Before the
Federal Communications Commission
Washington, D.C. 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 the Electronic Frontier Foundation

To: Marlene H. Dortch, Secretary
Federal Communications Commission

I. General comment

EFF is a member-supported nonprofit organization devoted to protecting civil liberties, free expression, and innovation in digital technology. With over 25,000 dues-paying members, EFF is a leading voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment.

The Commission has invited comment on MB Docket No. 14-261 on the topic of possible interpretations of the term Multichannel Video Programming Distributor (MVPD) as used in the Communications Act and seeks comment on how different interpretations would affect industry and consumers.

In its Notice of Proposed Rulemaking, the Commission expresses its preference for the interpretation of MVPD status to mean distributors of multiple linear video programming streams, including Internet-based services ("Linear Programing Interpretation").

Alternatively, the Commission presents the "Transmission Path Interpretation", according which the MVPD qualification will require a transmission path. The Commission seeks comments about the impacts of adopting either of those approaches.

As the Commission correctly states in the NPRM introduction, the technology shift during the 20th Century from analog television transmission to digital has prompted a shift in the consumer expectation of television consumption. Accounting for these changes, the proposed regulation should find the correct balance to ensure that viewers are able to access the broadcast programming they want, through the medium they want, and at the time and location they want.

The current rules balance the relationship between MVPD (cable and DBS) services as traditionally defined, and the broadcasters through must-carry and retransmission consent requirements. These regulations were designed in the context of particular technologies and distribution media, and were intended to promote competition among video distributors while promoting accessibility and other policy goals. But today's reality is that consumers do not care whether video content is delivered through one technology or another, or which are the facilities through the content is delivered to them. Consumers today simply have high expectations for broad availability of content.

Moreover, today's over-the-top (OTT) video services, and the panoply of video-sharing websites and other video-centric Internet services have developed and thrived without Commission regulation. Using the Internet as a distribution facility, these services can start with little or no need for physical facilities, and can scale much more easily to meet growing demand through the use of content delivery networks (CDNs) and other infrastructure providers. Scalability and relatively low start-up costs mean that some of the competitive concerns that animated the Commission's MVPD regulations are less relevant to Internet video. That said, competitive concerns remain, particularly around access to broadcast signals, and to broadcast and cable network programming owned or controlled by the parent companies of major cable operators.

Therefore, in our view, any regulation adopted in this matter should maximize the ability of the consumers to select the technology and type of service they want to access their favorite content, while preserving the distinctive advantages of cost, scalability, and global accessibility that Internet-based video services provide, without subjecting them to

inapplicable or unnecessary regulatory burdens. According with this principle, the Commission should give qualifying Internet-based video services the option of assuming the benefits (and appropriate burdens) of MVPD regulation, or to remain unregulated. Cable and satellite operators who also make programming available over the Internet should be subject to MVPD rules irrespective of which transmission facility they use.

II. MVPD Definition

We believe that the classification made by the Commission of the different Internet-based video services that illustrates the current business models is helpful to distinguish different services that should not be subject to the same regulation.

We agree with the Commission that Internet-based subscription linear services are the most similar to existing broadcast services. Nevertheless, there are sufficient differences that to include them mandatorily within an updated definition of MVPD would have unforeseen costs and side-effects. We further agree that the other categories mentioned by the Commission (subscription on-demand, transactional on-demand, and ad-based linear and on-demand) and other video services have a distinctive set of features such as consumer control of the selection and access to the content that should put them outside of the scope of MVPD regulation.

An example of a linear video service that is not mentioned in the NPRM is Ustream, which offers multiple streams of video content at http://www.ustream.tv/explore/all. Although these streams are free to view, Ustream also offers Premium Memberships which allow paying subscribers to watch the programming without advertisements. Therefore, these advertisement-free streams are arguably subscription linear video services according to the definition proposed by the Commission.

It makes little sense, and could be disruptive, to require services such as Ustream and other innovative streaming video services on a similar model, to join the MVPD regime. The rules that apply to MVPDs would require them, for example, to carry "local" broadcast channels, although for an Internet-based streaming service that "broadcasts" worldwide, the concept of "local" is meaningless. It is possible that a video streaming service might base itself in the United States due to the favorable Constitutional speech protections that it enjoys here, although its broadcasts, which might be in a foreign language, are directed

primarily at viewers overseas. Why would such viewers be interested in the service carrying “local” US-specific channels along with its foreign-language programming?

We are also concerned that by bringing them within MVPD status, streaming services that rebroadcast public domain material obtained from other broadcasters—such as pre-1964 films whose copyright was not registered—would be required to obtain retransmission consent, notwithstanding that the broadcaster has no exclusive rights in that material. Moreover, we fear that this could be a way of implementing the proposed, highly problematic WIPO Broadcasting Treaty “on the sly,” without a full review by Congress.

In summary, today's flexible and innovative video streaming services should not be burdened with rules and obligations shaped a long time ago for the administration of services of a completely different nature.

We consider that the Commission has taken a reasonable approach in the reading of the Communications Act's MVPD definition by excluding most categories of video streaming service from redefinition. However, as explained above, we would go further and allow Internet-based services that offer multiple channels of video programing in a linear prescheduled Internet format to “opt in” to MVPD status, but not be required to assume that status.

Internet-based streaming services are qualitatively different from broadcast services due to their non-territorial nature and their lower cost of provision. They should not be considered functionally equivalent to traditional broadcast services. As such, the interpretation that best serves the Congressional intent in this matter is one that recognizes these key differences in the nature of the service provided. Following this line of reasoning, a functional equivalency approach would avoid unduly imposing the MVPD category on new business models recently developed to offer differentiated access more tailored to the consumers desires and expectations. Niche online subscription programming providers should not be required to operate as MVPDs.

