In the Matter of

Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services

MB Docket No. 14-261

REPLY COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

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REPLY COMMENTS OF THE
CITY OF SAN ANTONIO, TEXAS

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

The opening comments confirm the City’s positions that (1) managed linear IP video service offered over a right-of-way (“ROW”)—crossing wireline network is a “cable service,” and (2) a cable operator’s provision of over-the-top (“OTT”) video programming is a “cable service.” We address each issue below.

I. THE OPENING COMMENTS OVERWHELMINGLY ENDORSE THE NPRM’S CONCLUSION THAT LINEAR IP-VIDEO SERVICE IS A “CABLE SERVICE.”

Virtually all comments that addressed the issue agreed with the NPRM’s conclusion (at ¶ 72) that the Cable Act’s “definition of ‘cable service’ includes linear IP video service.”² As those comments noted, nothing in the “cable service” definition depends on the transmission protocol or format in which video programming is delivered.³ Most commenters also agreed that if managed linear IP video is provided over facilities consisting of ROW-crossing “closed transmission paths,” then that facility is a “cable system,” and any entity that either directly or indirectly owns or controls that system is a “cable operator.”⁴

² E.g., Comments of NCTA at 33-35; Comments of Cox Communications at 14-16; Comments of Anne Arundel County et al., at 3-4; Comments of Alliance for Community Media at 2-3.
³ Comments of NCTA at 33; Comments of Anne Arundel County et al., at 4.
⁴ Comments of NCTA at 35; Comments of Cox Communications at 14; Comments of Anne Arundel County et al., at 4.
CenturyLink is the only commenter that made any serious attempt to dispute the NPRM’s conclusion that managed linear IP video programming service offered over a ROW-crossing landline networks is not a “cable service.” But its arguments cannot withstand scrutiny.

First, CenturyLink quibbles with the NPRM’s citation (at ¶ 72 n.203) to the Commission’s Cable Television Technical Standards NPRM and the district court’s decision in SNET, pointing out that the former was only a statement in a notice of proposed rulemaking, and the latter decision was later vacated as moot by the Second Circuit. Although CenturyLink’s characterizations of the procedural postures of both proceedings are accurate, the procedural postures of those proceedings in no way detract from the strength of the legal analysis in each. CenturyLink does not even address, much less even attempt to dispute, the legal analysis of the relevant statutory definitions set forth in the SNET decision. Indeed, CenturyLink offers no argument whatsoever as to how its view that managed linear IP video service is not a “cable service” can possibly be squared with the Cable Act’s definitions of “cable service,” “cable system” and “cable operator.”

Second, CenturyLink asserts that the “NPRM does not afford the Commission the ability to create [a] record” on the issue of whether managed linear IP video service is a “cable service.” That is untrue. The NPRM (at ¶¶ 72-77) certainly gave clear notice that this issue is raised in this proceeding, and it also gave a detailed explanation of the reasons for the NPRM’s

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7 Comments of CenturyLink at 5-6.
8 See Comments of Cox Communications at 15 (citing and discussing the SNET decision).
9 Comments of CenturyLink at 7.
conclusion on the issue. Moreover, in response to the NPRM, parties (including, of course, CenturyLink) commented on the issue. Nothing more is required.

Third, CenturyLink disagrees with the NPRM that “regulating an IP-based video service that a provider distributes over its own facilities as [a] cable service is necessarily good policy.”\(^{10}\) The City disagrees with CenturyLink: treating likes alike is good policy, and other commenters agreed.\(^{11}\) But without any articulation of how CenturyLink’s view of “good policy” can be squared with the statutory language (and CenturyLink certainly provides none), its views of “good policy” are beside the point.

In sum, the record leaves no doubt that the NPRM correctly concluded that (a) managed linear IP video service is a “cable service,” (b) when that service is provided over a ROW-crossing network of closed transmission paths, that network is a “cable system,” and (c) any entity that directly or indirectly owns or controls such a system is a “cable operator.”

II. **A CABLE OPERATOR’S PROVISION OF OTT VIDEO PROGRAMMING OVER A CABLE SYSTEM IS A “CABLE SERVICE,” AND INDUSTRY COMMENTERS ARE WRONG IN CLAIMING OTHERWISE.**

Some commenters agreed with the City’s position that cable operator-provided OTT video programming is a “cable service,” and that the NPRM’s contrary tentative conclusion is mistaken.\(^{12}\) Not surprisingly, cable industry commenters uniformly disagreed with our position, arguing that operator-provided OTT video programming is not a “cable service.”\(^{13}\)

With one exception discussed below, however, cable industry commenters, just like the NPRM itself (¶ 78), offer no argument tied to the statutory language as to why cable operator-
provided OTT video programming would not be a “cable service.” Instead, they offer what they believe are good policy arguments for their position, but those arguments are completely unhinged from what the relevant statutory definitions actually say.

Thus, cable industry commenters rail against the supposedly “anachronistic” nature of the “legacy” franchising provisions of the Cable Act and assert that their OTT offerings should be shielded from those provisions.\textsuperscript{14} We and other commenters pointed out the fundamental fallacy of these claims: the Cable Act’s franchising provisions that industry denigrates serve several vital public interest policies,\textsuperscript{15} as the \textit{NPRM} (at ¶ 75, 76 nn.222 & 230) also recognizes. But even leaving aside who has the better of these policy arguments, the Cable Act’s language trumps any generalized policy arguments that are divorced from the Act’s language, and industry’s policy attacks on the Cable Act are just that: attacks on the Act itself and thus by definition divorced from its language.

