

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS AND
THE NATIONAL LEAGUE OF CITIES**

The National Association of Telecommunications Officers and Advisors (“NATOA”)¹ and the National League of Cities (“NLC”)² submit these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”), released February 19, 2016, in the above-entitled

¹ NATOA is a national trade association that promotes local government interests in communications, and serves as a resource for local officials as they seek to promote communications infrastructure development.

² The National League of Cities (NLC) is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

proceedings.³ NATOA and NLC commend the FCC for moving forward with this NPRM and taking another look at how consumers may access multichannel video programming.

DISCUSSION

Introduction

“This rulemaking is complicated.”

FCC Commissioner Jessica Rosenworcel⁴

For nearly two decades, the FCC has attempted to fulfill its statutory mandate under Section 629 of the Communications Act to “assure a commercial market for devices that can access multichannel video programming and other services offered over multichannel video programming systems.”⁵ In 1998, the FCC adopted a Report and Order that sought to “ensure the commercial availability of “navigation devices,” the equipment used to access video programming and other services from multichannel video programming systems.”⁶ At that time, FCC Chairman William E. Kennard stated: “The Commission’s action today ensures that consumers will be able to purchase their television set top box and other equipment from retail stores starting in July 2000. This will create a huge market for the manufacture, distribution and sale of these devices. It will enhance innovation and bring consumers better prices. Our

³ *In the Matter of Expanding Consumers’ Video Navigation Choices and Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket 16-42 and CS Docket No. 97-80, FCC 16-18 (rel. Feb. 18, 2016) (“NPRM”).

⁴ NPRM, Statement of Commissioner Jessica Rosenworcel.

⁵ NPRM, ¶ 1.

⁶ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996 and Commercial Availability of Navigation Devices*, Report and Order, CS Docket No. 97-80, FCC 98-116 (rel. June 24, 1998) (“Report”), ¶ 1.

decision today is another key part of the larger goal of creating competition across the spectrum of telecommunications services.”⁷ Unfortunately, the Commission’s CableCARD effort was less than successful.

In 2010, the FCC began work on a new proceeding – the AllVid concept – that sought “comments on specific steps [the Commission could] take to unleash competition in the retail market for smart, set-top video devices” that could “spur investment and innovation, increase consumer choice, allow unfettered innovation in MVPD delivery platforms, and encourage wider broadband use and adoption.”⁸ In a statement echoing that of Chairman Kennard over a decade earlier, FCC Chairman Julius Genachowski said: “Today the Commission acts to increase video choices for consumers, and unleash competition and innovation in the retail market for smart video devices. . . . Consumers want devices that can navigate the universe of video programming from all of these sources and present the choices to them in a simple, integrated way.” But this effort, too, was unsuccessful and came to an end when the Commission “ultimately decided not to propose rules to mandate it.”⁹

And here we are today with a new proceeding with new proposed rules “that are intended to assure a competitive market for equipment, including software, that can access multichannel video programming.”¹⁰ And we have another chairman, Tom Wheeler, stating: “In the end, this

⁷ Report, Statement of FCC Chairman William E. Kennard.

⁸ *In the Matter of Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, and Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, and PP Docket No. 00-67, FCC 10-60 (April 21, 2010), ¶ 1.

⁹ NPRM, ¶ 8.

¹⁰ *Id.* at ¶ 11.

proposal is about one thing: putting the future of TV in consumer's hands. You should have options that competition provides. It's time to unlock the set-top box market – let's let innovators create, and then let consumers choose.”¹¹

To some, the FCC's latest effort to “unlock the box” and provide consumers with real set-top box choices and, perhaps, lower prices, might best be summed up as “everything old is new again.” But to its proponents, perhaps it's “third time's the charm.” But whatever the outcome of this proceeding, one thing is certain – this rulemaking is complicated. To assert otherwise is to ignore the many issues that have been raised concerning the ramifications of the Commission's latest proposal.

Argument

“What's the rush, FCC?”

Rep. Yvette Clarke, D-NY¹²

A wide variety of commenters have voiced opposition to, or at least raised concerns about, the Commission's proposal. Cable and satellite providers, equipment manufacturers, content providers, consumer groups, minority programmers, federal agencies, individuals, and a large bipartisan block of Senate and House members have all raised questions and concerns about the proposal. Among the issues raised to date are: the plan's failure to recognize the

¹¹ NPRM, Statement of Chairman Tom Wheeler.

¹² Politic365 Staff, *Clarke Launches Multicultural Media Coalition, Explores FCC Set Top Rule*, Politic365, May 19, 2016, <http://politic365.com/2016/05/19/clarke-launches-multicultural-media-coalition-explores-fcc-set-top-rule/> (Congresswoman Yvette Clarke and the congressional Multicultural Media Caucus ask the FCC “to press pause on its current set top box rulemaking to conduct, and listen to forthcoming, impact studies about how this rule will either benefit or harm small, diverse, and independent voices.”)

interrelationship between content distribution and compensation;¹³ the creation of an unfair competitive landscape;¹⁴ copyright infringement concerns;¹⁵ harms to contractual relations;¹⁶ adverse effects on minority and diverse programming;¹⁷ potential impact on the 21st Century Communications and Video Accessibility Act of 2010 (“CVAA”);¹⁸ threats to user privacy and security;¹⁹ lack of consumer protection requirements;²⁰ loss of control over user interface;²¹

¹³ Directors Guild of America and the International Alliance of Theatrical Stage Employees Comments at 2 (“[W]e do not see the NPRM taking into consideration the critical interrelationship between the distribution of content and the compensation system that pays filmmakers and craftspeople for actually creating that content.”).

