



POLICY & ACTION FROM CONSUMER REPORTS

November 10, 2016

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

Re: In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigational Devices
MB Docket No. 16-42, CS Docket 97-80

Dear Chairman Wheeler:

Consumers Union, the policy and mobilization arm of Consumer Reports,¹ writes to urge the Commission to complete its work and enact the Set-Top Box Order that was scheduled to be considered at the September 29, 2016 Open Commission Meeting. This common sense reform is long overdue and would directly benefit consumers who currently have little, if any, choice but to rent a set-top box from their pay-TV provider for months and years in perpetuity. Recently, media reports detailed how cable prices increased by nearly triple the rate of inflation in the last 20 years, based upon data in the Federal Communication Commission's (FCC) *Report on Cable Prices* released last month.² (see Appendix for a graph comparing cable rates versus inflation for 1995-2015) Liberating consumers from burdensome set-top rental fees—which average more than \$231 per household a year³—is a real and tangible way to lower cable bills.

We agree the Commission has a decades old mandate to inject competition into the market of devices that access and deliver multichannel video programming, or pay-

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over eight million subscribers to its magazine, website, and other publications.

² Steven Lovely, Cable Prices Have Risen Faster Than Inflation For Each Of The Past 20 Years, *CORDCUTTING.COM* (Oct. 31, 2016), <http://cordcutting.com/cable-prices-have-risen-faster-than-inflation-for-each-of-the-past-20-years/>

³ Press Release, Senator Ed Markey of Massachusetts, Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace (July 30, 2015) <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>

TV content. Titled “Competitive Availability Of Navigation Devices,” Section 629 of the 1996 Telecommunications Act could not be clearer in its intent:

The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.⁴

The FCC has tried on more than one occasion to meet its obligations to open up this market to meaningful competition. Unfortunately, those efforts have come up short for consumers. For example, the CableCARD experiment barely made a dent, if at all, into the multichannel video programming distributors’ (MVPDs) lock on the navigational devices market where 99 percent of consumers rent a set-top box from their MVPD.⁵

Under your leadership, the Commission’s work on an apps-based approach represents the best chance since passage of the 1996 Telecom Act to fulfill the promise of Section 629. Like the consumers we represent, we were disappointed when the Set-Top Box Order was removed from the September Open Meeting Agenda the very morning it was to be considered. We recognize the resistance from the MVPD and content industries whose multi-billion dollar stranglehold on the set-top box market would finally be disrupted should the FCC’s proposal succeed. But consumers have been waiting for almost 20 years for an option to view pay-TV—content they have paid for—without having to fork over extra cash to rent a set-top box. Unlocking the set-top box market is more than just a consumer benefit; federal law requires it.

When 99 percent of pay-TV consumers are still renting these devices more than two decades after a statute was passed to break up this business model, something is wrong. A majority of the Commissioners wants to modernize and expand consumer choice in the set-top box market. A statement you issued with Commissioners Clyburn and Rosenworcel confirms as much: “. . .we share the goal of creating a more innovative and inexpensive market for these consumer devices. We are still working to resolve the remaining technical and legal issues and we are committed to unlocking the set-top box for consumers across this country.”⁶

⁴ See 47 U.S.C. § 549 (codifying section 629 of the Telecommunications Act of 1996)

⁵ Press Release, Senator Ed Markey of Massachusetts, Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace (July 30, 2015) <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>

⁶ Press Release, Statement From Chairman Tom Wheeler, Commissioner Mignon Clyburn and Commissioner Jessica Rosenworcel On the Set-Top Box Proposal (September 29, 2016) https://apps.fcc.gov/edocs_public/attachmatch/DOC-341503A1.pdf

We encourage you to quickly find consensus on the “remaining technical and legal issues” that center upon the licensing agreements necessary to enable alternative devices or apps to legally deliver copyrighted content to consumers, just as existing set-top boxes currently do. We were not surprised when the content industry made a last ditch effort to sabotage the Set-Top Box Order by conjuring up the specter of a copyright compulsory license that the FCC has no authority to impose.⁷ But, to believe this strained legal logic begs the question how MVPDs ever delivered copyrighted content via set-top boxes (regulated by the FCC) in the first place.

More than a dozen law professors signed onto comments in this proceeding that clarify the intersection of copyright law with communications law and the FCC’s proper authority to implement an apps-based alternative to set-top boxes.⁸ We strongly suggest the Commission revisit the legal arguments explained within those comments, which make it clear the FCC is not trampling upon copyright law or acting outside of its powers when implementing section 629 of the 1996 Telecommunications Act. In their comments, the professors note:

...it is clear that, whatever the merits of a specific FCC proposal, the apps proposal does not amount to a compulsory license. In fact, it doesn’t implicate any of the exclusive rights the Copyright Act grants to programmers. With respect to copyright law, the current proposal is no different than the existing CableCARD rules, which require cable operators to make their programming available on unaffiliated, third-party devices.

