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VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte
WC Docket No. 04-36, *IP-Enabled Services*

Dear Ms. Dortch:

This letter responds to NCTA's November 1, 2005, *ex parte* filing concerning the extent to which the Commission's pro-competitive policies with respect to IP-enabled services should apply to IP-enabled video offerings.[1] NCTA's *ex parte* is, above all, a plea for Commission inaction. In the face of rapidly evolving technology and regulatory uncertainty, NCTA asks the Commission to stand by and do nothing. The premise of this request — that AT&T's and other new IP video services are still "hypothetical" — is wrong as a factual matter, and the conclusion NCTA draws from it is wrong as a policy matter. AT&T already has begun to deploy its video service and will continue doing so. But more importantly, the Commission's longstanding policies favor regulatory clarity early in the game, when such action can serve to *encourage* the deployment of new services. Clarity provided only after market conditions and anachronistic legal obligations have deterred or delayed new entry and innovation comes too late.

NCTA's position here stands in stark contrast to its unqualified support for rapid Commission engagement with respect to clarifying the unregulated status of VoIP, when cable incumbents and others first began providing such services. But Commission inaction is not an option. While it would undoubtedly enhance the already entrenched market hold enjoyed by NCTA's members, it would do nothing to advance the public interest, which can only benefit from regularity clarity that facilitates the provision of IP-based video and new, bundled services by telco entrants to consumers.

NCTA also argues that even if the Commission does address the regulatory treatment for new IP video services, it should employ a "quacks like a duck" approach and conclude, on this

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[1] Response of the National Cable & Telecommunications Association, *IP-Enabled Services*, WC Docket No. 04-36, Nov. 1, 2005 ("NCTA Response").

basis, that these services must be regulated just like legacy cable services. But the Commission already has rejected that archaic approach to evaluating the appropriate regulatory status of new, IP-enabled services, and has never employed it when considering whether or how to regulate new entrants in video, enhanced services, and other services. Moreover, NCTA's argument finds no basis in the language of the Cable Act itself, which puts no stock in the superficial similarities between some aspects of IP-enabled video and traditional cable and instead bases its regulatory classifications and obligations on specific technological distinctions. Those distinctions exempt new IP video services from many Title VI requirements — an outcome that best serves the Commission's and Congress's policies favoring deployment of advanced telecommunications capabilities.

DISCUSSION

1. *NCTA's contention that the Commission need not clarify the regulatory landscape for IP video services because they are purely "hypothetical" fails on the facts, would disserve the public interest, and contradicts long-standing Commission policy.* NCTA asserts that Project Lightspeed is "hypothetical" and in fact "may never be [deployed]."[2] Proceeding from this premise, NCTA argues that "it is a waste of the Commission's time" to issue a ruling "to accommodate a service that [AT&T] is barely able to define, let alone deploy."[3] Both components of this argument are wrong.

First, there is nothing "hypothetical" about AT&T's IP video service. AT&T already is deploying the broadband network it will use to provide its "integrated suite of IP-enabled services," including IP video.[4] AT&T described these services at length in its prior ex parte.[5] The company has been working with Microsoft and others to develop some of the more advanced capabilities of its video offering, and the company already has initiated service under a controlled launch of its IP video service in San Antonio, Texas, and will offer service to additional communities throughout its service footprint in the middle part of this year.[6]

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[2] *Id.* at 3.

[3] *Id.* at 7-8.

[4] *See, e.g.*, Testimony of Tim Krause, Chief Marketing Officer and Senior Vice President for Government Relations, Alcatel North America, Before the United States House of Representatives Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, at 2 (Nov. 9, 2005), *available at* http://energycommerce.house.gov/108/ Hearings/11092005hearing1706/Krause.pdf.

[5] Letter to Marlene H. Dortch, FCC, from James C. Smith, SBC, *IP-Enabled Services*, WC Docket No. 04-36, Sept. 14, 2005, at 15-19 ("AT&T Ex Parte").

[6] *See, e.g.*, David Ranii, *Cable companies may start offering family-friendly packages*, RALEIGH NEWS & OBSERVER, Dec. 2, 2005, *available at* 2005 WLNR 19400566 (noting that AT&T "is on the verge of entering the video business" in San Antonio, Texas); Sanford Nowlin, *S.A.'s AT&T Is Getting a New Logo, Too*, SAN ANTONIO EXPRESS-NEWS, Nov. 21, 2005, *available at* 2005 WLNR 18795344 (reporting that AT&T plans to expand its video service to other major markets this year).

