

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF AT&T SERVICES, INC.

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INTRODUCTION AND EXECUTIVE SUMMARY

AT&T Services, Inc., on behalf of the subsidiaries and affiliates of AT&T Inc. (collectively, “AT&T”), respectfully files these comments in response to the Commission’s *Notice of Proposed Rulemaking* (“NPRM”),¹ which inquires whether providers of certain over-the-top (“OTT”) video programming services should be classified as “multichannel video programming distributors” (“MVPDs”) under section 602(13) of the Communications Act of 1934, as amended.²

Applying the MVPD classification now to any OTT video service provider would be harmfully premature. Regulation imposes very real costs and therefore is appropriate only where there is compelling evidence of a problem to be solved. But there is no evidence of any such problem in the OTT ecosystem. To the contrary, Internet-delivered video is experiencing robust growth and innovation, and increasing competition among providers, services, features, and business models is yielding tremendous benefits to consumers. That ecosystem is still evolving, however, and premature regulation would undermine these early successes. In particular, applying anachronistic Title VI obligations to OTT providers could produce a variety of unintended negative consequences. And risking those consequences now would be particularly unwarranted given Congress’s active consideration of the proper legislative and regulatory approach to today’s evolving video marketplace.

¹ Notice of Proposed Rulemaking, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, 29 FCC Rcd 15995 (2014) (“NPRM”).

² 47 U.S.C. § 522(13).

DISCUSSION

I. Over-the-Top Video Services Are Growing and Evolving at a Rapid Pace.

Over-the-top video services are relatively new, but they are quickly creating a flourishing ecosystem, providing tremendous benefits to consumers.

The OTT Ecosystem Is Growing Rapidly. Usage of OTT video services is expanding rapidly. By the end of 2014, more than 70 percent of the households in the United States subscribed to broadband services, and more than half of those households had at least one television connected to the Internet.³ And these numbers do not capture the full extent of the demand for OTT services, because the vast majority of Americans access video on their desktops, tablets, smart phones, and other devices. Undoubtedly, America has entered the “OTT era.”⁴

Current data on revenue, market share, consumer preferences, and a range of other metrics reveal that the OTT video ecosystem is quickly becoming a key part of the growing video marketplace.⁵ In 2009, more than 99 percent of videos were viewed on TVs, delivered through standard channels; today, only a few years later, Netflix accounts for approximately 40

³ Joyce Wang, *The Start of an OTT Explosion . . . and Google’s TV Plan*, Cablefax (Oct. 28, 2014), available at <http://www.cablefax.com/programming/start-ott-explosion-googles-tv-plan#>.

⁴ *Id.*

⁵ Press Release, MarketWatch, *Over the Top (OTT) Media Delivery Services Market 2014-2019: Strategies for Global Audio, Message, Voice, Gaming, & Video on Demand (VOD)* (Dec. 23, 2014), available at <http://www.marketwatch.com/story/over-the-top-ott-media-delivery-services-market-2014-2019-strategies-for-global-audio-message-voice-gaming-video-on-demand-vod-2014-12-23>; Andrew Berger, *Strategy Analytics: OTT Video Revenue Will Surpass DVD Revenue in 2019*, Telecompetitor (Aug. 5, 2014), available at <http://www.telecompetitor.com/strategy-analytics-ott-video-revenue-will-surpass-dvd-revenue-in-2019/>.

percent of the traffic on the Internet in the United States on a given Friday night.⁶ Analysts project that between 2013 and 2019, pure OTT video revenue will double,⁷ and in North America, revenues from pure OTT video are soon expected to overtake those from traditional DVDs.⁸ OTT video providers also are expected to generate significant advertising revenue in the coming years;⁹ indeed, they already are changing advertising agencies' practices.¹⁰

The OTT Ecosystem Is Evolving. As encouraging as they are, these developments do not tell the whole story. Perhaps even more promising than the rapid growth of the OTT ecosystem is its remarkable pace of innovation and evolution, which has provided a wealth of benefits to consumers.

