

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Applications of Comcast Corporation, General Electric Company And NBC Universal, Inc.)	MB Docket No. 10-56
)	
For Consent to Assign Licenses and Transfer Control of Licenses)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	

OPPOSITION OF COMCAST CORPORATION

Kathryn A. Zachem
David Don
Regulatory Affairs

Lynn R. Charytan
Julie P. Laine
*Comcast NBCUniversal Transaction
Compliance*

Francis M. Buono
Ryan G. Wallach
Legal Regulatory Affairs

COMCAST CORPORATION
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

March 14, 2016

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
Counsel for Comcast Corporation

TABLE OF CONTENTS

	PAGE NO.
I. INTRODUCTION AND SUMMARY.....	2
II. STREAM TV IS A CABLE SERVICE.....	6
A. STREAM TV IS NOT AN ONLINE VIDEO SERVICE DELIVERED OR ACCESSED OVER THE INTERNET.....	7
B. STREAM TV MEETS THE STATUTORY DEFINITION OF A CABLE SERVICE.	8
C. STREAM TV IS TREATED EXACTLY THE SAME AS COMCAST’S OTHER CABLE SERVICES, AND COMPLIES WITH APPLICABLE REGULATORY REQUIREMENTS.....	12
D. TITLE VI CABLE SERVICES ARE DIFFERENT FROM BROADBAND INTERNET ACCESS SERVICES – AND REGULATED DIFFERENTLY.....	13
III. STREAM TV IS CONSISTENT WITH BOTH THE LETTER AND SPIRIT OF THE <i>COMCAST-NBCUNIVERSAL ORDER</i> AND CONSENT DECREE.....	14
IV. COMCAST HAS NOT VIOLATED THE LETTER OR THE SPIRIT OF THE OPEN INTERNET RULES.....	17
V. CONCLUSION.....	24

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Applications of Comcast Corporation, General Electric Company And NBC Universal, Inc.)	MB Docket No. 10-56
)	
For Consent to Assign Licenses and Transfer Control of Licenses)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	

OPPOSITION OF COMCAST CORPORATION

Pursuant to 47 C.F.R. § 1.45, Comcast Corporation (“Comcast”) hereby opposes the “Petition for the Federal Communications Commission to Enforce Merger Conditions and its Policies” (“Petition”) filed by Public Knowledge (“PK”).¹ The Commission must reject the Petition because PK’s entire argument is based on an erroneous factual premise – and, as a result, a flawed legal analysis. Stream TV is not an online or over-the-top (“OTT”) video service delivered over the Internet; rather, it is a Title VI *cable* service that, just like all of Comcast’s other cable services, is delivered to customers’ homes over Comcast’s private, managed network over Comcast’s cable systems, and is subject to and abides by all the regulatory requirements that apply to other Title VI cable services.

¹ See Public Knowledge, Petition for the Federal Communications Commission to Enforce Merger Conditions and its Policies, MB Docket No. 10-56 & GN Docket No. 14-28 (Mar. 2, 2016) (“PK Petition”).

Contrary to PK’s repeated assertions, Stream TV is not a “new *online* video service,”² and, most fundamentally, customers *do not* and *cannot* “access Stream TV via their broadband Internet access subscriptions.”³ Accordingly, Stream TV does not violate the merger condition that Comcast treat affiliated and unaffiliated network traffic equally, because the condition is applicable only to network traffic delivered *over the Internet*. Nor does Stream TV violate the Open Internet rules, which likewise govern the provision of *broadband Internet access services* and not the provision of cable services. As PK correctly notes, “The law is the law, and the FCC must apply it.”⁴

Ultimately, PK’s Petition is another misguided attempt to have the Commission limit Comcast’s ability to develop an innovative service that benefits consumers by giving them more choice. This effort, like PK’s prior efforts along these lines, must fail.

I. INTRODUCTION AND SUMMARY

Comcast first began offering Stream TV in select markets (the greater Boston and Chicago markets) last fall.⁵ Stream TV is delivered using IP technology – just like AT&T’s U-verse has been doing for nearly a decade – but it is not delivered or accessible over the Xfinity *Internet* service or any other Internet service. Rather, it includes and uses dedicated bandwidth on Comcast’s cable systems that is separate from, and in addition to, the bandwidth used to

² *Id.* at 2 (emphasis added).

³ *Id.* at 8.

⁴ *Id.* at 14.

⁵ As a threshold matter, aside from being wholly without merit, the allegation at the heart of PK’s complaint is not yet even ripe. Comcast’s usage-based billing (“UBB”) trials are only being conducted in a small number of Comcast’s markets covering less than one-fifth of all Comcast customers. The only two markets in which Comcast offers Stream TV today *do not overlap with the markets in which Comcast is conducting Internet UBB trials*. Further, despite PK’s overblown assertions that Stream TV risks destabilizing the entire video marketplace, the Commission should be aware that Stream TV today has a very small number of customers.

deliver the subscriber's broadband Internet traffic, and is provided only on this closed transmission path to the customer's home. In this and other ways, Stream TV squarely meets the definition of a cable service.

Cable services are subject to different regulatory treatment than broadband Internet access services and (more recently) video services delivered over an Internet connection. These regulatory distinctions do not evaporate because Stream TV is delivered using IP instead of analog or digital QAM technology or is delivered to a modem or gateway (for customer and in-home authentication purposes) rather than to a traditional set-top box. Quite naturally, then, Stream TV is subject to, and complies with, regulatory responsibilities and legal restrictions that apply to cable services, such as must-carry and public, educational, and governmental ("PEG") channels, Emergency Alert Service ("EAS"), closed captioning, video description, and local franchise fees – *none of which apply to online video services*.⁶

PK's Petition attacks Stream TV on the theory that "Comcast's decision to exempt its online video service from its own data caps is precisely the type of behavior contemplated and barred by the Commission in the Merger Order" approving Comcast's acquisition of NBCUniversal, Inc.⁷ PK is wrong on both the facts and the law.

