

**Before the
Federal Communications Commission
Washington, DC 20554**

In the matter of

Promoting Innovation and Competition
in the Provision of Multichannel Video
Programming Distribution Services

MB Docket No. 14-261

COMMENTS OF PUBLIC KNOWLEDGE

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Introduction

In proposing to recognize that online video services can operate as multichannel video programming distributors (MVPDs),¹ the FCC has charted a course that could lead to more new, innovative video choices for consumers. By interpreting the law in a technology-neutral way, in accord with Congressional intent, the FCC can promote competition and protect the public interest without imposing undue regulatory burdens on online video providers.

In recent years, online video has shown itself to be a viable option to for many viewers. Overcoming much initial skepticism, numerous providers have shown that it is possible to deliver high-quality video over the Internet at scale, and that there is a ready market of subscribers.

At the same time, most online video services remain complementary to traditional MVPD services, instead of substitutes. Instead of offering largely the same content as traditional cable—the option that IPTV and DBS systems followed—online video services have generally specialized in back-catalog, original,

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, at ¶ 1 (Dec. 19, 2014) [hereafter “NPRM”] (“[W]e propose to update our rules to better reflect the fact that video services are being provided increasingly over the Internet. Specifically, we propose to modernize our interpretation of the term ‘multichannel video programming distributor’ (‘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.”)

and specialty content.² For many viewers, this is enough, and cord-cutting is a real phenomenon. But for most viewers, it is not.

By allowing certain online linear programming services to operate as MVPDs, the FCC will enable both kinds of online video competition. Successful services like Netflix can continue without any additional regulation and can continue to popularize non-linear viewing options. Alongside these new kinds of services, however, online MVPDs can offer the linear programming many viewers are accustomed to, but in a more convenient way. When coupled with free, over-the-air broadcast programming, viewers will be able to subscribe to services that offer a complete line-up of programming that had traditionally only been available through facilities-based MVPDs. The FCC's existing rules will also ensure that this content is accessible to viewers with disabilities. This additional competition will help drive down prices and increase choices for all customers, including those of traditional MVPDs, while ensuring continued accessibility.

This pro-competitive step by the FCC will also demonstrate that the public policy of the United States is to encourage new forms of video competition, on new platforms. Absent this guidance, it is difficult for the law to evolve properly in other areas; e.g., copyright. While the FCC has no jurisdiction over copyright law, copyright laws (in particular, the cable and satellite compulsory licenses) have generally been interpreted in the absence of a clear demonstration of this pro-competitive policy. Those interpretations may be revisited in light of a clear

² The online services that offer the most new content are either part of an MVPD subscription ("authenticated" service) or offered by MVPDs that have been able to leverage their existing programming contracts (e.g. DISH's Sling TV).

articulation of an FCC policy designed to treat like services alike even if they are offered online.

I. The Term “Multichannel Video Programming Distributor” Encompasses All Platforms That Make Available Prescheduled “Video Programming”

Public Knowledge believes, as the Commission has held before, that whether or not a service is a multichannel video programming distributor should be “based on the similarity of the video service provided to the consumer, not on the technology used.”³ Until the present NPRM, the Commission has not followed through on this logic, and has instead treated video services that are similar to MVPD services, but offered online, as non-MVPDs.⁴ Consistent with the preliminary conclusions in the NPRM, however, the Commission should revise this understanding, and construe the term “multichannel video programming distributor” more broadly. As will be discussed below, the “programming channel” interpretation of the term “channel” in the definition of MVPD makes the most legal and policy sense, and is best in accord with Congressional intent. That being said, even the “transmission path” interpretation allows the Commission to find that online services can operate as MVPDs.

Stepping back, nothing in the text or legislative history of the Act suggests that Congress intended to hide an unstated requirement that MVPDs must be facilities-based. From the perspective of a consumer, this distinction is bizarre. Viewers do not purchase a portion of the electromagnetic spectrum when they

³ Annual Assessment of Competition for the Delivery of Video Programming, 27 FCC Rcd. 8610, ¶ 18 (2012).

⁴ Sky Angel Emergency Petition for Temporary Standstill, *Order*, 25 FCC Rcd. 3879 (MB 2010).

subscribe to an MVPD. They buy access to content—in particular, to channels like NBC, ESPN, and Comedy Central. An MVPD like Comcast even distinguishes its various TV plans as offering different levels of “on demand” and access to different numbers of “channels.”⁵ The channels in question are given names like “MTV” and “Discovery,” not like “549.25 MHz.” Thus, to the extent that the term “channel” is ambiguous, the Commission should construe the term in accord with its ordinary consumer and marketing meaning—a reading that also best accords with the public interest. By adopting such a reading, the Commission will allow online providers to compete on the same footing with traditional MVPDs.

A. *The Commission Must Take Account of Context When Interpreting the Term “Channel” As Used By the 1992 Cable Act*

The 1934 Communications Act,⁶ as amended over the years by the Cable Communications Policy Act of 1984,⁷ the Cable Television Consumer Protection and Competition Act of 1992,⁸ and many other statutes, uses the word “channel” in various ways. In a video context, the Act uses the term both in a “transmission path” sense, to refer to a range of frequencies used to transmit programming, and in a “linear programming” sense to refer to the programming itself, or the programmer.⁹

⁵ See, for example, Comcast’s overview at <http://comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (last accessed May 10, 2012).

⁶ PL 73-416, 48 Stat. 1064 (1934).

⁷ PL 98-549, 98 Stat. 2779 (1984).

⁸ PL 102-385, 106 Stat. 1460 (1992).

⁹ When a word can be used in both a “container” and a “contents” sense, this is an example of synecdoche. Similarly, when one says “the kettle is boiling,” this literally means “the water inside the kettle is boiling.” See *generally* CHRISTOPHER KELEN, AN INTRODUCTION TO RHETORICAL TERMS 28 (Humanities-Ebooks 2007).

Thus when the term is used in the Act it is necessary to read the word in either the “linear programming” sense, or in the “transmission path” sense, as context demands.

There is nothing unusual about reading a statutory term different ways in different contexts. While there is an interpretive presumption that a term that appears several times in a statute is given the same reading each time,¹⁰ the Supreme Court has explained that this presumption “readily yields” and that “[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.”¹¹ As the Court further explained,

Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.¹²

Commission practice confirms that the same word can be given a different construction when it is used by different acts. For example, the Commission interprets the word “telecommunications” to mean one thing under the Telecommunications Act, and another thing under the Communications Assistance for Law Enforcement Act.¹³ As the DC Circuit recognized, it is well within the

¹⁰ *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

¹¹ *Atlantic Cleaners & Dyers. v. United States*, 286 US 427, 433-34 (1932).