However, we share the Commission's concern about incumbent MVPDs such as major cable and satellite operators using a transition to IP-based video as a means of avoiding pro-competitive requirements. Thus, supplemental access provided by traditional MVPDs to their subscribers that allows them to access existing subscription video channels through the Internet should not be considered separate from service over existing facilities.

In our view, an interpretation which preserves MVPD status for incumbent MVPDs regardless of the means of transmission they use, while allowing new, purely Internet-based services to choose MVPD status at their option, is best suited to encourage more competition in the provision of video services through new technologies.

III. Regulatory Implications of the MVPD Definition

The regulatory implications of updating and broadening the MVPD definition to include Internet-based services fall into two categories: access privileges and imposed obligations.

A. Access privileges

Recent court decisions about the legal regime applicable to Internet based services leave these services in an intermediate status where they are not able to benefit from the retransmission consent rules or access the compulsory license to content provided by the Copyright Act.[1] The courts' reluctance to treat online video services as "cable systems" for purposes of Section 111 of the Copyright Act[2] stems in part from these services' ineligibility for MVPD status. However, the Supreme Court's decision in *WNET v. Aereo* emphasized the similarity of cable and over-the-top services from the standpoint of consumer experience and potential economic impact.[3] Although the Copyright Act and the Communications Act are separate bodies of law, the cable and satellite compulsory licenses in the Copyright Act were written with MVPDs in mind.

Allowing Internet-based services to opt into MVPD status, giving them regulatory parity with incumbent services for purposes of the Communications Act, may encourage

1See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012). Concluding that "Congress did not ... intend for§ 111 's compulsory license to extend to Internet transmissions," id. at 282. The overruling of this precedent by the Supreme Court Aereo decision (*American Broadcasting Companies v. Aereo*, 573 U.S. ___ (2014)) was discussed in *ABC v. Aereo, Inc.*, 112 U.S.P.Q.2D (BNA) 1582, 42 Media L. Rep. 2541, 61 Comm. Reg. (P & F) 643 (S.D.N.Y. Oct. 23, 2014), were the District Court affirmed: "The Copyright Office has not changed its interpretation of §111 since ivi and, in fact, recently informed Aereo that it "do[es] not see anything in the Supreme Court's recent decision in [Aereo lll] that would alter" ivi's conclusion that "Section 111 is meant to encompass 'localized retransmission services' that are 'regulated as cable systems by the FCC."' Pis.' Br. Ex. C (Letter of Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, to Yelena Calendar (July 16, 2014)). Although Aereo informed the Court that the FCC may be reviewing its current regulations affecting Internet retransmissions, the Court is unaware of any actual changes that the FCC has made to date. Nor has the Court been informed that the Copyright Office has altered its interpretation of §111-an interpretation to which the Second Circuit has already accorded Chevron deference-in light of the FCC's possible review of its current regulations."

217 U.S.C. § 111.

3 *Aereo*, 573 U.S. ___ (2014) ("an entity that acts like a CATV system itself performs.").

the courts to treat such services as "cable systems" for Copyright Act purposes, completing the framework of regulatory parity and technological neutrality.

Without this shift, over-the-top services face serious hurdles under both copyright and communications law, as they lack both the Commission's rules on carriage and good faith negotiation and the Copyright Act's statutory license to programming.

B. Imposed Obligations

Obligations imposed on the traditional MVPDs are related to the ownership and control of infrastructure that allows them to discriminate against some video programming. Originally when those sets of obligations were established, the cable or satellite facilities were the only efficient media for massive lineal video distribution.

The technology landscape for online video providers is different from that of traditional services because today they do not need to own any particular infrastructure. This change justifies the Commission in distinguishing the obligations imposed on this new category of service providers.

First, MVPD status should be optional for Internet-only providers, and the default status for such providers should be unregulated. Internet services, regardless of their possible characterization as linear, on-demand, or other categories, have thrived in the absence of Commission regulation, governed instead by generally applicable doctrines of contract and antitrust law. Moreover, regulation of the content of communications, whether through carriage requirements or other regulations, is disfavored (or in some cases prohibited) under the First Amendment. The traditional bases for Commission regulation of video programming in light of the First Amendment, such as spectrum scarcity, do not apply in the Internet context.

IV. **Regulatory treatment of cable or DBS operators providing services via IP**

We agree with the Commission in 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 cable operator."[4] Thus, a shift to IP-based delivery over cable facilities should not allow operators to avoid MVPD status. But the provision of other over-the-top ("OTT") services that are

4 Notice of Proposed Rulemaking p. 32.

substantially different from ordinary cable or satellite service by incumbent MVPDs should not automatically be subject to MVPD status. This differentiation will preserve the ability of traditional MVPDs to explore the provision of innovative services to deliver content over the Internet that could be attractive for consumers that are not currently satisfied with traditional services. Nonetheless, the Commission should carefully scrutinize the practice of bundling OTT services with MVPD subscription linear services in cases where the MVPD subscription linear service has a dominant position that it could leverage in the OTT space to the disadvantage of new entrants. This scrutiny of competitive concerns should be based on antitrust principles and is justified by the Commission's continuing oversight of incumbent MVPDs.

EFF urges the Commission to honor the tradition of treading carefully in the regulation of content traveling over the Internet. Allowing Internet-based video services the ability to opt in to MVPD status will promote competition and technological neutrality while allowing new services to develop without regulatory burdens if they so choose.