⁶ PK's suggestion that somehow a cable service ceases being cable when it is delivered in IP and/or to a connected device is particularly ironic given that it and others have fervently argued in the Commission's set-top box-related proceedings that Title VI services *must* be supported on IP-enabled retail devices – an outcome that would be unachievable if a cable service ceased being subject to Title VI the moment a cable operator delivered that same service in IP. *See, e.g.*, Comments of PK, MB Docket No. 15-64 (Oct. 7, 2015); Letter from PK et al., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Jan. 20, 2016).

⁷ PK Petition at 1.

Strangely, the merger condition that PK cites (repeatedly) is not from the Commission’s *Comcast-NBCUniversal Order*,⁸ but from the Consent Decree (the “Decree”) that Comcast entered into with the Department of Justice – and PK’s theory that the Commission may somehow enforce the Decree is wrong.⁹ But Comcast nonetheless responds here on the merits because the company is subject to a similar binding commitment to the Commission.¹⁰ Comcast has scrupulously adhered to the requirements from both the *Comcast-NBCUniversal Order* and the Decree.

The letter and intent of the applicable commitment (and for that matter the Decree provision) are to require that all network traffic delivered over Xfinity *Internet* be treated equally. To the extent that Comcast employs usage-based pricing for Xfinity Internet, Comcast may not “measure, count or treat Comcast or NBCU affiliated network traffic differently from unaffiliated network traffic.” Comcast adheres to that requirement. Thus, where UBB applies at

⁸ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 (2011) (“*Comcast-NBCUniversal Order*”).

⁹ See PK Petition at 7 & n.15, 17 & n.34. As detailed below, the Decree can only be enforced by the Department of Justice. It is black letter law that a consent decree is not enforceable by those who are not parties to it, so the Commission has no authority to enforce it. Moreover, the Commission did not rely on the Decree provision in approving the NBCUniversal transaction (rather, it relied on Comcast’s own commitment), nor could it have relied on the Decree as a factual matter since the Decree was not even final when the FCC approved the transaction.

¹⁰ See Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 1-2 (Jan. 17, 2011) (“Jan. 17 Ex Parte”) (tendering a voluntary commitment that specifies: “Any Comcast or NBCU broadband Internet access service (as defined in the R&O) offering that involves caps, tiers, metering, or other usage-based pricing shall not measure, count or treat Comcast or NBCU affiliated network traffic differently from unaffiliated network traffic”); *Comcast-NBCUniversal Order* ¶ 285 (making the commitments in that letter conditions of the Commission’s approval). This Commission commitment and the Decree both encapsulate the same requirement to treat all content delivered over Comcast’s *Internet access services* equally with respect to any UBB rules. The Department of Justice’s Competitive Impact Statement makes this abundantly clear: “Section V.G.2 addresses [concerns about UBB] by ensuring that under these plans Comcast must treat other OVD services just as it treats its own *Internet-based* video services.” Competitive Impact Statement at 38, *United States v. Comcast Corp.*, No. 11-0106 (Jan. 18, 2011) (emphasis added).

all, Internet traffic to and from Comcast-affiliated sites like Xfinity.com, nbc.com, and Hulu is “measure[d], count[ed, and] treat[ed]” precisely the same as unaffiliated Internet network traffic. But this condition has nothing to do with cable TV traffic, like Stream TV, that is not transmitted over the Internet.

Perhaps recognizing that neither the facts nor the law support its claims, PK creates from whole cloth the novel theory that Stream TV should be subject to the NBCUniversal Internet conditions and the Open Internet rules because it may be *both* a Title VI service and a “broadband service subject to the Commission’s Open Internet rules.”¹¹ But this effort to conflate distinct services is unavailing. Congress clearly defined “cable service,” and went to great lengths to make clear that “cable service” is subject to Title VI regulation and *not* the Title II common carrier regulation that PK has long advocated (and that the Commission eventually adopted) for broadband Internet access service. And, the Commission has gone to great lengths to *distinguish* between broadband Internet access service – to which Title II regulation and the Open Internet rules apply¹² – and other services, including those delivered using IP, that travel over the same last-mile facilities as Internet access service.¹³

Stream TV clearly falls into the latter, not the former, category. The Commission took special care to exclude MVPD services from its 2010 Open Internet rules; it confirmed that approach in the *Comcast-NBCUniversal Order*, in which it excluded Title VI services from the

¹¹ PK Petition at 10 (citation omitted).

¹² See 47 C.F.R. § 8.2(a).

¹³ See, e.g., *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶¶ 207-208 (2015) (“*Open Internet Order*”) (concluding that “non-BIAS data services,” such as “existing facilities-based VoIP and Internet Protocol-video offerings,” as well as “limited-purpose devices such as automobile telematics,” do not qualify as Broadband Internet Access Services and are not included within the scope of the Open Internet rules).

conditions imposed on broadband Internet access and Specialized Services; and it endorsed that approach in the 2015 *Open Internet Order*. Thus, differential treatment of Title VI MVPD services and broadband Internet access services is fully consistent with all applicable regulatory requirements, and in fact mandated by the Communications Act.

For the same reasons (and others), Stream TV does not run afoul of the Open Internet rules or the General Conduct standard. For one thing, these rules apply only insofar as a provider of broadband Internet access service is engaged in the provision of such service, so the rules are not even applicable here. Second, the mere fact that a provider offers an unmetered cable service as well as a broadband Internet access service that is subject to usage allowances cannot be an appropriate basis for scrutiny under the rules. Third, there is nothing unique about IP delivery of cable service that changes the analysis. Finally, in no way does Stream TV “unreasonably disadvantage” online video distributors (“OVDs”); Comcast delivers an extremely high-quality Internet service, and keeps improving that service; and OVDs have been a major beneficiary of that investment and innovation and have flourished.

