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 THE
CITY OF SAN ANTONIO, TEXAS

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The City of San Antonio, Texas (“City” or “San Antonio”), submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in this docket.¹

INTRODUCTION AND SUMMARY

San Antonio, with approximately 1.4 million residents, is the second largest city in Texas, and the seventh largest city in the nation. Unlike many localities across the nation, the City is fortunate to be served by three cable operators, Time Warner Cable, AT&T U-verse and Grande Communications, each of which serves either all or parts of the City. San Antonio recognizes the important benefits that competition brings to its residents, and the substantial economic development and growth benefits that are provided by having significant investment in advanced communications infrastructure throughout the City. For these reasons, the City has long, and successfully, pursued policies intended to promote competition in communications services and to enhance investment in communications infrastructure in the City.

San Antonio also receives from, and relies on, cable operators in the City for important contributions to the City’s budget in the form of cable franchise fees, and to the City residents’ ability to have access to the uniquely local programming provided by the City’s public, educational and governmental (“PEG”) access channels. Under Texas law, cable providers are required to pay the City a 5% franchise fee, Tex. Util. Code § 66.005, to set aside PEG channel capacity, id. § 66.009, and to pay a PEG capital support fee of 1% of gross revenues, id. § 66.006(b).

For over a century and consistent with Texas law, San Antonio has received rent-based compensation from all persons who install private profit-making facilities in the City’s rights-of-way (“ROW”). The City’s revenues from ROW use fees, of which cable franchise fees are a significant part, totalled $30 million in fiscal year 2014. The City relies on ROW fees, such as the cable franchise fee, to provide vital and essential public services to its residents and businesses.

Against that background, the City wishes to comment on two issues raised in the NPRM. The City applauds and supports the NPRM’s conclusion (at ¶¶ 72-77) that managed linear IP video service is a “cable service” within the meaning of the Cable Act, and that therefore an entity that provides such services over a ROW-crossing “closed transmission path[]” system is a “cable operator” of a “cable system” within the meaning of the Act. The City disagrees, however, with the NPRM’s tentative conclusion (at ¶ 78) that a cable operator would be “a non-cable MVPD … with respect to its OTT [over-the-top Internet video] service.” Under the plain language of the Act, OTT video service, when offered by a cable operator over a cable system, is clearly a “cable service.”

I. THE NPRM IS CLEARLY CORRECT THAT MANAGED LINEAR IP VIDEO SERVICE OFFERED OVER A ROW-CROSSING LANDLINE NETWORK IS A “CABLE SERVICE,” AND THUS THAT A PROVIDER OF SUCH SERVICE IS A “CABLE OPERATOR” UNDER THE CABLE ACT.

San Antonio endorses and appreciates the NPRM’s conclusions (at ¶¶ 72-77) that (1) linear IP video service falls within the Cable Act’s definition of “cable service,” 47 U.S.C. § 522(6); and (2) therefore any entity that provides such services over landline, ROW-crossing facilities that it owns or in which it or its affiliates have a significant interest is a “cable operator,” 47 U.S.C. § 522(5), providing such a “cable service” over a “cable system,” 47 U.S.C. ¶ 522(7).
The NPRM is correct that these conclusions flow directly from the plain language of those Cable Act definitions. The NPRM also correctly notes that both “[t]he Commission and other authorities have previously concluded that the statute’s definition of ‘cable service’ includes linear IP video service.”\(^2\)

The NPRM is equally correct in finding that, in addition to being required by the Cable Act’s language, these conclusions represent “good policy, as it ensures that cable operators will continue to be subject to the pro-competitive, consumer-focused regulations that apply to cable even if they provide their services via IP” (NPRM ¶ 75). As the NPRM recognizes, among the important public interest obligations that apply to cable operators are “franchising requirements,” including franchise fee requirements (id. ¶ 76 & n.230, listing 47 U.S.C. ¶ 542) and “public, educational, or governmental” access channel and facilities requirements (id. & n.222).

The NPRM’s conclusion that linear IP video service is a “cable service” necessarily means that AT&T’s U-verse video service is a “cable service,” and thus that AT&T is a “cable operator” providing that service over a “cable system.” The City is pleased that the Commission appears to have laid to rest AT&T’s longstanding claims to the contrary, which never were consistent with the statutory definitions or with sound public policy.\(^3\) The NPRM’s conclusions on these issues will be equally important to preserving the public interest policies of the Cable Act going forward, as traditional incumbent cable operators are increasingly likely to transition to linear IP video service in the years ahead.


