

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

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

**COMMENTS OF THE TENNIS CHANNEL, INC.**

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## SUMMARY

The Tennis Channel, Inc. (“Tennis Channel”) supports the Federal Communications Commission’s (“Commission’s”) efforts to enhance competition in the video distribution marketplace. The Commission here proposes to expand the definition of multichannel video programming distributor (“MVPD”) to include Internet-based distributors that provide multiple linear video programming streams on a subscription basis (“Subscription Linear” distributors). Tennis Channel supports this redefinition to the extent it affords Subscription Linear distributors the competition protections contained in the program access rules and the exclusivity protections contained in the program carriage rules. Those protections will contribute to the creation of a robust distribution marketplace that will make it easier for entities like Tennis Channel to reach broader and more diverse audiences.

However, while the Commission’s proposed redefinition will allow one category of Internet-based distributor to avail itself of the protections contained in the program access and program carriage rules, it omits from comparable protection many other types of Internet distributor that have similar potential to compete with incumbent MVPDs in the delivery of content of interest to consumers. Whether Internet-based distributors stream programming assets on a video-on-demand basis or on a linear basis, and regardless of their business models (whether subscription, transactional, or advertiser-based delivery), new Internet distribution entrants should be expected over time to provide viewers with an array of content choices and delivery formats, which will make them highly competitive with incumbent MVPDs. Their growing potency in the video distribution marketplace makes all Internet-based distributors vulnerable to traditional MVPDs willing to employ anti-competitive means to stifle new competition. Thus the protections that the Commission seeks to afford to Subscription Linear

distributors also are needed by Internet-based distributors using different formats and economic models to deliver programming.

Equally significant, a definition-based approach of the kind proposed by the Commission will not provide protections against the range of anti-competitive conduct Internet distributors may well face. Through complex contractual restrictions and covenants imposed on third-party programmers, some traditional MVPDs will be able to limit Internet distributors' access to high value content, and thus their ability to compete, regardless of a definitional extension of the program carriage and program access rules to Internet-based distributors. The proposed relief that flows from a redefinition of the term MVPD simply will not solve these important problems without agency action that addresses the underlying web of contractual restrictions that could be used to achieve the same anti-competitive results.

Therefore, even as the Commission moves forward to modify the definition of MVPD as a means to protect the competitive marketplace, it should issue a further notice of proposed rulemaking that targets and eliminates the contract-based techniques that incumbent MVPDs can otherwise use to stifle competition from Internet-based distributors.

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**COMMENTS OF THE TENNIS CHANNEL, INC.**

The Tennis Channel, Inc. (“Tennis Channel”) supports the Federal Communications Commission’s (the “Commission’s”) efforts to promote and protect competition in the video distribution marketplace. The Tennis Channel brings a unique perspective to this discussion as one of the leading independent sports programming services on cable and satellite systems. Through substantial effort and high quality programming, it can now be seen in a Nielsen-estimated 36 million homes nationwide. It brings popular year-round, high quality tennis programming (including the exclusive rights to telecast portions of all four tennis Grand Slam events) and a fresh sports voice to the video content marketplace. Like other cable networks, Tennis Channel is distributed by multichannel video programming distributors (“MVPDs”) for viewing on television sets via traditional cable, satellite, and telco systems. As an independent programmer, Tennis Channel has a vested interest in a competitive distribution marketplace, and it has experienced first-hand the ways in which some incumbent MVPDs seek to prevent such a marketplace from developing.

The Commission proposes to adopt a “technology-neutral” definition of the term MVPD that would include Internet-based distributors that make available multiple linear video programming streams on a subscription basis (“Subscription Linear” distributors). As Congress

and the Commission have recognized, traditional MVPDs (particularly vertically integrated MVPDs) have significant incentives and capacity to limit competition in video programming distribution from new entrants.<sup>1</sup> Treating Subscription Linear distributors as MVPDs would entitle them to non-discriminatory access to programming controlled by entities affiliated with vertically integrated cable operators pursuant to the “program access” framework.<sup>2</sup> These distributors also would be protected by the provisions of the “program carriage” rules that prohibit MVPDs from demanding from non-affiliated programmers, as a price of carriage, comprehensive exclusivity rights that deny other MVPDs access to that content.<sup>3</sup> The Tennis Channel supports the Commission’s policy goals underlying its proposal to extend these pro-competitive limitations to the Internet distribution marketplace; in Tennis Channel’s experience, some incumbent MVPDs are using the same tactics today to stifle competition from Internet-based distribution services as were being used to stifle competition from satellite distributors when these protections were adopted in 1992.<sup>4</sup>