II. STREAM TV IS A CABLE SERVICE.

PK bases its entire Petition on the erroneous claim that Stream TV is an “online video service,” i.e., a service that “*does* travel on the ‘public Internet.’”¹⁴ It asserts that “[c]ustomers access Stream TV via their broadband Internet access subscriptions” and “connections.”¹⁵ This characterization is simply not true. Stream TV is a Title VI cable service delivered over a

¹⁴ See, e.g., PK Petition at 1, 9.

¹⁵ *Id.* at 8-9.

private, managed closed transmission path to customers' homes, not over the Internet, so PK's claims about "zero-rating" of the service make no sense in this context.

A. STREAM TV IS NOT AN ONLINE VIDEO SERVICE DELIVERED OR ACCESSED OVER THE INTERNET.

Stream TV is *not* an online video service, is *not* delivered over the Internet, and is *not* accessible through a customer's Internet service. It is an in-home, cable television offering that consists of Basic Service Tier programming, including local broadcast stations as well as PEG channels; HBO; any video-on-demand content associated with the just-mentioned channels; and a cloud-based DVR service.¹⁶ Because Stream TV is delivered in IP, the programming can be accessed on IP-enabled devices, such as mobile phones, tablets, and computers in the home, without the need for a set-top box.¹⁷ Stream TV is essentially an IP version of Comcast's "Internet Plus" cable service, first offered in 2013. That service offers a similar skinny package with the same programming but requires a set-top box due to its delivery in QAM.¹⁸

Today, Comcast offers Stream TV only to Xfinity Internet customers, but that has nothing to do with the delivery of Stream TV and does not somehow convert Stream TV into an Internet service. The reason the service currently is offered only to these customers is that Comcast must provide Stream TV to a Comcast-authenticated modem or gateway device in the

¹⁶ Just as with all of Comcast's other cable services, Stream TV customers also are able to access certain programming delivered over the Internet as part of their cable subscription through Comcast or third-party apps and websites. That programming *is* accessed by consumers through a broadband Internet access service, which *is* subject to – and compliant with – the *Comcast-NBCUniversal Order*, the Decree, and the Open Internet rules.

¹⁷ See Jared Newman, *Comcast's Streaming TV Service for Cord Cutters Goes Live in the Boston Area*, TechHive (Nov. 12, 2015), <http://www.techhive.com/article/3004598/streaming-services/comcasts-streaming-tv-service-for-cord-cutters-goes-live-in-the-boston-area.html> ("For about the same price as HBO's streaming service, subscribers get access to HBO plus a bunch of broadcast channels. Best of all, there's no clunky and expensive cable box required.").

¹⁸ Internet Plus also does not include DVR service.

customer's home in order to authenticate the user as a valid Comcast customer and verify that the customer is in her home. The only customers who have such devices today are Xfinity Internet customers. However, Comcast is in the process of developing a "cable-only" gateway device, and Stream TV will be available on a standalone basis using this device later this year.¹⁹

B. STREAM TV MEETS THE STATUTORY DEFINITION OF A CABLE SERVICE.

Stream TV meets the definition of a cable service on a cable system under Section 602 of the Communications Act in every regard. The Communications Act defines "cable service" in terms of what the provider offers, how it is delivered, and over what type of network.

Specifically, a "cable service" is defined as "(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."²⁰ Additionally, a "cable system" is defined, in relevant part, as 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."²¹

Stream TV provides video programming delivered over a closed transmission path, and, therefore, qualifies as a cable service delivered over a cable system. Specifically, Stream TV involves the delivery of video programming directly to customers exclusively over Comcast's network facilities and over a distinct, managed, closed IP path utilizing dedicated bandwidth

¹⁹ Comcast was already working on this device when it deployed Stream TV, but did not want to delay Stream TV's availability while that development work was being completed.

²⁰ 47 U.S.C. § 522(6); *see also* 47 C.F.R. § 76.5(ff).

²¹ 47 U.S.C. § 522(7); *see also* 47 C.F.R. § 76.5(a).

(i.e., a separate service flow). PK’s claim that “[t]he channel in question is not provided by the Stream TV service, but by Comcast in another capacity, as part of another, separately-billed service,”²² i.e., broadband Internet access, is not only unsupported but completely erroneous.

The statutory definitions of cable service and cable system are technology-agnostic. Accordingly, the fact that Stream TV uses IP, rather than QAM, technology does not change the analysis, and does not make the service an OTT Internet service. The Commission has clearly and repeatedly recognized that cable service delivered in IP is still cable service subject to Title VI regulation. For example:

- The Commission recognized in its recently-launched set-top box rulemaking that MVPDs are “using IP for content delivery over MVPD systems.”²³
- The Commission observed in its 2014 MVPD definition rulemaking 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.”²⁴ It stated further that “an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint.”²⁵
- The Commission noted in a 2012 Order implementing portions of the Twenty-First Century Communications and Video Accessibility Act that “[a]ll video programming that is available on the Internet is IP-delivered, but not all video programming that is delivered via IP is Internet programming.”²⁶
- The Commission has explicitly recognized that cable services can be delivered using IP: “Non-QAM digital *cable systems* have . . . emerged . . . and primarily utilize

²² PK Petition at 12.

²³ *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18, ¶ 11 (rel. Feb. 18, 2016).

²⁴ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd. 15995, ¶ 71 (2014).