As the *NPRM* recognizes, OTT providers offer a wide and expanding range of products, pricing options, and business models.¹¹ First, new OTT service providers are emerging at an astounding rate.¹² Second, innovative services and features are being deployed by new and existing providers at a blistering pace. For example, a number of providers have developed “TV Everywhere”-type offerings, which allow customers to stream live TV channels and thousands of

⁶ Diana Paschal, *Streaming Media West Recap: Is OTT the TV Model of the Future?*, Conviva (Mar. 12, 2014), available at <http://www.conviva.com/streaming-media-west-recap-is-ott-the-tv-model-of-the-future/>.

⁷ Berger, *Strategy Analytics*, *supra* note 5.

⁸ Steven Rosenbaum, *Digital Video and OTT Poised for Dramatic Growth*, Forbes (June 9, 2014), available at <http://www.forbes.com/sites/stevenrosenbaum/2014/06/09/digital-video-and-ott-poised-for-dramatic-growth/>.

⁹ *Id.*

¹⁰ Wang, *OTT Explosion*, *supra* note 3.

¹¹ *See, e.g., NPRM*, 29 FCC Rcd at 16000-02 ¶ 13.

¹² *See, e.g., Alan Breznick, Verizon Likes OTT Video Prospects*, Light Reading (Jan. 23, 2015), available at <http://www.lightreading.com/video/ott/verizon-likes-ott-video-prospects/d/d-id/713257> (noting OTT service launch announcements of Dish Network LLC and CBS Corp.—to join HBO and Showtime’s entry into the marketplace); Wang, *OTT Explosion*, *supra* note 3.

shows on demand to a computer, smartphone, or tablet, essentially allowing customers to turn a wide range of devices into another television.¹³ Third, there is a constant stream of new devices enabling over-the-top access to video content, including many offered by some of the largest and most well-established Internet companies.¹⁴

Nonetheless, despite its promise, the OTT ecosystem is still developing. And outdated or overly restrictive regulation, particularly in the absence of any evidence of harm to consumers, could unnecessarily undermine the functioning of this fast-changing marketplace. Indeed, as discussed in the next section, regulating OTT providers now would do more harm than good.

II. Premature Regulation of OTT Video Services Could Produce a Wide Range of Unintended Harmful Consequences.

The promising developments in the OTT ecosystem have been achieved in an environment of minimal regulation for Internet-delivered video services. Abruptly applying potentially burdensome regulations to these new and evolving video technologies—especially regulations derived from the ill-fitting Title VI framework—could undermine those early successes. Regulations impose costs and risks on businesses, which can stifle innovation and distort the marketplace through their disparate impact. Regulations also can cement business

¹³ They include AT&T's U-verse Online, which enables subscribers to watch scores of live television programming streams or access programs on demand on their computers, smart phones, or tablets, both inside and outside the home; schedule and manage DVR recording from any U-verse receiver; and watch up to four channels at one time. AT&T, *AT&T U-verse®: More Ways to Watch*, available at http://www.att.com/Common/merger/files/pdf/uverse_multiscreen.pdf (last visited Mar. 2, 2015); AT&T, *AT&T U-verse TV: Advanced Features and Apps*, available at http://www.att.com/Common/merger/files/pdf/uverse_current_features.pdf (last visited Mar. 2, 2015). Importantly, TV Everywhere-type offerings from existing MVPDs should be treated like any other OTT offering. See *infra*, Part II.

¹⁴ Wang, *OTT Explosion*, *supra* note 3; Google, *Product Description, Google Nexus Player*, available at <http://www.google.com/nexus/player/>; Press Release, Amazon, (Oct. 27, 2014), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1981713>.

models that may be inefficient or otherwise inferior, as well as invite arbitrage, leading companies to design to regulations instead of customer preferences. All of these drawbacks are well documented and long recognized. For these reasons, the Commission should not impose new regulations on the OTT ecosystem in the absence of compelling evidence of competitive or consumer harms, and even then, the appropriate regulatory framework should be narrowly tailored to address any such harms, not drawn from an anachronistic set of backwards-looking rules. But presently there is no evidence of any problem with regard to Internet-delivered video services that would warrant the extension of Title VI to these services. At a minimum, it is premature to apply the outdated Title VI regulatory model to any particular Internet-delivered video offering without record evidence that regulation of that *specific* offering is necessary. The legacy framework simply is not up to the task of addressing the complex, and sometimes provider-dependent, issues that arise in connection with OTT video.