\(^3\) To the City’s knowledge, no other ROW-crossing network provider of multichannel video programming services has taken AT&T’s position. Incumbent cable operators have not, and Verizon has never taken the position that its FiOS video service is not a “cable service.”
II. A CABLE OPERATOR’S PROVISION OF OTT OVER A CABLE SYSTEM IS A “CABLE SERVICE.”

San Antonio disagrees with NPRM’s tentative conclusion (at ¶ 78) that a cable operator’s OTT video programming service offerings are not a “cable service.” The tentative conclusion is at odds with the Cable Act’s definition of “cable service.” A cable operator’s OTT offering would clearly be “video programming,” as the NPRM itself elsewhere recognizes. Moreover, because a cable operator would exercise editorial control over its OTT video programming offering by choosing what to include in that offering, the operator’s provision of OTT video programming to subscribers over its cable system would constitute “the one-way transmission to subscribers” of “video programming” within the meaning of 47 U.S.C. § 522(6)(A) under both Commission and court precedent. That subscribers may access such programming over Internet access provided over the cable operator’s system does not alter the status of a cable operator’s OTT video programming offering as a “cable service.” The “cable service” definition also encompasses “subscriber interaction … which is required for the selection or use of such video programming or other programming service,” 47 U.S.C. § 522(6)(B), and the subscriber is “interacting” for the “selection or use” of the cable operator’s OTT offering via the operator’s cable system.

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4 NPRM ¶ 16 & n.35. Even if OTT video services were not “video programming,” they would clearly be “other programming service,” because they would be “information that a cable operator makes available to all subscribers generally,” 47 U.S.C. § 522(14), which would also make them a “cable service,” 47 U.S.C. § 522(6)(A)(ii).


6 NCTA v. FCC, 33 F.3d at 72.
Thus, a cable operator’s OTT video programming offerings would fall squarely within the Act’s “cable service” definition. And within the cable operator’s cable footprint, those cable services would unquestionably be provided over that cable operator’s cable system.

A cable operator’s provision of OTT video programming service outside of its cable footprint (see NPRM ¶ 78) would not change the fact that the OTT service is still a “cable service” when provided over other operators’ cable systems. The “cable service” definition does not draw a distinction as to whether a “cable service” is provided by the cable operator or someone else. In the case of a cable operator providing OTT video programming outside of its cable footprint, however, that operator would not be a “cable operator” outside of its footprint. As a result, any local taxes or fees on the out-of-footprint operator’s OTT service revenues would fall under 47 U.S.C. § 542(h), which addresses fees and taxes on cable services provided by a person other than a cable operator, rather than 47 U.S.C. § 542(b), which addresses fees imposed on a cable operator’s provision of cable service.

But this difference in the applicable Cable Act franchise fee provision does not change what the out-of-footprint cable operator’s OTT service is, and it clearly would be a “cable service” whenever it is offered over a cable system.

To be sure, cable operators will no doubt claim that classifying their OTT video programming service offerings as a “cable service” would be unfair and handicap their ability to compete with the offerings of non-facilities-based OTT video providers that would not be subject to cable franchising obligations. But that claim is misguided in three critical respects.

First, it ignores the fact that cable operators providing OTT video programming are “cable operators” under the Cable Act, while non-facilities-based OTT service providers are not.
Second, it overlooks that non-facilities-based OTT video programming service providers may be subject to fees under 47 U.S.C. § 542(h) as a person providing a “cable service” that is not a “cable operator.”

Third, any cable industry unfairness claim is rendered hollow by a central, inescapable fact: To obtain non-facilities-based OTT video services, a subscriber must subscribe to, and pay for, broadband service. As a result, cable operators earn significant broadband revenue from their OTT-using subscribers regardless whether those subscribers subscribe to the cable operator’s OTT offering or a non-facilities-based OTT provider’s offering. Moreover, the ample revenues that a cable operator earns from broadband subscribers are immune from Cable Act franchise fees,7 and from most state and local taxes.8 In short, cable operators will inevitably derive substantial subscriber revenues from non-facilities-based OTT services provided by others, largely free of state and local fees and taxes. When viewed, as it should be, from this larger perspective, any industry claim of supposed unfairness evaporates.

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7 See Internet over Cable Declaratory Ruling, 17 FCC Rcd at 4838; Video Franchising Order, 22 FCC Rcd 5101, 5146 (2007).
CONCLUSION

The Commission should adhere to the NPRM’s conclusion that the Cable Act’s “cable service” definition includes linear IP video service. It should decline, however, to adopt the NPRM’s tentative conclusion that a cable operator’s OTT video programming offering is not a “cable service” and conclude instead that such an offering is a “cable service.”

Respectfully submitted,

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