²⁵ *Id.* ¶ 74; *see also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd. 787, ¶ 11 (2012) (“*Online Captioning Order*”) (Online captioning rules do not “apply to traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used.”).

²⁶ *Online Captioning Order* ¶ 12.

Internet Protocol (‘IP’) delivery over either fiber-optic cable or DSL-based transmission over twisted-pair copper wires.”²⁷

- The Commission has applied Title VI rules to managed IP video services delivered via MVPD apps on customer-owned devices.²⁸

In short, there is nothing novel about the idea that an IP-based service such as Stream TV qualifies as a “cable service” being delivered over a “cable system.”²⁹

To be sure, Stream TV traffic travels over the same last-mile *physical* connection and infrastructure to a Comcast subscriber’s home as does the subscriber’s traffic to and from the Internet. But that is true of traditional cable services as well. Indeed, there is nothing at all novel about delivering separate – and separately regulated – voice, video, and Internet services over a single physical network; that is precisely what Congress contemplated in the Communications Act. Cable operators have been delivering multiple services alongside their QAM-based cable services over the same physical network, i.e., their cable systems, since the 1990s when they introduced broadband Internet access services,³⁰ and then voice-over-Internet Protocol (“VoIP”)

²⁷ *Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd. 9678, ¶ 5 (2012) (emphasis added).

²⁸ *See, e.g., Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd. 5186, ¶¶ 9-15 (2015) (imposing emergency information requirements on MVPD-supplied apps). The FCC further clarified in this order that the emergency information requirements would *not* apply “to an MVPD’s linear programming that is accessed via the Internet, such as TV Everywhere offerings.” *Id.* ¶ 14.

²⁹ Contrary to PK’s claim (at 12), there is nothing here that is inconsistent with the Media Bureau’s 2010 Sky Angel decision, which dealt with a service that was designed to be *accessed over broadband Internet access* connections provided by third-party broadband Internet access providers. *See Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd. 3879 (2010). For the same reason, under the NBCUniversal conditions, Stream TV would *not* be an OVD because, among other reasons, Stream TV is not provided “by means of . . . the Internet or other IP-based transmission path provided by a Person other than the OVD.” In delivering Stream TV, Comcast is the provider of its own IP-based, non-Internet transmission path.

³⁰ *See* Cable’s Story – NCTA.com, <https://www.ncta.com/who-we-are/our-story> (last visited Mar. 11, 2016) (“By the 1990s, the cable modem was introduced, making residential high-speed Internet access a reality in the U.S. The early 2000’s saw the benefits of cable’s massive investment to build high-capacity hybrid fiber-coax networks. (footnote continued...)”)

services.³¹ Subsequently, hundreds of other network operators ranging from AT&T to Google to small rural providers started offering IP-based cable services over converged networks.

Comcast provisions a separate “service flow” to deliver Stream TV service to the home of each Stream TV customer. As a result, there are two separately provisioned and entirely distinct IP paths to the customer’s house – one for Stream TV, and one for Xfinity Internet.³² These two IP paths are technologically similar to, but much more efficient than, having two separate physical connections into the house.

This “closed” network offering is entirely distinct from online content, which is delivered to the customer over the Internet using an “open” transmission path – to wherever that customer happens to be.³³ Comcast’s own OTT video services such as those available through Xfinity.com or the Xfinity TV Go and Xfinity TV apps, as well as nbc.com websites, or affiliated services like Hulu, are all delivered in the same manner as Netflix, Amazon, iTunes,

(...footnote continued)

Soon after, operators began delivering digital and HD video, high-speed Internet access, and two-way voice services to the home.”).

³¹ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, ¶ 11 n.42 (2004) (“PacketCable is built on top of the DOCSIS 1.1 cable modem infrastructure that uses IP technology to enable a wide range of multimedia services, such as IP telephony, multimedia conferencing, interactive gaming, and general multimedia applications.”).

³² If the customer chooses to procure digital voice service from Comcast, there is a third IP path.

³³ PK seems to think that “Stream TV . . . is limited to Comcast broadband subscribers in the same sense that some online video programming is often unavailable to residents of particular countries, for instance – licensing terms require that video service providers institute such blocks.” PK Petition at 9. This is incorrect. As noted, Stream TV is limited to Comcast *cable* customers for the simple and straightforward reason that it is a *cable* service delivered only to the home of the cable customer. There is no relevant comparison to the types of technical solutions online video providers put in place to execute geographical restrictions on video content. To the extent that PK is trying to highlight the fact that Comcast currently markets Stream TV to Xfinity Internet customers, as noted above, Comcast plans to offer the service on a standalone basis when it has a cable-only gateway ready to deploy later this year.

and all other unaffiliated OTT video services.³⁴ And, when delivered over Xfinity Internet, all of these services – affiliated and unaffiliated alike – are treated the same, including for purposes of UBB (where applicable).

C. STREAM TV IS TREATED EXACTLY THE SAME AS COMCAST'S OTHER CABLE SERVICES, AND COMPLIES WITH APPLICABLE REGULATORY REQUIREMENTS.

Comcast's treatment of Stream TV is consistent with its treatment of all its cable services, with the Communications Act and Commission rules, and with industry practice. Comcast pays local franchise fees and taxes on Stream TV revenues, just like it does for its other cable services. Comcast also ensures that Stream TV complies with Title VI requirements: Comcast transcodes all local broadcast stations and PEG channels into IP, so as to ensure that Stream TV fulfills Basic Service Tier and franchise requirements; Stream TV supports delivery of EAS messages; and Stream TV meets Title VI closed-captioning and video description requirements.³⁵ In addition, Stream TV is delivered based on contracts that generally require Comcast's distribution of the programming to be part of an in-home cable service.³⁶ OTT services like Hulu (cited by the Petition) are not subject to any of these requirements.

