45] If the programming is provided over a cable television system, consumer choice as to how most conveniently to consume that programming does not change the legal character of the "cable service." The cable operator chose to become a cable operator. The operator has access and provides this programming because the cable system exists. The operator has used the cable system to acquire the cable subscriber and cannot now claim that subscriber discretion to consume that programming in multiple ways and on different consumer platforms changes the legal obligations of the cable operator.

VI. THE COMMISSION SHOULD AVOID RULE CHANGES WHICH THREATEN PROPERTY RIGHTS

The novel proposed distinction between a franchised cable operator's "managed video service" (a term found nowhere in the Communications Act) that is subject to franchise obligations and a [non-managed?] video programming service that is exempt from those same requirements raises significant constitutional concerns. Local government has worked constructively with the federal policy to encourage deployment of cable television services. Cable franchising has worked in the nation's benefit. The Commission should tread softly if its proposals might have the effect of dismantling cable television franchising.

A cable operator uses the public rights-of-way in exchange for franchise obligations, including construction and safety and consumer protection standards, franchise fee payments, and community benefits in the form of capacity and support for public, educational and

[45] *AT&T v. City of Portland*, 216 F3d 871, 876 (9th Cir. 2000).

governmental programming.[46] If cable video services can be provided by a franchise holder over-the-top, and this is treated as a "non-cable MVPD," even though these services could not exist but for the cable franchise, then these video programming services would potentially no longer be subject to franchise obligations.[47] As the Commission states, "[i]ncumbent cable systems have made plain their intent to use a new transmission standard that will permit cable systems to deliver video via IP."[48] If the Commission redefines certain video services provided by a cable system arbitrarily as "non-cable" services, and "non-cable" cable operators are no longer to be responsible to provide compensation for use of the rights-of-way, the Commission's action could constitute a regulatory taking that requires just compensation.[49]

VII. MVPDs AND CABLE OPERATORS HAVE SIGNIFICANT PUBLIC INTEREST OBLIGATIONS

Coalition members wish to briefly emphasize the importance of the extensive obligations that existing MVPDs have to the public interest, which balances their privileges. As Boston and Montgomery County pointed out in the Sky Angel proceeding,[50] Coalition members are (or are comprised of) local franchising authorities whose communities have issued franchises consistent with federal law guidelines. These franchises require set-aside of channel capacity on subscriber networks for public, educational and government ("PEG") access video programming channels, and provision of channel capacity on institutional networks ("I-Nets"). The franchises also require compliance with significant consumer protections. The franchises impose significant

[46] 47 U.S.C. § 542(b).

[47] NPRM ¶ 37.

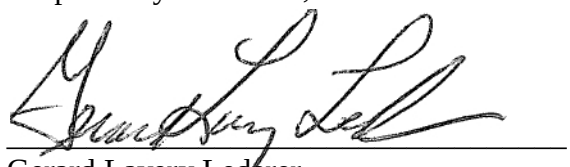
[48] *Id.* at ¶ 2.

[49] *City of Dallas, Texas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999), *reh'g and suggestion for reh'g en banc denied*, (May 28, 1999).

[50] *In the Matter of Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, Reply Comments of the City of Boston, Massachusetts and Montgomery County, Maryland, MB 12-83 (June 13, 2012).

public safety, construction and availability of service obligations. The franchises require that MVPDs cooperate on matters of homeland security, and home and business security, and provide information that is accessible to all, including citizens with disabilities.[51] It is essential for the Commission to ensure that any transition to IP networks and development of new MVPDs can occur without harm to these public benefits.

Respectfully submitted,



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March 3, 2015
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[51] NPRM ¶ 56.