

**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)
)

REPLY 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 reply 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 For the reasons discussed below, it would be premature for the Commission to classify any type of OTT video provider as an MVPD; moreover, the Commission cannot lawfully reclassify AT&T’s U-verse TV service as a “cable service” or AT&T as a “cable operator.”

The over-the-top video ecosystem is a model of robust growth and innovation. Tens of millions of subscribers turned to OTT providers for video content in 2014.³ And market analysts predict that this is only the beginning; the coming years are expected to show a rapid increase in both customers and revenues for OTT providers. Further, this ecosystem is evolving at an extraordinary pace. New products, features, and business models are deployed weekly, and

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

² 47 U.S.C. § 522(13).

³ See, e.g., Andrew Berger, *Strategy Analytics: OTT Revenue Will Surpass DVD Revenue in 2019*, Telecompetitor (Aug. 5, 2014), <http://www.telecompetitor.com/strategy-analytics-ott-video-revenue-will-surpass-dvd-revenue-in-2019>.

novel devices continue to emerge, enabling still more video options.⁴ Together, these developments are yielding tremendous benefits to consumers.⁵

But despite its promise, the OTT ecosystem is still developing. And applying outdated or overly restrictive regulation could undermine the advancement of Internet-delivered video. In particular, as AT&T explained in its opening comments, there is no justification for preemptively applying anachronistic and burdensome Title VI regulations to OTT video providers. First, *no* commenter has identified any evidence of a problem in the OTT ecosystem that could warrant regulatory intervention now. Moreover, numerous commenters agree with AT&T that classifying OTT providers as MVPDs could stifle innovation and give rise to many other negative policy consequences.⁶ Indeed, even those commenters who *favor* action by the Commission generally propose only limited and/or “voluntary” regulation.⁷ Thus, as discussed in Part I below, the Commission should defer action and await further guidance from Congress.

⁴ See Part I, *infra*. See also Comments of AT&T Services, Inc., Docket No. 12-261, at 2-4 (filed March 3, 2014) (“AT&T Comments”). Unless otherwise stated, all other comments are from this proceeding.

⁵ In its recent orders and video competition reports, the Commission has highlighted the growth and evolution of the OTT ecosystem as well as the benefits that consumers derive from it. See, e.g., Fifteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, 10500 ¶¶ 9-10 (2013) (discussing SNL Kagan estimate that 35.4 percent of television households would use OTT video by the end of 2012, and noting that OTT providers “continue to expand the amount of video content available to consumers through original programming . . .”). See also *id.* at 10625 ¶ 263 (“The [OTT] marketplace continues to expand and change. Entrants often use new technologies and experiment with a variety of business models.”).

⁶ See, e.g., Walt Disney et al. Comments; MPAA Comments; DIRECTV Comments; CEA Comments; Digital Media Association Comments; CCIA Comments; Competitive Enterprise Institute Comments; Discovery Comments.

⁷ See, e.g., Pluto TV Comments; CenturyLink Comments; PBS Comments; Verizon Comments; Charter Comments.

In Part II below, AT&T responds to the small handful of commenters who contend that AT&T’s U-verse TV service should be reclassified as a “cable service” for purposes of Title VI of the Communications Act. These contentions should be rejected on both substantive and procedural grounds. As AT&T has explained elsewhere, unlike cable systems that employ a primarily one-way “broadcast” or “point-to-multipoint” model, U-verse TV is a “point-to-point” IP video architecture that requires substantial continuous two-way communication to function. As part of that unique and pervasive two-way operation, U-verse TV also features a “high degree of interactivity” with subscribers, enabling them to generate individualized video streams that are “tailored to the subscriber’s request.”⁸ Accordingly, while U-verse TV is appropriately categorized and regulated as an “MVPD service” under Title VI of the Communications Act, the plain text of the statute and the Commission’s longstanding precedent make clear that U-verse TV is *not* a “cable service.” In any event, the Commission could not lawfully reclassify U-verse TV as a cable service without first providing—in the manner prescribed by the Administrative Procedure Act—public notice that it was contemplating doing so. Here, the *NPRM* unquestionably failed to provide the requisite notice.

⁸ See Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High – Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 64 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d*, *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

DISCUSSION

I. THE COMMISSION SHOULD NOT PREMATURELY REGULATE ANY OVER-THE-TOP VIDEO PROVIDER AS AN MVPD.

As AT&T detailed in its opening comments, the OTT video ecosystem is growing rapidly and is evolving at a remarkable pace.⁹ Imposing more regulation on those services now—and especially the ill-fitting Title VI framework that was designed decades ago for legacy video services—would undermine the continued development of innovative OTT offerings. Such regulation could, for example, deter investment and innovation; arbitrarily and preemptively pick marketplace winners and losers; cement business models that may be inefficient or otherwise inferior; and invite arbitrage, leading companies to design to regulations instead of customer preferences. *See, e.g.*, AT&T Comments at 4-8. In short, prematurely classifying OTT video providers as MVPDs would create a number of problems without yielding any meaningful benefits.

