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 FilmOn X, LLC

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EXECUTIVE SUMMARY

FilmOn X, LLC ("FilmOn X") supports the Commission's proposal to adopt a technology-neutral definition of an "MPVD" that recognizes the increasingly important role played by the Internet as a video channel transmission path. In light of changing technologies and the opportunities to facilitate the introduction of new competing video providers, the Commission should take steps to promote regulatory parity among IP-based Internet video distributors, thus enhancing the ability of new providers to provide consumers greater access to valuable content.

In 1992, Congress added to the Communications Act (the "Act") the legal concept of a "Multichannel Video Programming Distributor," or "MVPD." It defines an MPVD 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." The use of these varied examples reflects an illustrative approach to the definition of an MPVD that focuses on the functions or services performed by the person as opposed to the technological infrastructure used to deliver video programming. Further, in recent years, the FCC has used a functional approach toward interpreting statutory classifications of new communications services and their technologies. This approach accounts for customer expectations and
minimizes the importance of “behind-the-scenes” technological differences.

As applied to over-the-top providers of prescheduled linear programming, the functional, technology-neutral approach compels the conclusion that such a provider is an MVPD. In this context “channels of video programming” should mean streams of linear video programming, irrespective of whether the provider also makes available physical transmission paths. With the rising importance of Internet Protocol technology as a medium for the delivery of video programming, consumers increasingly expect to be able to view programming over the Internet. Moreover, as the NPRM notes, a transmission path requirement would give incumbent MVPDs strong incentives to circumvent FCC regulations by moving their services to the Internet.

FilmOn X urges the Commission to apply a light regulatory touch to Internet-delivered video services where the provider is not also providing the transmission path. FilmOn X does not object to certain existing regulations that promote regulatory parity among MVPDs, such as rules that prohibit MVPDs from coercing a video programming vendor to provide exclusive rights as a condition of carriage. Other regulations, however, are simply inapplicable to over-the-top providers. For example, MVPDs that use Internet protocol to deliver programming should not be subject to the requirements related to signal leakage and inside wiring because these do not apply technologically to Internet-based MVPDs that do not own the transmission path. Additionally, an
Internet-based MVPD's duty under the Communications Act to negotiate in good faith with local broadcasters over the terms of retransmission consent should apply only to the extent that the MVPD provides, or attempts to provide, retransmission of local broadcast signals.

Finally, the Commission's technology-neutral approach to the definition of an MVPD will clarify that Internet-based video programming services are permissible under FCC rules and regulations. That clarification may also impact the treatment of those services under the Copyright Act. Congress has established a detailed regulatory structure for cable systems under the Communications Act and the Copyright Act. A broad, technology-neutral MVPD definition aligns well with the Copyright Act as initially written, as subsequently clarified by Congress, and as interpreted by the courts. In fact, the Supreme Court recently ruled in American Broadcasting Companies, Inc. v. Aereo, Inc. ("Aereo") that the services offered by an Internet-based retransmission service were "substantially similar" to traditional cable systems, notwithstanding certain technological differences in delivery methods.¹ The FCC's proposed approach to the definition of an MVPD wisely recognizes that statutory interpretation should not be so narrow as to require new legislation for each and every new technological development, an inefficient process that would interfere with effective government.

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I. INTRODUCTION

FilmOn X, LLC ("FilmOn X"), by counsel and pursuant to 1.415 and 1.419 of the Commission's rules, submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding. FilmOn X is an online distributor of multiple channels of linear and on-demand video programming. The NPRM presents a watershed opportunity for the Commission to adopt targeted but necessary reforms to modernize the regulatory structure for developing video distribution technologies. FilmOn X urges the FCC to move forward to immediately clarify that online video distributors such as FilmOn X are Multichannel Video Programming Distributors ("MVPDs") for purposes of FCC rules and to consider and

2 See, 47 C.F.R. §§ 1.415, 1.419.

adopt appropriate rules to foster innovation, to increase consumer choice and to promote competition among linear multichannel video services.

II. BACKGROUND

FilmOn X is an Internet-based television service that launched in the United States in 2012. The company distributes multiple channels of linear and on-demand video programming. The company has an extensive and quickly growing library of programming to deliver to subscribers. It licenses and distributes more than 600 channels of content and more than 90,000 video-on-demand titles. FilmOn X customers can view programming on their computers and mobile devices.

FilmOn X has informed the Commission of its intent to commence retransmission of local television broadcast stations to authenticated subscribers in local markets consistent with FCC Rules applicable to MVPDs and subject to any applicable Court Orders or decisions. In recent meetings with FCC staff and Commissioners, FilmOn X noted that while traditional cable and satellite video programming distributors claim that capacity constraints limit their ability to carry new, independent and niche video programming services, FilmOn X is not subject to those same constraints. FilmOn X carries a wide variety of programming alternatives from U.S. and international sources, including many channels that are unavailable from traditional MVPDs.
FilmOn X offerings and pricing plans will evolve in response to, among other things, consumer demand, the extent to which the programming is exclusive or original content and FilmOn X's costs to acquire the programming. FilmOn X believes that carriage of local broadcast stations, and the ability to deliver local news, public affairs, emergency information and local and national entertainment programming carried by such stations, is critical to the success of a consumer-facing multichannel video offering. FilmOn X and other similarly situated MVPDs are placed at a competitive disadvantage to entrenched "traditional" MVPDs in efforts to negotiate content rights with broadcasters and vertically integrated cable programmers.

