

August 2, 2016

VIA ECFS

EX PARTE NOTICE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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 July 29, 2016, Chip Pickering, Angie Kronenberg, and the undersigned counsel of INCOMPAS and Jeff Kardatzke of Google Fiber (the "INCOMPAS Representatives") spoke on the phone with Gigi Sohn, Counselor to Chairman Wheeler, Jessica Almond, Legal Advisor to Chairman Wheeler, Louisa Terrell, Advisor to Chairman Wheeler, and Eric Feigenbaum of the Office of Media Relations, to discuss several topics related to the above-captioned proceeding.

The INCOMPAS Representatives addressed the July 21, 2016 filing of the National Cable & Telecommunications Association ("NCTA"), et al.,¹ which provides additional technical information for a HTML5 apps-based alternative ("apps proposal") to the original approach proposed by the Commission in its Notice of Proposed Rulemaking ("NPRM").² Following the initial release of the apps proposal in June,³ INCOMPAS has examined this approach individually⁴ and as a member of the Consumer Video Choice Coalition ("CVCC")⁵

¹ Response to Questions About Open Standards HTML5 Apps-Based Approach, Rick Chessen & Neal M. Goldberg, National Cable & Telecommunications Association, et al., MB Docket No. 16-42, CS Docket No. 97-80 (filed July 21, 2016) ("NCTA Response").

² See 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").

³ See Letter from Paul Glist, Davis Wright Tremaine LLP, MB Docket No. 16-42, CS Docket No. 97-80 (filed June 16, 2016).

⁴ See Chip Pickering, *Competition and Innovation Principles Will Help FCC "Unlock the Box,"* MEDIUM (July 11, 2016), <https://medium.com/@ChipPickering/competition-and-innovation-principles-will-help-fcc-unlock-the-box-faa67f53a980#.srflajqzx>.

⁵ See Letter from Robert S. Schwartz, Constantine Cannon LLP, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (filed July 1, 2016) ("CVCC Ex Parte Letter").

using four core principles fundamental to the NPRM and any proposed regulatory solution to address the competitive concerns underlying Section 629. A competitive solution must include: (1) an open and independent user interface (“UI”) to ensure innovation and access to new content; (2) at a minimum, equivalent functionality to that enjoyed and relied upon by consumers pursuant to the CableCARD regime; (3) device interoperability across all MVPDs; and (4) strong provisions to protect and enforce rights. We expressed concern that the app proposal falls short of these principles and the Commission’s statutory goals.

With respect to integrated search, INCOMPAS cautioned that the apps proposal may not provide third-party devices with information and metadata necessary to actualize a truly integrated search feature. The apps proposal would require device manufacturers to license metadata from third-party providers (such as Rovi or Gracenote) for linear content, but fails to provide details about how metadata for VOD content would be made available to competitive navigation devices. Under the apps proposal, device manufacturers would be unable to present sufficient information to consumers about available VOD programming, significantly limiting a third-party device’s utility. NCTA’s illustrative example of a consumer moving from search results to an app on a Roku device⁶ requires more information and metadata about linear and VOD content than app proposal proponents have been willing to provide up to this point. For example, Roku’s search requires providers of applications embedded on its platform to submit all relevant metadata to Roku via a unique identifier that indicates what content to play back when launched as well as information about purchasing options.⁷ To have a Roku-like experience via the app proposal, each MVPD would be required to submit all of their linear TV and VOD catalog information to each device manufacturer, which NCTA has not committed its members to do in its filing. NCTA also previously has argued that it does not have the rights to submit the metadata required by a partner like Roku, leading critics to wonder whether and how the app proposal has changed that position.⁸

The INCOMPAS Representatives indicated that the search feature’s user experience could be frustrated by MVPDs’ intentions not to provide individual subscriber entitlement data through search. This would prevent the search function from filtering out content the user is unable to access; users would not know if they can play content after they have selected it from the search feature. The app proposal also seeks to limit search results provided on third-party devices to “licensed content” to prevent presentation of pirated content. While well-intentioned, the app proposal would chill search usage and restrict users from searching the general Internet through their personal devices. The INCOMPAS Representatives agreed that pirated content should not be purposefully co-mingled with legitimate content sources, but as presented the app proposal would restrict access to lawful, popular, user-generated content on sites such as YouTube, Facebook, and Vimeo.⁹ Furthermore, non-MVPD affiliated programmers would benefit from a competitive navigation device market to share their content with a wider audience. The app proposal would foreclose the opportunity for many independent programmers to make

⁶ See NCTA Response at 19-20.