First, no party has identified any compelling justification for imposing new regulation now. None of the commenters identified any problem within the OTT ecosystem that could support prescriptive rules. Rather, the only purported issue cited by commenters was the demise of two companies, Sky Angel and Aereo.¹⁰ But as CEA notes (at 7), “innovation includes failures on the way to success.” And two casualties among numerous other *thriving* OTT

⁹ AT&T Comments at 2-4. This evolution has continued apace since the opening comment deadline. For example, the Wall Street Journal has reported that Apple is getting close to launching an OTT pay-TV service, including a bundle with about 25 streams of programming. *See* Keach Hagey et al., *Apple Plans Web TV Service in Fall*, Wall St. J. (Mar. 17, 2015), http://www.wsj.com/article_email/apple-in-talks-to-launch-online-tv-service-1426555611-1MyQjAxMTA1NTEzNjUxOTY0Wj.

¹⁰ *See, e.g.*, Consumer Federation of America Comments at 1.

entrants¹¹ is not evidence of a market failure—instead, it evidences evolution and competition.¹² As AT&T noted in its comments (at 7), a healthy marketplace enables consumers to pick both winners *and* losers.

Many commenters agreed that the OTT ecosystem is robustly healthy, and they cited factors that counsel strongly against imposing potentially counterproductive regulation now.¹³ The MPAA captured the general theme of commenters opposing regulation, remarking (at 7) that “[i]t would be a shame if we put all this experimentation at risk, especially in these early stages of online video distribution, by trying to fit new square pegs into old round holes.” Similarly, Walt Disney, 21st Century Fox, and CBS observed (at ii) that, absent market failure, additional regulation “could jeopardize the nascent state of the [OTT] market.” CEA urged the Commission (at 14) to “allow the online video marketplace to continue to develop unhindered by regulation” because “[t]his approach will best serve the video-hungry consumers anxiously awaiting new, cutting-edge products and services.” The Computer & Communications Industry

¹¹ See, e.g., CCIA Comments at 3-4 (“Investment in online video is in the hundreds of millions of dollars as almost every major content provider (*e.g.*, Time Warner, Disney, CBS, Comcast, Fox, Sony), many leading information technology companies (*e.g.*, Apple, Amazon, Google, Microsoft), and newer companies like Netflix and Roku are exploring new ways to deliver online video content to a voracious public.”).

¹² See MPAA Comments at 3 (“The NPRM recounts claims by Aereo and FilmOn that regulatory uncertainty has limited their ability to win subscribers, attract investment, or acquire programming. But to the extent anything is stymying Aereo or FilmOn, it is their lack of sufficiently unique services or their decisions to build businesses around violation of copyright, rather than any shortcoming in the marketplace.”); Walt Disney et al. Comments at 17 (“Market forces have successfully driven the creation of new digital business models in response to consumer demand and there is no sustainable basis to conclude that platforms that emerge to meet evolving consumer demand are deprived of a market based opportunity to obtain needed content.”).

¹³ See, e.g., Digital Media Association Comments at 2-4; CCIA Comments at 1-4; Competitive Enterprise Institute et al. Comments at 11; CEA Comments; Walt Disney et al. Comments; MPAA Comments; Discovery Comments.

Association pointed out (at 3) that OTT services “have grown without government intervention or assistance – solely by appealing to what viewers want.” And DIRECTV warned (at 3-4) that regulation likely would stifle innovation and “deter at least some providers from deploying such services in the first place, retarding or even halting the progress seen over recent months.”

Several commenters urged the Commission not to impose regulation that could favor certain parties over others. The Competitive Enterprise Institute noted (at 2) that “[s]ubjecting certain OVDs to the regulatory privileges and obligations of MVPDs is not only unnecessary given today’s thriving Internet video market, but also likely to distort competition among various OVD business models.” Other commenters warned of regulatory arbitrage.¹⁴ And still others expressed concern that the new rule would hurt the same parties that the Commission hopes to help—new OTT entrants. For example, CEA stated (at i) that “[a]s a practical matter, imposing ill-suited MVPD regulations, designed for facility-based video distributors, will likely generate more obligations, costs, and uncertainty than benefits for new market entrants.” And these are but a handful of the potential negative consequences that parties raised in their comments.¹⁵

Of course, some commenters support additional regulation. But even they generally warn that the Title VI framework is a poor fit for the evolving OTT ecosystem. For instance, although ITTA “does not object to expanding the definition of MVPD to include additional entities[,]” it

¹⁴ See, e.g., Disney Comments at 13 (urging the Commission not to rely on the number of linear programming streams and thereby “draw arbitrary, and in many cases, irrational lines to define which entity qualifies as a MVPD,” and warning that “an inflexible test could lead to regulatory arbitrage, as entities could provide more or fewer streams or services based upon whether they deem it beneficial to qualify as MVPDs”).

