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 COX COMMUNICATIONS, INC.

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Cox Communications, Inc. ("Cox") respectfully submits these comments in response to the Notice of Proposed Rulemaking adopted in the above-captioned proceeding, which proposes to classify certain over-the-top ("OTT"), Internet-based video services as multichannel video programming distribution ("MVPD") services.[1] As set forth below, the Commission should adhere to the "Transmission Path Interpretation" previously endorsed by the Media Bureau and reject the "Linear Programming Interpretation" proposed in the NPRM. In all events, however, the Commission should promote regulatory parity by ensuring that all entities classified as MVPDs are subject to comparable requirements and that all video distributors that satisfy the statutory definition of "cable operator" comply with applicable obligations.

INTRODUCTION AND SUMMARY

Cox welcomes the opportunity to comment on ways the Commission should modernize its regulatory framework applicable to video distributors. Cox is a broadband communications and entertainment company, providing advanced digital video, Internet, telephone, and home security and automation services over its robust broadband network. As the third largest U.S. cable operator serving approximately six million customers, Cox competes with a variety of

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

companies, including DBS providers, telco video providers, and other facilities-based MVPDs, as well as an increasing array of OTT providers. Yet Cox is subject to far more extensive and burdensome regulation than any of its direct competitors, based on its status as a traditional cable operator. That regulatory disparity is an anachronism, and in today's vibrant and dynamic marketplace it serves only to distort competition and curtail innovation. The Commission should make it a priority to eliminate any distortions created by its own rules, and should work with Congress on revising the statutory framework to account for the dramatic changes in the video entertainment landscape that have occurred over the last two decades. By the same token, rather than focusing on the ability of certain OTT providers to obtain access to local broadcast and vertically integrated programming, the Commission should examine ways to address the broader challenges faced by many video distributors in negotiating with large programming conglomerates, whose pricing and bundling practices make it difficult to obtain high-demand programming on reasonable terms and conditions. It is these challenges that strain the ability of Cox and other small and mid-sized operators to provide the competitive price and value that customers want with their video subscription.

Although couched as a modernization effort, the proposal to classify OTT providers as MVPDs has significant flaws. Most fundamentally, reading the transmission path element out of the term "channels of video programming" is inconsistent with congressional intent. Specifically, the Commission's proposed "Linear Programming Interpretation," which focuses on "prescheduled streams of video programming … without regard to whether the same entity is also providing the transmission path,"[2] does not lead to the most sound legal or policy result. Rather, the statutory text and legislative history are best read to mean that an MVPD is an entity

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[2] *Id.* ¶ 18.

that controls the underlying transmission path used to distribute video programming—*i.e.*, is a *facilities-based* provider. The Commission therefore should retain the "Transmission Path Interpretation" adopted by the Media Bureau in 2010,[3] and reaffirmed in 2012.[4]

If the Commission overlooks the weakness of the Linear Programming Interpretation as a matter of statutory interpretation and adopts it for policy reasons, the Commission must apply MVPD regulations evenhandedly to all entities that qualify under the revised definition. While the NPRM suggests an interest in shielding OTT providers from the burdens applicable to MVPDs,[5] doing so would present insurmountable legal and policy obstacles. The statutory provisions applicable to MVPDs are technology-neutral and draw no distinctions based on an entity's status as incumbent or new entrant; to the contrary, the types of regulatory provisions at issue generally are intended to address social policy goals and do not turn on a provider's market share or any other measure of dominance. Title VI of the Communications Act does not include a forbearance provision akin to Section 10, which authorizes forbearance from regulations applicable to telecommunications carriers. Nor would it be remotely lawful to authorize OTT providers simply to opt into or out of classification as an MVPD based on the desired mix of rights and responsibilities.[6] Moreover, any effort to exempt OTT providers from the regulatory burdens that flow from an MVPD designation would inevitably result in competitive distortions and inefficient allocations of capital.

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3 *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879 ¶ 7 (MB 2010) ("*Sky Angel Order*").

4 Public Notice, *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, DA 12-507 ¶ 6 (MB rel. Mar. 30, 2012) ("*2012 Public Notice*").