¹² *Id.* at 433.

¹³ *See American Council on Educ. v. FCC*, 451 F. 3d 226, 230 (DC Cir. 2006).

Commission's authority to give words different constructions from one act to another when the different laws evince "different texts, structures, legislative histories, and purposes."¹⁴ Similarly, the word "channel" means one thing when used as part of the Cable Communications Act of 1984¹⁵ ("1984 Cable Act") and another thing when used as part of the definition of multichannel video programming distributor ("MVPD") in the Cable Television Consumer Protection and Competition Act of 1992¹⁶ ("1992 Cable Act"). In particular, the word "channel" in the 1992 Cable Act (as it appears in the definition of MVPD) should be given a "linear programming" reading, since only that reading is consistent with the Act's pro-competitive purposes.

B. Other Provisions of the Law, Commission Practice, and Common Usage All Demonstrate That the Term "Channel" Has Both a "Transmission Path" and a "Programming" Sense

According to the 1984 Cable Act, "the term 'cable channel' or 'channel' means 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 the Commission by regulation)." In *Sky Angel*,¹⁷ the Media Bureau used this definition to find that Sky Angel is not a "multichannel video programming distributor" (MVPD), since an MVPD "makes available for purchase...multiple channels of video programming."¹⁸ The Bureau reasoned that Sky Angel does not

¹⁴ *Id.* at 231.

¹⁵ PL 98-549, 98 Stat. 2779 (1984).

¹⁶ PL 102-385, 106 Stat. 1460 (1992).

¹⁷ *Sky Angel Emergency Petition for Temporary Standstill, Order*, 25 FCC Rcd. 3879 (MB 2010).

¹⁸ 47 USC § 522(13).

make available for purchase any “channels” since the electromagnetic frequency spectrum that its video programming uses for transmission is provided by a viewer’s broadband ISP and not by Sky Angel.¹⁹

This construction’s primary flaw is that it ignores the relevant context. The term “MVPD” was adopted as part of the 1992 Cable Act, not the 1984 Cable Act. As will be discussed below, the 1992 Cable Act was concerned with promoting inter-platform competition and (contrary to the Bureau’s conclusion) not all of systems listed in the statute as illustrative of MVPDs provide a transmission path. But it is important to note that *even the 1984 Cable Act’s definition* uses both senses of the term “channel” (the container sense and the contents sense) when it speaks of one kind of channel carrying another kind of channel. This demonstrates that the drafters of the 1984 Cable Act saw a channel as both a medium of communication (in this case, the frequency which a communication may use) and the content of a communication itself (a television station, or television channel). Otherwise, the statute would be incoherent. Used only in the “transmission path” sense, one channel cannot “deliver” another. A channel can be used to retransmit content, but one portion of the electromagnetic frequency spectrum cannot be used to “deliver” another portion of the electromagnetic frequency spectrum. A channel can only deliver programming. Thus the 1984 Cable Act’s definition of “channel” itself uses the term “channel” in both the “transmission path” sense and a “programming” sense.

¹⁹ *Sky Angel* at ¶ 4.

The Commission frequently uses the term in both senses, as well. For example, in an NPRM on revision of the program access rules, it wrote that “consumers do not consider the SD version of a particular channel to be an adequate substitute for the HD version.”²⁰ The word “channel” in this context makes no sense if it means “a portion of the electromagnetic frequency spectrum.” There is no “HD” or “SD” version of a particular frequency band; rather, particular frequency bands can carry content that is in either HD or SD. Similarly the Commission, in discussing the Comcast Network, wrote that “this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators.”²¹ Here again the Commission uses the term to refer to content and not to a frequency band. And in its Comcast/NBCU conditions order, while the Commission declined to resolve whether an online video distributor (OVD) could be an MVPD,²² it discussed how “the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.”²³ Thus the Commission has already acknowledged that no technical barrier stands in the way of online services providing “channels” of programming to their customers. Generally speaking it is clear from context whether the Commission (or

²⁰ Revision of the Commission’s Program Access Rules, *Notice of Proposed Rulemaking*, MB Docket No. 12-68, FCC 12-30 (Mar. 20, 2012) at ¶ 54. *See also* Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 55 (2010).

²¹ Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 30 (2010).

²² Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 61 n.131.

²³ *Id.* ¶ 80.

Congress) is using “channel” in a content or a container sense, and in those cases where there may be ambiguity, qualifying words (such as “channel capacity”²⁴) provide the necessary disambiguation. In the case of the definition of MVPD in the 1992 Cable Act, as will be discussed below, it is clear from the context and purpose of the law that a “channel” is intended to be given a service-based, not a technology-based reading.

Two popular reference works further demonstrate that the word “channel” in a television context frequently is used in two different senses. First, the Oxford English Dictionary defines channel as “[a] band of frequencies of sufficient width for the transmission of a radio or television signal; *spec.* a television service using such a band,” providing both senses of the word.²⁵ Second, Wikipedia, with an ethos very different from the OED, similarly provides both senses. It writes that “[i]n broadcasting, a channel is a range of frequencies (or, equivalently, wavelengths) assigned by a government for the operation of a particular radio station, television station or television channel,” providing the “transmission path” sense of the word. But it concludes with a programming sense, explaining that “[i]n common usage, the term also may be used to refer to the station operating on a particular frequency.”²⁶

²⁴ See Internet Ventures Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities, *Memorandum Opinion & Order*, 15 FCC Rcd. 3247 (2000).

²⁵ Oxford English Dictionary Online Edition, <http://www.oed.com> (accessed May 2, 2012).

²⁶ Channel (broadcasting), [http://en.wikipedia.org/w/index.php?title=Channel_\(broadcasting\)](http://en.wikipedia.org/w/index.php?title=Channel_(broadcasting)).

C. *The Text and Legislative History of the 1992 Cable Act Confirm That “MVPD” Is a Technology-Neutral Category*

The 1984 Cable Act was “was premised on the expectation that emerging competition in the video marketplace would result in reasonable rates for cable service and improved customer services practices.”²⁷ However, after its passage “competition to cable from alternative multichannel video technologies largely ... failed to materialize.”²⁸ Business and regulatory barriers stood in the way of competition, and consumers suffered.

