



Alex Starr
Executive Director-
Senior Legal Counsel

AT&T Services, Inc.
1120 20th Street NW Ste. 1000
Washington, D.C. 20036

Phone: 202.457.2044
Fax: 202.463.8066
E-mail: as261x@att.com

September 21, 2016

BY ELECTRONIC FILING

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

**Re: Notice of *Ex Parte* Communication,
MB Docket No. 16-42, CS Docket No. 97-80**

Dear Secretary Dortch:

AT&T is pleased that the Chairman has abandoned the radical and ill-considered unbundling proposal set forth in the NPRM¹ in this proceeding. That proposal, which drew strenuous objections from content creators, minority and independent programmers, labor unions, scores of members of Congress from both parties, and even the United States Copyright Office, among many others, was unlawful, unworkably complex, extraordinarily burdensome, and unnecessary in light of thriving competition in the video ecosystem.

Unfortunately, the Chairman's new, revised proposal, which was loosely described at a high level in a press release issued just three weeks before the scheduled vote, appears to suffer from its own set of fatal legal and policy problems. To be sure, this proposal is a kind of apps-based approach, which is a step in the right direction. But the market has already adopted an exceptionally successful apps-centric approach on its own; indeed, tens of millions of consumers already use apps to view video programming on a wide variety of third-party navigation devices. It is difficult to discern what possible market failure the Commission is trying to remedy by inserting itself so intrusively into this space. Under the revised proposal, the Commission would regulate virtually every aspect of MVPD apps in ways that are both unlawful and are a severe threat to the thriving video ecosystem. And it would do so under the pretense that all of this is somehow necessary to fulfill its relatively narrow mandate under Section 629. The Commission should reject this unlawful, unnecessary, and unwise expansion of its authority and let the market continue to flourish and innovate for the benefit of consumers.

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

The Joint MVPDs' September 19, 2016, *ex parte* letter sets forth numerous legal and policy flaws with the Chairman's new proposal.² AT&T files this letter to elaborate on a few of those issues.³

First, the Chairman's new proposal goes far beyond the Commission's statutory authority. Section 629 provides the Commission with authority to regulate only when necessary to ensure commercial availability of *in-home* navigation devices and only with respect to MVPDs' existing services. The proposal goes far beyond these bounds. The record conclusively shows there are already abundant navigation devices available to consumers. There is thus no basis to regulate. Even beyond that, the proposal would cover apps on devices that are designed for out-of-home use that, by definition, are not substitutes for the set-top boxes with which Section 629 is concerned. Finally, the proposal requires MVPDs not just to provide their existing services, but to support *new* services, such as integrated search of programming offered by non-MVPDs and to unbundle their existing service to accomplish such a search. None of that is authorized by Section 629.

Second, it is unclear under the Chairman's new proposal whether AT&T would continue to be permitted to deploy in-home devices for its U-verse TV service as it would continue to be permitted to do so for its DIRECTV service. Using the same devices for both video services will enhance the customer experience and will also reduce costs to the benefit of consumers.

Third, the Chairman's new proposal apparently imposes some undisclosed accessibility requirements on the government-mandated MVPD apps. Because these rules have not been made available for notice-and-comment, the Commission may not enact them. In any case, it appears – based on the little information disclosed about the proposal – that those accessibility requirements may be unlawful.

I. The Chairman's New Proposal Far Exceeds the Scope of Section 629

A. The Commission May Only Act "To Assure Commercial Availability"

Section 629(a) limits the Commission's authority to "assur[ing] the *commercial availability* to consumers" of "equipment used . . . to access" MVPD programming and other services offered over MVPD systems from "vendors not affiliated" with an MVPD.⁴ Where "commercial availability" of such competitive alternatives to set-top boxes *already exists*, there is no reason, and no statutory authority, for the Commission to act. That is emphatically the case here. The Chairman's new proposal acknowledges that MVPD apps are a permissible way to

² NCTA *et al.*, *An Analysis of the Chairman's New Set-Top Box Proposal*, MB Docket No. 16-42 (filed Sept. 19, 2016).

³ AT&T has previously identified and explained other policy and legal flaws that remain valid *vis-à-vis* the Chairman's new proposal. By not including all of those flaws in this letter, AT&T does not abandon them. *See, e.g.*, AT&T Comments (filed Apr. 22, 2016); AT&T Reply Comments (filed May 23, 2016); AT&T 5/24/2016 *Ex Parte*; AT&T 8/25/2016 *Ex Parte*.

⁴ 47 U.S.C. § 549(a) (emphasis added).

