

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261.

I marvel at and embrace what the Internet and the many innovative programmers and designers have been able to bring to the world. Over the last 20 years or so, the Internet has revolutionized all communication capabilities. It is the ultimate disruptive force. Nowhere is this more evident than in the offering of video programming. According to industry experts, video already accounts for two-thirds of U.S. Internet traffic today and is estimated to increase to approximately 80 percent in just three years.¹ Once the domain of a few select providers, the video marketplace is changing right before our very eyes. Business models are adapting on the fly, and a robust video offering on the Internet is becoming more of a necessity for those companies seeking to compete in the years ahead.

With all of this dynamism in the online video marketplace, it makes this item particularly puzzling. While I can appreciate that the Commission may be trying to be forward looking, this item misses the mark. The Internet—and online video in particular—has grown to where it is today outside of our regulatory clutches, and the FCC trying to jump into this space now, especially without clear direction provided by the Congress, is highly questionable. As a government agency with little to no authority over the Internet, the best thing that the Commission can do is not get in the way.

Although I am amenable to seeking comment on these ideas and will concur to this notice, I am unlikely to support a future order based on the central proposal set forth in today's item. Specifically, it sets up a regime to treat an over-the-top (OTT) video programming provider as a Multichannel Video Programming Distributor (MVPD) if it is offering multiple streams of prescheduled video programming. I am concerned that the Commission's actions—either intentionally or unintentionally—may skew the marketplace in a harmful way. For instance, OTT video providers may seek to follow this model, if adopted, in order to take advantage of some of the perceived benefits instead of pursuing other more promising or innovative offerings that the market and consumers may prefer. Or, will some entities decide not to pursue a linear online offering—or worse remove content from the Internet—because of regulation? The structure proposed could have significant unintended consequences on this nascent industry still trying to define itself in the immediate term and on the entire video industry in the years to come. So why are we doing this?

A review of the supposed benefits of the item results in a short and undistinguished list. For instance, declaring an OTT video offering as an MVPD would allow it to take advantage of the Commission's Program Access and Retransmission Consent Rules. These prevent certain entities from improperly withholding cable-affiliated programming from competitors and require that negotiations between parties for broadcast programming be in good faith. These rules, however, do not guarantee a successful outcome, which is determined by private marketplace negotiations; they only bring parties to the table. But, OTT video providers are doing more than just talking these days. You only have to look at the deals cut by Sony, Dish and others to see that negotiations can commence and agreements can be struck without FCC involvement.

It has also been asserted by some people that, as a response to Commission action, the Registrar of Copyrights at the United States Copyright Office could extend compulsory copyright to online video programmers wishing to transmit broadcast signals. My indications are that the Copyright Office is not poised to act nor seeking our advice or input. Moreover, having spent some time over the years working on potential amendments to the Copyright Act, I am not sure how much flexibility the Registrar would

¹ Cisco, VNI Forecast Highlights, United States – 2018 Forecast Highlights, Internet Video, http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (last visited Dec. 18, 2014).

have to deem an MVPD potentially covered by this item as eligible for a compulsory copyright license. In fact, the U.S. District Court for the Southern District of New York has stated that being like a cable system does not make it a cable system for purposes of a compulsory copyright license.² Likewise, the statute seems to be fairly clear in its use of the terms “cable system” and “satellite carrier,” as opposed to “MVPD.”³

While there may be a few tangible upsides to this item, there are also potential downsides. And this regime is not permissive; if an OTT meets the criteria, the Commission would presumably declare the OTT to be an MVPD—even if the OTT doesn’t want such a declaration. I hope to engage with stakeholders going forward to understand how these burdens could impact current and future business models or plans.

Moreover, I am deeply concerned by the suggestion that a cable-affiliated network could be required to obtain the online rights to all of its programs, which it may not own today, to make them available to OTT MVPDs. This suggested mandate would occur even if the cable provider didn’t want the rights for its own business purposes. In effect, we would be forcing a company to negotiate and purchase copyrights for purposes of selling a more complete video package to an OTT MVPD. Really? Not only is this beyond offensive, it may just violate the U.S. Constitution. It is extremely unlikely that I would support such a requirement in any final version, and it may taint my view of an entire item.

Finally, and maybe most importantly, I am extremely troubled that the Commission may be headed down a path to capture OTT video providers within Title VI of the Communications Act. Although it would not subject such providers to the full panoply of requirements, shoehorning Internet video providers—the quintessential edge providers—into a framework that many people, including those in leadership in Congress, have deemed in need of review or overhaul is just plain wrong. As I have previously stated, this effort, combined with a number of other items seeking to subsume Internet offerings into Title II, would seem to leave little of the Internet free from the grasp of the Communications Act, a law not written for the Internet age. How is it that some edge providers fail to see that the Commission will seek to extend its authority to their business models or plans?

Although I have serious concerns about the direction in which the Commission is headed, I would like to thank the Chairman and my fellow colleagues for working together to get this item to a better place. A number of harsher proposals, such as mandatory carriage requirements, were removed or modified at my request. I would also like to recognize the Media Bureau staff who spent many late nights working on this notice.

² See *American Broadcasting Companies, Inc. et al. v. Aereo, Inc.*, Nos. 12–cv–1540, 12–cv–1543, slip op. (S.D.N.Y. Oct. 23, 2014).

³ See 17 U.S.C. §§ 111, 119, 122.