

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

REPLY COMMENTS



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I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”) files these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) and comments filed in the above-captioned proceeding.¹ Through this rulemaking, the Commission seeks to promote innovation and competition in the provision of multichannel video programming distribution services. Specifically, the Commission proposes to enable certain online video distributors (“OVDs”) to avail themselves of the privileges Congress afforded multichannel video programming distributors (“MVPDs”), to subject them to certain obligations borne by traditional MVPDs, and to clarify the status of traditional cable and direct broadcast satellite (“DBS”) MVPDs providing similar over-the-top video services. The ultimate and laudable goal is to enable a regulatory environment that promotes fair access to programming for video providers and greater consumer choice in MVPD offerings. The NPRM accordingly proposes to update the Commission’s rules to include within the scope of its MVPD definition entities providing services over the Internet that make available for purchase, by subscribers or customers, multiple linear streams of programming, regardless of their ownership of the facilities over which the programming is distributed.²

ACA’s members raise no objections to new entrants to the video distribution marketplace and welcome new approaches to the provision of multiple channels of video programming to the public. For reasons beyond the control of cable operators, offering a viable cable service in the current marketplace is increasingly challenging, particularly for smaller operators, and cable customers seem increasingly dissatisfied with the service. ACA members, like many other entities, are therefore increasingly interested in offering various types of over-the-top video

¹ *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 (rel. Dec. 19, 2014) (“NPRM”).

² *Id.*, ¶ 1.

offerings both inside and outside their managed MVPD service footprints and partnering with existing and new providers of these services to give consumers more choices in how, where and when they receive their video programming services.

Accordingly, ACA applauds efforts by the Commission to re-evaluate the manner in which it implements the Communications Act (the “Act”) to ensure that its rules have kept pace with current marketplace conditions. ACA believes that regulations related to the provision of video services should be reviewed periodically and updated when necessary to ensure that they remain necessary, appropriate and in the public interest consistent with statutory language and current marketplace conditions. This is simply good stewardship of the Commission’s own statutory public interest obligations. ACA is therefore pleased that the NPRM explores ways that the Commission can reasonably fashion a fair and balanced regulatory environment for all MVPDs – facilities-based and over-the-top – but maintains that this exercise must be accomplished within the confines of the Act.

Definition of MVPD Requires Provision of Transmission Path. While ACA and its members support innovation and do not object to additional entry into the multichannel video distribution marketplace, ACA submits that the Commission’s preferred “Linear Programming Interpretation,” which would permit Linear OVDs to be deemed as MVPDs, cannot be reconciled with either the Act’s statutory language or the Commission’s own previous interpretations of the term “MVPD.” This alone prevents the Commission from acting, but it is not the only reason to hold off. The lack of any obvious marketplace problem demonstrated in the NPRM or the record supporting such regulatory intervention, and the hideous complexities of trying to both impose MVPD status on linear OVDs while limiting unwanted regulatory fallout from such an awkward interpretation of the Act counsels against it on public policy grounds.

ACA continues to maintain, as it did in response to the Media Bureau’s 2012 request for comment on this issue, that the best interpretation of the term “MVPD” is what the NPRM refers

to as the “Transmission Path Interpretation,” requiring that an entity provide a transmission path over which it makes available for purchase multiple channels of video programming to qualify as an MVPD.³ This interpretation of “MVPD” is not only the most natural reading of the relevant statutory definitions and provisions, it is also demonstrably consistent with the text, purpose, legislative history, and the context in which the terms are used in the Act. In contrast, the Commission’s proposed Linear Programming Interpretation that would consider an entity to be an MVPD if it makes available for purchase multiple linear streams of video programming without regard to whether it offers a transmission path, is implausible and fails on all counts.⁴

The term “MVPD” was adopted in 1992 when new competitors to cable were emerging and was designed to include both cable operators and other types of facilities-based entities similar to cable operators that Congress anticipated would enter the multichannel video distribution market. As the NPRM notes, the term is of critical importance for application of the program access rules,⁵ as well as for several other statutory provisions, including retransmission

³ The “Transmission Path Interpretation” is consistent with the interpretation previously given by the Media Bureau in the Sky Angel Standstill Denial. See *Sky Angel U.S., LLC; Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, ¶ 7 (2010) (“Sky Angel Standstill Denial”). In response to the Media Bureau’s request for comment on this and an alternative interpretation similar to the Commission’s Linear Programming Interpretation, ACA filed comments supporting the Media Bureau’s conclusions that an MVPD is an entity that provides both multiple channels of video programming and the transmission path over which the programming is distributed. *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, Public Notice, 27 FCC Rcd 3079 (2012) (“Public Notice” or “PN”); *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” Raised in the Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Comments of the American Cable Association (filed May 14, 2012) (“ACA PN Comments”).

⁴ See *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of the National Cable and Telecommunications Association at 5-15 (filed Mar. 3, 2015) (“NCTA Comments”); Comments of Cox Communications, Inc. at 10 (filed Mar. 3, 2015) (“Cox Comments”); Comments of CenturyLink at 4-7 (filed Mar. 3, 2015) (“CenturyLink Comments”); Comments of the Competitive Enterprise Institute, International Center for Law & Economics and Tech Freedom at 1-6 (filed Mar. 3, 2015) (“CEI et al. Comments”); Comments of the Consumer Electronics Association at 4-6 (filed Mar. 3, 2015)..

⁵ 47 U.S.C. §§ 543 (l)(1), 548.

consent.⁶ Because MVPD status is key to several statutory benefits and obligations, any interpretation of the definition of “MVPD” and of the terms integral to this definition, “channels” and “video programming,” must be done with an eye toward determining which entities Congress intended to bring within the Commission’s regulatory authority for purposes of applying these specific regulatory benefits and obligations.⁷ To put it simply, the overarching question becomes, is it plausible to interpret the provisions of the Act applicable to MVPDs as applicable to online content, applications, and service providers using last mile broadband Internet connections that they do not provide themselves as the NPRM proposes? In ACA’s view, the answer is: no. The large number of open-ended questions posed by the NPRM in terms of how the foregoing MVPD obligations would have to be tailored or rethought in order to sensibly apply to distributors of video programming over the Internet alone suggests that these rules were not intended to apply to this type of entity.⁸

The question of who may be deemed by the Commission to be an MVPD under the Act is governed, first and foremost, by the text of the statutory definitions. An examination of the relevant statutory definitions demonstrates that Congress intended to limit the sweep of Title VI regulation of MVPDs to facilities-based entities similar to cable operators who make available to subscribers both the conduit and content – the transmission path and multiple channels of video programming over the last mile facilities. As demonstrated below, this facilities-based interpretation is supported by the words of the statutory definitions, the context in which the term MVPD is used in the Act, as well as the legislative history. It is also reflected by the fact that

⁶ 47 U.S.C. §§ 325(b) (retransmission consent), 543(a)(2) (cable effective competition), 59 (commercial availability of navigation devices).

⁷ In interpreting which entities fall within the ambit particular regulation, a regulatory agency “must take into account ‘the provisions of the whole law, and . . . its object and policy.’” *National Cable Television Association, Inc. v. F.C.C.*, 33 F.3d 66, 75 (D.C. Cir. 1994); *United States Nat’l Bank v. Independent Ins. Agents, Inc.*, 508 U.S. 439, 455 (1993).

⁸ See NPRM, ¶¶ 46-63 (seeking comment on a variety of specific MVPD obligations that would be triggered by the Linear Programming Interpretation).

Congress and the Commission to date each have accorded separate status to video programming distributed over the Internet since the term was first defined in the Act. The Commission has accorded Internet video separate treatment, and has consistently and repeatedly refrained from subjecting “over-the-top” Internet video to regulations designed for MVPDs. This is not only a matter of statutory interpretation, but of wise public policy. The Commission should hesitate to impose a significant regulatory regime such as MVPD status to entities that have entered the market and appear to be, on the whole, thriving without the aid of regulatory intervention.

The examples cited in the NPRM where this may not be true – Aereo and Sky Angel – rightly provide the Commission with cause to thoroughly examine the issue of whether Congress intended to extend MVPD status to such entities, but do not support the case for immediate regulatory intervention. ACA sees no reason for the Commission to now diverge from its established precedents by re-interpreting “channels of video programming” and “MVPD” so as to extend the reach of Title VI regulation to non-facilities based linear OVDs. Such a wide-sweeping decision to reverse settled interpretations, and include linear OVDs under the ambit of the term “MVPD” should properly be left to Congress. Indeed, rather than continue to pursue that issue, the Commission may best effectuate Congressional intent and foster a competitive MVPD marketplace by adopting reforms in other long-pending proceedings regarding the retransmission consent good faith rules and its program access rules.

With respect to issues raised in the current proceeding, ACA submits that irrespective of whether the Commission grants MVPD status to linear OVDs, to achieve its goals concerning innovation and competition in the provision of multichannel video distribution services, the following actions must be taken.

Parity of Treatment for Cable Service Provided via Internet Protocol (“IP”) Over the Operator’s Facilities. To promote competition in the provision of multichannel video distribution

services, the Commission should confirm that a cable MVPD offering a managed cable service over facilities it owns or controls that meet the definition of a “cable system” will be treated as a cable operator under the Act with regard to that offering regardless of the transmission protocol (e.g., analog, digital, IP) utilized to offer the service. Specifically, the Commission must clarify that an MVPD offering a service using IP transmission to distribute video programming over a cable system it owns or controls is a cable operator providing a cable service.

Treatment of Cable Operator Offerings of Over-The-Top (“OTT”) Services. ACA applauds the Commission’s forward-looking tentative conclusion that video programming services an entity otherwise classified as a cable operator offers over the Internet should not be regulated as cable services and recommends that it be adopted, regardless of any action to classify linear OVDs as MVPDs. Specifically, it must also clarify that a cable operator distributing video services over the Internet to its subscribers is not providing a cable service.

Taking these two actions will both ensure greater regulatory certainty for cable operators wishing to join the great digital migration and distribute video programming online, as so many entities are now doing, and help achieve the Commission’s goals of promoting innovation and competition in the multichannel and non-multichannel video programming distribution markets.

Treatment of Cable MVPDs and Linear OVD MVPDs. Although ACA believes the Commission cannot permissibly grant MVPD status to linear OVDs, ACA proposes the following actions should the Commission find to the contrary. Specifically, should the Commission extend MVPD status to linear OVDs, the Commission must ensure even-handed regulatory treatment between the following types of MVPDs:

- A Cable MVPD offering both a managed service as a cable operator and offering a non-managed linear OVD service (i.e. over the Internet) that is accessed by subscribers over its affiliated broadband Internet platform with MVPDs offering a non-managed service as a linear OVDs within the Cable MVPD’s service footprint; and

- A Cable MVPD offering a managed cable service as a cable operator with MVPDs offering a non-managed service as a linear OVD within the cable MVPD's service footprint.