As described below, FilmOn X supports the Commission's interpretation of "MVPD" to include providers of linear programming that rely on third parties to provide the transmission path to the subscriber. In light of changing technologies and opportunities to facilitate the introduction of new competing video providers, the Commission should take steps to promote regulatory parity, thus enhancing the ability of new providers to distribute valuable content, benefitting consumers.
III. DISCUSSION

A. "MVPDs" Should Include All Entities That Make Available For Purchase By Subscribers Multiple Streams Of Video Programming At A Prescheduled Time.

In the NPRM, the FCC proposes "to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time." FilmOn X supports this proposal, which the FCC calls its "Linear Programming Interpretation." For the reasons set forth below, this interpretation is consistent with the Communications Act and with Congressional intent, and it represents sound policy to untether restrictions that impede competition in the rapidly changing marketplace for Internet-based distribution of video programming. It would also be consistent with the common-sense interpretation of the Copyright Act recently set forth by the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.* ("Aereo"), 134 S.Ct. 2498 (2014). In this section, FilmOn X identifies certain interpretive touchstones that should guide the Commission’s clarification of MVPD status.

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4 NPRM ¶ 13.
1. A Broad, Flexible Interpretation Of The MVPD Definition Is Consistent With The Act And With Congressional Intent.

In 1992, Congress added to the Communications Act the legal concept of a "Multichannel Video Programming Distributor," or "MVPD." By its terms, and consistent with Congressional intent, the term is broadly interpreted and contemplates flexible application to accommodate technological change.

History is instructive. The 1992 Cable Act reflects the increase of new programming distributors in the years after Congress adopted the 1984 Cable Act. Changes in technology at that time created new competition from providers other than traditional cable companies. Accordingly, Congress expanded its regulatory focus from primarily cable television to a broader marketplace that included new video service providers. Congress stated that its policy in the 1992 Cable Act was, among other things, to “promote the availability to the public of a diversity of views and information through cable television and other video distribution media.”\(^5\) In adopting program access provisions, Congress sought to “spur the development of communications technologies,” a goal whose benefits would permeate the other policies in the 1992

Cable Act by promoting competition and diversity.\textsuperscript{6}

Amid rapidly evolving technological changes,\textsuperscript{7} in 1992, Congress adopted the term “MVPD” as a flexible identifier of competing video providers in the “multichannel video programming market”: “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.”\textsuperscript{8} This technology-neutral definition, in its use of “such as, but not limited to,” clearly encompassed then-current providers as well as providers that would use technology that was not yet developed or deployed in 1992.

\textsuperscript{6} See 47 U.S.C. § 548(a) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.”).

\textsuperscript{7} At this time, new delivery systems were becoming a known and rapidly growing factor. In 1991, a bill was created to allocate funding for the “Information Superhighway” and the National Information Infrastructure. That same year, the World Wide Web was made available to the public for the first time on the Internet, three years after its creation by Tim Berners-Lee.

\textsuperscript{8} 47 U.S.C. § 522(13).
The record illustrates that Congress’ intent in adopting the MVPD definition was to codify a classification that would be applied flexibly in a manner to account for technological changes. The FCC’s Linear Programming Interpretation properly represents such a flexible application and therefore is consistent with Congressional intent.

2. **MVPD Treatment Is Appropriate For Over-The-Top Internet Video Offerings That Are Functionally Equivalent To “Traditional” MVPD Offerings.**

In recent years, the FCC used a functional approach toward interpreting statutory classifications of new communications services and their technologies. This approach accounts for consumer expectations and minimizes the importance of infrastructural differences when there is a functional equivalence in the services being offered. As applied to over-the-top providers of prescheduled linear programming, the functional approach compels the conclusion that such a provider is an MVPD.

Consider the FCC’s exercise of statutory interpretation in classification of broadband Internet access services. The Communications Act of 1934, as amended (the “Communications Act” or the “Act”),\(^9\) codifies different definitions for

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\(^9\) 47 U.S.C. § 151 et seq.
"telecommunications services,"\textsuperscript{10} "cable services"\textsuperscript{11} and "information services."\textsuperscript{12}

The Commission has struggled repeatedly to reconcile these definitions with developing technology. For example, in 2002, the Commission defined \textit{cable modem Internet service} as neither a "telecommunications service" nor a "cable service" but rather as an "information service" with a "telecommunications" component.\textsuperscript{13} In reaching this conclusion, the Commission recognized that the relevant statutory definitions rested not on the particular types of facilities used, but "on the function that

\textsuperscript{10} The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53).