5 *See* NPRM ¶¶ 37-38.

6 *See id.* ¶ 37.

Just as the interests in avoiding competitive distortions warrant establishing a level playing field for all MVPDs if OTT providers are deemed MVPDs, they likewise justify Commission action to ensure that all entities that meet the definition of "cable operator" under the Communications Act—including self-styled "IPTV" providers such as AT&T and Google Fiber—comply with the duties attendant to that classification. The NPRM appropriately proposes to clarify that cable operators' provision of managed IP-based services over their cable systems does not alter the classification of such offerings as "cable services" under the Act, and that, by contrast, OTT services are *not* cable services regardless of whether they are provided by a new entrant or traditional cable operator. But the NPRM fails to call out that its analysis of IP-based video services undercuts the strained efforts of AT&T and Google Fiber to maintain that their IP cable services are somehow exempt from cable regulation. Such claims have no legal or factual basis, as the NPRM implicitly recognizes. The Commission should make that understanding explicit and should not permit video distributors to flout their duties under Title VI.

Although the best way to achieve regulatory parity for the long run is to relieve *all* video distributors from legacy regulations that were designed for a monopoly environment and have no continuing policy justification in today's competitive marketplace,[7] the need for a level playing field demands that all MVPDs and all cable operators comply with their respective regulatory duties until such reform occurs.

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[7] *See, e.g.*, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (recognizing that "[c]able operators … no longer have the bottleneck power over programming that concerned the Congress in 1992").

DISCUSSION

I. THE COMMISSION SHOULD CONTINUE TO APPLY THE "TRANSMISSION PATH INTERPRETATION" IN CONSTRUING THE TERM "MVPD"

A. The "Transmission Path Interpretation" Is Far More Faithful to the Statute Than the "Linear Programming Interpretation."

To qualify as an "MVPD" under the Act, an entity must "make[] available for purchase ... multiple channels of video programming."[8] In turn, the Act defines the term "channel" as "a portion of the electromagnetic frequency spectrum."[9] As the Media Bureau previously recognized, that statutory focus on physical spectrum justifies construing the term MVPD to encompass only those entities that distribute video programming over transmission pathways they own or operate.[10]

The NPRM proposes to adopt a novel interpretation of the key term "channels"—the "Linear Programming Interpretation"—to mean "prescheduled streams" of video programming, abandoning the physical conception of a "channel" embodied in 47 U.S.C. § 522(4) for a colloquial definition that effectively amounts to a "programming service."[11] But the notion that mere aggregators of video content are MVPDs, notwithstanding their lack of ownership or control of the transmission pathway used to deliver video programming, is inconsistent with the Act and relevant legislative history, and is based on a misplaced judgment that OTT providers need a regulatory boost to achieve success in the marketplace.

As the Media Bureau had recognized before the NPRM was issued, each of the entities included "in the illustrative list in the Act's definition of an MVPD ... provide[s] a transmission

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8 47 U.S.C. § 522(13).

9 *Id.* § 522(4).

10 *2012 Public Notice* ¶ 6 (citing *Sky Angel Order* ¶ 7).

11 NPRM ¶ 18.

path for the delivery of video programming."[12] That commonality confirms Congress's intent that "channel" be treated consistent with its status as a term of art in the definition of MVPD.[13] While the NPRM posits that "the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase,"[14] that overlooks the far more salient characteristic of each entity's control of the underlying video transmission pathway. Indeed, the NPRM proposes to *exclude* from the definition of MVPD various entities that provide multiple streams of prescheduled video programming for purchase, such as those entities (including, *e.g.*, CBS) that only make available programming they own.[15] By contrast, there is no facilities-based provider that offers for purchase multiple streams of video programming over transmission pathways it controls that would not fit within the Transmission Path Interpretation. Indeed, the definitional manipulation contemplated by the NPRM to include or exclude particular types of entities within the MVPD classification under the Linear Programming Interpretation (excluding not only those OTT providers that stream multiple channels of their own programming but potentially other categories as well)[16] underscores that interpretation's absence of any grounding in the Act.

