



September 1, 2016

**VIA ELECTRONIC FILING**

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 August 30, 2016, members of the Consumer Video Choice Coalition (“the Coalition”), represented by John Bergmayer and Kate Forscey of Public Knowledge and Adam Goldberg, consultant to Public Knowledge; Dave Kumar of Goldberg, Godles, Wiener & Wright LLP, counsel to TiVo Inc.; John Howes of CCIA; Ken Plotkin of Hauppauge Computer Works, Inc. and counsel Seth Greenstein of Constantine Cannon LLP; Sarah-Wynne Eppes and the undersigned counsel of INCOMPAS (collectively, the “Coalition Representatives”), met to discuss the above-captioned proceeding with Gigi Sohn and Jessica Almond of the Office of Chairman Wheeler, with FCC Chief Technologist Scott Jordan dialing in. Joseph Weber of TiVo Inc., Brad Love of Hauppauge Computer Works, Inc., and Ken Lowe of VIZIO also participated by phone.

The Coalition Representatives reiterated their support for the proposed solution set forth in the Notice of Proposed Rulemaking,<sup>1</sup> with a digital certification requirement used to address concerns relating to preservation of channel line-ups and linear program streams, consumer

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<sup>1</sup> Expanding Consumers' Video Navigation Choices, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, MB Dkt. No. 16-42, FCC 16-18 (rel. Feb. 18, 2016).

privacy protections, and other requirements.<sup>2</sup> As the Coalition has demonstrated, this proposed solution can be implemented using technological standards and independent licensing along with certification in a manner consistent with protection of copyright and revenue streams of MVPDs.

The solution that the FCC proposed in the NPRM satisfies the four core competition and innovation principles identified by the Coalition as necessary to promote competition and innovation in the market for retail navigation devices: (1) open innovation, in particular an open and independent user interface; (2) assurances that consumers would continue to receive, at minimum, the functionality that they enjoy and rely upon today; (3) device interoperability across MVPDs, to enable consumers to purchase devices that work reliably and consistently across all programming distributors; and (4) protection and enforcement of rights so that MVPDs cannot unilaterally withdraw features or content from competitive devices. These core principles remain vital to the FCC's dual goals in the NPRM of saving consumers money and introducing meaningful competition and innovation in the video device market.<sup>3</sup>

Nevertheless, should the FCC proceed with a solution that relies on an MVPD-supplied app for delivering content in a manner specific to the operator's agreements, it should ensure a market that offers meaningful competitive choices to consumers and an "innovation sandbox" environment in which device and app makers can develop products to compete with those offered by the MVPDs. To foster such a market, the FCC's solution must enable device makers to provide consumers with competitive products that (1) use an open and independent UI, (2) enable a robust integrated search feature, and (3) preserve essential features consumers enjoy today, such as home recording. While the Coalition continues to believe that limiting all playback of content to an MVPD app is unnecessary to address the concerns that some critics of the NPRM's proposal have raised, requiring absolute parity in features and available content vis-à-vis competitive devices that are available to consumers today will help ensure that the FCC's solution enables meaningful competition in the market. In particular, any solution adopted by the FCC should ensure that consumers can access all the content they have paid for on the device of their choosing.

***Widely Deployed Platforms:*** The Coalition Representatives stressed that no approach reliant upon MVPD-supplied applications can achieve the goals of the NPRM unless the MVPDs

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<sup>2</sup> See *"Unlock the Box": How to Address Opposition and Boost Competition*, Computer & Communications Industry Association (CCIA) (Aug. 18, 2016), *submitted with* Notice of Ex Parte Letter from John A. Howes, Jr., CCIA, MB Dkt. No. 16-42, CS Dkt. No. 97-80 (filed Aug. 18, 2016)..

<sup>3</sup> See *NPRM* at III.B.

that are subject to this obligation make applications available on a reasonable, nondiscriminatory, and royalty-free basis for all entities capable of providing meaningful marketplace competition. The requirement to make such an MVPD app therefore should apply to systems and products that are broadly available from both today's competitors and promising new entrants. At minimum, such MVPDs should be required to make available applications that will operate on products that receive, display, and/or record transmissions of audiovisual content where one or more of the following criteria of widely-deployed platforms is met:

- The system (and updated versions of that system) that will run the application has been or is being deployed on devices that render or store audiovisual works offered on a nationwide basis by two or more major device manufacturers. These might include operating system platforms intended for implementation in devices produced by major device manufacturers such as televisions, computers, tablets, and mobile phones; and support in anticipation of release of new versions of such operating systems intended for broad deployment to such devices.
- The manufacturer has sold within the prior year more than 100,000 units of products that enable consumers to access subscription video services in the United States. Smart TVs, CableCARD-enabled set-top boxes and DVRs, game consoles, and Ultra HD Blu-Ray players are examples of devices that may use proprietary operating systems or proprietary versions of the types of systems described above.
- The product incorporates at time of sale applications that enable access to two or more over-the-top subscription services that each (a) offer programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, or by on-demand services offered by MVPDs, and (b) have more than five million domestic subscribers. A product manufacturer considered by such services and their content licensors sufficiently reliable and secure to offer access to video content of comparable value should be able to compete in the navigation device market for accessing MVPD services.
- The product is offered for purchase by a national retail entity with more than \$10 billion in annual domestic sales revenue that sells television and related audiovisual products in the regular course of its business. Sales of products by major retailers clearly can exert the type of meaningful competition in features and price contemplated by the NPRM, and should be required to be supported by MVPD-supplied apps.

