Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

The comments in this docket show that there is consensus among a wide range of disparate groups that the FCC should ensure that its video policies are technology neutral and pro-competitive. Broadcasters, online video distributors, programmers, existing MVPDs, and more all agree that the FCC should recognize that a "multichannel video programming distributor" can be any entity that offers MVPD-like service, even one that operates entirely online. Opponents of the FCC's proposed action fail to present any convincing legal arguments that the FCC cannot take this action, and their policy arguments are either illogical or based on misconceptions.

Perhaps the most-repeated misconception is the notion that, because online video is already a success, that there is no room for further policy action by the FCC intended to boost competition. But this is a narrow view. Online video is indeed successful—more successful than some people even though possible a few years ago.[1] But it is still dwarfed by traditional MVPD video. According to the FCC's 15th Video Competition Report, there are more than 100 million households in the United States that subscribe to MVPD service.[2] Meanwhile, according to Experian, there are only about 8.6 million households with broadband, but no MVPD

[1] *E.g.*, Mark Cuban, *The Great Internet Video Lie* (Jan. 27, 2009), http://blogmaverick.com/2009/01/27/the-great-internet-video-lie.

[2] 28 FCC Rcd 10496, ¶ 3 (2013).

subscription.[3] The number of MVPD households still far outpaces the number of broadband-only households.

Thus, for most viewers, online video is ae complement to, rather than a replacement for, a traditional MVPD subscription. This is because MVPDs have certain categories of programming that are impossible or more difficult to find lawfully online: live local sports, first-run network and cable programming, and so on. Many viewers would no doubt like to cut the cord, but can't. Were the FCC to make it possible for more online services to offer these kinds of programming, online video has the potential for substantially more growth than it is seeing today.

The wide interest shown by consumers in products such as Sling TV or Apple's rumored subscription TV service show there is a lot of demand for more MVPD-like offerings of online video. Yet there are few options for people that want programming of this kind—and it shouldn't only be possible for an existing MVPD or the most successful company in the world to provide those choices. Something is holding the development of the online video marketplace back. By creating regulatory parity between traditional and online video distributors, the FCC can at least remove one of those barriers.

Responses to Specific Arguments Raised in the Docket

The MPAA argues that the FCC's proposal amounts to regulating Internet video.[4] But this is misguided. First, most existing services would remain untouched. Online video services like Amazon Instant Video or iTunes do not offer MVPD-like service and would not be treated as MVPDs. The marketplace can accommodate both MVPD and non-MVPD video services, as they are largely complementary to each other. The MPAA's concerns about copyright and the First

[3] One million more households became cord-cutters last year, Experian, March 6, 2015, http://www.experian.com/blogs/marketing-forward/2015/03/06/one-million-households-became-cord-cutters-last-year.

[4] MPAA Comments at 1.

Amendment are simply misplaced,[5] as the purpose of MVPD rules is not to regulate content, but to limit the ability of existing MVPDs to limit competition. If the MPAA is concerned about the possible future expansion of cable and satellite compulsory licenses, then the FCC is the wrong forum: as PK explained in its comments, the FCC's action would at most be *persuasive* with regard to the applicability of the copyright license, but the FCC has no direct authority over the license, nor are its interpretations of copyright law subject to any special deference. Finally, it may be that the MPAA's handful of members do not feel this action is necessary for them to thrive by selling content online. But the FCC's actions shouldn't be tailored to the needs of the companies that are successful already, but to create opportunities for new programmers, new creators, and new distributors to introduce competition into the marketplace.

NCTA argues that "there is nothing pro-competitive about giving OVDs an artificial boost."[6] But this overlooks that existing MVPDs already received such an "artificial boost." NCTA may not feel that its members have benefitted from the FCC's attempts to promote video competition. But consumers certainly have. Because of program access and related rules, many viewers today can choose from cable, DBS, or telco-provided MVPD service. It makes sense to apply these pro-competitive rules to all services that offer a similar service, instead of using them as a barrier to entry against new platforms.

