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

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

REPLY COMMENTS OF AMC NETWORKS INC.

Tara M. Corvo
Craig Gilley
Mary Lovejoy
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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AMC Networks Inc. ("AMC") submits these reply comments in response to the Federal Communications Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1/] As explained below, the Commission's proposed redefinition of the term "multichannel video programming distributor" ("MVPD") to include certain online video distributors ("OVDs") will unnecessarily unsettle the emerging online video programming market, put vertically integrated programmers at a substantial competitive disadvantage with no countervailing benefit to the public, and interfere with affected programmers' First Amendment rights.

INTRODUCTION

As the record in this proceeding demonstrates, the market for online video distribution is growing and healthy in the absence of government interference.[2/] Consumers can watch video

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

2/ *See, e.g.*, Comments of Digital Media Association ("Digital Media Comments") at 2 ("The marketplace for online video content has undergone a revolution over the last several years."); Comments of the Electronic Frontier Foundation ("EFF Comments") at 1 ("[T]oday's over-the-top video services, and the panoply of video-sharing websites and other video-centric Internet services have developed and thrived without Commission regulation."); Comments of the Consumer Electronics Association ("CEA

programming from a wide variety of sources over a number of diverse new distribution platforms, giving content providers more avenues for reaching their potential audiences than ever before. As the Consumer Enterprise Institute, the International Center for Law & Economics, and TechFreedom explain, "[t]raditional, facilities-based MVPDs continue to compete against each other, but they are no longer the only means by which consumers can access plentiful streams of video programming. Far from it: dozens of companies now sell vast and diverse video offerings over the Internet, including both prescheduled and on-demand programming."[3/] Innovative new video distribution services abound, each with unique business models and technologies, and all without any need for government enforced access to a handful of particular programming services. There is no evidence that programmers such as AMC are anything but eager to distribute over these new platforms whenever economically and legally feasible. Given all this organic energy and opportunity for success, the proposed MVPD redefinition is unnecessarily disruptive, and would have far-reaching disruptive consequences for the programming industry, and particularly for cable-affiliated programmers such as AMC.

The record makes clear that the proposed MVPD redefinition is fundamentally unworkable. Programmers may not always have the necessary rights to distribute all

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Comments") at 1 ("Now is not the time to intervene in the nascent and rapidly evolving online video marketplace, which to date has seen explosive growth absent any industry-wide regulatory involvement,"); Comments of Verizon at 1 ("Consumers are rapidly turning to the Internet to view video programming, and emerging online video distributors are addressing this demand."); Comments of the National Cable & Telecommunications Association ("NCTA Comments") at 16 ("The Notice sets as a goal fostering further competition to traditional MVPD services, but the marketplace is already responding with a variety of online linear programming services that compete with MVPDs."); and Comments of the Computer and Communications Industry Association ("CCIA Comments") at 1 ("The Commission has noted the OTT video market's recent explosion in availability and popularity.").

3/ *See, e.g.*, Comments of the Competitive Enterprise Institute, International Center for Law & Economics, and TechFreedom ("CEI Comments") at 11.

programming to OVDs,[4/] and the market for online program distribution rights is not sufficiently developed at this point for it to be economically feasible to require a programmer to acquire such rights for every single program it distributes to MVPDs. For older programming in a network's library, acquiring such rights would be a nearly insurmountable task. Such a requirement would interfere with how the program content market functions today, artificially inflate the price of online distribution rights, lower the value of programming line-ups if desired content must be excluded, impact programmers' ability to create high-quality content, and tamper with how certain high-cost programming today is financed.

Moreover, imposing the expenses and burdens associated with the Commission's proposal only on the handful of programmers subject to the rules would place them at a considerable competitive disadvantage *vis-à-vis* programmers not subject to these rules and requirements. Non-affiliated programmers, which include many of the largest and most powerful competitors in the market, would not be subject to any of these new costs, and would remain free to conduct their business as they see fit. Such a result also calls into question whether the redefinition could ever really achieve what is intended. If OVDs need guaranteed access to popular programming to prosper, how is success achieved by imposing a rule that leaves out many of the largest programmers with some of the most popular programming from their reach?

