**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.**

In the Matter of **)**

**)**

Promoting Innovation and Competition in the **)** MB Docket No. 14-261

Provision of Multichannel Video **)**

Programming Distribution Services **)**

# REPLY COMMENTS OF THE

# NORTHWEST SUBURBS CABLE COMMUNICATIONS COMMISSION

**&**

**THE NORTHWEST SUBURBS COMMUNITY TELEVISION**

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**THE NORTHWEST SUBURBS COMMUNITY TELEVISION**

The Northwest Suburbs Cable Communications Commission (“NWSCCC”) and the Northwest Suburbs Community Television (“NWCT”), a Minnesota non‑profit corporation submits these reply comments in response to the Commission’s request for comments in the above captioned proceeding on how to interpret the term “Multichannel Video Programming Distributor” (“MVPDs”).[[1]](#footnote-1)

1. **INTRODUCTION AND SUMMARY**

NWSCCC, is a joint powers entity created in the State of Minnesota more than 30 years ago, comprised of its original nine cities, Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth, and Robbinsdale (the “Member Cities”). The NWSCCC was formed to serve as the cable television franchising authority, under authority of Minnesota law, [[2]](#footnote-2) on behalf of the nine cities, which are located in the northwest side of Minneapolis and having a combined total population of approximately 320,000 residents. The area served by NWSCCC also includes six school districts. Although CenturyLink, Inc. has recently expressed an interest in providing cable services to the residents of the Member Cities, Comcast, Inc. is currently the only cable provider for the NWSCCC.

 NWCT was created by NWSCCC in the early 1980s to serve as the body responsible for oversight of public, educational, and governmental access programming (PEG) and to develop local programming. In its creation of the NWCT, and in its continuation, NWSCCC has worked to advance federal and State policy to encourage the widespread deployment and availability of cable television services.

NWCT’s existence depends upon the funds provided under the cable franchise agreement with Comcast, as well the efforts of a staff of more than 80 individuals and a volunteer base of 605 local residents. In its annual report, NWCT noted, “[o]ne of the most important aspects of the franchise agreement between NWSCCC and the incumbent broadband (cable) service provider is the overall support provisions for community programming. Without these provisions, there would be no community programming.” [[3]](#footnote-3)

With the support of Comcast’s franchise fees, NWCT staff and volunteers create about 5824 hours of programming each year that is viewed on traditional television and other devices (volunteers alone created 1332 new programs (1057 new hours) in 2014).[[4]](#footnote-4) Programming provided by NWCT also includes the broadcasting of more than 10,000 public meetings to ensure transparency and the opportunity for the residents of the Member Cities to engage in their local governments.

Not only is programming broadcast, it is seen by a substantial portion of the population. As a recent survey of cable service subscribers in the Member Cities found that 55 percent of the subscribers tune into NWCT on a recurrent basis.[[5]](#footnote-5)

The opportunity to produce programming has sparked interest and launched career opportunities for numerous volunteers from the nine communities served by the NWCT throughout the 30 years of its existence.[[6]](#footnote-6) In addition to opportunities discovered, the efforts of those dedicated to NWCT has been consistently recognized. NWCT staff and volunteers have received many awards (including Regional Emmy Awards) for programming. Awards include recognition for local origination programming of current news, services, benefits and sports reporting.

Undoubtedly, the NWSCCC cable franchising, which spans over a period of three decades, has been a tremendous benefit to the Member Communities. For this reason we are concerned that a proposal by the Commission that may have the effect of dismantling cable television franchising would be devastating. As mentioned above, without the support that the cable operator has agreed to provide—and has consistently provided--there would be no community programming.

Moreover, the harmful effect of this proposal would not be exclusive to NWCT, but would also reach a national level. As the Coalition of Cities For Utility Issues pointed out in its comments, “[i]f cable video services can be provided by a franchise holder over-the-top, and this is treated as a ‘non-cable MVPD’ (Multichannel Video Programming Distribution service), even though these services could not exist but for the cable franchise, then these video programming services would potentially no longer be subject to franchise obligations.”[[7]](#footnote-7)

NWSCCC and NWCT reply to comments made by commenters on two issues raised in the *NPRM*. We agree with commenters who support the *NPRM*’s conclusion that the provision of IP video over a cable system, within the footprint of that cable system, is a cable service.[[8]](#footnote-8) We also agree with the commenters that do not agree with the *NPRM*’s tentative conclusion that a cable operator would be considered to be “a non-cable MVPD…with respect to its OTT [over-the-top Internet video] service.”[[9]](#footnote-9) We, like numerous other commenters, are concerned about unintended and potential harmful consequences if the cable companies’ OTT offerings are not treated as cable services when these services are made available over a cable operator’s system, or when they are bundled with the other cable services and offered exclusively to cable subscribers.

