

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

**COMMENTS OF THE
CONSUMER ELECTRONICS ASSOCIATION**

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ASSOCIATION**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. Introduction.....	1
II. Video Programming Will be a Key Driver of the Internet Economy, But Online Video Technologies and Business Models are at a Nascent Stage.....	2
III. The Commission’s Definition of “MVPD” Must Be Consistent With the Statute and Congressional Intent	4
IV. The Benefits Conferred by MVPD Status Do Not Outweigh the Obligations, Costs, and Uncertainty of Title VI Regulation on Start-Ups and Other New Services.....	6
V. Waiver Or Other Means of Regulatory Relief Probably Are Inadequate to Balance the Burdens Resulting from MVPD Status.....	11
VI. If The Commission Proceeds With Its Redefinition As Proposed, It Should Exempt Non-Facility Based MVPDs From Certain MVPD Obligations.....	13
VII. CONCLUSION.....	14

EXECUTIVE SUMMARY

Consumers today have access to more video content and service options over the Internet than ever before. These online video offerings both challenge and incorporate aspects of traditional video distribution. CEA appreciates the Commission's many efforts to facilitate the deployment of new products and services. However, now is not the time to intervene in this nascent and rapidly evolving marketplace, which to date has seen explosive growth absent any industry-wide regulatory involvement. The Commission should refrain from regulation and let online video technologies and business models more fully develop and compete.

Even if the circumstances were ripe for government intervention as a policy matter, the Commission's proposal introduces several legal and practical questions that strongly weigh against Commission action at this time. First, the *Notice* proposes a definition of "multichannel video programming distributor" ("MVPD") that is in tension with the Communications Act and Congressional intent. As a practical matter, imposing ill-suited MVPD regulations, designed for facility-based video distributors, will likely generate more obligations, costs, and uncertainty than benefits for new market entrants. The Commission's proposals to curtail such obligations, costs, and uncertainty through waiver or forbearance likely are inadequate to balance the burdens resulting from MVPD status. Faced with such an uneven scale, the Commission should decline to act on the *Notice*.

If the Commission ultimately decides to confer MVPD status on distributors of online video services, the Commission should exempt non-facility based MVPDs from certain regulatory obligations in an effort to avoid imposing a confusing and impractical regulatory scheme.

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I. INTRODUCTION

The Consumer Electronics Association (“CEA”)¹ respectfully submits these comments in response to the above-captioned Notice of Proposed Rulemaking (“*Notice*”).² CEA is a champion of innovation and disruptive technologies, and its members deeply appreciate the Commission’s many efforts to facilitate deployment of new products and services. With this same goal in mind here, CEA submits that now is not the time to intervene in the nascent and rapidly evolving online video marketplace, which to date has seen explosive growth absent any industry-wide regulatory involvement. The Commission should refrain from regulation and let online video technologies and business models more fully develop and compete. Even if the

¹ CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multinational corporations to specialty niche companies, CEA members cumulatively generate more than \$223 billion in annual factory sales and employ tens of thousands of people in the United States.

² *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, FCC 14-210, MB Docket No. 14-261 (rel. Dec. 19, 2014) (“*Notice*”) (proposing to “modernize” the Commission’s interpretation of the term “MVPD” by “including within [the definition’s] scope services that make available for purchase, by subscribers or customers, multiple linear [i.e., at a prescheduled time] streams of video programming, regardless of the technology used to distribute the programming”).

circumstances were ripe for government intervention, the Commission likely would be precluded from adopting its proposed definition of “multichannel video programming distributor” (“MVPD”), which is inconsistent with the Communications Act and Congress’s intent. As a practical matter, adopting this definition runs counter to the Commission’s stated goals in this proceeding, as the benefits conferred by MVPD status do not outweigh the obligations, costs, and uncertainty of Title VI regulation on start-ups and other new services. Although the Commission has suggested it might waive or otherwise forbear from applying certain Title VI requirements, it probably cannot do so in a fair and effective way that would actually serve to balance the burdens. Thus, the Commission should decline to act on the *Notice*. If the Commission nevertheless elects to move forward as proposed in the *Notice*, it should exempt non-facility based MVPDs from certain MVPD obligations in order to avoid imposing a confusing and impractical regulatory scheme.