As San Antonio anticipated in its opening comments (at 5-6), cable industry commenters also complain—again, uncoupled from the Cable Act’s language—that treating cable operator-provided OTT as a “cable service” would create an unfair “regulatory disparity” for cable operators’ OTT offerings vis-à-vis those of non-cable OTT providers.\textsuperscript{16} In its opening comments, the City pointed out the many flaws, both statutory and economic, with this “regulatory disparity” claim,\textsuperscript{17} and industry’s comments fail to address the City’s arguments. Other commenters also noted that excluding cable operator-provided OTT from the “cable

\textsuperscript{14} Comments of AT&T Services at 1, 4, 7-8. Accord Comments of NCTA at 5, 36; Comments of Cox Communications at 16; Comments of CenturyLink at 7; Comments of Verizon at 2, 10-13.

\textsuperscript{15} \textit{E.g.}, Comments of San Antonio at 3; Comments of Anne Arundel County \textit{et al.,} at 8-10; Comments of Alliance for Community Media at 4.

\textsuperscript{16} Comments of NCTA at 5. Accord Comments of Cox Communications at 16; Comments of Verizon at 10-11; Comments of Charter Communications at 7-9; Comments of AT&T Services at 5, 6-8; Comments of CenturyLink at 7.

\textsuperscript{17} Comments of San Antonio at 5-6.
“service” definition would invite counterproductive arbitrage, because it would incent cable operators to shift their video programming offerings to OTT to escape the public interest obligations that Congress has imposed on cable operator’s in the Cable Act.¹⁸

Only Verizon attempts to provide any statutory language-based argument to support its position that OTT video programming offered over a system is not a “cable service.” But its arguments miss the mark.

Verizon claims that OTT video programming does not satisfy the “one-way transmission” requirement of the “cable service” definition, 47 U.S.C. § 522(6). This is so, according to Verizon, because an OTT provider “does not provide the transmission path to the subscriber”; the underlying broadband service provider does.¹⁹ This claim is triply flawed.

First, it conflicts with what both the Commission and the D.C. Circuit have held: the “one-way transmission” requirement in the “cable service” definition refers not to the provision of a transmission path, but to “active participation in the selection and distribution of video programming.”²⁰ As a result, the “cable service” definition’s reference to “transmission” refers to the video programmer’s sending of its programming, not to the physical transmission of that programming by the local distribution system.²¹ And there can be no question that, in the case of cable operator-provided OTT, the cable operator engages in “active participation in the selection and distribution of [the] video programming” in its OTT offering.

¹⁸ Comments of Anne Arundel County et al., at 8; Comments of Alliance for Community Media at 4.
¹⁹ Comments of Verizon at 9.
²¹ NCTA v. FCC, 33 F.3d at 71.
Second, even if Verizon were correct that “one-way transmission” refers to provision of “the transmission path to the subscriber,” a cable operator providing OTT video programming within its cable footprint provides that path. Indeed, the operator both selects its own OTT package and, through its broadband offering, provides the transmission path for that OTT programming to reach the subscriber.

Third, Verizon’s “one-way transmission” argument rests on our unspoken premise: that only a cable operator can provide “cable service” over a cable system. But that premise is belied by the Cable Act’s statutory language. Section 622(h), 47 U.S.C. § 542(h), for example, specifically refers to the imposition of fees on “any person (other than a cable operator) with respect to cable service . . . provided by such person over a cable system.”

Verizon also asserts (at 9-10) that OTT video service is not delivered over a “cable system.” According to Verizon, delivery of OTT does not “use” the ROW within the meaning of the “cable system” definition because it places no “incremental burden on [the] rights-of-way.” Id. (citation omitted). But that is incorrect. First of all, OTT services, just like traditional non-OTT video programming services, are delivered over a cable operator’s network which, in turn, traverses the ROW; thus, provision of OTT no less “uses” the ROW than provision of traditional non-OTT cable services delivered over a cable operator’s ROW-crossing network.

More fundamentally, Verizon’s “burden” standard for measuring ROW “use” is at odds with the Cable Act. The five percent cable franchise fee authorized by Section 622, 47 U.S.C. § 542, is “a fee for [a cable] operator’s use of public ways.”\(^\text{22}\) The franchise fee is therefore “essentially a form of rent: the price paid to rent use of public right-of-ways.”\(^\text{23}\) And on its face, the Cable Act’s five percent cable franchise fee cap permits that rent to be based on value, not


\(^{23}\) City of Dallas v. FCC, 118 F.3d 393, 397 (5th Cir. 1997).
“burden.” If Verizon’s view were correct that burden, rather than value, were the Cable Act’s measure of rent for ROW use, then the Cable Act would not permit franchise fees to increase every time a cable operator simply increases its prices (and thus its revenue) without engaging in any physical expansion or modification of its system, because increasing prices would place no more “burden” on the ROW. But of course, that is not the measure of rent for ROW use that Congress enacted in the Cable Act. Measured as it must be, by the value of ROW use, a cable operator’s provision of OTT video service, and the operator’s earning of additional revenue as a result, does constitute additional “use” by the cable operator of the ROW.

Finally, Verizon argues (at 10) that an OTT provider is not a “cable operator” within the meaning of the Act because an OTT provider “can and does offer service without having any ownership or management responsibility in the broadband connection used by its subscribers.” Again, Verizon misses the mark. As an initial matter, this argument rests on the same fallacy as Verizon’s “cable service” argument: it assumes, contrary to the Cable Act’s specific language, that only a “cable operator” can provide “cable service” over a cable system. Further, Verizon overlooks that, with respect to cable operator-provided OTT, the OTT provider by definition has an “ownership [and] management responsibility” with respect to the system over which the OTT is delivered, and with respect to “the broadband connection used by its subscribers” to access that OTT video programming.24

24 Comments of Verizon at 10.
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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