Finally, commenters demonstrate that expanding the definition of MVPD in a manner that imposes substantial new burdens on cable programmer speech runs afoul of programmers'

[4/] *See* Comments of Discovery Communications Inc., ("Discovery Comments") at 10-13; *see also* NCTA Comments at 26-27.

First Amendment rights.[5/] For all of these reasons, the Commission should decline to redefine the term "multichannel video programming distributor" to include OVDs.

I. ADOPTING A DEFINITION OF "MVPD" THAT INCLUDES ANYONE OFFERING CHANNELS OF LINEAR PROGRAMMING WOULD UNNECESSARILY DISRUPT THE EMERGING ONLINE VIDEO MARKET

There is widespread consensus that the Commission should not impose regulatory mandates that may disrupt an online video distribution market that is healthy and developing organically in the absence of regulation.[6/] All segments of the market – distributors, programmers, and advertisers – are seeing success testing a variety of innovative business models and technologies. Consumers now have access to a variety of new distribution platforms, and content producers now have many different ways to reach their potential audiences. Netflix has a growing subscriber base of 36 million U.S. households, more than any MVPD, and an increasing number of individual video programmers, such as Nickelodeon, HBO and CBS, are offering direct-to-consumer subscriptions over the Internet.[7/] Programmers such as AMC are eager to distribute over these new platforms – AMC's networks, for example, will be available on Sony's new online service, and Sony reportedly also has deals with many other programmers,

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5/ *See, e.g.*, Comments of the Motion Picture Association of America ("MPAA Comments") at 8 ("[The Commission's proposals] raise First Amendment issues and conflict with principles of copyright law."); *see also* NCTA Comments at 12-14; Discovery Comments at 20-22; and EFF Comments at 5.

6/ CEI Comments at 11 ("Applying restrictive rules to the thriving OVD marketplace will result in less innovation and investment, harming consumers and OVDs alike. Such a result conflicts with the Commission's goal in this proceeding to promote competition and protect consumers."); Digital Media Comments at 1 ("The current OTT market is vibrant and growing, and the Commission should move carefully to avoid unintended consequences that could stunt the growth of this developing field."); Comments of CenturyLink at 2 ("It is critical that any new regulations promote innovation and competition and do not pick winners and losers in the video distribution marketplace."); CEA Comments at 2 ("The *Notice* chances imposing obligations that may hinder development and deployment of new, innovative, consumer-friendly services."); and CCIA Comments at 4 ("An effort to expand the MVPD definition beyond Congress' intent could seriously hinder e-commerce and how consumers access content.").

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

including Discovery Communications, Scripps Networks Interactive, Turner Broadcasting, NBCUniversal, and Viacom. Given all this organic energy and opportunity for success, the proposed MVPD redefinition is simply unnecessarily disruptive.

Even commenters that support the Commission's proposal admit that consumers have shown "wide interest … in products such as Sling TV or Apple's rumored subscription TV service."[8/] The growth of these online alternatives demonstrates the absurdity of Public Knowledge's bald assertion that "something is holding the development of the online video marketplace back."[9/] As Discovery plainly demonstrates, "[c]onsumer choice in video is at an all-time high; viewers have at their disposal a wide variety of programming, including exclusive programming that is unavailable on MVPDs."[10/]

As these innovative business models – largely unlike the historical business models employed by MVPDs – are still developing, the Commission should tread very lightly, especially in the absence of any real threat. As the Walt Disney Company, 21st Century Fox, Inc., and CBS Corporation rightly point out, "[i]t is … imperative that the FCC act only where needed to address a market failure."[11/] The premise underlying the proposed action – that in the absence of regulation, online video distributors will not have access to programming – is false; there is no evidence whatsoever that programmers such as AMC are anything but eager to distribute over these new platforms whenever economically feasible. Walt Disney *et al.* are correct in their observation that the Commission's proposal will do little to advance the Commission's stated ends, as "Internet distribution of programming will continue to be governed by privately-

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8/ Reply Comments of Public Knowledge ("Public Knowledge Reply Comments") at 2.

