Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

<u>COMMENTS OF LEE W. PREVIANT</u>

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SUMMARY

If the Federal Communication Commission ("FCC" or "Commission") adopts the proposed definition of multichannel video programming distributor ("MVPD") based on a linear programming interpretation the result could be the unintended consequence of regulatory arbitrage. Excluding video-on-demand ("VOD") programming from the interpretation of channel within the definition of MVPD would create a regulatory loophole wherein those entities classified as MVPDs could simply create a separate affiliate, or utilize an existing one, to provide exclusive VOD programming services and avoid MVPD regulations and obligations. Notably, many MVPDs, including broadcast and non-broadcast networks, already have VOD platforms and infrastructure in place. The focus of these comments are limited the Commission's tentative conclusion that "channel" only includes "linear" or prescheduled video programming. The Cable Television Consumer Protection and Competition Act of 1992[1] ("Act") was primary focus was to ensure diverse and competitive local broadcasting. The exclusion of VOD programming would fail to achieve the Commission's stated goals. VOD programming is both directly competitive with local broadcasting and capable of undermining local broadcasting's competitive position in the market. The technology-neutral content-based interpretation of "channel" tentatively adopted by the Commission should not exclude VOD programming. VOD programming and linear programming are both technological designations referring to the manner in which video programming content is delivered to the consumer.

From a consumer's perspective, the reality of video programming today makes little distinction between pre-scheduled and on-demand offerings. The trend in consumer viewing habits and the growth of original content generated by VOD distributors such as, but not limited to, Netflix, Hulu Plus, and Amazon Prime Instant Video, is evidence of the new video

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Act").

programming market reality. To the consumer, there is no functional difference between a show being made available to watch on-demand on a Monday night at 7:00pm and a show being pre-scheduled to air on a Monday night at 7:00pm. Well, the difference is the on-demand programming is more convenient to the consumer. The proliferation of VOD programming, digital video recorders ("DVR"), and DVR services permits the consumer to watch what they want when they want. That is a good thing.

Not all programming is desirable, from a consumer standpoint, of being offered on-demand because it is live and linear in nature. For example, news and sporting events would not be as attractive to consumers if they were only available on-demand as opposed to available via live linear streams. However, the vast majority of video programming today is capable of being offered as VOD programming. The rise of VOD distributors such as Netflix, Hulu, Amazon Prime Instant Video, Crackle, YouTube, and others is strong evidence that consumers support advertising-free, subscription-based VOD programming.

Excluding such an competitive, integral, and significant portion of the video programming consumption market would fail to achieve the Commission's goals and the purpose of the Act. VOD is at its core a type of time-shifting video consumption technology that is both convenient and readily available. If the FCC adopts the NPRM, this time-shifting technology will be used for classification-shifting to avoid MVPD obligations and regulations. A traditional or newly classified MVPD under the linear programming interpretation today will simply become On-Demand tomorrow.

TABLE OF CONTENTS

Before the
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	)	
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The Federal Communications Commission's ("FCC" or "Commission") has proposed to interpret multichannel video programming distributor ("MVPD") in a manner the Commission believes will promote competition in the video programming distribution market in a technology-neutral manner. The FCC concludes that adopting the "Transmission Path Interpretation" of MVPD would fail to promote competition and would not be technology-neutral.[2] And, indeed, the Commission is right to conclude that a pro-competitive and technology-neutral interpretation of MVPD would, at a minimum, include streams of prescheduled, or linear, video programming "regardless of whether the provider also makes available physical transmission paths.[]"[3] The Commission adopts this interpretation because, given the reality of today's video programming market, "channel" is best defined as the content being delivered and not the path that is being used to deliver the content.[4] However, excluding steams of video-on-demand ("VOD") programming and limiting the definition of MVPD to linear video programming 1) ignores the reality that VOD services are both directly competitive with local broadcasting and capable of

[2] Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, MB Docket No. 14-261, FCC 14-210, at ¶¶ 18-28 (Dec. 19, 2014) ("NPRM") (footnote omitted).
[3] *Id.* at ¶ 23.
[4] *Id.* at ¶¶ 1-2, 18-28.

undermining local broadcasting's competitive position in the market, 2) is inconsistent with the technology-neutral content-based definition of channel tentatively adopted by the Commission, and 3) will have the unintended consequences of creating an incentive for regulatory arbitrage.