In any event, the notion that the Commission should avoid providing regulatory clarity for this new class of IP video services — not just for AT&T but for other telco providers similarly poised to offer such services — finds no basis in Commission precedent and would grossly disserve the public interest. The Commission has repeatedly recognized the need to promote innovation and deployment of new services by providing new entrants with regulatory clarity *in advance* — before uncertainty or legacy requirements have proved to be an insurmountable deterrent.[7] Indeed, the Commission previously has reached precisely that conclusion with respect to new video entrants, ruling that it must swiftly remove "uncertainty with respect to state and local regulatory requirements" which might otherwise have "a chilling effect on entrepreneurs who otherwise would enter the pay television market."[8] And section 706 of the Act compels the Commission to engage early and actively to promote deployment of advanced telecommunications capabilities such as Project Lightspeed and other IP platforms. That provision mandates that the Commission adopt regulatory measures that "encourage the deployment" of such facilities and services, and requires "immediate action" where such services are not being deployed in a reasonable and timely fashion.[9]

Indeed, NCTA's contrary suggestion to do nothing stands in stark contrast to its own prior advocacy when its members were poised to offer new VoIP services. In that context, NCTA urged the Commission to clarify the unregulated status of VoIP with "utmost urgency," despite the fact that cable incumbents were "only in the initial stages of developing — let alone deploying" — services that "might" be described as IP-based voice services.[10] In *Vonage*, the Commission complied, going beyond the VoIP service at issue in the petition before it to hold

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[7] *See, e.g.*, Daniel Brenner, *The 2005 Communications Act of Unintended Consequences*, 57 FED. COMM. L.J. 175, 176 (2005) ("The 1970s saw the start of a revolution in communications regulation. Most of the new thinking can be tied to regulators addressing the demands of new competitors."); *see also* Declaratory Ruling, *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 15168, 15173 ¶ 13 (2000) (concluding that new entrants must know in advance of entry whether they are eligible to receive support as ETCs, because "[n]o competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support"); First Report and Order, *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, 10781 ¶ 45 & n.115 (2003) (noting the Commission's "determination in other proceedings that creating clearly defined initial operating rights reduces regulatory uncertainty, and so encourages investment").

[8] Memorandum Opinion, Declaratory Ruling, and Order, *Earth Satellite Communications, Inc. Petition for Expedited Special Relief and Declaratory Ruling*, 95 F.C.C.2d 1223, 1234 ¶ 21 (1983) ("*Earth Satellite Communications*"), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *see also id.* (finding that "consequence of [local] regulatory intervention" would likely be "delay in the initiation of service or termination of service"); 47 C.F.R. § 1.2 (stating the Commission's obligation to "remov[e] uncertainty").

[9] 47 U.S.C. § 157 notes (a), (b).

[10] Comments of the National Cable & Telecommunications Association on the Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, May 28, 2004, at 4, 10 ("NCTA IP Comments").

that its preemption ruling should extend as well to state regulation of cable VoIP.[11] To demand that the Commission take immediate action to clarify the regulatory treatment of "hypothetical" cable voice services while deeming it a "waste of the Commission's time" to do likewise for new video services requires considerable audacity.[12]

The inaction NCTA advocates would harm the public by potentially delaying the introduction of new IP video services — services that could challenge the cable incumbents' hold on the video distribution market and offer consumers lower prices and more choice. Indeed, even subscribers to traditional cable services stand to benefit by swift entry of new telco video providers, if recent experience is any guide: cable providers have dropped their rates in response to competition from new telco video providers.[13] Yet some telco providers already have made clear that their deployment of IP video services is contingent on receiving clarity from the Commission concerning the regulation of IP video.[14] Protracted uncertainty also could more generally deter deployment of broadband networks and advanced services. In fact, cities already have begun to block the deployment of Project Lightspeed unless AT&T agrees, now, to submit its IP video services to cable franchising requirements designed for a bygone era.