The Transmission Path Interpretation, in contrast, is grounded in the statutory definition of "channel" adopted in 1984,[17] of which Congress is presumed to be aware when it incorporated

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12 *2012 Public Notice* ¶ 6.

13 *Id.*

14 NPRM ¶ 19.

15 *Id.* ¶¶ 25-28.

16 *Id.*

17 47 U.S.C. § 522(4).

the term into the definition of MVPD in 1992.[18] And Congress's decision to retain the statutory definition of "channel" without modification despite the substantial statutory amendments enacted in 1992 and 1996 also is subject to a strong presumption of intentionality.[19] Fundamental tenets of statutory construction indicate that Congress intended not only to supplant the more colloquial use of the term "channel," but also that the statutory definition would guide the Commission's reading of the Act, including its interpretation of the term "MVPD."[20]

To be sure, the cable-centric language in the definition of "channel" in Section 602(4)—referring to "a portion of the electromagnetic frequency spectrum *which is used in a cable system*"[21]—preceded the emergence of some non-cable MVPDs that of course do not operate cable systems. But, as reflected in the Media Bureau's analysis in the *Sky Angel Order*, Congress's decision to define "MVPD" by reference to examples of facilities-based operators that all provide a transmission pathway making use of a portion of the electromagnetic frequency spectrum (whether wired or wireless) reflects its understanding that an MVPD must provide *some* type of spectrum-based transmission pathway.[22] Indeed, by specifying that the MVPD classification would include distributors "such as" cable operators, Congress presumably intended that "channels," as used in the definition of MVPD, would be read to limit the

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18 *See FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (explaining the "cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" (internal quotation marks omitted)); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

19 *See Cooper*, 132 S. Ct. at 1449; *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (Congress "says in a statute what it means and means in a statute what it says there." (internal quotation marks omitted)).

20 *See Cooper*, 132 S. Ct. at 1449.

21 47 U.S.C. § 522(4) (emphasis added).

22 *See Sky Angel Order* ¶ 7.

regulatory classification to those classes of distributors that offer channels of video programming in a manner *similar* to cable operators.[23]

The legislative history of the 1992 Act further confirms this understanding; in fact, as the NPRM acknowledges, the overwhelming focus of that statute was the promotion of *facilities-based* competition (*i.e.*, competition from new platforms that provide video programming over their own physical transmission pathways).[24] Moreover, Congress's repeated reference to "networks" in the 1992 Cable Act and legislative history further confirms that Congress did not use the defined term "channel" in the definition of MVPD when it actually intended to refer to a "network."[25]

It thus makes perfect sense to conclude that, in expanding its regulatory framework to cover new video distribution platforms in 1992, Congress intended its reference to "channels" in the definition of MVPD to conform to the understanding of "channel" grounded in the text and history of the Act. By contrast, the NPRM's proposal to abandon *any* notion of a physical, spectrum-based pathway, and to define a channel as a programming service, departs sharply from the statutory text and purpose. In short, whatever ambiguity exists in the statutory

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23 *See, e.g.*, Comments of Discovery Communications, LLC, MB Docket No. 12-83, at 4 (filed May 14, 2012).

24 NPRM ¶ 30 ("'The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.'" (quoting *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3384 n.79 (1993))); H.R. REP. NO. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 ("[The] conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.").

25 *See, e.g.*, 47 U.S.C. §§ 534(b)(2)(B), (b)(5); 535(b)(3)(C), (f); 548(c)(3)(B); S. REP. NO. 102-92 (1991), at 12, 25, 29, 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1144, 1158, 1162, 1168.

definition of "MVPD" cannot justify an interpretation that completely disregards the statutory definition of "channel."[26]

By the same token, the NPRM's admonition that the Commission "should be cognizant of the interplay between Section 111 of the Copyright Act and the Communications Act"[27] militates strongly in favor of the Transmission Path Interpretation and against the Linear Programming Interpretation. The Copyright Office and the federal courts have made clear that OTT providers do not qualify for the compulsory copyright license available to "cable systems" under Section 111 of the Copyright Act.[28] As a result, notwithstanding any classification as MVPDs under the Communications Act, and even if they secure retransmission consent rights (potentially at significant expense), OTT providers would continue to be barred from distributing broadcast content unless and until they first reached agreement with all underlying copyright holders. Creating such a disparity between the treatment of a video distributor under the Communications Act and the Copyright Act would only foster confusion and inefficiency, and thus counsels strongly against adopting the Linear Programming Interpretation.

