

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 CENTURYLINK¹

CenturyLink submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.² CenturyLink can see some benefit to clarifying that the definition of MVPD encompasses subscription linear video services that are distributed via IP but are not tied to the facilities over which they are distributed. At the same time, CenturyLink also sees sufficient concerns with imposing the status of “non-cable MVPD” on these types of video services. On balance, CenturyLink recommends that the Commission take time to fully evaluate the benefits and drawbacks of its proposal and particularly its interrelation with other aspects of the current and imminent regulatory framework including copyright law and open internet regulations. CenturyLink also recommends that the Commission decline to determine in this proceeding that linear IP video service is a “cable service” under the Communications Act and the Commission’s rules.

¹ This filing is made by and on behalf of CenturyLink, Inc. and its subsidiary entities that provide video services.

² *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, FCC 14-210, MB Docket No. 14-261 (rel. Dec. 19, 2014) (*NPRM*).

A. The Commission’s Proposed Expansion of the MVPD Definition Warrants Careful Consideration in Today’s Marketplace.

In the *NPRM* the Commission proposes to interpret the term MVPD in its rules “to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time.”³ This definition would clarify that entities that make video programming available in this manner, even without owning or controlling the underlying distribution facilities, would be considered MVPDs under the Communications Act and the Commission’s rules. While the plain language of the statutory definition of MVPD arguably permits this interpretation, historically, MVPDs have been limited to those entities that provide multiple channels of video programming via facilities that they own or control.

The Commission recognizes that this clarified definition would only encompass a limited set of entities that are distributing video programming using internet protocol. As the Commission outlines, those providing subscription linear programming via IP would be MVPDs, while those entities providing video programming via IP under other business models including subscription on-demand, transactional on-demand, ad-based linear and on-demand, and transactional linear would not be MVPDs. In other words, entities providing video programming using similar, if not the same, distribution technology but through different business models would be regulated differently. This may not be the right approach to regulating competitors in a rapidly changing market. It is critical that any new regulations promote innovation and competition and do not pick winners and losers in the video distribution marketplace. Additionally, simply subjecting new technologies to existing regulations is not typically the best

³ *NPRM* at ¶ 13.

fit. Instead, the Commission should be evaluating regulations and eliminating those that are no longer warranted in today's video distribution marketplace, and evaluating and modifying those that are still needed to promote innovation and competition or that are necessary to protect consumers.

The timing of this clarification may also make it hard to fully evaluate its necessity and likely impact. The Commission has just adopted new rules pertaining to regulation of broadband internet access service.⁴ It remains to be seen how video programming provided via IP will be impacted by those rules. It may be prudent to provide an opportunity for the Commission and others to consider the effect of any interplay between those rules and the modified rules being considered in this proceeding. Given the Commission decision regarding open internet rules, the Commission should ensure that it affords sufficient opportunity to evaluate the potential marketplace impacts of the proposed MVPD definition in conjunction with the new open internet rules in order to effectively address any unintended consequences resulting from the confluence of these proposed rules.

B. “Non-Cable MVPDs” May Not Be Eligible for the Copyright Statutory License for Cable Systems.

The effectiveness of the Commission declaring that certain entities would be “non-cable MVPDs” may be reduced by the potentially more limited scope of the Copyright Act’s statutory licensing scheme. The reason is that it is not clear that a “non-cable MVPD” will meet the definition of a “cable system” under the Copyright Act. For purposes of the cable statutory license of the Copyright Act a “cable system” is defined as “a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives

⁴ *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet*, FCC New Release, 2015 WL 851229 (Feb. 26, 2015).

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.”⁵ Whether the Copyright Office will determine that “non-cable MVPDs” are still “cable systems” for purposes of the statutory copyright license remains to be seen. To the extent that the Commission wants to promote regulatory parity at least across MVPDs, it may wish to consider coordinating regulatory modifications with the Copyright Office.

C. Non-Cable MVPDs Would Not Be EAS Participants.

Another set of Commission regulations to which MVPDs are currently subject is the Emergency Alert System requirements. But, MVPDs are subject to these requirements not by virtue of their status as MVPDs, but by virtue of their status as EAS participants.⁶ It does not seem that “non-cable MVPDs” would be required to comply with EAS rules as a result of this proceeding. The Commission may wish to clarify that “non-cable MVPDs” would not be required to participate in the EAS.

D. The Commission Should Not Determine That Linear IP Video Service Is a “Cable Service” Under the Communications Act in This Proceeding.

In addition to CenturyLink’s concerns as to whether it is prudent to and useful to expand the definition of MVPD in the manner that the Commission is proposing, CenturyLink is also concerned about the Commission’s espoused view in the *NPRM* that linear IP video service is “cable service” under the Communications Act and Commission rules. To be clear, there is no

⁵ 17 U.S.C. § 111(f).

⁶ See 47 C.F.R. § 11.2(d) (defining EAS Participants as “Entities required under the Commission’s rules to comply with EAS rules, e.g., analog radio and television stations, and wired and wireless cable television systems, DBS, DTV, SDARS, digital cable and DAB, and wireline video systems.”)

legal precedent that requires video service that is distributed via IP by a provider over that provider's facilities to be considered a "cable service" as that term is defined in the Communications Act. In the *NPRM* the Commission states that "[t]he Commission and other authorities have previously concluded that the statute's definition of 'cable service' includes linear IP video service" and provides two citations in support of this statement.⁷ The citations are not a sufficient basis for the Commission to hold that linear IP video service is a "cable service" under the Commission's rules.