NCTA advances a number of legal arguments against the FCC's proposed action, but they all fail. For example, NCTA attempts to argue that the FCC must use the 1984 Cable Act's "electromagnetic spectrum" definition of channel when construing the definition of MVPD. But it acknowledges[7] that under its preferred reading of the statute, a multichannel video programming distributor need not actually offer "multiple" channels. Thus, to support a reading

[5] MPAA Comments at 8.
[6] NCTA Comments at 5; see also 18 et seq.
[7] NCTA Comments at 9, fn. 14.

of the statute that gives "channel" a narrow and technological reading, NCTA advances an interpretation that turns reads the words "multiple" and "multichannel" out of the statute. By contrast, the FCC's tentative conclusion, and PK's preferred reading, gives independent weight to each term. Perhaps aware that its interpretation of the statute fails to give each word in the statute real work to do, NCTA attempts to level that same charge against the "programming" interpretation of "channel," arguing that the phrase "multiple channels of video programming" would be redundant if "channel" itself meant "video programming."[8] But this is not right: a "channel" of video programming is the prescheduled stream of programs, while "video programming" refers to the programs themselves. Second, as amply demonstrated in this docket, standing alone the word "channel" is susceptible to multiple interpretations. By clarifying that MVPDs make available multiple "channels of video programming" Congress was attempting to clarify that it was using the term in the "video programming network" sense and not the "portion of electromagnetic spectrum" sense.

Contrary to NCTA's claims, Congress did not express a preference for "facilities-based" competition *only*.[9] The FCC was right to conclude the Congress attempted to promote "facilities-based competition in the video marketplace from both cable operators and telephone companies."[10] But competition between telephone and cable companies is, in fact, facilities-based. Indeed, the FCC should continue to promote facilities-based competition between cable and telephone companies for video, broadband, and telephony services. But it would be perverse to read statements like this in a way that forecloses FCC attempts to promote other forms of

[8] NCTA Comments at 10, fn. 15.
[9] NCTA Comments at 10-11, fn. 17.
[10] Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Report and Order, 11 FCC Rcd 18, 223 ¶ 53 (1996).

competition. The video marketplace can support competition from both facilities-based and over-the-top providers just as the telephony market can.

The NCTA also offers a number of constitutional arguments against the FCC adopting a technology-neutral reading of "MVPD."[11] Or at least, that is what those arguments purport to be. In fact, the amount to attacks on the constitutionality of MVPD regulation per se. PK rejects these arguments in the first place—as cable operators are still the dominant providers of video services, and since they have become the dominant providers of broadband, it is logical to continue to treat cable-affiliated programming differently under Section 628 and to continue to subject cable operators to program carriage rules. But this is all besides the point as the rules in question will stand or fall regardless of whether there are online MVPDs. Given that these rules are currently in force, they should be applied to different platforms in as technology-neutral a manner as the statute supports. If NCTA's arguments had carried the day in the past, the FCC would never have been able to promote DBS services as an alternative to cable.

While NCTA's preferred interpretation of the statute may serve as a way to limit the amount of video competition its members face, it is legally unsupportable, historically untenable, and bad for consumers. Ultimately, too, it may be bad for NCTA's members. Even some cable companies find it difficult to offer a profitable video service in the face of increasing content costs. By promoting online video, the FCC can both boost demand for (often cable-supplied) broadband while allowing cable companies to shave their content costs, with the expectation that consumers can fill in the gaps in the video lineups with online offerings. A more vibrant online video marketplace has the potential to benefit not only consumers but also ISPs and cable companies.

[11] NCTA Comments at 12-15, 28.

Discovery argues that the costs for programmers could go up if they are required to acquire rights for distribution to new platforms.[12] Of course, the details of what rights a programmer may or may not have to acquire will vary according to the specifics of the contracts, so it is difficult to generalize about what rights may be in play. However, it is important to re-emphasize that the FCC's MVPD rules do not amount to "must-sell" requirements for independent programmers, and they do not require that programmers undertake new costs without any way to recover them. To the extent that a programmer must obtain new rights, it can recoup news costs from the MVPDs it sells to.