Whether the definition of MVPD can be so construed to include any particular type of video programming is dependent on the breadth of the statutory language and the ambiguity, if any, contained in the definition of MVPD itself. Where, as here, the statutory language contained in the Cable Television Consumer Protection and Competition Act of 1992[5] ("1992 Cable Act" or "Act") is both broad and sweeping, the Commission is provided great latitude to achieve the goal Congress has set forth.[6] The consumer-centric approach most in-line with Congress's statutory intent of the Act would include VOD programming under the content-based interpretation of channel. Since the Act's policy is technology-neutral, the manner in which the MVPD provides the video programming is largely irrelevant. Rather, the interpretation of channel must be construed in such a way as to ensure the policy goals of the Act are achieved. The fundamental questions the Act intended to address with respect to video programming services are: 1) whether the video programming provided is in direct competition with local broadcasting, and/or 2) whether the video programming provided is destroying the ability of local broadcasting to be competitive. If the answer to either of these inquiries is "yes" then it is a video programming service that the Act was intended to address. However, such an entity offering that video programming service still must satisfy the definition of MVPD to be subject to the applicable benefits, regulations, and obligations of the Act.

Based on the goals of the Act, the FCC's tentative conclusions may have the unintended consequence of encouraging regulatory arbitrage. The thrust of the Act was to ensure that local

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[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Act").
[6] *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 297-99 (D.C. Cir. 2003).

broadcast video programming would be competitive with cable and other emerging video programming technologies. To accomplish this Congress set about leveling the competitive playing field by providing a statutory framework to prevent the destruction of local broadcasters' ability to be competitive. It is with this goal in mind that the definition of channel must be considered.

The basic function of a MVPD is to provide video programming that consumers want to see when they want to see it. First, VOD programming is a large and expanding video programming market directly competing with local broadcasting video programming and capable of undermining local broadcasting's competitiveness. Second, applying the pro-competitive and technology-neutral policy goals of the Act, the definition of channel does not preclude VOD programming. Ulitmately, failing to include VOD programming within the meaning of channel would leave a competitive video programming market unregulated and encourage regulatory arbitrage.

I. Video-on-Demand Programming Directly Competes With Broadcast, Cable, and Other MVPD Video Programming

VOD programming is both directly competitive with local broadcasting and capable of undermining local broadcasting's competitive position in the market. VOD is a disruptive, competitive force which could dominate like cable did when the 1992 Cable Act was passed. This is exceedingly more likely if it remains unregulated while its competing peers do not. An examination of the Congressional findings and policy is instructive in explaining the addition of MVPD in the Act. Congress was concerned that the explosion in cable subscribers would undermine the ability of local broadcasters to effectively compete. Congress noted that initially, "cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising[.]"[7] While Congress had been referring to cable companies' ability to retransmit broadcast signals without compensating the broadcasters, it also shows that cable companies' success in directly competing with broadcasters strongly influenced the way Congress approached the Act.[8] Congressional concern with cable dominance in general was also of great concern.[9] While many of the Congressional findings refer to carriage of local noncommercial, commercial, public access, governmental, and educational channels on cable, Congress found a "substantial government and First Amendment interest in promoting a diversity of views provided through *multiple technology media*."[10] Congress clearly stated that one of the policy aims of the Act was to "promote the availability to the public of a diversity of views and information through cable television and *other video distribution media*."[11] It was the policy of the Act to "rely on the marketplace to the maximum extent feasible, to achieve that availability[.]"[12]

As the Commission has found, and is abundantly clear from the Congressional findings and policy statement, the Act is both unambiguously pro-competitive and technology-neutral.[13] This was part of Congress's two-prong strategy to ensure that local broadcast remained both viable and competitive. First, Congress wanted to ensure that local broadcast stations had a place on the dominant cable systems.[14] Second, Congress wanted to encourage the development

