

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

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

COMMENTS OF PLUTO, INC.

Pluto, Inc. (“Pluto”), respectfully submits these comments in response to the Notice of Proposed Rulemaking in the captioned proceeding (the “NPRM” or the “Notice”).¹

Pluto operates Pluto TV, a venture capital backed, fast-growing, independent, advertiser-supported linear video streaming service launched in 2014, offering more than one hundred channels devoted to news and information, arts and entertainment, educational, lifestyle, children’s and other programming, all drawn from a variety of sources. Pluto licenses and curates myriad content, including video clips, viral content, full-length series episodes and movies, and full linear network programming, organizing it as thematic linear channels available on the Pluto TV website and across multiple platforms, including desktop computers, mobile phones, tablets and connected TV devices.²

As a linear OTT video service born out of the Internet, Pluto exemplifies innovation in online video service offerings. It also confronts daily the challenges facing new entrants seeking to compete with entrenched legacy multichannel video programming distributors (“MVPDs”) for viewers, content and advertising. Because we are the only publicly

¹ See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking, MB Docket No. 14-261 (2014) (“NPRM”).

² Visit us at Pluto.tv.

available linear online video service not owned or controlled by an MVPD, Pluto has a unique perspective on the questions raised in the Notice, and on the Commission’s stated goal to “create new competitive opportunities that will benefit consumers.”³

Pluto welcomes the FCC’s efforts to facilitate new entry and competition in the online video marketplace. But, as explained below, Pluto believes that, in order to achieve the Notice’s stated goals, the Commission should expand the definition of MVPD to encompass both subscription *and* advertiser-supported services like Pluto TV. At the same time, Pluto urges the Commission to take care that any regulatory burdens imposed on Internet-based distributors do not have the unintended, and perverse, effect of stifling the very competition the Commission wishes to enhance. As explained below, although the selective application of existing rules (especially concerning access to programming) is essential to facilitate competition in the video marketplace, premature or heavy-handed regulation could impede innovation.⁴ Just as it did with respect to the nascent Direct Broadcast Satellite (“DBS”) service during the 1990s,⁵ the Commission should deploy its regulatory tool kit judiciously to ensure *both* that all online distributors have access to essential, high quality content, *and* that, at the same time, they are not subject to onerous regulatory burdens that could impede their emergence and development as robust competitors.

³ *Id.* at ¶ 4.

⁴ NRPM at Statement of Commissioner Pai (noting concern that regulation “could impede continued innovation”).

⁵ *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 06-11, 2006 WL 521465, ¶ 123-125 (March 3, 2006).

I. The Proposed Definition of MVPD Should be Expanded to Include Both Subscription and Advertiser-Supported Internet-Based Linear Distributors.

Advertiser-supported streaming services like Pluto TV constitute an innovative and competitive sector of the online video marketplace. They compete directly with subscription-based services for viewers and content -- and, not incidentally, advertising. It is therefore essential that advertiser-supported linear services (alongside subscription-based linear services) be included in the expanded definition of MVPD under consideration in this proceeding -- and thereby be allowed to benefit from the FCC's pro-competitive video distribution regulations to the same extent as their subscription-based competitors.

In passing the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress, among other things, envisioned a competitive and diverse video distribution marketplace where innovation would be enhanced by a technology neutral regulatory scheme.⁶ This precept requires that -- more than twenty years later -- regulations continue to be structured flexibly in order to accommodate a rapidly-changing technological and operational environment.⁷

Pluto therefore supports the Commission's proposal to expand the interpretation of "channels of video programming" beyond the historical cable-specific definition to encompass "prescheduled streams of video programming . . . without regard to whether the same entity is also providing the transmission path"⁸ -- precisely because the legacy interpretation no longer reflects the way video content is distributed and consumed. Having acknowledged this

⁶ See NPRM at ¶ 23 and n.56 (quoting Section 628 of the 1992 Cable Act, 47 U.S.C. § 548 (the purpose of this provision "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market . . .")).

⁷ *Id.* at ¶ 25.