In response, Congress enacted the 1992 Cable Act. In that Act, rather than simply regulating monopolist cable systems, Congress enacted a series of measures designed to promote consumer welfare by enabling competition to cable from systems that used different transmission methods. Rather than regulating each different system differently according to its technology, Congress created a new service category, “multichannel video programming distributors” (MVPDs), along with a framework that treated all MVPDs alike. Thus, the program access and retransmission consent systems that were central components of the 1992 Cable Act apply to all MVPDs, not just to cable or just to satellite TV. Of course, where there are good reasons to treat different classes of MVPDs differently Congress continues to do so. But the future-proof laws that concern MVPDs generally were specifically designed to be technology-neutral and can apply to online MVPDs today just as, in 1992, they easily encompassed cable, direct broadcast satellite, and multichannel multipoint systems.

²⁷ H.R. Rep. No. 102-628 (1992) at 26.

²⁸ *Id.*

It is clear from examining the text of the 1992 Cable Act that Congress intended the term “channel” to have a “programming channel” sense. The 1992 Cable Act provides that a “multichannel video programming distributor” is:

a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.]²⁹

A plain reading of this definition demonstrates that MVPDs are characterized by what they do, not how they do it. *All* providers who “make[] available for purchase, by subscribers or customers, multiple channels of video programming” qualify. As the FCC has previously found, the plain language of this definition does not require that an MVPD “operate [its] vehicle for distribution.”³⁰ Indeed, in the Telecommunications Act of 1996 Congress demonstrated that an MVPD need not be facilities-based when it mentioned that an MVPD might “use the facilities” of another provider.³¹ This shows that the last time it considered this issue, and consistent with the 1992 Cable Act, Congress found that “MVPD” was a service-oriented category and not a technological silo. The law does not require that an MVPD build or operate last-mile wired facilities, launch a satellite, or use any particular technology or method of program delivery.

²⁹ 47 U.S.C. § 522(13).

³⁰ Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Third Report & Order & Second Order on Reconsideration*, 11 FCC Rcd. 20227, ¶ 171 (1996).

³¹ 47 U.S.C. § 543(l)(1)(D) (discussing a “multichannel video programming distributor using the facilities of [a] carrier or its affiliate”).

To further clarify this, Congress provided in its definition a list of every then-existing multichannel service (“a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor”) while expressly reserving that the list was not intended to be exhaustive (“a person such as, but not limited to.”)³² This demonstrates that Congress intended the definition to encompass technologies that, at the time, had not yet been developed, as well as all then-existing vehicles for video distribution.

The statute provides further context that supports a “linear programming” interpretation of “channel.” It describes how viewers buy access to “video programming” in two primary ways: on-demand, and via prescheduled channels. It distinguishes these two services when it provides that

the term ‘interactive on-demand services’ means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider[.]³³

³² In *Sky Angel*, the Media Bureau took note of this but reasoned that, because the definition states that an MVPD must be a system “such as” the ones expressly listed, to be an MVPD a system must share characteristics with the ones given. *Sky Angel* at ¶ 7 n.41. Of course, any MVPD must, like the listed MVPDs and consistent with the definition, provide multiple channels of video programming to subscribers. This provides the necessary commonality between the listed services. But the Bureau further reasoned that each listed MVPD provides a “transmission path” it uses to deliver video programming. *Id.* at ¶ 7. There, the Bureau erred. Wireless systems do not make a “transmission path” available for purchase to viewers. Because the Bureau’s past construction is contradicted by the very list of MVPDs the statute provides, the Commission is right to tentatively reject it. Furthermore, even if by some reading wireless MVPDs do make a “transmission path” available for purchase by viewers, then online MVPDs do, as well.

³³ 47 U.S.C. § 522(12).

On-demand and prescheduled programming thus represent different models of presenting “video programming.” By defining a kind of service (“interactive on-demand service”) that is distinct from MVPDs, and by providing that video common carriers that offer only interactive on-demand services would not be considered “cable systems” (one kind of MVPD)³⁴ Congress drew a line between providers of prescheduled video programming on the one hand, and providers of on-demand video programming on the other. Since exclusively on-demand video programmers are *not* cable systems and are therefore not MVPDs, it follows that a provider of prescheduled video programming *is* an MVPD.³⁵ Thus, for the purposes of the 1992 Cable Act, a “channel” of video programming must mean “prescheduled video programming.”

Under the 1992 Cable Act’s scheme, “channels” and “on-demand” are both services, not technological delivery methods. The overall statutory scheme would fail if a “channel” were found to be a transmission method while “on-demand” remained a service. As will be discussed more fully below, under this reading, there is no reason why an on-demand service could not be delivered via a channel. Only a reading that understands that both of these terms refer to mutually exclusive services prevents such commingling.

³⁴ 47 U.S.C. § 522(7)(C).

³⁵ While an MVPD becomes one by virtue of delivering channels of video programming, video programming it offers via any means (including on demand) may be subject to Section 628. See Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 54 n.122; see also Telephone Company-Cable Television Cross-Ownership Rules, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 244, ¶ 109 (1994) (“video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.”).

The legislative history provides further evidence for this conclusion. A “principal goal” of the 1992 Cable Act was “to encourage competition from alternative and new technologies,”³⁶ by extending like treatment (e.g., under the program access rules, and for retransmission consent purposes) to like services.³⁷ This would enable competition rather than regulation to protect consumers. The House found that “competition ultimately will provide the best safeguard for consumers in the video marketplace and [that it] strongly prefers competition and the development of a competitive marketplace to regulation.”³⁸ (It also found that “until true competition develops, some tough yet fair and flexible regulatory measures are needed.”³⁹) Along these lines, the Senate found that “[e]ffective competition is achieved when there is competition from both another ‘multichannel provider’ (such as a competing cable operator, microwave or satellite system) and a sufficient number of over-the-air broadcast signals”⁴⁰—thus recognizing the need for broad, multi-platform competition between video providers without regard to their specific modes of operation.

The fact that online MVPDs were not yet possible when Congress passed the 1992 Cable Act is of no importance. To be sure, Congress enacted the 1992 Cable Act

³⁶ *Id.* at 27.

³⁷ 1992 Cable Act, PL 102-385, 106 Stat. 1460 at 1482 (retransmission consent applies to all multichannel video program distributors), 1494 (some MVPDs are prohibited from taking anti-competitive actions against any MVPD).

³⁸ H.R. Rep. No. 102-628 (1992) at 30.