¹⁵ See, e.g., Competitive Enterprise Institute Comments at 8-11 (rule will distort the Internet video market and encourage destructive rent-seeking behavior); Atlanta Interfaith Broadcasters Comments at 3-4 (rule would result in “loss of local programming”); Digital Media Association at 5 (the “Commission’s good intentions could thus end up back-firing, reducing resources and opportunities for these innovators rather than expanding them”); Discovery Comments at 3-4, 10-16.

nonetheless argues that the Commission “should refrain from imposing a host of onerous, legacy regulatory obligations on new providers and should release established providers from outdated regulations that ignore marketplace realities and place them at a competitive disadvantage.”¹⁶

Similarly, other commenters support regulation only if the Commission allows OTT providers to *choose* whether to be classified as MVPDs and thus to bear the resulting regulatory burdens.¹⁷

It is noteworthy that a number of the commenters that the Commission and certain public-interest groups claim would benefit from the new rule¹⁸ actually oppose it. Pluto TV, by its own identification, “exemplifies innovation in online video service offerings,” and “confronts daily the challenges facing new entrants seeking to compete with entrenched legacy [MVPDs] for viewers, content and advertising.”¹⁹ Yet Pluto TV objected to many of the “onerous regulatory burdens that could impede [online distributors’] emergence and development as robust competitors.”²⁰ Similarly, Blueriddle, a new OTT entrant, argued (at 4) that the MVPD definition proposed in the *NPRM* was too broad, sweeping into its reach providers that “do not

¹⁶ ITTA Comments at 2-3. Along similar lines, some commenters encourage the Commission to extend the *benefits* of MVPD classification to OTT providers, while at the same time urging the Commission not to impose the corresponding *burdens*. See, e.g., CenturyLink Comments; ITTA Comments at 8; Public Broadcasting Service Comments.

¹⁷ See, e.g., Electronic Frontier Foundation Comments at 6 (“EFF urges the Commission to honor the tradition of treading carefully in the regulation of content traveling over the Internet. Allowing Internet-based video services the ability to opt in to MVPD status will promote competition and technological neutrality while allowing new services to develop without regulatory burdens if they so choose”); Verizon Comments at 4 (“[G]iven the wide variety of potential business models among online video providers, and the fact that online video has so far emerged outside of the Commission’s MVPD regulatory framework, the Commission should allow providers flexibility in determining whether to offer their services as an MVPD”); Wireless Internet Service Providers Association Comments at 1; Supercloud Comments at 1-2.

¹⁸ See, e.g., *NPRM* ¶ 2.

¹⁹ Pluto TV Comments at 1.

²⁰ *Id.* at 2; 8-10.

conform to the business model that the MVPD definition was apparently intended to reach originally.” In addition, Blueriddle argued that program access benefits would be “of little use” to it. *Id.* BiggyTV, which launched its linear, multiple-stream iPhone app just a few months ago, argued (at 8) that the rule would create confusion and limit innovation: “The proposed changes will not create a level playing field for competition, nor will it deliver to consumers the best possible access and options to video content and diversity.”

Given the lack of any evidence in the record suggesting a need for new rules, and the valid concerns expressed by commenters about the potential effects of imposing ill-fitting regulation, the Commission should refrain from classifying any OTT video provider as an MVPD at this time. Instead, the Commission should defer to Congress, which not only is actively considering the appropriate framework for new video services, but also has the power to comprehensively reform the existing statutory framework in a manner appropriate for Internet-delivered video.

II. THE COMMISSION CANNOT LAWFULLY RECLASSIFY AT&T’S U-VERSE TV SERVICE AS A “CABLE SERVICE.”

Since its inception nearly a decade ago, AT&T’s Internet Protocol U-verse TV service has been treated as an MVPD service.²¹ A few parties contend, however, that U-verse TV is a “cable service” for purposes of Title VI of the Communications Act and, accordingly, that AT&T should be deemed a “cable operator.”²² These cursory, unsupported assertions should be rejected on both procedural and substantive grounds. As a threshold matter, the Commission

²¹ See, e.g., Letter from James C. Smith to Marlene H. Dortch, *IP-Enabled Services*, WC Docket No. 04-36 (Sept. 14, 2005).

²² See, e.g., NCTA Comments at 35; Cox Comments at 14; Alliance for Community Media Comments at 2; District of Columbia Comments at 7; American Community Television Comments at 4-5.

would violate the Administrative Procedure Act (“APA”) if it were to reclassify U-verse TV as a cable service in this proceeding. And in all events, there is no legitimate substantive basis for reclassifying U-verse TV.

A. The Commission Would Violate the Administrative Procedure Act If It Reclassified U-verse TV As a Cable Service in This Proceeding.

To reclassify AT&T’s U-verse TV service as a “cable service,” the Commission would first need to provide—in the form prescribed by the APA—public notice that it was considering doing so. No such notice was provided in the *NPRM*. And although a handful of parties did raise this issue in their comments, the law is clear that this cannot satisfy the APA’s notice requirement.