⁸ *Id.* at ¶ 18.

fundamental shift, it would be inconsistent with the pro-competitive goals of the proceeding for the Commission to exclude advertiser-supported linear services from the scope of the online MVPD definition.

The Commission appears to acknowledge that limiting the definition to subscription services could arbitrarily disadvantage similarly-situated distributors,⁹ but does not articulate a credible rationale for this distinction.¹⁰ From an end-user perspective, the viewer experience of an advertiser-supported service like Pluto TV and of a competing fee-based service (that very likely carries advertisements) is indistinguishable. The services may exhibit the same, or similar, content. They may have the same, or similar, advertising. Both are available only on the Internet and therefore can be enjoyed only if the end-user viewer pays a fee for Internet service. To the extent the traditional MVPD definition was intended to differentiate between programming accessible *via* free, over-the-air television and programming made “available for purchase” by way of a subscription to a cable or satellite service, that distinction -- like the cable-specific interpretation of “channels of video programming” the Commission has determined to abandon -- is outdated and irrelevant in today’s marketplace.

II. The Program Access Rules Would Facilitate the Emergence and Growth of Competitive Online Distribution Services.

As an innovative linear Internet-based video service, the ability of Pluto TV to attract viewers and advertisers depends on its access to high quality third-party content, including

⁹ See *id.* at ¶ 27 (seeking comment on the implications of its proposed definition for OTT business models “that do not conform with the traditional monthly subscription model”).

¹⁰ This distinction is also inconsistent with the Commission’s recognition of the legitimacy of both business models in its subscription television rules, which allowed broadcasters to choose between subscription and free-to-air business models. See, e.g., Amendment of Part 76, Subpart G of the Commission’s Rules, 52 F.C.C.2d 1 (1975) (authorizing over-the-air subscription television service).

cable-affiliated programming. Clearly, emerging competitors like Pluto TV would be severely disadvantaged if vertically integrated programmers were permitted to make their affiliated programming available for online distribution only to affiliated Internet-based distributors. As Chairman Wheeler has explained, there is no policy justification for Commission rules prohibiting cable companies from exercising their incentives to withhold their affiliated content from competitive legacy MVPDs -- but allowing them to withhold their affiliated content from emerging Internet-based distributors.¹¹ Moreover, services like Pluto, as additional buyers of content, increase competition in the program supply market by expanding programmer outlets for distribution.¹²

The Program Access rules would make it more difficult for integrated legacy MVPDs to extract anti-competitive terms from programmers, which also would speed competition. Absent judicious regulation, it could take close to a decade (if ever) for online distributors to inject meaningful competition into the video marketplace due to the longstanding agreements that bind content owners to incumbent MVPDs and that feature anticompetitive terms that are intended to, and do, deter entry.¹³

¹¹ Thomas Wheeler, FCC Chairman, Tech Transitions, Video, and the Future, FCC Blog (Oct. 28, 2014), <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

¹² Pluto recognizes that it may not be able to exhibit certain content for which an upstream licensor has not granted a program network the right to permit online distribution. It also recognizes that the Commission cannot compel programmers to secure the online rights to such programming. *See* NPRM at Statement of Commissioner O'Reilly. The solution, from Pluto's perspective, is to black out specific content embedded within a program stream if and as necessary.

¹³ *See, e.g.*, DISH Network Corp., Petition to Deny Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, at 63-64 (August 25, 2014) (arguing that the combined company will have the ability to harm broadband-reliant video products because of the ability to pressure third party programmers to withhold online rights from rivals).

Accordingly, Pluto urges the Commission to ensure that the protections of the program access rules extend to Internet-based distributors. Doing so would yield beneficial effects in the online program distribution market comparable to those achieved in the 1990s and early 2000s, when the rules helped spur the development of the DBS industry.¹⁴

III. The Good Faith Negotiation Obligation Under the Retransmission Consent Rules Should Not Be Interpreted to Mandate Carriage of Local Television Stations.