II. VIDEO PROGRAMMING WILL BE A KEY DRIVER OF THE INTERNET ECONOMY, BUT ONLINE VIDEO TECHNOLOGIES AND BUSINESS MODELS ARE AT A NASCENT STAGE

CEA applauds the Commission for its focus on competition in a new and important market that is ripe for innovation and entrepreneurship, but the *Notice* is not the best approach with respect to this market. While well-intentioned, it attempts to impose regulatory solutions for unclear, unknown problems that may never even develop. The *Notice* chances imposing obligations that may hinder development and deployment of new, innovative, consumer-friendly services.

As CEA consistently has said, the Internet is a critical platform for economic growth and a 21st century engine for innovation.³ Broadband is the key to the economic future for the U.S.

³ See, e.g., Comments of the Consumer Electronics Association, GN Docket No. 14-28, GN Docket No. 10-127 (filed July 15, 2014) (“CEA Open Internet Comments”) at 3.

and the world, and IP-delivered video unquestionably will be a driver in this economy.⁴ But just as the world we live in today is fundamentally different from the world 20 years ago, we cannot imagine how the world will work 20 – or even five – years from now.⁵ The technological progress that was demonstrated at the 2015 International CES in January has the potential to change the world and consumers’ lives – and many of these developments may be displaced by newer, even better solutions at the 2016 International CES. The services to which this proceeding would apply are nascent, the consumer demand for them is unknown, and many have not even been offered to the public yet. For example, it has not even been two months since DISH announced its new Sling TV streaming video product at this year’s CES.⁶ Other similar services will launch this year, such as Sony’s Internet-based TV service, PlayStation Vue.⁷

⁴ See Notice ¶ 1 (“video services are being provided increasingly over the Internet”). Cisco projects that it would take an individual over five million years to watch the amount of video that will cross global IP networks each month in 2018, and IP video traffic – which includes linear video, on-demand video, video clips, and combinations thereof – will comprise 79 percent of all consumer Internet traffic in 2018, up from 66 percent in 2013. Internet video to TV doubled in 2013 and is projected to grow at a rapid pace, increasing fourfold by 2018 (when it will represent 14 percent of all consumer Internet video traffic). See Cisco Visual Networking Index: Forecast and Methodology, 2013-2018 (June 2014) available at: http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html. See also, e.g., Samantha Bookman, *World Cup: Last-Mile Broadband Drives Online Streaming Numbers*, Fierce Online Video, June 25, 2014, available at: <http://www.fierceonlinevideo.com/special-reports/world-cup-last-mile-broadband-drives-online-streaming-numbers>.

⁵ See, e.g., Mignon Clyburn, Commissioner, FCC, Remarks at Federal Communications Bar Association Luncheon (Feb. 19, 2015) (“Clyburn FCBA Remarks”) (“The media landscape has undergone sweeping and dramatic change in just a few short years. Growing numbers of Americans consume content in ways that are disrupting the traditional landscape. . . . [W]hile many continue to value traditional cable and broadcast outlets, an entirely new suite of options have taken hold. From Netflix and Hulu, to Sling and Amazon, the over-the-top offerings provide consumers with increasingly diverse programming, at a variety of price points.”)

⁶ See, e.g., Scott Moritz and Lucas Shaw, *Dish Starts \$20-a-Month Streaming TV With ESPN, TNT*, Bloomberg, Jan. 5, 2015, available at <http://www.bloomberg.com/news/articles/2015-01-05/dish-to-unveil-20-a-month-streaming-tv-service-with-espn-tnt> (describing Dish’s unveiling of the first major Internet-streaming television service from a cable or satellite company, a \$20-a-month set of 12 channels that targets U.S. customers who don’t want to pay for larger, more expensive TV packages).