For potential competitors that do not meet any of these standards, MVPDs should be required to provide, under a reasonable, nondiscriminatory, and royalty-free license, a “development kit” or middleware that a competitor can use to enable its own nationally-portable device to run the MVPD application.

***Open and Independent UI:*** With respect to enabling an open and independent UI, the Coalition Representatives stressed that competitive navigation devices must be able to provide the front-facing interface with the consumer even if the playback is always via an MVPD app. The MVPD app must expose APIs that provide information required to access all the linear, VOD, and DVR content, and all associated entitlement information. This will enable a competitive device to provide an independent user experience with the device’s own program guide and integrated search capability, giving consumers access to the content to which they are entitled and enabling tuning to live events via the MVPD app. The MVPD app must also enable the consumer to directly select and play video programming from the third-party guide, and must enable device multitasking by allowing resizing, relocation, and overlapping of the video content. This is no different from Picture in Picture, and will allow consumers to view programming while viewing a guide or browsing other available content.

***Feature Parity:*** The Coalition Representatives also stressed that feature parity is essential to enabling a competitive market for navigation devices, including parity of user experience (e.g., the MVPD app should not take ten seconds to load content on a competitive device when the same content is loaded instantaneously if the consumer were using an MVPD-supplied device or app). Competitive navigation devices further should continue to have the option to offer at least the same degree of personal viewing flexibility and home recording capabilities through the MVPD-supplied app that consumers enjoy today using CableCARD-enabled devices. Consumers must be able to make personal recording, and be able to pause, rewind, fast forward at multiple speeds, and other innovations on playback of those recordings. Recordings will use permanent secure storage for encrypted tier subscription channels (and no use restrictions on recording of broadcast content). Such personal use practices should not be curtailed by an MVPD app. Similarly, recorded content should be capable of being accessed on devices throughout the home network and to secure authenticated remote devices connected to the home network from outside the home; live broadcast content should be accessible not only on all devices throughout the home network but also to such remote devices; and users should be able to continue to make use of their personal recordings if they switch or discontinue their service provider. Such capabilities exist today for CableCARD-enabled devices through the DFAST license, which permits such devices to securely pass the content only to approved digital

output and recording content protection technologies that perpetuate the mutually agreed usage rules for every device connected to the home and personal network.

***Nondiscriminatory Treatment:*** The Coalition Representatives also explained that MVPDs should not be able to discriminate against competitive devices and apps via licensing terms or other means. All programming available on cable-provided devices must be available via MVPD apps, at the same quality, within the viewer’s home. Just as programming contracts and licenses today do not, and cannot, prevent cable companies from providing programming to CableCARD devices, discriminatory license terms cannot interfere with an MVPD’s obligation to provide full support for the contemplated apps.

Licensing terms associated with an MVPD app should not extend to aspects of the competitive device not directly related to the use of the app. For example, the app (or the “development kit” or middleware) cannot be offered under licensing terms that dictate outcomes with respect to integrated search functionality, or that compel relinquishment of a licensee’s intellectual property rights. In addition, MVPD app licensing terms must not be dictated solely by MVPDs and programmers, and must be subject to oversight by the FCC. The Coalition Representatives also urged the FCC to ensure that any industry group responsible for determining and supervising the MVPD app license include meaningful representation and input from competitive device makers, independent programmers, and/or public interest organizations.

***Effective Enforcement:*** The Coalition Representatives recalled the history of nonexistent to poor support for competitive navigation devices and the attempts to eliminate or weaken CableCARD, and urged the FCC to ensure that the rules adopted in this proceeding include effective means for enforcement. As one approach, the FCC should require cable operators to continue to supply CableCARDS for competitive devices for a period of at least seven years,<sup>4</sup> with operators having the option to petition for relief from this requirement if they can demonstrate that the new solution is providing the competition envisioned by the FCC. This would ensure that consumers are not losing any competitive choices they have today. The FCC should also consider other approaches, including periodic reviews of the state of the market for competitive navigation devices and substantial fines for failure to comply with rules established in this proceeding.

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<sup>4</sup> See *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-49, *Memorandum Opinion and Order* (May 5, 2016).

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*No Change to Copyright Law:* The Coalition Representatives observed that the Commission’s rulemaking power in this proceeding as derived from Section 629—“to assure the commercial availability” of competitive navigation equipment from manufacturers and developers that are not affiliated with MVPDs—neither enlarges nor diminishes rights and limitations provided under the Copyright Act.

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/ Angie Kronenberg  
INCOMPAS

Cc:

Gigi Sohn  
Jessica Almond  
Scott Jordan