Pluto does not oppose conceptually the applicability of the retransmission consent regime -- including the obligations of good faith and fair dealing -- in the online distribution context. Although in the future Pluto may wish to take advantage of the access to broadcaster content that retransmission consent provides, we note that we cannot do so absent changes in copyright law (which we hope this proceeding will facilitate).¹⁵ But, in any case, the retransmission consent framework must not be read to mandate online distributors' retransmission of local television stations.

As business models and the online distribution marketplace evolve, Internet-based distributors must have the flexibility to assess whether the carriage of local broadcast television stations is feasible, from both a business and an operational perspective. Thus, just as Congress did for the nascent DBS market,¹⁶ the Commission should preserve innovators' ability to make

¹⁴ Section 19 of the 1992 Cable Act, 47 U.S.C. § 548 (prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming); *see also* 47 C.F.R. § 76.1000 et seq.

¹⁵ *See* Jacqueline C. Charlesworth, General Counsel and Associate Registrar of Copyrights, Letter to Matthew Calabro of Aereo, Inc., at n.3 (July 16, 2014) (FCC's regulatory classification of online distributors "could impact the analysis under Section 111, as Section 111 limits the statutory license to retransmission services that are 'permissible under the rules... of the FCC'.").

¹⁶ *See* Satellite Home Viewer Improvement Act of 1999, Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999), codified at 47 U.S.C. § 338 (providing that, if a DBS operator elects to retransmit the signal of a local television station, the operator will be obligated (continued...))

an independent determination, on a market-by-market basis, whether to carry local signals. Any other result, *i.e.*, that an Internet-based distributor is obligated to engage in retransmission consent negotiations with all broadcasters, would be tantamount to a “must carry” obligation. Such a requirement would be onerous and cost-prohibitive for emerging online services and therefore inconsistent with the procompetitive goals of this proceeding.

IV. Internet-Based Distributors and Programmers Need Flexibility In Making Content Acquisition Decisions.

The Commission also seeks comment on the applicability to Internet-based distributors of Commission rules that prohibit MVPDs from requiring as conditions of carriage a financial interest in programming services or exclusive rights against other MVPDs.¹⁷ These rules were adopted to address the anticompetitive conduct of incumbent facilities-based distributors that were exploiting locally-derived market power to foreclose then-nascent satellite distributors from the marketplace.¹⁸ As in other contexts discussed in these comments, these rules do not make sense when enforced against nascent Internet-based distributors that do not have the “local monopoly” power about which Congress was concerned, and thus should not be so applied.

Indeed, program carriage restrictions, if applied to online distributors, actually would undermine the Commission’s stated procompetitive goals in this proceeding. In order for

to carry the signals of all television broadcast stations located within the same market). *See also* 47 U.S.C. §§ 338, 534, 535 (carry-one, carry-all and must carry requirements, which apply to DBS and cable operators, respectively).

¹⁷ *See* NPRM ¶ 48.

¹⁸ *See* S. Rep. No. 102-92 (1991), at 24, reprinted in 1992 U.S.C.C.A.N. 1133, 1156-57 (“The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of local competition. This testimony provided evidence that programmers are sometimes required to give operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.”); *see* 47 U.S.C. § 536(a); 47 C.F.R. 76.1301.

a new entrant to create a competitive service offering with high quality content, Internet-based distributors and programmers (to which Internet-based distributors provide an additional outlet for distribution) need the flexibility to negotiate for creative deal features. This may include bargaining for exclusivity or a financial interest in a content owner as consideration for carriage.

V. The Commission Should Not Subject Emerging Internet-Based Distribution Services To Ancillary Regulatory Burdens.

Certain of the FCC’s regulations applicable to legacy MVPDs would “unduly and unnecessarily burden companies seeking to offer innovative new services,”¹⁹ thus deterring entry into and stifling success in the emerging market for online video services. The FCC can mitigate that risk by exempting Internet-based distributors from certain requirements.