9/ *Id*.

10/ Discovery Comments at 5.

11/ Comments of The Walt Disney Company, 21st Century Fox, Inc. and CBS Corporation ("Walt Disney *et al*. Comments") at 12.

negotiated copyright licenses, regardless of whether OTT providers are classified as MVPDs for purposes of the FCC rules."[12/]

At the same time, as Discovery explains, it is critical that programmers be allowed to make individual business decisions about when and where to launch their products.[13/] Requiring by government mandate that such affiliated programmers acquire and resell online distribution rights, regardless of whether it makes business sense to do so, and regardless of the relative affordability of the online rights to specific content, does nothing more than drive up the costs of programming significantly at a time when distributors already argue that programming costs are too high.

A. Programmers Cannot Be Required To Sell Online Distribution Rights To OVDs When They Do Not Possess Those Rights To Sell.

As many commenters observe, the proposed MVPD redefinition would require programmers such as AMC to distribute programming in a manner they may not always have the ability to offer.[14/] As NCTA explains, "[h]istorically, programmers have acquired distinct MVPD and online distribution rights from their program suppliers, so while the programmer may have MVPD distribution rights for a certain program, it may not have the online distribution rights for that same content."[15/] While AMC increasingly chooses and is able to obtain online distribution rights, it does not have such rights for 100 percent of its current programming, and certainly does not hold such rights for all older shows in its programming library. Nor is AMC unique in this regard; Discovery observes that "[w]hile acquisition of such rights is far more common than even a few years ago, programmers have far less than 100% of such rights for all

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12/ *Id.* at 6.

13/ Discovery Comments at 11.

14/ NCTA Comments at 26-27; *see also* Discovery Comments at 10-11.

15/ NCTA Comments at 27.

content they carry."[16/] Moreover, NCTA further points out that even if a programmer has the ability to license online distribution as part of a TV Everywhere-adjunct to an MVPD service, it may not have the ability to license the same programming for an online-only model.[17/]

The Commission's proposal that programmers simply be required to obtain those rights ignores the reality of the content acquisition marketplace. The decision to include the sale of online distribution rights in a licensing agreement is not solely a programmer's decision.[18/] The content creator or copyright holder often dictates what distribution rights it is willing to sell.[19/] Moreover, either party may have legitimate business reasons for not including online rights in the bundle of rights acquired. For example, sometimes it is simply uneconomical for a programmer to acquire the complete bundle of rights for every program it distributes to traditional MVPDs.[20/] AMC, like all programmers, has a set programming budget. AMC makes decisions daily over how to allocate funds in a manner that results in the most compelling programming service for viewers and distributors – and it is imperative that it retain that control over this most essential aspect of its business.[21/] At other times, content producers withhold

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16/ Discovery Comments at 3.

17/ NCTA Comments at 27.

18/ Walt Disney *et al*. at Comments 16 ("Content owners – whether a broadcast network, a cable programmer, or other copyright owner – should be permitted to determine the best means by which to distribute their own content to viewers."); Discovery Comments at 11 ("[T]he decision to purchase or sell any bundle of rights, including online distribution rights, appropriately lies with the programming vendor and the copyright holder.").

19/ Walt Disney *et al*. Comments at 13-14 (noting that even programmers that distribute their own programming online "do not necessarily own the copyrights to the underlying content.").

20/ Comments of DIRECTV, LLC ("DIRECTV Comments") at 10 ("[R]equiring programmers to obtain [online distribution rights] would put them in the untenable position of not being able to walk from even an unreasonable commercial offer, if that offer contained online distribution rights.").

