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 CONSUMER FEDERATION OF AMERICA

March 3, 2015

Executive Summary

In this proceeding, the Commission sets out to unleash a new wave of innovation in the online video market by tentatively adopting an expanded definition of MVPD that includes online providers of linear video programming. If such a redefinition were to take effect, online providers of linear video programming would be able to reasonably negotiate for programming with vertically-integrated cable companies (under the program access rules) and with broadcasters (under the retransmission consent regime). The Consumer Federation of America applauds the Commission's proposal to remove the "transmission path" requirement from the current definition of MVPD, as it would clear up a crucial bottleneck in the online video industry: access to programming. The conditions that led to the demise of Aereo and Sky Angel are instructive. In both cases, a hostile regulatory environment prevented these companies from accessing programming on an equal footing with incumbent firms. Without access to programming, MVPDs and other providers of video programming cannot survive even when there is overwhelming consumer demand. Expanding the definition of MVPD would apply a rule industry-wide that has applied to Comcast for several years. As part of its merger with

NBCUniversal, Comcast has been required to offer reasonable access of its programming to online providers. According to its annual compliance reports, Comcast continues to reach programming agreements with online providers of linear video programming.

In addition to spurring a nascent market for online linear video programming, removal of the "transmission path" requirement will stimulate a "virtuous cycle," whereby a greater value proposition to consumers at the edge of the network leads to greater consumer demand for broadband. The increased demand for broadband, in turn, leads to greater investment in broadband infrastructure. This notion of a virtuous cycle is enshrined in Section 706 of Communications Act. The Commission's application of this principle in its regulatory interpretations of Section 706 has been upheld on several occasions by the D.C. Circuit Court of Appeals, most notably in the Open Internet and Data Roaming rulings.

While the Commission should take note of the intersection between copyright and communications law, it should not let copyright issues frustrate the expansion of the definition of MVPD. The Commission is the expert agency on communications policy, and the Copyright Office should follow its lead by allowing online providers of linear video programming to be part of the compulsory license process.

Expanding the definition of MVPD to include online entities will help to solve or mitigate many of the problems facing small content providers, such as neighborhooding and access to PEG content. By unbundling video content from Internet access, more niche programming packages (perhaps similar to Aereo or Sky Angel) will likely be made available to consumers. With offerings by competitive MVPDs of just the programming that the consumer wants, and very little he or she does not want, neighborhooding problems would likely not occur.

Moreover, free from the technical limitations of cable, online providers should be far more willing to carry PEG and other “must carry” programming. Aereo, for example, enthusiastically delivered “must carry” programming to its subscribers.

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I. INTRODUCTION

The Consumer Federation of America is pleased to submit these comments in response to the Notice of Proposed Rulemaking in the above captioned proceeding. The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in CFA and govern it through their representatives on the organization's Board of Directors and the annual Consumer Assembly. CFA has been involved in communications, media, and Internet policy for decades in legislative, regulatory, and judicial arenas and has advanced the consumer view in public policy and academic publications.

CFA applauds the Commission's proposal to redefine multi-channel video programming distributor (MVPD) to include online entities. By granting online video providers the same access to programming afforded to traditional MVPDs, the Commission would unleash a new generation of innovation in online video, creating greater choice and value for consumers. Such innovation will advance the participation of consumers in culture and society through the vehicle of new technologies. With their aid, the consumer is no longer a passive participant in the information economy. In the digital information age, new forms of media enable the principle of consumer choice. Eliminating the barriers between incumbent MVPDs and emerging online video technologies will allow consumers to choose among many flexible, cost-effective options for content distribution.

II. THE COMMISSION SHOULD INTERPRET MVPD TO INCLUDE ONLINE PROVIDERS OF LINEAR VIDEO PROGRAMMING.

In its Notice of Proposed Rulemaking (NPRM), the Commission proposes a redefinition of MVPD that eliminates the "transmission path" requirement that exists in the current definition. This requirement has stymied the investment, development, and growth of online providers of linear programming in the face of rapidly growing consumer demand. Historically, access to programming by way of the program access rules and the retransmission consent regime has been instrumental in the growth of competitive MVPDs.[1] Although a nascent online linear video market has begun to develop, the Commission must ensure that "a clear path to

[1] *See* the following comments from and about MVPDs. "A robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan." Comcast/NBCU Order, MB Docket No. 10-56, at 26, ¶ 2 (Jan. 20, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021030543. "Perhaps the most significant opportunity for increased video competition is the possibility of online video distributor ("OVD") competition. However, the future for OVD competition depends to a considerable degree on whether the Commission determines that OVD providers that wish to do so can qualify as MVPDs under the Communications Act." Free Press, Revision of Program Access Rules, MB Docket No. 12-68, at 3 (June 22, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021976519. "The current MVPD marketplace has indeed changed since the 1992 enactment of the Cable Act. However, these changes have not sufficiently served to preserve and protect competition and diversity in the distribution of programming. For instance, as the Commission recognized, online distributors of video programming have emerged as a potential competitive threat to traditional MVPD service." Joint Comments of Interstate Communications et al., Revision of Program Access Rules, MB Docket No. 12-68, at 3 (June 22, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021976438. "For NTCA members providing video services, the ability to offer an affordable video service with video content that consumers desire spurs broadband adoption. The intrinsic link between video and broadband offerings has long been recognized by the Commission." NTCA–The Rural Broadband Association Comments in Response to the U. S. House of Representatives Energy & Commerce Committee White Paper 6: Regulation of the Market for Video Content and Distribution at 6 (Jan. 23, 2015)(citing Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007)), *available at* https://prodnet.www.neca.org/publicationsdocs/wwpdf/12315ntca4.pdf. Further examples are provided in the Appendix.

regulatory certainty"[2] exists, so as to foster meaningful competition for linear video programming, online or not.