\textsuperscript{11} "[C]able 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." 47 U.S.C. § 522(6).

\textsuperscript{12} The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

\textsuperscript{13} In re High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, at 4802, ¶ 7 (2002)("Cable Modem Declaratory Ruling"), aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
is made available.” This compelled the Commission to examine “the functions that
cable modem service makes available to its end users.”

In 2005, the Commission determined that *wireline broadband Internet access service*
(including DSL), like cable modem service, is also an information service that does not
include a separate telecommunications service and that the transmission component of
such service is “telecommunications” and not a “telecommunication service.” Again,
the Commission analyzed the issue from the “end-user’s perspective,” concluding,
“what matters is the finished product made available through a service rather than the
facilities used to provide it.”

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14 Id. at 4821, ¶ 35; see also *Appropriate Regulatory Treatment for Broadband Access to the
23, 2007) (“Wireless Broadband Declaratory Ruling”) (The Commission found that [in
its 2002 ruling] the classification of cable modem service depended on the nature of the
functions that the end user is offered....”).

15 See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20
FCC Rcd 14853, at 14858, ¶ 5 (2005) (“We determine that the use of the transmission
component as part of a facilities-based provider’s offering of wireline broadband
Internet access service to end users using its own transmission facilities is
“telecommunications” and not a “telecommunication service” under the Act.”), aff’d

16 See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20
FCC Rcd 14853, at 14864–65, ¶ 16 (2005) (“There is no reason to classify wireline
broadband Internet access services differently depending on who owns the
transmission facilities. From the end user’s perspective, an information service is being
offered regardless of whether a wireline broadband Internet access service provider
In 2007, the Commission found that under the Communications Act, terrestrial wireless broadband Internet access service is an "information service," that the transmission component of such service is "telecommunications," but that the offering of the telecommunications transmission component as part of a functionally integrated Internet access service offering is not "telecommunications service."\(^{17}\) It stated, "As with both cable and wireline Internet access, this definition appropriately focuses on the end user's experience, factoring in both the functional characteristics and speed of transmission associated with the service."\(^{18}\)

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\(^{17}\) See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 22 FCC Rcd. 5901, 5903–04 (rel. Mar. 23, 2007) ("Wireless Broadband Declaratory Ruling") (describing 2005 ruling as ruling based on what the service "offers end users").

\(^{18}\) Id. at 5909, ¶ 21.
In these actions to classify cable, wireline and wireless broadband Internet access services, the Commission focused on the “end-user’s experience.”\(^{19}\) This functional approach to classifying broadband service springs in part from the Commission’s interpretation of “Congress’s direction that the classification of a provider should not depend on the type of facilities used.”\(^{20}\) The Commission noted that the Act’s definitions of “telecommunications,” “telecommunications service” and “information service” did not rest “on the particular types of facilities used. Rather each rests on the function that is made available.”\(^{21}\) It follows, then, that if the particular broadband transmission facilities that the subscriber uses to access Internet-based services are interchangeable for purposes of classifying services under the Communications Act,

\(^{19}\) In each instance, the FCC focused on the end-user’s experience in defining Internet Access Services. See Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4799; Wireless Broadband Internet Access Services Order, 20 FCC Rcd. at 14860, 14864–65; Wireless Broadband Declaratory Ruling, 22 FCC Rcd at 5909, ¶¶ 20–21.

\(^{20}\) Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, ¶ 59 (rel. April 10, 1998) (stating that “[a] telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers.”).

\(^{21}\) Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 34-35 (rel. Mar. 15, 2002).
then the Internet-based applications that customers access will be interchangeable as well.

In addition to classification of new broadband providers, the Commission also relied heavily on the expectations of customers when it adopted certain regulatory obligations for providers of interconnected Voice over Internet Protocol ("VoIP") service. Without determining whether interconnected VoIP is an "information service" or a "telecommunications service," to date the Commission has applied a variety of traditional telephony regulations to interconnected VoIP services, which it described as "increasingly used to replace analog voice service," including in some cases, local exchange service."\textsuperscript{22} Indeed, as interconnected VoIP service improves and proliferates, consumers' expectations for these services trend toward their expectations for other voice services.

The functional equivalency approach to MVPD classification is further supported by the Supreme Court's recent interpretative approach to the Copyright Act. In \textit{Aereo}, the Supreme Court found that Aereo (an Internet-based retransmission service) was

\textsuperscript{22} See, e.g., Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization; Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19531, \S 18 (rel. Nov. 8, 2007).
“substantially similar” to a cable system despite technological differences between the delivery methods of television programming.\textsuperscript{23} It reasoned that “an entity that acts like a CATV system itself” engages in a “public performance” under the Transmit Clause,\textsuperscript{24} and that the technological differences between Aereo technology and traditional cable technology made no difference to either subscribers or broadcasters.\textsuperscript{25} The Court disregarded technological differences in favor of a functional approach, stating:

“Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo’s activities outside the scope of the Act.” The Court concluded that to hold otherwise would frustrate the purposes of the Copyright Act by allowing cable companies to continue with their commercial-oriented goals free of copyright restrictions by merely


\textsuperscript{24} Id. (emphasis added).