For example, the city of Walnut Creek, California, has refused to permit AT&T to perform line conditioning necessary to deploy advanced Project Lightspeed services unless it first agrees to obtain a Title VI cable franchise before providing any type of video service. Because the city's position may leave AT&T unable to deploy Project Lightspeed without waiving its rights, AT&T has been forced to file suit against the city in federal court.[15]

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[11] Memorandum Opinion and Order, *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22432 ¶¶ 1, 46 (2005) ("*Vonage Order*") (explicitly addressing its preemption with respect to other VoIP providers).

[12] NCTA's argument also is internally inconsistent. In response to AT&T's factual description of the differences between traditional cable and IP video, NCTA protests that this is irrelevant, because cable operators may offer similar capabilities *in the future*, *see, e.g.*, NCTA Response at 3-4 & n.9, apparently forgetting its insistence that the Commission should disregard "hypothetical" offerings. NCTA's reference to its members' hypothetical future capabilities also does not prove that IP video must be burdened with legacy cable regulation. Rather, the fact that NCTA's members may intend to deploy such capabilities as cable operators at most proves that the law is anachronistic and cumbersome — not that it should be further extended to encompass even more new services.

[13] *See, e.g.*, Anthony Massucci, *Charter, Facing Verizon's FiOS Threat, Cuts Prices*, BLOOMBERG, Oct. 4, 2005 (noting that Charter Communications lowered its cable prices in Keller, Texas in direct response to Verizon's entry in the video market); *see also* AT&T Ex Parte at 6-7 (describing findings that competition induces cable providers to reduce their prices).

[14] For example, Cincinnati Bell, which hopes to unveil an IP video product, has noted that "[a]ssurance that IPTV service will be free from franchise requirements is crucial to Cincinnati Bell's successful and timely rollout of its IPTV services[.]" Comments of Cincinnati Bell Inc., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Sept. 19, 2005, at 6. BellSouth also has noted that its "decision to proceed" with an IPTV service "will depend" in part on "getting the right regulatory structure in place." Comments of BellSouth Corp., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Sept. 19, 2005, at 2-3 n.5.

[15] *See* Linda Haugsted, *SBC Sues Calif. City Over Access*, MULTICHANNEL NEWS, Dec. 19, 2005.

Affirmation by the Commission that the city cannot impose franchise requirements as a condition for the provision of IP video would allow AT&T to proceed with Project Lightspeed deployment today — as well as to roll out IP video and other advanced broadband capabilities more swiftly in the near future. Walnut Creek is not alone. The city of San Jose also just denied AT&T a routine permit to perform work to deploy advanced Project Lightspeed facilities on the basis of supposed future franchise obligations.

Commission action is thus not premature, as NCTA contends, but overdue. Cable incumbents are exploiting the delay telcos face in entering the video market to gain a foothold not only in the video market, but also in the market for the critical "quadruple play" of services — video, voice, data, and now wireless.[16] Analysts agree that once the incumbent cable operators sign customers up for packages of three or four services, it will be far more difficult for a latecomer to the market to disturb the incumbents' hold.[17] Thus, the inaction that NCTA advocates will deprive consumers of the benefits of competition. In such circumstances, it is not just appropriate that the Commission act; it is imperative that it do so quickly.

2. *NCTA's insistence that IP video must be regulated as a legacy cable service is the same "quacks like a duck" argument that the Commission has rejected in connection with VoIP and other new services.* NCTA also argues that, because IP-based video "appears to be the same thing that today's cable customer gets" and many customers "will not know" that they are interacting with an IP network, such services should be regulated in the same manner as legacy cable service.[18] This argument is inconsistent with Congressional and Commission policies for IP-based services.

Like other IP-enabled services, IP-based video is and should be subject to distinct regulatory treatment. Congress has expressly recognized that Internet-based services offer substantial benefits to the American public and should therefore be left to flourish "unfettered by Federal or State regulation."[19] By the same token, Congress specifically directed the Commission to adopt *deregulatory* policies to encourage the deployment of the underlying

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16 *See, e.g.*, Mike Farrell, *Sprint Wants Uniform Pricing on Bundles; Devil's Still In Details for Cable-Wireless Alliance*, MULTICHANNEL NEWS, Nov. 21, 2005, *available at* 2005 WLNR 18934052 (describing Sprint's recent agreement with the cable incumbents "to form a joint venture to offer a quadruple play bundle of voice, video, high-speed Internet and wireless communications services. Rather than just add cell-phone service to cable's existing triple play, the wireless deal would encompass a range of products . . . ."); Statement of Michael S. Wilner, President and CEO, Insight Communications on the Discussion Draft "BITS" Legislation, Before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, at 3 (Nov. 9, 2005), *available at* http://energycommerce.house.gov/108/ Hearings/11092005hearing1706/Willner.pdf.