³⁹ *Id.*

⁴⁰ S. Rep. No. 102-92 (1992) at 63.

in response to conditions that were prevalent in 1992.⁴¹ But in defining MVPDs it used broad language, and “[t]he use of broad language ... to solve [a] relatively specific problem ... militates strongly in favor of giving [a statute] broad application.”⁴² In any event the problem that it sought to solve—consumer harms caused by a lack of sufficient competition—persists today. And the solution is the same: a service-oriented approach to the video market that permits MVPDs using any technology to compete with established cable systems.

Given the pro-competitive, technology-agnostic approach evinced in the statute and the legislative history it is clear that Congress intended “MVPD” to be a service category, not a technological silo. If it intended to require that MVPDs be facilities-based it could have easily said so in the statute. It is unlikely that it would have enacted such a requirement through the circuitous means of incorporating in its definition one of the “transmission path” sense of the word “channel.”⁴³ Thus, the Commission should read the word “channel” in the “programming channel” sense.

D. A Narrow Reading of “Channel” Would Have Unintended Consequences

If the Commission does not adopt the “programming channel” reading, numerous unintended consequences may follow. These go beyond the anti-competitive and anti-consumer effects that would be expected to follow from

⁴¹ The legislative history’s reference to “facilities-based” competition should be read in this light. *See* H.R. Rep. No. 102-862 at 993 (1992). In 1992 the main competition to cable that could be foreseen was facilities-based. However, given the broad language of the Act, the pro-competitive policies that Congress enacted should not be confined to particular kinds of technology.

⁴² *Consumer Electronics Ass’n v. FCC*, 347 F. 3d 291 (D.C. Cir 2003).

⁴³ *See Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

artificially restricting market entry. Instead the Commission may be forced to conclude that many “channels” that are currently offered by MVPDs are not channels at all anymore—or it may find that other services offered by MVPDs, such as interactive apps or on-demand programming are now defined as “channels,” based only on the behind-the-scenes technical characteristics of the way that the content is delivered.

For example, if the Commission finds that an MVPD must provide its subscribers with a transmission path, any programming that is delivered without a fixed transmission path may no longer be viewed as being delivered via a “channel.” IP-based MVPDs such as U-Verse that may not assign particular programming networks particular frequencies may not provide any “channels” at all. Switched digital networks on cable systems may no longer count as “channels” since they are not *continually* broadcast on a fixed “portion of the electromagnetic frequency spectrum.” And any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation. At the same time, if an MVPD provides its video-on-demand or other services on particular bands of frequencies, then these services would be considered “channels” under the Commission’s rules: there is nothing in the “transmission path” reading of “channel” that would restrict the term to channels that provide linear programming. Needless to say such shifting categories would wreak havoc with the Commission’s ability to perform its statutory duties. While the Commission may be able to avoid *some* of these effects if, as discussed below, it adopts an understanding of the “transmission path” interpretation that does not require facilities ownership, it can best achieve

regulatory certainty via the “programming” construal of “channel” in the definition of MVPD.

E. Even Under the “Transmission Path” Interpretation, Online Services That Make Linear Programming Available for Purchase are MVPDs

Even if the Commission adopts the “transmission path” interpretation, it could still find that online services do in fact provide a “transmission path” from their own facilities to the customer, simply by establishing a two-way communications path between their facilities and the customers’ equipment. An online video service might not own the wires and servers that connect it to the customer—but neither do DBS providers own the spectrum their signals travel over. (Indeed, a cable provider does not own the *entire* communications path its signal travels over, e.g., the customer’s inside wiring.) Online services, cable providers, DBS, an IPTV providers alike all establish a communication between their own facilities and the viewing equipment of the end user. This may be sufficient to find the existence of a “transmission path.”⁴⁴

An analogous statute provides further support for the idea that, even under the “transmission path” interpretation, an online entity may still qualify as an MVPD if it offers linear video programming for purchase. The “passive carrier” exemption to copyright law’s public performance right holds that an entity does not infringe copyright if it merely “provid[es] “wires, cables, or other communications channels

⁴⁴ By contrast, a “closed transmission path,” as specified in the definition of a cable system, may be one where the provider does own the transmission facilities. *See* 47 U.S.C. § 522(7).

for the use of others.”⁴⁵ In *NFL v. Insight Telecommunications*,⁴⁶ the NFL attempted to argue that Insight did not qualify for this exemption solely because it “did not own the ‘wires’—the hardware, if one will—over which the signals were transmitted.”⁴⁷ In the NFL’s view, Insight therefore infringed copyright when it retransmitted NFL’s programming. But finding that Congress did not intend “that section be read in such a crabbed fashion,”⁴⁸ the court found that Insight qualified as a passive carrier.

Just as it is not necessary for a passive carrier to own the physical facilities its video retransmissions travel over in order to “provide” those facilities within the meaning of the law, it is not necessary for an MVPD to own the transmission paths it uses to make video programming available for purchase.

F. Reading the Statute Broadly Will Not Include Popular Online On-Demand Services Like YouTube and Netflix

While broad, a service-oriented reading of the statute is not all-encompassing—it only applies to continuous, linear, pre-scheduled programming services. Even if “channel” is read to mean a “programming channel” (a linear stream of pre-scheduled video programming), “video programming” itself is defined by statute to mean “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁴⁹ The definition of MVPD could not be construed to include exclusively on-demand services (or to non-

⁴⁵ 17 U.S.C. § 111(a)(3).

⁴⁶ 158 F. Supp. 2d 124 (D. Mass. 2001).

⁴⁷ *Id.* at 131.

⁴⁸ *Id.* at 133-34.

⁴⁹ 47 U.S.C. § 522(20).

continuous linear programming), which are not prescheduled channels of programming and are unlike television broadcast programming. Additionally, the statute requires that an MVPD offer *multiple* channels of programming, *for purchase*. A free service would not meet this definition, nor would a service that only made available for purchase a single programming channel.