CFA's analysis of the role of policy in establishing the conditions for the success of the Internet shows that simple rules that afford access to critical communications facilities have played a key role in creating the "virtuous cycle" of innovation that drives the dynamic engine of the digital communications network. Driven by entrepreneurial experimentation at the edge of the network, demand for new services is created that elicits investment in network capacity and functionality. This, in turn, stimulates further experimentation at the edge, creating new demand and the cycle is repeated. To its credit, the Commission used the concept of the virtuous cycle as the foundation of its National Broadband Plan and its Open Internet Order. Likewise, the D.C. Circuit Court of Appeals accepted the virtuous cycle in upholding the Commission's authority to adopt policies to promote the "timely and reasonable" deployment of broadband. In this proceeding, once again, the challenge for the Commission is to develop a regulatory framework that protects and advances the virtuous cycle, so that broadband deployment and adoption is stimulated. Network effects mean that as more people use these products, the products become more valuable to each user, stimulating more people to join the network and use it more intensely.

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[2] Seth Greenstein, *Ex Parte Presentation Notice, Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel," MB Docket No. 12-83*, at 2 (Oct. 10, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000972464 ("Letter of Seth Greenstein").

As CFA has shown in recent comments in the Open Internet rulemaking,[3] the Commission, Congress, and the courts are central to the delivery of the benefits of broadband to consumers, as well as the value of broadband to the nation. These bodies have all acknowledged adoption and use of new communications technologies. Recognizing the impact that utilization has on individuals and society leads to the broader concept of digital inclusion.[4]

A decade earlier, CFA had used the concept of virtuous cycles in the analysis of the digital divide, an issue at the core of the National Broadband Plan and Section 706. Thus, CFA is pleased to see this concept take a central role in the economic and legal analysis. The empirical evidence overwhelmingly supports the view that maximum utilization of broadband infrastructure can deliver benefits to households and the nation – consumer welfare, economic growth, worker training, civic participation, e-government services, education, training, community development, ability/disability, and maximum utilization.[5]

Driven by the powerful and unique characteristics of technological revolutions in computing and communications, American society is undergoing a "digital transformation." The speed and power of change in these technologies has penetrated deeply into the production process of a wide range of industries and transformed the global economy. The virtuous cycle in the economy, however, may become a vicious cycle for those who do not have access to the new

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[3] Mark Cooper, Comments of the Consumer Federation of America, In the Matter of The Open Internet Remand, Federal Communications Commission, GN Docket No. 14-28, at 8-9 (July 15, 2014), *hereinafter* CFA July 2014 Comments. CFA did more than just explain the theoretical concept. We introduced a comprehensive review of empirical evidence that supported the concept and showed that the "virtuous cycle" is the correct approach to understanding the policy concerns raised by Congress in the American Recovery and Reinvestment Act (ARRA).
[4] Mark Cooper, The Challenge of Digital Exclusion in America: A Review of the Social Science Literature and Its Implications for the U.S. National Broadband Plan, Attachment to "Reply Comments -- National Broadband Plan, Public Notice #30, Center for Media Justice, Consumer Federation of America, Consumers Union, Open Technology Initiative, Public Knowledge, on Broadband Adoption," Federal Communications Commission, In the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-47, 09-51, 09-137, at 11-12 (Jan. 27, 2010).
[5] *Id.* at 12.

technologies.[6] Analysis of the success of the Internet shows that the model for promoting entrepreneurial experimentation at the edge and preventing harmful behavior in the center of the digital communications ecology is already in hand, embodied in past Commission regulatory decisions. In the Carterphone, Computer Inquiries, and unlicensed spectrum decisions, the Commission adopted bright lines that guaranteed access and helped avoid communications bottlenecks. These clear and simple rules allowed extensive and intensive entrepreneurial experimentation, but did not require the involvement of the regulator in the day-to-day operation of the communications protocols or entrepreneurial activity.[7]

Modernizing the MVPD rule to make it consistent with digital technology would be yet another example of this process. By removing a major barrier to entry, the Commission would promote competition, consistent with the purpose of the Telecommunications Act of 1996, as expressed in its first paragraph.[8]

A. NEW ENTRANTS AND COMPETITORS IN THE LINEAR VIDEO MARKET LIVE AND DIE BY THEIR ACCESS TO PROGRAMMING.

The recent demise of Sky Angel and Aereo have made it clear that new entrants and competitors in the linear video market live and die by their access to programming. The

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[6] Mark Cooper, *Inequality In The Digital Society: Why The Digital Divide Deserves All The Attention It Gets*, **Cardozo Arts and Entertainment Law Journal**, at 2 (2002)(first presented at Bridging The Digital Divide: Equality In The Information Age, Cardozo School Of Law, November 15, 2000).

[7] Cooper, CFA July 2014 Comments, *supra* note 3 at 1, 2-3.

[8] *See* 47 U.S.C. § 1302(a) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . ."). *See also* H.R. Rep No. 104-458, at 1 (1996)(" . . . to provide for a procompetitive, de-regulatory national policy framework to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening telecommunications markers to competition.").

circumstances of these companies' failures are instructive. Both companies offered technologically innovative, differentiated products to consumers seeking something different than the monolithic offerings of existing MVPDs. Sky Angel took a traditional route to acquiring content by negotiating for licenses from program owners. Aereo employed a combination of new technology with a novel legal interpretation of the Copyright Act to allow consumers greater flexibility in how they viewed free, over-the-air broadcast television. A hostile regulatory landscape, which currently prevents online video providers from acquiring access to programming on an equal footing with incumbent firms, led to Sky Angel's suspension of service and Aereo's suspension of service and declaration of bankruptcy. CFA applauds the Commission for opening this proceeding and proposing a much-needed update to the definition of MVPD, which will ensure that consumers can access more innovative services like Sky Angel and Aereo, not less. It is worth noting that both of these services sought to differentiate themselves from traditional MVPDs. In both cases, these online providers of pre-scheduled linear video programming served previously under-addressed markets.