21/ Discovery Comments at 11 ("Programmers have limited programming budgets, and must have discretion over how to allocate those funds[.]");Walt Disney *et al*. Comments ("FCC intervention in copyright would increase the cost of programming, which, in turn, could have the unintended consequences of reducing the amount and/or quality of programming available in the marketplace.").

online distribution rights as they make the business decision to retain exclusive rights to the distribution of their content online, or to negotiate with OVDs directly for the distribution of their content. [22/] Regardless of the reason that online rights are excluded, the business reality is that programmers sometimes do not have the online rights to programming that they sell to traditional MVPDs such that they can make it also available to OVDs. [23/]

In addition, as Discovery explains, the market for online rights is still quite unformed: "there is not yet any stable or consistent approach to pricing such rights, and content providers' quote for such rights can fluctuate greatly."[24/] In AMC's experience, because there is not yet a consensus on the economic value of online distribution rights, the price for obtaining such rights can vary greatly. Some content creators enjoy the prospect of online distribution, while others, sensing opportunity, are speculating the upper limits of those values. The unpredictable nature of the asking price makes it difficult to establish and conform to programming budgets; as Discovery notes, "the price for content when online distribution rights are acquired may add a small fraction to the total programming costs, or can increase it significantly."[25/]

Programmers need flexibility to determine whether their budgets can absorb these additional costs, especially when "price demands for online distribution rights are high enough that the cost of acquiring those rights outweighs the benefits of obtaining them."[26/] Because, as discussed below, the Commission's proposal will give licensors incentives to demand ever-

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22/ DIRECTV Comments at 8 (noting that sports leagues, for example, often reserve online distribution rights to themselves or license them to other distributors).

23/ DIRECTV Comments at 9 ("Programmers … generally would like to license their programming to as many distributors as possible, regardless of distribution method. Yet they often lack the rights to do so.").

24/ Discovery Comments at 11.

25/ *Id.*

26/ *Id.* at 11-12.

higher prices for online distribution rights, it is increasingly likely that the purchase of such rights will not make economic sense in 100% of situations.

Even when a programmer acquires online distribution rights, it is not always with the intent of using those rights in conjunction with its linear programming. When content is especially expensive, either to acquire or to produce in-house, it is not uncommon for a programmer to try to recover some of the costs of that programming by selling the online distribution rights to another entity, or by licensing certain programs on an on-demand basis to Netflix or other non-linear distributors.[27/] Without these extra funds, programmers could be unable to compete for the highest quality content, yet the Commission's proposal would deprive programmers of this alternative.

As the Motion Pictures Association of America ("MPAA") points out, "the ability of content producers and distributors to decide what programming to create, license, and disseminate is what makes the online marketplace so dynamic. It also enables companies to manage the economic risks they face in the competitive and unpredictable online video marketplace, thereby allowing them to continue investing and innovating to deliver high-quality content to consumers."[28/] Even Syncbak, an online video distributor that otherwise endorses the Commission's proposal, states affirmatively that the "[t]he FCC must be careful to develop rules under which the rights of program owners and programmers are respected in all forms of television distribution, including those that rely in whole or in part on the Internet for distribution."[29/] The Commission must not risk the continued growth and success of the online

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[27/] Discovery Comments at 12 ("[P]rogrammers who produce their own content in-house may sometimes seek to subsidize their production costs … by selling the online distribution rights of their own programming to another entity.").

[28/] MPAA Comments at 7-8.

[29/] Comments of Syncbak, Inc. at 9.

video marketplace by needlessly interfering in the developing relationships between programmers, content providers, and distributors.

B. Requiring Programmers To Purchase Online Distribution Rights Will Lead To Increased Programming Costs And Competitive Disparity Among Programmers.

Public Knowledge's statement that Discovery's concerns about increased costs is unfounded because "it is difficult to generalize about what rights may be in play"[30/] is perplexing, given that the *NPRM* expressly contemplates the idea that cable-affiliated programmers be forced to obtain such online distribution rights to comply with the program access rules.[31/] As Discovery aptly notes, it is self-evident that "having to acquire additional distribution rights would raise overall programming costs."[32/]

Under the Commission's proposed regime, a programmer would have to purchase all rights in all circumstances, and pay full freight for the entire bundle of rights, no matter what the cost. These costs can be substantial and content owners would likely take advantage of their newly-found leverage to increase costs further.[33/] Moreover, "programmers would have to acquire such rights even if no online video distributor had even asked to carry the programming,"[34/] and even though there is as of yet no good case that investment in online distribution rights results in a return on that investment (especially because there is no effective means of measuring viewers on most such devices). Costs would eventually be passed through

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30/ Public Knowledge Reply Comments at 6.