Discovery is also concerned about being drawn into new program access disputes.[13] Understandably, its perspective is colored by its experience in the Sky Angel matter. That proceeding has been protracted precisely because of the uncertainties the FCC proposes to resolve in this proceeding. By allowing for online MVPDs, the FCC will put to rest the primary legal question that has been debated in that proceeding.

But more to the point, as the FCC has found, Discovery is an affiliated programming vendor.[14] The program access rules protect MVPDs from anti-competitive actions from other MVPDs; they do not burden programmers per se, except insofar as those programmers are affiliated with cable operators.[15] (Even then, the purpose of the rules is to prevent the affiliated MVPD from exercising undue influence on carriage decisions.) While an affiliated programmer vendor like Discovery may have an obligation to treat all MVPDs fairly (to prevent favoritism toward the MVPDs they are affiliated with), the program access rules in general protect programmers by preventing MVPDs from imposing restrictive contracts terms on them.

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[12] Discovery Comments at 10.
[13] Discovery Comments at 13.
[14] News Corp., 23 FCC Rcd 3265, §§ 78-81 (2008).
[15] The retransmission consent rules do require that broadcast programmers negotiate in good faith for carriage with MVPDs, as well.

This explains why Tennis Channel, an unaffiliated programmer, favors the FCC's proposed interpretation. That said, Tennis Channel rightly points out that the FCC's interpretation of "MVPD" is not self-executing.[16] The FCC's proposed interpretation would create a mechanism where aggrieved parties can bring complaints. It will also be necessary for the FCC to resolve those complaints promptly for the benefits of its rule changes to be effective. Tennis Channel's comments and detail into the many ways that dominant MVPDs can restrict independent programming and hobble MVPD competition also serve to highlight why the FCC was premature to sunset many of its strongest program access rules.

The FCC has proposed to exclude from the scope of "MVPD" entities that "own" the programming they distribute. This is intended to exclude a service like CBS All Access, where all the programming is controlled by the service itself, and where it is not retransmitting cable and broadcast channels obtained from various sources. But as Disney, Fox, and CBS argue, because some entities do not "hold the copyrights to all of the programs included [in their services].... the proposal to interpret the definition of MVPD to exclude distributors who make available only programming they 'own' would not serve its intended purpose and not work as a practical matter."[17] To overcome this objection, the FCC must merely clarify that "own" in this context refers to the entity that determines what prescheduled programs appear in a linear stream, not who owns the copyrights. A cable channel may not own the copyrights to the programs it airs, either: it has merely purchased a license to transmit them. The services that the FCC intends to exclude from the scope of "MVPD" are readily distinguishable from traditional (or online) MVPDs merely by seeing what entity controls what programming appears on the channel.

[16] Tennis Channel Comments at 7.
[17] Disney, Fox, and CBS Comments at 13.

WISPA argues that "Internet-based programming distributors or online video distributors ('OVD') should have the option of electing whether to be classified as an MVPD or not."[18] EFF makes a similar argument,[19] and the Digital Media Association's recommendation that an online entity be considered an MVPD only if it makes use of the FCC's regulatory mechanisms amounts to the same thing.[20] While PK agrees that this election could be good policy with respect to some aspects of the rules[21] that would apply to online MVPDs, there is no statutory mechanism by which to carry it out. A service is an MVPD or not depending on whether it offers MVPD service. However, online video today shows that there are ways to offer video services other than through offering multiple prescheduled linear channels of programming. Video distributors who do not wish to be classified as MVPDs will continue to have that option.