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<sup>1</sup> When Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) provisions that created the program access and program carriage frameworks, it sought to preserve and facilitate competition in the distribution marketplace from the then-nascent satellite industry in light of the anti-competitive tactics of incumbent cable companies. *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking (“NPRM”), (rel. Dec. 19, 2014) at ¶ 42 (discussing program access concerns and noting that, absent regulatory constraint, cable-affiliated programmers would be able to make affiliated programming available for online distribution to only certain Internet-based distributors of video programming, such as those owned by an affiliated cable operator, but not to those owned by others); *Id.* at ¶¶ 48-49 (discussing program carriage concerns and ability for large MVPDs and technology companies to “demand[ ] a financial interest or exclusive rights from programmers as a condition for carriage”). This included cable companies demanding that cable network programmers commit not to license their content for distribution on new entrant satellite systems. *Id.* at ¶ 40.

<sup>2</sup> See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004.

<sup>3</sup> See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

<sup>4</sup> See S. Rep. No. 102-92 (1991), at 24-29.

While the Commission’s proposal would ensure that a subset of Internet-based distributors—Subscription Linear distributors—have access to the program access and exclusivity protections that currently apply to MVPDs, the proposal would leave unprotected and vulnerable other Internet-based distributors with the same needs for protection, simply because they employ different formats and business models.

Moreover, even with program access and exclusivity protections applied to Internet-based distributors, cable networks may well remain hamstrung in their ability to enter into innovative arrangements with Internet-based distributors because of restrictions in their agreements with large incumbent MVPDs, and may in some cases be deterred from entering into such agreements because of fear of retaliation by some incumbent operators. Therefore, even as the Commission adopts a redefinition of MVPD, it should issue a further notice of proposed rulemaking to address potential anti-competitive conduct (both contract-based and otherwise) that some incumbent MVPDs may use to restrict the availability of content to new Internet-based distributors and otherwise stifle a competitive distribution marketplace.

#### **I. The Proposal to Redefine MVPD Is Under-Inclusive**

Extending program access and exclusivity protections to Subscription Linear distributors does not adequately confront the threat of anti-competitive conduct aimed at stifling the emergence of “over-the-top” (“OTT”) services as competitive offerings. As the *NPRM* recognized, there are a number of other categories of Internet-based video service offerings in addition to Subscription Linear services, which the *NPRM* categorizes as: Subscription On-Demand, Transactional On-Demand, Ad-based Linear and On-Demand, and Transactional Linear.<sup>5</sup> The Commission has tentatively concluded that only Subscription Linear distributors

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<sup>5</sup> *NPRM*, ¶ 13.

should be treated as MVPDs because “they make multiple channels of video programming available for purchase.”<sup>6</sup> The Commission has acknowledged that the term “channel” is “ambiguous,” but the *NPRM* proposes a definition of “MVPD” that requires an entity to make multiple “channels” of programming “available for purchase” and therefore excludes other Internet-based distributors.<sup>7</sup> As discussed below, Tennis Channel believes that the Commission has the requisite authority to prohibit legacy MVPDs from engaging in anticompetitive conduct that excludes Internet distributors beyond those that stream linear “channels” of distribution. This is critical, as the Commission’s own policy statements suggest, because all Internet-based distributors need the protection afforded by the program access and program carriage frameworks.<sup>8</sup>

The proposed redefinition does not reflect the reality that, in the evolving video marketplace, incumbent MVPDs have incentives to foreclose competition from a wide variety of Internet-based distributors and, as the Commission suggested in the *Comcast-NBCU Order*, those services offer a potential substitute product.<sup>9</sup> There is no question that existing MVPDs

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<sup>6</sup> *Id.* at ¶ 14.

<sup>7</sup> *Id.* at ¶¶ 14, 24.

<sup>8</sup> For example, the Commission explained that the goals of the program access provision of the 1992 Cable Act are to “increase competition and diversity in the video programming market, . . . and to spur the development of communications technologies.” *NPRM*, ¶ 23. The Commission also noted that “consumers are focused on the content they receive, rather than the specific method used to deliver it to them.” *Id.* at ¶ 24.

