

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS OF DISCOVERY COMMUNICATIONS, LLC**

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Discovery Communications, LLC (“Discovery”) submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking* (“*NPRM*”) in the above-captioned proceeding.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The Commission’s proposal to expand the definition of multichannel video programming distributor (“MVPD”) to include certain online video distributors (“OVDs”) is legally unsustainable and will have far-reaching adverse consequences for the video programming industry.

The *NPRM* proposes to interpret the term “channels of video programming” as a single phrase meaning “prescheduled streams of video programming.”<sup>2/</sup> This interpretation, which the Commission refers to as the “Linear Programming Interpretation,” would expand the definition

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<sup>1/</sup> *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, FCC 14-210 (rel. Dec. 19, 2014) (“*NPRM*”).

<sup>2/</sup> *NPRM* ¶ 18.

of MVPD to include any “entity that makes linear services available via the Internet.”<sup>3/</sup> The Commission believes that by “specifying the circumstances under which an Internet-based provider may qualify as an MVPD,” it will “incent new entry that will increase competition in video markets.”<sup>4/</sup> Given the rapid development of the unregulated online video marketplace, it is unclear why the Commission believes it necessary – or even wise – to extend its regulatory authority into this space. As the Motion Picture Association of America explained the last time the Commission raised this issue, “[i]f a market is working well, and if private, business-to-business negotiations generally have been sufficient to ensure that programming is made available, then there is no reason for the FCC to risk intervening in ways that could reverberate across the industry.”<sup>5/</sup> But because the Commission is nevertheless considering such an intervention, there are four main points that it should keep in mind.

*First*, the Commission’s acknowledgement that it is proposing to change and update the definition of MVPD – a change that would make online video distributors eligible for the first time to file program access complaints – means that it is well beyond time to dismiss Sky Angel’s meritless program access complaint against Discovery. Regardless of the outcome of this proceeding, by proposing to “update” and “modernize” its interpretation of the term MVPD, the Commission proves that at the time that Discovery exercised its right to terminate its contract with Sky Angel,<sup>6/</sup> Sky Angel was not an MVPD entitled to bring a program access complaint.

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<sup>3/</sup> NPRM ¶ 25.

<sup>4/</sup> NPRM ¶ 5.

<sup>5/</sup> *Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Comments of the Motion Picture Association of America (filed May 14, 2012) at 3.

<sup>6/</sup> *See Sky Angel U.S., LLC. v. Discovery Communications LLC, et al.*, Answer to Program Access Complaint, File No. CSR-8605-P, MB Docket No. 12-80 (filed April 21, 2010) at 11 (“*Discovery Answer*”) (explaining that Discovery sent Sky Angel a letter terminating its agreement on January 22, 2010).

Even should the Commission decide to expand the MVPD definition to include online distribution of programming, it cannot retroactively apply a new definition of the term – essentially a new rule – to actions that took place more than five years ago. Further, the Commission should clarify that any change in the MVPD definition does not entitle any entity to bring a program access complaint based on actions that occurred before the effective date of the change.

*Second*, a decision to expand the definition of MVPD to include certain OVDs – and so to require programmers considered affiliated with cable operators to make themselves available to such distributors – would have a severe negative impact on the way programmers do business. Even today, many programmers simply do not own the rights to distribute all of their programming online.<sup>7/</sup> While acquisition of such rights is far more common than even a few years ago, programmers have far less than 100% of such rights for all content they carry. Moreover, there is not yet any stable or consistent approach to pricing for such rights, and content providers' quotes for such rights can fluctuate greatly, such that a programmer interested in acquiring online rights might still pass them up because of the increase in costs that would result. It is also a common practice when a programmer produces its own programming to subsidize the costs of acquiring that programming by selling online distribution rights to another entity, allowing for a better overall product. And some programmers, including Discovery, have simply chosen to be cautious in engaging in online video offerings.

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<sup>7/</sup> *Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Comments of Discovery Communications Inc. (filed May 14, 2012) at 9-12 (“*2012 Discovery Comments*”); *see also Discovery Answer* at 12-16; *Sky Angel U.S., LLC. v. Discovery Communications LLC, et al.*, Opposition of Discovery Communications to Emergency Petition for Temporary Standstill, File No. CSR-8605-P, MB Docket No. 12-80 (filed April 21, 2010) at 13-17 (“*Discovery Opposition*”). Those arguments are hereby incorporated by reference.