¹⁴ Hispanic Leadership Fund Comments at 1 (“[T]his proposal] is an intervention that appears specifically designed to pick winners and losers in the marketplace – using government fiat to transfer billions in dollars of business value from content creators and programmers to large technology companies”).

¹⁵ Recording Industry of America, *et al.* Comments at 4 (The result of the FCC’s proposal “would be to frustrate the incentives to create and disseminate copyrighted content via MVPD services and stifle innovation in business models that allow consumers access to music.”).

¹⁶ Echostar and DISH Comments at 19 (“Third-party manufacturers . . . made clear that they do not feel bound by any limitations imposed in the contracts through which content providers authorize MVPDs to distribute their programming.”).

¹⁷ Multicultural Media, Telecom and Internet Council, *et al.* Comments at 3 (“The unintended consequences of the FCC’s choice would harm diverse programmers and content creators by violating their copyright and licensing agreements and existing distribution arrangements with MVPDs, the lifeblood of their very existence.”).

¹⁸ American Council of the Blind Comments at 1 (“ACB raises deep concern over the expansion of Multi-Video Programming Systems (MVPS), to the degree by which expansion of such regulations runs the risk of derailing current efforts under the CVAA to make such systems accessible for individuals with sensory disabilities.”).

¹⁹ Digital Citizens Alliance Comments at 11 (“[T]he FCC’s proposals could make it easier for hackers and malware purveyors to trick consumers into turning over sensitive financial and personal information.”).

²⁰ Jessica L. Rich, Director of the Bureau of Consumer Protection, Federal Trade Commission, Comments at 2 (“I propose that if the FCC adopts the rules, MVPDs should require that third-

increased compliance costs and re-engineering of networks;²² and threats to competition and delayed innovation.²³

We do not vouch for the credibility of any of these commenters or the veracity of any of their claims. But we do share Rep. Clarke’s concern: “What’s the rush?” Some suggest that it would take at a minimum of three years before consumers would see any new set-top boxes on the retail market in the event the Commission adopts its proposed rules. Considering the earlier failed attempts to open up the set-top box market and provide rental cost relief to subscribers, we believe the FCC should fully examine the record, rely on credible data, and undertake any necessary studies in order to “get it right.”

Furthermore, while engaged in this fact-finding mission, we urge the Commission to address how public, educational, and governmental access channels (“PEG channels”) will be treated under this proposal. Like minority and diverse programmers, PEG channels also need assurances that “unlocking the box” will not result in harming the distribution, availability, and copyright protections of their programming. As we have pointed out many times before, PEG channels face obstacles in getting their programming listed on electronic program guides

party set-top box manufacturers represent *to consumers*, as well as to MVPDs, that their products comply with cable and satellite statutory privacy provisions.”).

²¹ Roku Comments at 14 (“[R]ules that sever MVPDs from the user interface could lead to a reduction in low-price packages, or lead video distributors to pursue additional revenue streams from consumers to make up the lost revenues derived from the user interface.”).

²² National Association of Manufacturers Comments at 1 (“The proposed rulemaking on video navigation choices may result in increased compliance costs, re-engineering of networks, and new hardware requirements therefore diverting critical resources away from enhancements to the telecommunications networks the manufacturing sector is dependent on for driving innovation.”).

²³ Roku Comments at 2 (“The proposed rules carry a very real and significant risk of impeding the innovation that is occurring today by replacing today’s market-driven advances that are expanding consumer choice with a lengthy rule making and standard-setting process.”).

(“EPGs”). The inability to have universal access to EPGs results in consumers being unable to find PEG programming, or from viewing such programming on demand, or recording such programming for later viewing. Furthermore, PEG operators have long sought to protect their channel placement on cable systems, oftentimes through franchise agreements. We must not permit the progress that has been made to date on these issues to be undermined or undone by third parties that may “repackage” MVPD programming for their own business purposes with little or no concern for its effect on PEG channels. In addition, like any other content providers, PEG channels need to know that their programming will not lose its copyright protections as a result of the Commission’s proposed rules.

Finally, we also raise a number of customer service issues that need to be addressed by the FCC as it moves forward with this proposal. For the most part, current set-top box practice includes operator installation of boxes (though some do offer consumers a “do-it-yourself” installation option); equipment insurance and upgrades; and customer service support. How will third party equipment providers handle these issues? Will consumers be left on their own when it comes to installation or repair? Who will they call when there’s a problem with the equipment? Will insurance for these new devices be available? Providing consumers with set-top box choices will prove little benefit unless sufficient consumer protections are in place to address these and other service concerns.

Conclusion

At this time, our associations do not take a formal position on the Commission’s proposed rules. However, considering the fact that previous efforts to “unlock the box” have fallen short, we urge the Commission to take its time and undertake a complete and full

examination of the record to ensure that its proposed rules “do no harm” and will truly result in increased consumer choice and lower consumer costs.

Respectfully submitted,



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