\textsuperscript{25} See id. at 2507 ("Given Aereo’s overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. [Describing the technological difference] . . . [T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into ‘a copy shop that provides its patrons with a library card.’").
substituting new technologies for old.\textsuperscript{26}

The NPRM seeks comment on a “functional equivalency” standard “whereby an entity would qualify as an MVPD if it looks and functions like a traditional MVPD from the perspective of consumers.”\textsuperscript{27} In fact, such a standard already exists and has been set by precedent. In classifying a new video programmer as an “MVPD,” just as the Commission has done for broadband Internet access services and Voice over Internet Protocol services, the Commission should focus on the perspective of the end user. FilmOn X’s continuous, subscription-based linear streams of video programming are available on the Internet with an advanced interactive programming interface. Customers may select streams of programming and view near-live streams or video on demand, as they choose. By comparison, cable and satellite providers have similar online customer experiences. A simple comparison of landing and interface pages between FilmOn X and Verizon’s FiOS reveals overwhelming similarity. Both list channel options, live streaming options, and on demand options.\textsuperscript{28}

\textsuperscript{26} Id. at 2509.

\textsuperscript{27} NPRM ¶ 17.

Any underlying technical differences in system architecture, such as systems that transmit all channels simultaneously versus those that only stream the channel at the request of the end user, are generally invisible to the consumer. Even the differences in interface would appear mere aesthetic choices to an end user. For these reasons, FilmOn X believes that the FCC’s proposed Linear Programming Interpretation is based on functional equivalency and should be the preferred interpretation of the term “MVPD.”

3. “Make available for purchase multiple channels of video programming” Should Be Defined As Streams Of Linear Video Programming.

The Act provides that a person must offer “multiple channels of video programming” to be an MVPD. As the FCC points out, the Communications Act defines a “channel” 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 the Commission by regulation).” FilmOn X agrees with the Commission that in this context “channels of video programming” means streams of linear video programming, irrespective of whether the provider also makes


29 NPRM ¶ 17 (citing 47 U.S.C. §522(4)).
available physical transmission paths. As described below, this interpretation finds support in the Act’s plain text, in its legislative history, in its structure, in Congressional intent and in sound policy.

**Channels.** First, as to what constitutes “channels” of video programming, the Act describes MVPDs through an illustrative list of such providers, each of which provides “channels” of programming in the ordinary and common meaning of that term. While Section 602(4) of the Act defines a channel that “is used in a cable system,” this definition adopted in the 1984 Cable Act is ambiguous as applied to a non-cable MVPD. MVPDs were adopted as a term in 1992, but the Act was not amended to specifically state how “channel” would apply to MVPDs. Nevertheless, the illustrative list of MVPDs in the Communications Act’s MVPD definition includes several operators that use channels of programming that are not used in a cable system. For example, satellite providers do not use the same electromagnetic frequency spectrum used in a cable system, but the statute defines them as MVPDs. Accordingly, the best interpretation of the plain statutory text is that “channels of video programming” means “channels” in the sense of linear video programming networks, and the Commission correctly interprets the Act as using the “ordinary and common meaning” of the term.

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"channels."

**Video programming.** The Act provides guidance as to what programming represents "video programming" for purposes of the Communications Act's MVPD definition. The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."\(^{31}\) In an ordinary and common sense, "programming" refers to the selection and scheduling of video programs over a particular period and a certain degree of editorial control – the type of scheduling and control functions typically exercised by television broadcast stations.\(^{32}\) By contrast to this editorial control, user-generated content that is distributed via the Internet is not, and should not constitute, video programming.\(^{33}\)

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\(^{32}\) See *F.C.C. v. Midwest Video Corp*, 440 U.S. 689, 707 (1979) (noting that cable operators and broadcasters have "a significant amount of editorial discretion regarding what their programming will include"); *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F.2d 642, 654 (D.C. Cir. 1971) (noting that programming is "closely controlled and edited by broadcasters"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 199 (1973) (noting that broadcasters have "a significant interest in exercising reasonable journalistic control over the use of [their] facilities").

In FilmOn X's view, of the types of Internet-based video service offerings identified in paragraph 13 of the NPRM ("Subscription Linear," "Subscription On-Demand," "Transactional On-Demand," "Ad-based Linear and On-Demand" and "Transactional Linear"), Subscription Linear fully distributes video programming "by, or generally considered comparable to programming provided by a television broadcast station." A Subscription Linear service is Internet-based distribution of continuous linear streams of video programming on a subscription basis. Ad-Based Linear and Transactional Linear may also be "comparable to programming provided by a television broadcast station," but there may be additional considerations.

