



July 1, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

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

Dear Ms. Dortch:

On June 29, 2016, members of the Consumer Video Choice Coalition (“the Coalition”), represented by John Bergmayer, Kate Forscey, and John Gasparini of Public Knowledge; Chip Pickering, Angie Kronenberg and Christopher Shipley of INCOMPAS; Joseph Weber of TiVo Inc. and counsel Dave Kumar of Goldberg, Godles, Wiener & Wright LLP; John Howes of CCIA; and Ken Plotkin of Hauppauge Computer Works, Inc. and the undersigned counsel (collectively, the “Coalition representatives”), met with Gigi B. Sohn, Counselor to the Chairman, Jessica Almond, Legal Advisor to the Chairman, and Chief Technologist Scott Jordan. Ernesto Falcon of the Electronic Frontier Foundation, Linda Sherry of Consumer Action, and Adam Goldberg, consultant to Public Knowledge, participated by phone.

The subject of the meeting was the Commission’s Notice of Proposed Rulemaking (“NPRM”),¹ the Coalitions’ recommendations, and Coalition representatives’ perspective on and questions about the recent reworked proprietary app proposal² of some MVPDs (“MVPD Proposal”), as well as suggestions for how the MVPD Proposal could be modified to be consistent with the stated goal of the NPRM of “allow[ing] consumer electronics manufacturers, innovators, and other developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface.”

¹ *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18, at 2, ¶ 1 (rel. Feb. 18, 2016) (“NPRM”).

² Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 16, 2016) (“NCTA Letter”).

The Coalition representatives said that the Coalition has consistently supported core principles that are fundamental to the Commission's NPRM: (1) an open and independent user interface ("UI") is necessary to ensure innovation and access to new content; (2) consumers, at a minimum, must continue to receive the functionality that they enjoy and rely upon today; (3) consumers are entitled to device interoperability across all MVPDs; and (4) there must be strong provisions for protection and enforcement of rights. As the Coalition observed in its June 22nd ex parte letter,³ the MVPD Proposal, although it crucially lacks a commitment to a fully open and independent user interface and complementary features, constructively demonstrates that the Commission's proposed timeline for expecting major MVPDs to achieve IP-based delivery through open and interoperable standards is feasible, and that IP-based delivery of MVPD content to third-party devices is consistent with copyright concerns and protection. The MVPD proposal also took a step toward meeting the Commission's core principles: Unlike previous stances, the MVPDs now acknowledge the necessity of (1) open standards, (2) user interface competition (to some degree), (3) integrated search, and (4) commercial freedom for device makers.

The Coalition representatives observed that neither the Commission in its NPRM nor the Coalition in its Comments has suggested that there is only one technological path to achieving the goal of an interoperable, competitive, and secure IP-based solution. The technology outlined in the MVPD Proposal is potentially technically consistent with (e.g., could be "bolted on to") the CVCC Technical Appendix as filed with the Coalition's Comments,⁴ which describes a standards-based approach that would implement the three information flows for Discovery, Entitlement, and Content delivery, so as to provide all the information necessary for a fully competitive user experience. The MVPD, through IP delivery and Javascript libraries within their App, would provide the defined three information flows to the third party device and therefore enable both the MVPD user interface and the device user interface to access and play content in their respective applications or devices. By exposing the information flows through the MVPD application code in a standard format, the MVPD would use the same networking and security implementation that remains proprietary to each MVPD. While the CVCC Technical Appendix defines the information flows and leaves network-specific implementation up to each operator, common IP delivery to applications, per the MVPD proposal, could provide a combined solution, potentially bringing solutions to market faster.

³ Letter from Robert S. Schwartz, Counsel to Hauppauge Computer Works, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 22, 2016).

⁴ Coalition NPRM Comments, Appendix.

However, as noted above and as discussed in the NPRM, the goal of an interoperable, competitive, and secure IP-based solution requires a fully independent UI, through which sufficient information passes to enable manufacturers and app developers to create competitive products that provide their own Electronic Program Guide and grid of programs to which the subscriber has rights — *features that the MVPD Proposal appears to lack*. As described in general terms in the MVPD Proposal (and assuming comparable content delivery and resolution) the part inconsistent with this goal is the encapsulation of the delivery into an app that is available only in the context of the MVPD’s own UI. In its present form, to the extent implementable, the MVPD Proposal would appear to deny subscribers the present and future benefit of competition in the offer, choice, recording, and presentation of programming. It would, moreover, obstruct and complicate the path for potential competitive entrants.

Questions Raised

The Coalition representatives observed that the one-page outline of the MVPD Proposal also raised a number of questions about both the proposal and the terms on which it would be offered and implemented. These questions were summarized as follows:

- **The programming.** The commitment is to supply apps, not programming.⁵
 - Would the apps provide access to *all* of the programming to which the *subscriber* has rights under the MVPD service that the subscriber has paid for?
 - On what basis will an MVPD determine whether programming can be provided to a consumer who relies on an app rather than on a leased device?
 - Will the difference between the subscriber’s right to search for and receive programming through an app and through a device be disclosed in advance to the subscriber?
 - Will this difference be determined by contracts between content suppliers and MVPDs? Will the terms of such contracts be disclosed to device suppliers and to consumers? Will they be changeable during the life of devices that incorporate the app?
 - Would all provided apps enable user-directed recording, or could apps be compliant yet not offer user recording? If offered, could there be additional limitations on the recordable content, or consumer playback of recordings, compared to leased devices or compared to present CableCARD devices? Could surcharges be imposed for “home” recording?