Specifically, if the Commission deems linear OVDs to be MVPDs it must also (i) confirm that any entity may offer a linear OVD service as an MVPD regardless of whether or not the entity is owned or affiliated with another entity offering cable service; (ii) confirm that an entity offering a linear OVD service will not be treated as a cable operator providing cable service when its OVD service is distributed over the network of an owned or affiliated broadband Internet platform regardless of whether the network also provides cable service; and (iii) ensure that cable operators are able to compete fairly with OVDs by declaring that a cable operator who has the right to distribute broadcast television stations and cable-affiliated programming networks over their managed cable service are not denied the right to make such content available to their cable customers over-the-top. In other words, once any MVPD is granted consent to retransmit broadcast station signals or cable-affiliated programming, it should not be prevented from redistributing the programming in any legally permissible way without limitation or discrimination, whether as part of its managed MVPD service or over the Internet as an over-the-top offering.

Adoption of this even-handed and measured approach to the movement of video programming online will ensure equality of program access for both linear OVDs and providers of managed MVPD services over facilities that they own or control and allow the Commission to achieve the goals set forth in the NPRM in this proceeding.

II. THE MOST REASONABLE INTERPRETATION OF THE TERM "MVPD" REQUIRES THAT AN ENTITY MAKE AVAILABLE FOR PURCHASE BOTH VIDEO PROGRAMMING AND A TRANSMISSION PATH OVER WHICH THE PROGRAMMING IS DELIVERED

The NPRM posits that the Commission may "modernize" its interpretation of the statutory definition of an MVPD to be technology-neutral and opines that this approach is warranted by the terms of the statute, the expectations of consumers and marketplace

developments.⁹ Two primary competing interpretations – the “Linear Programming Interpretation” and the “Transmission Path Interpretation” – are delineated.¹⁰ The NPRM proposes to adopt the Linear Programming Interpretation and afford entities that make available multiple streams of pre-scheduled video programming over the Internet MVPD status, while seeking comment on the alternative Transmission Path Interpretation that had been preliminarily adopted earlier by the Media Bureau.¹¹

Specifically, the Commission proposes to interpret the term “channels of video programming” to mean prescheduled streams of video programming (which it refers to as “linear” programming), without regard to whether the same entity is also providing the transmission path, as is the case today for existing MVPDs such as cable operators, DBS operators and IPTV providers. To this end, it finds that the term “channel” is ambiguous and that the best reading of the statutory phrase “channels of video programming” means streams of linear (pre-scheduled) video programming.¹² It tentatively concludes that the statutory definition of MVPD includes certain Internet-based distributors of video programming – “entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time.”¹³

ACA respectfully disagrees. An MVPD “must own or operate the facilities for delivering content to consumers,” an interpretation reached correctly by the Media Bureau just a few years

⁹ *Id.*, ¶ 1 (“[W]e propose to modernize our interpretation of the term [MVPD] by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Such an approach will ensure both that incumbent providers will continue to be subject to the pro-competitive, consumer-focused regulations that apply to MVPDs as they transition their services to the Internet and that nascent, Internet-based video programming services will have access to the tools they need to compete with established providers.”).

¹⁰ *Id.*, ¶¶ 18, 29.

¹¹ *Id.*, ¶¶ 18, 29; Sky Angel Standstill Denial, ¶ 7.

¹² NPRM, ¶¶ 17-19, 21.

¹³ *Id.*, ¶ 13.

ago.¹⁴ Although ACA appreciates the Commission's desire to keep up with the times, for better or worse, the terms of the statute remain technology and service-specific, and in this case, cannot plausibly lend themselves to the technology-neutral interpretation the Commission favors. Even when interpreting a statutory ambiguity, the Commission must take care not to give the statute an implausible reading, lest it exceed the authority given it by Congress.¹⁵

The overriding question is whether the language of the definition suggests that Congress intended to extend MVPD status to entities that deliver multiple streams of video programming over the Internet. An effort to answer this question must begin with the statutory definition of an MVPD as well as the regulatory framework in which it was intended to be operative. The Act defines an MVPD as:

[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.¹⁶

Thus, there are key two elements of the definition: the entity (i) must be similar to (i.e., "such as") a cable operator, DBS provider, wireless cable or television receive-only satellite program distributor; and (ii) must make available to subscribers multiple channels of video programming. Both elements must be met before the regulatory benefits and obligations attendant to that classification can apply. As discussed in detail below, an examination of these elements supports the alternative "Transmission Path Interpretation," and shows the Commission's preferred "Linear Programming Interpretation" to be implausible. That is, to qualify as an

¹⁴ Sky Angel Standstill Denial, ¶ 7; see CEI et al. Comments at 1; NCTA Comments at 1-2; Cox Comments at 1, 5-9.

¹⁵ See Scalia, J. dissent, *NCTA v. Brand X*, 545 U.S. 967, 1005, 1013 (2005); (cautioning against "how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions").

¹⁶ 47 U.S.C. § 522(13); see also 47 C.F.R. §§ 76.1000(e) (program access), 76.64(d) (retransmission consent), 76.71(a) (EEO), 76.1200(b) (navigation devices), 76.1300(d) (program carriage).

MVPD, an entity must make available for purchase “multiple channels of video programming” over a transmission path it provides for the delivery of video programming to subscribers.¹⁷

A. An “MVPD” is an Entity that “Makes Available for Purchase” “Multiple Channels of Video Programming” Delivered Over Last Mile Facilities that It Owns or Controls.

The only plausible reading of the Act is that Congress intended to limit MVPD status to facilities-based providers. The fact that many of the legal requirements applicable to MVPDs presume that the MVPD provides facilities lends support for interpreting “MVPD” and “channel” as requiring that an entity make available a transmission path. The Commission’s proposed Linear Programming Interpretation cannot be squared with the statutory definition of “channel” or the statute as a whole. Rather, the text of the definitions, context in which they are used, Commission precedent and legislative history support the interpretation of the terms “channel” and “MVPD” as referencing facilities-based providers of video programming and as requiring the provision of a physical transmission path for delivery of video programming to the subscriber.

Section 602(13) of the Act limits the category of “MVPD” to entities providing video programming in a particular way: the entity must “mak[e] available for purchase, by subscribers or customers, multiple channels of programming.”¹⁸ The Commission has construed “this term according to the plain meaning of the statute as applying to entities that distribute (*i.e.*, make available to customers or subscribers) more than one channel of video programming in a franchise area.”¹⁹ Consistent with the foregoing, as discussed below, the Commission has traditionally interpreted the definition of “MVPD” as used in Title VI as requiring that the entity be

¹⁷ This is the interpretation the Media Bureau previously found to be the better interpretation of the statute. See Public Notice, ¶ 6; Sky Angel Standstill Denial, ¶ 7; ACA PN Comments at 5-20 (supporting Media Bureau interpretation).

¹⁸ 47 U.S.C. § 522(13).

¹⁹ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 20 (1993) (“1993 Rate Regulation Order”).

involved in last-mile delivery.²⁰ This interpretation is dictated by the text, structure and legislative history of the term “MVPD” contained in the Act.

B. The Text of the Statute and Commission Precedent Support an Interpretation of the Definition of “MVPD” as a Requiring the Provision of a Transmission Path for Delivery of Video Programming to Subscribers.

As the NPRM notes, Congress structured the definition of “MVPD” in two parts. The first part is a non-exclusive, illustrative list of a specific class of entity: an MVPD 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”²¹ The second part is descriptive: an MVPD is an entity “who makes available for purchase, by subscribers or customers, multiple channels of video programming.”²² Although the Media Bureau had concluded that the phrase “such as” indicated a Congressional intent that the other covered entities be “similar” in structure to those listed in the provision, the NPRM concludes to the contrary that “the essential element that binds the illustrative entities listed in the provision is that each entity makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network.”²³ Again, ACA respectfully disagrees.

While the list of illustrative entities included in the definition of MVPD is not limited, by including the phrase “such as,” it seems obvious that Congress intended the other covered entities to be similar to the entities listed. The most obvious commonality among each of the four examples of MVPDs listed in Section 602(13) is that each entity is engaged in last-mile video programming delivery over physical facilities it owns or operates, whether those facilities

²⁰ See *infra* at Section III.A.

²¹ NPRM, ¶ 19; 47 U.S.C. § 522(13).

²² *Id.*

²³ NPRM, ¶ 19.

are wireline, wireless or satellite. Each entity listed in the definition – “a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service or a television receive-only satellite program distributor” – owns or controls, either directly or indirectly, the mode of delivery by which the programming reaches the subscriber. What these distribution platforms have in common is that each was designed for the purpose of delivering multiple channels of video programming. Similarly, it is the operator of each platform that maintains control over the management, operation or selection of the facilities used to deliver its video offerings to end users, as well as other aspects of signal reception and delivery. This strongly suggests that the term “such as” in the definition of MVPD should be construed to include only an entity who similarly makes available to subscribers multiple channels of video programming through facilities that it owns or controls.²⁴ The fact that the list is prefaced by the word “but not limited to” does not suggest an alternative reading, as Congress likely foresaw that facilities-based providers using other technological platforms might well develop in the future.

In contrast, an OVD that delivers its video programming streams to the so-called “public” Internet for routing to its subscriber is not thereby making video programming available over an MVPD facility it owns or operates. In this case, it is the OVD’s subscriber who obtains the transmission path by which the programming is delivered to its premises or location.

The NPRM notes that the Commission “has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD,” but may use a third party’s distribution facilities.²⁵ Nonetheless, in the

²⁴ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words”).

²⁵ NPRM, ¶ 20. The NPRM cites a passage from the OVS Second Order on Recon where the Commission rejected a cable programmer’s argument that open video system video programming providers cannot qualify as MVPDs “because they do not operate the vehicle for distribution” as “unsupported by the plain language of Section 602(13), which imposes no such requirement.” *Id.*, n. 46. An additional factor cited by the Commission tilting in the direction of including OVS programming providers as MVPDs regardless of facilities ownership was the fact that Congress amended the statutory

majority of cases involving the question of who is an MVPD for statutory purposes, the Commission has employed an understanding of the term MVPD as comprehending the programming provider's direct involvement with delivering a transmission path together with multiple channels of programming. For example, the Commission recognized that video programming service providers using local exchange carrier-supplied video dialtone ("VDT") transport and satellite master antenna television ("SMATV") providers qualify as MVPDs for purposes of determining "effective competition" under Section 623 because they function much like traditional cable operators in making video programming "available for purchase" by subscribers.²⁶ In contrast, the Commission concluded that leased access providers offering compressed multiplexed multichannel video programming are not MVPDs because they use the facilities of the cable operator itself.²⁷ In the context of determining which entities were MVPDs for purposes of determining whether a cable operator was subject to "effective competition" and thus eligible for relief from rate regulation, the Commission explained that a lessee of multiple channels on a cable system pursuant to its leased access rules does not qualify as an MVPD because the "channels" that are being "made available" are channels of the cable system itself, such that the grant of MVPD status would not advance the goal of facilities-based competition with cable.²⁸

Consistent with this Commission precedent extending MVPD status only to facilities-based providers, when Congress added Section 629 to the Act in 1996 to foster a competitive

"effective competition" test of Section 623(d) to reference "a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate," which would clearly include OVS programming providers. *Id.*; 47 U.S.C. § 543(d).