“assure” the statutory goal of “commercial availability.” And because the record indisputably shows that MVPD apps may be accessed with a variety of non-MVPD equipment, the Commission must close this proceeding.

Today, as a result of the bilateral, market-driven arrangements *made without regulatory intervention*, consumers are using MVPD apps to watch video content in their homes on a sweeping array of competitive devices, including Smart TVs, Kindle Fire, Apple TV, Google Chromecast, and Roku; iOS and Android tablets and smartphones; game consoles; and PCs.⁵ More than 460 million IP-enabled retail devices in the U.S. market today support one or more MVPD apps, and 66% of them support MVPD apps from all of the top 10 MVPDs.⁶ At last count, MVPD apps supported twice as many retail devices as there are leased set-top boxes.⁷ On average, there are four retail devices with available MVPD apps in consumer homes, well exceeding the 2.4 MVPD set-top boxes per home.⁸ In 2015, forty percent of American Pay TV subscribers used apps to view their subscription content, and year-over-year viewing via MVPD apps increased 102% in 2015.⁹

There is no reason to believe that MVPDs will stop supporting the use of apps. As Chairman Wheeler himself recently stated, video consumers “have more options than ever,” creating enormous “competition for eyeballs.”¹⁰ In the context of that vigorous competition, MVPDs must compete by providing consumers what they want, which for millions and millions of Americans, is the ability to access content through an app on the device of their choosing.¹¹

⁵ See, e.g., David Katzmaier, *What You Can Watch on Apple TV, Roku, Fire TV, Chromecast and Android TV*, CNET (Apr. 6, 2016) (“These days just about every major entertainment app is available on just about every living room streaming device. You probably have five ways to stream Netflix.”), <http://www.cnet.com/news/what-you-can-watch-on-the-new-apple-tv-vs-roku-vs-fire-tv-vs-chromecast>.

⁶ See, e.g., NPRM ¶ 13. The Commission cannot diminish the overwhelming evidence of competition by finding that the competition is insufficient because it is created by affiliates of MVPDs, which, according to the NPRM, includes anyone with a contractual relationship with MVPDs. See, e.g., AT&T Comments at 72-74.

⁷ See Letter from Paul Glist, Davis Wright Tremaine LLP, the Future of TV Coalition, to Marlene H. Dortch, FCC, at 2, MB Docket No. 15-64 (Feb. 11, 2016).

⁸ Joint Statement on DSTAC Report at 1, MB Docket No. 15-64 (FCC filed Aug. 28, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001099145>.

⁹ See Jeff Baumgartner, *TV Everywhere Continues Its Climb*, Multichannel News (Feb. 25, 2016), <http://www.multichannel.com/news/content/tv-everywhere-continues-its-climb/402839>.

¹⁰ Tom Wheeler, *FCC Chairman: Here Are the New Proposed Rules for Set-Top Boxes*, L.A. Times Op Ed, Sept. 8, 2016, <http://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html>.

¹¹ See, e.g., Katz Decl. ¶¶ 16-29 (AT&T Comments Attach. 2).

Thus, AT&T's "strategy is to deliver video content however, whenever and wherever."¹² Indeed, apps are how thriving MVPD competitors such as Netflix, Amazon, and Hulu have built their businesses. MVPDs thus have every incentive to continue negotiating to place their apps on competitive devices. As Roku has explained to the Commission, its "arm's length agreements with MVPDs . . . arose because *both sides found common interest in meeting the growing demand of consumers for the ability to access the programming to which they subscribe on the device or the devices that they chose.*"¹³ In light of the blizzard of supporting evidence establishing that consumers already have and will continue to enjoy enormous competitive alternatives to MVPD-supplied set-top boxes, there is no basis whatsoever to conclude that regulatory intervention is needed or lawful under Section 629.

B. The Commission Can Regulate Only In-Home Devices under Section 629

The Commission lacks authority to adopt the Chairman's new proposal to regulate apps designed for out-of-home use on mobile devices. As discussed above, Section 629 grants the Commission limited authority to ensure that there are competitive alternatives to set-top boxes. Set-top boxes are, of course, used with *in-home* television screens, not mobile devices. As Congress explained, it enacted Section 629 to "help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator."¹⁴ Apps designed for out-of-home use thus are, by definition, outside the scope of the Commission's Section 629 authority because they are not providing substitute means of accessing MVPDs' offerings for in-home viewing. Indeed, programmers ubiquitously negotiate separately as to, and offer distinct licensing rights for, in-home and mobile use of apps, even on the same devices.¹⁵

