The voice of mid-size communications companies

July 22, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communications: MB Docket Nos. 16-42, 15-216; CS Docket No. 97-80

Dear Ms. Dortch:

On July 20, 2016, Genny Morelli and the undersigned met with Robin Colwell of the Office of Commissioner O'Rielly regarding the above-captioned proceedings.[1]

The comments filed by ITTA and its member companies in this proceeding addressed the myriad significant legal and policy shortcomings of the proposals contained in the NPRM.[2] In our meetings, we referenced these comments, and expressed general support for the alternative "ditch the box" proposal advanced by NCTA and others,[3] except as noted below. This alternative proposal appears to address several of ITTA's concerns with the NPRM's proposals, such as control over the user interface with the multichannel video programming distributor's (MVPD's) service. Moreover, a critical element of the alternative proposal is its cost-effectiveness using a single, open standards-based approach and with no need for ITTA's members to reengineer their networks to accommodate the proposed app. Furthermore, based on our understanding of the alternative proposal, no additional consumer "gateway" device would be required when the consumer purchases video and broadband services from ITTA's members.

We discussed the burdensome costs that smaller, new entrant MVPDs would be forced to bear associated with development of any third-party navigation solution. Those costs would impose tremendous hardship on ITTA members and other smaller MVPDs that are often the most recent and typically the third, fourth, or fifth entrant in their markets, and thus occupy a more precarious competitive position than the already entrenched cable and satellite providers. To illustrate, we described how one of ITTA's members, Frontier Communications, has limited,

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[1] *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd 1544 (2016) (NPRM).

[2] *See* Comments of ITTA, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Comments of Frontier, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Comments of CenturyLink, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016).

[3] *See* Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed June 17, 2016).

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overlapping technical resources both to launch a new video service in over three-dozen markets and to develop a new app in conformance with whatever requirements the Commission ultimately adopts in this proceeding.

In light of these costs, we expressed the benefits of a small provider exemption from any rules adopted by the Commission. More specifically, we urged the Commission to exempt providers with two million or fewer subscribers. We pointed out that over 90% of MVPD subscribers would be covered by the rules and the vast majority of consumers throughout the country would have three or more (two DBS providers and a large cable MVPD) open standards device choices under a two million subscriber exemption. In addition, adoption of a two million subscriber exemption is consistent with the requirements of section 629 of the Act. Certainly, rules which would mandate the "commercial availability" of an app to over 90% of MVPD subscribers satisfies any reasonable interpretation of the statutory standard.

At a minimum, in the absence of a small provider exemption for providers with more than one million subscribers, we suggested, for providers with more than one million but with two million or fewer subscribers, an implementation delay of two years, beyond the two-year implementation period suggested in the alternative proposal, for the applicability to such providers of whatever requirements the Commission ultimately adopts in this proceeding.

Finally, we expressed displeasure with the Chairman's announcement last week that the Commission will not at this time move forward with the above-captioned proceeding reviewing the totality of the circumstances test and the obligation of broadcasters and MVPDs to negotiate retransmission consent agreements in good faith. ITTA and others have introduced compelling evidence into the record regarding how the current system is broken and particularly skewed against smaller MVPDs such as ITTA's members.[4] We urged that Commissioner O'Rielly work with the next FCC Chair to place this proceeding high on the next Commission's priority list.

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

Michael J. Jacobs
Vice President, Regulatory Affairs

cc: Robin Colwell

[4] *See, e.g.*, Comments of ITTA, MB Docket No. 15-216 (filed Dec. 1, 2015); Joint Reply Comments of the Networks for Competition and Choice Coalition and the Open Technology Institute at New America, MB Docket No. 15-216 (filed Jan. 14, 2016).