II. In General, Existing MVPD Requirements Would Apply to Online MVPDs

Because the Commission appears ready to act to promote competition by allowing certain online services to operate as MVPDs, it is necessary to walk through the applicability of existing regulations to those services, whether those regulations are key to protecting consumers and prompting completion and diversity (such as the program access and program carriage rules), are designed to ensure accessibility, and even technical regulations such as signal leakage requirements. In the following subsections Public Knowledge will walk through the various duties and obligations of MVPDs as set forth in the NPRM.⁵⁰

A. Section 628 of the Communications Act and Program Access Rules Would Apply to Online MVPDs

One of the chief benefits of recognizing that online services can operate as MVPDs is that smaller MVPDs are protected under Section 628 of the Communications Act. Section 628 prevents dominant MVPDs from taking anticompetitive acts against other MVPDs, but does not prevent dominant MVPDs from taking anticompetitive acts against non-MVPD video providers. By bringing some online video services under the ambit of Section 628, the FCC would provide

⁵⁰ NPRM ¶¶ 33-64.

online MVPDs with an avenue to pursue claims of anticompetitive conduct, and its very applicability could act as a check against anticompetitive acts.

Additionally, Section 628 provides the FCC with “broad and sweeping”⁵¹ rulemaking authority to prevent certain kinds of anticompetitive acts categorically. The FCC has used this authority to check anticompetitive behavior in various ways, e.g., to prevent MVPDs from suing landlords over contracts granting exclusive access to multiple dwelling units,⁵² and through its (now partly sunset) program access rules.⁵³ While it is impossible to foresee all the ways in which the FCC might use its rulemaking authority to promote video competition in the future, there is no reason to restrict that authority to traditional, facilities-based MVPDs.

By ensuring that online MVPDs are protected by Section 628 and its program access rules, the FCC would promote a marketplace where much the same programming is available through online MVPDs as through facilities-based MVPDs. As mentioned above, the FCC allowed its program access rules, in part, to sunset. Specifically, the prohibition on exclusives in areas served by a cable provider is no longer in force. However, the prohibition on exclusives that prevent distribution of programming to areas not served by cable remains in place,⁵⁴ as does a prohibition on cable operators unduly influencing their affiliated programmers with respect to

⁵¹ *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (DC Cir. 2009).

⁵² See 47 C.F.R. § 76.2000(a); see also Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235 ¶ 51 (2007).

⁵³ *Revision of the Comm’n’s Program Access Rules*, 27 FCC Rcd. 12605 (2012).

⁵⁴ 47 C.F.R. § 76.1002(c).

their sale of programming to unaffiliated MVPDs,⁵⁵ and a prohibition on cable-affiliated programmers from discriminating with respect to carriage by different MVPDs.⁵⁶

The program access rules have been a success: they enabled what MVPD competition we currently have—neither DBS, nor IPTV would have been able to secure programming if incumbent cable companies were able to prevent programming from airing on these new competitive MVPDs. With similar rules in place for online MVPDs, the FCC could ensure they had the same access to programming as any other MVPD. While it would be better for online MVPDs if the categorical prohibition on exclusives in cable-served territories were still in place, the FCC retains statutory authority to re-strengthen its rules, particularly to benefit nascent competition.

But even in the absence of categorical rules preventing MVPDs from securing some kinds of exclusivity, many actions might still violate Section 628 in particular circumstances. For example, an MVPD that prevents a programmer from selling to an online MVPD in an effort to starve online MVPDs of valuable programming might violate the statute (as well as portions of the program access and program carriage rules). Thus, “most-favored nation” and “alternative distribution” clauses in programming contracts that would prevent a programming from selling to an online MVPD may be unlawful, with the programmer having a cause of action under program carriage and an online MVPD having a cause of action under Section 628.

⁵⁵ 47 C.F.R. § 76.1002(a).

⁵⁶ 47 C.F.R. § 76.1002(b).

Similarly, an incumbent MVPD that unduly influences an affiliated programmer, causing it to discriminate against an online MVPD, might also act unlawfully. Even when particular actions might not be *per se* violations under the Commission’s rules, by allowing online MVPDs to benefit from program access and Section 628, the FCC will provide them the opportunity to make their case under established complaint procedures.

It is important to note that the program access rules are restrictions on what limitations incumbent MVPDs can put on programmers—they are not positive obligations applicable to programmers themselves. While it is in the interest of programmers to sell their programming to as many providers as possible, program access protections are not “must sell” requirements. This is the context needed to understand the issue of whether programmers might have to deal with a “potentially large”⁵⁷ number of MVPDs that might wish to carry their programming. A “potentially large” number of customers is a good thing. Of course, independent programmers would have no obligation to sell their programming to a provider that did not appear reputable or meet other characteristics. But, while a number of online MVPDs might have a relatively-small subscriber base, that does not mean they would not be able to negotiate for programming. The transaction costs of selling to smaller online MVPDs could be minimized through the use of standard contracts and certifications that they are eligible for MVPD status.

If the FCC chooses not to recognize that online providers can operate as MVPDs, the FCC’s legal path for extending the protections of program access and

⁵⁷ NPRM ¶ 44.

Section 628 to online services is less clear. The FCC could find that limiting competition among online video services has the secondary effect of limiting MVPD competition, and apply the statute in that manner to ensure that online video services can access popular programming without restriction from incumbent MVPDs. However, instead of this second-best option, the FCC should simply recognize that some online video services can operate as MVPDs and apply Section 628 and its program access rules directly.

B. Retransmission Consent Rules Would Apply to Online MVPDs

Online MVPDs would be covered by the retransmission consent rules. The statute makes this clear—“[n]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station” without permission, or under one of a few limited exceptions. Were the FCC to allow online video services to operate as MVPDs, this would apply to them, as well.⁵⁸ While this action would not resolve all the copyright issues involved in the retransmission of broadcast programming, on balance the FCC’s action to recognize online MVPDs and apply its retransmission consent rules to them would have positive effects for both online video providers themselves and video policy more broadly.

Originally, cable systems operated without permission from the broadcasters they retransmitted. The Supreme Court agreed with the cable industry that this did

⁵⁸ The FCC’s retransmission consent regulations, *see* 47 CFR § 76.64, would not have to be modified much if at all to accommodate online MVPDs, as they do not refer to the specific facilities an MVPD service is offered over.

not infringe copyright law as it then existed⁵⁹—but then Congress changed the law. Instead of simply granting broadcasters a new right to control the retransmission of their programming without qualification, however, Congress created a compulsory license system whereby cable systems that complied with FCC procedures were granted an automatic (but not free) license to retransmit broadcast programming.⁶⁰ (A similar license was eventually created for satellite TV, as well, and for compulsory license purposes IPTV systems are considered “cable.”) After Congress passed a law to that effect, those FCC procedures came to include the requirement that cable systems get the consent of local broadcast stations whose signals they would retransmit. Thus over time the system for MVPD carriage of broadcast signals has come to be quite peculiar: instead of simply negotiating for a copyright license, as they do with cable programming, MVPDs must negotiate for “signal” rights and also do paperwork and make payments for copyright clearance with the Copyright Office. In this legal environment, a local broadcaster might not even have the right under copyright to license the programming it carries to an MVPD—the copyright aspect is taken care of entirely via the compulsory license, and the broadcaster only obtains the right to air the programming.