³⁴ When customers are authenticated on third-party programmer apps and websites to which they are provided access as part of Stream TV, like HBO Go, that OTT content is treated like all other OTT content.

³⁵ For all these reasons, in addition to those discussed above, PK is utterly mistaken in its claim that "Stream TV is little different than any other online video service, apart from being zero-rated." See PK Petition at 16.

³⁶ Indeed, just as with its other cable services, Comcast transmits the broadcast programming available on Stream TV pursuant to the statutory copyright for secondary transmissions by "cable systems" under the Copyright Act (17 U.S.C. § 111(c)-(d)) – a right not available to online video services. Although Stream TV customers, like all other Comcast cable customers, get access to certain online video programming through the Xfinity websites and apps (and through authenticated third-party apps), this typically is just a subset of the in-home cable programming and is simply a convenient additional benefit for customers who are already residential subscribers to the in-home cable service.

D. TITLE VI CABLE SERVICES ARE DIFFERENT FROM BROADBAND INTERNET ACCESS SERVICES – AND REGULATED DIFFERENTLY.

The Commission has explicitly recognized – in the 2010 and 2015 *Open Internet Orders* and the 2011 *Comcast-NBCUniversal Order* – that Title VI cable services are not subject to the rules that apply to broadband Internet access services. Differential treatment of cable services and broadband Internet access services is not only fair and reasonable, but also required by the distinct regulatory regimes that Congress and the Commission have instituted for these services.

PK fails in its attempts to gloss over this fundamental distinction. Quoting its own prior claim that “behind-the-scenes engineering and billing details should have no bearing on the regulatory treatment of a service,”³⁷ it asserts that “Stream TV is [i]llegal [r]egardless of its [r]egulatory [c]lassification.”³⁸ This is absurd on its face – regulatory classifications *do* matter, and that is so for purposes of the *Comcast-NBCUniversal Order*, the Open Internet rules, and any other regulations or requirements that attach to the service. Of particular note, Congress made clear that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this [title VI].”³⁹ With respect to subjecting cable services such as Stream TV to the same rules that apply to broadband Internet access services, Congress similarly mandated: “Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”⁴⁰

³⁷ See PK Petition at 6.

³⁸ *Id.*

³⁹ 47 U.S.C. § 544(f).

⁴⁰ *Id.* § 541(c).

PK goes on to claim that, “[w]hether or not Stream TV is an MVPD service, and whether or not it is a specialized service or some other ‘non-broadband’ service, and whether or not it is offered over the ‘public Internet,’ Comcast’s practice of zero-rating Stream TV is illegal.”⁴¹ PK provides no coherent rationale why this should be true, which is unsurprising since there is no legal foundation whatsoever for PK’s claim. And “zero-rating” in this context is merely using a slogan as a substitute for sound reasoning, since all cable services always have been so-called “zero-rated.” The only theoretical “exemption” here is the one established by the Communications Act for all cable services – Stream TV and any other QAM or IP-based cable service – because none uses any Internet service that could be “counted” toward an Internet usage threshold.

III. STREAM TV IS CONSISTENT WITH BOTH THE LETTER AND SPIRIT OF THE *COMCAST-NBCUNIVERSAL ORDER* AND CONSENT DECREE.

Although PK’s Petition is far from a model of clarity, its central legal theory appears to be that the *Comcast-NBCUniversal Order* stands for the proposition that Comcast cannot offer Stream TV on an unmetered basis so long as it applies any form of UBB billing to Xfinity Internet services.⁴² But this reading of the *Comcast-NBCUniversal Order* does not withstand scrutiny. In its acquisition of NBCUniversal, Comcast committed that it would abide by the 2010 Open Internet rules, regardless of the outcome of any judicial challenge to those rules, and that Comcast would ensure that “[a]ny Comcast or NBCU broadband Internet access service (as defined in the [2010 Open Internet Order]) offering that involves caps, tiers, metering, or other usage-based pricing shall not measure, count or treat Comcast or NBCU affiliated network traffic

⁴¹ PK Petition at 6.

⁴² *See id.* at 1, 16.

differently from unaffiliated network traffic.”⁴³ The Commission incorporated these commitments into the *Comcast-NBCUniversal Order*.⁴⁴ By their terms, these commitments clearly apply only to Comcast’s broadband Internet access service, i.e., Xfinity Internet.

Similarly, PK’s claims that Comcast’s treatment of Stream TV violates the Decree are without merit. As a threshold matter, the Commission has no authority to enforce the Decree. The Decree is a court order, and the Department of Justice and the approving court are responsible for overseeing it.⁴⁵ The Supreme Court has made clear in “a well-settled line of authority . . . that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it.”⁴⁶ The Commission was not a party to the Decree, and therefore cannot enforce it. PK cannot avoid this prohibition on the theory that the Commission “relied” on the Decree in the *Comcast-NBCUniversal Order*, so it can indirectly enforce it as part of its own merger compliance process. First, the Decree was not finally approved until nearly eight months *after* the *Order* was released.⁴⁷ Consequently, it would not have been possible for the Commission to rely on it. Second, the *Order* identified the conditions and requirements that are relevant to its approval, and in this regard expressly relied on Comcast’s own commitment

⁴³ Jan. 17, 2011 Ex Parte at 1-2.

⁴⁴ *Comcast-NBCUniversal Order*, ¶¶ 94, 285 & n.732.

⁴⁵ See, e.g., Modified Final Judgment (“Decree”) § VIII, *United States v. Comcast Corp.*, No. 11-0106 (Aug. 21, 2013) (compliance inspection by the Department of Justice); *id.* § IX (retention of jurisdiction by the approving court).