The APA requires agencies to provide a notice of proposed rulemaking that contains “either the terms or substance of the proposed rule or description of the subjects and issues involved.”²³ Notice is sufficient only “if the parties have not been deprived of the opportunity to present relevant information by lack of notice that the issue was there.”²⁴ Importantly, “an agency also must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.”²⁵

Here, the focus of the entire *NPRM* was on whether providers of OTT video services should be classified as MVPDs. To that end, the Commission inquired in Section III.C of the

²³ 5 U.S.C. § 553(b).

²⁴ *WJG Tel. Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (citations omitted); *see, e.g., Fla. Power & Light Co. v. Nuclear Regulatory Comm’n*, 846 F.2d 765, 771 (D.C. Cir. 1988).

²⁵ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (citing *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)).

NPRM whether *existing* “cable operators” that *also* provide OTT video services should be treated as cable operators when they provide such services, or only when they provide traditional “cable services.”²⁶ Although the Commission “tentatively conclude[d] that video programming services that a cable operator may offer over the Internet should not be regulated as cable services,” *NPRM* ¶ 78, the Commission recognized that existing cable operators could attempt to exploit that loophole to remove their *other* video services from regulation as “cable services.” *Id.* ¶¶ 75-77. Thus, the Commission noted that “merely using IP to deliver cable service **does not alter the classification** of a facility as a cable system or of an entity as a cable operator. That is, to the extent an operator may provide video programming services over its own facilities using IP delivery within its footprint **it remains subject to regulation as a cable operator.**” *NPRM* ¶ 71 (emphasis added). But nowhere in the *NPRM* did the Commission raise the question of whether entities that are not already classified as cable operators—because they do not provide “cable service” over a “cable system”²⁷ as defined in 47 U.S.C. § 522—should be reclassified as such.

²⁶ *NPRM* ¶¶ 71-79. The *NPRM* summarizes Section III.C as follows: “Below, we seek comment on the regulatory treatment of national OTT video services that a cable operator or DBS provider may provide nationally—as contrasted to the traditional services it offers.” *Id.* ¶ 71.

²⁷ Because AT&T’s U-verse TV service is not a “cable service” for the reasons explained below in Part II.B, AT&T’s network is not a “cable system,” and AT&T is not a “cable operator.” A “cable system” is defined in relevant part as “a facility ... that is designed to provide *cable service*.” 47 U.S.C. § 522(7) (emphasis added). AT&T’s U-verse network is not “designed to,” and does not, provide a cable service. Thus, as a straightforward matter of statutory construction, AT&T’s U-verse network cannot be subject to regulation as a cable system under Title VI. Similarly, a “cable operator” is “any person ... who provides *cable service* over a *cable system*.” *Id.* § 522(5) (emphasis added). Although NCTA maintains (at 5) “that an entity that offers video programming over ‘a set of closed transmission paths’ that it owns and manages is a cable operator, regardless of the format in which the signal is provided,” the statute provides otherwise, as the Commission has explained. *NPRM* ¶ 72 (the “Act defines a cable operator as, essentially, an entity that provides cable service over a cable system”). Thus, while AT&T does operate an MVPD service, it is not a cable operator for the same reason that its network is not a cable system: AT&T’s U-verse TV service is not a cable service.

Nonetheless, a few commenters point to a *single sentence* in the *NPRM* that they suggest puts certain non-cable-operators on notice that the Commission may reclassify their services as “cable services.”²⁸ Specifically, the *NPRM* notes that “[t]he Commission and other authorities have previously concluded that the statute’s definition of ‘cable service’ includes linear IP video service.”²⁹ Again, however, this stray statement appears in the midst of an explanation of why *existing* cable operators cannot immunize their offerings from Title VI cable regulation simply by delivering them in IP format. Indeed, even commenters who contend that U-verse TV *should* be regulated as a cable service implicitly recognized in their comments that the Commission did not provide sufficient notice to do so here.³⁰

The circumstances here are very similar to those in *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995). There, the Commission had instituted a rulemaking to develop an Open Network Architecture (ONA) so that enhanced service providers (ESPs) could purchase services on an unbundled basis from local exchange carriers. *Id.* at 1139. The Commission mentioned in a footnote in its *NPRM* that *long-distance carriers* also would have to purchase services from local exchange carriers under the ONA plan. *Id.* at 1140. Because the *NPRM* was otherwise devoted entirely to how the ONA plan would affect ESPs, the D.C. Circuit held that the *NPRM* did not provide adequate notice to long-distance carriers affected by the rule change. *Id.* at 1141-43. Similarly, here, the sentence to which commenters point was buried in a section

²⁸ See, e.g., City of San Antonio Comments at 2-3; Alliance for Community Media Comments at 1-3.

²⁹ *NPRM* ¶ 72. A footnote appended to this sentence (n.203) cites a Commission notice of proposed rulemaking and a Connecticut federal district court decision (later vacated) that purportedly support this proposition. As discussed below in Part II.B, neither does.