²⁶ 1993 Rate Regulation Order, ¶¶ 20-23; *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 5389, ¶ 46 (1993) ("1993 EEO Implementation Order") (the entity that utilizes video dialtone transport service to "make available channels" of video programming to subscribers will be treated as an MVPD subject to EEO requirements).

²⁷ 1993 Rate Regulation Order, ¶ 23.

²⁸ *Id.*

commercial market for the navigation devices used by MVPDs in the provision of their services to subscribers, it repeatedly used the term “multichannel video programming distributor systems.”²⁹ Yet, no new statutory definition was added to define what was meant by an MVPD system. This suggests a Congressional understanding that “MVPD” as used in the Act already references an entity using a system that it owns or operates that is optimized for the delivery of multiple channels of video programming in making their services available to consumer or subscribers.

In addition, although the Commission has citing two instances where it stated that an entity need not own the basic transmission and distribution facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD,³⁰ in each case where the Commission found an entity not owning facilities to be an MVPD – involving OVS or VDT programmers – the entities were at least in privity of contract (or otherwise acting in concert with, and with the approval of) the platform providers that did own the transmission facilities under a multichannel video distribution regulatory framework created by either Congress (OVS) or the Commission (VDT).³¹

²⁹ 47 U.S.C. §§ 549(a), (b), (c), & (d).

³⁰ NPRM, ¶ 20; citing *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Second Report and Order, 11 FCC Rcd 18233, ¶ 171 (1996) (“OVS Second Order on Recon”) (Section 603(13) does not require an entity to operate the vehicle for distribution to subscribers); see also 1993 Rate Regulation Order, ¶ 23 (“we agree with TCI that a qualifying distributor need not own its own transmission and distribution facilities”). 47 U.S.C. § 543(l)(1)(D) (for purposes of determining effective competition, referring to video programming provided by “a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)”).

³¹ OVS Second Order on Recon, ¶ 196 (1996) (extending program access protections to any “video programming provide that provides more than one channel of video programming on an open video system” (“OVS”) even though the OVS video programming provider held no ownership interest in the OVS distribution plant, where the OVS video programming provider had a contract with the OVS operator to deliver an integrated package of content and transmission); 1993 EEO Implementation Order, ¶ 46 (video dialtone programming providers can be MVPDs for purposes of EEO rules; video programming providers have contractual relationship with video dialtone platform provider to “make available channels” of video programming to customers); *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, ¶ 1, n.5 (1998) (program access rules apply to C-Band distributors, but not to C-Band retail agents; C-Band distributors enter into agreements with both programming networks and the satellite carrier that enable it to “make available channels” of programming to subscribers); *Wizard Programming, Inc. v. Superstar/Netlink Group, LLC and*

C. The Most Plausible Interpretation of the Phrase “Channels of Video Programming” as Used in the Definition of “MVPD” Includes the Provision of a Last-Mile Transmission Path to Subscribers.

A key element required for an entity to meet the definition of an MVPD is that the entity must make available for subscription multiple “channels of video programming.”³² Congress added the term “video programming” to the Act in 1984 as part of the description of “cable service,” and the term is defined through illustration as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”³³ The Commission’s longstanding interpretation of “video programming” is programming comparable to that provided by broadcast television stations in 1984.³⁴

Telecommunications, Inc., 12 FCC Rcd 22102, ¶¶ 17-22 (1997) (program access rules are premised on the assumption that a complainant MVPD has purchased or tried to purchase video programming for sale to its subscribers either by itself or through an agent or buying group; an entity that obtained rights to “resell” video programming that had been packaged by a C-Band distributor to customers did not “make available channels” for that programming to be transmitted to customers – the electronic transmission path was provided by a third party; Wizard was neither an MVPD nor a buying agent of an MVPD).

³² 47 C.F.R. § 522(20).

³³ The NPRM proposes to define as MVPDs only those OVDs who provide pre-scheduled or “linear” video programming, presumably in recognition of these settled interpretations. NPRM, ¶ 3. Although ACA disagrees that the Commission should adopt the Linear Programming Interpretation of an MVPD, it agrees with this limiting principle as consistent with the statutory definition of “video programming” and Commission precedents. When it implemented the 1984 Cable Act, the Commission concluded that the term “video programming” encompassed “broadcast stations, superstations, satellite delivered cable networks and pay cable” and was “sufficiently expansive to include such video programming as that provided by ESPN, HBO, and other satellite-delivered cable network programming.” See 47 U.S.C. § 522(6)(A) (“cable service” means the one-way transmission to subscribers of (i) video programming, or (ii) other programming service . . .); 47 U.S.C. § 522(20) (“video programming” means “programming provided by, or generally considered comparable to programming provided by, a television broadcast station”); *Amendment of Parts 1, 63, and 76 of the Commission’s Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 Rad. Reg.2d 1 n. 33 (1985) (“1984 Act Order”). Later, in its 1992 and 1994 Video Dialtone Orders, the Commission held that “Congress intended to include within ‘video programming’ only that which is comparable to programming provided by broadcasters in 1984.” See *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶ 74 (1992); *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63-54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission’s Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244 (1994) (“Video Dialtone Recon Order”).

³⁴ Public Notice, ¶ 13.

The key to the NPRM's tentative conclusion that the Linear Programming Interpretation should be adopted is the Commission's proposal that "channels" be interpreted in the colloquial sense of "networks" or "programs" rather than a physical medium.³⁵ ACA submits that this is not consistent with the statutory language and must be rejected.

The definition of "channel" was added in 1984, prior to the addition of the term "MVPD" and is defined as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by Commission regulation)."³⁶ "Television channel" is defined in the Commission's regulations as "a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies."³⁷ The regulations also define "cable television channel" as a "signaling path provided by a cable television system" for the purpose of relaying, delivering, or transmitting programming to the subscriber.³⁸ By their terms, these definitions strongly suggest that a "channel" is a physical transmission path over which video programming is made available to by an MVPD. The NPRM nonetheless finds the term "channel" as used in the context of the MVPD definition to now be ambiguous and further finds that Congress did not intend the term "channel" in this context to be interpreted in accordance

³⁵ NPRM, ¶ 19 ("We tentatively conclude 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.").

³⁶ 47 U.S.C. § 522(4); The Cable Communications Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. § 521 *et seq.*) (amending the Communications Act of 1934 to include Title VI). Related definitions added in 1992 are "activated channels" and "usable activated channels." "Activated channels" are defined as "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use". 47 U.S.C. § 522(1) ("Usable activated channels" are defined as "activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission"); 47 U.S.C. § 522(19).

³⁷ 47 C.F.R. § 73.681; *see also* 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1).

³⁸ 47 C.F.R. § 76.5(r)-(u) (describing four classes of cable television channels).

with the definition of Section 602(4) of the Act, but rather intended the term be given its ordinary and common meaning.³⁹

ACA disagrees. The pre-existing definition of “channel,” which incorporates a transmission pathway over which the programming is distributed, must be used when interpreting the separate definition of MVPD as a matter of law. The Commission is obligated to give statutory terms their intended meaning, and is not at liberty to ignore or write them out of the Act to suit its own policy prerogatives, even if they include the otherwise admirable goal of trying to keep its regulations up to date and reflective of marketplace realities.⁴⁰

ACA agrees with NCTA and others that the statutory definition of “channel” in Title VI cannot and should not be ignored when determining who is an MVPD under the Act.⁴¹ The fact that Congress did not amend the statutory definition of “channel” in subsequent amendments to Title VI to encompass video provided over the Internet is a strong indication that Congress intended the Commission to continue to use that term consistent with the way it is defined in the Act and has been interpreted by the Commission over the years. Had Congress wished to depart from the established definitions and interpretations, it stands to reason that it would have done so when it amended Title VI in 1992 by broadening the Act’s reach from solely cable

³⁹ NPRM, ¶ 21.

⁴⁰ See, e.g., *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (“The normal rule of statutory construction assumes that ‘identical words used in different parts of the same act are intended to have the same meaning.’”); *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1101 (10th Cir. 2007) (“[W]e typically apply the same meaning to the term each time it appears in the statute.”).

⁴¹ See NCTA Comments at 7-10; *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of Discovery Communications, LLC at 16-18 (filed Mar. 3, 2015); *Fowler v. U.S.*, 131 S. Ct. 2045, 2052 (2011) (stating “normally we must give effect ‘to every clause and word of a statute’”); Scalia, J., dissent, *Regions Hospital v. Shalala*, 522 U.S. 448, 467 (1997) quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) (“We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon’s Abridgment, sect. 2, it was said that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” This rule has been repeated innumerable times.”).

operators to encompass other platforms that provide multiple channels of video programming.⁴² That Congress did not do so indicates that the existing definition of “channel,” which requires the provision of a transmission path for the delivery of video programming, was advancing its objectives as intended.

Recently, the Commission’s rulemaking implementing legislation granting it authority to conduct broadcast incentive auctions refers to spectrum occupied by television broadcast stations as a physical medium – 6 MHz “channels” – that can be re-purposed for other uses if two or more broadcasters agree to share a single 6 MHz channel to deliver their programming to viewers.⁴³ Such a view of “channel sharing” reflects and reinforces Congress’ and the Commission’s long-standing view that a “channel” as used in the Act is the physical transmission path used by a broadcast station, such as a CBS network affiliate, rather than a broadcasting “network,” such as the CBS Television Network.

Although the statutory definition of “channel” specifically references cable systems, a permissible interpretation of that term within the definition of an MVPD may be that a “channel” as provided by another type of MVPD must similarly be defined as a physical transmission path engineered or controlled by the operator that is specific to that technology platform. For example, the statute explicitly treats wireless cable (multichannel multipoint distributor) and DBS systems as “MVPDs.”⁴⁴ Accordingly, a “channel” on a non-cable MVPD system such as wireless cable or DBS must refer to the portion of the electromagnetic spectrum used to deliver video programming on that system. For similar reasons, bandwidth reserved for video

⁴² Moreover, there have been several occasions since 1992 where Congress did not amend the definition of channel, but had the opportunity to do so. See, e.g., STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (2014); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010).

⁴³ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Report and Order, 27 FCC Rcd 4616 (2012).

⁴⁴ 47 U.S.C. § 522(13) (an MVPD “means a person such as, but not limited to . . . a multichannel multipoint distribution service, a direct broadcast satellite service . . .”).

distribution within a telephone company's wireline network would qualify as a "channel" such that a local exchange carrier could qualify as an "MVPD" under the Act.⁴⁵ Moreover, the fact that no unique transmission path is assigned to a particular "channel" on an IPTV system is not dispositive. If this were not the case, Congress would have been required to amend the statutory definition of "channel" in order to bring these non-cable entities within the definition of "MVPDs" when it broadened the class of entities brought within the scope of Title VI as MVPDs in 1992. Rather, ACA agrees with NCTA that "even if the phrase 'which is used by a cable system' were viewed as rendering the definition cable-specific and therefore incompatible with the definition of an MVPD, it would still make far more sense – and would be far more consistent with legislative intent – to view Congress's failure to eliminate that phrase when it adopted the 1992 Act as an oversight than to presume that Congress *intended* for 'channel' to mean something entirely different than in the definition and in every other provision of Title VI."⁴⁶ Accordingly, an examination of the statutory text and Commission precedent supports the interpretation of "channel" as including a transmission path supplied by the video programming distributor for the delivery of video programming to subscribers, rather than to conclude that Congress meant to include an entirely different definition of "channel" when defining an MVPD.