EFF points out the mismatch between the geographic aspects of some of the MVPD rules and the non-local character of online services. But the FCC has faced this problem before: while DBS providers are essentially national, they have found a way to localize their service when necessary. Simply as a technological matter, it is generally easier for an online service to geographically tailor its service than for a DBS system to do so. However, it is easy to overstate the extent to which rules of this sort would affect online MVPDs. First, because the compulsory licenses would not be available to an online MVPD under the prevailing view of the law, an online MVPD could not be forced to carry a "must carry" station unless that station could provide the MVPD with copyright clearances for all the programming it airs. Second, many of

[18] WISPA Comments at 1.
[19] EFF Comments at 4.
[20] DiMA Comments at 7.
[21] Some things (like accessibility requirements) should not be optional, even if the statute allowed it. Further, while these questions are beyond the scope of this proceeding, it is not clear that accessibility or emergency information and similar requirements should be limited to a particular class of video distributor.

the various geographic exclusivity rules[22] apply specifically to cable and satellite systems and not MVPDs generally. Third, even if geographic exclusivity rules were to apply, they only provide exclusivity to a broadcaster from having the same content distributed "as broadcast by any other television signal."[23] These rules create local monopolies for particular television stations as against other television stations, but they do not prevent an MVPD from obtaining the same content through other means (e.g., directly from the creator of the programming). In general PK believes these rules do not serve the public interest, and, to the extent they are economically valuable, could be requested from an MVPD by a television broadcaster in the course of retransmission negotiations.[24] However, despite the imperfections of some aspects of the FCC's current rules, on balance it would serve the public interest for the FCC to apply its existing rules on a technology-neutral basis.

PK disagrees with EFF's characterization of this proposal as being a way to implement the WIPO Broadcast Treaty on the sly.[25] Of course, the WIPO Broadcast Treaty doesn't currently exist, and PK has worked with EFF and many others at WIPO in opposing treaty proposals that would give broadcasters a quasi-copyright in the programming they broadcast, layered on top of existing copyrights. Indeed, PK would prefer if the US transitioned away from the compulsory license/retransmission consent system with respect to broadcast programming to a system grounded entirely in standard copyright. But the existing system, however imperfect,[26] does not

[22] 47 C.F.R. §§ 76.92 – 76.13.

[23] *E.g.*, 47 C.F.R. § 76.92(a).

[24] This would mean that a television broadcaster should not have the ability to tell an MVPD it does not have a contractual relationship with what other stations it may not carry, but it would not prevent a television broadcaster from using other means to enforce its lawful exclusivity (for example, its contracts with a network or programmer).

[25] EFF Comments at 4.

[26] It should be noted that the current retransmission consent rules are not entirely without merit. To just one example, the current rules prevent a broadcaster from entering into exclusive carriage arrangements with particular MVPDs. 47 U.S.C. § 325(b)(3)(C).

go nearly as far as some Broadcast Treaty formulations: It applies only to MVPDs, for instance (non-MVPDs who retransmit without consent violate programming copyrights, not a signal right), and does not extent to programs, just the broadcast signal. If anything, the complex nature of US law with regard to broadcast retransmission is an obstacle to certain WIPO proposals.[27]

Finally, PK would like to emphasize its agreement with the Consumer Federation of America's connection of this proposed FCC action to the "virtuous cycle."[28] By promoting online video, the FCC will increase demand for broadband, encouraging investment in new broadband deployment. Additionally, new online video services could relieve existing MVPDs from having to obtain certain high-cost programming that is easily available to their customers online. To the extent to which these MVPDs are also broadband providers, this could free up capital for continued deployment. While PK's comments on these issues have largely focused on the benefits to video subscribers, the FCC should not overlook the benefits to broadband.

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The comments in this proceeding demonstrate a broad consensus that the FCC's rules should be pro-competitive and technology-neutral. While some commenters misunderstand what the FCC proposes to do, the Commission should be confident that by allowing online MVPDs to operate it would benefit viewers.

Respectfully Submitted,

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PUBLIC KNOWLEDGE

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[27] *See* Public Knowledge, HOW THE WIPO BROADCAST TREATY CONFLICTS WITH AMERICAN MEDIA POLICY, https://www.publicknowledge.org/files/WIPOBcast-PK.pdf; *The Broadcast Treaty vs. Broadcast Law*, June 24, 2011, https://www.publicknowledge.org/news-blog/blogs/broadcast-treaty-vs-broadcast-law.

[28] CFA Comments at 15-17.