If programmers subject to program access rules are forced to purchase and retain online distribution rights for all of their programming on all of their networks, that requirement would significantly raise programming costs. Costs would increase further because content sellers would have great leverage in negotiations, knowing programmers could not refuse a price offer for online distribution rights without passing up entirely on acquiring the programming. And when programming line-ups are created based on the availability of online distribution rights, rather than the programmer's best business judgment concerning how to create the most compelling network, consumers will suffer.

The proposal would also expose programmers to significant risk of unnecessary complaints. Programmers would have to develop methods of pricing for these services and a means of determining what services are "comparable" in a world where everyone's service could be very different. Distributors' view of what is "comparable" or "discriminatory" could be very different even if both parties are acting in good faith, and the program access rules are not designed to address the significant differences between facilities-based and online video distribution. The result would be to open the floodgates of litigation, forcing programmers to defend against numerous complaints and putting the FCC in the place of dictating pricing for this emerging marketplace with no standard market price to use as a reference point.

The combination of these effects would have a profound negative impact on programmers subject to the program access rules. While other programmers would be free to negotiate with OVDs and experiment with innovative online offerings and different means of pricing, so-called "cable-affiliated" programmers would be forced to pay higher fees for content, accept lower affiliate fees from MVPDs that value the programming less due to its availability from multiple sources, and compete with programmers subject to none of these restrictions.

*Third*, as Discovery has previously explained, the Communications Act precludes the Commission from expanding the definition of MVPD to include OVDs.<sup>8/</sup> To qualify as an MVPD, an entity must own or control the transmission path on which it offers its video programming service. The Commission should not make such a radical policy change to a well-established statutory definition in the absence of a direct Congressional mandate.

*Finally*, the proposal runs afoul of the First Amendment. Many programmers have chosen, legitimately, not to engage in wide-scale Internet distribution or even any at all. The Commission may not force programmers to speak in a manner not of their own choosing absent a narrowly tailored means of addressing a compelling government interest. The proposal cannot survive under either a strict or intermediate scrutiny standard.

For all of these reasons, the Commissions should decline to change its interpretation of the term “multichannel video programming distributor,” and should continue to allow the marketplace for online video to develop free of regulatory constraints.

## **I. THE ONLINE VIDEO MARKETPLACE IS DEVELOPING RAPIDLY**

In the absence of regulation, options for watching video content online are emerging rapidly. Consumer choice in video sources is at an all-time high; viewers have at their disposal a wide variety of programming, including exclusive programming that is unavailable on MVPDs. Even Sky Angel, LLC, the online distributor whose program access complaint against Discovery first raised the issue of expanding the definition of MVPD, has acknowledged significant growth in online video offerings.<sup>9/</sup> Netflix’s U.S. subscriber base of 36 million is more than any

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<sup>8/</sup> 2012 *Discovery Comments* at 3-7.

<sup>9/</sup> *In re Sky Angel U.S., LLC*, Docket No. 12-1119, Petition for Writ of Mandamus (D.C. Circuit filed Feb. 27, 2012) at 29 (complaining that the increase of online video services has diminished Sky Angel’s “first-to-market” advantage) (“*Sky Angel Mandamus Petition*”).

MVPD,<sup>10/</sup> and Netflix's subscribership continues to grow, both within the U.S. and internationally.<sup>11/</sup> In recent months alone, several big names in the entertainment industry have announced the roll-out of new online-only services. Sony has launched an online offering that will include 75 networks, including major broadcast networks like CBS, NBC, and Fox.<sup>12/</sup> An increasing number of individual video programmers, such as HBO, CBS, and Nickelodeon, are offering direct-to-consumer subscriptions over the Internet, bypassing third-party distributors altogether,<sup>13/</sup> and a recent study by research firm Parks Associates concluded that the advent of HBO's new standalone streaming service alone could lead more than 7 million current MVPD subscribers to cut the cord.<sup>14/</sup>

Discovery, too, has begun experimenting with IP distribution of programming. Discovery's networks recently became available on Sony's cloud-based service and Discovery regularly monitors the marketplace to evaluate whether other distribution platforms might make sense. The fact is, regardless of government regulation, all programmers, including those considered affiliated with cable operators, have an incentive in securing the widest distribution possible to reach as many viewers as possible; these decisions simply need to be made at a time and in a manner that makes the best business sense.

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<sup>10/</sup> Jon Brodtkin, *Comcast and Time Warner Cable Lost 1.1 Million Video Customers in 2013*, ARS TECHNICA (March 17, 2014), <http://arstechnica.com/business/2014/03/comcast-and-time-warner-cable-lost-1-1-million-video-customers-in-2013/>.