The NPRM questions whether the Transmission Path Interpretation makes sense because it would require the Commission to determine whether an entity must "make available multiple transmission paths (or, using the language in the definition of 'channel,' multiple 'portions of the electromagnetic frequency spectrum') to each subscriber or customer to qualify

⁴⁵ 47 U.S.C. § 522(13) (an MVPD "means a person such as, but not limited to, a cable operator"). See *also* 47 U.S.C. § 571 (video programming services provided by telephone companies – distinguishing radio-based systems, common carriage of video traffic, and telephone companies providing cable services vs. operating open video systems); 47 U.S.C. § 573 (describing the requirements of open video systems).

⁴⁶ NCTA Comments at 10.

as an MVPD?”⁴⁷ As a corollary, the NPRM asks whether “all traditional MVPDs make available multiple ‘portions of the electromagnetic frequency spectrum’ to each subscriber or customer, including cable operators using switched digital video (“SVD”) technology or an IP-based system in which no unique transmission path is associated with any video programming stream?”⁴⁸

ACA suggests that the only plausible reading of the term “channel” in the context of the MVPD definition is simply that it requires the entity to control at least some portion of the physical means by which programming delivered, because it either owns or operates (including via contract with a facilities owner) a last-mile delivery network so that the product made available for purchase is both multiple channels of video programming and the transmission path over which they ride.

D. The Legislative History of the 1992 Act Supports the Interpretation of “Channels of Video Programming” and “MVPD” as Requiring the Provision of a Transmission Path for Delivery of Video Programming to the Subscriber.

The NPRM notes that the legislative history of the 1992 Cable Act includes a statement that Congress intended to promote ‘facilities-based’ competition, seeks comment on whether this indicates a Congressional intent to promote only facilities-based competition in the video distribution market, or whether Congress sought to encourage competition to incumbent cable operators more generally, regardless of how competition is delivered.⁴⁹ The evident concern of Congress in 1992 was with facilities-based competition to cable and that there is no indication that Congress intended to regulate other distributors of video programming under Title VI by bringing them under the definition of an MVPD. As discussed above, Congress created the

⁴⁷ NPRM, ¶ 29.

⁴⁸ *Id.*

⁴⁹ *Id.*, ¶ 30.

category for very specific reasons, and cabined its reach very carefully to achieve its paramount goal of facilities-based competition to cable.

First, as noted in the NPRM, the legislative history of the 1992 Cable Act specifically states that Congress intended to promote facilities-based competition.⁵⁰ The Conference Report passage cited in the PN that mentions “facilities-based competition” states:

In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing *facilities-based competition* to cable and extending programming to areas not served by cable.⁵¹

In its order implementing the program access provision, the Commission noted that “facilities-based competition,” as that term is used in the legislative history emphasizes “that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act was clearly on assuring that facilities-based competition develops.”⁵² In addition, the discussion of “effective competition” in the Senate Report further demonstrates Congress’ focus on promoting effective facilities-based

⁵⁰ *Id.*, citing H.R. Rep. No. 102-862 (1992), at 93 *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (“Conference Report”) (discussing the program access provision of the 1992 Cable Act and stating that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable”).

⁵¹ Conference Report at 93 (emphasis added).

⁵² *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 63, n. 79 (1993). See 1992 Cable Act § 2(a)(2). The “Findings” section of the 1992 Act also contains language that can be interpreted as demonstrating intent by Congress to promote facilities-based competition to cable systems. Specifically, Finding number two states: “For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. 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.” See S. Rep. 102-92, at 13-18 (1992) (discussing the viability of competition from overbuilders, wireless cable, broadcasting via satellite, and telephone) (“Senate Report”).

competition to cable by other technology platforms. Action to re-regulate the cable industry was considered necessary in light of findings that existing facilities-based competitors to cable systems, such as home satellite dish, wireless cable, broadcasting via satellite, and telephone facilities, could not provide effective competition to cable under the current rules.⁵³ As a consequence, in adopting the effective competition standard, Congress specifically described the types of MVPDs – all facilities-based – that would be required to be serving subscribers before a cable system could seek rate relief.⁵⁴

Second, the legislative history contains many references to other video distribution technology platforms that Congress hoped would benefit from the pro-competitive provisions it was adding to Title VI, most especially through the program access provision. For example, the floor debate over the program access provision is replete with references to other technology platforms like cable systems that could benefit from access to programming.⁵⁵ Each example cited is that of a system engineered or optimized for the delivery of multiple channels of video programming. Given the strong congressional interest expressed in facilities-based competition, this is also the only plausible interpretation of the term “MVPD.” Nowhere in the legislative history does Congress indicate an interest in applying Title VI regulation to non-facilities based video programming distributors.

⁵³ See Senate Report at 13-18 (discussing the viability of competition from overbuilders, wireless cable, broadcasting via satellite, and telephone).

⁵⁴ *Id.* at 8-9.

⁵⁵ See, e.g., 102 Cong. Rec. H 6535 (daily ed. July 23, 1992) (statement of Rep. Manton referring to statements of Rep. Tauzin concerning “the growth of alternative multichannel video technologies, specifically high power direct broadcast satellites.”); 102 Cong. Rec. H 6538-6539 (daily ed. July 23, 1992) (statement of Rep. Markey discussing how the home satellite dish industry would provide “the competition to the cable industry” as well as new technologies “such as wireless cable and direct broadcast satellite,” “competing technologies” that want to offer similar channel selections at competitive prices); 102 Cong. Rec. H 6542 (daily ed. July 23, 1992) (statement of Rep. Cooper discussing “new technologies” that would compete with cable); 102 Cong. Rec. H 6543 (daily ed. July 23, 1992) (statement of Rep. Thomas citing the need for “these emerging technologies” such as satellite dish to access programming).

In summary, the legislative history of the 1992 Cable Act supports the view that Congress intended to limit application of the term “MVPD” to entities providing service in a manner comparable to that provided by cable operators. That is, the provision of multiple channels of linear video programming, including video-on-demand, to subscribers over a last mile transmission path that is owned or operated by the MVPD for that purpose. A decision to “modernize” Title VI to and extend MVPD status and regulation to entities using the Internet to distribute video programming is one for Congressional deliberation rather than unilateral administrative action, as it raises questions beyond the Commission’s ability to address.⁵⁶

E. Requiring That an Entity Own or Control the Transmission Paths Over Which it Distributes Video Programming Serves Congressional Goals, Is Consistent With the Statute, and Is Good Policy.

The NPRM questions whether an interpretation of the term MVPD that focuses on the physical delivery method that an entity uses to provide video programming serves Congress’ goals, promotes innovation, and is consistent with the statute.⁵⁷ ACA submits that the Transmission Path Interpretation serves Congress’ goals of promoting facilities-based MVPD competition and, for the reasons stated above, is consistent with all of the relevant statutory definitions and related rules. To a great extent, the carefully balanced regulatory framework for the provision of MVPD service has led, over the past two decades, to the development of vibrant facilities-based competition and has led to the achievement of Congress’ goals of introducing sustainable competition, the substantial increase of multichannel video programming in rural areas, particularly by DBS operators, and service and technological innovation by both

⁵⁶ For example, the NPRM acknowledges that a decision classifying OVDs as MVPDs will not bind the Copyright Office, which has heretofore declined to extend the compulsory license to online distributors. See NPRM, ¶ 66.

⁵⁷ See *Id.*, ¶ 23. The statutory goals of the 1992 Cable Act referenced in the NPRM include program access goals of increasing competition and diversity in the video programming market, increasing the availability of programming to persons in rural areas, and to spur the development of communications technologies and the retransmission consent goal of giving local broadcast stations the opportunity to consent to and seek compensation for retransmission of their signals by cable and other MVPDs. *Id.*; 47 U.S.C. §§ 548(a); 325(b).

incumbents and competitive MVPDs.⁵⁸ Suggestions of problems with OVDs entering and competing in the marketplace against existing facilities based video providers based on the two examples cited in the NPRM seem overblown.⁵⁹ There is little evidence that lack of access to programming is significantly hindering the vast majority of OVDs that have entered, and have announced plans to enter, the marketplace recently, and the handful of instances cited in the NPRM can hardly sustain such a broad expansion.⁶⁰ At the same time, the record reflects concern that imposing MVPD status on previously unregulated OVDs would most likely deter investment and drive some current online distributors from the market.⁶¹ As there is no evident problem to be solved in the marketplace by this rulemaking, the Commission may avoid taking on the administrative costs of re-engineering all of its rules concerning MVPDs, which will

⁵⁸ This does not mean, as NCTA appears to suggest, that the rationale for the program access rules has lessened over the years. See NCTA Comments at 18-21 (MVPD competition and decreases in vertical integration call into question foundation of program access rules). Access to cable-affiliated programming remains as vital today for MVPDs as it was in 1992; no marketplace changes over the decades have lessened the incentives and ability of cable-affiliated programmers to raise rivals' costs or deny access to programming at fair and non-discriminatory rates, terms and conditions. Because the definition of MVPD does not encompass non-facilities based online video distributors, the question whether these same rights, tougher with corresponding social obligations should be extended to OVDs, is a matter for Congress rather than the Commission to determine.

⁵⁹ NPRM, ¶¶ 10-11.

⁶⁰ Many entities have recently launched, or announced plans to launch, linear programming services that compete with MVPDs. See, e.g., Jeff Baumgartner, *Apple TV Flips on CNNgo*, MULTICHANNEL NEWS (Mar. 25, 2015), available at <http://www.multichannel.com/news/tv-everywhere/apple-tv-flips-cnngo/389164>; Todd Spangler, *Dish's Sling TV to add AMC to \$20 Monthly Internet Package, Launched Nationwide*, VARIETY (Feb. 9, 2015), available at <http://variety.com/2015/digital/news/dishs-sling-tv-to-add-amc-to-20-monthlyinternet-package-launches-nationwide-1201428588/>; Todd Spangler, *DirecTV Launches First Over-the-Top Video Service, Yaveo, for Spanish-language Audiences*, VARIETY (Dec. 22, 2014), available at <http://variety.com/2014/digital/news/directv-launches-first-over-the-top-video-service-yaveo-for-u-s-hispanic-audiences-1201385186>; Lance Whitney, *Sony to Launch PlayStation Vue, an Online TV Service That Challenges Cable*, CNET (Nov. 13, 2014), available at <http://www.cnet.com/news/sony-to-launch-online-tv-service-to-challenge-cable-tv/>; Mikolo Ilas, *Verizon Online TV Service Coming in 2015*, SNL KAGAN (Sept. 11, 2014), available at <https://www.snk.com/InteractiveX/article.aspx?ID=29187285>.