⁷ See *id.* There are many other examples. Ultraflix hopes to capitalize on the conversion between 1080p HDTVs and the emerging wave of 4K TVs with its Ultraflix app. Mark Hachman, *Ultraflix Wants to Become the Netflix of the 4K Generation*, TechHive, Jan. 12, 2015, available at: <http://www.techhive.com/article/2867018/ultraflix-wants-to-become-the-netflix-of-the-4k-generation.html>. Viacom will launch a Nickelodeon subscription video service. Keach Hagey and Michael Calia, *Nickelodeon to Launch Paid Video Service*, Wall Street Journal, Jan. 29, 2015, available at: <http://www.wsj.com/articles/viacom-media-networks-filmed-entertainment-post-revenue-gains-1422533981>.

Meanwhile, there presently appears to be no widely available commercial service that would meet the Commission’s proposed definition of an online video distributor (“OVD”) that qualifies as an MVPD.

The *Notice* explains that the Commission’s goal is to “bring [its] rules into sync with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology.”⁸ The truth is that there are no fixed “realities of the current marketplace and consumer preference,” other than the fact that video options are exploding as innovators develop and launch new offerings to see what best fits consumers’ tastes.

III. THE COMMISSION’S DEFINITION OF “MVPD” MUST BE CONSISTENT WITH THE STATUTE AND CONGRESSIONAL INTENT

Even if factual circumstances warranted Commission regulation in the online video space, the Commission is constrained by the Communications Act. The *Notice*’s proposed definition relies on an interpretation of “channel” that likely is inconsistent with Title VI when the defined statutory terms “MVPD” and “channel”⁹ should guide the Commission. The *Notice* proposes in its “Linear Programming Interpretation” to interpret the term MVPD to mean “all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time.”¹⁰ In doing so, the Commission overlooks the word “channel,” as defined in Title VI, relying instead on an everyday understanding of the word “channel” to interpret “multiple channels” within the MVPD definition.

⁸ *Notice* ¶ 4.

⁹ 47 U.S.C. § 522(13) (“the term ‘multichannel video programming distributor’ means 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”); 47 U.S.C. § 522 (4) (“the term ‘cable channel’ or ‘channel’ means a portion of the electromagnetic frequency 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)”).

¹⁰ *Notice* ¶ 13.

While there may be an appeal to using this more common meaning of channel, the canons of statutory construction point in another direction. As commenters on this topic previously have explained, once Congress defines a term, that term is then given the defined meaning throughout the statute.¹¹ The Supreme Court has held that “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹² In contrast, it is only “[w]hen a word is *not defined* by statute” that “ordinary or natural meaning” is assigned to a term. Here, Congress has defined the term. Moreover, the Commission’s appeal to a common definition raises concerns because channel has multiple common meanings.¹³

While the Media Bureau’s decision in the interlocutory Sky Angel order does not control, the reasoning behind the Bureau’s conclusion remains sound.¹⁴ The Bureau noted that Sky Angel’s “non-technical” understanding of the term channel – similar to the new Linear Programming Interpretation – failed to address the statute’s references to spectrum and any

¹¹ See, e.g., Comments of Cablevision, MB Docket 12-83 at 12 (May 14, 2012) (“Generally, where a term is defined in a statute, the Commission is not free to ignore that defined term, even when it appears in other provisions of the statute.”) (citing *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (“The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning [and] . . . an explicit definition . . . in the same subchapter strengthens the presumption.”) (internal quotes and citations omitted); *United States v. Altamirano-Quintero*, 511 F. 3d 1087, 1101 (10th Cir. 2007) (explaining that where a term is defined in the statute, “we typically apply the same meaning to the term each time it appears in the statute”)); Reply Comments of the National Cable & Telecommunications Association, MB Docket 12-83 at 2 (June 13, 2012) (“[W]hen one of the multiple places where the word is used is in a provision defining the word, no such variation in meanings is permissible.”). Congress may carve out specific parts of the Communications Act by adopting a specific meaning of a term for a particular subsection, but it did not do so here. For example, Congress defined “premium channel” separately for the purposes of Section 624 of the Communications Act. 47 U.S.C. § 544 (“For the purpose of this section, the term “premium channel” shall mean any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.”)

