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

COMMENTS OF
<u>NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION</u>

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The National Cable & Telecommunications Association ("NCTA")[1] hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes to adopt a definition of "multichannel video programming distributor" ("MVPD") that encompasses online video distributors ("OVDs") that offer multiple linear streams of video programming to subscribers. That definition cannot be squared with how Congress defined the term in 1992, nor is it consistent with the policies Congress sought to achieve when it adopted rules conferring benefits and imposing obligations on MVPDs. Nor, for that matter, would defining OVDs as MVPDs make good policy sense today, even if the Commission had authority to do so.

As the Commission's Media Bureau tentatively (and rightly) concluded when it considered this very issue several years ago, OVDs do not meet the statutory definition of an MVPD because they do not make available multiple "channels" of video programming for purchase by subscribers. The term "channel" is itself unambiguously defined, for purposes of

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $230 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

Title VI of the Communications Act, to require the provision of a *transmission path* on which video programming is provided – and *not* simply the video programming itself. There is no indication that Congress intended to define "channel" differently for purposes of the Title VI definition of an MVPD. To the contrary, all evidence – in the statute and in the legislative history – indicates that Congress meant the term "channel" to mean a transmission path throughout Title VI, and that it intended that the definition of "MVPD" be restricted to *facilities-based* entities.

Moreover, any notion that Congress intended that the benefits and burdens of MVPD status apply to providers of programming on the Internet would also conflict with Congress's subsequent determination that it 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*."[2] And, finally, extending the program access and program carriage provisions of the 1992 Cable Act to all online providers of multiple linear programming streams would raise serious Constitutional issues.

For all these reasons, the Commission may not simply discard the statutory definition of a "channel" and replace it with one that it claims better meets its *own* policy preferences.

In any event, extending MVPD status to OVDs would *not* represent sound public policy. The Commission has tentatively concluded that giving OVDs the benefits of such status – specifically, access to cable-owned programming pursuant to the "program access" rules and the right to good faith negotiations with broadcasters under the "retransmission consent" rules – would promote competition in the video marketplace. But competition in the video marketplace is already flourishing – both among facilities-based MVPDs and on the Internet, where new,

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[2] 47 U.S.C. § 230(b)(2) (emphasis added).

innovative providers of video programming are coming to market and gaining viewers and customers every day. This is hardly the marketplace that existed in 1992, when Congress worried that cable operators, by denying programming that they owned to fledgling facilities-based competitors such as DBS services, might squelch the development of any significant competition at all.

In today's circumstances, there is nothing pro-competitive about giving OVDs an artificial boost by requiring cable-owned programming services to deal with them on regulated terms and conditions. To the contrary, intervening in the marketplace to provide special benefits to an entire new class of providers of video programming while imposing special obligations on certain program networks has the effect of *distorting* competition – of promoting some competitors over others without regard to their ability to best and most efficiently meet consumer demand.

Giving OVDs the right to good faith retransmission consent negotiations with broadcasters would also do nothing to promote competition and would, in fact, do nothing to enhance the ability of OVDs to compete. Although the Copyright Act provides for a compulsory copyright license covering the retransmission of content on certain platforms, this does not extend to retransmission on the Internet, as courts and the Copyright Office have confirmed. Retransmission consent from a broadcast station is meaningless unless an MVPD also has permission from the copyright owner of each program carried by the station to retransmit its program. If OVDs were classified as MVPDs, they would be required (like other MVPDs) to obtain retransmission consent, and they would be entitled to good faith negotiations with broadcasters to obtain such consent – but, absent copyright permission, they would, in any event, be unable to carry the broadcast station's programming.

Aside from the fact that extending MVPD status to OVDs would do nothing to promote fair marketplace competition, such an interpretation of the statute would disrupt the marketplace for online video and would raise knotty compliance problems. For example, if OVDs were deemed MVPDs, they might be entitled to obtain certain cable-owned program networks on nondiscriminatory terms and conditions. But, as the Commission recognizes, those networks may not have been granted the rights, by the owners of all the programs that they carry, to distribute that programming online. Forcing networks to acquire such rights from program owners would be a wholly unprecedented, unwarranted, and unlawful intrusion into the program distribution marketplace and is not a viable solution to this conundrum.

The statutory obligations of MVPDs would (and should, as a matter of regulatory parity) apply to such OVDs along with the benefits of such status. But the administrative burdens of enforcing and complying with not only the benefits but also the obligations associated with such status would be substantial at best, and overwhelming at worst. Even *identifying* every OVD that provides linear programming streams would be a near impossible task for the Commission; ensuring that each such OVD *complies* with the array of statutory and regulatory MVPD requirements addressing, for example, equal employment opportunity, accessibility, emergency information, and loud commercials will tax the enforcement and rulemaking capabilities of the Commission while imposing additional burdens on the regulated entities.

Recognizing that reclassification would impose significant regulatory burdens on OVDs that qualified as MVPDs, the Notice proposes a number of exceptions and limitations to the definition of MVPD to narrow the scope of entities covered by reclassification. But such arbitrary line-drawing would only compound the problems of enforcing and complying with

MVPD regulation, and would create artificial incentives for OVDs to structure their operations in order to take advantage of the benefits or avoid the burdens of MVPD status.

In addition to seeking comment on whether the definition of an "MVPD" encompasses OVDs, the Commission also asks whether the provision of programming in Internet Protocol ("IP") format or over the Internet affects the regulatory status of a "cable operator." NCTA has consistently maintained that an entity that offers video programming over "a set of closed transmission paths" that it owns and manages is a cable operator, regardless of the format in which the signal is provided – so that, for example, the fact that AT&T and Google provide their facilities-based multichannel video programming to subscribers in IP format does not alter their status as cable operators.

By contrast, when a cable operator also offers programming to customers on the public Internet, its Internet-based service should have the same regulatory status as other OVDs offering such services. Cable operators, when they provide traditional facilities-based cable service, already have unique obligations in addition to the requirements shared by all MVPDs. This regulatory disparity would only be exacerbated if cable operators faced regulatory burdens in the provision of Internet-based service that were not borne by their non-cable OVD competitors.

I. THE STATUTORY DEFINITION OF AN MVPD CANNOT REASONABLY BE CONSTRUED TO EXTEND TO ONLINE VIDEO SERVICES.

Although this proceeding purports, via its caption, to be about the broad policy issue of "promoting innovation and competition in the provision of multichannel video programming distribution services," what it is really about is a more prosaic issue of statutory construction: Does the definition of an MVPD, as that term is used in Title VI of the Communications Act of 1934, as amended, encompass OVDs?

The Commission lacks the authority to reclassify OVDs as MVPDs. When Congress first inserted the term MVPD into the statute in the Cable Consumer Protection and Competition Act of 1992, it specifically defined the term for purposes of Title VI. That definition (as the Media Bureau itself tentatively concluded several years ago),[3] both by its terms and by Congressional intent, applies only to *facilities-based* providers of video programming services and not to entities that, like OVDs, sell only programming – and no accompanying transmission path – to subscribers.

An MVPD, for purposes of Title VI, is

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple *channels* of video programming.[4]

According to the Notice, the term "channels," in that definition, is ambiguous and susceptible to two possible interpretations. It could refer to physical transmission paths that carry video programming, in which case "the definition of an MVPD would include only entities that make available transmission paths in addition to content, and thus exclude those Internet-based distributors of video programming that do not own or operate facilities for delivering content to consumers."[5] Or, it could simply mean "streams of linear video programming," in which case "linear video programming networks, such as ESPN, The Weather Channel, and other sources of video programming that are commonly referred to as television or cable 'channels,' would be considered 'channels' for purposes of the MVPD definition, *regardless of*

[3] *See Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882-83 (MB, 2010).

[4] 47 U.S.C. § 602(13).