¹² *AT&T to Enhance Next-Generation Video-Delivery Platform with Acquisition of Quickplay from Madison Dearborn Partners*, BusinessWire (May 16, 2016) (statement of AT&T CEO John Stankey), <http://www.businesswire.com/news/home/20160516005424/en/ATT-Enhance-Next-Generation-Video-Delivery-Platform-Acquisition-Quickplay>; see Daniel Frankel, *AT&T Adds NBCU to DIRECTV Now Bundle with Multi-Year Licensing Renewal*, FierceCable (Sept. 13, 2016) (reporting that AT&T "has secured licensing rights to more than 100 channels for DIRECTV Now"), <http://www.fiercecable.com/cable/at-t-adds-nbcu-to-directv-now-bundle-multiyear-licensing-renewal>; *AT&T to Launch Three New Ways to Access & Stream DIRECTV Video Content Later This Year*, AT&T Newsroom (Mar. 1, 2016), http://about.att.com/story/three_new_ways_to_access_and_stream_directv_video_content.html.

¹³ Roku Comments at 10 (filed Apr. 22, 2016) (emphasis added).

¹⁴ S. Rep. 104-230, at 181 (1996); see H.R. Rep. No. 104-204, at 112 (1995).

¹⁵ This argument does not in any way suggest that there is a basis for the Commission to regulate under Section 629. The fact remains that the Commission cannot and should not enact any regulation because there are numerous devices that consumers can use to access MVPD programming instead of STBs, including apps designed for in-home viewing (*e.g.*, Roku, Apple TV, set-top boxes), as well as other apps that fall outside the scope of Section 629 (*e.g.*, apps designed for out-of-home viewing on mobile phones, tablets, etc.).

Moreover, apps designed for out-of-home use on mobile devices are outside the Commission's authority for the additional and distinct reason that they are not provided "*over multichannel video programming systems*," as required under Section 629(a). Rather, the apps on mobile devices receive programming over any public Internet connection. The Commission has already correctly rejected any interpretation of Section 629 that would "encompass every device with the ability to access the Internet," and it must do so again.¹⁶

C. Section 629 Is Limited To Devices Used To Access MVPD "Services"

As AT&T explained in its comments, Section 629 has the discrete goal of ensuring that consumers have a choice of devices through which they can receive *existing MVPD services*.¹⁷ In other words, Section 629 seeks simply to promote the availability of third-party devices that provide access to services that MVPDs provide over their own set-top boxes.

The new proposal goes beyond that limited statutory authority. It requires MVPDs to unbundle their service to create entitlement data streams – which do not currently exist – to third-party devices. The proposal also conscripts MVPDs to support the creation of new integrated search services offered by third parties.¹⁸ These requirements exist to support new services and capabilities of third parties; they bear no relation to Section 629, which is limited to assuring competitive methods of accessing *MVPD service*.¹⁹ Section 629 thus does not grant the Commission authority to impose these requirements.²⁰

II. U-verse TV Should Be Allowed to Continue Using In-Home Devices

If the Commission does proceed with the Chairman's new proposal – and it should not – it must at least make clear that AT&T U-verse TV may continue to provide an in-home device

¹⁶ See Report and Order and Further Notice of Proposed Rulemaking, *Accessibility of User Interfaces, and Video Programming Guide and Menus*, 28 FCC Rcd 17330, ¶ 18 (2013) ("CVAA Order").

¹⁷ See AT&T Comments at 59-69.

¹⁸ Such regulations are especially heavy-handed and anticompetitive given that the same requirements do not apply to MVPDs' competitors who develop the same types of apps (*e.g.*, Netflix, Hulu, and YouTube). See *id.* at 62-67. YouTube, for example, has withdrawn a previously available feature that allowed for integrated search and deep linking of YouTube content. See NCTA 8/19/2016 Ex Parte at 8.

¹⁹ See, *e.g.*, 47 U.S.C. § 549(a) ("The Commission shall . . . adopt regulations to assure the commercial availability, to consumers of . . . equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.").

²⁰ See, *e.g.*, 47 U.S.C. § 549(f) ("Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996."); AT&T Comments at 61-67 (explaining that, where Congress intends to impose unbundling, it adopts clear language to that effect, which is absent from Section 629).

with its service. As the Commission has recognized, DBS providers like DIRECTV “will be required to have equipment of some kind in the home.”²¹ DBS providers use a server-client architecture where the in-home device has local storage and manages all in-home viewing for client devices (e.g., DIRECTV Genie and DISH Hopper). This device is necessary to replicate (and to be competitive with) two-way video services, including receiving the satellite data, processing it into video streams, storing VOD and other content for future display, and providing interactive features and functionality. This in-home equipment also would have been necessary to provide the three Information Flows in the Commission’s original proposal, and it is equally necessary to support an app for third-party devices. Given these issues, we understand that the Commission will continue to allow DIRECTV to employ in-home devices.