³⁰ For example, Cox noted (at 4) that “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.”

devoted to existing cable operators, and the entire *NPRM* was devoted to the appropriate regulatory framework for *OTT video services*, not IPTV services.³¹

Equally important, the law makes clear that “there must be an exchange of views, information, and criticism between interested persons and the agency. ... Consequently, the notice required by the APA ... *must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.* ... [A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.”³² Here, even if the *NPRM* had raised the ultimate question of whether the Commission should reclassify U-verse TV as a cable service, it *certainly* did not “disclose in detail the thinking that [could] animate[]” such a drastic change in the status quo or specify “the data upon which that [change could be] based.” *Id.* For example, the *NPRM* provided no explanation whatsoever of how the Commission proposes to square the statutory definition of “cable service”—which covers only “one-way transmissions”—with the pervasively two-way transmission and interactive characteristics of AT&T’s U-verse TV service.³³

Commission action here thus would be even less defensible than the action struck down in *Prometheus Radio*, 652 F.3d at 451, where the court vacated a new rule relaxing limits on cross-ownership of newspapers and broadcast outlets because the FCC failed to provide adequate

³¹ See also *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1100-01, 1107 (4th Cir. 1985) (concluding that a passing reference in an *NPRM* dedicated to a related, but not identical issue, did not suffice to provide notice under the APA).

³² *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (internal citations and footnotes omitted) (emphasis added).

³³ See Part II.B, *infra* (explaining that U-verse TV has been treated as an MVPD service, and not a cable service, for more than a decade and documenting the Commission’s consistent distinction between cable operators and telephone MVPDs).

notice. The court held that although the Commission had grappled with the issue in a number of prior proceedings—a 2006 Quadrennial Review, a 2003 Order, an NPRM in 2002, *and* a remand from the court³⁴—and although the Commission had clearly signaled that it was planning to overhaul its approach to newspaper/broadcast cross-ownership, the Commission “did not solicit comment on the overall framework under consideration, how potential factors might operate together, or how the new approach might affect the FCC’s other ... rules. These were significant omissions.” *Id.* at 450. The same is true here.³⁵

Of course, some parties *did* raise the reclassification issue in their opening comments. But an agency “cannot bootstrap notice from a comment, ... or from third-party accounts of what the agency might be considering.”³⁶ To the contrary, under the APA “notice necessarily must come—if at all—from the agency.”³⁷ As the D.C. Circuit has explained, even where some parties have “anticipated [an issue] ..., it was the business of [the agency], and not the public, to

³⁴ *Id.* Thus, *Prometheus Radio* also makes clear that discussions in prior Commission dockets about the appropriate scope of the “cable service” definition do not excuse the Commission’s failure to provide adequate notice in *this* docket. This also is a key takeaway from *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010). There, the court invalidated a rule on notice grounds because it was inadequately raised in the Commission’s NPRM, even though “the FCC had previously solicited broader comment on the [issue], and in much more specific terms than it did here.” *Id.* at 253-54. Indeed, the *NPRM* here does not refer at all to the other dockets in which the U-verse TV classification issue (among many others) has been raised, which is further proof that those dockets do not supply the requisite APA notice in this proceeding. In any event, the Commission’s own rules require notice to be linked with a specific docket. 47 C.F.R. §1.413(d) (“A notice of the proposed issuance, amendment, or repeal of a rule will include ... The docket number assigned to the proceeding”).

³⁵ Reclassifying U-verse TV as a cable service would not be a “logical outgrowth” of the *NPRM*. Taken as a whole, the *NPRM* contains no indication that the Commission contemplated such a change. And while agencies may adopt rules that are a “logical outgrowth” of a Commission proposal, “something is not a logical outgrowth of nothing.” *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

³⁶ *Agape Church, Inc. v. FCC*, 738 F.3d 397, 412 (D.C. Cir. 2013) (citations omitted).

³⁷ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

foresee that possibility and to address it in its proposed regulations.” *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). In short, if the Commission is contemplating reclassifying *any* IPTV service, including U-verse TV, as a cable service, it cannot act without first issuing an *NPRM* clearly expressing its intention and bases to do so.

Finally, and importantly, any decision on this record to reclassify U-verse TV as a cable service would be “arbitrary and capricious” under the APA as well.³⁸ Agency decisions are unlawful when the information upon which they are based “is erroneous or where the agency may be drawing improper conclusions from it.”³⁹ As the D.C. Circuit has explained, “[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). In particular, the law clearly requires agencies to account for changed factual circumstances in their decisions.⁴⁰

Here, there is no contemporary record for the Commission to examine. The *NPRM* did not solicit facts, data, or studies about the nature or technical characteristics of IPTV services. Any reclassification decision issued now therefore would be based on an outdated record—found

³⁸ 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (under arbitrary and capricious review, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made”).

³⁹ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984); *see also Motor Vehicle Manufacturers Ass’n*, 463 U.S. 29 (an agency action may also be arbitrary and capricious if the agency ignored an important aspect of a problem).