Sky Angel provided a service with the look and feel of a traditional MVPD, but curated its programming to ensure that all content was family friendly.[9] What further set Sky Angel apart from traditional MVPDs was its over-the-top (OTT) delivery of streaming video to a set-top-box device attached to the customers' televisions. In short, Sky Angel offered consumers a unique product that utilized new technologies. Aereo provided a simple service for those wanting to "cut the cord" from their cable companies by combining already existing

[9] *See* Statement of Robert W. Johnson, CEO of Sky Angel U.S. LLC, Subcommittee on Communications and Technology (June 25, 2012)(Sky Angel was an early adopter and provider of IPTV in the United States), *available at* http://archives.republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/20120627/HHRG-112-IF16-WState-JohnsonR-20120627.pdf.

technologies. Aereo set up clusters of mini antennas in its service areas, and each subscriber was assigned two of the antennas, one for watching live television and another for recording programs. Local over-the-air (OTA) shows were then streamed to a DVR-like, cloud-based service for subscribers' use.[10] Unfortunately, the regulatory landscape, which favored vertically-integrated incumbent cable companies, led to Sky Angel's move away from the online streaming market and Aereo's bankruptcy filing.

A company like Sky Angel can only offer to consumers what it can license from programmers. For at least two years, Sky Angel successfully obtained such licenses and thus could offer a unique and technologically innovative service to consumers. However, Discovery Communications terminated its contract with Sky Angel categorically and without explanation. Discovery Communications refused to even sit at the negotiating table with Sky Angel. Sky Angel sought relief from the Commission, asserting that it should be afforded the same program access protections as traditional MVPDs. Using an antiquated interpretation of MVPD, the Media Bureau tentatively concluded that for an entity to be considered an MVPD, it needed control of a "transmission path."[11] Despite Sky Angel's arguments that it did, in fact, control a transmission path,[12] the Media Bureau disagreed and denied Sky Angel's petition.[13] As a consequence of its inability to acquire programming, Sky Angel suspended operations.[14]

Aereo, an online provider of linear, pre-scheduled broadcast programming, intentionally kept its programming limited to broadcast content, primarily addressing a market of "cord

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[10] Steven J. Vaughan-Nichols, *What is Aereo and why does it have the TV networks in an uproar?*, **ZDNet** (Apr. 10, 2013), *available at* http://www.zdnet.com/article/what-is-aereo-and-why-does-it-have-the-tv-networks-in-an-uproar/.
[11] *See Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7.
[12] *Id*.
[13] *Id*.
[14] *See* Supplemental Comments of Sky Angel, MB Docket No. 12-83 (June 10, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521313509.

nevers." It operated facilities in 14 cities, with plans of aggressive expansion to dozens more. Aereo, which began operations in 2012, empowered consumers to watch content from free, OTA broadcasts (including local and PEG programming) on the devices of their choosing, without the need for an individual or building broadcast antenna and free from the reception problems characteristic of urban areas. After April 2014, Aereo paused – and ultimately shut down – its operations following a Supreme Court ruling that effectively prevented the company from acquiring content on an equal footing with other retransmission services.[15] Aereo's operations did not stop because consumers no longer wanted the service. A redefinition of MVPD that includes online entities would give services like Aereo the regulatory certainty needed to seek investment, develop their products, and acquire content under the retransmission consent regime.[16] Similarly, entities like Sky Angel, which provided an OTT, family-friendly, cable-like subscription service would be able to fairly enter the online video market with the assurance that they can reasonably acquire content under the program access rules.

There are many questions yet to be answered about the future shape of the online video market, which remains in flux during a time of technology transition. However, those questions are best answered by a forward-looking, consumer-driven market, not a top-down approach where vertically-integrated MVPDs and broadcasters act as gatekeepers to innovation.

While it is important that the Commission pay close attention to the evolving online video market, it need not know precisely how that market will change in order to best serve the

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[15] *See generally* American Broadcasting Co., Inc. v. Aereo, Inc., 134 S. Ct. 2498. *See also* Chet Kanojia, Aereo – The Next Chapter (Nov. 21, 2014), *available at* http://blog.aereo.com/2014/11/next-chapter/.

[16] *See* Letter of Seth Greenstein, at 2 ("The Commission could provide such assurance to new market entrants like Aereo by defining or construing "MVPDs" to include systems that transmit linear channels of video programming to consumers via the internet—thereby securing to all MVPDs, in a technology-neutral way, the right to engage in timely, good faith negotiations to license channels by retransmission consent.").

goals of the Communications Act. Rather, the Commission's role here is to create market conditions that empower online video providers to meet consumer demand, whatever those conditions may be, in one, five, or ten years. Consistent with the goals of the Communications Act and the Cable Act, in this proceeding the Commission seeks to correct the course by eliminating the outdated "transmission path" requirement, thus affording online providers of linear video the increased the benefits of greater access to programming.