[5] Notice, ¶ 17.

whether the provider also makes available physical transmission paths."[6] The Commission tentatively concludes that, given this ambiguity, the latter is the better interpretation and is most consistent with its view of what Congress intended – which is that the definition of "MVPD" (and, therefore, the statutory provisions that apply to MVPDs) should *not* be limited to the facilities-based providers that concerned Congress in 1992 but should instead be "sufficiently flexible to cover providers using new technologies such as Internet delivery."[7]

The term "channel" might have been ambiguous and susceptible to these two interpretations – and the Commission might then have had discretion to choose its preferred interpretation – if Congress had not also specifically defined *that* term for purposes of Title VI:

> The terms "cable channel" or "channel" means *a portion of the electromagnetic 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).[8]

That definition makes unambiguously clear that a channel is the transmission path that delivers video programming – not the video programming itself.

The Commission does not dispute that this definition of "channel" is at odds with its proposed "linear programming" interpretation of the term. But it concludes that Congress could not have intended for this definition to apply to the definition of an MVPD. The Commission maintains that because a "channel" is defined as a portion of the electromagnetic spectrum "which is used in a cable system," no entities other than cable systems can provide such "channels" – and therefore no entity other than a cable system can be an MVPD. Since the term MVPD was clearly meant to encompass DBS and other services in addition to cable systems,

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[6] *Id.* (emphasis added).

[7] *Id.*, ¶ 23.

[8] 47 U.S.C. § 602(4) (emphasis added).

"we tentatively conclude that we should not rely on the *cable-specific* definition of the term 'channel' to interpret the definition of 'MVPD.'"[9] Instead it proposes to jettison the statutory definition altogether and to adopt a definition that will, in its view, better promote the broad policy goals of the statute.

But if there is a reasonable way to read the plain language of a statutory definition so that it does not yield an absurd and obviously unintended result, the Commission may not cast the definition aside and make up one of its own.[10] And it especially may not, in such circumstances, ignore the unambiguous statutory definition of a channel as a transmission path in order to implement its own policy objectives.[11]

While the Commission construes the phrase "which is used by a cable system" in a way that, in the context of the definition of an MVPD, leads to an absurd result, a more reasonable construction is available. Properly read, there is nothing "cable-specific" – or cable exclusive – about the definition of a "channel." The definition does *not* say, as the Commission suggests, that a channel is a portion of the electromagnetic spectrum only *when it is being used* by a cable system. The electromagnetic spectrum "which is used" by a cable system can also be used by other entities delivering video programming. Indeed, all the facilities-based services identified

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[9] Notice, ¶ 21 (emphasis added).

[10] "[A]n agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable." *Massachusetts v. U.S. DOT*, 93 F. 3d 890, 893 (D.C. Cir. 1996).

[11] *See*, *e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (U.S. 1935) ("[D]efinition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. . . . There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.); *National Assn. of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 665 (2007) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.") *See also National Homeopathic Hospital Ass'n of District of Columbia v. Britton*, 147 F.2d 561, 562 (D.C. Cir. 1945).

as examples in the definition of an MVPD deliver programming over portions of the electromagnetic spectrum, just as cable systems do.[12]

Even if the Commission were correct that the statutory definition was "cable-specific," it would still be overreaching to conclude that Congress meant to use a wholly different definition of "channel" in defining an MVPD. Congress used the term "channel" in numerous substantive provisions throughout Title VI, and in virtually every case the term clearly was intended to mean the transmission path indicated in the statutory definition.[13] Just once, when Congress used the term "*premium* channel" in Section 624 of the Act, did the term instead mean a program service, and in that case, Congress separately defined "premium channel" for purposes of that section. Indeed, that section itself refers, twice, to "the channel carrying the premium channel" – making clear again that the term "channel" means the portion of the spectrum on which the programming is delivered.[14]

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12 The Notice suggests that Section 336(b)(3) of the Act is inconsistent with the interpretation that a "channel" means a transmission path. Notice, ¶ 22 n. 53. That is incorrect. Section 336(b)(3) provides that no broadcaster shall be deemed an MVPD for purposes of the program access rules on the basis of any "ancillary or supplementary" sources offered on its digital spectrum. *See* U.S.C. § 336(b)(3). As the Commission has explained, Congress enacted this provision to avoid a situation where a broadcaster might try to claim the benefits of the program access rules if it started using its spectrum to deliver pay TV services. *See* Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 65 (2001). Without this provision, a broadcaster might qualify as an MVPD since it would be providing an integrated television service that included both video programming and transmission to paying customers.

13 *See, e.g.,* 47 U.S.C. § 531 (public, educational, and governmental access channels); 47 U.S.C. § 532 (leased access); 47 U.S.C. 533 (ownership restrictions); 47 U.S.C. § 534 (b) (mandatory carriage of local commercial television signals); 47 U.S.C. § 534 (c) (low power station carriage obligations); 47 U.S.C. § 535 (mandatory carriage of noncommercial stations); 47 U.S.C. § 543 (rate regulation); 47 U.S.C. § 544 (regulation of services, facilities, and equipment); 47 U.S.C. § 544a (consumer electronics equipment compatibility); 47 U.S.C. § 548 (program access); 47 U.S.C. § 557 (provisions in pre-existing franchises); 47 U.S.C. § 558 (criminal and civil liability); 47.U.S.C. § 560 (scrambling of channels for nonsubscribers); 47 U.S.C. § 561 (scrambling of sexually explicit adult video service programming); 47 U.S.C. 573 (open video systems).

14 The Notice suggests that the so-called Transmission Path Interpretation would require that an MVPD deliver programming using multiple transmission paths, *see* Notice ¶ 29, but such a cramped reading of Section 602 ignores the text and history of the Act. To be sure, at the time the definition of channel was adopted, cable operators delivered analog channels in 6 MHz blocks of spectrum. However, as detailed above, Congress and the Commission have both understood that the definition of MVPD encompasses other distribution methods. While some MVPDs (such as traditional cable systems and DBS) broadcast all linear channels at the same time using different portions of spectrum, others (such as IP cable systems) deliver linear channels as requested by

If Congress had meant to define "channel" differently in the definition of "MVPD" than in the specific statutory definition of the term – and differently than anywhere else in Title VI – it is reasonable to presume that it would have said so. Even if the phrase "which is used by a cable system" were viewed as rendering the definition cable-specific and therefore incompatible with the definition of an MVPD, it would still make far more sense – and would be far more consistent with legislative intent – to view Congress's failure to eliminate that phrase when it adopted the 1992 Act as an oversight than to presume that Congress *intended* for "channel" to mean something entirely different than in the definition and in every other provision of Title VI.[15]

Moreover, while the Commission suggests that Congress intended "to define 'MVPD' in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery,"[16] all evidence is to the contrary. *First*, as the Commission points out in the Notice and has noted before, the legislative history specifically indicates that Congress was concerned about "facilities-based" competition.[17]

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customers on a unicast or multicast basis. The common characteristic of these different distribution models is that they all involve transmission.

[15] Interpreting the word "channel" in the definition of an MVPD to mean a "video programming network" would make the subsequent term "video programming" *in that same provision* redundant and meaningless, i.e., an MVPD would be a distributor who makes available for purchase "multiple [video programming networks] of video programming." This would violate a basic rule of statutory construction. *See Jarecki v. G.D. Searle Co.*, 367 U.S. 303, 307-08 (1961) (Where "[t]he statute admits a reasonable construction which gives effect to all of its provisions[,] . . . we will not adopt a strained reading which renders one part a mere redundancy."). The fact that Congress used both "channel" and "video programming" in the same phrase is evidence that Congress plainly intended the definition of MVPD to mean a single integrated service that included both "container" ("channel") and "content" ("video programming").

[16] Notice, ¶ 23.