⁴⁰ *See, e.g., Sierra Club v. EPA*, 671 F.3d 955 (9th Cir. 2012) (approval of state implementation plan (SIP), without consideration of long-available updated emissions inventory data, was arbitrary and capricious); *Am. Horse Prot. Ass’n, v. Lyng*, 812 F.2d 1, 6-7 (D.C. Cir. 1986) (holding agency’s action arbitrary and capricious for failure to consider an intervening study about inhumane treatment of horses); *Golden Northwest Aluminum, Inc. v. Bonneville Power Adm’n*, 501 F.3d 1037, 1052 (9th Cir. 2007) (holding that an agency should have considered “changed market conditions”).

only in other dockets—that does not reflect the current state of IPTV offerings and, accordingly, it would be arbitrary and capricious under well-established law.

B. AT&T’s U-verse TV Service Is Not a “Cable Service.”

AT&T’s U-verse TV service is not a “cable service” for purposes of Title VI of the Communications Act. This is not “simply” because U-verse TV is provided in IP format, as a couple of commenters erroneously assert is AT&T’s position.⁴¹ Instead, U-verse TV falls outside the statutory definition of a “cable service” due to its unique two-way architecture and the high degree of subscriber interactivity that it entails.⁴² Moreover, contrary to the implication of the *NPRM* and certain commenters,⁴³ neither the Commission nor any binding court decision has concluded otherwise.

Congress intended to regulate as a “cable service” only certain methods of providing video programming. The statute defines “video programming” broadly to include “programming ... considered comparable to programming provided by[] a television broadcast station.” 47 U.S.C. § 522(20). But the Act then defines “cable service” far more narrowly, as “(A) the *one way-transmission to subscribers* of ... video programming ... and (B) subscriber interaction, if any, which is required for the selection or use of such video programming.” *Id.* § 522(6)

⁴¹ NCTA Comments at 35; *see also* Cox Comments at 14.

⁴² In prior proceedings, AT&T has explained why U-verse TV is not a cable service under Title VI of the Communications Act. We incorporate those arguments by reference here. *See, e.g.,* Letter from James C. Smith to Marlene H. Dortch, *IP-Enabled Services*, WC Docket No. 04-36 (Sept. 14, 2005); AT&T Response to Notice of Ex Parte, *IP-Enabled Services*, WC Docket No. 04-36 (Jan. 12, 2006); AT&T Ex Parte, MB Docket No. 09-13 (June 11, 2009); AT&T Letter, *IP-Enabled Services*, WC Docket No. 04-36 (Aug. 14, 2006); Comments of AT&T, *Petition for Declaratory Ruling of the City of Lansing, Michigan, on Requirements for a Basic Tier and for PEG Channel Capacity Under Sections 543(b)(7), 531(a), and the Commission’s Ancillary Jurisdiction Under Title 1*, MB Docket No. 09-13 (Mar. 9, 2009).

⁴³ *NPRM* ¶ 72; *see also, e.g.,* Alliance for Community Media Comments at 2.

(emphasis added). On its face, this provision establishes that video programming is not *inherently* a cable service; instead, video programming may be regulated *as a cable service* only when it is provided via a “one-way transmission to subscribers.” *Id.*

Although the phrase “one-way transmission to subscribers” is not defined in the Act, the Commission has correctly construed it to reach only traditional cable services. In the *Cable Modem Declaratory Ruling*, the Commission held that “[t]he phrase ‘one-way transmission to subscribers’ ... reflects the traditional view of cable as primarily a medium of mass communication, with *the same package or packages* of video programming *transmitted* from the cable operator and available *to all subscribers*.”⁴⁴ The Commission explained, moreover, that, although the definition of cable service “contemplates *some* subscriber interaction,” Congress intended that such subscriber interaction would be limited, such as “simple menu-selection or searches of pre-sorted information” that “would *not* produce a subset of data *individually tailored to the subscriber’s request*.”⁴⁵ Put differently, subscriber interaction that “produce[s] a subset of data individually tailored to the subscriber’s request” would exceed the level of subscriber interaction that Congress established for a cable service. *Id.* The Commission specifically recognized that “services offering a high degree of interactivity” would fall outside

⁴⁴ See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at ¶ 61 (emphasis added).