⁶¹ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of the Computer & Communications Industry Association at 3 (filed Mar. 3, 2015) ("CCIA Comments"); Comments of the National Association of Telecommunications Officers and Advisors at 2 (filed Mar. 3, 2015); Comments of AT&T Services, Inc. at 6-7 (filed Mar. 3, 2015) ("AT&T Comments"); CEI et al. Comments at 6-7; .

involve the expenditure of considerable time both by Commission staff and industry participants.⁶²

* * *

Congress created the term MVPD when it enacted Section 628 to promote “competition and diversity in the multichannel video programming market” long before the rise of the Internet as a medium for distribution of video programming.⁶³ Since there is ample competition in the MVPD marketplace, and Internet-based video distribution has not had problems entering and competing in the market, there is no basis for bringing online video distributors under the regulatory authority of the Commission as a “MVPD.” To qualify as an MVPD, the entity must meet the elements of the definition. As discussed above, the text of the definition and its use in the Act, as well as the legislative history, all point to an interpretation of the terms “channel” and “MVPD” that includes the entity’s provision of a last mile transmission path for delivery of video programming to subscribers which an OVD does not provision in distributing its programming to subscribers.

⁶² In addition to the list of questions concerning the necessary attributes an OVD must have to be considered an MVPD and the MVPD obligations that identified in the NPRM as requiring re-examination and re-engineering if linear OVDs are recognized as OVDs, broadcasters have proposed an entirely new set of retransmission consent notification and election procedures for linear OVD MVPDs, as well as extension of the Commission’s broadcast exclusivity rules. NPRM, ¶¶ 48-64; see, e.g., *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of the National Association of Broadcasters at 10-13 (filed Mar. 3, 2015); Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates 24-29 (filed Mar. 3, 2015).

⁶³ 47 U.S.C. § 548(a).

III. THE COMMISSION CAN BEST EFFECTUATE STATUTORY GOALS BY CONTINUING TO ACCORD SEPARATE STATUS TO ENTITIES DISTRIBUTING VIDEO PROGRAMMING OVER THE INTERNET AND MOVING FORWARD WITH LONG PENDING REFORM OF RULES CONCERNING ACCESS TO PROGRAMMING BY FACILITIES-BASED MVPDs

A. The Separate Regulatory Status of OVDs Has Been Correctly and Widely Recognized.

Even if the Commission could plausibly decide to interpret the term MVPD to include linear OVDs, it would serve no sound public policy to do so. The online video programming distribution environment is nascent, evolving and complex, and involves multiple participants, not all of whom are subject to the Commission's jurisdiction,⁶⁴ and many of whom likely wish to remain outside its regulatory reach.⁶⁵ Including linear OVDs as MVPDs would require the Commission to engage in innumerable line-drawing exercises, some of which are foreshadowed in the NPRM, which can only result in arbitrary and capricious decision-making.⁶⁶ Moreover, as

⁶⁴ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of DirecTV, LLC at 3 (over-the-top services remain in their infancy); NCTA Comments at 16-17 (OVD marketplace is dynamic and growing); Cox Comments at 5-9 (discussing the NPRM's proposed "novel interpretation of the key term 'channels'"); AT&T Comments at 4-5 (noting issues with applying regulation to new and evolving video technologies); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Reply Comments of the American Cable Association at 4-7 (filed Nov. 1, 2011); Comments of the National Association of Broadcasters at 3 (filed Oct. 18, 2011) ("the instant proceeding presents novel questions about an extremely complex programming distribution ecosystem that is still very much evolving"); Comments of the National Cable and Telecommunications Association at 2 (filed Oct. 18, 2011) ("There are multiple entities involved in providing television programming to viewers via the Internet either through streaming or downloading;" online distribution chain is still emerging).

⁶⁵ Cox Comments at 12; CenturyLink Comments at 4-5. As several commenters have noted, the Commission has no forbearance authority under Title VI as it has under Section 10 with respect to Title II provisions. See Cox Comments at 12; NCTA Comments at 31. Once the statutory status of MVPD attaches to an entity, the Commission is not at liberty to waive any of the provisions of the Act that apply to MVPDs. For this reason, the Commission cannot deem MVPD status discretionary and adopt an "opt-in" interpretation of the Act's commands, even if that would solve some of the many logistical problems that would arise if OVDs are deemed to be MVPDs. See NPRM, ¶¶ 37-38.

⁶⁶ See, e.g., CEI, et al Comments at 6-8 (describing several unanswered question under Linear Programming Interpretation, including whether a subscription linear OVD is still an MVPD if it enables and encourages its subscribers to preschedule recordings of programs – or an entire season of shows – and stores such content in the cloud, where subscribers can watch programs at their leisure); NCTA Comments at 24 (reclassification of OVDs as MVPDs would impose substantial administrative burdens on the marketplace participants as well as the Commission, including making arbitrary decisions on issues such as how many channels must be provided to be considered "multiple").

several commenters have noted, classifying linear OVDs as MVPDs will not by itself secure extension of the Section 111 statutory copyright license for “cable systems” to OVDs, nor will it necessarily spur the Copyright Office to depart from its interpretation of this provision that Internet transmissions of broadcast television stations fall outside the scope of the Section 111 license.⁶⁷

The Copyright Office is not alone in recognizing that online distribution of video programming presents unique legal and policy issues and cannot simply be shoehorned into existing definitions and statutory programs simply to achieve policy goals. Since the time that the term “MVPD” was first added to the Act, Congress and the Commission have wrestled with the question of whether OVDs qualify as MVPDs under the Act, and it is instructive that when faced with the question, it has been the practice of both bodies to treat Internet-delivered video programming differently from video programming distributed over conventional MVPD systems and networks.

It is significant that when Congress determined that certain video programming distributed over the Internet and using Internet protocol should contain video descriptions and closed captions, it enacted the CVAA to bring such online video programming under the Commission’s jurisdiction for those purposes *only*.⁶⁸ Once again, the definition of “video programming” used by Congress to describe programming covered by the CVAA is “programming by, or generally considered comparable to programming provided by a television

⁶⁷ See, e.g., NCTA Comments at 21-24; see also Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights to Mr. Matthew Calabro, Aereo, Inc. (dated July 16, 2014) (“In the view of the Copyright Office, internet retransmissions of broadcast television fall outside the scope of the Section 111 license.”).

⁶⁸ CVAA, §§ 202(a)(3)(A)-(B) & 202(b) (directing the Commission, respectively, to examine the costs and benefits of imposing video description requirements on “video programming distributed on the Internet” and imposing closed captioning requirements on “video programming providers” using, respectively, the Internet and the Internet protocol to distribute programming previously aired on television with captions).

broadcast station, but not including consumer-generated media. . . .”⁶⁹ This strongly suggests that Congress did not believe that online video programming was already encompassed within the term “video programming” as used in the definition of “MVPD.”⁷⁰ If it were, enactment of the CVAA would have been unnecessary with respect to closed captioning as the existing television closed captioning rules, already applicable to MVPDs, would require that the online video programming contain and be passed through with captioning included. Indeed, in adopting its IP closed captioning rules, which are narrower than the television closed captioning rules, the Commission carefully excluded traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used, subjecting such services instead solely to the television closed captioning rules.⁷¹

The illogic of adopting the Linear Programming Interpretation would be most obvious with respect to closed captioning. If there is no difference between Internet-delivered and traditional “video programming,” both the television closed captioning and IP closed captioning rules would appear automatically to apply to all MVPDs, creating potentially conflicting and inconsistent obligations with respect to application of the new IP closed captioning mandates that the Commission would be required to resolve.⁷² The NPRM appears to acknowledge this difficulty but fails to even offer a workable resolution upon which parties may comment.⁷³

⁶⁹ *Id.*, § 202(h)(2) (“Video programming”).

⁷⁰ See *Id.* § 202(b) & (c) (requiring Commission to adopt rules for video programming delivered using Internet-Protocol); see also H.R. 3101, *Twenty-First Century Communications and Video Accessibility Act of 2009* (proposing new definition of “video programming that would include programming that “is distributed over the Internet or by some other means”), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3101ih/pdf/BILLS-111hr3101ih.pdf>.

⁷¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, ¶ 11 (2012).

⁷² 47 C.F.R. §§ 79.1, 79.4.

⁷³ NPRM, ¶ 54.

It is telling that when first faced with the issue, the Commission declined to include Internet-delivered video as “video programming” subject to the television closed captioning rules.⁷⁴ In this instance, the Commission considered whether to extend the television closed captioning rules to video programming delivered over the Internet and declined to do so, stating that “there are issues that need to be addressed relating to the convergence of television receivers and computers and the growth of Internet video like programming that may need to be addressed in the future.”⁷⁵ Recognizing this, the Commission adopted television closed captioning rules that excluded Internet delivered video, but applied to all “video programming distributors” – which, by definition, include MVPDs.⁷⁶ Thus, the very structure of the Commission’s rules demonstrates its hitherto unquestioned understanding that an entity distributing video programming over the Internet is not included within the category of an MVPD under the Act.⁷⁷

Similarly, the Commission has consistently distinguished between Internet content, applications and services providers and MVPD services, and has refrained from imposing

⁷⁴ *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, ¶ 249 (1998) (“Television Closed Captioning Order”) (declining to extend programming regulations such as closed captioning to Internet video; distinguishing between services offered by MVPDs and services providing streaming video over the Internet, finding that closed captioning regulations that specifically apply to MVPDs should not apply to Internet video).

⁷⁵ *Id.*, ¶¶ 248-249.

⁷⁶ *Id.* at Appendix B (adopting 47 C.F.R. § 79.1(a)(2). Section 47 C.F.R. § 79.1(a)(2) defines “video programming distributor” as “Any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in §76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section.” 47 C.F.R. § 79.1(a)(2).

⁷⁷ This is but one example of the Commission declining to apply the term MVPD to video provided over the Internet. For example, in its 2010 Open Internet Order, the Commission coined the term “online video aggregators” to describe companies such as Netflix, Hulu, YouTube, and iTunes “that are unaffiliated with traditional MVPDs.” *Preserving the Open Internet Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905, ¶ 22 (2010).

regulations on video programming distributed over the Internet that were designed to apply to traditional video programming and MVPDs.⁷⁸ In some early cases, the Commission concluded that video delivered via the Internet, including “streaming video,” is not “video programming” as defined in the Act in the technological sense, citing qualitative differences between Internet-delivered video programming and programming provided by a broadcast station.⁷⁹ Although reflective of technology and the marketplace as it existed at the time, the decisions remain instructive as to the Commission’s hesitation to treat Internet video as “video programming” under the Act. Similarly, the Commission has declined to extend to Internet-delivered video and Internet services regulations applicable to “video programming,” such as rules concerning over-the-air reception devices (otherwise known as “OTARD”) and Emergency Alerts.⁸⁰ The

⁷⁸ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, ¶ 2 (2013) (categorizing entities within the report in three strategic groups – MVPDs, broadcast television stations, and OVDs); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, Table B-1, Appendix B (2009) (excluding Internet video from list of competitive MVPD technologies); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶¶ 46, 57 (2003) (“Digital Cable Compatibility Order and FNPRM”) (copy protection encoding rules would apply to all MVPDs; such rules do not apply to “distribution of any content over the Internet” thereby implicitly recognizing that a provider of streaming video over the Internet is not an MVPD); 47 C.F.R. § 76.1901(b) (specifying that encoding rules “shall not apply to distribution of any content over the Internet”); Television Closed Captioning Order, ¶ 33 (declining to extend programming regulations such as closed captioning and v-chip to Internet video; distinguishing between services offered by MVPDs and services providing streaming video over the Internet, finding that closed captioning regulations that specifically apply to MVPDs should not apply to Internet video); *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings; Implementation of Sections 551(c), (d), and (e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 11248, ¶ 33 (1998) (“V-Chip Order”) (declining to apply V-Chip requirement to streaming Internet video; limiting applicability to signals received over the air or through cable television, MMDS or DBS, i.e., recognized MVPDs).