Overall, this system is overly cumbersome and has outlived its usefulness, and Public Knowledge has argued for some time that policymakers ought to revisit it.⁶¹ And it is true that were the FCC were to encompass online MVPDs within its

⁵⁹ See *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974).

⁶⁰ 17 U.S.C. § 111; see also Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541.

⁶¹ Public Knowledge, *TOMORROWVISION* (2012).

retransmission consent rules, it would only be taking care of some of the legal issues that would need to be resolved if an online MVPD wants to carry broadcast programming in the same way that a traditional MVPD does. Nevertheless, the FCC should clarify that the retransmission consent rules do in fact apply to online MVPDs—that is, both local broadcasters and online MVPDs have an obligation to negotiate for carriage in good faith, and an online MVPD cannot carry the signal of a local broadcaster without its consent. These rules should apply even in light of the uncertainty around the copyright license for a number of reasons.

First, as a legal matter, the FCC does not have the ability to consider online services as MVPDs only for the purposes of protections that have an immediate benefit, such as Section 628, and not for retransmission consent. The worst that could be said of the FCC’s action with respect to online MVPDs and retransmission consent is that it would change nothing, at least in the short term. But the overall benefits of the FCC’s broadening its understanding of “MVPD” in other areas are clear enough to outweigh this uncertainty. Additionally, even if an online MVPD is not able to secure rights to broadcast programming via other means, it remains the case that over-the-air broadcast programming can be viewed by anyone with an antenna. Thus an inability to carry popular broadcast programming is not necessarily a fatal flaw for an online MVPD, which could specialize in popular “cable” channels and appeal to the “cord-cutting” demographic.

Second, while the FCC cannot guarantee that online MVPDs will qualify for the cable (or satellite) compulsory licenses that traditional MVPDs make use of, its actions would have a persuasive effect, demonstrating that the public policy of the

United States is to promote online video competition.⁶² The Copyright Office and the courts have thus far been reluctant to apply copyright law in a technology-neutral way. The Copyright Office, for instance, has interpreted copyright law in an “Internet exceptionalist” manner, recommending against the extension of existing licensing systems to new platforms.⁶³ Similarly, even though the Supreme Court has articulated a “looks like a duck, quacks like a duck” test for whether certain online video services engage in public performances of copyrighted works in the same way that cable television does,⁶⁴ lower courts have declined to extend the same compulsory license to such systems as are available for cable.⁶⁵ Some online video systems thus find themselves in a double bind: they are treated as cable systems for the purpose of liability, but not for the purpose of qualifying for the statutory licenses that enable them to operate. The FCC can help solve this problem. While the FCC’s action would have no binding effects on other government bodies, it would have persuasive authority that could help copyright law, like communications law, adapt to new platforms, and provide occasion for interpretations of the Copyright

⁶² The Department of Justice has also recognized the competitive importance of online video. *See* Competitive Impact Statement of the Department of Justice 11-30, *United States v. Comcast Corp.*, 1:11-cv-00106 (D.D.C. Jan. 18, 2011).

⁶³ *See* COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT (2008) (*109 Report*), at 199.

⁶⁴ *American Broadcasting v. Aereo*, 134 S. Ct. 2498 (2014).

⁶⁵ *American Broadcasting Companies v. Aereo*, Nos. 12-cv-1540, 12-cv-1543, (SDNY, October 23, 2014) (granting a preliminary injunction against Aereo and finding that “not all entities that perform publicly in ways similar to cable systems are entitled to the § 111 license”).

Act to be revisited.⁶⁶ Thus it is possible that online MVPDs could eventually benefit from the same legal regime as traditional MVPDs in all respects.

Third, a given broadcaster might in fact have the right to license or sublicense the programming it carries—for instance, if it primarily airs self-produced programming, or programming produced by its corporate parent. The “good faith” obligation for retransmission consent negotiations should not be read to require a local broadcaster to obtain rights it does not have, but it should require that a local broadcaster be willing to negotiate for the rights it does in fact have.

Fourth, an online MVPD might be able to negotiate for private copyright licenses for the programming carried by a particular signal from a third party, and it might choose to carry a local broadcaster’s signal instead of, e.g., a network feed. In this case, the law would still require that the online MVPD get the consent of the local broadcaster to carry its signal, even though it has separate rights clearance otherwise. The FCC’s rules should acknowledge this possibility.

C. Program Carriage Rules Would Apply to Online MVPDs

The FCC’s program access rules protect consumers’ right to benefit from MVPD competition by limiting the ability of dominant MVPDs to limit the distribution of programming on rival systems. Similarly, the program carriage rules protect consumers’ right to benefit from diverse content, by preventing MVPDs from

⁶⁶ Additionally, by establishing that the policy of the United States is to promote video competition online, the FCC can help provide guidance to the US delegations in places like WIPO, where issues pertinent to the distribution of video programming online have been under discussion for many years.

discriminating against programmers on the basis of their affiliation,⁶⁷ or requiring a financial interest in the programming vendor, or requiring that the programmer withhold programming from competing MVPDs.⁶⁸

Simply classifying some online services as MVPDs would bring about one immediate positive effect under the program carriage rules: Because it is unlawful for any “cable operator or other multichannel video programming distributor [to] coerce any video programming vendor to provide, or [to] retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system,” incumbent MVPDs would not be able to prevent unaffiliated programmers from selling their programming to online MVPDs.

The rules, of course, would not only protect online MVPDs; they would prevent online MVPDs from taking the same actions with respect to programmers that traditional MVPDs are prohibited from taking. The program carriage rules were generally enacted to counter the effect of dominant MVPDs, and while there are no dominant online MVPDs right now, that may change. If the FCC is successful in

⁶⁷ In other words, an MVPD that gives preferential treatment to its own programming, or programming produced by a company it has invested in, instead of similar programming from an independent programmer, would run afoul of program carriage. Unlike the program access rules, “affiliation” here is not limited to cable affiliation, but refers to affiliation with any MVPD. Notably, it would constitute discrimination by affiliation if an MVPD discriminated against a programmer if that programmer was affiliated with a competing MVPD, or if an MVPD discriminated against a programmer because it was not affiliated with any MVPD. That is, the prohibition should not be read to only prevent an MVPD from discriminating in favor of its own affiliated programming, but from affiliation *per se* being a factor in carriage decisions.