[17] H.R. Rep. No. 102-862 at 93 (1992); H.R. Rep. 102-628 at 46 (1992); Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Report and Order, 11 FCC Rcd 18, 223 ¶ 53 (1996) ("We believe that Congress expressed a clear preference, where possible, for facilities-based competition in the video marketplace from both cable operators and telephone companies."). Moreover, Congress has consistently and repeatedly maintained this distinction between facilities- and non-facilities-based distributors over the

Second, even in 1992, there were providers of multiple video programming services that were excluded from the definition of an MVPD specifically because they did *not* control the facilities and provide the transmission path over which such programming was delivered. For example, the Commission distinguished between "satellite carriers," which retransmitted via satellite the signals of multiple broadcast stations for a fee directly to backyard dish owners, and various entities that were authorized by those carriers to also sell those carriers' packages of retransmitted broadcast stations to dish owners. Only the former – the entities that actually *delivered* the programming over a transmission path that it controlled – qualified as MVPDs, while the entities that simply charged for the "unscrambling" of programming that was delivered by the satellite carrier did not.[18]

Third, the legislative history is replete with indications that the Act's provisions were meant to remedy a particular marketplace problem that Congress believed existed at the time – *i.e.*, the market power that resulted from the absence of facilities-based competition among

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ensuing decades. For example, in the CVAA, Congress directed the Commission to adopt new closed captioning rules for Internet-delivered video, while maintaining a separate regulatory framework for MVPDs. There would have been no need for these new rules if Congress believed that OVDs fall within the statutory definition of MVPDs. *See* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 202(b), 124 Stat. 2751, 2770-71 (codified at 47 U.S.C. § 613(c)) ("CVAA"). Likewise, Congress directed the Commission to reinstate the video description *rules* applicable to MVPDs, but merely directed the Commission to produce a *report* regarding video description for Internet-delivered programming (i.e., OVDs). *See* CVAA § 202(a), 124 Stat. at 2768 (codified at 47 U.S.C. § 613(f)(3)).

[18] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965 ¶ 131 (1993) (only satellite carrier is an MVPD, and satellite carrier's agents were not). The Notice cites to Commission precedent involving Open Video Systems ("OVS") in support of its Linear Programming Interpretation. *See* Notice. ¶ 20 & n.47. While it is true that the Commission found that OVS providers constitute MVPDs despite the fact that they might not own or operate the underlying facilities, that decision does not support the conclusion that OVDs must also be treated as MVPDs. Like cable and DBS providers, but unlike OVDs, OVS providers include the transmission of video as part of the integrated service that they provide to end users. In other words, even when the OVS provider does not own or operate the underlying facility, the service being provided to the end user is, in the most critical respect, no different from a cable service or DBS service – it is an integrated service that includes both the video programming and the transmission of that video programming. *See* 47 C.F.R. § 76.1500. OVD services, in contrast, provide a *fundamentally different product* that completely divorces the video from the transmission.

incumbent cable systems.[19] There is no indication anywhere that Congress intended to expand the scope of Title VI regulation to encompass any new technologies and to protect and artificially boost any new entrants – facilities-based or otherwise – in perpetuity, especially in a vigorously competitive video marketplace. The legislative history indicates exactly the opposite:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that *until true competition develops*, some tough yet fair and flexible regulatory measures are needed.[20]

Fourth, there is especially no basis for concluding that Congress intended "to cover providers . . . using Internet delivery," as the Commission contends. To the contrary, Congress specifically recognized, in the Telecommunications Act of 1996, that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*,"[21] and it determined that it was "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*."[22] Congress is free to change this policy and the scope of the provisions of Title VI, but the Commission is not free to disregard it in divining Congress's intent.

Furthermore, the Commission may not choose a definition that raises serious Constitutional problems when it is possible to construe the statute in a way that avoids such

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[19] *See*, e.g., Conference Report, H.R. Rep. 102-862, 102d Cong. 2d Sess. 92 (1992) ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.") *See also* Report of the Committee on Energy and Commerce, H.R. Rep. 92-628, 102d Cong. 2d Sess. 30 (1992) ("House Report").

[20] House Report at 30 (emphasis added).

[21] 47 U.S.C. § 230(a)(4).

[22] *Id.*, § 230(b)(2) (emphasis added).

problems.[23] Interpreting the term MVPD to encompass all OVDs that offer multiple linear streams of video programming would vastly extend the scope of the program access and program carriage provisions of the Act in a manner that also extends their already substantial impact on First Amendment rights.

The courts have left no doubt that the program access rules, which require cable-affiliated program networks to deal in a nondiscriminatory manner with all MVPDs, and restrict the protected speech of cable operators and cable program networks. Similarly, the program carriage rules constrain speech by regulating whether, and on what terms and conditions, certain video programming services must be carried by certain MVPDs.

When the United States Court of Appeals for the D.C. Circuit first considered the constitutionality of the program access requirements shortly after they were enacted, it found that the rules served an important government interest – promoting competition in a marketplace where effective competition among MVPDs barely existed – and therefore were permissible under the "intermediate" First Amendment scrutiny that applies to "content-neutral" restrictions on speech.[24] But the development of competition in the facilities-based MVPD marketplace along with the decline in the amount of programming owned by cable operators has weakened the link between the program access and program carriage rules and the government's interest in ensuring a competitive marketplace.[25]

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[23] *See*, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 577 (1988); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

[24] *See Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 977-79 (D.C. Cir. 1996).

[25] *See*, *e.g.*, *Cablevision Sys. Corp. v. FCC,* 597 F.3d 1306, 1315-29 (D.C. Cir. 2010) (dissenting opinion of Judge Kavanaugh); *Comcast Cable Communications v. FCC,* 717 F.3d 982, 987-994 (D.C. Cir. 2013) (concurring opinion of Judge Kavanaugh).

Extending these rules to the online video marketplace would almost surely strain the "intermediate scrutiny" link between rule and government interest to the breaking point. Is there any reason to think that giving every OVD that offers multiple linear programming streams nondiscriminatory access to the small number of cable-owned program networks (or forcing such OVDs to carry any program network that might be deemed similar to a programming service that the OVD owns) is necessary to ensure competition in an already vibrant and intensely competitive video marketplace? Indeed, is there any evidence that the burgeoning competition in the Internet-based video marketplace has been hampered by a lack of access to cable-owned program networks (or an ability to obtain carriage on an OVD's video platform)? Unless the answer is yes (and it clearly is not), extending MVPD status to these online distributors will almost surely fall short under any analysis of the constitutionality of the program access and program carriage provisions of the law.

Moreover, the unconstitutional effects of extending the benefits of the program access rules to Internet-based providers are compounded by the fact that the obligations of those rules are imposed only upon cable operators and cable-owned program networks and not on DBS companies or OVDs or any other non-cable MVPDs. Today, when the two national DBS companies, DirecTV and Dish, rank second and third in subscribership among all MVPDs,[26] it is hard to find a rational basis, much less an important government interest, in singling out cable for the speech-restricting burdens of the program access rules. And this discriminatory treatment will only be exacerbated if the benefits of the rules are extended to all Internet-based providers of multiple programming streams.

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[26] NCTA Analysis of SNL Kagan Data.

For all these reasons, if the statutory definition of an MVPD could be read in no way other than as encompassing OVDs, the program access and program carriage provisions of the 1992 Cable Act would be unlikely to survive First Amendment scrutiny. But if the language of the statute does not compel such an interpretation, the Commission is required to interpret it in a way that avoids these serious First Amendment problems.[27] As discussed above, the statute permits and compels a different interpretation – namely, that, as the Media Bureau tentatively concluded, the term MVPD applies only to entities that provide a transmission path along with video programming services and not to OVDs.

II. EVEN IF THE COMMISSION HAD STATUTORY DISCRETION TO INCLUDE OVDs WITHIN THE DEFINITION OF AN MVPD, THERE WOULD BE NO SOUND PUBLIC POLICY RATIONALE FOR DOING SO.