17 *See* Lorne Manly & Ken Belson, *Calling Out the Cable Guy*, N.Y. TIMES, Nov. 27, 2005 (noting a finding that "customers who buy at least two products from one company are half as likely to switch carriers than if they have just one").

18 NCTA Response at 8.

19 47 U.S.C. § 230(b)(2).

advanced, broadband facilities needed to deploy such services.[20] Regulating IP-enabled video because some of its components may "look" like traditional cable would defeat not only the express language but the very purpose of these provisions, which are designed to leave new, Internet-based services free of reflexive regulation specifically so that providers can innovate and develop their offerings to the benefit of the American public.

This was precisely the basis for the Commission's explicit rejection of a reflexive regulatory approach in the *Vonage Order* (and the previous *Pulver Order*). Even though VoIP "enabl[es] the sending and receiving of voice communications and provid[es] certain familiar enhancements like voicemail" — and thus "resembles the telephone service provided by the circuit-switched network"[21] — the Commission found that imposing traditional state telecommunications regulations on VoIP services would frustrate the goals of sections 230 and 706 by imposing costs and burdens on VoIP providers that would delay or deter entry and innovation.[22]

Even aside from the specific Congressional policies for IP-based services, the Commission has a well-established history of treating new services and entrants more leniently than their legacy counterparts in order to promote innovation and competition. For example, in the voice market, the Commission (and many states) exempted new CLEC entrants from carrier-of-last-resort and build-out obligations applicable to incumbents — a policy from which NCTA's members benefited substantially.[23] And in the video market, the Commission has specifically found that new entrants should be spared the full freight of legacy regulatory obligations, despite obvious similarities with traditional cable: It spared DBS providers from many Title VI requirements on the grounds that DBS was a "relatively new entrant attempting to compete with an established, financially stable cable industry" and that legacy rules "might hinder the development of DBS as a viable competitor to cable."[24] The Commission similarly rejected

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20 *Id.* § 157 note (a).

21 *Vonage Order* at 22406 ¶ 4.

22 *Id.* at 22426 ¶ 34 (finding that Vonage's service was "plainly embrace[d]" by section 230's reference to the "Internet and other interactive computer services"); *see also* Memorandum Opinion and Order, *Petition for Declaratory Ruling That Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3311 ¶ 11 (2004) (finding that Pulver's VoIP service was an "information service," despite allowing real-time voice communications, because it employed various "computing capabilities").

23 *See, e.g.*, Memorandum Opinion and Order, *Public Util. Comm'n of Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3466, 3498, 3500, 3506 ¶¶ 13, 78, 81, 95 (1997); Decision No. 01-08-068, *Application of Cable & Wireless (U 5056C) for Approval to Withdraw its Certificate of Public Convenience and Necessity to Provide Resold Local Exchange Service and to Discontinue Provisioning Resold Local Exchange Service*, 2001 Cal. PUC LEXIS 518, at *7 (Cal. P.U.C. Aug. 23, 2001).

24 Report and Order, *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 23254, 23278 ¶¶ 58-60 (1998); Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775, 14801 ¶ 65 (1998); Order, *Optel Inc. Petition for Waiver of Section 101.603 of the Commission's Rules*, 14 FCC Rcd 3762, 3763 ¶ 2 (1998).

reflexive "regulatory parity" for nascent master antenna television system ("MATV") and satellite master antenna television system ("SMATV") services.[25]

Despite its contrary advocacy here, NCTA is not only familiar with but traditionally supportive of these Commission policies. In fact, in this very docket, NCTA rejected the very "quacks like a duck" argument it now makes, arguing instead that cable VoIP providers are entitled to special regulatory treatment — including the need to avoid state franchising requirements — because of their use of IP and their nascent status and that regulators should create regulatory parity among similar services by *removing* regulation, not by extending and expanding regulatory burdens for new services.[26] In NCTA's own words, imposing regulation on new IP services that compete with legacy services "would be counter-productive, stifling investment and innovation just when broadband services are seen as an economic and technological boon to the Nation."[27] And NCTA member Cablevision has argued that a deregulatory approach "should be applied to *all* IP-enabled services," regardless of the technology used to provide the service or the functionality offered to the end user.[28]