⁶⁸ 47 C.F.R. § 76.1301.

promoting video competition it may be that an online MVPD achieves significant market power. This may be a good problem to have from today's perspective, but it is still a potential problem, and the FCC's program carriage rules should apply in a technology-neutral way to all MVPDs to the greatest extent possible. Thus, it would be sensible, forward-looking policy for the FCC to prohibit an online MVPD from discriminating against an independent programmer on the basis of affiliation, requiring exclusivity, or demanding a financial interest.

D. Section 629 of the Communications Act Would Apply to Online MVPDs, Though CableCARD Would Not, and the Commission Should Take Online MVPDs Into Account When Updating its Navigation Device Rules

Section 629 of the Communications Act would apply to online MVPDs, but the state of the implementation of Section 629 is currently in flux. It would be illogical and physically impossible to apply the CableCARD system to online MVPDs—a system that doesn't even apply to all traditional MVPDs. Public Knowledge has long argued that the FCC should replace CableCARD with a more modern technology that provides for consumer choice of video devices across all MVPDs.

That said, much of the rationale for Section 629 derives precisely from the facilities-based nature of traditional MVPDs. Section 629 is designed to ensure that customers who must install a satellite dish or install wiring into their homes continue to have choice between video devices. As the Commission has observed before, Section 629 amounts to *Carterfone*⁶⁹ for video networks:

⁶⁹ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

Just as the *Carterfone* decision resulted in the availability to the consumer of an expanding series of features and functions related to the use of the telephone, we believe that Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer.⁷⁰

It later elaborated that

The competitive market for consumer equipment in the telephone context provides the model of a market we have sought to emulate [in implementing Section 629]. Previously, consumers leased telephones from their service provider and no marketplace existed for those wishing to purchase their own phone.... As a result of *Carterfone* ... the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.⁷¹

The Commission was not the first to see the analogy between the creation of a competitive market in set-top boxes and *Carterfone*. In fact, the same analogy was noted by then-Representative Markey,⁷² Section 629's chief advocate in the House, and by Representative Bliley⁷³ when he introduced the earlier Competitive Consumer Electronics Availability Act.

⁷⁰ Implementation of Section 304 of the Telecommunications Act of 1996, Report & Order, 13 FCC Rcd. 14775, ¶ 26 (1998).

⁷¹ *Id.* at ¶ 11.

⁷² Representative Markey noted that the provision would [H]elp to replicate for the interactive communications equipment market the success that manufacturers of customer premises equipment (CPE) have had in creating and selling all sorts of new phones, faxes, and other equipment subsequent to the implementation of rules unbundling CPE from common carrier networks.

Comments of Representative Markey, 142 CONG. REC. H1170 (1996)

⁷³ Representative Bliley observed that under his bill, Commission regulations will assure that converter boxes, interactive communications devices, and other customer premises equipment [would] be available on a competitive basis from manufacturers, retailers, and other vendors who are not affiliated with the operators of telecommunications systems, as is the case in our telephone system today.

Comments of Representative Bliley, 141 CONG. REC. E635 (1995).

It is therefore relevant than in *Carterfone*, the Commission found that a tariff that prevented a user from attaching “equipment, apparatus, circuit or device not furnished by the telephone company” to “the *facilities* furnished by the telephone company”⁷⁴ was unreasonable. Higher switching costs, and fewer competitive choices, exist for video services that run wires to (or install equipment on) a customer’s premises; therefore, rules that ensure that customers have a competitive choice of video devices are especially warranted for those services. These concerns are lessened with respect online video services that do not control physical facilities or require viewers to use specific equipment to access their services, and where it is simpler for the customer to switch from one provider to another.

Thus, it may be acceptable for the Commission to find that online MVPDs satisfy their obligations under Section 629 to the extent that they make their service available on a variety of popular platforms or in standards-compliant ways (e.g., through the web, without the need for proprietary software). However, given the unknowns about CableCARD’s eventual successor, the Commission should leave the door open to applying the same rules to online MVPDs as any other MVPDs, once it figures out exactly what those rules will be. A single standard for accessing video services, whether they are facilities-based or over-the-top, may benefit both consumers and online video providers.

⁷⁴ *Carterfone* at 421.

E. The Commission Should Apply Other MVPD Rules to Online MVPDs When Reasonable

The Commission has long needed to apply provisions of the Communications Act and its regulations to diverse physical media. The challenges of applying regulations regarding geographic specific information such as emergency information alerts to a potentially national service is no different here than in the case of DBS. As always, the Commission should apply a basic rule of reason, clearly exempting service rules that clearly do not apply, or modifying rules where mechanical application would produce absurd results.

1. Rules Regarding Closed Captioning; Video Description; Accessibility of Emergency Information; and Accessible User Interfaces, Guides, and Menus Would Apply to MVPDs

There should be no debate about whether emergency information, programming, guides, and associated metadata should be accessible. These rules do not depend on their applicability on the nature of the transmission technology the MVPD uses. Instead, they are imposed on video distributors based on the needs of viewers. Therefore, online MVPDs like all other MVPDs should have an obligation to make their services useful and usable to all people, including those with disabilities. As a policy matter, online MVPDs will receive a benefit from being classified as MVPDs—protection from anticompetitive conduct, for instance. It is not asking much in exchange to require that they ensure they serve the entire public in return. But even more fundamentally, whether online MVPDs should make their services available is not a matter of tit-for-tat exchange, since all services have a public interest obligation to ensure they are accessible, regardless of any regulatory

“benefit” they might receive. For these reasons, the FCC must apply its accessibility rules and principles to online MVPDs.

2. Equal Employment Opportunities Rules Would Apply to Online MVPDs

All companies, including online MVPDs, should provide equal employment opportunities and seek to have a diverse and representative workforce. The online video distribution marketplace is potentially much larger, with many more competitors, than the traditional MVPD marketplace. It therefore provides more opportunities for women, minorities, and underrepresented groups to play a strong part in providing video services to viewers. This, in turn, will help ensure that viewers have access to programming that reflects diverse perspectives. Therefore, the Commission should ensure that EEO rules apply to any entities it categorizes as MVPDs. Rules Regarding Signal Leakage, Inside Wiring, and MDU Access Would Likely Not Be Applicable to Online MVPDs

Either these provisions should not apply to online MVPDs, since they refer to physical characteristics of transmission networks that online MVPDs do not share, or online MVPDs should be found to be automatically in compliance with them.