A practical precedent for giving program access to OVDs already exists in connection with the Comcast/NBCU merger. In its review of that merger, the Commission recognized, and sought to prevent, the harms created when Comcast, a giant, vertically-integrated cable company, would anti-competitively withhold content from competitors. As a condition of the transaction, Comcast was required provide some amount of parity in program access to online video distributors.[17] According one of its annual compliance reports, "agreements with online video distributors ("OVDs") have become a regular part of the Company's program licensing business, as they were before the Transaction. NBCUniversal entered into or renewed agreements with several OVDs during the Reporting Period, including deals with Amazon, Drama Fever, Hoopla, Netflix, Sensio, and others, as well as deals with several MVPDs that include access to linear channels across multiple platforms. In addition to these arrangements, NBCUniversal continues to negotiate with OVDs for carriage of its linear programming networks."[18]

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[17] *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensee*s, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238, 4360, App. A., § IV, A.2 (2011).

[18] David Cohen, Comcast/NBCUniversal Press Release, Four Years Later: The Comcast NBCUniversal Annual Compliance Report (Mar. 3, 2015), *available at* http://corporate.comcast.com/comcast-voices/comcast-nbcuniversal-annual-compliance-report-2014-15. *See also* Comcast NBCUniversal, Third Annual Report of Compliance of Transaction Conditions, MB Docket No. 10-56, at 3-4 (Feb. 28, 2014)(" . . . NBCUniversal continues to negotiate with OVDs for carriage of its linear programming networks."); Comcast NBCUniversal, Fourth Annual Report of Compliance of Transaction Conditions, MB Docket

B. A REDEFINITION OF MVPD TO INCLUDE ONLINE ENTITIES IS CONSISTENT WITH THE COMMISSION'S AUTHORITY UNDER SECTION 706 OF THE COMMUNICATIONS ACT.

Section 706 of the Communications Act enables the Commission to enact measures that encourage the deployment of broadband infrastructure.[19] In its 2010 Open Internet Order, the Commission sought to promote a virtuous cycle of investment between consumers, Internet Service Providers, and content providers (or edge providers). Under that rationale, last-mile access between edge providers and consumers would have increased consumer demand for broadband access, thus stimulating investment in broadband infrastructure. The Commission's interpretations of this statute in the 2010 Open Internet Order[20] and the Data Roaming Order[21] both were upheld by the U.S. Court of Appeals for the District of Columbia.

The recognition of the important role of adoption and use in driving the virtuous cycle and delivering the benefits to consumers has a clear legal footing, which factors directly into the present proceeding. In CFA's Open Internet comments, it chose to "conclude the discussion of Section 706 by noting two changed circumstances that raise its prominence:

> First, the passage of the Broadband Data Improvement Act (2008) and the American Revival and Revitalization Act (2009) have shifted the focus of universal service policy to recognize the importance of adoption and utilization.
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> Section 706 was not entered into the U.S. Code in 1996, when the rest of the Telecommunications Act of 1996 was. In 2008, Congress enacted an amendment

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No. 10-56, at 3 (Feb. 28, 2015)("NBCUniversal entered into or renewed agreements with several OVDs during the Reporting Period . . . as well as deals with several MVPDs that include access to linear channels across multiple platforms. NBCUniversal also entered into a linear OVD agreement with Sony.") (citations omitted).

[19] *Verizon v. Federal Communications Commission*, No. 11-1355 (D.C. Cir.,Jan. 14, 2014) ("Open Internet Ruling").

[20] *Id.*

[21] *Cellco Partnership v. Federal Communications Commission*, No. 11-1135 (D.C. Cir. Dec. 4, 2012) ("Data Roaming Ruling").

> to Section 706 and it was codified. The Broadband Data Improvement Act listed a series of findings about the impact of broadband, which was the motivation to improve the quality and frequency of the FCC's analysis of broadband deployment under Section 706.[22]
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> [Second,] the following year, the Congress authorized funds to develop programs to accelerate the deployment of broadband in the Broadband Technology Opportunities Act. It also charged the FCC with developing a National Broadband Plan . . . . reflect the earlier findings of the Broadband Data Improvement Act: 'the national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. . . .'[23]
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> The Broadband Technology Opportunity Program directly references the Broadband Data Improvement Act.
>
> The issues that were raised by these two Acts are at the heart of the "virtuous cycle" and they go well beyond the 20th century approach to universal service. Availability of service is a small part of universal service in the digital age; adoption and utilization are much more important."[24]

These two amendments to the Communications Act underscore the need to adapt the definitions and approaches employed by the Commission to the digital age. In CFA's comments in the Open Internet rulemaking, it was argued that the need for change was imprinted into the 1996

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[22] Cooper, CFA July 2014 Comments, *supra* note 3 at 56-57. Congress made the following findings: "(1) The deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans; (2) Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth; (3) Improving Federal data on the deployment and adoption of broadband service will assist in the development of broadband technology across all regions of the Nation; (4) The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation." *Id.*

[23] *Id.* This Comment also states that: "the plan should also include -- (A) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States; (B) a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public; (C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and (D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes." *Id.*

[24] *Id.*

Act through Section 706. In Section 706, Congress gave a specific grant of authority to the Commission in the case where the most important goals were not being achieved.[25] Two federal appeals courts have upheld the Commission's interpretation under this section.[26] This is the "new law" that the Commission should now implement. New law requires new practice.[27] Not only is the modernization of the MVPD definition supported by the legal and technological developments, it is also long overdue.

