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United States Senate

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May 23, 2016

The Honorable Thomas E. Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

In February 2016, the Federal Communications Commission ("FCC") issued a Notice of Proposed Rulemaking ("NPRM") seeking comment on changes to existing set-top box rules. These changes would require Multichannel Video Programming Distributors ("MVPDs") to deliver to third-party manufacturers selling set-top boxes and suppliers of software, video programming and other information about what programming is available to consumers. The NPRM states that these rules are "intended to assure a competitive market for equipment, including software, that can access multichannel video programming."

I support the goal of greater competition and innovation in the marketplace for how consumers are able to access and watch video programming. That is why I have been heartened to see a flourishing of new technology over the past several years that give consumers greater access to content on a growing array of devices. However, I am concerned that this proposed rulemaking would replace marketplace solutions with greater government regulation. Further, there are significant concerns as to how the FCC's proposal affects important consumer privacy and copyright interests.

Under federal law, MVPDs must keep subscribers' viewing habits private, abide by advertising limits during children's programming, and build devices that display emergency alerts, closed captioning, and parental controls. These privacy protections are important to my constituents and others around the country. It remains unclear how these important consumer protections will be extended under this proposal in an effective manner.

Further, existing copyright protections have encouraged a vibrant, creative climate which has led to more interesting and greater quality television content for consumers. There are concerns that the proposed regulations will harm creators and impede innovation thereby ultimately hurting viewers. Additionally, it is important that this proposed rulemaking not disproportionately affect rural providers and consumers.

Achieving greater competition in the set-top box marketplace is a valid goal but it must not come at the expense of important consumer protections, market-based competition, or America's creators and innovators.

Sincerely,

Charles E. Grassley
Chairman
United States Senate Committee on the Judiciary

cc: Commissioner Mignon Clyburn
Commissioner Michael O'Reilly
Commissioner Ajit Pai
Commissioner Jessica Rosenworcel

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you very much for your letter sharing your views about how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact the privacy protections afforded to pay-TV consumers, the legal rights of copyright owners and creators, and rural pay-TV providers. I take your input on these issues seriously and assure you that it will receive careful consideration.

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, $231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.[1] With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.[2] Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

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[1] U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY, 17 (Jun. 23, 2016).

[2] One recent analysis found that the cost of cable set-top boxes has risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

You shared your views about how this proceeding might affect the privacy protections afforded to pay-TV consumers. I share your goal of ensuring that the privacy protections that exist today will also apply to alternative navigation devices and applications. Pay-TV providers abide by privacy obligations under Sections 631 and 338 of the Communications Act. These privacy obligations, among other things, prohibit pay-TV providers from disclosing personally identifiable information concerning any subscriber, including data about a subscriber's viewing habits, without the subscriber's prior consent.

I strongly believe that third-party app developers and device manufacturers must afford consumers the same level of protection as afforded by pay-TV providers. While the NPRM proposes that competitive devices and apps certify compliance with the privacy protections in the Act, we also invited parties to provide alternative proposals that would ensure the preservation of these important privacy protections.

We will continue to engage with stakeholders on this important issue. Notably, our record includes filings on this issue from the Federal Trade Commission (FTC) and a group of state attorneys general (state AGs)—representing the states of California, Illinois, New York, Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, Oregon, Pennsylvania, Vermont, and the District of Columbia. In their comments, the FTC and the state AGs explain that—if we require competitive devices and apps to publicly commit to providing the same privacy protections required of pay-TV providers under the Communications Act—the FTC and the state AGs would be willing and able to enforce the privacy commitments made by third party app and device manufacturers just as they currently enforce other privacy commitments made by apps and devices. I am confident that by working with stakeholders and our federal and state partners, we will identify clear rules of the road that will afford consumers with strong privacy protections and the enforcement mechanisms necessary to ensure compliance by third parties.

You also shared your views about how this proceeding might affect copyright interests. The FCC's authority to regulate communications has always existed alongside content owners' rights to control the duplication, distribution, or performance of their works. Starting with broadcast, and continuing with cable, satellite and the internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe that we can foster competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the Writers Guild of America, West (WGAW), who concluded the following in one of its filings in this proceeding: "[t]he proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content."[3]

I share your goal of ensuring that pay-TV subscribers in all parts of our country can enjoy the benefits of consumer choice without unduly burdening small, rural providers of pay-TV. Recognizing the important role that small pay-TV providers play in many rural communities, the Notice of Proposed Rulemaking (NPRM) adopted in February seeks comment how this proceeding could affect these providers. Notably, the NPRM proposes to exempt all analog cable systems from new requirements while also seeking comment on the American Cable Association's proposal to exempt all pay-TV providers serving one million or fewer subscribers from any rules. The NPRM further asks how the Commission can ensure that any rules adopted are not overly burdensome to pay-TV providers. We are continuing to engage with all stakeholders on this issue, including small pay-TV providers. Customers of MVPDs of all sizes deserve choice and innovation, and I am confident that we will be able to find a balance that accurately reflects the technology and resources available to truly small providers.

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[3] Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).

The record we are developing will help us preserve strong copyright and privacy protections and avoid overburdening small pay-TV providers while delivering American consumers meaningful choice. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,

Tom Wheeler