¹² *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The Supreme Court held in *Brand X* that *Chevron* applies to the Commission’s interpretation of the Communications Act. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

¹³ See Notice ¶ 24 (“the term ‘channel’ can be interpreted both in the ‘content’ sense and in the ‘container’ sense”); see also Comments of Discovery Communications, LLC, MB Docket 12-83 at 7 (May 14, 2012) (observing that the *American Heritage Dictionary* contains thirteen primary definitions for “channel” and the *Webster’s II New College Dictionary* contains nine).

¹⁴ See *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 (MB 2010).

capability of delivering a television signal, which “appear to include a transmission path as a necessary element.”¹⁵ Indeed, the Linear Programming Interpretation would ignore why the definition of channel is there in the first place, as well as its relevance to the physical facilities and investments that are common to MVPDs but not to all OVDs. Congress created the MVPD category in 1992 as a means to promote “facilities-based competition” because it believed that alternative *facilities* were crucial to encouraging competition.¹⁶ Therefore, the illustrative list of MVPDs in the term’s definition includes facilities-based cable systems and cable competitors.¹⁷ The Commission must define channel (and, thus, MVPD) in a manner that is consistent with the statute.

IV. THE BENEFITS CONFERRED BY MVPD STATUS DO NOT OUTWEIGH THE OBLIGATIONS, COSTS, AND UNCERTAINTY OF TITLE VI REGULATION ON START-UPS AND OTHER NEW SERVICES

Even if it were possible to harmonize the proposed definition of channel (and MVPD) with the statute, this approach would not serve the Commission’s goal of promoting innovation and competition in the MVPD marketplace. Redefining MVPD to include OVDs would create regulatory uncertainty, numerous obligations, and significant costs that will overwhelm the two primary privileges of MVPD status – program access and retransmission consent.

As online video distribution is at a nascent stage, the Commission’s well-intentioned

¹⁵ *Id.* at 3883 ¶ 7.

¹⁶ H.R. Rep. No. 102-862 (1992), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275. *See also In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report & Order*, 8 FCC Rcd 3359 ¶ 63, n.79 (1993) (“‘Facilities-based competition’ is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities . . . are first created. The focus of the 1992 Cable Act is on assuring that facilities-based competition develops.”); Comments of American Cable Association, MB Docket 12-83 at 10-13; Cablevision Comments at 10.

¹⁷ *See* 47 U.S.C. § 522(13).

instinct to assist this sector in its infancy would be counter-productive.¹⁸ Rather, the lack of a viable model warrants caution, not broad, unprecedented action. Innovators are risk-takers who think outside the box and strategize solutions to problems previously accepted as the facts of everyday life. Right now, entrepreneurs are experimenting with different business models that may not fit squarely in the categories set forth in the *Notice*.¹⁹ The Commission should not feel a weight to act too quickly because innovation includes failures on the way to success.²⁰ For example, the *Notice* proposes to consider “subscription linear” OVDs MVPDs – yet it has only two contemporary examples of this mode, neither of which currently is in operation.²¹ It is unclear if program access and retransmission consent under the Commission’s rules would have saved Sky Angel and Aereo, particularly in light of an uncertain interplay with copyright law.²² Without a clear path toward a sustainable linear video programming distribution model, the benefits of MVPD status are uncertain.

The *Notice* asks whether “subjecting Internet-based distributors to MVPD regulations [would] deter investment in new technologies and drive some current or prospective Internet-

¹⁸ See *supra* p. 3. See also *Notice* at n. 1; Gary Arlen, *Finding Your Show*, CEA i3, Feb 3, 2015, <http://www.ce.org/i3/Grow/2015/Finding-Your-Show.aspx> (describing more than a dozen new and existing streaming and video content aggregator services).