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[7] Pub. L. No. 102-385, § 2(a)(19), 106 Stat 1460, 1462-63 (1992).
[8] *Id.*
[9] *Id.* at 1462-63, § 2(a)(2) ("Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.").
[10] *Id.* at 1461, § 2(a)(6) (emphasis added); *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").
[11] Pub. L. No. 102-385, § 2(b)(1), 106 Stat 1460, 1463 (1992) (emphasis added).
[12] *Id.* at 1463, § 2(b)(2).
[13] NPRM at ¶ 23; *see* 47 U.S.C. § 548(a).
[14] *See* 47 U.S.C. §§ 325, 338, 534, 535, 536, 548; *see also* 47 C.F.R. §§ 76.55-62, 76.64, 76.65, 76.1001-1002, 76.1614, 76.1300-1302, 76.1617, 76.1709; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd. 8055,

of technologies and competitors to the cable operators.[15] It is important to keep these Congressional goals in mind when examining how to define a MVPD.

A technologically objective analysis of competition in the broadcast, cable, and MVPD video programming market leads to the conclusion that VOD distributors are competing in that same market. The FCC tentatively concludes "that the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network.[]"[16] The illustrative entities included in the MVPD definition are a "cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor[.]"[17] However, when examined in light of the Congressional findings in the Act, the "essential element" that the illustrative examples in the MVPD definition share is their direct competition with local broadcasting, their ability to destroy local broadcasting's ability to be competitive, or their ability to provide a competitive counterweight to the dominant cable systems.

It is evident that VOD distributors are directly competing with local broadcast stations. The Commission has concluded that online video distributors ("OVDs") are "potentially a substitute product" for MVPD service.[18] In fact, Verizon and WGAW claimed that OVDs

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8056, ¶ 4 (1992) (Noting Congress's emphasis on public interest in allowing cable subscribers access to their local commercial and noncommercial broadcast stations).

[15] Pub. L. No. 102-385, § 2(a)(2), 106 Stat 1460, 1462-63 (1992) ("Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.").

[16] NPRM at ¶ 19 (footnote omitted).

[17] 47 U.S.C. § 522(13).

[18] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd. 10496, 10606-07, ¶ 222 (2013) ("*15th Annual Report*"); *see 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, 26 FCC Rcd 4238, 4256, ¶ 41 ("*Comcast-NBCU Order*").

represent a replacement to MVPD services such as Verizon's FiOS service.[19] ABC went so far as to state that OVDs are direct competitors to broadcast television stations network programming and that programs could migrate to subscription-based OVDs.[20] Importantly, VOD programming services are a appreciable portion of the OVDs competitive substitute offerings and the Commission has acknowledged the quick growth of VOD programming services.[21] In fact, the Commission held "the most significant trends since the last report include the continuing development, and consumer usage, of *time* and location shifted viewing of video programming[.]"[22] And VOD programming, at its core, is simply a time-shifting video programming technology.

The Commission claims that the proposed linear programming interpretation "best aligns with consumer expectations and industry developments."[23] But the growth of VOD viewing has been steadily increasing and consumers prefer real-time on-demand more than a download-for-later-viewing service.[24] Additionally, as the Commission is well aware, Hulu, which is owned by News Corporation, NBCUniversal, and the Walt Disney Company, "increased content on the subscription service Hulu Plus by 105 percent compared with what was available in 2010.[]"[25] Some networks are providing content available the same day it airs, such as Viacom's Comedy Central.[26] In fact, television series are the majority of Netflix's VOD consumption.[27] During