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26 *See, e.g.*, *Massachusetts v. United States Dept. of Transportation*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("[A]n agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable.").

27 NPRM ¶ 66.

28 *See* 17 U.S.C. § 111 (providing a compulsory copyright license for cable systems); *WPIX, Inc. v. ivi, Inc.* 691 F.3d 275, 284 (2d Cir. 2012) (concluding that "Congress did not intend for § 111 [compulsory] licenses to extend to Internet retransmissions" and that "the Copyright Office's interpretation of § 111 – that Internet retransmission services do not constitute cable systems under § 111 – aligns with Congress's intent and is reasonable"); *Am. Broad. Co. v. Aereo, Inc.* Nos. 12-1540, 12-1543, 2014 WL 5393867, at *4 (S.D.N.Y. Oct. 23, 2014) (relying on *WPIX*).

B. There Is No Sound Policy Reason To Adopt the Linear Programming Interpretation.

While the impetus for the proposed expansion of the MVPD definition to include OTT providers appears to be "creat[ing] new competitive opportunities that will benefit consumers,"[29] there is no need to contort the statutory text to achieve that result. Indeed, as the NPRM acknowledges, OTT services are burgeoning without any regulatory leg-up, with robust new OTT offerings being launched by Sony, DISH Network, and others.[30] Services should succeed in the marketplace based on whether consumers find them compelling, and not as a result of any artificial regulatory preferences. And, in any event, there is no basis to conclude that the absence of program access or retransmission consent rights is impeding the development of such offerings.

To the extent the Commission seeks to take action to facilitate increased competition in the video marketplace, it should focus on eliminating legacy rules that impede innovation and working with Congress on related legislative reforms, as such action would do far more good than the proposed adoption of the Linear Programming Interpretation. Cable operators are subject to a variety of anachronistic rules that impede innovative new video offerings more than any purported absence of rights applicable to OTT providers. Moreover, by treating all similarly situated providers comparably—including by putting a stop to certain "IPTV" providers' evasion of their duties as "cable operators," as discussed below—the Commission will minimize competitive distortions flowing from the existing regulatory scheme.

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[29] NPRM ¶ 4.

[30] *See, e.g.*, *id.* ¶ 1 n.1.

II. THE COMMISSION SHOULD APPLY MVPD RULES EVENHANDEDLY TO ALL COVERED PROVIDERS

If the Commission chooses to adopt the Linear Programming Interpretation, despite the various flaws inherent in that approach, it should avoid creating new regulatory disparities between or among subcategories of MVPDs. Indeed, adding to such disparities would distort the competitive landscape and directly undercut the innovation and investment goals animating this proceeding.

It should make little difference from a regulatory standpoint whether an MVPD is a traditional cable operator, IP-based cable operator, DBS provider, or OTT provider. The Commission has argued in defense of MVPD regulations that such requirements—unlike traditional *cable* regulations—are not premised on theories of bottleneck control or market power.[31] Rather, MVPD regulation is intended to address social policy goals relevant to all MVPDs and their subscribers.[32] Moreover, a number of the major players in the emerging OTT arena, such as DISH Network and Sony, are sophisticated, well-financed entities with established operations in the video marketplace.[33] It would be particularly perverse to exempt such entities from otherwise-applicable MVPD rules on the basis of their status as "new entrants," especially

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31 *See, e.g.*, Final Form Br. for Respondents Federal Communications Commission and United States of America, No. 11-4138, at 34 (2d Cir. Aug. 14, 2012) (stating that the assumption that "Congress adopted the program carriage statute solely to restrain ... 'bottleneck' power" is "mistaken" because the statute "applies to *all* MVPDs—including non-cable MVPDs like DIRECTV, which have *never* held a bottleneck monopoly").