<sup>9</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order (“*Comcast-NBCU Order*”), 26 FCC Rcd 4238, 4256, ¶ 41 (Jan. 20, 2011) (“In the last few years, the Internet has evolved into a powerful method of video programming distribution. We recognize that the amount of video content available on the Internet continues to increase significantly each year, and consumers are increasingly turning to the Internet to view video programming. . . . [W]e conclude that regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product.”).

understand that potential; they are themselves seeking to steal a march on these nascent developments by getting there first. As technology has evolved to enable viewers to access cable network programming on new types of platforms, some MVPDs have begun to offer subscribers the ability to stream subscription programming to mobile and other devices within the home via subscribers' modems, and offer "TV Everywhere" platforms through which subscribers have access to their subscription programming via the MVPDs' websites and applications. Incumbent MVPDs increasingly offer non-linear VOD programs through a variety of business models. And, most recently, some MVPDs have created or announced new OTT services that distribute programming to consumers (and not just authenticated subscribers) over the Internet. According to the Commission's *Fifteenth Video Competition Report*, incumbent MVPDs are using their streaming, VOD, pay-per-view, and standalone online video services as part of a competitive strategy for attracting and retaining subscribers.<sup>10</sup> Direct, comprehensive, and expeditious action is thus required to provide fledgling Internet services with the opportunity and incentive to enter the market before it has jelled around incumbent services.

Moreover, MVPDs often seek to impose as a condition of carriage contractual prohibitions on a programmer's distribution of content through means other than traditional MVPD facilities (so-called "alternative distribution means" or "ADM" restrictions) without respect to the business model used for the alternative distribution means.<sup>11</sup> Incumbent MVPDs

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<sup>10</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report ("*Fifteenth Video Competition Report*"), (rel. July 22, 2013), at ¶ 91 ("Another competitive strategy for attracting and retaining subscribers is the 'TV Everywhere' initiative, which allows consumers to access both linear and VOD programs on a variety of in-home and mobile Internet-connected devices."); *Id.* at ¶ 114 (explaining that DIRECTV and DISH Network "deliver most or all VOD content over broadband"); *Id.* at ¶ 239 ("Several MVPDs offer [online video services] to non-subscribers.").

<sup>11</sup> These prohibitions typically apply for a specified "holdback period." For example, a programming agreement might prohibit the distribution of content through any means other than (continued...)

typically seek exclusivity provisions that are triggered by the distribution of content to a broad array of online distributors, including both VOD OTT services like Netflix, and OTT services that stream programming on a linear basis to consumers. Such exclusivity provisions deny nascent Internet-based distributors access to programming, and foreclose networks like Tennis Channel from reaching their subscribers through new and innovative platforms—a result that is at odds with the aims of the program access and program carriage frameworks adopted by Congress.<sup>12</sup> The effect of the *NPRM*'s expansion of the MVPD definition would necessarily protect only those Internet-based distributors that are covered by the redefinition—and not other OTT services that incumbent MVPDs are seeking to exclude without regard to business model. Finally, Tennis Channel suggests that it would be inconsistent with the public interest and the Commission's goal of increased competition and claimed preference for a technology-neutral framework for the Commission to drive market participants to a particular business model (namely, Subscription Linear video services) rather than permit the market to drive business models.

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traditional MVPD facilities for a period of days to months after a programming asset is telecast on the programming network. For a live-sports network like Tennis Channel, in particular, a hold-back period can destroy the market value of some of its marquee content.

<sup>12</sup> See Tom Wheeler, *Tech Transitions, Video, and the Future*, FCC Blog (Oct. 28, 2014, 1:48 PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future> (“Congress realized that the then-nascent satellite industry would have a hard time competing because much cable programming was owned by cable companies who frequently kept it from competitors. Congress mandated access to cable channels for satellite services, and competition flourished. Today I am proposing to extend the same concept to the providers of linear, Internet-based services; to encourage new video alternatives by opening up access to content previously locked on cable channels.”)