A. Title VI Is an Anachronistic Framework.

Adopted in large part decades ago, Title VI was not, and could not have been, written with Internet-delivered services in mind.¹⁵ As the Commission appears to recognize, applying the legacy framework to Internet-delivered video would be forcing a square peg into a round hole.

For example, how would the CALM Act, which requires commercials to have the same average volume as the programs they accompany, apply, especially in cases where commercials are supplied by a party other than the OTT provider?¹⁶ Similarly, the utter inapplicability of

¹⁵ See, e.g., Representative Greg Walden, *Rethinking Communications Law in a Converged, 21st Century Marketplace*, 20 CommLaw Conspectus (2012), available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1477&context=commlaw>.

¹⁶ See Commercial Advertisement Loudness Mitigation (“CALM”) Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (*codified at* 47 U.S.C. § 621); see also 47 C.F.R. § 76.607; Report

certain requirements to OTT providers—namely, signal leakage¹⁷ and inside wiring¹⁸ requirements—demonstrates the folly of attempting to impose Title VI obligations on OTT video providers. And these are examples of the mismatches and burdens that arise under the *existing* regulatory framework; if OTT providers are classified as MVPDs, they also could be subject to a wide range of new obligations imposed on MVPDs in the future.

B. Premature Regulation Would Have Negative Consequences.

Even if the Commission could somehow tailor the Title VI framework to Internet-delivered video, doing so now would be a mistake. First, regulation imposes very real costs on regulated entities, and additional burdens on providers could deter investment and innovation in the OTT ecosystem. Indeed, regulation can stifle innovation in many ways, including by (1) placing “a compliance burden on firms, which can cause them to divert time and money from innovative activities to compliance efforts”; and (2) creating a situation in which a firm may be “unable to achieve compliance with existing products and processes” and may shut down or hesitate to launch a new product or service in the first place.¹⁹ And where it is unclear whether a new business model or service feature is permissible under existing or impending regulations, providers will be slower to adopt such innovations.

and Order, *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, 26 FCC Rcd 17222 (2011).

¹⁷ See 47 C.F.R. § 76.610; see also 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.614, 76.1803; 1.1705(a)(1) (FCC Form 320 – Basic Signal Leakage Performance Report). To be sure, the Commission notes that these rules apply only to the extent that aeronautical frequencies are used, *NPRM*, 29 FCC Rcd at 16013 ¶ 36 n.101, but that is the point: OTT video does not implicate aeronautical frequencies at all.

¹⁸ See 47 C.F.R. §§ 76.800 - 76.806.

¹⁹ Luke A. Stewart, *The Impact of Regulation on Innovation in the United States: A Cross-Industry Literature Review*, at 2 (June 2010) (commissioned by the Institute of Medicine Committee on Patient Safety and Health IT), available at <http://www.itif.org/files/2011-impact-regulation-innovation.pdf>. Of course, potentially positive innovation also may result, but all too often, regulation “can . . . stifle innovation in the end.” *Id.*

Premature regulation under anachronistic Title VI constructs also could pick winners and losers in the OTT video marketplace, arbitrarily and preemptively depriving consumers of more attractive service options.²⁰ In the absence of competitive or consumer harms, generally the most efficient way to pick winners and losers in a marketplace is to permit consumers themselves to decide. Services that provide the features that consumers want for the lowest price are more likely to succeed. But regulation can place a finger on the scale, inadvertently favoring certain services and business models over others. This phenomenon can be particularly acute when regulation is extended to services that previously were unregulated, because providers must expend considerable resources to establish the processes and systems necessary for compliance. And there is no guarantee that such competition-distorting intervention will favor the most efficient option or the one that consumers would choose for themselves. Indeed, premature regulation can exert a gravitational pull toward legally sanctioned business models that may be inefficient or otherwise inferior.²¹

Moreover, these distorting effects of regulation could not be remedied through corrective regulatory interventions. The OTT industry has thrived on technological dynamism and the ability to evolve quickly in response to shifting market forces. But the pace of regulatory change is far slower; even the most nimble of regulators cannot hope to keep pace with changes in a

²⁰ See Statement of Commissioner Jessica Rosenworcel on *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A4.pdf (“What new video models succeed, what degree of self-curated viewing they enable, and what prices consumers are willing to pay are still up for grabs.”).