<sup>11/</sup> Lauren Gensler, *Netflix Soars On Subscriber Growth*, FORBES (Jan. 20, 2015), <http://www.forbes.com/sites/laurengensler/2015/01/20/netflix-soars-on-subscriber-growth/>.

<sup>12/</sup> *Id.*

<sup>13/</sup> *Id.*

<sup>14/</sup> Jessica Rawden, *HBO Standalone May Convince an Insane Number of People to Drop Cable*, CINEMA BLEND (Jan. 27, 2015), <http://www.cinemablend.com/television/HBO-Standalone-May-Convince-An-Insane-Number-People-Drop-Cable-69666.html>.

## II. THE FCC MUST DISMISS SKY ANGEL'S PROGRAM ACCESS COMPLAINT

Regardless of the outcome of the present proceeding, it is indisputable that Sky Angel U.S., LLC ("Sky Angel") was not an MVPD as that term was defined by the Commission at the time Sky Angel filed its program access complaint against Discovery. Even if the Commission expands the definition of MVPD to include certain online video distributors, the new interpretation cannot be applied retroactively. The complaint must be dismissed. Moreover, the Commission should clarify that any change in the MVPD definition does not entitle any entity to bring a program access complaint based on actions that occurred before the changed approach.<sup>15/</sup>

The Commission has consistently acknowledged that "MVPD" does not currently include OVDs. In adjudicating Sky Angel's program access claim, the Media Bureau considered whether the statutory definition of the term "multichannel video programming distributor" could be interpreted to include an entity that offers video programming services over the public Internet rather than a facilities-based transmission path that it owns or otherwise controls. It tentatively concluded that it could not.<sup>16/</sup> Throughout every stage of the complaint process that has followed, the Commission has reinforced that Sky Angel did not qualify as an MVPD either at the time the parties entered into the agreement or when the agreement was terminated. In seeking comment on the question of whether the statutory definition of MVPD could encompass online distributors, the Media Bureau observed that MVPDs are subject to numerous statutory

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<sup>15/</sup> Simultaneously with the release of the *NPRM*, the Commission released an Order holding Sky Angel's complaint in abeyance pending the outcome of this proceeding. *Sky Angel v. Discovery*, MB Docket No. 12-80, Order, DA 14-1874 (rel. Dec. 19, 2014).

<sup>16/</sup> *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, 25 FCC Rcd 3879, 3882 (Media Bur. 2010).

and regulatory requirements, such as the closed captioning requirements,<sup>17/</sup> with which Sky Angel admittedly did not comply.<sup>18/</sup> In its Opposition to Sky Angel’s Petition for Mandamus, the Commission argued that Sky Angel’s complaint presented “issues of first impression that could have repercussions for a wide range of Internet-based distributors of video programming.”<sup>19/</sup> These statements, along with the Commission’s earlier proclamation that “the statutory requirements applicable to established categories of service providers should not be applied reflexively to Internet-based services,”<sup>20/</sup> make clear that “MVPD” at the time of Sky Angel’s complaint excluded Sky Angel’s service.

Any change in interpretation cannot be applied retroactively to the facts of the Sky Angel case. The Supreme Court has made clear that “retroactivity is not favored in law,” and “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”<sup>21/</sup> Absent an express grant of statutory authority to promulgate retroactive rules, the FCC may not apply its new “interpretation” to an old case.<sup>22/</sup>

The FCC has previously acknowledged the limitations on its authority to apply rules retroactively, explaining that the “[a]pplication of a rule is impermissibly retroactive when it would impair rights a party possessed when he acted, increase a party’s liability for past conduct,

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<sup>17/</sup> *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” As Raised in Pending Program Access Complaint Proceeding*, Public Notice, 27 FCC Rcd 3079, 3080 (Media Bur. 2012) (“2012 Public Notice”).

<sup>18/</sup> *Discovery Opposition* at 1, 3, 13-17.

<sup>19/</sup> *In re Sky Angel U.S., LLC*, Docket No. 12-1119, Opposition of the Federal Communications Commission to Sky Angel’s Petition for Writ of Mandamus (D.C. Circuit filed Apr. 5, 2012) at 15 (“*FCC Opposition to Sky Angel Mandamus Petition*”).

<sup>20/</sup> *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4886, ¶ 35 (2004).

<sup>21/</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928).