Statutory construction and constitutional issues aside, extending the definition – and, as a result, the regulatory advantages and obligations – of an MVPD to Internet-based services would be utterly unwarranted as a matter of public policy. In today's competitive video marketplace, giving an artificial regulatory boost to certain online competitors would undermine rather than promote fair marketplace competition and the consumer benefits associated with such competition. Giving OVDs the benefits and obligations of good faith negotiation regarding retransmission consent are unnecessary in light of marketplace developments. The Commission also mistakenly assumes that extending retransmission consent rights to OVDs would resolve the copyright licensing issues OVDs face. Moreover, as the Notice suggests, implementation and enforcement of the various regulatory requirements that apply to MVPDs would ensnare the

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[27] *See, e.g.*, *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012) ("Because the canon of constitutional avoidance trumps *Chevron* deference, . . . we will not accept the Commission's interpretation of an ambiguous statutory phrase if that interpretation raises serious constitutional difficulty."(internal quotations and citations omitted)); *Bell Atl. Tel. Cos. v. FCC,* 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."(citations omitted)), *superseded by statute*, 205 F.3d 416 (2000).

Commission, cable operators, cable-affiliated program networks and the multitude of OVDs that might qualify for MVPD status in a nightmare of administrative burdens, line-drawing, uncertainties and impossibilities.

A. The Online Video Distribution Marketplace is Dynamic and Growing.

As a threshold matter, the Notice's proposals are predicated on the notion that OVDs are not able to access programming that they need to compete. But this is belied by today's vibrant marketplace.[28] As the Notice recognizes, OVDs are developing various business strategies for offering access to both linear and on-demand content, including free access supported by advertising, subscription-based access, and transactional access whereby a customer pays on a per-episode, per-season, or per-movie basis.[29] Newer services offer a combination of these business models, allowing consumers to further customize their viewing experience. The fact that this marketplace continues to innovate in different directions to meet evolving consumer demand makes it all the more important that the Commission *not* insert itself and single out one model for different regulatory treatment. This would skew the marketplace and create significant practical difficulties for all marketplace participants.

The Notice sets as a goal fostering further competition to traditional MVPD services,[30] but the marketplace is already responding with a variety of online linear programming services that compete with MVPDs. For example, Sony has announced that it will launch PlayStation Vue – a live TV streaming service for which customers will pay a monthly subscription fee –

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[28] The fact that there is no marketplace problem that needs fixing makes potential Commission intervention not only unnecessary, but also contrary to the APA. *See, e.g.*, *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985) ("[T]he Commission has failed entirely to determine whether the evil the rules seek to correct is a real or merely a fanciful threat.").

[29] *See* Notice ¶ 13.

[30] *See* Notice ¶¶ 1, 18-24.

sometime in the first quarter of this year.[31] Sony has announced carriage agreements with NBCUniversal, CBS, Discovery Communications, Fox, Scripps Networks Interactive, and Viacom, and is actively negotiating with other programmers.[32] Likewise, DirecTV launched Yaveo in December 2014,[33] a standalone Spanish-language online streaming service that provides access to live sports and entertainment programming as well as on-demand movies and TV programs.[34] And Dish recently launched Sling TV, a live OTT television service, to customers nationwide.[35]

These new entrants add to the numerous diverse OVDs that already distribute on-demand programming using a variety of different business models. Netflix provides a library of ad-free on-demand content for a monthly subscription fee; Hulu Plus offers an ad-supported on-demand subscription service; Amazon bundles access to its online video library with its Prime shipping service; iTunes offers individual programs for sale or rental; search engines such as Yahoo!

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[31] *See* Lance Whitney, *Sony to Launch PlayStation Vue, an Online TV Service That Challenges Cable,* CNET (Nov. 13, 2014), *available at* http://www.cnet.com/news/sony-to-launch-online-tv-service-to-challenge-cable-tv/.

[32] Andrew Wallenstein, *Sony in Talks for Virtual MSO Service*, Variety (Jan. 3, 2013), *available at* http://variety.com/2013/digital/news/sony-in-talks-for-virtual-mso-service-1118064150. The invite-only beta preview, conducted in November 2014, contained 75 channels. *Id.*

[33] *See* Peter Leitzinger, *Live O&O Station Streaming Expanding Heading Into 2015*, SNL Kagan (Jan. 12, 2015), *available at* https://www.snl.com/interactivex/article.aspx?id=30504194&KPLT=6.

[34] *See* Janko Roetggers, *DirecTV CEO Confirms Launch Plans for Spanish-language Online Video Service*, Gigaom (Sept. 12, 2014), *available at* https://gigaom.com/2014/09/12/directv-yaveo-confirmed; Todd Spangler, *DirecTV Launches First Over-the-Top Video Service, Yaveo, for Spanish-language Audiences*, Variety (Dec. 22, 2014), *available at* http://variety.com/2014/digital/news/directv-launches-first-over-the-top-video-service-yaveo-for-u-s-hispanic-audiences-1201385186. AT&T and The Chernin Group also recently announced that they will invest $500 million to create over-the-top video services. *See* Todd Spangler, *AT&T, Chernin Group Invest $500 Million in Over-the-Top Video Venture*, Variety (Apr. 22, 2014), *available at* http://variety.com/2014/digital/news/att-chernin-group-invest-500-million-to-form-over-the-top-tv-venture-1201160876/. And Verizon, which recently acquired Intel's OnCue cloud TV platform, is planning to launch an online TV service late in the first half of 2015. *See* Mikolo Ilas, *Verizon Online TV Service Coming in 2015,* SNL Kagan (Sept. 11, 2014), *available at* https://www.snl.com/InteractiveX/article.aspx?ID=29187285. Verizon announced a deal with Viacom last fall that includes online distribution rights for the planned service. *See id.*

[35] Todd Spangler, *Dish's Sling TV to add AMC to $20 Monthly Internet Package, Launched Nationwide*, Variety (Feb. 9, 2015), *available at* http://variety.com/2015/digital/news/dishs-sling-tv-to-add-amc-to-20-monthly-internet-package-launches-nationwide-1201428588/l; Press Release, Dish, Sling TV to Launch Live, Over-the-Top Service for $20 Per Month (Jan. 5, 2014), http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets.

provide ad-supported video on their home pages; and social media sites such as Facebook are beginning to host ad-supported video content. All have become wildly popular with consumers, and have been successful entrants in the online video marketplace.[36]

B. In a Vibrantly Competitive Video Marketplace, It Does Not Promote Competition To Give Regulatory Benefits To Certain Competitors.

Despite these marketplace realities, the Commission proposes to intervene with a regulatory "solution" to foster competition. As discussed above, classifying OVDs as MVPDs would mean that OVDs would become beneficiaries of the "program access" provisions of Section 628 of the Communications Act. The Commission suggests that this "may incent new entry that will increase competition in video markets"[37] by allowing OVDs to "'access[] critical programming needed to attract and retain subscribers.'"[38]

Those outcomes were, of course, the objectives of Section 628 when it was enacted, and they may have been warranted by the marketplace circumstances that existed in 1992. Franchised cable operators at that time faced very little competition in their provision of an array of broadcast and non-broadcast programming to subscribers. And the majority of the most popular cable programming networks were owned by cable operators. Direct broadcast satellite

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[36] The number of hours Americans spend watching video over the Internet has grown 70 percent since June 2010, and will likely account for 80 percent of all U.S. Internet traffic by 2018. *See* FCC, Fact Sheet: Internet Growth and Investment (Feb. 19, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0219/DOC-325653A1.pdf; Michael O'Rielly, Commissioner, FCC, Remarks at The American Enterprise Institute Luncheon (Jan. 21, 2015). According to comScore, nearly four in ten households subscribe to a paid online video subscription service, *see* comScore*, The U.S. Total Video Report* (Oct. 2014) , *available at* http://www.comscore.com/Insights/Presentations-and-Whitepapers/2014/The-US-Total-Video-Report, a burgeoning market that saw $3.67 billion in revenues in 2013. *See* SNL Kagan, *SNL Kagan Databook* (Oct. 2014), *available at* https://www.snl.com/interactivex/doc.aspx?id=29546782&IOP=1. Millennials are a key driver of this growth in online video, spending one-third of their original TV series consumption time watching on digital platforms. *See* comScore*, The U.S. Total Video Report* (Oct. 2014), *available at* http://www.comscore.com/Insights/Presentations-and-Whitepapers/2014/The-US-Total-Video-Report.