⁷ See Roku Search, ROKU, <https://sdkdocs.roku.com/display/sdkdoc/Roku+Search#RokuSearch-IntegratingYourVODChannelContentIntoRokuSearch> (last visited Aug. 1, 2016).

⁸ See Reply Comments of NCTA, MB Docket No. 16-42, CS Docket No. 97-80, at 39-40 (filed May 23, 2016).

⁹ NCTA Response at 20.

their programming available via search features of third-party devices, and keep search results firmly within MVPDs' control.

The INCOMPAS Representatives also called on MVPDs to provide content parity under the apps proposal and suggested the Commission seek additional information to determine what content would be available on an MVPD-leased device as opposed to a MVPD-provided app. NCTA's filing proposes to include "all linear and all on-demand programming the MVPD *has the rights to distribute* through their MVPD service."¹⁰ While seemingly motivated to include all content from MVPD offerings on an app, the proposal makes no commitment and indicates that some content could continue to be restricted.¹¹ Additionally concerning is the admission that the app proposal would supplement, and not replace, the current MVPD app approach, where content and the user experience is already limited. The proposal contains no assertions about whether an MVPD-provided app would provide content at the same quality level or resolution as that provided to a leased navigation device. Device manufacturers would need assurances, for instance, that apps would not receive SD programming while leased set-top boxes continue to receive HD content.

In terms of providing functionality equivalent to CableCARD navigation devices, the NCTA filing lacks any technical details for implementing a third-party DVR or for local recording of content accessible by apps. Consumers have come to rely on the flexibility that DVRs provide to them, and their elimination would be a step back for the user experience. While the NCTA Response claims that the NCTA is "investigating potential for local recording," any expectations are tempered through statements indicating that content licensing agreements likely will render the investigation moot.¹² As noted by the CVCC, "courts have repeatedly held that home recording is a fair use."¹³ Third-party video navigation devices should not be denied DVR functionality under the app proposal.

The INCOMPAS Representatives also raised concerns about NCTA's claims that consumers could access both their video service and broadband Internet access service ("BIAS") via the same cable gateway device if the consumer chooses an Internet service provider different from their pay-TV provider. The filing indicates that the user could utilize a leased or customer-owned cable modem to access content from MVPD offerings over a managed IP network.¹⁴ However, this networking technique is advanced and not something that consumers could generally configure without technical support. The problem arises with consumer routers, which generally have a single upstream connection. A consumer would connect all of their devices to a router on their home network connected upstream to their ISP, generally by a modem. As a result, consumers cannot properly connect the cable modem for the managed IP video channels, because that device also is intended to be connected upstream of the router. Consumers would have to choose to which network they connect, and only with very advanced networking

¹⁰ *Id.* at 8-9 (emphasis added).

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ See Reply Comments of the CVCC, MB Docket No. 16-42, CS Docket No. 97-80, at 52 (filed May 23, 2016) (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); *Fox Broad. v. Dish Network*, 723 F. 3d 1067 (9th Cir. 2013)).

¹⁴ NCTA Response at 13.

configurations would they be able to connect to both services simultaneously. Taking into account cable's record of providing installation and technical support for CableCARD devices,¹⁵ we noted that it is unlikely that consumers would receive adequate customer support for this advanced networking technique.