<sup>22/</sup> *Bowen*, 488 U.S., at 208-209.

or impose new duties with respect to transactions already completed.”<sup>23/</sup> The FCC’s decision to hold Sky Angel’s program access complaint in abeyance rather than dismiss it outright does all three of these things, potentially holding Discovery liable for an action that the FCC tacitly acknowledges was lawful at the time.

The circumstances here are analogous to those present in 2010, when the Commission revised its program access rules to bring within their scope unfair acts involving the distribution of cable-affiliated, terrestrially-delivered programming services.<sup>24/</sup> At the time those revisions were adopted, there were two pending program access complaints alleging unfair acts involving cable-affiliated, terrestrially-delivered programming. To complainants with pending 628(b) claims against terrestrial programmers, the *2010 Program Access Order* offered a distinct choice: either proceed to decision under the pre-*Order* framework, or make a supplemental filing alleging a violation of the Commission’s rules occurring after the effective date of that *Order* to have the case decided based upon the new regulatory framework established therein.<sup>25/</sup>

The Commission should proceed similarly here. It can and should resolve the Sky Angel decision under the current regulatory framework – which, as the *NPRM* effectively confirms, does not presently treat OVDs such as Sky Angel as an MVPD. Alternatively, it can dismiss the complaint without prejudice to Sky Angel’s ability to re-file under whatever new framework, if any, is established through this proceeding – so long as Sky Angel is able to allege a violation of

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<sup>23/</sup> *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293 and IB Docket No. 95-91, Report and Order and Second Report and Order, 25 FCC Rcd. 11710, 11774, ¶ 157 (2010) (quoting *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001)) (“Application of a rule is impermissibly retroactive when it ‘would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.’”).

<sup>24/</sup> *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 (2010) (“*2010 Program Access Order*”).

<sup>25/</sup> See *2010 Program Access Order* ¶ 55, n.237.

the Commission's rules occurring on or after the effective date of that new framework. Under no circumstances, however, can Sky Angel be afforded a decision on its pending complaint filed in 2010, based upon revisions to the definition of MVPD adopted in 2015 or thereafter.

### **III. EXPANDING THE DEFINITION OF MVPD WOULD HAVE A PROFOUND NEGATIVE IMPACT ON THE VIDEO PROGRAMMING BUSINESS MODEL**

The technological and operational differences between facilities-based MVPDs and online distributors have practical implications that the marketplace is only beginning to address. The Commission's proposal to expand the definition of MVPD would wreak havoc on the video programming marketplace, particularly for video programmers that are subject to the program access rules, leading to increased costs and lower quality line-ups for consumers.

#### **A. Requiring Programmers To Purchase Online Distribution Rights Will Lead To A Substantial Rise In Programming Costs.**

As recognized in the *NPRM*, video programmers do not always own the right to distribute video content over the Internet,<sup>26/</sup> making the application of the program access rules to online video distributors highly problematic. While acquisition of such rights is far more common than even a few years ago, programmers do not always have such rights for all content they carry on all of their networks. At Discovery, the percentage of programming cleared for online rights on Discovery's networks varies by network. In addition, older programming is far less likely to have such clearances, even though it may re-air often.

The FCC tried to solve this problem in the context of the Comcast-NBCU merger by directing that NBCU programmers need only make their programming streams available to online distributors when they have the rights to do so.<sup>27/</sup> But the Commission now appears to be

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<sup>26/</sup> *NPRM* ¶¶ 67-69.

<sup>27/</sup> *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, Appendix A, at 4359 (2011).

contemplating a “solution” that is many times worse, asking whether cable-affiliated programming networks that do not possess the right to authorize Internet distribution of content displayed on their network “should...be required to obtain such rights to comply with the program access rules.”<sup>28/</sup>

The implications of a regulatory regime that would force programmers to purchase online distribution rights for all programming in all circumstances are profound. First and foremost, the decision to purchase or sell any bundle of rights, including online distribution rights, appropriately lies with the programming vendor and the copyright holder of the content in question. Either party may have legitimate business reasons for not entering into an online licensing agreement. For example, while Discovery is beginning to experiment with online video distribution of some of its programs, it is being thoughtful and measured in its approach to this new form of distribution. Some content creators may wish to retain exclusive rights to the distribution of their own content online, or may wish to negotiate with OVDs directly for the distribution of their content on an on-demand basis. Programmers have limited programming budgets, and must have discretion over how to allocate those funds in a manner that results in the most compelling programming service possible. The Commission is not well-positioned to second guess these decisions.