¹⁹ See *Notice* ¶ 13 (identifying five current OVD business models: Subscription Linear, Subscription On-Demand, Transactional On-Demand, Ad-Based Linear And On-Demand, and Transactional Linear).

²⁰ See, e.g., Adam Davidson, *Welcome to the Failure Age!*, N.Y. Times Magazine, Nov. 12, 2014, available at <http://nyti.ms/1pQlu2I>; Eric Markowitz, *Why Silicon Valley Loves Failure*, Inc., Aug. 16, 2012, available at <http://www.inc.com/eric-markowitz/brilliant-failures/why-silicon-valley-loves-failures.html>.

²¹ See *Notice* ¶ 10 (“This category includes Sky Angel’s service as it existed *before* 2014 and Aereo’s service as it existed *before* the Supreme Court decision.”) (emphasis added). As discussed *infra* note 13 and accompanying text, the current proposal introduces many questions as to how hybrid services combining aspects of the *Notice*’s business model categories would be treated if the Commission reclassifies MVPD to include OVDs.

²² See *Notice* ¶¶ 11, 66; 17 U.S.C. § 111. Lest the Commission attribute Sky Angel’s and Aereo’s fate to an absence of FCC intervention on the part of new entrants, CEA cautions that even ownership by an incumbent with resources is not a sure sign of success. For example, VOOOM satellite, Cablevision’s 2003 attempt to provide selective suite of HDTV channels, shut down its domestic service offering after only a few years on the market. Press Release, *Cablevision’s Rainbow DBS to Introduce World’s First Comprehensive HDTV Service on October 15*, Sept. 30, 2003, <http://www.cablevision.com/about/news/article.jsp?d=093003>; Todd Spangler, *Voom Shutdown To Cost Cablevision*, Dec. 27, 2008, <http://www.multichannel.com/news/cable-operators/voom-shutdown-cost-cablevision/330349>.

based distributors from the market,”²³ and CEA submits that the answer is “Yes.” Unless forbearance and/or waiver are freely granted (which, as a matter of law and policy, they likely cannot be),²⁴ deeming an OVD provider an MVPD may threaten, rather than assure, its viability. As a threshold matter, if the Commission decides to move forward with regulating online distribution of linear video programming, it should first determine whether legacy video programming rules are even needed or appropriate. In addition, the Commission must carefully weigh the many MVPD obligations which may be too burdensome or require substantial modification for OVDs:

Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to (i) program carriage; (ii) the competitive availability of navigation devices (including the integration ban); (iii) good faith negotiation with broadcasters for retransmission consent; (iv) Equal Employment Opportunity (“EEO”); (v) closed captioning; (vi) video description; (vii) access to emergency information; (viii) signal leakage; (viii) inside wiring; and (viii) the loudness of commercials.²⁵

It is clear that the burdens resulting from MVPD status have potential to hinder the development and deployment of new, innovative video services. For example, CEA recognizes that the technology industry must continue to encourage diversity, but Commission-mandated requirements in the form of legacy MVPD EEO rules are unnecessary. CEA is proud that Intel chose the 2015 International CES to announce Intel’s new \$300 million workplace diversity initiative.²⁶ The Commission should not impose needless compliance costs that when industry is already acting to achieve policy goals. OVDs treated as MVPDs would be ill-suited and over-

²³ Notice ¶ 20.

²⁴ See *infra* Section V.

²⁵ Notice ¶ 36 (footnotes omitted).