²¹ Marc Scribner, *Self-Driving Regulation, Pro-Market Policies Key to Automated Vehicle Innovation* (Apr. 23, 2014), available at <https://cei.org/onpoint/self-driving-regulation> (noting that “regulation and legislative intervention also poses great risks to the development of the technology,” including “locking in inferior technology...”).

highly dynamic marketplace.²² And where regulation does not permit certain services or features, consumers will be deprived of potentially more attractive service alternatives.

Finally, regulation, and especially burdensome and inapt regulation in the mold of Title VI, also could invite arbitrage by OTT video providers. Companies might seek to structure their operations so as to evade regulation—so-called “circumventive innovation”—where firms design products to “escape . . . regulatory constraints” rather than for efficiency or in the interests of the consumer.²³ As the *NPRM* notes, providers could incorporate in Mexico or Canada as part of such an effort.²⁴ Such arbitrage efforts could distract companies’ focus and lead to inefficiencies and higher transaction costs.

* * * * *

The available information strongly indicates that there is now no compelling—or even arguable—need to impose on OTT video providers legacy requirements that were designed for a completely different marketplace and technology. Given the potential harms that could arise from additional regulation, the Commission should require clear evidence of market failure, harm to consumers, or some other tangible problem to be solved before fettering certain OTT providers with the burdens borne by conventional MVPDs.²⁵ To date, there is no such evidence.²⁶ In fact, as demonstrated above, quite the opposite is true.

²² See Commissioner Rosenworcel statement, *supra* note 20 (“New Services are emerging fast—faster than any rulemaking process at this agency.”).

²³ Stewart, *The Impact of Regulation*, *supra* note 19, at 2.

²⁴ *NPRM*, 29 FCC Rcd at 10610 ¶ 28.

²⁵ As AT&T has previously argued, should the Commission proceed, it need not and should not determine whether an entity is an “MVPD” based on the narrow definition of the term “channel” in the Cable Act. See AT&T Comments, *Public Notice on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83 (filed May 14, 2012). Specifically, AT&T does not believe that an entity necessarily must provide a transmission path as an element of its

III. Regulation of OTT Video Providers as MVPDs Could Give Rise to Complex Implementation Issues That Congress Is Best Equipped to Resolve.

The potential regulation of OTT video providers as MVPDs also raises significant and complex implementation issues. Indeed, the magnitude of this challenge is clear from the *NPRM* itself, which asks a wide range of questions about how the Commission could or should alter the existing Title VI regime so that it could sensibly be applied to Internet-delivered video. But what is needed is not merely a handful of targeted tweaks; rather, the Commission would need to dramatically pare back the Title VI legal requirements to make them even remotely workable in the OTT context. Although the Commission may have some tools at its disposal, only Congress has the power to comprehensively overhaul the existing statutory framework. And such a holistic approach would be more efficient than any piecemeal work-arounds devised by the Commission.

The better course therefore would be for Congress to clarify the scope of the Commission's regulatory authority over OTT services before the Commission takes any action. Such congressional action could take up this issue and apply to OTT providers only those specific obligations that make sense in light of their unique technological characteristics and the robust health of the OTT ecosystem. Given that Members of Congress have articulated concerns about applying Title VI to new video technologies and are actively considering developing a

service to qualify as an MVPD. See AT&T Reply Comment, *Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83 (filed June 13, 2012).

²⁶ To be sure, some OTT service providers have not succeeded—but that is natural and inevitable in a well-functioning marketplace.

more appropriate statutory framework,²⁷ the Commission should defer regulatory action for now and give the legislative process time to work.

CONCLUSION

For the reasons detailed above, it would be premature for the Commission to classify any type of OTT video provider as an MVPD.

Respectfully submitted,

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²⁷ See, e.g., Video CHOICE Act of 2013, H.R. 3719, 113th Cong. (2013); *To amend the Communications Act of 1934 to prohibit the Federal Communications Commission from adopting certain rules or policies relating to multichannel video programming distributors, and other purposes*, H.R. 3196, 113th Cong. (2013); Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013); Open Internet Act of 2014, H.R. 5429, 113th Cong. (2014).