That having to acquire additional distribution rights would raise overall programming costs is self-evident. But additionally, there is not yet any stable or consistent approach to pricing for such rights, and content providers’ quotes for such rights can fluctuate greatly. The price for content when online distribution rights are acquired may add a small fraction to the total programming costs, or can increase it significantly. In some cases, price demands for online

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<sup>28/</sup> *NPRM* ¶ 69.

distribution rights are high enough that the cost of acquiring those rights outweighs the benefits of obtaining them. When that happens, a programmer may choose to simply forego the right to distribute content online. Forcing programmers to purchase online distribution rights in all circumstances would deprive them of that choice. And knowing that programmers cannot refuse a price offer for online distribution rights without passing up entirely on the programming, content creators would likely raise the price of those rights even further. The result would be significantly higher costs of assembling a programming service – and programmers would have to acquire such rights even if no online video distributor had even asked to carry the programming.<sup>29/</sup> These costs would eventually be passed through to subscribers of all distributors, forcing MVPD subscribers to subsidize costs for those viewing video online.

In other cases, the content creator chooses not to sell its online distribution rights. Content creators may wish to sell those rights to others, or keep them for themselves. For that content, programmers considered “cable affiliated” would have no choice but to pass up the opportunity to acquire it for their programming services, leaving it to be acquired by programmers not subject to the rules. Moreover, programmers’ library of programming would be greatly devalued if they could no longer use large portions of it because they do not have online distribution rights for that content. The result would be lower-quality programming line-ups for consumers.

Additionally, programmers who produce their own content in-house may sometimes seek to subsidize their production costs – especially for very popular, expensive programming – by selling the online distribution rights of their own programming to another entity. This decision, which must be made by the programmer that owns the copyright, provides necessary added

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<sup>29/</sup> It is also important to remember that all necessary online distribution rights cannot always be acquired as part of one deal. Music rights, for example, are often acquired separately.

funds to the programming budget, allowing for more investment in quality and talent – but the Commission’s proposal would foreclose this technique.

The competitive disparity that would result from this proposal cannot be understated. The very few programmers that are subject to this rule already bear an unfair burden compared to the rest of the industry and would risk losing viewers if the costs of their networks increase and the quality potentially decreases. Non-affiliated programmers, which include many of the largest and most powerful competitors in the marketplace, would not be subject to any of these new costs, but would remain free to conduct their business as they see fit, unreasonably altering the competitive playing field even further.

**B. Applying The Program Access Rules To OVDs Would Subject Affected Programmers To An Unreasonably High Risk Of Complaints And Interfere With Their Reasonable Business Judgment.**

While most facilities-based MVPD services look largely the same, online video distribution has taken many forms. Facilities-based MVPDs generally offer subscribers very similar network tiers and packages, with even the most basic of advertised tiers comprising well over a hundred channels. This standard distribution model has led to an imperfect but reasonably stable marketplace where per-subscriber rates for individual or bundled networks are predictably influenced by a limited number of variables, such as penetration rate and number of subscribers.

In contrast, even those OVDs that might offer multiple channels of video programming and so qualify as an MVPD could offer services that differ greatly from traditional MPVD services and from each other. Today’s OVDs are offering a wide variety of network packages, and it is still unclear what impact these packaging choices will have on the value of individual programming networks. OVDs may also differ in terms of user interface (whether it is user-friendly or difficult to navigate), the reliability of their service (how often it shuts down or experiences congestion-related delays), and the overall quality of their video and audio streams.

Programmers will have to study and develop methods of pricing for these services based on their best business judgment of how these services will function and succeed in the marketplace. Such pricing will necessarily involve a certain amount of trial and error, because there are no marketplace standards to use a reference point. As services and business models develop, pricing could be and should be adjusted to account for both parties' new understanding.

While such experimentation and innovation should be encouraged, the Commission's proposal would subject programmers to excessive and unreasonable risk of a discrimination complaint. In the near term, online distributors' view of what services are like theirs, or what pricing is "discriminatory" could be very different, even if both parties are acting in good faith. Until the marketplace for online video has fully matured and stabilized, the program access rules are simply not suited to evaluate whether any difference between the rates charged to MVPDs and OVDs, or even between competing OVDs, is reasonable or discriminatory.