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[19] *15th Annual Report* at 10606-07, ¶ 222 (*citing* Verizon Comments at 5, 24; *citing* WGAW Comments at 15).
[20] *Id.* (*citing* ABC Affiliates Reply at 2-3).
[21] *Id.* ("OVDs primarily compete with some non-core services offered by MVPDs, such as video-on-demand,[] but only represent a substitute for a minority (albeit a growing minority) of viewers.[]") (footnotes omitted).
[22] *Id.* at 10498, ¶ 1 (emphasis added).
[23] NPRM at ¶ 18.
[24] *15th Annual Report* at 10621-22, ¶ 256 (*citing* Sandvine, *Adoption Trends of Over-the-Top Video from a Cable Network Perspective* (July 2011) ("*Sandvine Over-the-Top Video White Paper*") at 3).
[25] *Id.* at 10608, ¶ 226 (footnote omitted).
[26] *Id.* at 10608, ¶ 225.
[27] *Id.* at 10632-33, ¶ 278 (*citing* Netflix *3Q 2012 Earnings Statement*, Oct. 23, 2012, at 2-3; *Netflix, Inc. UBS Global Media and Communications Conference*, Corrected Transcript, FACTSET CALLSTREET, LLC, Dec. 5, 2012, at 21-22 ("Netflix reports that two thirds of its viewing hours consists of television series, with the other third of its viewing hours consisting of movies.")).

2012, Netflix was responsible for nearly 33 percent of peak downstream traffic.[28] VOD services Netflix and YouTube generate more downstream Internet traffic than any other applications. [29] And the amount of time consumers spend watching time-shifted or on-demand video programming has steadily increased and will continue to do so.[30] Referring to an agreement between Netflix and Walt Disney Studios, the Commission notes that, "[t]his represents the first time that a major studio has selected an OVD over a premium television network for this distribution window.[]"[31] Clearly, Walt Disney Studios believed that Netflix was a capable partner and was a competitive venue to attract consumers. The *15th Annual Report* is replete with examples of competitive OVDs, many of which are VOD distributors.[32]

What's more, these VOD distributors are generating top quality original programming that is in direct competition to network programming. The Commission acknowledges that the generation of original content is a brand-building exercise reminiscent of "cable networks' strategies.[]"[33] In fact, Netflix not only offers original programming it also revived a previously canceled *network* program, *Arrested Development*.[34] Netflix is not alone. In 2012 alone, Hulu commissioned 10 original series and exclusively licensed 13 television programs, Sony's Crackle had 43 original series, YouTube generated its own content, and Amazon intended to so as well.[35]

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[28] Sandvine, *Global Internet Phenomena Report*, 1H 2012, at 19; *see 15th Annual Report* at 10621-22, ¶ 256.
[29] Sandvine, *Global Internet Phenomena Report*, 1H 2014, at 5-6.
[30] *Content is King, But Viewing Habits Vary By Demographic*, NIELSEN, December 3, 2014, http://www.nielsen.com/us/en/insights/news/2014/content-is-king-but-viewing-habits-vary-by-demographic.html ("Timeshifting content (using a DVR or video-on-demand technology) continues to resonate with consumers, and while still a small part of overall usage across platforms and devices, daily time spent using a multimedia device continues to climb.") (visited March 24, 2015).
[31] *15th Annual Report* at 10632-33, ¶ 278 (*citing* Brooks Barnes, *Netflix Reaches Deal to Show New Disney Films in 2016*, N.Y. TIMES, Dec. 4, 2012, http://mediadecoder.blogs.nytimes.com/2012/12/04/netflix-bests-starz-in-bid-for-disney-movies/?ref=media (visited Dec. 5, 2012).
[32] *Id.* at 10608-11, ¶¶ 225-231.
[33] *Id.* at 10633, ¶ 279 (*citing* SNL Kagan, *The State of Online Video Delivery*, 2012 Edition, at 4.)
[34] *Id.* at 10610-11, ¶ 231 ("On February 1, 2013, Netflix introduced its original series, *House of Cards*.[]") (footnote omitted); *see* Willa Paskin, *Netflix Resurrected Arrested Development. Next Up: Television Itself*, WIRED, March 19, 2013, http://www.wired.com/2013/03/netflix-3/ (visited March 24, 2015).
[35] *Id.* at 10633-34, ¶ 280.