²⁶ See Nick Wingfield, *Intel Allocates \$300 Million for Workplace Diversity*, N.Y. Times, Jan. 6, 2015, available at <http://www.nytimes.com/2015/01/07/technology/intel-budgets-300-million-for-diversity.html>; Ben Gilbert, *The Most Important News at CES is a \$300 Million Response to GamerGate*, Engadget, Jan. 8, 2015, <http://www.engadget.com/2015/01/08/the-most-important-news-at-ces-is-a-300-million-response-to-gam>.

burdened by an obligation to comply with EEO rules designed for more traditional media companies. These rules impose a number of reporting, recordkeeping, and prescribed outreach efforts that may be prohibitive for start-ups.²⁷

Similarly, subjecting OVDs to rules premised on the ownership of or control over certain infrastructure – in particular, requirements relating to signal leakage, inside wiring, and access to multiple dwelling units (“MDUs”)²⁸ – would be infeasible and impractical. As a general matter, such rules are an ill fit for entities that lack control over the physical facilities used to transmit video programming. Indeed, the *Notice* notes an “expect[ation]” that OVDs will not need to comply with the Commission’s signal leakage and inside wiring rules, observing that a key prerequisite of each set of requirements (respectively, the use of aeronautical frequencies, and the ownership of home wiring and home run wiring as defined in the Commission’s rules) do not apply to OVDs.²⁹ The same logic forecloses application of the rules concerning MDU access to OVDs, since OVDs are not in a position to enter into the type of exclusive access contracts with building owners that the Commission has prohibited.³⁰ While these infrastructure-related rules are a poor fit for over-the-top providers, the Commission should avoid any future uncertainty on the matter by confirming expressly that they will not apply to OVDs, regardless of which MVPD definition the Commission ultimately adopts. Otherwise, the mere prospect that OVDs may be expected, for example, to have some role in monitoring and reporting signal leakage could well deter them from continuing or starting to offer services that might trigger an MVPD

²⁷ See 47 C.F.R. §§ 76.75(a)-(c),(e); 76.77(a),(d); 76.1702; 76.1802.

²⁸ *Notice* ¶¶ 60-61, 63.

²⁹ *Notice* ¶ 60 (noting expectation that MVPDs using IP to deliver video will not use aeronautical frequencies and thus would not be subject to the signal leakage rules, which only apply to such frequencies); *id.* ¶ 61 (noting expectation that inside wiring rules will not apply to Internet-based distributors of video programming); *see also id.* ¶ 36 n.102 (stating that the inside wiring rules apply only to the extent an MVPD owns inside wiring).

³⁰ *Id.* ¶ 63 (noting that the Commission’s rules prevent the enforcement or execution of contractual provisions that grant exclusive rights to provide any video programming service to an MDU).

classification.

With respect to accessibility rules (*e.g.*, closed captioning, video description, accessibility of emergency information, accessible user interfaces, guides, and menus),³¹ applying the MVPD rules to online video services would undermine years of work by the VPAAC, Commission staff, industry, and consumer groups. As the *Notice* acknowledges, the Commission is still working through the specific contexts in which its CVAA rules should apply.³² The Commission should not suddenly introduce MVPD accessibility requirements into this discussion with respect to OVDs. Moreover, it is also unclear how hybrid services – combinations of one or more of the *Notice*'s four broad categories of OVD³³ that may, for example, incorporate linear video, video clips, and user-generated content – would be treated under a new MVPD definition. For example, the *Notice* does not address whether a hybrid service would be subject to *both* MVPD and CVAA accessibility requirements. Splitting different parts of a service so that each complies with its applicable regulatory regime would likely be resource-intensive, if technologically possible at all. Start-ups often change their services and business models as they scale. The *Notice* does not address how small start-ups just getting a handle on CVAA obligations would know when to switch over to MVPD obligations and whether doing so would benefit consumers. These types of regulatory line-drawing problems create unnecessary lags on innovation and experimentation. The Commission thus should decline to act, at least until the marketplace has had an opportunity to mature.

³¹ *Id.* ¶¶ 54-57.

³² *Id.* and nn. 157, 158, 162.

³³ See *Notice* ¶ 13 (“The current business models include, but are not limited to, the following types of Internet-based video service offerings, including combinations of these offerings”).