CFA sees the opportunity to promote the virtuous cycle at play in this proceeding, as it was in the Open Internet context. There is a clear relationship between the availability of online content, especially video, and the demand for broadband. The policy objectives set forth in the Communications Act, which include adoption (and not only deployment) of broadband, are substantially served by a competitive market for online linear video.[28] The program access rules and the retransmission consent regime, extended to online entities, will eliminate a key barrier to entry to the online video market: acquisition of content. Several parties, including traditional MVPDs, have made the link between consumer access to video and broadband adoption clear in their advocacy for increased access to must-have programming.[29] Untethering access to content

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[25] *Id.* at 17, 20. (Appendix, entitled: Decision Making in the face Of Complex Ambiguity: Mapping The FCC's Route to the Broadband Network Compact).
[26] *See infra* at 13.
[27] CFA identifies this as the "new law" throughout its comments in the Open Internet rulemaking. *See* Mark Cooper, Initial Comments Of The Consumer Federation Of America, In the Matter of The Open Internet Remand, Federal Communications Commission, GN Docket No. 14-28, at 8 (Feb. 25, 2014).
[28] Brett Sappington, *Appeasing Consumers' Insatiable Appetite for Online Video*, **ECommerce Times**, (Mar. 3, 2014)(explaining the connection between demand for online video and demand for increased broadband bandwidth), *available at* http://www.ecommercetimes.com/story/80069.html.
[29] *See, e.g.* Comments of the Independent Telephone & Telecommunications Alliance, Revision of the Commission's Program Access Rules, MB Docket No. 12-68, at 8 (Dec. 14, 2012)("Research demonstrates that the availability of video service drives broadband deployment and that investment in broadband networks and the provision of advanced services is greatly improved by telco providers' access to video content. In other words, program access protections that allow MVPDs to obtain non-discriminatory access to programming should allow telco video providers to make cost-based decisions that facilitate their continued investment in broadband facilities."), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022083073.

from control over the distribution path gives more innovators the ability to enter the online video market; thus, a redefinition of MVPD will also allow new entrants to "experiment at the edge" – bringing the appeal of broadband access to new Internet users.

III. THE COMMISSION SHOULD TAKE NOTE OF THE INTERSECTION OF COMMUNICATIONS LAW WITH COPYRIGHT LAW, BUT IT SHOULD NOT LET COPYRIGHT CONSIDERATIONS FRUSTRATE THE EXPANSION OF THE DEFINITION OF MVPD.

CFA understands that the Commission is concerned about what the implications of redefining MVPD to include Internet-based distributors would have on the operation of various provisions of the Copyright Act.[30] CFA asserts that the requested redefinition could have beneficial effects on the copyright system, and urges the Commission to assume leadership on this issue, considering that its expertise on emerging trends and innovation within the communications sector make it uniquely capable of interpreting what qualifies as a MVPD. CFA also urges the Commission to note that, in any event, the operation of federal copyright would not be adversely affected by the proposed reinterpretation, because (1) the communications law scheme is separate and distinct,[31] and (2) the copyright law scheme is capable of making whatever adjustments in its operation might subsequently be viewed as desirable.

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[30] NPRM at ¶¶ 44, 45, 66, 67.

[31] The Commission was created with the 1934 Communications Act, 47 U.S.C. §151 et seq., and Constitutional power behind this legislation can be found in the Commerce Clause at Art. I., § 8, cl. 3. Federal Copyright law is codified in the 1976 Copyright Act, 17 U.S.C. § 101 et seq., and derives its Constitutional power from the Copyright Clause at Art. I, § 8, cl. 8.

In CFA's view, removing the barrier that now prevents new entrants from introducing new modes of content retransmission will help to inform the debate over copyright policy, by enabling the copyright system to serve its proper function in the market economy. In recent comments to the U.S. Patent and Trademark Office, CFA[32] cited a study by the of the Board on Science, Technology, and Economic Policy for the National Research Council (STEP)[33] that provides the two key pillars on which policies to adjust copyright to the digital age must rest.[34]

> First, it is vitally important to recognize that the private incentive that copyright is intended to afford to creators and artists must be balanced by three broad public interest benefits: Creativity – particularly fair use, to reflect the principle that copyrighted materials should be available not only for personal use, but as the building blocks on which creativity rests. Efficiency – optimal economics, network effects, [reducing] transaction costs, innovation, technological change. Control of market power – consumer surplus, artist income, [avoiding] supra-competitive profits.
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> Second, in the decades of the flowering of the commercial Internet and the digital revolution, the knowledge base for policymaking in the copyright area is 'poorly informed by objective data and empirical research.'[35]

By providing a new definition of MVPD, the Commission will be giving the Copyright Office the benefit of an extensive record, compiled during this proceeding, on the basis of which it can reconsider its rules on the compulsory licensing of retransmission services.

Should the Copyright Office follow the Commission's lead, the result would be consistent with the concept of digital disintermediation.[36] In the past, this contemporary social and technological phenomenon has, for example, helped to create "a much more

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[32] Mark Cooper, Comments of the Consumer Federation of America: Copyright Policy, Creativity and Innovation in the Digital Economy, United States Department of Commerce, Patent and Trademark Office (Nov. 13, 2013).
[33] Committee on the Impact of Copyright Policy on Innovation in the Digital Era, Board on Science, Technology, and Economic Policy, Policy and Global Affairs (STEP), 2013, *Copyright In The Digital Era Building Evidence For Policy*, Stephen A. Merrill And William J. Raduchel, (EDSs.), National Academy Press, 2013.
[34] *Id.*
[35] *Id.* at ix.
[36] Mark Cooper, Digital Disintermediation and Copyright in the 21st Century: Lessons From the transformation of the music sector (Nov. 2013).

efficient, consumer-friendly music sector that has eliminated anti-consumer and anti-competitive practices, wrung out excess profits created by the abuse of market power of a highly concentrated music sector, and replaced it with a more efficient, consumer and artist friendly ecology that is coming into economic equilibrium."[37] Now its impact can be felt in the domain of video services as well.

A. THE COMMISSION IS AN EXPERT AGENCY ON COMMUNICATIONS POLICY AND IS BEST POSITIONED TO DETERMINE WHICH ENTITIES SHOULD BE CONSIDERED MVPDS.