While "On-Demand" services provide valuable sources of video content, shifting the scheduling function to the consumer (other than through basic DVR functionality), television broadcasting is inherently one-way distribution of content that is subject to extensive editorial control. Given this cornerstone principle of "programming" that is scheduled by the distributor, the most solid legal foundation for Internet-based video services to be treated as MVPDs is for those services that are provided on a subscription linear basis.
Newly recognized MVPDs should be required to prospectively satisfy MVPD obligations.\textsuperscript{34} Although many companies may have met the previous definition of MVPD under the kind of functional, end-user analysis the Commission uses in the current NPRM, they may not have been recognized as such under the prior definition and therefore may have been denied the benefits of such status despite functionally acting as MVPDs. These entities, which would now officially be recognized as MVPDs, should not be penalized for failing to comply with the previous MVPD obligations when they were not recognized or protected as such.

\textit{Multiple channels.} FilmOn X supports the Commission’s interpretation that “multiple channels of video programming” should mean multiple linear streams of video programming, as described in the Linear Programming Interpretation. FilmOn X takes no position on the minimum number of channels that a service provider must make available before the “multiple channels” criterion would apply. FilmOn X shares the Commission’s apparent concern, however, of unintended consequences that would

\textsuperscript{34} See, e.g., the obligations referenced in the NPRM at ¶ 76; Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, 23 FCC Rcd. 10731, at 10738, ¶¶ 22, 24 (2008) (classifying audio bridging service providers as “providers of telecommunications that are required to contribute directly to the USF,” and finding that “[i]n part because of the lack of clarity regarding the direct contribution obligations of stand-alone audio bridging service providers that [Commission] actions may have created. . . prospective application of our decision is warranted.”); recon. denied, 27 FCC Rcd. 898 (2012); aff’d Conference Group, LLC v. FCC, 720 F.3d 957 (2013).
flow from categorically designating certain providers as MVPDs without strict limiting principles.

**Make available for purchase.** In this context, FilmOn X supports a common, ordinary interpretation of “make available for purchase.” MVPD status turns on the nature of the provider and the services offered. That said, MVPDs should be permitted to offer some services for free on a limited basis – for example, for trial customers or in cases to facilitate technical testing – without being deemed in violation of the “make available for purchase” criterion.

In sum, FilmOn X believes that as the MVPD definition is considered by reference to its component parts, the FCC’s proposed Linear Programming Interpretation rests on a sound footing as a matter of the law, Congressional intent and communications policy. The FCC should take this opportunity to adopt new rules to unlock new competition and innovative services.

**B. The Presence Of A “Transmission Path” Should Not Be A Prerequisite To MVPD Status.**

The FCC proposes that “linear video programming networks, such as ESPN, The Weather Channel, and other sources of video programming that are commonly referred to as television or cable ‘channels,’ would be considered ‘channels’ for purposes of the MVPD definition, regardless of whether the provider also makes available physical
transmission paths." FilmOn X supports this interpretation. Neither the Communications Act nor Congressional intent requires an MVPD to own or operate facilities for delivering content to customers. As communications services transition to Internet and Internet-protocol delivery systems, outmoded regulatory structures should not stifle technological change but rather should encourage innovation and new competition.

The Communications Act defines an MPVD 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.” The use of these varied examples describes a technology-neutral approach to the actual distribution technology. Moreover, one of the examples – a “television receive-only satellite program distributor” – does not provide or control the transmission path that is used to provide video programming to subscribers or customers. Thus no specific transmission path is recognized or required under the Communications Act. To the contrary, as the FCC has noted, “a qualifying [multichannel video programming]

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35 NPRM ¶ 17 (emphasis added).
distributor need not own its basic transmission and distribution facilities," and an MVPD “may use a third party’s distribution facilities in order to make video programming available to subscribers.” While the statute explicitly defines a transmission path to be an element of a “cable system” as the Communications Act defines that term, Congress did not take the same approach with MVPDs. FilmOn X agrees that while Congress in the 1992 Act may have intended in part to spur competition between facilities-based competitors and incumbent cable systems, Section


37 NPRM ¶ 20.

38 See 47 C.F.R. § 76.5 (defining a “cable system” for the purposes of the Communications Act 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.”)

39 As with the MVPD definition, the Copyright Act’s definition of a cable system does not require control over the transmission path. See 17 U.S.C. 111(f) (“A ‘cable system’ is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”). In this respect, the statutory definition of a “cable system” under the Copyright Act is broader than the definition of a “cable system” under the Communications Act.
623 of the Act’s “effective competition test” makes clear that Congress also intended for providers to count as MVPDs if they use another entity’s facilities to provide video programming.\(^\text{40}\) 

Indeed, reading a “transmission path” requirement into the Communications Act’s MVPD definition would not only be contrary to the plain text of the statute and to prior Commission interpretations, it would lead to unintended consequences harmful to competition. A transmission path requirement would mean that to qualify as an MVPD, the provider would also have to “control at least some portion of the physical means by which the programming is delivered – for example, via a physical cable that the provider owns or via spectrum that the provider is licensed to use.”\(^\text{41}\) To the extent that this position implies a sort of “facilities-based” service where the video provider must also control last-mile access, it also apparently would limit the rights and privileges of MVPD status to an end user’s primary broadband provider, even as technology develops to allow customers to view video content via mobile networks or by third-party networks that the provider does not control. Such a result is at odds with customer expectations and with evolving technology. It would also frustrate

\(^{40}\) NPRM n.47 (citing 47 U.S.C. § 543(l)(1)(D) (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)").