[37] Notice, ¶ 5.

[38] *Id., quoting Revision of the Commission's Program Access Rules,* Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605, 12608, ¶ 3 (2012).

service was (literally) just about to get off the ground, and while there was no evidence of any anticompetitive conduct by the cable industry, Congress adopted the program access provisions to ensure that cable operators did not stifle any prospect of competition by collectively withholding a critical mass of programming from this and other nascent competitors.

Today's video marketplace in no way resembles that scenario. Cable operators now face strong competition virtually everywhere from multiple competitors. Over the past two decades, cable operators' share of MVPD customers has steadily eroded, from 98% to 53%. The two national DBS companies – which provide competitive alternatives to virtually every cable system in the country -- have grown from near-zero to become the second and third largest MVPDs. Their total share of MVPD customers was 34% by the end of 2013. The major telephone companies did not enter the marketplace in force until 2006, but their market share has already reached 11%.

Furthermore, there are new facilities-based providers entering this competitive market. For example, Google has launched Google Fiber in three cities (Kansas City, Austin, and Provo), and has announced plans to deploy in four more (Nashville, Atlanta, Charlotte, and Raleigh-Durham).[39] Google Fiber offers multichannel video service combined with broadband Internet service capable of delivering Gigabit speeds; it even offers a free broadband Internet option.

Meanwhile, the vertical integration that characterized the cable industry two decades ago has dwindled. The channel capacity of cable systems has enormously increased, and a vast number of program networks have emerged to fill those channels – and only a handful of networks are vertically integrated with cable operators. Between 1994 and 2012, the percentage

[39] *See* Google Fiber, *Expansion Plans*, https://fiber.google.com/newcities/ (last visited Mar. 3, 2015).

of program networks affiliated with cable operators dropped from 53% to just over 11%.[40] Today, only three of the top 20 most viewed cable networks are controlled by cable operators.[41]

With both these factors – market dominance and vertical integration – substantially eroded, any pro-competitive rationale for giving an artificial regulatory boost to every Internet-based service that might offer multiple linear programming streams to subscribers is non-existent. Once a marketplace has become competitive and the ability to unfairly thwart new competitors has disappeared, the success or failure of new (and old) entrants should depend on their ability to successfully and efficiently meet the needs and demands of consumers – not on the protection or favoritism of regulators. In these circumstances, interfering with the right of individual companies to decide on what terms they will deal is generally deemed to be *at odds* with the pro-competitive objectives of antitrust policy.[42]

In other words, to force cable-affiliated programming networks to deal on particular terms with any OVD that offers multiple linear programming streams would not promote marketplace competition but would simply skew the marketplace by singling out particular

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[40] *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd. 10496 (2013) ¶ 38 ("Fifteenth Report"); *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610 (2012) ¶ 42 ("Fourteenth Report"). As video content continues to expand online and on demand and yet more program networks are introduced, the Commission has recognized that it has become virtually impossible to keep track of the number of networks now available to consumers. *Id.* But in such an environment, there is no reason to expect that vertical integration between cable operators and cable program networks will increase above the current low level.

[41] NCTA Analysis of Nielsen Media Research Data.

[42] As Judge Kavanaugh of the United States Court of Appeals for the D.C. Circuit has explained,

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are procompetitive. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies – and thus reduce prices and lead to better goods and services for consumers.

Comcast Cable Communications v. FCC, supra, 717 F.3d at 990 (concurring opinion of Judge Kavanaugh).

competitors at the expense of other competitors – and at the expense of consumer welfare. This is precisely the opposite of what sound pro-competitive policy would compel.[43]

In any event, while the purpose of Section 628 has been fulfilled by the realization of robust competition among facilities-based multichannel competitors, as mentioned above, competition is already taking hold and proliferating in the online video marketplace as well. Every day brings a new article describing another new online video service, another innovative technology, and another option for "cord cutters." And while there is no assurance that any particular service will survive in a fiercely competitive marketplace, there is also no reason to suspect that online competition will not continue to grow and flourish. As noted, OVDs are already successfully licensing content from various programmers today, including cable-affiliated program networks. Giving all such online providers guaranteed "non-discriminatory" access to such networks will, *at best*, do *nothing* to promote marketplace competition.

C. Retransmission Consent Is Unlikely to Benefit OVDs.

The Commission also identifies another way in which classifying OVDs as MVPDs will supposedly help them compete in the video marketplace. As it correctly notes, broadcasters are "require[d]… to negotiate in good faith with MVPDs for retransmission consent and [are] prohibit[ed]… from negotiating exclusive retransmission consent agreements with any MVPD."[44] But the Commission's suggestion that classifying OVDs as MVPDs will somehow enable OVDs to benefit from these provisions misconstrues the interplay between copyright and communications law. To be sure, OVDs cannot retransmit programming on broadcast signals

[43] *See*, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for 'the protection of *competition,* not *competitors.*'" (*quoting Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962)).

[44] Notice, ¶ 43.

without permission.[45] Neither a cable operator nor any other MVPD may carry a local commercial broadcast station (other than those that have opted for the protections of the must-carry provisions that apply to cable and DBS systems) without obtaining that station's consent.[46] But obtaining retransmission consent conveys only the statutory right to carry the broadcaster's signal – and not the underlying rights to retransmit the copyrighted programming contained in that local station's signal. Congress has enacted a statutory copyright license for "cable systems" (under Section 111 of the Copyright Act) and for "satellite carriers" (under Sections 119 and 122 of the Copyright Act). It has not enacted a similar license for OVDs – and, as the Supreme Court has made clear, OVDs may not retransmit broadcast programming without copyright permission.[47]

The Notice suggests that the Copyright Office may step in to extend the statutory license for "cable systems" to OVDs.[48] However, the Copyright Office has historically declined to take it upon itself to expand the types of entities that qualify as "cable systems" for purposes of the statutory license under Section 111, deferring instead to Congress to make such decisions. For example, while the Copyright Office indicated it was "comfortable" with the idea of treating

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[45] Certain OVDs have successfully negotiated to obtain permission to carry broadcast programming outside of the retransmission consent framework. In fact, the Copyright Office has observed that "statutory licensing has not been needed to provide millions of hours of local and national television content." U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report at 87 (2008).

[46] Some television stations, such as particular superstations and non-commercial television stations, do not have retransmission consent rights.

[47] *See American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014).

[48] Notice, ¶11 n.20. In denying Aereo's claim to eligibility to the cable compulsory license, the Copyright Office reiterated its longstanding view that "internet retransmission of broadcast television fall outside the scope of the Section 111 license." See Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights to Mr. Matthew Calabro, Aereo, Inc. (dated July 16, 2014). A footnote to the letter expresses the (non-controversial) view that the outcome of this proceeding "could impact the analysis under Section 111, as Section 111 limits the statutory license to retransmission services that are 'permissible under the rules, regulations, or authorizations of' the FCC." In other words, if an online video provider were not allowed to retransmit television stations under FCC rules, it would not be allowed to retransmit programming on that station pursuant to Section 111 of the Copyright Act even if it clearly was a cable system under the Section 111 definition.