Although exemption may be appropriate with respect to some obligations, certain other obligations identified in the Notice are not applicable at all to Internet-based distributors.²⁰ An online streaming product, for example, does not implicate the technical requirements relating to signal leakage, navigation devices, inside wiring, or MDU access obligations. The Commission does not need specific authority to exempt Internet-based video distribution services from unenforceable regulatory obligations.²¹

¹⁹ NPRM at ¶ 34.

²⁰ NPRM at ¶ 64. As the FCC recognizes, “even if an Internet-based distributor qualifies as an MVPD it will not be subject to a number of regulations and statutory requirements applicable to cable and DBS operators unless it also qualifies as one of those services. *See, e.g.*, 47 C.F.R. §§ 76.92, 76.122 (network non-duplication rules, which apply to cable operators); 47 U.S.C. §§ 338, 534, 535 (carry-one, carry-all and must carry requirements, which apply to DBS and cable operators, respectively); 47 U.S.C. § 315, 335(a), 47 C.F.R. §§ 76.205-206, 76.1611, 76.1701; 47 C.F.R. § 25.701(b)-(d) (political programming and candidate access obligations for DBS and cable operators).” NPRM at n.107.

²¹ NPRM at ¶ 37.

Other obligations would impose undue and anticompetitive burdens on emerging online distributors, without a countervailing public interest benefit. Accordingly, we believe Internet-based distributors should be exempted from such requirements.

Accessibility. Extending accessibility rules applicable to MVPDs to Internet-based distributors²² would risk forcing re-design and re-deployment of services, thus imposing significant operational burdens and costs on Internet-based distributors, which could deter new entry. The Commission’s closed captioning regulatory regime reflects a record developed in extensive rulemaking proceedings, which did not contemplate applicability to services like Pluto TV and created rules specifically tailored to the participants in that proceeding.²³ Meanwhile, the Notice’s proposal would contravene Congress’s intent in passing the CVAA, who did not apply the same video description obligations to online providers as it imposed on broadcasters and legacy MVPDs.

Commercial Loudness. The CALM Act imposes obligations on legacy MVPDs with respect to the volume level of commercial messages, but it directs the FCC to mandate that distributors comply with a technical standard that is not applicable to IP-based distribution.²⁴ The obligation to install costly equipment and software associated with CALM Act compliance would consume start-up online distributors’ limited resources and stifle the development of competitive services, thereby impeding competition.

²² See 47 C.F.R. § 79.3(b)(5).

²³ See Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), Pub. L. No. 111-260, Title II, § 202(a), 124 Stat. 2751, 2767-70 (2010), 47 U.S.C. § 613(f), (“CVAA”); see also 47 C.F.R. § 79.3; Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 26 FCC Rcd 11847 (2011) (“Video Description Order”).

²⁴ NPRM ¶ 62; 47 C.F.R. § 76.607; Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621); Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, Report and Order, 26 FCC Rcd 17222 (2011).

EEO Requirements. The Commission’s EEO program would impose practices and reporting requirements on entities never before regulated.²⁵ Aside from the burdens this regime would impose on Internet-based distribution services, thus imposing costs and deterring entry, the EEO rules’ focus on local recruitment fails to account for the non-geographically limited nature of such distribution services.

CONCLUSION

Pluto urges the FCC to ensure that its rules facilitate the development of innovative new services like Pluto TV and levels the playing field between emerging Internet-based distributors and legacy MVPDs. The definition of MVPD should be broadly crafted to ensure that both subscription-based and advertiser-supported online linear video services will have access to the high quality content they need in order to emerge and grow. At the same time, the Commission must be careful not to encumber new entrants with onerous regulatory burdens that stifle competition in a rapidly evolving market.

Respectfully submitted,

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²⁵ NPRM ¶ 58. *See also* Michael O’Rielly, FCC Commissioner, Embrace the Internet for EEO “Widely Disseminated Rule,” FCC Blog (Feb. 20, 2015), <http://www.fcc.gov/blog/embrace-internet-eeo-widely-disseminated-rule> (arguing that the Commission’s EEO rules are in need of modernization to take account of Internet dissemination of notifications of job vacancies).