⁷⁹ See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 63, n. 236 (2002) (“Cable Modem Order”) (“Streaming video . . . is not consistent with the definition of video programming. Even if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of ‘cable service.’”).

⁸⁰ *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices; Television Broadcast Service and Multichannel Multipoint Distribution Service, Order on Reconsideration*, 13 FCC Rcd 18962, ¶¶ 55-56 (1998) (Commission rejected contention that “video programming” includes information received over the Internet that is viewable on computer monitors, because the record did not contain evidence demonstrating that Internet-delivered video services “are comparable to that provided by a television broadcast station.”); *Amendment of Part 73, Subpart G, of the*

Commission has also declined in the past to impose requirements on providers of video programming over the Internet for copy protection encoding⁸¹ and the “V-Chip.”⁸² Nor has the Commission included Internet video distribution in its total subscriber counts in determining total subscriber counts for purposes of computing its horizontal cable ownership limits.⁸³ Accordingly, the Commission has a long, and continuing, record of treating video distributed over the Internet differently from traditional MVPD services, and despite technological advancements in the distribution of video programming online there is little predicate for changing course now.⁸⁴

Commission’s Rules Regarding the Emergency Broadcast System, Second Report and Order, 12 FCC Rcd 15503, ¶ 38 (1997) (Goal of emergency alert system is to provide emergency alerts to receivers of video programming; both visual and aural emergency alerts must be provided to subscribers on all “programmed channels.” “Programmed channel means a channel carrying video programming.” “Programmed channels do not include channels used primarily for the transmission of data services such as Internet services.”). *But see Internet Ventures, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247 (2000) (Commission denied an ISP’s request for commercial leased access under Section 612, finding that leased access rules were limited to providers of “video programming” and did not extend to ISPs, while recognizing the answer might be different for an entity providing multiple channels of video programming online).

⁸¹ Digital Cable Compatibility Order and FNPRM, ¶¶ 46, Appendix B, ¶ 7 (Commission implicitly excluded providers of streaming Internet video as MVPDs when it found that copy protection encoding rules apply to all MVPDs but adopted rules expressly excluding Internet content); *see also* 47 C.F.R. § 76.1901(b) (specifying that encoding rules “shall not apply to distribution of any content over the Internet”).

⁸² V-Chip Order, ¶¶ 33-34 (1998) (declining to apply V-Chip requirement to streaming Internet video because v-chip technology is not compatible with Internet signal formats; limiting applicability to signals received using recognized MVPD formats).

⁸³ *The Commission’s Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 44 (2008) (declining to include “mobile phones, the Internet, home video rentals or international distribution in . . . total [MVPD] subscriber count[s]” because there “is scant evidence in the record whether and how these alternative outlets affect the viability of the cable programmer. Moreover, many of these alternative outlets operate based on the existing popularity of the content, which is gained only through widespread counting or triple-counting the same consumers.”). More recently, in its 2014 regulatory fee reform NPRM proposing to include DBS providers in an MVPD regulatory fee category along with cable operators and IPTV providers, the Commission failed even to mention Internet video distributors as potential fee payors. *Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 10767, ¶¶ 38-43 (2014).

⁸⁴ This distinction between traditional and online video programming distribution was most recently maintained by the Commission in its order approving the license transfers associated with Comcast Corp.’s acquisition of NBC Universal. *See Applications of Comcast Corp., General Electric Co., and NBC Universal Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011). For this purpose, the Commission defined the online video distributors – OVDs – who would be able to take advantage of special program access license conditions designed for their benefit by explicitly excluding from the

Thus, the Commission, like Congress in enacting the CVAA, has recognized that online video distribution deserves separate treatment from video programming distributed by MVPDs over distribution facilities that they maintain for this purpose. The examples discussed above illustrate that, when faced with the question whether existing categories and rules apply to video programming distributed online, Congress and the Commission have consistently afforded different treatment to video programming distributed by MVPDs and video programming distributed online by OVDs. While the NPRM posits that online video distribution has grown, matured and is now viewed by consumers as a viable multichannel video distribution service, those features, standing alone, fail to justify deviation from this wise course under the guise of re-interpreting the term “MVPD” for the purpose of extending regulatory rights and obligations on linear OVDs.⁸⁵

B. The Commission Can Best Achieve Statutory Goals By Directing its Limited Resources to Completion of Pending Rulemakings Concerning MVPD Access to Programming.

While the Commission can and should periodically review its rules, and is free to change its regulatory policies to take account of changed circumstances upon an appropriate record and so long as its actions are in accordance with law, not every re-examination of settled policy and interpretation should result in a departure from precedent. In this case, the Commission

category of OVDs an MVPD acting in its capacity as an MVPD in certain circumstances. Specifically, the Commission stated that: “OVD” means any entity that provides Video Programming by means of (i) the Internet or [(ii)] other IP-based transmission path provided by a Person other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.” *Id.*, ¶¶ 67-90 (discussion the provision of online content to MVPDs and to non-MVPDs); Appendix A, Conditions, I. Definitions (emphasis supplied). Use of the term “footprint” appropriately references the physical footprint of the MVPD’s network or system, again confirming the Commission’s settled interpretation of an MVPD as a facilities-based provider of multiple channels of video programming. The approach of the Commission to OVDs in reviewing the Comcast-NBCU transaction represents a common sense regulatory response to entities that distribute video programming online using the networks of others to deliver their video programming. MVPDs and OVDs are each assigned a different status, and each receives a different set of rights and obligations.

⁸⁵ NPRM, ¶ 23.

has failed to provide a convincing rationale why it should reject its settled approach to the interpretation of the statutory term MVPD so as to bring within its ambit entities using the Internet to distribute video programming. Indeed, the number of arbitrary distinctions in determining the scope of the new classification and the list of rules and regulations that would have to be repurposed to sensibly apply to linear OVDs in the NPRM alone counsels against this action.⁸⁶ ACA agrees with NCTA on this fundamental point: classifying linear OVDs as MVPDs would be arbitrary, unworkable and a poor use of Commission and industry resources.⁸⁷

This is especially true when the Commission has had pending before it for four years a retransmission consent reform rulemaking and for over two years a program access reform rulemaking in which key regulatory actions that will affect the ability of traditional facilities-based MVPDs to fairly purchase programming and compete in the marketplace continue to await decision with no end in sight.⁸⁸ ACA agrees with those commenters who have urged the

⁸⁶ For example, the Commission questions whether it should interpret the term “MVPD” to require a certain number of channels, such as 20, be made available, and whether it should interpret the term “channels of video programming” to require a certain number of programming hours per day or per week, such as eighteen hours per day, seven days per week. NPRM, ¶ 25. In addition, the Commission will need to work out how to apply multiple set of closed captioning rules – for television and Internet delivered programming – to OVDs as well as other MVPD-specific rules that clearly contemplate facilities ownership or operation, such as the CALM Act rules. See 47 C.F.R. §§ 79.1 *et seq*, 79.4 *et seq*; see, e.g., NCTA Comments at 30 (noting both the burden on the Commission in overseeing OVD compliance with the CALM Act’s protections against loud commercials and the difficulty posed by the fact that “the standards adopted by the Commission to implement the CALM Act’s protections apply to over-the-air broadcasters and cable program networks, and rely on equipment in the headend and software in cable-supplied set-top boxes to ensure that commercial loudness is kept in check” for OVDs that “typically will not have in place the technology to ensure that commercials included in their content reach consumers in a manner that complies with the requirements of the CALM Act”).

⁸⁷ NCTA Comments at 24-29. See also CEI et al Comments at 6-11 (classifying some OVDs as MVPDs will distort the market, create regulatory uncertainty, and encourage regulatory gamesmanship).

⁸⁸ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011); *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) exclusivity (the Commission has only addressed one issue to date: joint negotiation of retransmission consent by non-commonly owned, top-four same market broadcast stations, whereas numerous other important decisions have been pending for years without resolution); *Revision of the Commission’s Program Access Rules*; *News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et.*

Commission to conclude these and other related proceedings as the best means of achieving Congress' goals with respect to the market for disposition of rights to retransmit broadcast programming and access cable-affiliated programming networks.⁸⁹

Achievement of clear Congressional program access goals is the very reason that ACA has asked the Commission among, other things,⁹⁰ to update its definition of a "buying group" – an entity identified by Congress and already included within the Commission's own definition of a multichannel video programming distributor ("MVPD") – to include the National Cable Television Cooperative ("NCTC"), a buying group to purchase video programming that is used

al.; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 27 FCC Rcd 12605 (2012) ("2012 Program Access FNPRM") (launched following sunset of the exclusivity prohibition to address other needed reforms of the program access rules, including adoption of a fourth alternative liability condition for a buying group to qualify as an MVPD able to file a program access complaint). See also Inquiry Concerning the Deployment of Advanced Telecommunications to All American in a Reasonable Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126, Comments of the American Cable Association (filed Mar. 6, 2015) (seeking Commission use of its Section 706 authority to address the impact of out-of-control video programming costs on broadband expansion).

⁸⁹ See, e.g., *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Comments of ITTA at 3-7 (filed Mar. 3, 2015) (urging the Commission to complete its pending retransmission consent and program access reforms); Comments of the United States Telecom Association at 7-9 (filed Mar. 3, 2015) (the Commission should resolve its pending retransmission consent reform proceeding and complete its reforms to the program access rules); CenturyLink Comments at 2-3 (the Commission should refrain from extending MVPD rules to online providers and devote its resources instead to "evaluating regulations and eliminating those that are no longer warranted in today's video distribution marketplace, and evaluating and modifying those that are still needed to promote innovation and competition or that are necessary to protect consumers"); Cox Comments at 10 ("To the extent the Commission seeks to take action to facilitate increased competition in the video marketplace, it should focus on eliminating legacy rules that impede innovation and working with Congress on related legislative reforms, as such action would do far more good than the proposed adoption of the Linear Programming Definition.").