**A. NWSCCC And NWCT Agree With The *NPRM* And Other Commenters Statements That Managed Linear IP Video Service Offered Over A Row-Crossing Landline Network Is A “Cable Service,” And Thus That A Provider Of Such Service Is A “Cable Operator” Under The Cable Act.**

NWSCCC and NWCT favor the commenters supporting the *NPRM*’sconclusions (at ¶¶ 72-77) that linear IP video service falls within the Cable Act’s definition of “cable service,” 27 U.S.C. § 522 (6); and therefore any entity that provides such services over landline, right-of-way (ROW)-crossing facilities that it owns or in which it or its affiliates have a significant interest is a “cable operator,” 47 U.S.C. § 522(5), providing such a “cable service” over a “cable system,” 47 U.S.C. § 522(7). We do not agree with commenters criticizing the *NPRM*’s conclusions that there is not sufficient legal precedent supporting linear IP video service as falling within the Cable Act’s definition of “cable service.”[[10]](#footnote-10)

 The *NPRM* correctly states that these conclusions flow directly from the plain language of Cable Act. In recognizing that both “[t]he Commission and other authorities have previously concluded that the statute’s definition of ‘cable service’ includes linear IP video service,”[[11]](#footnote-11) we agree with commenters that there is sufficient support that the definition indeed encompasses such service.

 We do not agree that regulating an IP-based video service that is distributed over a provider’s own facilities under existing regulations is not good policy as it would amount to a “round hole, square peg problem” as suggested by CenturyLink’s comments opposing the *NPRM*’s conclusion.[[12]](#footnote-12) The Cable Act defines the term “cable system” 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…[[13]](#footnote-13)

CenturyLink’s analogy is wrongly focused on the technology that delivers programming and ignores the fact that the definition of video programming in the Cable Act is primarily based upon the nature of the programming provided. Thus there is no issue with finding a good fit as there is no place in the definition above that is dependent on the transmission technology that is used to deliver the cable system. The Commission correctly concluded 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.”[[14]](#footnote-14)

As the Cable Act truly is technology-neutral, the Commission was correct when it stated that “IP-based service provided by a cable operator over its facilities and within its footprint must be regulated as a cable service not only because it is compelled by the statutory definitions [but also because it is] good policy, as it ensures that cable operators will continue to be subject to the competitive, consumer-focused regulations that apply to cable even if they provide their services via IP.”[[15]](#footnote-15) In saying such, the *NPRM* acknowledges our primary concerns, that the important public interest obligations that apply to cable operators through “franchising requirements,” that include franchise fee requirements and, more specifically, franchise requirements related to “public, educational, or governmental” access channels and facilities, apply equally to IP-based services.[[16]](#footnote-16)

The *NPRM*’s conclusion that linear IP video service is a “cable service” necessarily means that AT&T’s U-verse video service is a “cable service,” and thus that AT&T is a “cable operator” providing that service over a “cable System.” We are pleased that the Commission appears to have rested AT&T’s longstanding claims to the contrary. The *NPRM*’s conclusions on these issues will be equally important to preserving the public interest policies of the Cable Act going forward, as traditional incumbent cable operators are likely progressing toward transitioning to linear IP video service in the years ahead.

**B. NWSCCC And NWCT Agree With Other Commenters Statements That The Provision By A Cable Operator Of OTT Video Programming Over A Cable System Is A “Cable Service.”**

NWSCCC and NWCT do not agree with the tentative conclusion of the *NPRM* that a cable operator’s OTT video programming service offerings are not a “cable service.”[[17]](#footnote-17) We believe that this tentative conclusion is at odds with the Cable Act’s definition of “cable service.” Besides our belief, the *NPRM* itself elsewhere recognizes that a cable operator’s OTT offering would clearly be “video programming.”[[18]](#footnote-18) In addition, because a cable operator would exercise editorial control over its OTT video programming offering by choosing what to include in that offering, the operator’s provision of OTT video programming to subscribers over its cable system would constitute “the one-way transmissions to subscribers” of “video programming” within the meaning of 47 U.S.C. § 533(6)(A) under both Commission[[19]](#footnote-19) and court precedent.[[20]](#footnote-20) The status of a cable operator’s OTT video programming offering as a “cable service” is not altered simply because subscribers may access such programming over Internet access provided over the cable operator’s system. This reasoning is further supported by the fact that the “cable service” definition also encompasses “subscriber interaction…which is required for the selection or us of such video programming or other programming service,” 47 U.S.C. § 522(6)(B). The subscriber is indeed “interacting” as the individual is making a “selection or use” of the cable operator’s OTT offering when using the operator’s cable system.

 It follows that there would not be a “square peg, round hole” fit issue in this instance either; as a cable operator’s OTT video programming offerings fit squarely within the Cable Act’s definition of “cable service.” Additionally, within the cable operator’s cable footprint, those cable services would be provided over that cable operator’s cable system.