## II. The Rule Proposed By The Commission Will Not Protect Against A Variety of Other Techniques Used By Incumbent MVPDs to Stifle Competition

To fully achieve its goals of increasing competition in the video marketplace,<sup>13</sup> the Commission must also consider the availability of other techniques used by incumbent MVPDs to restrict third-party programmers from doing business with new entrants. A second notice of proposed rulemaking should seek comment on the following matters, among others.<sup>14</sup>

***ADM Restrictions.*** As discussed above, extending the program carriage framework's protections to Internet-based distributors would prohibit incumbent MVPDs from seeking ADM restrictions that outright prohibit programmers from providing their content to these third-party Internet distributors covered by the redefinition. However, incumbent MVPDs often impose other penalties and seek other remedies in connection with a programmer's distribution of content through third-party OTT services.<sup>15</sup> Such provisions have the same impact as outright prohibitions since the specter of MVPD enforcement deters programmers from entering into distribution agreements with OTT distributors.<sup>16</sup> In such situations, the expansion of program

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<sup>13</sup> *NPRM*, ¶¶ 4-5.

<sup>14</sup> Tennis Channel does not claim that any or all of the provisions or practices discussed here are features of its relationships with MVPDs, or that all MVPDs use them. Much of this discussion is based upon what many industry participants may describe as "common knowledge" about distribution relationships.

<sup>15</sup> MVPDs also may seek ADM restrictions that prevent a cable network from distributing its own content (while it is still fresh, relevant, and of value to viewers) directly to consumers.

<sup>16</sup> See Todd Spangler, *Pay TV Ops Set Conditions on Cable Nets in Inking Internet Video Pacts*, Variety (June 12, 2013), <http://variety.com/2013/digital/news/pay-tv-ops-set-conditions-on-cable-nets-in-inking-internet-video-pacts-1200495726/#> ("In some cases, pay TV operators' agreements essentially prohibit programmers from distributing their TV services to OTT providers because the larger distributors have the right to drop networks from the lineup unless they are extended the same rights, according to sources. Other deals are structured with financial incentives, offering cabling better per-subscriber rates if a programmer agrees to withhold content from online video providers, sources said.").

carriage protections may well be inadequate to rectify the anti-competitive effects of the contractual provisions in many incumbent MVPD carriage agreements.

*Most Favored Nation Provisions.* It is commonly understood that many cable networks are subjected to aggressive most favored nation (“MFN”) provisions that make it difficult to provide more favorable economic or non-economic terms to any other distributor (whether a traditional MVPD or an Internet-based service).<sup>17</sup> A cable network subject to a broad economic MFN with one or more MVPDs might well not have flexibility, for example, to grant a nascent OTT service favorable economic terms for an introductory period to facilitate the service’s entry as a competitor in the distribution market. Moreover, it is common practice for incumbent MVPDs to seek MFNs relating to a cable network’s content. For example, MVPDs may seek a commitment that the cable network will make available to the MVPD any network programming (or even “related” or “non-network” programming) that is made available to any other distributor, whether on a VOD (including a subscription VOD) or linear basis. To the extent such provisions are enforced, they may necessarily inhibit a cable network from making available the applicable programming rights to OTT services.

In addition, many MFNs would permit an MVPD to obtain the benefit of an agreement with an OTT distributor without the costs—that is, the MVPD is entitled to the more favorable rights granted without having to shoulder the related burdens that were part of the very

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<sup>17</sup> See Testimony of Gigi B. Sohn, President, Public Knowledge, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, Hearing on “The Future of Video” (June 27, 2012), at 8 (discussing MVPDs’ use of “exclusionary contracts and ‘most favored nation’ clauses to limit the online distribution of independent programming”).

negotiation that led to the creation of the rights.<sup>18</sup> In the context of content MFNs, MVPDs thus may be entitled to programming that a network makes available to OTT services (whether on a VOD or linear basis) at a reduced charge or even for free.

The operation of such provisions can be expected to deter or prevent a programmer from granting Internet distribution rights to an OTT service on innovative terms. Ultimately, many MFNs thus can create disincentives for a cable network to work with new entrant OTT distributors on a bundle of carriage rights and obligations that meets both parties' economic needs since doing so likely would entitle incumbent MVPDs to the most favorable sticks in the bundle without the related burdens that the new entrant accepted.