⁹⁰ See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees*, MD Docket Nos. 14-92, 13-140, 12-201, Ex Parte Letter of the American Cable Association (filed Feb. 12, 2015); Reply Comments of the National Cable and Telecommunications Association and the American Cable Association (filed Dec. 29, 2014); Comments of the National Cable and Telecommunications Association and the American Cable Association (filed Nov. 26, 2014); Comments of the American Cable Association at 2-9 (filed July 7, 2014) (requesting that the Commission update its regulatory fee categories to include DBS providers in the Media Bureau's "Cable television and IPTV" fee category and create an MVPD fee category that will capture all current and future MVPDs on whose behalf the Media Bureau administers MVPD regulation).

by over 900 small and medium-sized MVPDs.⁹¹ Congress added program access rules in the 1992 Cable Act to ensure specifically that MVPDs *and* their “buying groups” are among the class of beneficiaries protected against the incentive and ability of cable-affiliated programmers to impose discriminatory rates, terms and conditions. In order to qualify as an “MVPD” under the Commission’s rules, NCTC must meet the Commission’s definition of a “buying group.” Yet when implementing this directive in the 1990s, the Commission imposed a needlessly restrictive set of liability conditions that today excludes NCTC from program access protection, even though NCTC’s liability practices have been accepted by the vast majority of programmers for some time. The need to amend the Commission’s definition of a buying group to include the proposed alternative liability condition is especially pressing against the backdrop of the Commission’s willingness to update its interpretation of who is covered by the statutory term “MVPD” and extend the protections of the program access rules to a type of entity neither mentioned in the Act nor contemplated by Congress. No less an “updating” of the definition of a class entities specified by Congress and currently included in the Commission’s definition of an “MVPD” is needed. It is unconscionable for the Commission to entertain expansion of its interpretation of “MVPD” to include online distributors so that they may avail themselves of program access protections and the Commission’s complaint processes while leaving the nation’s largest buying group and its members out in the cold by failing to adopt its own 2012 tentative conclusion that the definition of a buying group should be updated to include a fourth

⁹¹ 47 U.S.C. § 548(c); 47 C.F.R. § 76.1000(c); *Revision of the Commission’s Program Access Rules; News Corporation and the DIRECTV Group, Inc, Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Comments of the American Cable Association at 11-33 (filed June 22, 2012) (seeking change of buying group definition and related relief to preclude programmer evasion of program access obligations). In Oct. 2012, the Commission agreed and tentatively concluded that it should add the alternative liability condition proposed by ACA. 2012 Program Access FNPRM, ¶ 87. *See also In the Matter of Revision of the Commission’s Program Access Rules*, MB Docket No. 12-68, Reply Comments of the American Cable Association (filed Jan. 14, 2013); Comments of the American Cable Association (filed Dec. 14, 2012).

alternative liability condition consistent with the model currently used by NCTC and accepted by the vast majority of video programmers.

IV. THE COMMISSION SHOULD CLARIFY THE REGULATORY STATUS OF INTERNET AND IP-BASED VIDEO DISTRIBUTION SERVICES OFFERED BY CABLE OPERATORS AND ESTABLISH A LEVEL PLAYING FIELD FOR CABLE OPERATORS IN THEIR PROVISION OF BOTH MANAGED AND ONLINE VIDEO SERVICES VIS-À-VIS OTHER LINEAR OVDs

For the reasons stated above, ACA disagrees that the Commission may extend MVPD status to linear OVDs consistent with statutory directives. Regardless of whether it takes this action or not, the Commission should clarify the regulatory status of both Internet and IP-based video distribution services offered by cable operators and non-cable MVPDs. Should the Commission determine to move forward with its proposal to adopt the Linear Programming Interpretation, it must also establish a level playing field for cable operators in their provision of both managed and online video services vis-à-vis other linear OVDs.

The Commission's goals for this rulemaking include promoting competition in the market for multichannel video programming distribution as distribution of video services increasingly moves online, ensuring that the rights and responsibilities of an MVPD are not jeopardized by changes in technology, and fostering new competitive opportunities for new entrants and incumbents that will benefit consumers.⁹² ACA submits that irrespective of whether the Commission grants MVPD status to linear OVDs, to achieve these goals the Commission should confirm that a cable MVPD offering a managed cable service over facilities it owns or controls that meet the definition of a "cable system" will be treated as a cable operator under the Act with regard to that offering regardless of the transmission protocol (e.g., analog, digital, IP) utilized to offer the service. Specifically, the Commission must clarify that an MVPD offering a service using IP transmission to distribute video programming over a cable system it owns or controls is a cable operator providing a cable service. Separately, the Commission must also

⁹² NPRM, ¶¶ 1-4.

clarify that a cable operator distributing video services over the Internet is not providing a cable service – a conclusion that the Commission already tentatively reached in this proceeding.

Should the Commission grant MVPD status to linear OVDs, the Commission must also ensure even-handed regulatory treatment between the following types of MVPDs:

- A Cable MVPD offering both a managed service as a cable operator and offering a non-managed linear OVD service (i.e. over the Internet) that is accessed by subscribers over its affiliated broadband Internet platform with MVPDs offering a non-managed service as a linear OVDs within the Cable MVPD's service footprint; and
- A Cable MVPD offering a managed cable service as a cable operator with MVPDs offering a non-managed service as a linear OVD within the cable MVPD's service footprint.

Thus, if the Commission deems linear OVDs to be MVPDs it must also (i) confirm that any entity may offer a linear OVD service as an MVPD regardless of whether or not the entity is owned or affiliated with another entity offering cable service; (ii) confirm that an entity offering a linear OVD service will not be treated as a cable operator providing cable service when its OVD service is distributed over the network of an owned or affiliated broadband Internet platform regardless of whether the network also provides cable service; and (iii) ensure that cable operators are able to compete fairly with OVDs by declaring that a cable operator who has the right to distribute broadcast television stations and cable-affiliated programming networks over their managed cable service are not denied the right to make such content available to their cable customers over-the-top. In other words, once any MVPD is granted consent to retransmit broadcast station signals or cable-affiliated programming, it should not be prevented from redistributing the programming in any legally permissible way without limitation or discrimination, whether as part of its managed MVPD service or over the Internet as a linear OVD offering.

A. Entities Providing the One-Way Transmission of Multiple Channels of Video Programming Over a Set of Closed Transmission Paths They Own or Control Fit the Definition of Cable Operators Regardless of their Use of the Internet Protocol for Transmission.

In addition to examining the correct regulatory classification of OVDs, the NPRM seeks comment on the regulatory treatment of cable operators and DBS providers that provide linear video services via IP.⁹³ With respect to cable operators, the NPRM posits that “the fact that an entity uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a cable operator.”⁹⁴ ACA agrees and urges the Commission to make this clear in its Order to end regulatory uncertainty concerning the matter.

The Commission’s conclusion that an entity providing video programming services over its own facilities using IP delivery within its footprint that meets the statutory definition of a cable operator remains subject to regulation as a cable operator is undoubtedly correct.⁹⁵ The basic issue is one of statutory construction, and here the definitions drive the discussion. An entity attains the status of “cable operator” for purposes of Title VI to the extent that it provides “cable service” over a “cable system” it owns or manages. “Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”⁹⁶ ACA agrees with NCTA and others that this definition of cable service makes no distinction in terms of the format or transmission protocol

⁹³ *Id.*, ¶¶ 71-79.

⁹⁴ *Id.*, ¶¶ 8, 71.

⁹⁵ *Id.*, ¶ 71.

⁹⁶ 47 U.S.C. § 522(6).

used by the operator, and the Commission accordingly has recognized no change in status as operators transitioned from analog to digital to IP.⁹⁷

The transmission format used by the “cable operator” also does not affect whether the service is being provided over a “cable system.” A “cable operator” is defined as an entity that provides cable service over a cable system that it owns or controls.⁹⁸ Subject to certain express exceptions, a “cable system” is defined as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community”⁹⁹ The exceptions make clear by excluding a facility that serves subscribers without crossing any public right-of-way, that a facility cannot be considered a cable system unless it crosses a public right-of-way.¹⁰⁰

The Commission is therefore correct in concluding that “merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable

⁹⁷ NCTA Comments at 33; Cox Comments at 14-16. The Commission should reject CenturyLink’s request that it not address at this time the regulatory status of entities providing video programming via IP over that provider’s facilities. CenturyLink Comments at 4-5. CenturyLink’s real objection is to the suggestion in the NPRM that the Commission and other authorities have previously made this determination. *Id.*; NPRM, ¶ 72. CenturyLink asks instead that the Commission make this determination based on the statutory definitions, rather than by reliance on precedents. That can easily be accomplished on the record in this proceeding.

⁹⁸ 47 U.S.C. § 522(5). The term “cable operator” is defined as “any person or group of persons (i) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (i) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.” *Id.*

⁹⁹ 47 U.S.C. § 522(7).

¹⁰⁰ 47 U.S.C. § 522(7)(B). The other exclusions are: (i) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (ii) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of Title VI, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of Title VI) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (iii) an open video system that complies with section 573 of this title; or (iv) any facilities of any electric utility used solely for operating its electric utility system. See 47 U.S.C. §§ 522(7)(A), (C), (D), (E).

operator.”¹⁰¹ An entity providing a service meeting the definition of “cable service” over a facility consisting of “closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service” that crosses public rights-of-way that it either owns or manages is a “cable operator” without regard to the format in which it transmits video programming and other programming services, unless it falls into one of the statutory exceptions.¹⁰² Nothing further is needed to support this conclusion; rather it is compelled by virtue of operation of the unambiguous terms of the statute, and the Commission is well within its authority to clarify this point as part of its examination in this proceeding.

B. A Cable Operator Distributing Video Services Over the Internet to Subscribers is Not Providing a Cable Service.

The Commission’s related tentative conclusion that “video programming services that a cable operator may offer over the Internet should not be regulated as cable services” is also undoubtedly correct and should be adopted.¹⁰³ ACA agrees with NCTA that providing video programming over the Internet, rather than use of IP is the relevant factor in determining who is a cable operator under the statutory definitions.¹⁰⁴ As NCTA has observed, an entity providing

¹⁰¹ NPRM, ¶ 71.

¹⁰² NCTA and Cox urge the Commission to make clear that AT&T’s U-verse IPTV service and Google Fiber’s TV Package qualify as cable services, thereby officially rejecting AT&T and Google Fiber’s position that they qualify as non-cable MVPDs under the Act. NCTA Comments at 35; Cox Comments at 15. ACA agrees that the Commission should make this explicit in the order it adopts in this proceeding. ACA notes that although AT&T refrained from commenting directly on the NPRM’s conclusions concerning the regulatory status of managed IPTV services in its Comments, it has conceded that “AT&T is subject to the Commission’s existing program access rules” in its Joint Opposition to Petitions to Deny in the AT&T-DirecTV merger review. See AT&T Comments at 4-9 (counseling against premature application of Title VI regulation on OTT video service providers); *AT&T Inc. and DirecTV, For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Joint Opposition of AT&T Inc. and DirecTV to Petitions to Deny and Condition and Reply to Comments at 55-56 (filed Oct. 16, 2014) (stating that AT&T is subject to the Commission’s existing program access rules); *Id.* at n. 203 (stating AT&T’s understanding that the “program access rules state that a cable operator with an attributable interest in programming may not ‘engage in unfair methods of competition or unfair or deceptive acts or purposes, the purpose or effect of which is to hinder significantly or prevent any [MVPD] from providing [applicable] programming to subscribers or consumers’”).

¹⁰³ NPRM, ¶ 78.