31/ *NPRM* ¶ 69.

32/ Discovery Comments at 11.

33/ *See id.* at 12 ("[K]nowing that programmers cannot refuse a price offer for online distribution rights without passing up entirely on the programming, content creators would like raise the price of [online distribution] rights even further.").

34/ *Id.*

to all subscribers, either "forcing MVPD subscribers to subsidize costs for those viewing online"[35/] or forcing the programmers themselves to take a significant loss.

This result would be unworkable. A regulatory mandate that *requires* programmers to purchase online rights gives content owners incredible leverage to make otherwise unreasonable demands, knowing a programmer will have no choice but to accede to those demands or risk losing content to a competing programmer not covered by the rules. Forcing affiliated programmers to pay unreasonably high rates for rights will put pressure on programming costs for distributors, and eventually on consumer retail costs. While Public Knowledge appears to believe that it would not be problematic for programmers to raise costs to distributors,[36/] distributors will be resistant to paying higher prices for the same programming, and could choose to forego the programming and replace it with programming from a competitor.

The only alternative to this result that programmers would have under the Commission's proposal would be to pass on the opportunity to acquire high-value content when the asking price for online distribution rights is too high.[37/] Programmers subject to the requirement would have fewer choices for acquiring content, and would be forced to create programming line-ups based on which content creators sell online distribution rights at a reasonable cost. The result would be a lower-quality line-up based on factors that should not drive programming decisions. There is no justification for this result in a market that is already functioning well.[38/]

35/ *Id.*

36/ Public Knowledge Reply Comments at 6.

37/ NCTA Comments at 26-27 ("Cable-owned programmers would have to decide whether to pay whatever the program owner might charge for [bundled online and facilities-based distribution rights] … or not carry the programming on their networks.").

38/ Walt Disney *et al*. at 10 ("Distribution of cable network programming is, and always has been, determined by private, market-based negotiations and agreements. Those same rules apply today – without market disruption – to the online video marketplace for the retransmission of both broadcast station and cable network content.").

The proposed change in rules would also exacerbate the already unlevel playing field among programmers, as affiliated programmers would be forced to expend significant resources negotiating with any number of new market entrants, which could number in the hundreds depending on how the Commission defines the scope of Internet-based MVPD. Non-affiliated programmers, which include many of the largest and most powerful competitors in the market, would not be subject to any of the new costs associated with the expansion of the program access rules, and would remain free to conduct their business as they see fit, experimenting with new online business models and investing programming funds only when on where it makes business sense to do so.[39/] Indeed, non-affiliated programmers such as The Walt Disney Company, 21st Century Fox, Inc. and CBS Corporation proudly tout their commitment to tread into online distribution carefully, and – only over time – to "evolve their distribution strategies to meet consumer demand for access to content enabled by Internet distribution."[40/] Programmers such as AMC, in contrast, by virtue of these long-outdated rules, would be prevented from "evolving their business strategies" and instead would be forced to change their business model immediately, and to compete with programmers that do not face the same mandatory cost increases.

Only a few programmers are subject to the program access rules today, and they already bear an unfair burden compared to the rest of the industry. There is no correlation between ownership interests by a cable operator and the popularity or ratings of a network – indeed, much of the programming most commonly considered "must have" is not subject to the program access rules at all, nor is programming owned by DBS operators, even though they are much larger and more powerful than all but a few cable operators. Yet the rules impose unique burdens on the

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39/ Discovery Comments at 15.

40/ Walt Disney *et. al.* Comments at 2-5.

handful of cable-affiliated programmers, and this proposal would cement and extend those disparities.[41/]

This burden will be accompanied by very little positive result. Guaranteeing OVDs access to the most popular programming will never be achieved by a rule that covers only programmers subject to program access rules, because such a rule excludes the largest programmers with the most popular programming. There is no justification for placing only particular programmers in the market at such a huge disadvantage.