***Restricting Authentication.*** Some MVPDs use their power to refuse to authenticate their customers to a cable network's TV Everywhere platform as a way to deter the programmer from offering its own TV Everywhere platforms or other Internet services to a competing OTT distributor or more generally from entering into Internet distribution agreements with OTT providers. MVPDs have been known to seek extensive restrictions on the authentication of a cable network's content appearing on the network's website and applications, and sometimes refuse to commit to do so. Because of the importance of TV Everywhere platforms, in cases where programmers must rely on MVPDs for authentication, many may well become reluctant to

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<sup>18</sup> See, e.g., ReelzChannel, LLC, *Notice of Ex Parte Presentation*, MB Docket No. 14-90 (July 30, 2014), at 2 (describing use of “‘unconditional’ MFNs, which allow the MVPD to ‘cherry pick’ whatever terms it wants from each of that programmer’s carriage deals. Once an MVPD has demanded and obtained an unconditional MFN with a programmer, it may choose to import terms from any other distribution agreement involving that programmer, even if the MVPD does not intend to be bound by obligations that may apply to the MVPD that signed the other agreement”).

be perceived as supporting competing alternate distributors for fear of incurring such retaliation.<sup>19</sup>

### **III. The Commission Has The Authority To Protect OTT Services Against The Anti-Competitive Incentives and Conduct Employed By Incumbent MVPDs**

The Commission's proposal to augment the definition of MVPD to include a limited category of nascent OTT services is not the only, and may not be the most effective, approach to achieve the Commission's pro-competitive objectives. Tennis Channel urges the Commission to move past the "channel" concept as a limiting factor in its ability to expand the MVPD definition. Tennis Channel also asks the Commission to issue a second notice of proposed rulemaking that examines how to protect all OTT services from the range of techniques available to incumbent MVPDs that stifle competition in the distribution marketplace, and that are not reached by the redefinition approach.

Consistent with the Commission's recognition that the Communications Act reflects Congress's intent to achieve "broad and technology-neutral" protections for services that "increase competition and diversity in the video programming market, . . . and spur the

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<sup>19</sup> More generally, the Commission's goals of a healthy and competitive distribution marketplace are undermined by the fact that MVPDs may refuse to authenticate their subscribers to access programming via online platforms or agree to do so only pursuant to unreasonable terms and conditions. Some MVPDs altogether refuse to authenticate subscribers to access service programming through a network's own websites and applications, even for free. *See Comments of Tennis Channel, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, (Aug. 25, 2014) at 22-23. MVPDs may even refuse to authenticate their subscribers to access service programming through the MVPD's own websites and applications. *Id.* Other MVPDs may agree to authenticate subscribers to a network's own websites and applications, but only pursuant to unreasonable and anti-competitive conditions designed to make the programmer's platforms uneconomical, unattractive, and difficult to find. *Id.* Such conduct reflects that MVPDs have incentives to stifle competition with their own facilities-based and Internet-based distribution platforms.

development of communications technologies,”<sup>20</sup> the Commission has the authority to adopt substantive rules to prohibit incumbent distributors from engaging in anti-competitive conduct.<sup>21</sup> The program access and carriage provisions of the 1992 Cable Act require the Commission to impose “important pro-consumer responsibilities on MVPDs”<sup>22</sup> and to regulate, among other activity, incumbent MVPDs’ demands for exclusivity and other anti-competitive activity.<sup>23</sup> As technology and video distribution services have evolved,<sup>24</sup> the Commission can surely justify as giving effect to those provisions of the 1992 Cable Act its exercise of the concomitant authority to establish rules to prevent incumbent MVPDs from engaging in anti-competitive practices that inhibit the provision of video programming online.

To the extent that there are any questions about the Commission’s authority to promulgate substantive rules in this area, the second notice of proposed rulemaking should invite comment on the question.

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<sup>20</sup> *NPRM*, ¶ 23.

<sup>21</sup> Pursuant to the Communications Act, the Commission is authorized to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). Furthermore, the Commission may invoke its ancillary authority pursuant to sections 628 and 616 of the 1992 Cable Act. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 667-70 (1972) (upholding a cable regulation as reasonably ancillary to the Commission’s responsibilities for the regulation of broadcast television, because the Commission reasonably concluded that the rule would “further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services” (internal quotation marks and citation omitted)); *United States v. Sw. Cable Co.*, 392 U.S. 157, 173 (1968) (“Congress in 1934 acted in a field that was demonstrably both new and dynamic, and it therefore gave the Commission a comprehensive mandate, with not niggardly but expansive powers.” (internal quotation marks and citation omitted)).

<sup>22</sup> *NPRM*, ¶ 23.

<sup>23</sup> 47 U.S.C. §§ 536, 548.

<sup>24</sup> *See NPRM*, ¶ 23 (“We believe that our proposed interpretation is consistent with Congress’s intent 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.”).