\(^{41}\) NPRM ¶ 29.
innovation and competition among providers, which would undermine the public interest.

Moreover, as the NPRM notes, a transmission path requirement would give incumbent MVPDs strong incentives to circumvent FCC regulations by moving their video services to the Internet.\textsuperscript{42} For these reasons, FilmOn X urges the FCC to adopt the Linear Programming Definition without a requirement that the video provider must provide a transmission path before the provider can be an MVPD.

C. The Commission Should Carefully Define The Rights And Obligations Of MVPDs To Comport With Technology.

The NPRM identifies a variety of privileges and legal obligations that will apply to MVPDs unless and until the Commission decides to waive those obligations where the Commission has the legal authority to do so. Many of the Commission's rules relating to MVPDs were adopted at a time when the medium and the message were inseparable, but the rise of Internet protocol has allowed for a meaningful separation between data and delivery infrastructure. Certain regulations therefore are inapplicable to over-the-top video providers. FilmOn X urges the Commission to apply a light regulatory touch to Internet-delivered video services where the provider is not also providing the transmission path. To ensure that such regulations achieve this result,

\textsuperscript{42} NPRM ¶ 35.
the Commission should rationalize its rules to account for Internet-based distribution of video programming and where applicable and authorized, should waive or forbear from certain regulatory requirements that apply to providers that provide their own transmission path.

Program Access. Internet-based distributors of video programming should have the same benefits of program access that apply to other MVPDs. These rules offer protections to MVPDs against competing providers who may seek to leverage their infrastructure and program ownership to compete unfairly with new MVPD competitors. The Commission must balance Congressional intent in adopting the MVPD designation with certain technical realities.

Separately, FilmOn X has no objection to the prohibitions that apply to MVPDs, such as prohibiting MVPDs from requiring a financial interest in a video programming vendor’s program service as a condition for carriage, coercing a video programming vendor to provide, or retaliating against a vendor for failing to provide, exclusive rights as a condition of carriage or unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions of carriage. These rules promote regulatory parity among a variety of MVPDs, and as the Commission notes, without such program carriage obligations
being applied to Internet-based video distribution, current traditional MVPDs that migrate their video programming to the Internet would have incentives to evade the protections that the program access rules provide. Accordingly, the program access rules should apply equally to traditional MVPDs as well as online distributors.

Retransmission Consent. FilmOn X recommends that the FCC’s retransmission consent rules should apply to Internet-based MVPDs given the critical importance of local broadcast programming to any suite of linear programming services.

The MVPD’s duty under the Communications Act to negotiate in good faith in the retransmission consent context should apply only to the extent that the MVPD provides, or attempts to provide, retransmission of local broadcast signals. FilmOn X agrees with the Commission that some Internet-based MVPDs may seek to operate on a national scale and may seek to forego carriage of local broadcast signals in toto. Such a categorical exclusion should not be deemed a violation of the statutory duty to negotiate in good faith with local broadcasters for retransmission consent.

With respect to other MVPD obligations identified by the FCC, FilmOn X urges the FCC to adopt narrowly tailored obligations that avoid imposing undue regulatory

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43 NPRM ¶¶ 54–65, 76. These obligations include closed captioning, video description, accessibility of emergency information, accessible user interfaces, guides and menus, equal employment opportunities, navigation devices, signal leakage, inside wiring, commercial loudness, and multiple dwelling unit ("MDU") access.
burdens on smaller MVPDs or startups. FilmOn X agrees that in general MVPDs that use Internet protocol will not be subject to the requirements related to signal leakage and inside wiring because these simply do not apply technologically to Internet-based MVPDs that do not own the transmission path. Other obligations would be potentially relevant to Internet-based MVPDs, and such obligations must be narrowly tailored so as not to impede innovation and competition. The FCC has recognized the importance of balancing the interests represented by these burdens against the importance of allowing smaller companies to develop and provide services in limited situations, such as with small cable operators in more sparsely populated regions.44


The NPRM states that “[s]ome content creators and owners contend that the Commission, in interpreting the definition of MVPD in the Communications Act, should be cognizant of the interplay between Section 111 of the Copyright Act and the