We also agree with other commenters who note that a cable system subscriber continues to interact with the operator’s cable system even when the services are accessed by the subscriber outside of the franchised area.[[21]](#footnote-21) There should not be a restriction on the definition of cable services in regard to the franchise boundary. We are concerned that the Commission’s conclusion, “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,”[[22]](#footnote-22) may allow for cable operators to dodge their franchise obligations when the operator’s cable services are accessed by cable system subscribers temporarily outside of the footprint of the cable company’s franchised area.[[23]](#footnote-23) By keeping in mind the only reason why a cable subscriber has the ability to access the OTT service offered by the cable operator while they are outside of the franchise area is because of the subscription the subscriber has with the cable operator; the OTT service offered by the cable operator to its subscribers should remain a part of the cable system within the right-of-way that makes such services possible. Thus, the legal character of the video programming services does not change simply because the operator has made available it services outside the facilities and footprint of the franchise agreement.

 We are very concerned with the potential negative effect of allowing or promoting an unbalanced method from a public policy perspective, as this aspect of the *NPRM* may provide an incentive to cable operators to promote services that diverge from the public benefits objective within the Cable Act. In particular, we are troubled by the potential diminishing of public interest benefits of PEG channels and franchise fees, if the Commission proceeds with its tentative conclusion that a cable operator’s OTT video programming service offerings are not a “cable service.”

1. **CONCLUSION**

Echoing many commenters before us, we ask the Commission to adhere to the *NPRM*’s conclusion that the Cable Act’s “cable service” definition includes linear IP video service. Further we urge the Commission not to adopt the *NPRM*’s tentative conclusion that a cable operator’s OTT video programming offering is not a “cable service,” and conclude instead that such offering is a “cable service.”

 Respectfully submitted,

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1. *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services,* MB Docket No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014) (“*NPRM*”) [↑](#footnote-ref-1)
2. NWSCCC has been authorized by the Member Cities of a Joint Powers Agreement adopted pursuant to Minnesota law, Chapter 238, to serve as a franchising authority on behalf of the Member Cities and authorized to grant a cable television franchise since its inception in the early 1980s. [↑](#footnote-ref-2)
3. See Northwest Community Television, 2014 annual Report *available at* <http://www.nwsccc.org/files/nwsccc/files/NWCT%202014%20Annual%20Programming%20Report6.pdf> [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. *2012 Northwest Community Television Cable Subscribers Survey* conducted by Decision Resources Ltd. [↑](#footnote-ref-5)
6. For example, Tim O. Johnson owner of Johnson Production Group and who once served as West Coast Head of Programming and Production for Pax Television, was a volunteer for NWCT in the 1980s. See <http://www.imdb.com/name/nm0426330/?ref_=fn_al_nm_1>. [↑](#footnote-ref-6)
7. *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Distribution Services*, Comments of the Coalition of Cities For Utility Issues, MB 14-261 (March 3, 2015). [↑](#footnote-ref-7)
8. *NPRM*, MB Docket No. 14-261, FCC 14-201 (Dec. 19, 2014) ¶ 71. [↑](#footnote-ref-8)
9. *Id*. at ¶ 78 [↑](#footnote-ref-9)
10. *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Comments of CenturyLink, MB 14-261 (March 3, 2015). [↑](#footnote-ref-10)
11. *NPRM* ¶ 72 & n.203 (citing *Cable Television Technical and Operational Requirements*, 27 FCC Rcd 9678, 9681, ¶ 5 (2012), and *Office of Consumer Council v. Southern New England Telephone Co.*, 515 F. Supp.2d 269, 276 (D. Conn. 2007), *vacated on other grounds,* 368 Fed. Appx. 244 (2d Cit. 2010)). [↑](#footnote-ref-11)
12. *See Supra* 10. [↑](#footnote-ref-12)
13. 47 U.S.C. § 522(7). [↑](#footnote-ref-13)
14. *NPRM* at ¶ 71, [↑](#footnote-ref-14)
15. *NPRM at* ¶ 75. [↑](#footnote-ref-15)
16. *NPRM* at ¶76, n. 230 (listing 47 U.S.C. ¶542) and n. 222. [↑](#footnote-ref-16)
17. *NPRM* at ¶78 [↑](#footnote-ref-17)
18. *NPRM* ¶ 16 & n.35. Even if OTT video services were not “video programming,” they would clearly be “other programming service,” because they would be “information that a cable operator makes available to all subscribers generally,” 47 U.S.C. § 522(14), which would also make them a “cable service,” 47 U.S.C. § 522(6)(A)(ii). [↑](#footnote-ref-18)
19. *Video Dialtone Reconsideration Order,* 7 FCC Rcd 5069, 5071-72 (1992), *review denied sub nom. NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); *Internet over Cable Declaratory Ruling*, 17 FCC Rcd 4798, 4834 (2002), *review granted sub nom. Brand X Internet Servs. V. FCC*, 345 F.3d 1121 (9th Cir. 2003), *rev’d sub nom. NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005). [↑](#footnote-ref-19)
20. *NCTA v. FCC*, 33 F.3d at 72. [↑](#footnote-ref-20)
21. *NPRM* ¶ 78. [↑](#footnote-ref-21)
22. *Id.* at ¶ 74. [↑](#footnote-ref-22)
23. *Id.* at ¶ 78. [↑](#footnote-ref-23)