The Act and Commission policy compel this deregulatory approach for IP video. Indeed, this approach is particularly important with respect to IP video services, both because the costs of entry for such services are enormous even without the additional burden of state entry barriers,

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[25] Memorandum Opinion, Declaratory Ruling, and Order, *Orth-O-Vision, Inc. Petition for a Declaratory Ruling*, 69 F.C.C.2d 657, 669 ¶ 24 (1978), *recon. denied*, 82 F.C.C.2d 178 (1980), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 63 (2d Cir. 1982); *Earth Satellite Communications* at 1231, 1234 ¶¶ 17, 21.

[26] *See, e.g.*, Ex Parte Submission of the National Cable & Telecommunications Association, WC Docket Nos. 03-211, 04-36, Oct. 28, 2004, Attach. at 1-2 ("To require cable VoIP providers to comply with numerous state regulatory regimes would undermine the most innovative aspects of the service and the cable VoIP network."); NCTA IP Comments at 30 (relying on cable VoIP's nascent status to argue why it was "essential" that the Commission exercise "regulatory restraint" with respect to that service); *id.* at 10 (relying on section 706's pro-broadband policies to argue, "Creating a regulatory overhang, or even the threat of one, for services that are at the very early stages of development to solve problems that do not yet (and may never) exist would discourage investment in such services . . . . The Commission should employ instead the regulatory caution that it has repeatedly recognized is appropriate for nascent services . . . ."); *see also* National Cable & Telecommunications Association White Paper, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition," at 33 (Feb. 2004) (arguing that "even VoIP services that more closely resemble conventional telephone offerings may well meet the definitions of an information service" and thus would not be subject to economic regulation under Title II).

[27] Reply Comments of the National Cable & Telecommunications Association, *IP-Enabled Services*, WC Docket No. 04-36, July 14, 2004, at 11; *see also* Testimony of Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association, Before the United States Senate Committee on the Judiciary, "Video Competition in 2005: New Choices for Consumers," at 17 (Oct. 19, 2005) ("It is not unreasonable to consider, from time to time, whether existing regulations and requirements continue to serve important governmental purposes — for *all* competitors subject to those regulations."), *available at* http://judiciary.senate.gov/testimony.cfm?id=1642&wit_id=4706.

[28] Reply Comments of Cablevision Systems Corp., *IP-Enabled Services*, WC Docket No. 04-36, July 14, 2004, at 3 (emphasis added).

and because the results, if telcos do not enter this market, will be so far-reaching, affecting broadband deployment and competition for bundled, facilities-based service in general.

3. ***Switched IP Video Is Not a Cable Service Under the Cable Act.*** NCTA also is incorrect—both as a matter of fact and law—that IP-based video is "the same thing" as traditional cable. The Cable Act expressly premises the applicability of its "cable service" provisions on specific technology-based criteria, not on how the customer perceives the service. By definition, a "cable service" under Title VI includes only those services that involve "the one-way transmission" of programming,[29] and a "cable system" does not include telco facilities that provide interactive video services over "switched networks and "point-to-point" architectures.[30] Applying these statutory definitions, the Commission has concluded that video services "enabling subscribers to interact with or manipulate information typically would not be considered cable service."[31] It similarly concluded that the "predominantly" two-way, interactive nature of cable modem service took it outside the definition of a cable service.[32] Thus, even if some IP video services may include some "linear video programming,"[33] they fall outside the relevant parameters of the Cable Act.

As AT&T already has explained, IP-based video differs significantly from traditional cable in terms of both network architecture and end-user experience.[34] AT&T's IP video services are *two*-way services provided over a two-way network.[35] For example, Project Lightspeed uses a client-server, switched, point-to-point architecture. This is quite different from the point-to-multipoint, broadcast-like transmissions of traditional cable networks. Cable systems transmit all channels to all subscribers simultaneously, and permit interaction only between the subscriber and the set-top box, rather than with the network. In contrast, the switched service used for Project Lightspeed requires regular communications and interaction with the network itself, and ensures that nothing is sent to the subscriber unless and until he or she communicates directly with the network by sending a request for specific programming — at which point the network transmits only the requested material to that subscriber. In other words,

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29 47 U.S.C. § 522(6).