Basing the apps proposal on the HTML5 standard for a video-connected application is curious because of the general issues associated with use of HTML5. Native apps continue to be ideal platforms for consumer electronics devices. Although HTML5 provides ample compatibility, its use is not ideal for performance. A major OVD's use of the HTML5 standard is instructive because it used apps with HTML5 to standardize its user interface across all platforms. In 2013, this OVD abandoned HTML5 due to performance issues and adopted a native apps approach instead.¹⁶ The INCOMPAS Representatives noted that NCTA intends to update current applications with the updated HTML5 standard moving forward. This means that older devices—which may lack compatibility with updated HTML5 standards—may suffer a significant drop-off in performance and cause pay-TV consumers serious disruption. Rather than adopt the HTML5 standard, the INCOMPAS Representatives encouraged the Commission to require MVPDs to adopt and develop native apps. While HTML5 app updates are controlled by the app developer (here, MVPDs), control over updates to native apps is held by the user, who can make the ultimate determination about the impact an update might cause to her consumer electronics. Additionally, the cost for consumer electronics devices that support MVPD apps also likely would increase because these devices require a more powerful processor to support a well-performing HTML5 app than a well-performing native application.¹⁷

The INCOMPAS Representatives disputed NCTA's onerous claims that the "bolt on" solution offered by the CVCC¹⁸ "is not an apps-based approach or a compromise."¹⁹ The CVCC solution would use the EME/MSE components of the MVPD-provided HTML5 application to provide video content delivery and DRM license acquisition in ways that could be controlled by the MVPDs to allay concerns about content protection and security. This would represent a subset of solutions currently being developed by the Web Application Video Ecosystem (WAVE). The NCTA filing does not offer any technical concerns associated with the "bolt on"

¹⁵ See FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) at 52 (explaining that users of CableCARD-enabled, retail set-top boxes "encounter more installation and support costs and hassles than those who lease set-top boxes from their cable operators").

¹⁶ See Janko Roettgers, *Netflix Ditches Webkit to Roll Out Slick New UI for Smart TVs, Roku Boxes and Game Consoles*, GIGAOM (Nov. 12, 2013, 9:01 PM), <https://gigaom.com/2013/11/12/netflix-ditches-webkit-to-roll-out-slick-new-ui-for-smart-tvs-roku-boxes-and-game-consoles/> (reporting that to make the HTML5 app work, Netflix "had to tweak its app for each platform, and leave out some features on cheaper and less powerful devices – which is why Roku boxes for example never had access to individual profiles").

¹⁷ See Letter from Trey Hanbury, Hogan Lovells US LLP, MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed July 8, 2016) (expressing Roku, Inc.'s concern that additional hardware requirements to accommodate HTML5 applications would increase consumer prices for streaming devices).

¹⁸ CVCC Ex Parte Letter at 2.

¹⁹ NCTA Response at 27.

proposal, but reiterates the original arguments against the NPRM in areas of consumer privacy, emergency alerts, advertising protection, preservation of channel lineups, and security.

The INCOMPAS Representatives emphasized, however, that the practice of digital certification, which is in common use today, could assure enforceable compliance with MVPD requirements and consumer expectations. Digital certification would simplify achieving the NPRM's goals of device and user interface competition and portability. For a device manufacturer to obtain a digital certificate, a navigation device would need to pass certification testing administered by a certificate authority. The manufacturer also would need to sign a contract agreeing to requirements for privacy, emergency alerts, advertising protection, preservation of channel lineups, and security. A digital certificate would allow third-party devices to electronically verify that they comply with licensing and certification protections outlined in the NPRM.²⁰ Devices seeking to access content from MVPD offerings would present a digital certificate to the MVPD at which point the information about the content and the actual content itself would be exchanged. This would establish a solid, enforceable chain of trust for any device or app that intends to make use of content from MVPD offerings. This process also allows device identification to permit MVPDs to deny access to any device found to be in violation of the rules.

The INCOMPAS Representatives also expressed support for the Computer & Communications Industry Association's ("CCIA") analysis of the app proposal in its most recent filing.²¹

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced docket. Please do not hesitate to contact me if you have questions about this submission.

Respectfully submitted,

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²⁰ See NPRM at ¶ 70 et seq.

²¹ See Letter from John A Howes, Jr., CCIA, MB Docket No. 16-42, CS Docket No. 97-80 (filed July 28, 2016) (raising concerns about the NCTA Response in the areas of content parity, offering a competitive UI, integrated search, technical support, and functionality).