Expanding the definition of MVPD could bring many immediate benefits to the market and to consumers. The Supreme Court's decision in *Aereo* considered it to be the very kind of retransmission service that Congress was attempting to regulate in the 1976 Copyright Act.[38] The Court's majority made it clear that if Aereo was to proceed with its business model that it would need to do so within the regulatory structure, including the Section 111 compulsory license, established within that Act.[39] In fact, however, previous efforts by providers such as Aereo to qualify for that compulsory license have failed. If the Copyright Office were to take note of a new definition of MVPD arrived at by the Commission, and modify its regulations accordingly, significant additional benefits would follow.[40] In particular, CFA asserts that the

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[37] *Id.* at 4.
[38] *See generally* American Broadcasting Co., Inc. v. Aereo, Inc., 134 S. Ct. 2498. *See also* 17 U.S.C. § 111.
[39] *See* 17 U.S.C. § 111.
[40] NPRM at 6, n.20, 21 (citing to Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc., at 2, n.3 (July 16, 2014); American Broadcasting Companies, Inc. et al. v. Aereo, Inc., Nos. 12–cv–1540, 12–cv–1543, 2014 WL 5393867, at *5, n.3 (SDNY Oct. 23, 2014)). Ms. Charlesworth made it clear that the Copyright

consuming public, as well as Internet-based distributors of video programming themselves, would likely benefit greatly from new MVPDs being a part of the compulsory licensing process. The Commission's redefinition of MVPD, as proposed, would be helpful in resolving the specific copyright conundrum that was inherent in *Aereo*, and helpful overall to promoting consumer choice and innovation in the field of video distribution.[41] Given that the Copyright Office is required to consider the position of the Commission when authorizing statutory compulsory licensing,[42] it would likely take into consideration an expansion of the definition of MVPD.[43] This is exemplified by the Copyright Office's response to Aereo's attempt to secure a compulsory license,[44] which expresses the fact that the Office is awaiting the final promulgated rules of the Commission – that is, the result of this proposed rulemaking – before revisiting its Section 111 analysis.[45]

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was accepting Aereo's filings on a provisional basis, given that 17 U.S.C. § 111 limits statutory license to retransmission services that are "permissible under the rules, regulations, and authorizations" of the Commission. The Southern District of New York also made it clear that regulatory changes on the definition of an MVPD when considering 17 U.S.C. § 111 claims would play a factor into their interpretation, but that they were not aware of any action by the Commission at the time of its opinion.

[41] *Supra* introduction.

[42] *See* 17 U.S.C § 111(c)(stating that, among other requirements, secondary transmission of the cable system must be permissible under the "rules, regulations, and authorizations" of the FCC in order to be subject to compulsory licensing).

[43] "Cable system" is defined as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service." 17 U.S.C. § 111(f). This is a similar definition to the Commission's previous interpretation of what constitutes an MVPD, *see* NPRM at ¶ 9, n.9 & 10. As the statutory definition from the Copyright Act mirrors the previous Commission standard for an MVPD, it is likely that the Copyright Office would take notice if the Commission chose to change its standard, potentially fostering change in the Copyright statutory definition, or at least how the Copyright Office interprets this statute.

[44] Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc., at 2, n.3 (July 16, 2014).

[45] *See* 17 U.S.C. § 111(c)(1).

B. THE COPYRIGHT OFFICE COULD FOLLOW THE LEAD OF THE COMMISSION IN RECONSIDERING THE AVAILABILITY OF COMPULSORY LICENSES TO ONLINE SERVICES.

What can be considered a cable system is the threshold restriction on Internet video distributors seeking eligibility for the Copyright Office compulsory licensing regime, which applies to copyrighted content in retransmitted broadcasts. Under Section 111 of the Copyright Act, any secondary transmission by entities considered as cable systems[46] must fulfill several further requirements before being eligible for statutory compulsory licensing.[47] This would be as true for providers of Internet video if the definition were to be expanded to embrace them along with traditional cable video distributors. This equality of treatment for Internet video providers would, in turn, significantly level the playing field. Should a MVPD meet the standard statutory compulsory licensing requirements, it would be eligible to benefit from the existing mechanism by paying set fees, in lieu of negotiated transactional licenses, that ultimately are distributed to compensate copyright owners.[48] Congress made the compulsory licensing scheme it introduced in the 1976 Copyright Act flexible enough to absorb changes in technology, such as the one being considered in this rulemaking by the Commission. The Commission's guidance should help, rather than harm, the operation of the copyright scheme.

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[46] *See* 17 U.S.C. § 111(f).

[47] *See* 17 U.S.C. § 111(c)(1)(stating that first, the performance must be primarily transmitted by a broadcast station licensed with the Commission or its equivalent in Canada or Mexico; second, it must meet the requirements of § 111(d); and finally, that the carriage of the signals comprising the secondary transmission be permissible under the rules, regulations, and authorizations of the Commission). *See also* 57 Fed. Rec. 3284 (Jan. 29 1992)(final regulation). For more information on wireless cable systems and its interactions with compulsory licensing, see 4 Patry on Copyright § 14.65.

[48] *See generally* 17 U.S.C. §§ 111(d)(2)-(6)(explaining the Copyright Office's process of collecting fees and redistributing them back out to each person entitled to statutory license fees).

Since 1978, copyright law has kept up with – rather than obstructed – innovations in consumer technology. However, the *Aereo* decision has temporarily interrupted this record of achievement. The Commission can help the Copyright Office surmount a formal obstacle in order to continue the tradition of welcoming technological innovation. The consumers whose interests CFA represents would ultimately benefit if the expanded class of MVPDs were qualified under Section 111. Compulsory licensing gives capital back to the producers of broadcast content, allowing them to create more of the content that consumers want, while enabling consumers to enjoy that content in new and flexible ways.