⁴⁶ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (citing *United States v. Armour & Co.*, 402 U.S. 673 (1971); *Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42 (1925)).

⁴⁷ See, e.g., *Comcast-NBCUniversal Order* ¶¶ 21-25 (distinguishing the Commission’s transaction review from the Department of Justice’s separate review).

tendered directly to the Commission.⁴⁸ Nowhere does the *Order* suggest that approval is contingent on compliance with the Decree or with anything not cited directly in the *Order*.

In any event, although the provision in the Decree cited by PK is beyond the Commission's jurisdiction to enforce, that provision likewise applies only to Internet service. Of particular note, PK selectively quotes from the Decree and omits the fact that this commitment is located in the section of the Decree (Section V.G) that is titled "Practices Concerning Comcast's Internet Facilities" and is prefaced by the language "Comcast shall abide by the following restrictions on the management and operation of its *Internet facilities*."⁴⁹ Moreover, to ensure that affiliated and unaffiliated *OTT services* were treated equally, DOJ explained in its Competitive Impact Statement that Section V.G.2. "ensur[es] that under [usage-based plans] Comcast must treat other OVD services just as it treats its own *Internet-based* video services."⁵⁰ It also bears noting that the Department of Justice looked at essentially the same issue PK raises here and raised in its 2012 complaint to the Commission, and found no basis for proceeding.⁵¹

Precisely as Comcast promised (and as the Decree requires) Xfinity Internet service treats all Internet traffic – affiliated and unaffiliated – the same. In fact, Comcast offers Internet

⁴⁸ See *id.* ¶ 94.

⁴⁹ Decree § V.G (emphasis added). In addition, Section V.G.2 applies to Comcast's "Internet Access Service," and the Decree plainly states that "Internet Access Service does not include virtual private network services, content delivery network services, *multichannel video programming services*, hosting or data storage services, or Internet backbone services (if those services are separate from Internet Access Services)." *Id.* § II.P (emphasis added) (defining "Internet Access Service").

⁵⁰ Competitive Impact Statement at 38 (emphasis added).

⁵¹ See generally Thomas Catan & Amy Schatz, *U.S. Probes Cable for Limits on Net Video*, Wall St. J. (June 13, 2012), <http://www.wsj.com/articles/SB10001424052702303444204577462951166384624> ("According to the people familiar with the matter, the Justice Department is examining whether Comcast's Xbox policy violated legal commitments made by the company in 2011 to secure antitrust approval for its takeover of NBCUniversal. . . . Comcast has said it is complying with the terms of the settlement and isn't discriminating against other companies' content. Xfinity [TV for Xbox], it says, is unlike Internet video services like Netflix because it travels over Comcast's own private network and not the public Internet.").

services that include affiliated content and does so in compliance with these commitments and the Open Internet rules. But Comcast’s provision of Stream TV does not implicate this commitment in any way, because, as explained above, the service is delivered wholly independent of Xfinity Internet service. PK’s repeated insistence that Stream TV is delivered over the Internet does not make it so and, in fact, there is no version of reality in which that is true. The one point on which Comcast and PK do agree, however, is that Stream TV is *not* a “Specialized Service” within the meaning of the NBCUniversal conditions, which moots PK’s arguments about this issue.⁵²

IV. COMCAST HAS NOT VIOLATED THE LETTER OR THE SPIRIT OF THE OPEN INTERNET RULES.

PK has not filed a complaint under the Open Internet rules.⁵³ Nonetheless, claiming that Comcast’s conduct (as mischaracterized by PK) is relevant and informative to the Open Internet docket,⁵⁴ PK devotes several pages of its Petition to arguing that Comcast’s decision not to apply UBB to Stream TV is “inconsistent with” the Open Internet rules. PK invokes the General Conduct standard, claiming that Comcast’s “zero-rating [of] Stream TV . . . appears to violate this rule.”⁵⁵ These claims, as well as any

⁵² PK admits that Stream TV is not a Specialized Service, but then argues that, if it were, it would be specifically prohibited by conditions on the NBCUniversal transaction. PK Petition at 14, 16. The NBCUniversal conditions specifically define “Specialized Service” to mean “any service provided over the same last-mile facilities used to deliver Broadband Internet Access Service other than (i) Broadband Internet Access Services, (ii) services regulated either as telecommunications services under Title II of the Communications Act or as MVPD services under Title VI of the Communications Act, or (iii) Comcast’s existing VoIP telephony service.” *Comcast-NBCUniversal Order*, App. A, § I. The fact that Stream TV is a Title VI cable service is all that is needed to end the consideration of this issue, since by definition Specialized Services exclude “MVPD services [regulated] under Title VI.” *Id.*

⁵³ See PK Petition at 1 n.1.

⁵⁴ *Id.*

⁵⁵ *Id.* at 17. PK makes no claim that Comcast has violated any of the “bright-line” rules – which prohibit blocking, throttling, and paid prioritization.

suggestion that Stream TV implicates the Open Internet rules, fail for the same reason that its other arguments fail: Stream TV is not provided over the Internet. The Open Internet rules do not, and cannot, regulate the provision of Title VI cable services. And “zero rating” has no applicability to a Title VI cable service, which does not travel over the Internet.

The General Conduct standard provides:

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage [(i)] end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or [(ii)] edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.⁵⁶

By its terms (and like the other Open Internet rules), this standard *applies only insofar as a provider of broadband Internet access service is engaged in the provision of such service and only with respect to end users’ ability to select, access, and use “broadband Internet access service or the lawful **Internet** content, applications, services or devices of their choice.”*

Conversely, these rules do not apply insofar as the provider is engaged in providing a separate, discrete non-Internet service. Thus, as a matter of law, the General Conduct standard cannot be applied to IP cable services like Stream TV, which are Title VI cable services.⁵⁷

⁵⁶ 47 C.F.R. § 8.11.