Moreover, because the threshold for establishing a *prima facie* case is so low, and programmers are so limited in their allowable defenses, the Commission's proposal could lead to an avalanche of patently unreasonable program access complaints. As the Commission acknowledges, the proposed Linear Programming Interpretation could force programmers to "negotiate with and license programming to potentially large numbers of Internet-based distributors."<sup>30/</sup> Programmers like Discovery would be forced to expend significant resources to defend against every complaint, and would be faced with a series of decisions in which the FCC sets the standards for online pricing, rather than allowing the nascent online video marketplace to develop and sort them out. The FCC is not well-suited to this role, and attempting to assume such a drastic position could seriously alter the manner in which the marketplace develops.

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<sup>30/</sup> *NPRM* ¶ 41.

Moreover, programmers not subject to the rules will enjoy freedom to implement an online strategy that reflects their own evaluation of the associated risks and benefits. While some programmers are eager to experiment with a variety of online distribution models, others take a more conservative approach out of concern that broader distribution of their content online could decrease the value of that content to traditional MVPDs – a loss that would be compounded by a likely decline in advertising revenues, since viewing over the MVPD platform would shrink yet advertisers may not invest in online ads.<sup>31/</sup>

Disney, for example, recently explained that while the company is willing to experiment with a limited over-the-top offering via Dish’s Sling TV, Disney is “mindful of the value of the expanded basic bundle” and may not distribute all of its networks online, at least immediately.<sup>32/</sup> While Disney said that it would be on the look-out for changing market dynamics that might make online distribution models more attractive, “we think that if we were to do that now, it would be somewhat precipitous of us and there doesn’t seem to be any reason to be that way.”<sup>33/</sup> Under the Commission’s proposal, programmers that are subject to the program access rules would be prohibited from making this same strategic exploration and would be weighed down by an outdated paradigm that cannot account for the many variables that online distribution adds to the business equation.

The vast majority of channels in the marketplace that are not deemed to be affiliated with a cable operator (or a telco) will have no obligation to deal with any particular OVD, or to offer them non-discriminatory rates, terms and conditions. Unaffiliated programmers will have full

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<sup>31/</sup> *Discovery Answer* at 12; *2012 Discovery Comments* at 12-13.

<sup>32/</sup> Mike Farrell, *Iger: No plans for ESPN OTT, For Now*, MULTICHANNEL NEWS (Feb. 3, 2015), <http://www.multichannel.com/news/news-articles/iger-no-plans-espn-ott-now/387618>.

<sup>33/</sup> *Id.*

leeway to decide based upon their business judgment whether to distribute their linear channel over the Internet, and also have discretion to reject or embrace any particular OVD as a content licensee. By contrast, providers of cable-affiliated linear channels may be required to deal with any OVD that expresses interest in distributing its channel, regardless of how the OVD positions itself in the marketplace (*e.g.*, as primarily a distributor of sports and adult programming) or its track record with respect to copyrighted content.

The framework envisioned under the *Notice* would rely upon government intervention to re-shape the emerging OTT marketplace into a carbon copy of the fully mature MVPD marketplace, characterized by distributors that intermediate between programmers and consumers. This vision threatens to squelch the potential disruptiveness of the OTT market, which offers programmers an unprecedented opportunity to distribute their content directly to subscribers. Unaffiliated programmers providing their channels direct-to-consumer via the Internet would not be compelled to “cannibalize” such an offering by also having to provide it to any requesting OVD, but cable-affiliated programmers would not be afforded such flexibility. There is no justification for government rules that distort competition and disadvantage a subset of the marketplace in this fashion.

#### **IV. THE COMMUNICATIONS ACT DOES NOT PERMIT THE COMMISSION’S PROPOSED LINEAR PROGRAMMING INTERPRETATION**

##### **A. Statutory Text Makes Clear That MVPDs Must Control The Physical Transmission Path To The Subscriber.**

The statutory definition of MVPD requires an entity to “make available multiple channels of video programming.” As Discovery has previously demonstrated, OVDs do not “make

available” multiple “channels” of video programming because they do not own or control the transmission paths for such programming.<sup>34/</sup>

It is essential that the Commission interpret the Communications Act “as a symmetrical and coherent regulatory scheme.”<sup>35/</sup> The Commission’s proposal ignores this canon of construction by discarding the Act’s definition of “channel” simply because it was adopted in the 1984 Cable Act and “focused primarily on the regulation of cable television.”<sup>36/</sup> Congress is presumed to have been aware of the existing statutory definition for “channel” – which specifically references the pathway by which a cable operator makes a certain programming stream available – when it deliberately used the term to define “MVPD.”<sup>37/</sup> Accordingly, Congress directed that MVPDs must offer “channels of video programming” in a manner comparable with, though not necessarily the same as, cable operators’ offering of physical channels that transmit video programming signals.