44 See Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System, 12 FCC Rcd. 15503, at 15503, ¶ 1 (1997) (imposing differing EAS requirements on cable systems depending on their size—more than 10,000 subscribers; between 5,000 and 10,000 subscribers; or fewer than 5,000 subscribers). There, the FCC noted, “[o]ur decision in this matter reflects our effort to balance the important safety objectives of the statute against the adverse financial impact on some small cable systems which, if it were to result in failure of some cable systems, would mean loss of service and, therefore, loss of emergency information in those service areas.” Id.
Communications Act and even suggest that a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law.\textsuperscript{45} It seeks comment "to update the record with respect to how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law."\textsuperscript{46}

Not only has the market and legal landscape changed since these initial comments (as recognized by the Commission), but even at the time, the content creators' position reflected a misunderstanding of the Copyright Act and its breadth. A broad, technology-neutral definition of an MVPD in fact aligns well with the Copyright Act. Under a functional approach to Section 111 of the Copyright Act, Internet-based distributors can meet the statutory definition of a cable system and may be subject to any existing rules, regulations or authorizations imposed upon MVPDs by the FCC.

Section 111 of the Copyright Act and the Communications Act are interrelated. To obtain a statutory license under Section 111, an entity must meet the Copyright Act's definition of a "cable system."\textsuperscript{47} Additionally, "secondary transmissions to the public

\textsuperscript{45} NPRM ¶ 66.

\textsuperscript{46} Id.

\textsuperscript{47} 17 U.S.C. § 111(f)(3).
by a cable system . . . shall be subject to statutory licensing upon compliance with [Section 111(d)] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.”

In 1976, Congress drafted the definition of a “cable system” in purposefully broad and flexible language that would not become outdated with advancements in technology delivery systems. Section 111(f)(3) then defined a “cable system” as:

a facility, located in any State, Territory, Trust territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications

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49 Ample evidence in the legislative record suggests that Congress intended the compulsory copyright license to cover new retransmission technologies. During subcommittee hearings on the proposed amendments to the Copyright Act, the former Register of Copyrights, Barbara Ringer, testified that Section 111 “deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other—usually cable but sometimes other communication channels, like microwave and apparently laser beam transmissions that are on the drawing board if not in actual operation.” Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. On the Judiciary House of Representatives, 94th Cong., 1st Session 1820 (1975) (hereinafter “H.R. 2223 Hearings”); see also H.R. 2223 Hearings at 442 (“the technology is so rapidly changing that we cannot really foresee what kind of changes in technology will occur”) (statement of Rep. Pattison).
channels to subscribing members of the public who pay for such service.\textsuperscript{50} The statutory definition is, on its face, completely indifferent as to the mode of retransmission technology. By its terms, a broadcast retransmitter can qualify as a Section 111 "cable system" regardless of the type of communications channels it chooses to use. Congress' open-ended definition of a "cable system" to include "other communications channels" demonstrates a clear intent that the Act be construed to accommodate new, as-yet unnamed technologies. Indeed, courts have recognized that "Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the Act."\textsuperscript{51}

Subsequently, in the Satellite Home Viewer Act of 1994, Congress amended the statutory definition of a cable system to "overturn[] an erroneous interpretation of the definition of 'cable system' by the Copyright Office, an interpretation which denied the license to microwave carriers."\textsuperscript{52} In so doing, as detailed in the Senate Report

\textsuperscript{50} Pub. L. 94-553, Title I, § 101 (1976).

\textsuperscript{51} WGN Continental Broadcasting v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982).

\textsuperscript{52} H.R. Rep. 103-703, at 7.
accompanying the Copyright Act, Congress emphasized that its amendment to section 111(f) was a *clarification* of the scope of the definition, not a change in current law:

The proposed legislation amends the definition of the term "cable system" contained in section 111(f) to clarify that the cable compulsory license applies not only to traditional wired cable television systems, but also to multichannel multipoint distribution service systems, also known as "wireless" cable systems.53

The Copyright Office then repealed the provision of its regulations that denied eligibility of "wireless" MDS and MMDS cable operators for compulsory licensing under section 111. Significantly, given that the Amendment was a "clarification" of current law, the Copyright Office recognized its retroactive effect, declaring that it "will treat 'wireless' cable operators as being eligible for the cable compulsory license since January 1, 1978, the effective date of the Copyright Act and section 111."154 Congress's

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53 S. Rep. 103-407, at 14. *See also* H.R. Rep. 103-703, at 7 (explaining that the amendment "overturns an erroneous interpretation of the definition of 'cable system' by the Copyright Office, an interpretation which denied the license to microwave carriers").