And it doesn't end there, Amazon Prime Instant has distribution agreements with CBS, Disney, Viacom, Discovery, and NBCUniversal and offers "more than 100,000 movies and television shows for rent or purchase.[]"[36] Since 2010, year over year revenue growth for VOD distributors has been approximately $1 billion.[37]

VOD programming and distributors are increasingly in direct competition with traditional MVPDs. VOD distributors are also increasingly a replacement for traditional MVPDs and offer programming that is comparable to that of a television broadcast station. In recognition of this reality, traditional MVPDs and broadcast networks are offering their own VOD programming and distribution. Based on these realities, and applying the pro-competitive and technology-neutral policy of the Act, it would be an oversight by the Commission to exclude VOD programming from the definition of channel. This exclusion would lead to regulatory arbitrage because the regulations applicable to MVPDs' video programming will not be applicable to VOD programming. Leaving a competitor in the local broadcasting video programming market, such as VOD, unregulated would also serve to undermine local broadcasters' ability to remain competitive.

The rapidity of changing video programming consumption patterns and the exponential growth in new content-delivery models cannot, and should not, be ignored by the Commission. VOD programming has proven to be a viable and lucrative enterprise and MVPDs will migrate their video programming content to these services if it is left as an unregulated market. VOD programming is already providing effective competition with linear video programming and is only increasing in popularity. If the Commission adopts the definition of channel as proposed in the NPRM, good business sense dictates that traditional MVPDs and newly regulated MVPDs

[36] *Id.* at 10611, ¶ 233.
[37] *Id.* at 10642, ¶ 297.

would be foolish not to move every bit of linear video programming possible to an on-demand offering. Surely, this cannot be what the Commission intended.

II. The Term "Multichannel Video Programming Distributor" Does Not Preclude Video-On-Demand Programming

Despite the Commission's conclusion that the term "channel" only includes "linear" video programming, a forward-looking, technology-neutral interpretation of channel does not exclude online video-on-demand programming services. A MVPD, as defined by 47 U.S.C. § 522(13), is:

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[38]

An entity covered by this definition is subject to a multitude of regulations and obligations designed to ensure that local broadcasting remains competitive with emerging technologies.[39] Despite no explicit exclusion of on-demand services contained in this definition, the FCC tentatively concludes that the definition will apply only to pre-scheduled ("linear") video programming.[40] The Commission notes, and to which there is no disagreement, that "video distributed over the Internet qualifies as 'video programming'"[41] and thus the "definitional issue is how to interpret the phrase 'multiple channels of video programming.'"[42] First, it is well settled that VOD is video programming.[43] With respect to the definition of MVPD, the focus herein will be the limited issue of whether "channel" is applicable to VOD distributors.[44]

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[38] *See* 47 C.F.R. §§ 76.64(d), 76.71(a), 76.905(d), 76.1000(e), 76.1200(b), 76.1300(d).
[39] NPRM at ¶ 36.
[40] *Id.* at ¶ 18.
[41] *Id.* at ¶ 16.
[42] *Id.*
[43] *See Applications of Comcast Corp., GE Co. & NBC Universal, Inc.*, Memorandum Opinion & Order, 26 FCC Rcd 4238 at ¶ 54 n.122 (2011) (Video programming, including on demand, may be subject to Section 628); *see also Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on

In the NPRM, the Commission determines that "channel" is ambiguous as used in the MVPD definition[45] and to effectuate the technology-neutral and pro-competitive goals of the Act the term "channel" is best understood as defined by the "content" it delivers and not the path (or "container") that delivers the content.[46] The Commission recognizes that a technology-dependant interpretation of channel is unworkable with respect to the illustrative examples, such as direct broadcast satellite ("DBS"), because it does "not align with the definition of 'channel' in Section 602(4) of the Act," solely referring to a cable system.[47] However, while the Commission determines that the Act was technology-neutral,[48] it then disregards this important determination by adhering to an overly rigid interpretation of channel by requiring video programming that is prescheduled.[49] The Commission notes that the services listed in the MVPD definition are merely illustrative and not "exclusive"[50] but the Commission then strangely seeks to find a common exclusive *technological* quality among the illustrative services.[51] The Commission reaches the conclusion that prescheduled video programming is a necessary element of a MVPD because each of the illustrative examples in the definition of MVPD "makes multiple

Reconsideration, 10 FCC Rcd 244, at ¶ 109 (1994) ("video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.").