V. WAIVER OR OTHER MEANS OF REGULATORY RELIEF PROBABLY ARE INADEQUATE TO BALANCE THE BURDENS RESULTING FROM MVPD STATUS

Fully cognizant of the potential burdens that could befall OVDs if they were to be classified as MVPDs, the *Notice* seeks comment on whether the Commission could provide some measure of regulatory relief through waivers or exemptions.³⁴ Notably, the *Notice* itself does not convey much optimism about the answer; it does not offer a tentative view on the issue, and it even hints at some doubt that the Commission has the legal authority to waive any MVPD rules or exempt any OVDs from them.³⁵ Skepticism on the matter is warranted. In contrast to the telecommunications context,³⁶ the Commission has recognized that Title VI does not establish a forbearance mechanism.³⁷ Attempting to forbear here would invite, rather than remove, uncertainty. The *Notice* carefully avoids any explicit reference to forbearance as a vehicle for relief here, even though this rulemaking is, in effect, a proposed exercise in forbearance.

The absence of clear forbearance authority leaves waiver relief as the Commission's

³⁴ *Id.* ¶¶ 7, 37.

³⁵ *See, e.g., Notice* ¶ 7 (asking whether the Commission should consider waiver or exemption, “if allowed under the statute”); *id.* ¶ 37 (stating that OVDs classified as MVPDs will be subject to MVPD regulations “unless the Commission waives some or all of them if authorized to do so”).

³⁶ 47 U.S.C. § 160 (upon appropriate findings, the Commission may apply forbearance authority to a telecommunications carrier or service in some or all markets); 47 U.S.C. § 332(c)(1) (authorizing the Commission to specify that certain provision of Title II shall not apply to commercial mobile radio service providers).

³⁷ *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374 ¶ 48 n.197 (2005) (“Title VI of the Communications Act contains no provision granting the Commission authority to forbear from applying its rules.”); *see also Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd 11532 ¶ 22 (2012) (forbearing from applying Section 652(b) only as it applies to telecommunications carriers). Commissioner Pai has reiterated the same point more recently. *See* Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Subcommittee on Communications and Technology of the U.S. House of Representatives Committee on Energy and Commerce, “Oversight of the Federal Communications Commission,” Dec. 12, 2013, at 9 (explaining that “forbearance has allowed the FCC to remove outdated regulatory burdens from telecommunications carriers” but that “we currently can’t take these same steps with respect to laws and regulations aimed at MVPDs,” and encouraging Congress to grant the Commission forbearance authority for MVPDs); “The Video Marketplace and the Internet Transformation,” Remarks of Commissioner Ajit Pai, Federal Communications Commission, Media Institute Luncheon, Feb. 7, 2013, at 3 (noting that the Commission “could accomplish a lot if [its] forbearance authority included MVPDs and cable service”).

primary tool for ameliorating the harms of MVPD classification, but that route may not provide sufficient relief either. The Commission historically has conducted waiver analyses on a case-by-case basis, requiring the party seeking a waiver to bear the burden of proving that application of a particular rule or rules would be inconsistent with the public interest.³⁸ While the Commission has granted blanket waivers in limited instances, it has not done so where there are differences among the subject entities – as inevitably will be the case with the evolving and diverse OVD segment of the video marketplace.³⁹ Further, waiver requests are frequently contested, and any relief that may initially be granted would always be vulnerable to future challenges and possible reversal. To the extent any waiver request poses difficult policy choices or raises complex legal issues, a Commission-level review likely would be necessary. Thus, any newly classified MVPD faces the prospect of litigating its way out of its newly acquired obligations without any sure chance of success – a scenario that entails sufficient expense and uncertainty to dissuade aspiring OVDs from pursuing their plans. As a practical matter, the use of exemptions fares no better. The Commission would need to establish and create the precise contours of these carve-outs (a difficult exercise unto itself), and then individual companies presumably would be required to show that they qualify for one, again facing the variables inherent in litigation.