⁴⁵ *Id.* ¶ 64 (emphases added; internal quotation marks omitted).

the definition of “cable service.”⁴⁶ The *Cable Modem Declaratory Ruling* remains the position of the Commission.⁴⁷

Traditional cable TV services fall squarely within the statutory definition of a “cable service” because they are characterized by “one-way transmission” and lack the “high degree of interactivity” with subscribers that is described in the Commission’s orders. Cable providers use a point-to-multipoint, or “broadcast” model, in which *every channel* of video programming is sent simultaneously to *every customer*, regardless of whether the customer subscribes to or requests those channels, meaning that every cable customer in a service area continually receives the same group of channels or programming into his or her home. The customer then tunes his or her set-top box in order to select one of the incoming channels, and the set-top box decodes those channels to which the customer subscribes. It was this paradigm model of operation that Congress had in mind when defining cable service as the “one-way transmission to subscribers” of video programming.⁴⁸

By contrast, AT&T’s U-verse TV service is an inherently two-way service provided over an interactive, switched network architecture (a point-to-point model). Indeed, the U-verse TV architecture *requires* continuous two-way interaction and transmission between a subscriber, the subscriber’s set-top box, and AT&T’s network in order to function. U-verse TV subscribers are

⁴⁶ *Id.* (concluding that services offering the ability for subscribers to “engage in transactions or off-premises data processing, including unlimited key word searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers’ premises,” fall outside the scope of section 522(6)(B)) (footnote omitted).

⁴⁷ The Commission reversed course on its classification of cable modem service as an “information service” in its recent *Open Internet Order*, but nothing in that order calls into question the Commission’s separate interpretation of these Title VI provisions. *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (Mar. 12, 2015).

⁴⁸ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at ¶ 61.

not sent all channels simultaneously; rather, they must communicate instructions upstream to AT&T's off-premises network facilities (*i.e.*, to AT&T's servers) and ask the network to send a specific video programming stream. And to access a different video stream (*e.g.*, to change channels), a subscriber must request that AT&T's network stop sending the previous stream and start sending a new stream. Upstream interaction and communication are also necessary for verification and security purposes so that only authorized subscribers can decrypt and view the secure IP video stream. Moreover, two-way interaction and communication are necessary for guide viewing, picture-in-picture viewing, and even error corrections to the IP video packets being viewed.⁴⁹

Importantly, unlike traditional cable offerings that are one-way over the TV platform, U-verse TV also enables subscribers to generate, through two-way transmissions with AT&T's network, an individualized video stream that is "tailored to the subscriber's request."⁵⁰ For example, through an interactive process that takes place entirely over the U-verse TV platform itself, *and without requiring a separate Internet connection or telephone line to transmit upstream communications*, subscribers can order additional TV services (such as movie channels or sports packages); identify selections for DVR recordings and avoid potential programming conflicts; and avail themselves of Video on Demand and Pay-per-View options. Similarly, each member of a U-verse TV household can configure and watch their own, individually tailored "Multiview," which enables viewers to watch up to four of their favorite channels

⁴⁹ Error correction is an instructive example of the differences between traditional cable service and U-verse TV. After a subscriber has established an IP video session with AT&T's network, the subscriber's set-top box will make constant requests via upstream communication for any missing or incorrect packets it receives. That interactivity contrasts sharply with traditional cable services, which ordinarily lack any two-way error correction capability.

⁵⁰ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at ¶ 61.

simultaneously. Each viewer can update and modify the included channels at any time, again through the TV platform rather than via a separate communication channel over the Internet or a phone line connected to the receiver.⁵¹

In addition, U-verse TV subscribers have a “Go Interactive” button on their remotes, which brings up a menu of more than forty on-screen interactive features to choose from. Many of these features function purely through the TV platform, and all of them require two-way transmissions between the U-verse TV receiver and AT&T’s network. For example, viewers watching the Food Network can simultaneously use the Food Network feature to look up recipes; viewers using the CNBC feature can watch the news or peruse stock quotes or get more information on current events; and viewers using the Weather Channel feature can obtain more localized information while watching a nationwide report. Subscribers also can challenge themselves with U-verse Trivia, again without Internet access, and while using only their TV remotes.⁵² Content delivered through these features (or applications) is tagged at the IP packet level as U-verse video and not ordinary Internet traffic. In short, U-verse TV involves a uniquely “high degree of interactivity” and two-way transmissions that enable viewers to create “a subset

⁵¹ Notably, these settings are saved in the U-verse TV network, and not on the subscriber’s set-top box.

⁵² The two-way transmission capabilities of the U-verse TV network enable AT&T to offer a unique application programming interface (or “API”) that empowers third parties to design interactive apps for use on AT&T’s U-verse TV network. See AT&T, *Get AT&T U-verse® Enabled SDK*, <http://developer.att.com/developer/legalAgreementPage.jsp?passedItemId=10100309>. The associated free software development kit makes it possible to design mobile apps that run on smartphones and tablets but that interact with the U-verse TV platform. See AT&T, *Start Using AT&T U-verse® Enabled*, <http://developer.att.com/apis/u-verse-enabled/start>.

of data individually tailored to the subscriber’s request.” Under Commission precedent, this fundamental characteristic of U-verse TV compels a finding that it is not a “cable service.”⁵³