¹⁰⁴ NCTA Comments at 35-36.

video service over the Internet, whether as a linear streaming service or something else that the Commission is not considering to be an MVPD service, is not using a “set of closed transmission paths” that it owns or manages to deliver that programming to subscribers.¹⁰⁵ Irrespective of whether the Commission deems a linear OVD provider to be an MVPD, ACA urges the Commission to confirm this critical distinction and acknowledge the Internet video service offered by the cable operator is not a cable service.¹⁰⁶ This will bring regulatory certainty for cable operators who wish to explore innovative new video programming offerings over the Internet.¹⁰⁷

The NPRM also seeks comment on whether the classification of a video over the Internet service should be different if a cable operator provides it within its footprint only, rather than nationally, or whether the service is bundled with cable service.¹⁰⁸ The answer to both questions is no.

The Commission should not regulate a cable operator’s distribution of video programming service over the Internet as the offering of a cable service by a cable operator because the Internet video service does not fit the statutory definitions. This is true whether or not the service is offered on a national or regional basis, or solely within the service area of a cable operator, and regardless of whether the video over the Internet service is accessible over

¹⁰⁵ *Id.*

¹⁰⁶ ACA notes there is a distinction between a video service offered over the Internet that a cable operator offers as a standalone product and the type of online programming access many operators currently provide as a “TV Everywhere” feature of their managed cable service. Although cable subscribers may access video programming over the Internet through TV Everywhere arrangements their cable operators have made with video programmers, the online access capability is not offered as service for purchase separate and apart from the cable service.

¹⁰⁷ The record is clear: local franchising authorities view any video programming services provided by a cable operator, whether over its own system or over broadband Internet facilities owned and operated by other entities outside the cable operator’s franchise area, to be “cable services” provided by a “cable operator” subject to cable franchise fees and other obligations. See City of San Antonio Comments at 5-6; Anne Arundel County Comments at 10-12. The Commission can perform public service and save all stakeholders years of litigation by clarifying the regulatory status of such services in this proceeding.

¹⁰⁸ NPRM, ¶ 78.

that cable operator's broadband Internet facilities and service. The regulatory status of the Internet video service offering should be the same for a cable operator as any other entity distributing video over the Internet, even in areas, best described today as "mythical," where it is the only video service offered in-market. The guiding principle should be that each service retains its distinct regulatory status on the basis of its unique attributes, consistent with statutory directives, rather than based solely on the identity of the entity making the service available.

ACA also does not believe this outcome should change in cases where a video over the Internet service is bundled with a cable service. To promote innovation at this early stage, the Commission should not interfere with different types of entities exploring different types of offerings to consumers. Accordingly, the Commission should not regulate a video over the Internet service that is bundled with a cable service, even when the providers of both services are under common ownership or control, differently from a comparable standalone Internet video service. Moreover, the Commission should not regulate bundled offerings by commonly owned cable operators and providers of video over the Internet service differently from bundled offerings by those who are separately owned. Allowing managed MVPD service providers to bundle Internet video offerings with their traditional MVPD service is one of many innovative new types of services that may become available to consumers in the future, and should be neither helped nor harmed by a different regulatory treatment of the Internet video service component based on whether it's bundled or offered on a standalone basis or the ownership of the entity offering the Internet video service in the bundle.

* * *

For the reasons previously stated, ACA believes that the Commission may not extend MVPD status to linear OVDs consistent with statutory directives. Nonetheless, should the Commission take this action, the Commission must ensure even-handed regulatory treatment between incumbent cable operators, linear OVDs, and linear OVDs that are associated with

incumbent cable operators. The following discussion offers suggestions as to ways in which the Commission can achieve this goal.

C. The Commission Should Recognize and Protect the Right of An Entity to Offer a Linear OVD Service as a Non-Cable MVPD Irrespective of the Entity's Relationship to An Entity Offering Cable Service or Whether the Service is Accessed Over Broadband Facilities Also Used to Provide Cable Service.

The NPRM recognizes that cable operators may want to provide linear OVD services using that cable operator's broadband facilities for Internet access and these operators should be treated as non-cable MVPDs in that capacity.¹⁰⁹ Consistent with this recognition of their separate status as non-cable MVPDs in their provision of linear OVD services, if the Commission deems linear OVDs to be MVPDs, the Commission should affirmatively state that any entity, irrespective of whether it is owned by or affiliated with another entity offering cable service as a cable operator, may elect to offer a linear OVD service as an MVPD. Further, the Commission should expressly confirm that these non-cable MVPDs are permitted to offer such linear OVD service over owned or affiliated broadband facilities that are also used to offer cable service.

Once the Commission recognizes the right of a cable operator to declare that it is offering linear OVD service as a non-cable MVPD, it must also prevent a broadcast station or cable-affiliated programming from using carriage negotiations to limit the ability of the cable operator to offer an OTT service in its capacity as a non-cable MVPD. Today, cable operators and DBS providers often face restrictions against redistribution of the signals of local broadcast stations online under the terms of their retransmission consent agreements with broadcast stations. These restrictions also arise with regard to cable-affiliated programming. Accordingly, if linear OVDs are given retransmission consent rights to distribute broadcast signals online and program access rights to offer cable-affiliated programming online, the Commission must

¹⁰⁹ *Id.*, ¶ 78.

amend its good faith negotiation rules to provide that it is a *per se* violation of the obligation to negotiate in good faith for a broadcast station to restrict, as a condition of granting retransmission consent rights for carriage on a managed MVPD service, the operator's offering of the content of the broadcast signal as a non-cable MVPD inside or outside the cable operator's managed MVPD service footprint. It must also declare that a cable-affiliated programmer that restricts, as a condition of granting rights for carriage on a managed MVPD service, the operator's offering of the content of the programming feed as a non-cable MVPD inside or outside the cable operator's managed MVPD service footprint is an unfair act that violates Section 628(b).

D. The Commission Must Ensure Parity of Treatment for OVD MVPDs and Non-OVD MVPDs With Respect to Online Distribution Rights.

The primary benefit to linear OVDs that would qualify as MVPDs under the NPRM's proposals is coverage by the protections of the program access rules and the good faith negotiation obligation of local broadcast stations concerning retransmission consent.¹¹⁰ If the Commission adopts this approach, it must ensure that facilities-based MVPDs such as cable operators providing managed MVPD services are not disadvantaged in the marketplace regarding the services they can offer their customers vis-à-vis linear OVDs. For competitive parity, if a linear OVD is defined as an MVPD and is able to access video programming under the protections afforded MVPDs by Title VI, the Commission must ensure parity of access to online distribution rights for facilities-based MVPDs in their capacity both as cable operators and as linear OVDs. Cable operators should be free to offer video services online and be treated by the Commission, broadcast stations and cable-affiliated programming vendors the same as any other linear OVD for that service, wholly independent of their status as cable operators also providing managed cable service over cable systems.

¹¹⁰ 47 U.S.C. § 548; 47 C.F.R. § 76.1000 et seq.; 47 U.S.C. § 325(b)(3)(C)(ii)-(v); 47 C.F.R. § 76.65.

Retransmission Consent. It would be unfair to extend MVPD status to linear OVDs for the purpose of granting them the protections of the retransmission consent good faith rules if doing so puts those OVDs in a superior competitive position vis-à-vis the incumbent facilities-based MVPD service provider. If linear OVDs are able to negotiate for rights to redistribute broadcast stations signals under the retransmission consent framework and deliver these signals to customers over the Internet, then incumbent cable operators who have negotiated for retransmission consent rights should not be denied the right to also deliver the signals over the Internet.¹¹¹ The guiding principle is that the consent granted covers retransmission of the broadcast station signal as distinct from the terms and conditions of how the retransmission is to be handled by the cable operator on its system in terms of things like channel placement, the neighborhood in which the channel is located, acceptable advertising, etc. While Section 325(b)(3)(C)(ii) permits the broadcaster to provide such consent on different terms and conditions to different MVPDs in the local market, it prohibits exclusive agreements and does not permit discrimination among MVPDs in the grant of the right to retransmit itself.¹¹² If the Commission declares that the right to retransmit conveyed by the broadcast station under its rules includes the right of an OVD MVPD to redistribute the broadcast signal over the Internet,

¹¹¹ ACA recognizes that the rules governing retransmission consent separate the rights granting retransmission consent from the copyright to redistribute the copyrighted materials. Thus, even if OTT providers or cable operators obtain the rights to redistribute the broadcast station signal over the Internet, the question whether the copyright compulsory license applies to distribution of the signal over the Internet remains to be conclusively resolved by the Copyright Office. The Commission's rules, however, should ensure that in the event a broadcast station obtains the rights to sublicense the content of its signal to an MVPD for Internet distribution through a private agreement with a copyright holder, these same rights are available to any MVPD carrying the station's signal.

¹¹² 47 U.S.C. § 325(b)(3)(C)(ii) (Commission's rules shall "prohibit a broadcast television station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations"); 47 C.F.R. § 76.65(b)(1) (listing certain actions or practices that violate a broadcast television station's or MVPD's duty to negotiate retransmission consent agreements in good faith).

then this right to distribute the signals over the Internet shall not be denied to MVPDs who have existing retransmission consent rights.

Access to Cable-Affiliated Programming. For similar reasons, to protect and promote competition between cable operators providing managed MVPD services within their service areas and linear OVDs, if a linear OVD obtains distribution rights from a cable-affiliated programmer subject to the program access rules, then facilities-based MVPDs who have carriage rights to distribute such programming on their managed services must not be denied the right to distribute the programming online as well. The Commission has recognized that a cable operator and cable-affiliated programmer violate Section 628(b) and Section 76.1001(a) of the Commission's rules by engaging in the unfair act of withholding from one MVPD in market the high definition ("HD") version of covered regional sports networks and offering only the programming in standard definition ("SD") version while supplying both SD and HD feeds to the affiliated cable operator.¹¹³ The same logic applies to access to online distribution rights for facilities-based MVPDs and linear OVDs – a cable-affiliated programmer should not be permitted to restrict online distribution rights to facilities-based MVPDs in a market while granting them to linear OVDs.

V. CONCLUSION

The Commission is to be commended for its efforts to periodically assess whether marketplace and technological changes require a change of course. In this instance, however,

¹¹³ *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Order, 26 FCC Rcd 13145 (2011). The Commission affirmed its prior decision that a cable operator can be held liable for the "unfair act" of a terrestrial cable programming vendor that it wholly owns, controls or with which it is under common control, and found that the cable operator and its affiliated regional sports networks violated Section 628(b) by withholding access to the programming in HD format from another MVPD for the purpose of providing a competitive benefit to the affiliated cable operator over its MVPD competitor. *Id.*, ¶¶ 24-37; *accord AT&T Services Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011); *AT&T Services Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Order, 26 FCC Rcd 13206 (2011).

the case for extending MVPD status to linear OVDs cannot be made either as a legal or policy matter. Administrative agencies have limited resources and should spend their time addressing actual rather than speculative harms and faithfully administering the laws as written by Congress. The Commission can best discharge its statutory obligations in this regard by declining to extend MVPD status to linear OVDs, clarifying that an IPTV provider offering a managed cable service over a cable system it owns or controls using IP transmission will be treated as a “cable operator” the same as any operator using analog or digital transmission, and moving ahead with pending reforms of its retransmission consent good faith rules that will benefit existing facilities-based MVPDs and with pending reforms to its program access rules so that MVPDs and their buying groups receive the protections Congress intended.

Respectfully submitted,

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