IV. EXPANSION OF THE MVPD PROTECTIONS TO ONLINE ENTITIES SIGNIFICANTLY MITIGATES ISSUES WITH CABLE BUNDLING, IN ADDITION TO OTHER REGULATORY ISSUES FOR SMALLER CONTENT PROVIDERS.

CFA anticipates that the expansion of legal safeguards for MVPDs will have clear consumer benefits because consumers have expressed a strong desire for more choice in programming. The existing players in the MVPD space -- that is the cable companies and the broadcasters -- have taken advantage of anticompetitive rules in ways that harm consumers. Today, the cable operators act as gatekeepers and toll collectors, and disputes between content suppliers and transmission entities are repeatedly resolved by raising consumer prices and increasing the size of the bundle consumers are required to purchase in order to get the small number of programs consumers want to watch. The antiquated definition of MVPD is standing

in the way of marketplace reform that will benefit consumers. Removing the obstacle posed by requiring ownership of a transmission path will allow online video programmers greater access to consumers and offer more incentives for experimentation and competition.

Making video services more responsive to consumer demand will be an important stimulus to the virtuous cycle mentioned above.[49] Availability of video content is one of the prime drivers of Internet use. Two sources of increased demand may be tapped by opening retransmission to independent entities seeking to compete in meeting consumer needs. Consumers who have been priced out of the traditional MVPD market by expensive bundles of programming may be attracted to specialized bundles offered by online video distributors. Consumers who have not entered the broadband market may be attracted to it by the increased value that online video services would deliver. In turn, increased demand will stimulate more innovation.

The Commission's proposed redefinition of MVPD also solves or helps to solve many other inherent problems faced by smaller content providers. CFA contends that moving forward with this proposed change will be beneficial to consumers, as it allows the consumers to choose the content they prefer at a lower price point, and allows for new technologies in the online video distribution field to flourish. Several examples show how current problems in the MVPD structure could be eliminated or reduced should the definition be expanded include but are not limited to channel neighborhooding, consumer demand for specific kinds of programming, and access to PEG content.

[49] *Infra* Section II.

A. EXPANDING THE INTERPRETATION OF MVPD WILL HELP THE COMMISSION AVOID FUTURE ISSUES WITH CHANNEL NEIGHBORHOODING.

Channel neighborhooding occurs when smaller, independent content providers are relegated by larger cable companies into higher-numbered "neighborhoods," or groupings of similar channels, on the system's channel guide list. In practice, the result is that the consumer may only become aware of such channels if they happen upon them while channel surfing and actually pause to look. One prominent recent instance was Bloomberg's 2013 battle with Comcast over being included in "news neighborhoods" adjacent to other business and news channels.[50] For purposes of this proceeding, "news neighborhoods" were defined as "a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup."[51] Conditions that the Commission placed on Comcast during its merger with NBCUniversal included moving Bloomberg's channels into news neighborhoods in order to prevent Comcast from favoring its own news channels, such as CNBC and MSNBC, over independent news channels.

This problem illustrates the power that larger MVPDs hold over smaller content providers. If online video distributors were considered MVPDs, this problem would be reduced substantially. A possible solution to the neighborhooding issue, for example, would be

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[50] *See* John Eggerton, *Bloomberg Wants FCC Action on Comcast Neighborhooding Complaint*, **Broadcasting & Cable** (June 26, 2013), *available at* http://www.broadcastingcable.com/news/washington/bloomberg-wants-fcc-action-comcast-neighborhooding-compliant/61564.

[51] *Order*, Bloomberg L.P. v. Comcast Cable Communications, LLC, FCC-13-124A3, Docket No. 11-104, at 2, ¶ 2 (Sept. 26, 2013). *See also* Statement of Commissioner Ajit Pai, approving in part and dissenting in part, Bloomberg L.P. v. Comcast Cable Communications, LLC, FCC-13-124A3, Docket No. 11-104 (Sept. 26, 2013).

unbundling. Small content providers gain subscribers through means apart from traditional methods of video distribution, and this could give the consumer the choice to purchase only the kinds of content he or she wishes to have at a lower overall price. Consumers who want just the Bloomberg news channel, for example, could potentially purchase it as part of a small, niche packaging of channels from an online provider where neighborhooding is not a concern--and the same logic could apply to any kind of content, from sports to foreign-language programming and beyond. Again, broadening the concept of what qualifies as a MVPD means broadening the possibilities for innovation in video distribution.

B. THE COMMISSION WOULD MAKE IT POSSIBLE FOR CONSUMERS TO SUBSCRIBE TO MVPDS THAT CATER TO THEIR NEEDS BY EXPANDING THE DEFINITION.

Specialized programming provided by online video distributors newly classified as MVPDs will help those consumers with specific programming interests, as well as small content providers, to reach their ultimate goals. Consumers may differ on what kinds of content they wish to have. Thus, for example, Sky Angel provided a solution for consumers that wanted only family-friendly content, allowing them to choose programming that they knew was safe for their children. Expanding the interpretation of MVPD will allow new market innovation to create other kinds of content packages that are catered to other kinds of consumers. Instead of traditional MVPDs struggling unsuccessfully to appeal to a multitude of consumer desires,

online video distributors that offer specific kinds programming will allow consumers to pay only for the kinds of content that they want, eliminating these issues.

C. PUBLIC ACCESS, EDUCATIONAL, AND GOVERNMENT PROGRAMMING DISTRIBUTION ARE MADE EASIER BY EXPANDING THE DEFINITION OF MVPD TO INCLUDE ONLINE DISTRIBUTORS.