OVS as "cable systems" under the license, it deferred to Congress to effect that change in the statute.[49] Likewise, Congress, rather than the Copyright Office, expanded the scope of the license to include MVPDs such as and multipoint multichannel distribution service providers,[50] and adopted a separate statutory license for DBS providers.[51]

Finally, the Copyright Office and every federal court to have considered the issue have consistently found that the compulsory license for "cable systems" does not apply to OVDs.[52] For example, in *WPIX v. ivi*, the United State Court of Appeals for the Second Circuit concluded that ivi, a provider of a package of television stations online, did not qualify for the cable compulsory license.[53] And, after the United States Supreme Court found that the online retransmissions of broadcast signals by Aereo required permission from the copyright owners of the underlying programming, the district court, on remand, similarly determined that an online provider of linear broadcast stations is not a "cable system" under Section 111 of the Copyright

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[49] *See* United States Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, 76 (1997), *available at* http://www.copyright.gov/reports/study.pdf ("While the Copyright Office is, therefore, comfortable with the notion that open video systems should be eligible for compulsory licensing for their retransmission activities, the Office finds it to be vastly preferable for Congress to modify the existing cable compulsory license to clarify how open video systems fit into the licensing scheme rather than trying to suggest that open video systems are already cable systems under section 111.").

[50] *See Cable Compulsory License; Definition of Cable System*, 59 Fed. Reg. (Dec. 30, 1994), *available at* http://www.copyright.gov/fedreg/1994/fr30de94.html ("The 1994 Home Viewer Act amends the definition of a 'cable system' in the section 111 cable compulsory license to include what are known as 'wireless' cable systems. 'Wireless' cable operators, which provide video retransmission in the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS), are eligible for section 111 compulsory licensing for the broadcast signals that they retransmit to their subscribers.").

[51] Even though Congress defined DBS to be an MVPD under the Communications Act, DBS providers were unable to retransmit programming on local broadcast stations until Congress amended the Copyright Act in 1999 to include a separate copyright compulsory license for DBS.

[52] *See, e.g.*, U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 91-99 (1997); Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. On Courts and Intellectual Property of the Comm. On the Judiciary, 106th Cong. 25-26 (2000) (statement of Marybeth Peters, Register of Copyrights) ("if there were to be a compulsory license covering such retransmissions, it would have to come from newly-enacted legislation and not existing law."); Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights to Mr. Matthew Calabro, Aereo, Inc. (dated July 16, 2014) (explaining that "internet retransmissions of broadcast television fall outside the scope of the Section 111 [cable] license.").

[53] *WPIX v. ivi*, 691 F.3d 275 (2d. Cir. 2012).

Act and is therefore not entitled to the cable statutory license.[54] A Commission determination that OVDs that offer multiple linear streams of programming are MVPDs under Title VI of the Act would do nothing to change this analysis. An entity can be an MVPD for purposes of the Communications Act and not be a "cable system" for purposes of the Copyright Act.[55]

D. Classifying OVDs as MVPDs Would Be Arbitrary and Unworkable.

Wholly apart from the competitive issues discussed above, powerful policy considerations militate against a decision to treat OVDs as MVPDs. Such an interpretation would subject certain OVDs to the regulatory burdens and putative benefits of the MVPD classification.[56] From a practical standpoint, the administrative burdens of designing, enforcing and applying MVPD rules to OVDs would be substantial. These burdens would be shared by cable operators, by cable-owned program networks, by the Commission, and by OVDs themselves – and they would far outweigh any illusory public policy benefits.

First, the Commission has identified some of the initial questions it would have to address – and arbitrarily answer – if it were to classify OVDs as MVPDs. For example, if it

[54] American Broadcasting Companies v. Aereo, 2014 U.S. Dist. LEXIS 150555 (S.D.N.Y. 2014). Contrary to the Notice's suggestion, *Aereo* did not say that OVDs are cable systems for purposes of Section 111, but rather said only that they are enough like cable systems that they are covered by Section 101 of the Copyright Act. *See* Aereo Injunction, 2014 WL 539867, at 3 ("The Supreme Court concluded that Aereo performs in ways similar to CATV systems when it retransmits broadcasts while those broadcasts are still being broadcast, and therefore its services are similarly covered by the transmit clause. Doing its best to turn lemons into lemonade, Aereo now seeks to capitalize on the Supreme Court's comparison of it to a CATV system to argue that it is in fact a cable system that should be entitled to a compulsory license under Section 111. This argument is unavailing for a number of reasons.").

[55] A "cable system" for purposes of the Section 111 cable statutory license means "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmission of such signal or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service." 17 U.S.C. § 111(f). Conversely, an entity can be a "cable system" under the Copyright Act and not be defined as a "cable system" for purposes of the Communications Act. *See* 47 U.S.C. § 602((7) (excluding certain facilities, including those that retransmit only television broadcast stations or do not use any public right of way, from Communications Act "cable system" definition).

[56] *See* Notice ¶¶ 36, 39- 62 (detailing regulatory benefits and obligations of MVPD status).

concluded that an MVPD was any entity that provides "*multiple* linear programming streams," would that mean that any OVD that offers "more than one" such stream would qualify? Or should the term "multiple" be interpreted to mean "many" or "manifold" – in which case, *how* many and *how* manifold? It asks whether 20 might be the right number, but 20 is entirely random – why not ten, or 19, or 15, or 25? The Notice offers no reason why that arbitrary number has anything to do with what Congress had in mind when it adopted and defined the term MVPD, nor does it explain how this arbitrary line-drawing is consistent with Congressional intent or aligns in any way with consumer expectations and industry developments. The Commission is right to be concerned that an overly broad interpretation of the term might constitute an undue intrusion on innovation and on legitimate business models.[57] But selecting an arbitrary number of linear programming streams as the minimum to qualify for MVPD status would only compound such regulatory interference by creating artificial and perverse incentives to tailor one's service so as to satisfy or avoid the definition of MVPD, rather than respond to marketplace demands and consumer preferences.[58]

In addition to being arbitrary, some of the proposals in the Notice would be entirely unworkable in the marketplace. In the legacy world, an entity qualifies as an MVPD simply by having a transmission facility and delivering programming to customers. But if a start-up OVD under the Commission's proposal would not become an MVPD until it offered 20 linear programming services (or whatever number the Commission settles upon), the administrative

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[57] *See* Notice, ¶ 25.

[58] And confusion and uncertainty would arise from the fact that OVDs that offer both linear and on-demand programming under a unified business model would find some aspects of their business subject to regulation, while other aspects would be free of such regulation. It also bears noting that OVDs that are entering the marketplace are rapidly assembling channel lineups that exceed 20 linear networks – Dish's Sling TV service reportedly has 33 linear networks and the Sony service will have 68 networks, 24 of which are cable-affiliated (though it is unclear whether all 68 networks will include linear programming). This further calls into question the necessity of Commission intervention in the marketplace.

burdens would soon get out of hand. It is unclear how a programmer would know where an OVD stood in the OVD's licensing efforts, and whether that OVD had licensed sufficient programming to qualify as an MVPD or not. This raises the further question as to whether a cable-affiliated programmer would be required to license programming to an OVD under the program access rules based on an expectation, or an assurance, or a hope, that the OVD would, at some time in the future, receive enough linear programming to qualify as an MVPD.[59]

Second, the Commission recognizes an obvious problem that would immediately arise if cable-owned program networks were to be required to make their programming available to OVDs, which is that the networks often do not have permission from the owners of the programming they carry to distribute that programming online.[60] The Commission asks whether, in such cases, it should simply *require* the program networks to obtain the online distribution rights in order to comply with their program access obligations.[61] In that case, by regulatory fiat, not only the business models of program networks but also those program owners would be restricted and jeopardized by the extension of the program access rules to online distribution.