30 *Id.* § 522(12).

31 Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, 5821 ¶ 75 n.194 (1992).

32 Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4838 ¶ 68 (2002), *aff'd*, *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

33 NCTA Response at 12.

34 AT&T Ex Parte at 16-19. For example, IP-based video provides the capability for customers to customize their viewing experience through many and varied forms of interaction with the IP-enabled network, *see id.* at 15-16 — which is far from just "surfing channels" as NCTA suggests. NCTA Response at 8.

35 *See generally* AT&T Ex Parte at 15-25.

the network is designed to send programming to the customer in much the same way the Internet does: information flows to the customer only once he or she has selected it.

Moreover, IP video service itself is highly interactive. Such interactivity goes well beyond the selection of specific channel streams or programming. IP video services include features that permit the user to create an individualized, customized viewing experience. And the subscriber will be able to combine programming with other features, including online content, different frames, different simultaneous program streams, and the voice and data services that will typically be provided in conjunction with IP video. Such switched, two-way, interactive, on-demand services accordingly are not cable services delivered over a cable system. And since the "linear programming" notion NCTA suggests is somehow definitive does not appear in the Cable Act at all, it is hard to fathom NCTA's contention that including such programming in a service automatically puts it back within the parameters of the Cable Act's cable service provisions.

Nor is there any basis for NCTA's contention that the 1996 amendments to the Cable Act require that telco video entrants be classified for regulatory purposes as common carriers, OVS providers, radio operators, or cable operators. The Act provides only that if a telco does not choose to provide video as a Title II service, as an OVS provider, or using radio communications, it will be subject to the provisions of Title VI.[36] That is not synonymous with being a cable operator offering cable service over a cable system.

NCTA characterizes the notion that a telco could provide video subject to Title VI without being a cable operator as a "loophole,"[37] because the Title VI obligations for non-cable MVPDs are not extensive.[38] But, just as the different treatment of CLECs and ILECs under Title II of the Act is not a "loophole," this result also is not a "loophole." Rather, it flows from the plain language of the Act, which exempts new interactive video services from the more cumbersome provisions applicable to legacy providers. It is hard to see how NCTA can wrest from this plain language an argument that the Commission should reach out to *extend* legacy regulations to these new services. In any event, if additional safeguards are necessary, the Commission's Title I authority over video services is more than sufficient to address them; AT&T and others have made clear that they are fully prepared to pay franchise fee equivalents, to support PEG programming, and to otherwise work with local governments and the Commission to protect the public interest. But that is a separate question from whether these new services can be shoehorned into all of the requirements of Title VI simply because those provisions apply to the traditional services of established incumbents.

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[36] 47 U.S.C. § 571(a)(3)(A) (providing that, to the extent a common carrier provides video using a method other than "radio communication" or "on a common carrier basis," "such carrier shall be subject to the requirements of" Title VI).

[37] NCTA Response at 5.

[38] *Id.* at 1.

Indeed, even if there were a question about the reach of the Cable Act's definitions, the answer to that question should be no. In interpreting how and whether to squeeze new services into a statute whose roots are over twenty years old, the Commission must be guided by the pro-competitive policies of the Cable Act itself, and the overarching deregulatory mandates of sections 706 and 230. All of these policies compel an interpretation of the Cable Act that excludes new IP video services, since this is the only result that will encourage entry, broad deployment of advanced networks and services, and vibrant video and telecommunications competition.[39]

Sincerely,

cc: Chairman Kevin Martin
Commissioner Deborah Tate
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Daniel Gonzalez, Chief of Staff
Michelle Carey, Sr. Legal Advisor
Jessica Rosenworcel, Sr. Legal Advisor
Scott Bergmann, Sr. Legal Advisor
Thomas Navin, Chief, Wireline Competition Bureau
Donna Gregg, Chief, Media Bureau
Samuel Feder, General Counsel

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[39] In addition, no other interpretation would be consistent with the Commission's obligation to construe the Cable Act to avoid constitutional problems — specifically, the First Amendment problems that would arise if telcos are required to obtain entry permits in order to provide IP video services over facilities that are already authorized to use the rights of way for other services. *See* AT&T Ex Parte at 33-35. Notably, NCTA has no answer to this issue.