Including online video distribution within the definition of MVPD will allow public programming to transition safely to the world of Internet video. Aereo, for example, enthusiastically delivered "must carry" programming to its subscribers.[52] Local public access, educational, and government programs face challenges in transitioning to providing content over the Internet. If the Commission chooses to encourage the development of non-traditional MVPDs, these important classes of programming will be more readily available to a wider range of interested consumers. The result would be a more educated, informed, and fulfilled public.

V. CONCLUSION

CFA commends the Commission for this proposal to redefine MVPD to include online video distributors. Expanding this definition will stimulate competition amongst Internet video distributors, as well as new entrants, and to allow for innovation in the video programming

[52] Letter of Seth Greenstein, at 3.

distribution market. By adopting the proposed redefinition, the Commission would thus be creating a multitude of choices with respect to kinds of content available at various price points, as well as choices about the manner in which that content is received. Promoting consumer choice in this manner would serve the fundamental public interest in access to knowledge and information. Continuing with the current definition of MVPD would mean maintaining status quo that has stymied consumer choice and innovation in the video distribution market. This status quo empowers incumbent MVPDs that continue to increase vertical integration and anti-competitive practices. CFA believes that by granting online video providers access to programming in the same manner as traditional MVPDs, the Commission will be opening the door to a new era of online video, fostering innovation while creating value for consumers. By allowing the virtuous cycle of innovation and investment to flourish within the MVPD context, CFA believes that the Commission would take a much-needed step towards opening up the market to the benefit of new technologies, businesses, and especially consumers. As such, CFA supports an adoption of the proposed redefinition of MVPD.

Respectfully submitted,

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APPENDIX

Further examples from Footnote 1:

- "We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDS, 131 through a variety of anticompetitive strategies. These strategies include, among others: (l) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video." Comcast/NBCU Order, MB Docket No. 10-56, at 26, ¶ 61 (Jan. 20, 2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.
- "First, the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future." (citing confidential Comcast documents). Comcast/NBCU Order, MB Docket No. 10-56, at 32, ¶ 80 (Jan. 20, 2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.
- "The growing popularity of online video, combined with the burgeoning technological options for viewing online video on television sets, is likely to heighten consumer interest in cord-cutting, provided a sufficient amount of broadcast and cable programming is replicated on the Internet" (citing, e.g., Craig Moffett, Ruminations on Cord Cutting, Household Formation, and Memories of 2005, Bernstein Research, at 1 (Sept. 24, 2010)). Comcast/NBCU Order, MB Docket No. 10-56, at 32-33, ¶ 80 (Jan. 20, 2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.
- FCC required Comcast, as a merger condition, to treat OVDs like MVPDs with respect to its content under the program access rules. John Eggerton, *FCC: First-Year Films Are Covered By Comcast/NBCU OVD Condition*, **Multichannel News** (Nov. 14, 2012, 8:40 AM), *available at* http://www.multichannel.com/news/content/fcc-first-year-films-are-covered-comcastnbcu-ovd-condition/359838.
- The Commission Recently Found that Allowing a Vertically Integrated Programmer to Withhold Programming from Competitors Posed a Risk to Competition. "The Commission found that withholding Comcast-NBCU national cable programming and RSNs, for which there are no good substitutes, would cause competitors to lose significant numbers of subscribers, and harm competition by allowing the accumulation and maintenance of market power." *See* Comments of the American Cable Association, Revision of the Commission's Program Access Rules, MB Docket No. 12-68, at 7-9 (June 22, 2012)(citing Comcast/NBCU Order ¶¶ 36-37), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021976932.
- "Comcast should be barred from conditioning carriage on an independent network's agreement not to replicate video programming on the network's online portal. Similarly, Comcast-NBCU should be barred from conditioning carriage on an independent network's agreement not to license its programming to an OTT video provider. The ability of Comcast to do so shrinks the online portfolio of content, thereby reducing the

private returns to investing in broadband access. Replication of a sports event by an independent sports network on its portal 24 hours after the event originally airs does not eviscerate the value of airing the event in real-time on Comcast's cable system; it does create value, however, for the Internet ecosystem generally, which Comcast perceives to be a long-run threat to its cable television network." Declaration of Hal J. Singer, Petition of Communications Workers of America, MB Docket No. 10-56, at 151 (June 28, 2010), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020514071.

- "The more popular the programming for the rival distributor's customer base, the more profitable a withholding strategy becomes. This is because withholding high popularity programming either inhibits subscriber adoption of the rival MVPD, or, in the case of withholding after a period of carriage by the rival MVPD, results in significant churn for the rival MVPD customer base." Comments of Dish Network L.L.C., Revision of the Commission's Program Access Rules, MB Docket No. 12-68, at 5 (June 22, 2012)(citing Expert Report of Simon J. Wilkie, PhD ¶ 42 (June 2012) ("Wilkie Report") at para. 12-14)), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021976763.
- "Research demonstrates that the availability of video service drives broadband deployment and that investment in broadband networks and the provision of advanced services is greatly improved by telco providers' access to video content." Comments of the Independent Telephone & Telecommunications Alliance, Revision of the Commission's Program Access Rules, MB Docket No. 12-68, at 8 (Dec. 14, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022083067.
- "As with previous reports, Real-Time Entertainment maintains its status as the dominant traffic category in the region and likely the key driver of network growth." Sandvine Global Internet Phenomena Report, at 5, *available at* https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/2h-2014-global-internet-phenomena-report.pdf. Streaming video services accounted for at least 55% of Internet traffic. *Id.* at 6. During peak periods in 2010, "Real-Time Entertainment" accounted for 43% of downstream traffic in North America. Sandvine Global Internet Phenomena 2010 Report. By 2014, that figure has increased to 67%. *See generally* Sandvine, *Global Internet Phenomena Trends*, *available at* https://www.sandvine.com/trends/global-internet-phenomena/.