The first citation is a prior notice of proposed rulemaking in which the Commission used the term "[n]on-QAM digital cable systems" to describe video delivery systems that do not use quadrature amplitude modulation (QAM) over hybrid fiber-coax (HFC) cable plant, but instead "primarily utilize Internet Protocol ("IP") delivery over either fiber-optic cable or DSL-based transmission over twisted-pair copper wires."⁸ This labeling standing alone is not legally sufficient to constitute any regulatory determination or create any regulatory obligation.⁹ It is nothing more than an assumptive categorization for purposes of discussing potential rules.¹⁰ The Commission presumably does not reference a Commission order or Commission rule to support

⁷ *NPRM* at ¶ 72.

⁸ *In the Matter of Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, FCC 12-86, MB Docket No. 12-217 (rel. Aug. 3, 2012) at ¶ 5.

⁹ To the extent that the term itself could even be considered a proposed rule, a mere proposed rule is without legal effect. *See, e.g., United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004), *rehearing & rehearing en banc denied* (No. 03-1673, Feb. 13, 2004) (noting that it is "well-settled" that merely proposed regulations have no legal effect); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 845 (1986) (stating that "[i]t goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute. . . .")

¹⁰ "Non-QAM digital cable systems" is also a somewhat oxymoronic term since the only definition of "digital cable systems" in the Commission's rules currently depends on QAM. *See* 47 C.F.R. § 76.640(a) (defining "digital cable systems" as "a cable system with one or more channels utilizing QAM modulation for transporting programs and services from its headend to receiving devices.")

its assertion that it has previously concluded that “cable service” includes linear IPTV service, because there is none to reference.¹¹

The Commission’s second citation is to a federal district court decision which held that AT&T in providing its U-verse service is a “cable operator” providing “cable service” over a “cable system.”¹² While this decision squarely addressed and decided that U-verse, an IP-delivered video service, was a cable service under the Communications Act, that decision was later vacated as moot by the Second Circuit.¹³ As such, the district court decision has no value as legal precedent.¹⁴

In sum, the Commission’s statement in the *NPRM* that it and others have previously concluded that linear IP video service constitutes “cable service” is not sufficient to establish that linear IP video service constitutes “cable service.” If the Commission intends to now for the first time categorize linear IP video service as “cable service” it needs to make that determination

¹¹ The Commission has not issued a further order or adopted rules pertaining to “non-QAM digital cable systems” in MB Docket No. 12-217. Additionally, in adopting rules requiring IPTV providers to pay regulatory fees the Commission did not find that IPTV providers were cable providers and thus subject to the cable provider fees. Instead, it added IPTV providers to a new regulatory fee category of “cable television systems and Internet Protocol TV service providers,” and expressly stated that it was not declaring IPTV providers to be cable television service providers. *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, FCC 13-110, MD Docket No. 13-140 (rel. Aug. 12, 2013), at ¶¶ 32-33 & n. 81 (stating that “[i]n this new category we assess regulatory fees on IPTV providers in the same manner as we assess fees on cable television providers; *we are not stating that IPTV providers are cable television providers*” and stating “*we are not categorizing IPTV as a cable television service*”) (emphasis added).

¹² *Office of Consumer Counsel v. Southern New England Telephone Company*, 515 F. Supp.2d 269 (D. Conn. 2007).

¹³ *Office of Consumer Counsel v. Southern New England Telephone Company*, 368 Fed.Appx. 244 (2^d Cir. 2010).

¹⁴ *See, e.g. Zeneca Ltd. v. Novopharm Ltd.*, 919 F. Supp. 193, 196, 198 (D. Md. 1996) (recognizing that as a general rule a vacated judgment is a legal nullity and it and its underlying factual findings have no preclusive effect and holding that a vacated decision had no binding precedential effect); *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (holding that a district court decision vacated as moot has no precedential effect).

based on a record that reflects reasoned decision-making and does not rely solely on prior statements that have no legal value. The *NPRM* does not afford the Commission the ability to create that record. As such, given the Commission’s precarious legal footing on this issue, the Commission should not use the instant proceeding to determine that IPTV constitutes a “cable service” under the Commission’s rules.

Further, CenturyLink disagrees that regulating an IP-based video service that a provider distributes over its own facilities as cable service is necessarily good policy.¹⁵ In fact, it is generally not good policy to subject new, innovative services to old regulations that were not created to address those services in the first instance. Instead, it is the classic round hole, square peg problem. The solution is not to jam the square peg into the round hole in an ill-fitting manner. The solution here should be to change the hole to better fit the peg. The Commission should carefully consider the policy effects of subjecting new innovative video distribution technologies to old cable regulations that were designed for a different, more monopolistic era of wireline video distribution, especially when those new services are provided by new competitive providers in the video distribution marketplace.

Respectfully submitted,

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¹⁵ *NPRM* at ¶ 75.