[44] *See* NPRM at ¶ 25 (With respect to the term "multiple" the Commission concludes that "an entity that makes linear services available via the Internet is an MVPD, and our regulations apply to all of the MVPD's video service." It is unclear whether the removal of "linear" would have any bearing on the Commission's stance regarding the meaning of "multiple." Alternatively, a definition could require the VOD distributor to be capable of providing more than one stream to a single user account. For example, much as a single household could watch different channels on different televisions simultaneously so should a user's on-demand account be able to stream different content to different devices simultaneously.).

[45] *Id.* at ¶ 21.

[46] *Id.* at ¶ 24.

[47] *Id.* at ¶ 22; *see* 47 U.S.C. § 522(14).

[48] NPRM at ¶ 23 (We believe that our proposed interpretation is consistent with Congress's intent to define "MVPD" in a broad and technology-neutral ways[.]"); *see* NPRM at ¶ 4 ("Adoption of a technology-neutral MVPD definition will not only preserve current responsibilities, it may create new competitive opportunities that will benefit consumers.").

[49] *Id.* at ¶ 24.

[50] *Id.* at ¶ 19.

[51] *Id.* (Stating that the use of the phrase "such as" implies that other entities should be "similar").

streams of prescheduled video programming available for purchase[.]"[52] While this is true, each of the illustrative examples does offer linear programming, it is not consistent with a solely content based interpretation of channel. "Prescheduled" is simply a type of technology that determines the time, place, or manner in which content is delivered. But linear or prescheduled is not a *type* of content. Simply put, linear programming is no less a type of technology than on-demand programming.

A. From the Consumers' Perspective Linear Video Programming is Similar to Video-on-Demand Programming

In addition, the Commission has previously found that being a MVPD is "based on the similarity of the video service provided to the consumer, *not on the technology used*."[53] The Commission held that numerous of these MVPDs offer "thousands of non-linear video-on-demand ("VOD") programs."[54] The key to this analysis is the *similarity* of the video programming provided to the consumer. The similarity of video programming is most appropriately understood from the perspective of the consumer. That is, does the consumer make any distinction between a pre-scheduled show and an on-demand show? Consumer viewing habits continue to show that the consumer views VOD and linear video programming as similar. In 2013, the New York Times reported "[s]ome shows, like Fox's 'The Following' and ABC's 'Scandal,' now gain hundreds of thousands of viewers every week because of VOD, part of a *decades-long shift from television on a linear schedule to television on viewers' own terms*."[55] The VOD market accounts for a small, but growing, percentage of the prime-time

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[52] *Id.*
[53] *15th Annual Report* at 10503, ¶ 17 (emphasis added); *see 14th Annual Report* at 8617, ¶ 18.
[54] *15th Annual Report* at 10503-04, ¶ 18; *see 14th Annual Report* at 8617, ¶ 19.
[55] Brian Stelter & Amy Chozick, *Viewers Start to Embrace Television on Demand*, N.Y. TIMES, May 20, 2013, http://www.nytimes.com/2013/05/21/business/media/video-on-demand-viewing-is-gaining-popularity.html?_r=0 (viewed on March 24, 2015).

audience sold to advertisers.[56] Based on the how consumers actually conceptualize video programming, a technology-neutral, or content driven, definition of channel means: 1) a type or category of content (i.e., sports channel, news channel, etc.) and/or 2) a brand (i.e., Discovery Channel, ESPN, MTV, CNN, etc.). What substantive difference exists between HBO's *Game of Thrones* on-demand and *Game of Thrones* pre-scheduled? None. The content is identical; it is a distinction without a difference.