⁵⁷ Moreover, despite PK’s nonsensical suggestion, *see* PK Petition at 16 n.31, Stream TV would not implicate the Commission’s decision to retain the right to act in such cases where a provider was offering a service that is “functionally equivalent” to broadband Internet service, but free from the strictures of the Open Internet rules. Simply put, there is nothing functionally equivalent about Stream TV and broadband Internet access service – one offers a limited package of cable content on a managed basis, and the other offers access to the wide array of content, applications, and services offered over the Internet – and at no point has Comcast marketed Stream TV as the functional equivalent of a broadband Internet access service. Moreover, the *Open Internet Order* expressly found that facilities-based VoIP and IP video services would *not* be considered broadband Internet services covered by the Open Internet rules. *See Open Internet Order* ¶¶ 35, 208.

More generally, under the text and structure of the Communications Act, the Commission simply has no authority to apply its Open Internet regulations – or any other Title II regulations – to cable services that are subject to direct regulation under Title VI. Indeed, as noted above, Section 621 of the Act specifically provides that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,”⁵⁸ and Section 3 of the Act provides that “[a] telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.”⁵⁹ The Commission has never suggested that the Open Internet rules were intended to subsume regulatory categories governed by other sections of the Communications Act (and it would not have the authority to do so in any event), or that the *Open Internet Order* was intended to impose new rules on non-Internet services.

Cable services have *never* been subject to usage allowances, and the mere fact that Stream TV and other IP cable services are delivered using IP transmission technology rather than QAM changes nothing in that regard – not for Comcast and not for the many other providers who already offer IP cable services or those who have begun to transition their cable offerings to IP. As a result, cable providers have treated the cable services they offer in IP just like their QAM services in connection with their *Internet UBB* policies – namely, the latter have no applicability to the former.

For example, CenturyLink’s Prism TV is delivered in IP and “lets you watch what you want, when you want, where you want”; however, not surprisingly, “[t]raffic associated with

⁵⁸ 47 U.S.C. § 541(c).

⁵⁹ *Id.* § 153(51).

Prism™ TV service is not subject to the CenturyLink [Excessive Use Policy],” which applies only to Prism Internet service and, for most plans, includes a monthly download usage limit of 250 GB.⁶⁰ Similarly and equally unsurprisingly, Cox Communications, which includes various data usage plans for its Internet users depending on the speed tier they have, states that “Video on Demand and TV content accessed through the Contour or Cox TV Connect app” (which are delivered in IP) do not count toward the data usage plans.⁶¹ And so on. In short, if the mere offering from the same company of a cable service along with Internet access service subject to data caps or UBB somehow implicates these considerations, *then any cable operator that offers historically unmetered legacy QAM cable service (leaving aside any cable service in IP) could be in violation of the General Conduct standard if it has or adopts data caps or UBB for its Internet service.*⁶²

Even if the Commission were able to apply the General Conduct standard here, however, no violation can properly be found. In no way is Comcast “mak[ing] it harder for competing online video distributors to access content and reach consumers, . . . denying consumers the choice of online video providers that would otherwise be available, [or] coercing them to use a service that might not otherwise succeed on its merits.”⁶³ More specifically, there is nothing

⁶⁰ See CenturyLink, Inc., *CenturyLink Prism TV*, <http://www.centurylink.com/prismtv/#index.html> (last visited Mar. 14, 2016); CenturyLink, Inc. *High Speed Internet Service Management*, <http://www.centurylink.com/Pages/AboutUs/Legal/InternetServiceManagement/> (last visited Mar. 14, 2016).

⁶¹ See Cox Communications, *Internet*, <http://www.cox.com/residential/support/internet/article.cox?articleId=2fd6ccb0-b13a-11df-4be3-000000000000> (last visited Mar. 14, 2016).

⁶² Title VI treatment of managed IP cable services also reflects marketplace realities, as programming agreements (and their associated conveyance of exhibition rights) typically differentiate between managed IP cable services (delivered solely in the customer’s home) and Internet-delivered services (that can be accessed from any broadband Internet access connection).

⁶³ PK Petition at 17.

about Stream TV that unfairly disadvantages OVDs or otherwise harms competition in a way that could support a Commission finding that somehow Comcast's offer of Stream TV violated the Internet General Conduct standard or any other Open Internet rule or policy. Indeed, PK's issues really do not relate specifically to Stream TV at all, but stem instead from its hostility to UBB generally. It is also worth noting that PK's claims regarding Internet usage thresholds are based on various untested and dubious assumptions about data usage.⁶⁴

Indeed, if the exemption of cable services like Stream TV from Comcast's UBB trials were designed – as PK seems to suggest – to entice customers to use cable service in lieu of online video services, it is curious that Comcast has never marketed it as a “benefit” of Stream TV or any of its other cable services. That fact is simply not mentioned in any of Comcast's advertisements. And it is equally noteworthy that Comcast first introduced Stream TV in *non-trial markets*, which would have made little sense if the exemption from Comcast's UBB trials were intended to be a core attraction of the Stream TV service. In short, PK's theory of some nefarious plan to undermine online video services simply does not fly. It reduces to the basic – and unsustainable – assertion that the mere provision of cable services by an MVPD that also employs data caps or UBB unfairly disadvantages OVDs. Notably, in the *Open Internet Order*,