With this proper, statutory understanding of “channel,” even if an MVPD might not own the facilities used to offer “channels of video programming” to customers, the MVPD must still “make[] available for purchase” to customers both the channels of video programming and the path of transmission.<sup>38/</sup> An MVPD cannot make a transmission path available without control over that transmission path – control that transmission over the public Internet does not afford.

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<sup>34/</sup> See *2012 Discovery Comments* at 3-7.

<sup>35/</sup> *2012 Discovery Comments* at 3-4, citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).

<sup>36/</sup> *NPRM* ¶ 21.

<sup>37/</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”); *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (“[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”) (internal quotations omitted).

<sup>38/</sup> See 47 U.S.C. § 522(13).

All MVPDs, including DBS providers, make available transmission paths for programming over facilities they own or control, as cable operators do.<sup>39/</sup> This commonality – not the mere provision of multiple streams of prescheduled video programming available for purchase – is the “essential element that binds the illustrative entities listed in the provision.”<sup>40/</sup>

The Commission asserts that its proposed understanding of “channel” reflects “its ordinary and common meaning,”<sup>41/</sup> but neither the *American Heritage Dictionary* nor *Webster’s II New College Dictionary* provides any definition suggesting that “channel” means a programming network. Both dictionaries do, however, include a definition specifically referring to the transmission of television signals.<sup>42/</sup> Further, the phrase “channels of” is commonly used to describe the pathways – literal or figurative – over which something travels.

The Commission’s own rules reflect this usage. For example, the “channel positioning” rules lay out the requirements for positioning the signal pathways for certain “must-carry” programming, and “assignment” is defined as an “authorization given to a station licensee to use specific frequencies or channels.” Redefining the word “channel” as “a stream of prescheduled video programming” would actually distance the word from its “common, everyday meaning.”<sup>43/</sup>

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<sup>39/</sup> The Act expressly defines a cable operator as owning a “significant interest” or otherwise controlling the “management and operation” of the cable system. *See* 47 U.S.C. § 522(5).

<sup>40/</sup> *NPRM* ¶ 19.

<sup>41/</sup> *NPRM* ¶ 21.

<sup>42/</sup> *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 310 (4th Ed. 2006) (defining “channel” in the context of electronics as “[a] a specialized frequency band for the transmission and reception of electromagnetic signals, as for television signals.”); *see also* WEBSTER’S II NEW COLLEGE DICTIONARY at 186 (1995) (defining channel as “a specified frequency band for transmitting and receiving electromagnetic signals, as for television.”).

<sup>43/</sup> *See NPRM* ¶ 24.

**B. The Commission Cannot Effectuate Such A Dramatic Policy Change Absent Explicit Congressional Direction.**

What the Commission characterizes as merely a clarifying interpretation of an ambiguous statutory term is a radical departure from the widely understood definition of MVPD and MVPD service around which an entire regulatory scheme has developed. By redefining what it means to be an MVPD, the Commission is effectively amending key provisions of the Communications Act. The FCC itself has acknowledged that redefining the term MVPD “has potentially sweeping consequences for providers of video programming via the Internet.”<sup>44/</sup> The Commission should not enact such far-reaching changes absent the direct input of Congress.

The legal lynchpin of the Linear Programming Interpretation is that the statutory definition of MVPD as a “person such as, but not limited to, a cable operator, multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite programming distributor” suggests that the list of qualifying MVPDs is illustrative rather than exclusive.<sup>45</sup> While the Commission has concluded that covered entities need only be “similar” to those listed,<sup>46/</sup> OVDs are not similar at core to the listed entities. While OVDs may provide services that share certain similarities with MVPDs, there are significant technical and operational differences between the two. By definition, MVPDs deliver video programming services to a single, fixed location using a last-mile connection that they control. OVDs offer streaming video that can be accessed virtually anywhere via the public Internet. These differences cannot be ignored. By eliminating the distinction between the two, the Commission would be usurping Congress’s authority to establish appropriate public policy objectives in a changing world. To the extent that new regulations may be needed to encourage the

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<sup>44/</sup> *FCC Opposition to Sky Angel Mandamus Petition* at 2.

<sup>45/</sup> *NPRM* ¶ 19, *citing* 47 C.F.R. § 522(13).

<sup>46/</sup> *Id.*

development of non-facilities based video services, Congress can expand the Commission's authority to regulate those services.