To further illustrate the point, if the "everyday meaning"[57] of channel is what the Commission intends to adopt then where do YouTube "channels" fit into this definition? YouTube has "[m]ore than a million channels in dozens of countries" that generate revenue.[58] The generation that consumes more video programming than any previous generation identifies with YouTube stars more so than other celebrities.[59] The video programming consumption reality, in terms of data, is that no video programming generated more downstream Internet traffic than Netflix and YouTube in 2012.[60] What do YouTube and Netflix have in common? They're on-demand.[61] In 2012, Netflix was the leading application in North America.[62] In 2014, Netflix continued to be the leading application in downstream traffic followed by YouTube.[63]

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[56] *Id.* ("VOD now accounts for 3 percent of the prime-time audience that ABC sells to advertisers. That's because this TV season, for the first time, Nielsen counted VOD views of ABC's shows the same way it counts digital video recorder playback — that is, within three days of an episode's premiere.").
[57] NPRM at ¶ 24.
[58] *See* Statistics, YouTube, https://www.youtube.com/yt/press/statistics.html ("More than a million channels in dozens of countries are earning revenue from the YouTube Partner Program, and thousands of channels are making six figures per year") (visited March 24, 2015).
[59] *See* Susan Ault, *Survey: YouTube Stars More Popular Than Mainstream Celebs Among U.S. Teens*, VARIETY, August 5, 2014, http://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/ (visited March 24, 2015).
[60] Sandvine, *Global Internet Phenomena Report*, 1H 2012, at 6 ("When analyzing data for this report, one common thread emerged on every network, no matter the region or access technology: Real-Time Entertainment traffic, comprised of streaming video and audio, is truly a global Internet phenomenon. Within that category, another observation was common on all but one of the networks we examined: with the exception of North America's fixed access networks, where Netflix is the largest application, YouTube reigns as the global leader in Real-Time Entertainment traffic.").
[61] Note, YouTube does have live streaming channels as well. *See* http://www.youtube.com/live.
[62] Sandvine, *Global Internet Phenomena Report*, 1H 2012, at 19.
[63] *Id.* at 5-6.

Furthermore, the amount of time consumers spend watching time-shifted or on-demand video programming has steadily increased.[64] By mid-2014, eighty percent of linear broadcast video programming was available on-demand and on-demand viewership was up over forty percent.[65]

B. The Definition of Channel Does Not Require That The Video Programming Be Prescheduled

Some of the reasoning supporting a "linear programming" definition has been that if an entity is a not "cable system" then it is not a MVPD.[66] The logical inverse to that statement is: if an entity is a MVPD then it is a cable system. Clearly, this is inconsistent with both the illustrative examples and a technology-neutral interpretation of MVPD. A cable system is just one type of MVPD and certainly not all MVPDs are cable systems. The defining characteristic of a "cable system" is not prescheduled video programming.[67] In fact, an entity can still qualify as a "cable system" *even if it offers on-demand services* so long as the "facility is used in the transmission of video programming directly to subscribers" and such use is not "*solely* to provide interactive on-demand services."[68] Congress excluded "video programming prescheduled by the programming provider" because it is *necessary* for the definition of "interactive on-demand services."[69] That is, on-demand services simply cannot be prescheduled. "On-demand" and "prescheduled" are mutually exclusive concepts. But this does not preclude these types of offerings from being competitors in the same video programming market. As noted previously,

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[64] *Content is King, But Viewing Habits Vary By Demographic*, *supra* note 30.
[65] Luke McCord, *On Demand: Rentrak Execs Tout VOD Growth*, BROADCASTING & CABLE, May 22, 2014, http://www.broadcastingcable.com/news/technology/demand-rentrak-execs-tout-vod-growth/131325, ("The percentage of broadcast primetime content available on demand grew from 70% in the 2012-2013 season to 84% in the 2013-2014 season. Not only did content grow, but the amount of time spent viewing VOD grew 42%.") (viewed March 24, 2014).
[66] *See* Public Knowledge Comments at 13 ("Since exclusively on-demand video programmers are *not* cable systems and are therefore not MVPDs, it follows that a provider of prescheduled video programming *is* an MVPD.[]") (emphasis original) (citation omitted).
[67] 47 U.S.C. § 522(7).
[68] *Id.* § 522(7)(C) (emphasis added).
[69] *Id.* § 522(12).

they are direct competitors. If Congress had intended the definition of channel to apply solely to prescheduled video programming then it would have done so. The FCC recognizes this very principle while discussing its interpretation of the meaning of "channel."[70] The Commission concludes that just because "transmission path" is contained in the definition of cable system it does not necessarily follow that the definition of channel requires a "transmission path." [71] The same reasoning is applicable in the instant matter. Because a cable system offers linear video programming it does not necessarily follow that the definition of channel requires linear video programming. The fact that Congress defined two different types of video programming offerings, prescheduled and on-demand, does not necessarily require the inference that Congress intended they be regulated differently and there is insufficient evidence to reach that conclusion.