⁶⁴ PK relies on Netflix's FAQs to support its claims, *see id.* at 2 & n.6, but even those FAQs describe various tools the user can employ to reduce data usage. *See* Netflix, Inc., *How can I control how much data Netflix uses?*, <https://help.netflix.com/en/node/87> (last visited Mar. 14, 2016). Moreover, PK totally ignores new compression technologies like H.265 and other advances that enable consumers to access video more efficiently and using less data. And beyond that, it is implausible that UBB somehow encumbers online viewing when wireless providers are actively pursuing business offerings that include providing or featuring online video while providing Internet usage data thresholds that are *two orders of magnitude lower* than 300 GB.

the Commission rejected any such wholesale condemnation of UBB,⁶⁵ and nothing about the facts at issue gives rise to a reason for the Commission to make a different finding here.⁶⁶

Other factors relevant to the General Conduct standard weigh heavily in Comcast's favor or are neutral at worst. The availability of Comcast's cable service on equipment other than set-top boxes advances Congress's and the Commission's goal of promoting competition in the device marketplace, and thus "leads to greater options for consumers."⁶⁷ Comcast's vertical integration (which PK gratuitously discusses at length⁶⁸) is irrelevant, as Stream TV in particular (and IP cable services more generally) provide access primarily to *unaffiliated* content via Comcast's cable service.⁶⁹ The Stream TV offering in no way raises consumer protection concerns – in fact, it gives consumers who do not want traditional cable TV with a set-top box a more convenient way to enjoy cable service.⁷⁰ Stream TV does not threaten free expression. Far from impeding the virtuous cycle, Stream TV and other IP cable services give providers like Comcast additional incentives to deploy and enhance broadband infrastructure without creating any interference with any online video service that a Comcast customer accesses over her Xfinity Internet service.

⁶⁵ See *Open Internet Order* ¶ 153.

⁶⁶ PK's zero-rating claims fail for the same reason. Of course, as Chairman Wheeler just reaffirmed, zero-rating is not inherently problematic and may have pro-consumer benefits, and likewise will be reviewed on the merits. See *Open Internet Order* ¶¶ 151-152; see also Nilay Patel, *The Dragonslayer*, The Verge (Mar. 9, 2016), <http://www.theverge.com/2016/3/9/11181450/fcc-chairman-tom-wheeler-interview-5g-internet-net-neutrality> (quoting Chairman Wheeler regarding zero-rating). But that is irrelevant here because Stream TV is not an Internet service and zero-rating is applicable only to such services.

⁶⁷ See *Open Internet Order* ¶ 140.

⁶⁸ See PK Petition at 21-25.

⁶⁹ At last count, six of every seven channels Comcast carries is unaffiliated.

⁷⁰ See *Open Internet Order* ¶ 141.

By contrast, PK's theory would "stifle innovation, investment, [and] broadband deployment" by freezing cable services in their current form.⁷¹ It would perversely penalize cable operators for developing and offering innovative technologies and services that are good for consumers; discourage cable operators from investing in the IP transition and the deployment of IP cable services; and conflict with the Commission's navigation devices goals (and PK's avowed support for those goals) by undermining the legal theory that IP cable applications are subject to Title VI at all.

Finally, it bears emphasis that, contrary to PK's suggestions, Comcast's Internet access service provides a hospitable environment for online video and other Internet content to flourish. Year after year, Comcast has invested substantially in advanced broadband technology, system upgrades, and innovative services to meet consumer demand and stimulate increased use of broadband. As a result, Comcast delivers the industry's fastest broadband Internet service speeds – both upstream and downstream – and regularly over-delivers on these speeds.⁷² Indeed, Comcast has increased Internet speeds 16 times in the past 14 years, with Comcast's top residential broadband speed increasing more than 30-fold since just five years ago.⁷³ In light of these substantial investments, which have actually fostered the development and robust growth

⁷¹ See *id.* ¶ 142.

⁷² See FCC, *Measuring Broadband America Fixed Broadband Report*, at 50-52 tbl.2 (2015), <http://data.fcc.gov/download/measuring-broadband-america/2015/2015-Fixed-Measuring-Broadband-America-Report.pdf> (reporting that Comcast delivered 110.9 percent and 109.4 percent of its advertised speeds to customers subscribing to 25 Mbps and 50 Mbps download speeds, respectively).

⁷³ As broadband speeds have increased again and again and again, Comcast has consistently reduced the average price Comcast's customers pay on a per-Megabit-per-second basis, particularly when considered on an inflation-adjusted basis. Comcast will be increasing speeds again when it rolls out DOCSIS 3.1 technology later this year. See Press Release, Comcast Corp., Comcast to Introduce World's First DOCSIS 3.1 Powered Gigabit Internet Service (Feb. 2, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-to-introduce-worlds-first-docsis-3-1-powered-gigabit-internet-service-in-atlanta-chicago-detroit-miami-and-nashville>.

of numerous OTT services, PK's claims that Comcast is somehow hostile to online video ring hollow.

V. CONCLUSION

The Petition represents PK's latest bid to impose its preferred regulatory vision on cable operators and ISPs. The Commission has rejected similar efforts in the past, and should do so again here. Stream TV is an innovative cable service that by law is subject to Title VI of the Communications Act, with which it fully complies. Nothing about Comcast's offering of Stream TV – or its trials of usage-based pricing for Xfinity Internet service – calls into question Comcast's compliance with the *Comcast-NBCUniversal Order* (or the Consent Decree), or with the Commission's Open Internet rules. For these reasons, the Commission should disregard or deny the Petition.

Respectfully submitted,

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006

Counsel for Comcast Corporation

/s/ Kathryn A. Zachem
Kathryn A. Zachem
David Don
Regulatory Affairs

Lynn R. Charytan
Julie P. Laine
*Comcast NBCUniversal Transaction
Compliance*

Francis M. Buono
Ryan G. Wallach
Legal Regulatory Affairs

COMCAST CORPORATION
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

March 14, 2016