C. Expanding The MVPD Definition Could Subject Affected Programmers To Innumerable And Onerous Complaints.

Programmers subject to program access rules are required to price their networks in a nondiscriminatory fashion, so that comparable distributors pay comparable prices. Even among traditional MVPDs, who all pursue the same business model, it is often complicated to determine what makes an MVPD comparable. NCTA observes that "determining the substantive grounds and procedures for resolving case-by-case adjudications of program access complaints – even for the well-defined group of facilities-based MVPDs and MVPD buying groups that are entitled to bring such complaints – has been a complex task for the Commission."[42/] In the OVD world, where distributors can fashion any service offering they believe will tempt customers and services could be very different, discerning which distributors are similar or comparable could be even more difficult.

As Discovery explains, the Commission's proposal would subject certain programmers to "excessive and unreasonable risk of a discrimination complaint."[43/] The lack of a well-established mechanism for pricing newly-developed business models, and the relative

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41/ Discovery Comments at 13.

42/ NCTA Comments at 29.

43/ Discovery Comments at 14.

inexperience of many new distributors in carriage negotiations, means that parties to a negotiation could very well have good faith differences of opinion about what they believe is a fair, nondiscriminatory price. By placing these negotiations under the FCC microscope, the proposed redefinition could open the floodgates of litigation and complaints, forcing affected programmers to defend against numerous complaints, even if baseless, and putting the Commission in the inappropriate position of dictating pricing for an emerging but unsettled market.[44/]

Public Knowledge's assertion that because the program access rules "protect MVPDs from anti-competitive action by other MVPDs" … they "do not burden programmers *per se*,"[45/] demonstrates a startling lack of understanding of the rules. The burden of the program access rules fall nearly entirely on programmers, who must constantly engage in an effort to ensure that all prices, terms and conditions are comparable across all distributors and face the prospect of unwarranted complaints every time a distributor sees the value of its offering in a different light than the programmer might believe. Public Knowledge's assertion that Discovery's concern about being drawn into new program access disputes is "colored by its experience in the Sky Angel matter"[46/] ignores programmers' valid concerns about "an avalanche of patently unreasonable program access complaints."[47/] "Putting to rest the primary legal question"[48/] about whether or not online distributors are MVPDs would not alleviate the risk of complaints in the least, as Public Knowledge contends; it would instead expand the pool of distributors that

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44/ As NCTA points out, the inevitable increase in unwarranted litigation will also place an enormous administrative burden on the Commission itself. *See* NCTA Comments at 29-30.

45/ Public Knowledge Reply Comments at 6.

46/ *Id*.

47/ Discovery Comments at 14.

48/ Public Knowledge Reply Comments at 6.

programmers must attempt to compare and evaluate for similarity and the pool of distributors ready to complain about those decisions.[49/]

As a result, affected programmers would have no choice but to institute sterilized and defensive pricing for their services, and some artificial means of determining what services are "comparable" in a world where everyone's service are in fact very different. Instead of using strategies to maximize the value of their content, affiliate programmer negotiating strategies will be driven by avoiding the risk of receiving a program access complaint. And distributors of all types will use the threat of a complaint as a weapon in negotiations with affected programmers, driving down further programmers' already-diminished bargaining power.

The need for defensive pricing will put affiliated programmers at even more of a competitive disadvantage compared to unaffiliated programmers, who will face no such risk and can price their networks higher to pay more for high-quality content. There is no justification for putting in place unnecessary rules that give a clear advantage to unaffiliated programmers. Rules based solely on a programmer's status as cable-affiliated should be based on evidence that there is a unique problem arising out of that affiliated status that calls for such disparate treatment.[50/] No such evidence exists here.

[49/] AMC agrees with Discovery that, regardless of the outcome of this proceeding, the Commission cannot apply the rule change retroactively and allow distributors that were not MVPDs to bring complaints based on past distribution decisions. Discovery Comments at 7-10.