The "broad, sweeping language" of the Act should embolden the Commission to look beyond the specific illustrative examples listed in the definition and adopt a truly technology-neutral interpretation of channel.[72] The FCC may not claim that it has adopted a technology-neutral stance in interpreting an ambiguous term and then read into that term a decidedly technology-dependant requirement (i.e., linear video programming). The Commission places too much emphasis on the phrase "such as" to conclude the phrase dictates requiring a technologically common thread.[73] The conclusion that the Act was technology-neutral is severely undermined by the inconsistent conclusion that there must be some technologically unifying element among the illustrative examples. Based on the Congressional findings and policy statement in the Act it is reasonable to conclude that Congress used the illustrative list as

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[70] NPRM at ¶ 22 ("If Congress intended an entity to have control over the transmission path in order to be deemed an MVPD, presumably it would have explicitly specified that in the definition of MVPD, as it did with the definition of cable system.[]") (footnote omitted).
[71] *Id.*
[72] *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 297-99 (D.C. Cir. 2003).
[73] NPRM at ¶ 19.

examples of video programming services that were directly competing with local broadcast video programming, undermining the competitive position of local broadcasting, or could provide a competitive counterweight to dominant cable. The FCC acknowledges one of the purposes of the Act was to "increase competition and diversity in the video programming market, to increase the availability of programming to persons in rural areas, and to spur the development of communications technologies."[74] Excluding competitive and diverse VOD distributors as entities covered by the MVPD definition based on a technological distinction undermines the goals of the Act.

It is difficult to subscribe to an "everyday meaning" of channel that is not indicative of consumers' understanding of what "channel" means. If the definition of channel is content driven then The Discovery Channel on-demand is no less a channel than the linear Discovery Channel. The Commission is absolutely correct that "consumers are focused on the content they receive, rather than the specific method used to deliver it to them.[]"[75] To adopt a technology-neutral content definition of channel and then exclude VOD services, one of the largest video programming consumption models currently in existence, based on a technological distinction is not only inconsistent and arbitrary but would lead to regulatory arbitrage.

III. Conclusion

An exclusive linear video programming requirement in the MVPD definition would result in unintended consequences. The ability to avoid MVPD obligations by simply moving video programming to an on-demand offering is not just foreseeable but likely. The vast majority of programming today is easily shifted to VOD. As Netflix, Hulu, and others have demonstrated, subscription-based services can generate sufficient revenue to offset loss of

[74] *Id.* at ¶ 23 (*citing* 47 U.S.C. § 548(a)).
[75] *Id.* at ¶ 24.

advertising dollars. Most broadcasters, cable operators, DBS systems, and MVPDs already have platforms and infrastructure in place to take advantage of on-demand offerings. Despite the Commission's best efforts, these services would simply migrate to an unregulated market. The result is the Commission will have failed to achieve its goal and would be forced to revisit its reasoning.

The definition of MVPD must be construed in such a way as to ensure the policy goals of the Act are achieved. To the consumer, there is no functional difference between a show being made available to watch on-demand on a Monday night at 7:00pm and a show being pre-scheduled to air on a Monday night at 7:00pm. In fact, the on-demand offering is more convenient to the consumer. The interpretation of channel does not necessitate preclusion VOD programming. The Act is pro-competitive, technology-neutral, and designed to ensure local broadcasting remains competitive. The reality of the video programming market today is VOD distributors are directly competing with broadcasting, including local broadcasting. Further, exclusion from equal regulation of a competing service within a single market would undermine local broadcasters' ability to remain competitive, would be anti-competitive, and would encourage regulatory arbitrage. If the FCC adopts the NPRM, this time-shifting technology will be used for classification-shifting to avoid MVPD obligations and regulations. As stated before, a traditional or newly classified MVPD under the linear programming interpretation today will simply become On-Demand tomorrow.