Although the Commission indicated in the *NPRM* that “[t]he Commission and other authorities have previously concluded that the statute’s definition of ‘cable service’ includes linear IP video service,” *NPRM* ¶ 72, and a few commenters cite this language,⁵⁴ there is no basis for this proposition. As CenturyLink notes, the *NPRM* cites to a prior notice of proposed rulemaking in which the Commission, at most, made an “assumptive categorization for purposes of discussing potential rules. The Commission presumably does not reference a Commission order or Commission rule to support its assertion that it has previously concluded that ‘cable service’ includes linear IPTV service, because there is none to reference.”⁵⁵ Indeed, in an *order* issued *after* the notice cited in ¶ 72 of the *NPRM*, the Commission said that “we are not stating that IPTV providers are cable television providers” and “we are not categorizing IPTV as a cable television service.”⁵⁶ This is consistent with the Commission’s statements in a wide variety of other contexts in recent years, in which the Commission has drawn express distinctions between “telephone MVPDs” and cable operators.⁵⁷

⁵³ *Id.*; see also Second Report and Order, *Telephone Company–Cable Television Cross-Ownership Rules*, Sections 63.54-63.58, 7 FCC Rcd 5781, ¶ 75 (1992) (defining “one-way,” in the context of video services, to mean programming that “provided no opportunity for viewer interaction, manipulation or customization”).

⁵⁴ See, e.g., Alliance for Community Media Comments at 2.

⁵⁵ CenturyLink Comments at 5 (addressing Notice of Proposed Rulemaking, *Cable Television Technical and Operational Requirements*, FCC 12-86, MB Docket No. 12-217, ¶ 5 (rel. Aug. 3, 2012)).

⁵⁶ Report and Order, *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, FCC 13-110, MD Docket No. 13-140, ¶¶ 32-33 & n.81 (rel. Aug. 12, 2013).

⁵⁷ See, e.g., Notice of Proposed Rulemaking, *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53 ¶ 6 (rel. Mar. 16, 2015) (noting that “cable operators [are] facing

The only court that has ever addressed the specific question whether AT&T's U-verse TV service is a cable service was the District of Connecticut in *Office of Consumer Counsel v. Southern New England Telephone Company*, and that decision was **vacated** by the Second Circuit.⁵⁸ In other words, that decision no longer has any legal effect. More importantly, whatever the merits of that decision at that time, the Connecticut court was reviewing a factual record that is now a decade old. The court emphasized, for example, that the "heart" of its determination that U-verse TV was a cable service was its view that the "extent of interactivity in the AT&T service is insufficient to remove it from falling within the statutory definition of 'cable service.'" ⁵⁹ The court was clear that its ruling was based on the specific record before it, not on AT&T's assertions about the prospective capability of its service.⁶⁰

The facts surrounding U-verse TV have changed substantially since the record was compiled by the Connecticut state commission in 2005. AT&T's IP-based video architecture has continued to evolve, both enhancing and expanding the interactive nature of U-verse TV. For example, the "Go Interactive" button, "My Multiview," and many of the other features described

dramatically increased competition," including from "telephone MVPDs"); Notice of Inquiry, *Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming* (16th Report), 29 FCC Rcd 1597, ¶ 3 (rel. Jan. 31, 2014); Fifteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Rcd 10496, 10503 ¶ 17 (2013) (noting that "the MVPD group includes cable operators, DBS operators, and telephone companies that offer multiple channels of video programming").

⁵⁸ 515 F. Supp. 2d 269 (D. Conn. 2007), *vacated*, 368 F. App'x 244 (2d Cir. 2010) (holding that the district court lacked jurisdiction to issue its decision and should have dismissed the case as moot).

⁵⁹ *Office of Consumer Counsel v. Southern New England Tel. Co.*, 514 F. Supp. 2d 345, 350 (D. Conn. 2007) (order on reconsideration).

⁶⁰ *Id.* at 351 (declining to speculate about the potential relevance of future levels of interactivity and concluding only "that AT&T's *existing* product constitutes a 'cable service' within the meaning of the Cable Act") (emphasis added).

above all post-date the court's decision. These elements of the U-verse TV service were mere "speculation" eight years ago when the Connecticut court issued its decision. As such, any reliance on the district court's decision is misplaced.⁶¹

In sum, interactivity that allows substantial upstream and downstream communication is the touchstone for distinguishing between one- and two-way transmissions for purposes of Title VI of the Communications Act. Providers of traditional cable service continually transmit on a one-way basis an entire package of video programming, wholly apart from any subscriber interaction or other upstream communications, and may *separately and additionally* offer some functionalities that involve subscriber interaction (such as video-on-demand). AT&T's U-verse TV service, on the other hand, is *at its core* a two-way transmission service that depends upon and cannot exist without constant upstream communications from the subscriber to the U-verse TV network. Accordingly, while U-verse TV is an MVPD service, both the statute and prior Commission orders make clear that it is not a "cable service."

⁶¹ See, e.g., Cox Comments at 15. Further, reliance on a stale record in this proceeding would be arbitrary and capricious under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

CONCLUSION

For the reasons detailed above, it would be premature for the Commission to classify any type of OTT video provider as an MVPD. Furthermore, the Commission cannot lawfully reclassify AT&T’s U-verse TV service as a “cable service” or AT&T as a “cable operator.”

Respectfully submitted,

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