32 *See id.*

33 *See* Emily Steel, *Dish Network Unveils Sling TV, a Streaming Service to Rival Cable (and It Has ESPN)*, THE NY TIMES (Jan. 5, 2015), http://www.nytimes.com/2015/01/06/business/media/dish-network-announces-web-based-pay-tv-offering.html?_r=0; Jeff Baumgartner, *Sony Boots Up 'PlayStation Vue' OTT Service*, MULTICHANNEL NEWS (Nov. 13, 2014), http://www.multichannel.com/news/tv-apps/sony-boots-playstation-vue-ott-service/385510.

given that the rules at issue are not economic regulations that have anything to do with a provider's status as an incumbent or newer competitor.

It also would be contrary to the Communications Act for the Commission to find that an OTT provider, or any other class of video distributor, is free to "choose whether they wish to be classified as MVPDs."[34] As the NPRM recognizes, classification as an MVPD depends on the language of the statute, and whatever interpretation the Commission adopts must apply to all providers that meet the criteria established by the Commission (whether the criteria include control of the transmission path or only an offering of multiple streams of linear programming). A provider may structure its business model to include the relevant attributes or not, but if it *does* elect to provide a service that meets the definition of MVPD as construed by the Commission, then its mere preference to avoid regulation is beside the point.[35]

As noted above, the statute does not authorize forbearance from Title VI obligations, nor is there any principled basis to waive Commission rules for certain "preferred" competitors while continuing to impose them on others. To the extent the Commission believes that certain rules are no longer necessary (and such rules are not statutorily mandated), it should eliminate the obligations for all MVPDs, not just for OTT providers. Any other approach would distort competition and cause significant economic inefficiency. The Commission's experience implementing Section 629 is instructive. Notwithstanding that Section 629 applies broadly to all MVPDs, the Commission exempted DBS providers from complying with the integration ban and

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34 NPRM ¶ 37.

35 Analogously, IP-based voice services are provided by both over-the-top providers, like Vonage, and facilities-based providers of managed voice services, like Cox. Each class of provider has elected to provide a service that meets the definition of interconnected VoIP, and therefore each is subject to the same regulations (*e.g.*, E911, CALEA, CPNI). An entity that elects to operate as an interconnected VoIP provider cannot avoid its obligations merely by opting out of them.

has tacitly acquiesced to the decision of some other MVPDs to ignore their Section 629 obligations.[36] The resulting regulatory regime is one that the Commission itself has characterized as a failure,[37] with traditional cable operators wastefully expending hundreds of millions of dollars to support CableCARDs with scant interest from consumers.[38] Exempting OTT MVPDs from MVPD regulation (either wholesale or on a more targeted basis) while continuing to apply such rules to facilities-based providers inevitably would cause similar unforeseen inefficiencies and consumer harms.

III. THE COMMISSION SHOULD CLARIFY THE REGULATORY STATUS OF IP-BASED CABLE SERVICES AND OTT SERVICES OFFERED BY CABLE OPERATORS

While Cox disagrees with the proposal to adopt the Linear Programming Interpretation set forth in the NPRM, Cox applauds the Commission's proposal to clarify the application of the statutory cable-related definitions. Indeed, providing such clarifications is likely to be far more impactful than any change in the interpretation of the MVPD definition.

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36 *See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775 ¶¶ 64-65 (1998); *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, MB Docket No. 10-91 *et al.*, FCC 10-60 ¶ 9 (rel. Apr. 21, 2010) (acknowledging that "AT&T does not provide CableCARD devices" and stating more generally that CableCARD rules apply only "*nominally* ... to all MVPDs" (emphasis added)).

37 *See Implementation of Section 304 of the Telecommunications Act of 1996 et al.*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657 ¶ 4 (2010).

38 Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, CS Docket No. 97-80, at 1 (filed Jan. 30, 2015) (reporting that the nine largest cable operators have deployed less than 620,000 CableCARDs, while more than 51 million operator-supplied set-top boxes currently are deployed).