3. The Commercial Loudness Rules Would Apply to Online MVPDs

This consumer protection provision does not depend on its applicability on the nature of the transmission technology the MVPD uses. Therefore, commercial loudness rules should apply equally to all MVPDs, including online MVPDs.

III. The FCC's Pro-Competitive Action of Permitting Online Services to Operate as MVPDs Would Have Positive Effects on Content Owners

The FCC's action would have a salutary effect on content owners and broadcasters. By creating a new class of customers for them to sell to, and extending the provisions that already protect them against dominant MVPDs, the FCC would promote competition while protecting diverse voices.

A. Online MVPDs Could Be a New Outlet for Broadcast Programming

As discussed above, by recognizing a new class of MVPD, the FCC would create an obligation for local broadcasters, in some circumstances, to negotiate in good faith for retransmission consent.

It is worth remembering that after Congress created the obligation for all MVPDs to seek permission to retransmit signals as part of the 1992 Cable Act, cable systems were able to obtain exclusive carriage agreements with local broadcasters. Such local broadcasters then withheld their consent from DBS systems. In response, Congress enacted the Satellite Home Viewer Improvement Act of 1999,⁷⁵ which, among other things, directed the FCC to create rules preventing a local broadcaster from “engaging in exclusive contracts for carriage or failing to negotiate in good faith,” as well as requiring an MVPD to negotiate in good faith over broadcast carriage.⁷⁶ Like the program access rules, the “good faith” provisions of the retransmission consent rules prevent broadcasters from being exclusive to any one

⁷⁵ PL 106-113, 113 Stat. 1501.

⁷⁶ The provisions in question are codified at 47 U.S.C. § 325(b)(3)(C). Since the passage of the STELA Reauthorization Act of 2014, PL 113-200, 128 Stat. 2059, those provisions now expire around the end of 2019.

MVPD, though they do not prevent deals that take into account marketplace considerations. Though framed as an obligation on broadcasters, the exclusivity aspect of the good faith requirement in fact promotes their interests (as well as MVPD competition) by preventing dominant MVPDs from imposing restrictive conditions on them.

In the absence of a compulsory license for the MVPD, the good faith obligation should include the obligation for local broadcasters to be willing to license whatever rights they have, but it should not go so far as to require that they obtain the right to sub-license all the programming they air. (It is far from clear that sub-licensing from local broadcasters, as opposed to more centralized negotiations, would be optimum in the absence of a compulsory license in any event.)⁷⁷ Overall, the FCC's action would create new revenue for local broadcasters, without increasing their regulatory or financial burden.

For the time being, nothing about the FCC's action to allow online MVPDs would upset the traditional territorial exclusivity of local broadcasters. Online MVPDs can easily restrict portions of their service to particular areas through geocoding an IP address or through the customer's billing address. That said, as a policy matter, online MVPDs, like DBS systems, are inherently national, and it makes little sense to require that national systems tailor their offerings to each local market. MVPDs may have localized offerings in response to demand, or the needs of

⁷⁷ See generally The Silicon Flatirons Roundtable Series on Entrepreneurship, Innovation, and Public Policy, *The Cable and Satellite Compulsory Copyright Licenses* (2011), available at <http://www.silicon-flatirons.org/documents/publications/report/CompulsoryCopyrightLicenses.pdf>.

public safety, but policymakers should reevaluate the current rules. However the scope of such a reevaluation exceeds the bounds of this proceeding.

B. Online MVPDs Could Be A New Outlet for Non-Broadcast Programming

As discussed above, the availability of procedures under Section 628 of the Communications Act may mean that some non-broadcast programming is affected if the Commission recognizes online MVPDs—for example, an online MVPD might bring a complaint that an exclusive contract between an independent programmer and a dominant MVPD, or the rates charged by cable-affiliated programming, restrain MVPD competition. Such arguments, if successful, would have an effect on programmers—a positive one, by increasing their potential customer base, and ensuring that incumbent MVPDs cannot interfere with the wide availability of programming. Additionally, the same rights that a programmer currently has against traditional MVPDs under the program carriage rules, it would have against online MVPDs, were the Commission to recognize this category.

If a programmer has the right to license its programming to a traditional MVPD, it likely already has the right to distribute to an online MVPD. No specific authorization to license programming to an online MVPD should be necessary any more than a specific authorization would be needed to deliver programming to an IPTV provider. To the extent that an existing contract mentions (or prohibits) “online” distribution, this should be read to refer only to non-MVPD online distribution. If this fails, however, the FCC should clarify at least that cable-affiliated programmers have an obligation to secure whatever rights they need to ensure they can distribute programming to online MVPDs. Traditional MVPDs should not be able

to use obscure contracts to prevent their affiliated programming from being carried by online MVPDs.

IV. Under Any Interpretation of the Term “Channel,” The Status of Traditional MVPDs Would Not Change Even if They Change Their Mode of Transmission

Under either a “transmission path” or “linear programming” interpretation of “channel,” a cable operator that offers a linear programming service within its own service territory, whether or not it uses IP, and whether it not it could be characterized as “over the top” or “online,” is offering a cable service within that territory. The Communications Act definition of a “cable system” is as follows:

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....⁷⁸

Whatever interpretation of “channel” the Commission adopts, the “transmission paths” and associated features this definition refers to plainly encompass a cable operator’s physical infrastructure. A cable operator who provides video programming of any kind over its own infrastructure controls the closed transmission paths and equipment used in the delivery of that programming. Thus, a cable operator cannot evade its cable-specific requirements under the Commission’s rules and the Communications Act by tweaking its specific mode of transmission. Thus, any service that connects physical wires or fiber to a viewers’ home (including telco-provided IPTV services) and offers a linear video service over those wires is offering a cable service.

⁷⁸ 47 U.S.C. § 522(7) (exceptions omitted).

If the Commission elects to recognize that online providers can operate as MVPDs, then any online service offered by a cable operator outside its service territory, or any online service offered by a DBS provider, would be an MVPD service if it otherwise meets the relevant definition.

Conclusion

The Commission should adopt a reading of the term “multichannel video programming distributor” that is technology-neutral and would enable new competition, to the benefit of consumers and the public interest.

Respectfully Submitted,

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

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