## **V. THE COMMISSION'S PROPOSAL CREATES IMPERMISSIBLE FIRST AMENDMENT BURDENS**

Discovery and other programmers "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment."<sup>47/</sup> The Linear Programming Interpretation would expand the class of entities entitled to government-mandated access to programming to a potentially unlimited number of online distributors, forcing Discovery to speak in a venue and manner not of its own determination. Any restriction that "[m]andat[es] speech that a speaker would not otherwise make" is inherently "content-based."<sup>48/</sup> Under the strict scrutiny test applicable to such restrictions, the Commission would be required to demonstrate that the burden on speech serves a compelling governmental interest and is narrowly tailored to achieve that end.<sup>49/</sup> The Commission can do neither.

A rule that significantly expands the universe of MVPDs eligible for program access rights serves no compelling governmental interest." As a First Amendment speaker, Discovery has the right to present its speech in the environment and context it chooses. That right includes the decision of whether or not to distribute the entirety of any of its programming networks over the Internet, or to allow any of its distribution partners to include the Discovery networks in an

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<sup>47/</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner P*"), citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

<sup>48/</sup> *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988).

<sup>49/</sup> *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

online video service offering. Forcing programmers to offer programming to online providers has the effect of forcing them to speak when they would prefer to remain silent.<sup>50/</sup>

While the Commission’s purported interest in imposing the new rules is to enhance competition for video programming distribution services by encouraging new entrants in the online market,<sup>51/</sup> there is no evidence of any “compelling” need to do so.

Further, the proposal is not narrowly tailored to achieve the government’s stated purpose. Although courts have concluded that the existing program access rules impose on programmers no greater burden than is necessary to further even an important or substantial (as opposed to compelling) government interest, the expansion of the program access rules to an unknown number of OVDs would substantially alter that analysis.<sup>52/</sup> As Cablevision explained in its comments in response to the *2012 Public Notice*, upon expansion of the program access rules to include OVDs, “the restriction on cable-affiliated programmer First Amendment rights would no longer be ‘incidental.’ Having to negotiate with a potentially large number of entities newly qualified as MVPDs – many of whom may not be established businesses with any reputable brand, or who may target a type of niche audience not in line with the programmer’s image (*e.g.*, a service comprised mainly of programming rated R or X) – would burden the programmer’s speech in a manner never before examined by the courts.”<sup>53/</sup> The expansion of the rules in so

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<sup>50/</sup> See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 18 (1986) (noting First Amendment implications of “forcing appellant to speak where it would prefer to remain silent”).

<sup>51/</sup> *NPRM* ¶ 5.

<sup>52/</sup> *Time Warner Entertainment Co. v. FCC*, 93 F. 3d 957, 978 (D.C. Cir. 1996); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

<sup>53/</sup> *Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Comments of Cablevision Systems Inc. (filed May 14, 2012) at 19.

dramatic a fashion cannot reasonably be considered “narrowly tailored” to serve any government purpose.

Even if the Commission’s proposal is examined under intermediate scrutiny, it would still fail to pass First Amendment muster. Under intermediate scrutiny, burdens on cable programmers’ protected speech are permissible only if they “further[] an important or substantial governmental interest” and are “no greater than is essential to the furtherance of that interest.”<sup>54/</sup> A restriction is permissible only if it addresses harms that are “real, not merely conjectural,” and it “alleviate[s] these harms in a direct and material way.”<sup>55/</sup> The Commission’s proposal to expand program access rights to OVDs cannot meet this standard for the same reasons described above.

Further, the proposal will impose a significant burden on a select group of programmers. If Discovery and others like it are forced to make their programming networks available to a potentially unlimited number of OVDs, the end result would be increased costs, lower revenues, decreased investment in programming, and ultimately a decrease in viewership. By reducing economic incentives to invest in the development of new programming, the result is “reduced programming – that is, less speech.”<sup>56/</sup>

Consumers today have more choices for viewing video online than ever before. Given these circumstances, the substantial First Amendment burdens created by the Commission’s proposal cannot be justified.

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<sup>54/</sup> See *Turner I*, 512 U.S. at 662, quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

<sup>55/</sup> *Turner I*, 512 U.S. at 664.

<sup>56/</sup> *Time Warner Entm’t Co.*, 93 F.3d at 979.

## CONCLUSION

For the foregoing reasons, the FCC should not adopt its proposal to re-interpret the definition of “multichannel video programming distributor” to include any online video distributor.

Respectfully submitted,

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