A. The Commission Should Confirm That Wireline Providers of Managed IP Video Services Are Cable Operators.

The Commission should use this proceeding as an impetus to put a halt to certain self-styled "IPTV" providers' longstanding efforts to evade their obligations as cable operators. The NPRM recognizes that "merely using IP [technology] to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator."[39] That observation not only means that managed IP-based video services offered by traditional cable operators like Cox over their cable systems remain subject to Title VI, but also that AT&T U-Verse, Google Fiber TV Package, and similar managed IP video services must be classified as cable services.

As the NPRM notes, a "cable operator" is defined as an entity that "provides cable service over a cable system," without reference to the technology used to provide such service.[40] A "cable service," in turn, is defined to include "(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."[41] And a "cable system" is "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."[42]

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39 NPRM ¶ 71.

40 47 U.S.C. § 522(5).

41 *Id.* § 522(6).

42 *Id.* § 522(7).

Despite the clear applicability of these definitions, and despite a federal court's rejection of its attempts to evade them,[43] AT&T for years has disclaimed its status as a cable operator. As the *SNET* court recognized, because "the flow of [AT&T's] video programming" is "one-way" in nature, the subscriber interaction involved in signaling the network to obtain programming "does not exceed the scope of that degree of interaction 'required for the selection or use' of the programming."[44] The court contrasted interactive services that involve "the back-and-forth of the actual programming (or other target service)," noting that the legislative history drew a clear distinction between such services and those, like AT&T's that transmit programming "in only one direction but the selection and retrieval of which might involve upstream transmission of signaling or other data."[45] The court therefore held that the statute compels classification of AT&T's service as a cable service, and the NPRM cites that analysis with approval.[46] The Commission's reminder that providers that disregard their regulatory obligations are subject to enforcement action is a start,[47] but the Commission must move from words to action in light of AT&T's longstanding flouting of its obligations as a cable operator.

Similarly, the Commission should make clear that Google Fiber's TV Package qualifies as a cable service and that Google Fiber is a cable operator in providing this service. Like AT&T, Google Fiber has denied its status as a cable operator, generally relying on the same

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43 *Office of Consumer Counsel v. Southern New England Tel. Co.*, 515 F. Supp. 2d 269 (D. Conn. 2007) ("*SNET*"), *vacated as moot*, 2010 WL 744353 (2d Cir. Mar. 5, 2010).

44 *Id.* at 277, 278.

45 *Id.* at 277.

46 NPRM ¶ 72 & n.203.

47 *Id.* ¶ 59 & n.173.

arguments that AT&T advanced in connection with the reliance on a switched IP connection.[48] Yet the statutory definitions quoted above plainly encompass Google Fiber's facilities-based IPTV system and thus compel the conclusion that Google Fiber also is a cable operator. As long as the Commission continues to apply any given cable regulation to traditional providers,[49] it must enforce the rules that apply equally to entities like AT&T and Google Fiber.

B. The Commission Should Confirm That OTT Services Offered by Cable Operators Are Not Cable Services.

Cox strongly supports the NPRM's tentative conclusion that OTT services offered by cable operators are not cable services.[50] As the NPRM recognizes, the classification of an OTT service should turn on the functional attributes of the service, not the legacy regulatory silo to which the provider belongs. Any contrary approach would produce harmful inefficiencies, as cable operators' ability to innovate through new OTT services would be thwarted by needlessly burdensome regulations, while other providers' identical services arbitrarily would be subject to preferential treatment. The proposal to treat all comparable OTT services comparably, regardless of who provides them, is not only sound policy but required to avoid an unlawful result.[51]

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48 *See* Kansas Corporation Commission, Order Approving Amended Application for a State-Issued Video Service Authorization, Staff Report and Recommendation, Docket No. 12-GFKC-643-VSA, at 2 (rel. Sept. 13, 2012) (reciting Google Fiber's statements in franchise filings, which asserted that the TV Package falls outside the definition of a cable service because it is "transmitted via a *two-way*, *interactive* network that … involve[s] regular communication with customer premises equipment to deliver content").

49 *See* NPRM ¶¶ 76-77 (listing cable-specific regulations).

50 *Id.* ¶ 78.

51 *See Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005) ("An agency must provide an adequate explanation to justify treating similarly situated parties differently.").

CONCLUSION

Cox therefore urges the Commission to take steps to modernize its rules consistent with the proposals described above.

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