⁵ NCTA letter at 1.

- **The nature of the “apps”.** It is unclear whether the MVPD proposal envisions that MVPDs would provide a single app, and require competitors to design their devices in such a way as to work with this app, whether it envisions that MVPDs would create apps native to specific platforms, or whether it envisions that MVPDs would license technology to competitors to create apps for their platforms.
 - The Coalition representatives noted an MVPD provided proprietary app, if this were the only way for consumers to access the video content they have paid for, would not allow for an independent user interface and therefore not be consistent with the notion of a “competitive navigation device.”⁶
 - Would the proposed apps rule out OS platform-related charges for apps? How would this be enforced?
 - What interaction would there be, if any, between MVPD provided proprietary apps and the proprietary apps of content providers? Does the MVPD Proposal’s limitation of MVPD content only via MVPD apps prevent or preclude these applications? If not, what are the conditions and limitations?
 - If user-directed recording is supported, would this be exclusively in the “cloud”? Would available features, user controls, and network sharing be equal to those provided on future leased devices and present CableCARD devices?
 - Some Coalition representatives also noted that broadband delivery of video programming could have implications for Open Internet policy, including such matters as data caps and zero-rating, and that customers should not be required to purchase broadband from their MVPD (or need broadband at all) to make use of competitive navigation devices.

- **The licensing of the apps.** The Coalition representatives observed that a “royalty free” assurance did not necessarily include a freedom from other potentially disabling conditions, legal or technical prerequisites, and failures to supply necessary technology, certificates, or access to facilities.⁷

⁶The app proposal, like OCAP before it, would require hosting the full MVPD user experience, thus is inherently more technically complex to create, test and deploy than protocol-based approaches.

⁷ The Coalition representatives also expressed concern over the apparent assumption in the MVPD Proposal that all potential proprietary app licensors would be free of any obligation to comply with existing Commission Rules 76.1201 and 1203, which limit license impositions to protection of the MVPD network from electronic harm or theft of service. The Coalition representatives cited to filings in CS Docket 97-80 in 2000 through 2002 in which (prior to the DFAST License) retail interests expressed frustration with offered terms that appeared to violate these rules, and with the unavailability of sufficient information to construct compliant devices. *See* CS Docket No. 97-80, *In the Matter of Implementation*

- The Coalition representatives also asked whether an app license could carry a requirement that the device entrant grant back a license to all of its intellectual property pertaining to the licensed device, or could require that a device entrant promote the MVPD app in its marketing materials or give it particular prominence in the device's user interface.
- The Coalition representatives noted that the condition laid out in the MVPD Proposal that a device must comply with *all* of the terms of content suppliers' programming contracts⁸ would on its face contravene 47 CFR 76.1201 and 76.1203, which limit licensing impositions on navigation devices to those seeking to avoid electronic harm to the network or unauthorized receipt or theft of service.
 - Do the MVPDs assert that these regulations would not apply because, as argued in MVPD comments, software apps are not "equipment" or "navigation devices"?⁹
 - If the MVPDs acknowledge that navigation device regulations apply to third party software apps, do they assert that the requirement to comply with *all* provisions of confidential contracts is consistent with sections 76.1201 and 76.1203?

The Coalition representatives stressed that many of these questions are premised on whether the MVPD Proposal can be made consistent with the four core principles discussed at the outset of this letter and the goals of the NPRM. They observed that if modified to support *a truly open and independent user interface* and complementary features and functionality, this technology could potentially be a part of, or a basis for, a solution that complies with the goals of the Commission's NPRM. If so offered, it also would have the potential to simplify the NPRM itself, both by simplifying the "app parity" requirements and by simplifying the technological requirements upon both the MVPDs and competitive device manufacturers.

of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report at 1 - 7 (Aug. 2, 2000); ex parte letter of Jennifer L. Blum on behalf of RadioShack Corporation and Circuit City Stores, Inc. and appended material, July 12, 2001; Consumer Electronics Retailers Coalition Reply to the NCTA Letter as to "Retail Set-Top Initiative" and to the NCTA Response to CERC Status Report "J2K Plus 1" at 7 - 10, Nov. 6, 2001; CERC Reply to NCTA Attempt To Further Escape Commission Deadlines and Expectations for Competition and Interoperability at 18 (Aug. 1, 2002).

⁸ NCTA letter at 2.

⁹ See NCTA NPRM Comments at 20 - 24.

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The Coalition representatives pledged their continued work with the Commission toward achievement of the goal of assuring competition in the navigation devices market and providing consumers with meaningful choice in the display, selection, and use of video programming that MVPD subscribers have paid for.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

Consumer Video Choice Coalition

/s/ Robert S. Schwartz

Constantine Cannon LLP

Counsel to Hauppauge Computer Works, Inc.

Cc:

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