The Commission should also allow U-verse TV to continue to employ an in-home device, which will allow significant synergies with DIRECTV service, especially via a common in-home video platform.²² Among other benefits, a common in-home video platform will create numerous supply chain, development, installation, and customer support efficiencies. It will also ensure a high-quality, consistent experience for AT&T’s U-verse video subscribers, and provide them many of the benefits that DIRECTV subscribers already enjoy. Preventing AT&T from using the *same* in-home architecture for U-verse TV and DIRECTV – and requiring it to expend resources to develop and support different architectures – would serve none of the Commission’s regulatory goals. It would only harm U-verse TV subscribers and increase costs.

III. The Chairman’s New Accessibility Proposal May Be Flawed

AT&T understands that the new proposal would require MVPD apps to provide the same accessibility features as MVPD set-top boxes, ensure that third-party devices not be allowed to block such functions, and adhere to the Commission’s accessibility rules.

As an initial matter, AT&T cannot meaningfully comment on this issue because, as with virtually every other issue raised by the Chairman’s new proposal, the issue is entirely absent from the NPRM and the Commission has not made the Chairman’s proposal available for public comment.²³ That alone precludes the Commission from adopting any accessibility rules for MVPD apps.²⁴

²¹ NPRM ¶ 65.

²² *AT&T Expects Revenues, Earnings and Free Cash Flow to Grow in 2015 and Each of the Next Three Years*, AT&T Newsroom (Aug. 12, 2015) (“Additional potential capital spending and working capital synergies include moving to a common video platform, as well as transitioning to a common set-top box with the Genie platform.”), http://about.att.com/story/att_analyst_conference_release_2015.html.

²³ NPRM ¶¶ 47-49 (discussing an apps proposal but not mentioning anything relating to how accessibility rules could or should work for such apps).

²⁴ See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (reversing Commission rule where Commission did not “make its views known to the public in a concrete

The Chairman’s new proposal may also exceed the Commission’s statutory authority. MVPDs are required to provide certain accessibility features – such as talking guides – only on navigation devices requested by blind or visually impaired individuals.²⁵ Thus, MVPDs retain discretion to offer navigation devices *without* Section 205 accessibility features as long as it makes available upon request devices *with* accessibility features.²⁶ It would be inconsistent with the CVAA to impose a blanket requirement on *all* MVPD apps for *all* third-party devices.

Finally, MVPDs’ ability to implement accessibility features on government-mandated apps depends largely on the functionalities of the device platform. MVPD apps rely on the platform’s support for accessibility features (*e.g.*, iOS VoiceOver and Android TalkBack) and for closed caption operation. Without platform support for these features, MVPD apps will not be able to support accessibility functions. Indeed, the Commission has previously recognized that, “in most cases,” the device manufacturer “will be responsible for ensuring the accessibility of on-screen text menus and guides for the display or selection of multichannel video programming on its device to requesting blind or visually impaired individuals,” *not* the MVPD who provided the app.²⁷ Therefore, to the extent the Chairman’s proposal seeks to impose any yet-to-be disclosed accessibility rules, it must condition the requirement for an MVPD to develop an app on a platform’s full compliance with accessibility requirements.

* * *

and focused form so as to make criticism or formulation of alternatives possible”) (internal quotation marks omitted).

²⁵ See Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) § 205(b)(3), Pub. L. No. 111-260 (2011).

²⁶ See *id.* § 205(b)(4) (allowing accessibility requirements to be satisfied by other devices); CVAA Order ¶¶ 87-108.

²⁷ CVAA Order ¶ 50.

Marlene Dortch
September 21, 2016
Page 8

For the foregoing reasons, the Chairman's new proposal, to the extent its content can be divined, is not only unnecessary, but also unlawful and counterproductive. The Commission should reject it.

Sincerely,

/s/ Alex Starr

Alex Starr
Christopher M. Heimann
Gary L. Phillips
David L. Lawson

AT&T SERVICES, INC.
1120 20th Street, N.W.
Washington D.C. 20036
202-457-2044

as261x@att.com
ch1541@att.com
gp3812@att.com
dl0470@att.com