Forced to bundle the rights to facilities-based and online distribution when dealing with a cable-owned program network, program owners would have to decide whether to refuse to sell their programming to such networks (to the unfair competitive detriment of cable-owned networks) or abandon any plans they might have to distribute their programming online themselves or via some other distributor. Similarly, cable-owned program networks would have to decide whether to pay whatever the program owner might charge for such bundled rights – if

[59] Moreover, whether certain OVDs are or are not MVPDs would be in constant flux as programming services are added or subtracted from their lineups, and broadcast stations and cable-affiliated programmers would have a difficult time tracking (and verifying) exactly whether a particular OVD is, in fact, an MVPD for purposes of fulfilling their regulatory obligations to MVPDs.

[60] Notice, ¶ 67.

[61] *Id.*, ¶ 69.

the program owner was willing to sell them – or not carry the programming on their networks. If a program network does not have online distribution rights to the programming it carries, neither the network nor the program owner should be compelled to alter these choices. Such an outcome would extend the Commission's authority far beyond what Congress intended – and what the Constitution permits.

In fact, there is nothing in Section 628 or any other provisions of the Act that contemplates compelling cable-affiliated networks to obtain distribution rights they do not already have. To the contrary, the statute suggests that cable-affiliated programmers were not expected or intended to be compelled to acquire rights they don't possess. Thus, Congress imposed specific limitations on the scope of the program access rules, stating that: "Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."[62]

Compelling programmers to acquire and distribute programming online when they have not been otherwise authorized by the program owner to do so would extend the program access requirements far beyond any reasonable scope. Historically, programmers have acquired distinct MVPD and online distribution rights from their program suppliers, so while the programmer may have MVPD distribution rights for a certain program, it may not have the online distribution rights for that same content (and it may have the ability to license online distribution as part of a TV Everywhere-adjunct to an MVPD service, but not the ability to license the same programming for an online-only model). To the extent that the program access regime is

[62] *See* 47 U.S.C. § 548(c)(3)(A).

extended to online distribution, the limitations included in Section 628(c) should be construed as applying to situations where the programmer does not have online distribution rights.

Moreover, construing the program access statute to require cable-affiliated programmers to obtain online distribution rights that they currently do not have, so that such programmers can be compelled to share those online distribution rights with OVDs, would contravene the First Amendment – a result that courts (and the Commission) must avoid.[63] As already noted, the existing program access rules already raise serious First Amendment questions, even though they only require that a network already in the business of selling programming to make that same programming available on nondiscriminatory terms to a finite array of MVPDs that they are authorized to serve.[64] The Commission would be treading on even *thinner* ice if it were to adopt rules requiring networks to acquire rights they do not currently possess – effectively regulating what they buy as well as what they sell, requiring them to buy rights that they may not want, and interfering with the underlying rights-holders' discretion as to how and when to license their programming for online distribution.

Third, the Commission itself seems to recognize the irrationality of applying the program carriage rules across the board to *all* OVDs that carry multiple linear programming streams. In particular, it correctly notes that "a programmer that decides to sell two or more of its own programming networks directly to consumers online, either instead of or in addition to selling them through cable or DBS operators' programming packages, might subject itself to the benefits and burdens of MVPD status."[65] This could, among other things, force them, under the program carriage rules, to carry the similar content of other unaffiliated program services on their website.

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[63] S*ee supra,* n.23 and accompanying text.

[64] *See supra,* n.25 and accompanying text.

[65] Notice, ¶ 26.

To remedy this result, the Commission tentatively concludes that its proposed MVPD definition should not apply to "a distributor that makes available only programming that it *owns* – for example, sports leagues or stand-alone program services like CBS's new streaming service."[66]

The problem with this solution is that while a handful of program distributors (such as sports leagues) may actually own all the programming that appears on their networks, most program networks do not. It makes no sense to force an OVD that streams only *networks* that it owns to stream other unaffiliated networks, whether or not the OVD *owns* the programming on its networks. As discussed above, the best way to avoid such a nonsensical result is to recognize that Congress did not intend the definition of MVPD to apply to OVDs at all. But if the Commission were to persist in adopting its "linear programming stream" approach, it would need to find another way to avoid this result.[67]

E. Reclassification Would Impose Substantial Administrative Burdens on Marketplace Participants as well as the Commission.

Apart from these knotty problems, applying all the statutory benefits and obligations of MVPD status to all OVDs that stream multiple linear programming networks would enormously increase the enforcement burdens on the Commission as well as the compliance costs and burdens on such OVDs. Regarding the primary *benefit* of MVPD status (*i.e.*, program access), determining the substantive grounds and the procedures for resolving case-by-case adjudications of program access complaints – even for the well-defined group of facilities-based MVPDs and MVPD buying groups that are entitled to bring such complaints – has been a complex task for the Commission. Figuring out how the rules would apply to the emerging and potentially

[66] *Id.* (emphasis added).

[67] Even if the rules did not apply to OVDs that streamed only their own networks, they would presumably still apply to OVDs that chose to stream any unaffiliated programming along *with* their own networks. This would create artificial regulatory incentives to limit the programming on streaming websites to an entity's own networks – a peculiar result, given the purposes of the program carriage rules and the Commission's stated goals in this proceeding to expand outlets for video programming services.

unlimited array of Internet-based entities that might offer multiple streams of linear programming – much less actually resolving complaints that might be filed by any of these entities – would require the Commission (and affected parties) to devote disproportionate resources to provisions of Title VI that have already succeeded in their objective of creating a competitive video marketplace.

Regarding the various statutory *obligations* that Congress has imposed on MVPDs, it is hard to imagine how the Commission could ensure and enforce compliance by that same array of Internet-based entities. For example, how would the Commission ascertain that every such entity is complying with the statutory equal employment opportunity obligations? Any entity with more than five full-time employees must file EEO reports with the Commission.[68] It would not at all be surprising if nascent unregulated online video distributors have no awareness of FCC rules. Will the Commission require them to register with the FCC prior to providing online programming so as to comply with this obligation? How else will the Commission satisfy its statutory requirement to annually certify compliance and conduct periodic EEO investigations?

What resources will the Commission devote to ensuring that every OVD that offers multiple linear streams complies with the CALM Act's protections against loud commercials?[69] The standards adopted by the Commission to implement the CALM Act apply to over-the-air broadcasters and cable program networks, and rely on equipment at the headend and software in cable-supplied set-top boxes to ensure that commercial loudness is kept in check. Online providers do not typically have in place similar technology for ensuring that commercials included in their content reach consumers in a manner that complies with the requirements of the CALM Act. If they are deemed MVPDs (and therefore covered by the CALM Act's

[68] 47 U.S.C. § 554(3).

[69] 47 U.S.C. § 621.

obligations), they will have to take steps to modify their method for sending audio, and the Commission will need to develop new rules to ensure that they have done so.

Similarly, OVDs that transmit multiple linear programming streams would be required to comply with additional accessibility requirements of the Communications and Video Accessibility Act ("CVAA"), including, for example, the requirement that any "new" video programming be captioned.[70] Other requirements arising from the CVAA, such as ensuring that certain information is accessible to blind or visually impaired users, would also have to be adapted to an environment that was not considered when the CVAA was passed.[71]

These are all, to be sure, important public interest obligations, to which the facilities-based entities that serve video customers today have devoted substantial resources. And if the Commission decides to give OVDs the statutory benefits of MVPD status, it cannot avoid giving them the statutory obligations as well. Nor does the statute give OVDs that meet the definition of an MVPD the option to decide whether they *want* the benefits and burdens of MVPD status – any more than it gives facilities-based MVPDs the right to opt out of such status.[72] In contrast to Title II, Congress did not provide the Commission with general authority to forbear from applying Title VI obligations, or otherwise indicate that it intended to give the Commission broad discretion to pick and choose what obligations would apply to different categories of MVPDs.[73] With respect to potential waiver of its rules, where Congress has authorized the

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[70] 47 U.S.C. § 713(b).