[50/] Even if the Commission's policy goals of encouraging the development of online video would be furthered by expanding the concept of which entities are an MVPD (which they would not), AMC agrees that the Commission cannot expand the definition in a manner that violates the MVPD statutory definition in Section 602(13) of the Communications Act, which provides that an "MVPD" is an entity that "makes available to purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13). AMC agrees with commenters that key to the definition of MVPD is the provision of channels, and "channel" is defined in the Communications Act solely in terms of its delivery capabilities as part of a physical system – *i.e.*, the physical pathway by which video programming is delivered. The statutory definition just cannot support the inclusion of OVDs that do not and cannot "make available" any "channels" of video programming because they do not own or control the physical transmission paths for such programming. *See, e.g.*, CEI Comments at 3 ("[T]he term MVPD unambiguously encompasses

II. THE COMMISSION'S PROPOSAL CREATES IMPERMISSIBLE FIRST AMENDMENT BURDENS

Commenters agree that expanding the program access rules to allow Internet-based programming distributors to assert program access rights and requiring programmers to purchase online distribution rights would impermissibly restrict the protected speech of cable program networks.[51/] As NCTA states, "[i]nterpreting the term MVPD to encompass all OVDs that offer multiple linear streams of video programming would vastly extend the scope of the program access and program carriage provisions of the [Communications] Act in a manner that also extends their substantial impact on First Amendment rights."[52/] The Electronic Frontier Foundation explains that "regulation of the content of communications … is disfavored (or in some cases prohibited) under the First Amendment."[53/] MPAA points out that the FCC's interference with "the licensing relationships among content creators, programmers, and distributors raise significant issues under the First Amendment and copyright law,"[54/] as "[u]nder the First Amendment, it is the speaker and the audience acting in the marketplace of ideas – not

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only video distributors that own or operate the facilities for delivering content to consumers."); *see also* Comments of Cox Communications, Inc. at 2 ("Reading the transmission path element out of the term 'channels of video programming' is inconsistent with congressional intent."); CEA Comments at 4 ("The Notice's proposed definition relies on an interpretation of 'channel' that likely is inconsistent with Title VI."); Discovery Comments at 16-17 ("OVDs do not 'make available' multiple 'channels' of video programming because they do not own or control the transmission paths for such programming."); and NCTA Comments at 6 ("[The definition of MVPD] both by its terms and by Congressional intent, applies only to facilities-based providers of video programming services and not to entities that, like OVDs, sell only programming – and no accompanying transmission path – to subscribers.").

51/ *See, e.g.*, NCTA Comments at 12-14; Discovery Comments at 20-22; EFF Comments at 5; MPAA Comments at 9-10. All cable programmers "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"), *citing Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

52/ NCTA Comments at 13.

53/ EFF Comments at 5.

54/ MPAA Comments at 1.

the government – that determines what is said and heard."[55/] Discovery also agrees that "the proposal runs afoul of the First Amendment."[56/]

AMC has the right to present its speech in the environment and context it chooses, including whether, when, and how its programming is distributed over the Internet (including whether to purchase online rights from copyright holders). Compelling programmers like AMC to offer programming to any and all online distributors has the effect of forcing it to speak even at times it would prefer to remain silent.[57/] As Discovery explains, "[t]he Linear Programming Interpretation would expand the class of entities entitled to government-mandated access to programming to a potentially unlimited number of online distributors, forcing [programmers] to speak in a venue and manner not of its own determination."[58/] An action that "[m]andat[es] speech that a speaker would not otherwise make," is inherently a "content-based" restriction and must be evaluated under a strict scrutiny analysis.[59/] Strict scrutiny is also triggered by content-based regulation, applicable here because the effect of the change would be to prevent AMC from offering certain content to its viewers if it cannot acquire online video distribution rights. Under the strict scrutiny standard, the Commission must demonstrate that the burden on speech caused by the change in definition serves a compelling governmental interest, and that it is

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55/ *Id.* at 9.

56/ Discovery Comments at 5.