In short, whatever the benefits of MVPD classification, the Commission lacks a direct

³⁸ See, e.g., *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 23 FCC Rcd 7333 ¶ 9 (2008) (“[I]nherent in the Commission’s waiver analysis ‘is a case-by-case approach for analyzing the particular circumstances and factors presented by a carrier seeking waiver relief.’”) (quoting *Joint Petition of CTIA and The Rural Cellular Association for Suspension or Waiver of the Location-Capable Handset Penetration Deadline*, Order, 22 FCC Rcd 303 ¶ 19 (2007)); *Tucson Radio v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971) (holding that burden of proof rests with the petitioner seeking a waiver).

³⁹ See, e.g., *Rates for Interstate Inmate Calling Services*, Order, 29 FCC Rcd 5973 ¶ 14 (2014) (describing “the Commission’s historical approach to waivers” as: “Although the Commission has granted blanket waivers in certain circumstances, it has recognized that such waivers may not be appropriate where there are material differences in the individual circumstances facing different companies.”).

and certain means of mitigating the corresponding harms. As a result, the Commission likely would invite the very regulatory uncertainty that this proceeding aspired to reduce, depressing investment and preventing OVDs from fulfilling their competitive promise.

VI. IF THE COMMISSION PROCEEDS WITH ITS REDEFINITION AS PROPOSED, IT SHOULD EXEMPT NON-FACILITY BASED MVPDS FROM CERTAIN MVPD OBLIGATIONS

If the Commission ultimately determines to redefine MVPDs under its Linear Programming Interpretation, it should exempt non-facility based MVPDs from MVPD-specific infrastructure-, accessibility-, and community-based obligations. Modern broadband and the rise of cloud services enable transactions and experiences that increasingly are independent of place.⁴⁰ Unlike cable or satellite systems, OVDs can launch without having to build large servers or establish large physical footprints using cloud services. Today’s OVDs can be more specialized – an ISP can specialize in the last mile transmission to consumers; a cloud provider can specialize in the cybersecurity for an OVD’s information on servers.⁴¹ In contrast, many of the MVPD obligations assume a localized and facilities-based investment because traditional MVPDs had to build localized infrastructure to get their services to their consumers. Therefore, rules regulating signal leakage, MDUs, employment in local areas, and local wiring were understandable responses to public needs when MVPDs were deploying lots of equipment and infrastructure in communities. However, OVDs present a different situation and it would be inappropriate to burden OVDs with obligations that presume a connection to facilities and

⁴⁰ See, e.g., CEA Open Internet Comments at 4 (“Broadband . . . improves access to healthcare services and transform the level and nature of those services, regardless of physical location . . .”).

⁴¹ See, e.g., Microsoft Corp, Microsoft Azure Media Services, <http://azure.microsoft.com/en-us/services/media-services> (last visited Feb. 9, 2015) (explaining that video and audio content for both on-demand and live streaming delivery to a wide array of TV, PC and mobile device endpoints can be stored and deployed using Microsoft Azure); Google, Wix Media Platform on Google Cloud Platform, <https://cloud.google.com/solutions/wix-media> (last visited Feb. 9, 2015) (explaining that the Wix Media Platform on the Google Cloud Platform is a collection of services for storing, serving, uploading, and managing image, audio, and video files).

location when such a connection may not exist. Nor should OVDs be subject to MVPD accessibility rules,⁴² as many already are subject to the relatively new CVAA regime that more appropriately reflects their online business and technology models, as well as a careful balancing of the flexibility to innovate and the mandate to improve accessibility for all consumers. The Commission, industry, and consumer groups have worked hard to implement this regime, and there is no need to require OVDs treated as MVPDs to adhere to the Part 79 accessibility requirements.

VII. CONCLUSION

For the reasons discussed herein, CEA urges the Commission to refrain from acting on its proposal in the *Notice* and allow the online video marketplace to continue to develop unhindered by regulation. This approach will best serve the video-hungry consumers anxiously awaiting new, cutting-edge products and services.

Respectfully submitted,

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⁴² See 47 C.F.R. Part 79.