[71] For example, Section 202 of the CVAA expressly required reinstatement of the Commission's video description rules, which apply to MVPDs. 47 C.F.R. § 79.3. That same CVAA provision allows only an inquiry into the technical and operational issues, costs and benefits of providing video description in video programming distributed on the Internet.

[72] The concept of an opt-in approach is nowhere contemplated in the Communications Act, and the fact that the Commission is asking the question only highlights the result-oriented nature of the Notice's proposals.

[73] *See* 47 U.S.C. § 160 (providing the Commission with authority to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of

Commission to waive its rules for broad categories of providers, it has done so explicitly and with specificity.[74]

The legacy regulatory framework of Title VI already places cable operators at a disadvantage vis-à-vis their MVPD competitors. While the burdens of MVPD status apply to cable and non-cable MVPDs alike, Title VI imposes a large array of obligations that apply only to cable operators and *not* to other MVPDs. For example, the program access rules only prohibit conduct by cable operators and cable-owned program networks. But there are no reciprocal rules imposing program access obligations on non-cable MVPDs or protecting cable operators from unfair and harmful conduct directed at them by other MVPDs. Giving OVDs a competitive boost by granting them the benefits of MVPD status will only serve to exacerbate the disparate regulatory treatment of cable and its competitors – a disparity that reflects the marketplace circumstances of another era. Granting OVDs the benefits without the obligations will *further* compound the disparity.

In today's video marketplace – where competition in the facilities-based MVPD marketplace is flourishing, and there is no reason to believe that the proliferation of online video needs a regulatory boost – it makes little sense to extend MVPD status, with all its administrative costs and marketplace distortions, to OVDs. The best way to ensure the benefits of fair competition is to focus on *removing* regulations that no longer serve their intended purpose and

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telecommunications carriers or telecommunications services, in any or some of its or their geographic market" if certain determinations are made).

[74] For example, the navigation device statute (Section 629) includes a specific waiver provision. *See* 47 U.S.C. § 549(c) (authorizing the Commission to waive its navigation device rules upon a showing that "waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other services offered over multichannel video programming systems"); *see also* 47 C.F.R. § 76.1207 (implementing rule). Likewise, the CVAA authorizes the Commission to waive some accessibility requirements under certain conditions. *See, e.g.*, CVAA § 202 (Video Description) (codified at 47 U.S.C. § 613) (providing the Commission with authority to grant waivers to entities in specific DMAs where appropriate).

allowing facilities-based and online competitors continue to innovate and seek the best way to attract customers and viewers.

III. THE DEFINITION OF A "CABLE OPERATOR" DEPENDS NOT ON WHETHER AN ENTITY'S SERVICE IS PROVIDED VIA "IP" BUT ON WHETHER THE SERVICE IS PROVIDED VIA "A SET OF CLOSED TRANSMISSION PATHS."

As part of its inquiry into the regulatory status of OVDs, the Commission seeks comment on whether and to what extent a cable operator's status is affected if it (1) provides its programming in IP format or (2) offers programming on the Internet to customers nationwide or in a particular area.

A. Entities that Provide the One-Way Transmission of Video Programming Over A Set of Closed Transmission Paths That They Own or Manage Are Cable Operators, Without Regard to the Format of Their Transmissions.

The answer to the first question is, as the Commission suggests, straightforward: A cable operator's status does not change simply because it offers its service in IP format rather than in analog or QAM digital or any other format that results in the provision of video programming to its paying customers. To be a "cable operator," as that term is defined for purposes of Title VI, an entity must provide "cable service" over a "cable system" that it owns or manages. "Cable service" is defined as

> 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. [75]

Nothing about this definition depends on the *format* in which the programming is provided. Cable operators were still cable operators when they switched from providing programming in analog format to providing it in digital format. And, similarly, the mere fact that the

[75] 47 U.S.C. § 522(6).

programming is delivered in IP format does not affect whether the programming is "video programming" or whether the service is the "one-way transmission" of such programming. This is not a matter of first impression; as the Commission recognizes in the Notice, "[t]he Commission and other authorities have previously concluded that the statute's definition of 'cable service' includes linear IP video service."[76]

Similarly, whether such "cable service" is made available in IP or some other format does not affect whether it is being provided by a "cable operator" over a "cable system." A "cable system" is defined as

> 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, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system.[77]

And a "cable operator" is a

> person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.[78]

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[76] Notice, ¶ 72, *citing Cable Television Technical and Operational Requirements,* 27 FCC Rcd 9678, 9681, ¶ 5*; 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).

[77] 47 U.S.C. § 522(7).

[78] 47 U.S.C. § 522(5).

Thus, entities that provide a service that meets the definition of "cable service" over facilities consisting of "closed transmission paths" that they own or manage are "cable operators," without regard to format – analog, QAM, IP, or other – unless they meet one of the statutory exceptions. And none of the exceptions have anything to do with the format in which the service is provided.

The Commission is, therefore, entirely correct in concluding that "[i]t seems evident 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."[79] NCTA and its members have never suggested otherwise – but some other entities that provide the one-way transmission of video programming to subscribers over their own closed transmission paths in IP format have for years been flouting this self-evident interpretation of their regulatory status as cable operators. In particular, AT&T and Google continue to maintain that they are not subject to the Title VI provisions and FCC rules that apply to cable operators simply because they provide their service in IP.[80] The Commission should make clear once and for all that this is not the case and that any noncompliance with the obligations of a cable operator by these entities will not be tolerated.

B. Entities That Offer Programming on the Internet to Customers Are Not, With Respect To That Service, Cable Operators, and the Offering of Such Internet-Based Programming Is Not a Cable Service.

While providing video programming in IP format is not in itself relevant to whether an entity is a cable operator, providing such programming over the Internet *is* a relevant factor. An entity that provides service over the Internet is not using a set of closed transmission paths that it

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[79] Notice, ¶ 71.

[80] *See*, *e.g.*, Comments of AT&T, MD Docket 13-140 (June 19, 2013), at 4 n.10 (*citing* Letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 04-36 (Sept. 14, 2005); Letter from Austin Schlick, Google Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (filed Dec. 30, 2014).

owns or manages to deliver the programming to subscribers. Instead, customers access the service via the public Internet which is neither owned nor managed by the service provider. This is true even if the programming is offered to subscribers for purchase by an entity that also provides Internet access service to those subscribers over its facilities.

Therefore, as the Commission rightly suggests, an entity providing such an Internet-based service would not, with respect to such service, be a cable operator. If the service is available for purchase by Internet subscribers, it should not be deemed a cable service regardless of whether it is offered nationwide, regionally or only within a cable operator/ISP's service area. Its regulatory status, in such circumstances, should be no different from any other OVD's status. For the reasons discussed above, such providers of Internet-based services should not be deemed MVPDs and should not be subject to the benefits or the burdens of MVPD status. But whether they are given the benefits and the burdens of MVPD status or allowed to continue to flourish with neither, principles of regulatory parity and fair marketplace competition require that cable operators who compete with similar online services be treated similarly.

CONCLUSION

For the foregoing reasons, the Commission may not, as a matter of law – and should not, as a matter of sound public policy – deem OVDs to be within the scope of the statutory definition of an MVPD. The Commission should clarify that the definition of a "cable operator" does not depend simply on the format – analog, digital, QAM, or IP – in which video programming is provided and that entities that provided programming in IP format over a set of closed transmission paths that they own or manage are cable operators. But a cable operator that provides video programming services on the Internet for purchase by consumers is not, with regard to that service, a cable operator and should be treated the same as other OVDs offering such services.

Respectfully submitted,

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