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

58/ Discovery Comments at 20.

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

narrowly tailored to achieve that end.[60/] Discovery correctly notes that "[t]he Commission can do neither."[61/]

First, as Discovery states, "[a] rule that significantly expands the universe of MVPDs eligible for program access rights serves no compelling governmental interest."[62/] While the Commission states an interest in imposing the new rules to enhance competition for video programming distribution services by encouraging new entrants in the online market,[63/] this interest is hardly compelling, given that new options for online video have been emerging and gaining viewers rapidly in the absence of any government regulation. NCTA asks, "is there any evidence that the burgeoning competition in the Internet-based video marketplace has been hampered by a lack of access to cable-owned program networks?" Because the answer is clearly no, "extending MVPD status to these online distributors will almost surely fall short under any analysis of the constitutionality of the program access…provisions of the law."[64/] It is particularly telling that very few OVDs participated in the initial round of comments, suggesting that access to affiliated programming is not widely felt to be necessary to compete successfully in the marketplace.

Second, as Discovery points out, the proposal is also not narrowly tailored to achieve the government's stated purpose. "Although courts have concluded that the existing program access rules impose on programmers no greater burden than is necessary to further even an important or substantial (as opposed to compelling) government interest, the expansion of the program access

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

61/ Discovery Comments at 20.

62/ *Id.*

63/ *NPRM* ¶ 5.

64/ NCTA Comments at 13.

rules to an unknown number of OVDs would substantially alter that analysis."[65/] The vast expansion of the program access rules, which already strain the limits of permissible restriction on speech "given the development of competition in the facilities-based MVPD marketplace along with the decline in the amount of programming owned by cable operators,"[66/] cannot reasonably be considered "narrowly tailored" to serve any government purpose.

Moreover, the Commission's proposal cannot even withstand examination under intermediate scrutiny, which allows burdens on cable programmers' protected speech only if they "further[] an important or substantial governmental interest" and are "no greater than is essential to the furtherance of that interest."[67/] As NCTA explains, when the D.C. Circuit first considered the constitutionality of the program access rules in 1996, the Court determined that the rules were permissible under the intermediate scrutiny standard because they "served an important government interest – promoting competition in a marketplace where effective competition among MVPDs barely existed." [68/] Today there is no longer a legitimate government interest in promoting competition in a market that is already vibrant and thriving. Further, the intrusion is both overbroad (because it would require AMC to acquire or retain online rights for all programming it acquires, whether or not any OVD needs that programming to survive or succeed) and underbroad (because it applies only to a handful of programmers, who have not been shown to be necessary components of an OVD service for that OVD to compete,

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65/ Discovery Comments at 21, *citing Time Warner Entertainment Co. v. FCC*, 93 F. 3d 957, 978 (D.C. Cir. 1996); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

66/ NCTA at 13, *citing Cablevision*, 597 F.3d 1315-29 (dissenting opinion of Judge Kavanaugh); *Comcast Cable Communications v. FCC*, 717 F.3d 982, 987-994 (D.C. Cir. 2013) (concurring opinion of Judge Kavanaugh).

67/ *See Turner I*, 512 U.S. at 662, *quoting United States v. O'Brien*, 391 U.S. 367, 377 (1968).

68/ NCTA Comments at 13.

and it excludes the largest programmers with the most popular programs, who are arguably significantly more important to an OVD offering's success).

The market for online video distribution is competitive and thriving, and consumers have more viewing choices than ever before. Given these circumstances, the substantial First Amendment burdens created by the Commission's proposal cannot be justified.

CONCLUSION

The record makes clear that re-interpreting the definition of "multichannel video programming distributor" to include online video distributors contravenes the statute and violates programmers' First Amendment rights by dramatically expanding program access obligations, and would substantially distort the video programming marketplace. The FCC should not adopt its proposal to redefine the term "multichannel video programming distributor" to include online video distributors.

Respectfully submitted,

/S/

Tara M. Corvo
Craig Gilley
Mary Lovejoy
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for AMC Networks Inc.

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