54 From Senate Report 103-407, October 7, 1994: After noting the Act was a clarification of the definition, it continued, "In calculating royalty payments under section 111, reference must be made to past and present Federal Communications Commission rules and regulations governing the carriage of broadcast stations by wired cable systems. Examples of such regulations are the distant signal quota rules and the must-carry rules in effect on April 15, 1976. The past, and present, FCC rules and regulations relevant to the calculation of royalties under section 111 applied, and continue to apply, to only wired cable systems, not to 'wireless' cable. Consequently, the issue arises as to how royalty fees are to be determined for 'wireless' cable systems. The committee intends 'wireless' cable and traditional wired cable systems to be placed on equal footing with
intent was to overrule a decision of the Copyright Office and to place “wireless cable” on a competitive footing with wired cable for purposes of the compulsory license by adding the phrase “or microwave” to the statutory text.55

This was the case even though such wireless systems generally served subscribers “without using any public right-of-way” and thus fell within an exception to the Communications Act’s definition of “cable system” under Section 522. In 1994, the Copyright Office amended its regulations in response to Congress and set forth the eligibility of “wireless cable” for the Section 111 compulsory license.56

A technology neutral definition of an MVPD would be consistent with the language of the Copyright Act. Like the definition of an MVPD, Section 111 defines a

respect to their royalty obligations under the cable compulsory license, so that one not have an unfair advantage over the other due to differences in their regulatory status under FCC rules.
The committee expects the Copyright Office, in applying section 111 to "wireless" cable systems, should treat "wireless" cable systems as if they were subject to the same FCC rules and regulations that are applicable to wired cable systems, and "wireless" cable systems must file their royalty payments and statements of account accordingly, in order to qualify for the section 111 license." (emphasis added.)


56 Cable Compulsory License; Definition of a Cable System; 37 CFR Part 201 (rel. Dec. 30, 1994).

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cable system in broad technology-neutral terms. In contrast, the Communications Act more narrowly defines "cable system," in relevant part, 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 . . .". Unlike Section 111 of the Copyright Act, it expressly excludes specific kinds of facilities or systems, such as facilities that serve subscribers without using any public right-of-way and certain open video systems." Thus, the definitions of a cable system under the Communications Act and the Copyright Act are not identical, and there is precedent for treating a system as a "cable system" for purpose of the Copyright Act that is not a "cable system" for purposes of the Communications Act.

57 17 U.S.C. § 111(f)(3); see also H.R. Rep. 94-1476, at 52 ("This broad language is intended to avoid the artificial and largely unjustifiable distinctions. . .").


59 Id.

60 For example, as described above, "wireless cable" systems qualified for the Section 111 license under the Copyright Act, but because the systems used wireless facilities that, generally speaking, served subscribers without using any public rights of way, these systems were not "cable systems" for purposes of the Communications Act. See, e.g., Santellana v. Nucentrix Broadband Networks, Inc., 211 F. Supp. 2d. 848, 854 (S.D. Tex. 2002).
The FCC's proposed definition of an MVPD would continue the trend of recognizing Congress' intent that statutory interpretation should not be so narrow as to require new legislation for each and every new technological development, a process that would be endlessly time-consuming and would never allow for effective law and rule-making. It also would be consistent with the Supreme Court's reasoning in Aereo. In analyzing Aereo's service, the Supreme Court focused on the end user's experience and concluded that the service is "substantially similar to those of the CATV companies that Congress amended the Act to reach."61 It dismissed mere technological differences in delivery methods as "behind-the-scenes technological differences[,]" which are legally immaterial and "do not distinguish Aereo's system from cable systems."62

The Copyright Office has acknowledged that regulatory action by the FCC could impact its own analysis under Section 111. In a letter sent to FilmOn X in response to statements of account filed by the company, the Copyright Office accepted the filings on a "provisional basis" and advised that "further regulatory and/or judicial

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61 Aereo, 134 S.Ct. at 2501.

62 Id.
developments” might lead the Office to take more definitive action in the future. It also explicitly recognized that “the pendency of a proceeding before the Federal Communications Commission concerning whether Internet-based services may be treated as ‘multichannel video programming distributors’ for purposes of communications law... could impact the analysis under Section 111, as Section 111 limits the statutory license to retransmission services that are ‘permissible under the rules, regulations, or authorizations of’ the FCC.”

As the Commission has modernized its regulations to keep pace with technology, it has served to effectuate Congress’s original intent. Advances in technology and in consumer expectations are driving the market toward new linear programming packages, but outmoded regulations are limiting innovation. Formal recognition by the Commission of MVPD status for “over the top” video providers reflects the vibrant innovation that is driving the marketplace for video programming and would help facilitate the deployment of new, innovative forms of video services to consumers.

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64 Id.
IV. CONCLUSION

As more services migrate to the Internet, video is following the path of IP-enabled voice services and other new technologies, even as the MVPD definition adopted in 1996 is, on its face and by application, technology neutral. The Commission here has a critical opportunity to correct competitive imbalances that flow from applying arcane regulatory distinctions to new services. Regulatory uncertainty is taxing the marketplace for linear video programming, and customers are paying the price as new competing providers either face unfair burdens in accessing content or are effectively foreclosed from the market altogether. The actions that the Commission takes here will have a long-ranging and important impact on innovation and on the American public. For the above-stated reasons, FilmOn X urges the Commission to adopt its conclusion that providers of multiple channels of linear programming for purchase be deemed "multichannel video programming distributors" for purposes of the Act.
Respectfully submitted,

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