Fundamentally, under the apps proposal, additional copyright licenses are not needed by MVPDs, consumers, or device or platform developers. Any given app *is really just a virtualized CableCARD*. Moving to app-based delivery may have implications for competition, innovation, and consumer welfare that are within the FCC’s remit to assess, *but it raises no new copyright questions*. When MVPDs carry programming, they negotiate carriage agreements that grant them the public performance licenses they need to transmit programming to subscribers. Programmers are free to place conditions on these agreements, *provided they comply with applicable law, including FCC rules*.⁹

We agree with these arguments that the apps-based proposal, as we understand it, does not suddenly insert the Commission as an arbiter of copyright law. We do not posit that the legal issues are simple and unworthy of further debate and consideration. However,

⁷ Notice of Communication During Sunshine Period, MB Docket No. 16-42, CS Docket 97-80, The Walt Disney Company (September 28, 2016)

<https://www.fcc.gov/ecfs/filing/109282581521605/document/1092825815216051405>

⁸ Law Professor Letter on Copyright Issues in Set-Top Box Proceeding, MB Docket No. 16-42, CS Docket 97-80, Annmarie Bridy, et. al. (September 22, 2016)

<https://www.fcc.gov/ecfs/filing/109222162420957/document/1092221624209579a95>

⁹ Id. at 1. (emphasis added)

they are not intractable—as the content industry would try and persuade you—to prevent the FCC from moving forward with its set-top box proposal.

We strongly recommend you place the Set-Top Box Order on the November Open Meeting Agenda to be favorably considered. By doing so, the FCC will free consumers from the *de facto* set-top box monopoly and provide relief from ever increasing cable rates. With 2016 drawing to a close, the time to act is now.

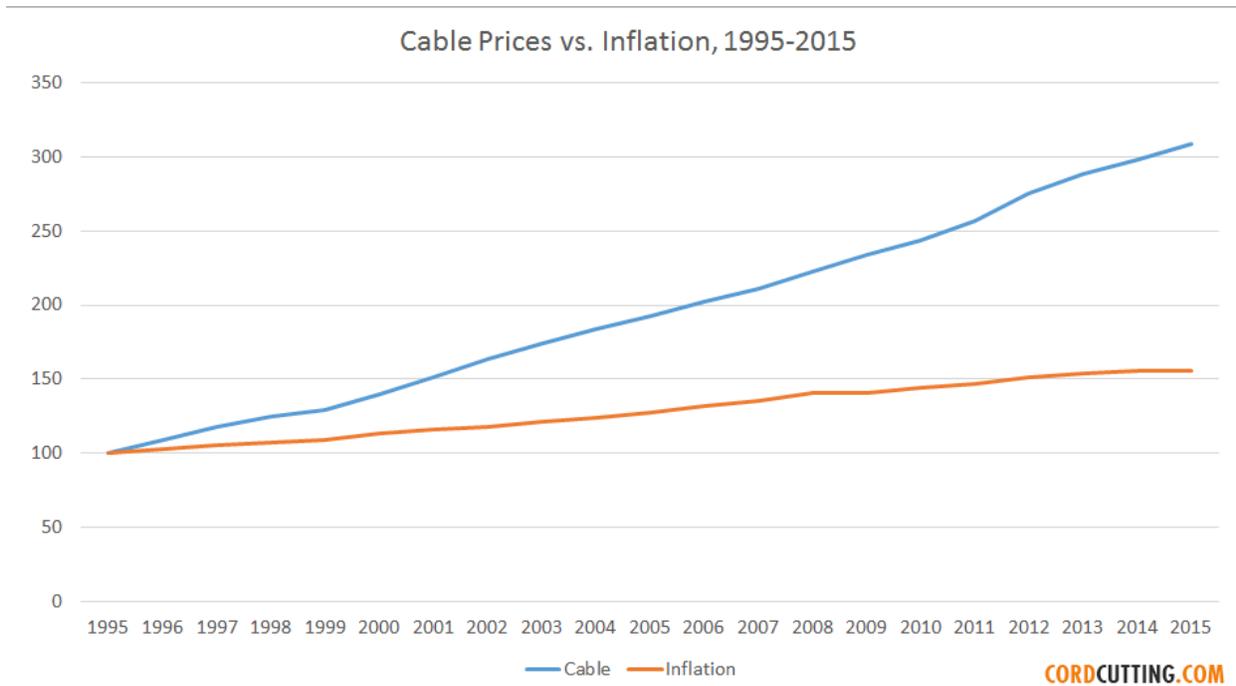
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JS' followed by a stylized flourish.

Jonathan Schwantes
Senior Policy Counsel

cc. Commissioners Clyburn, Rosenworcel, Pai, O’Rielly

APPENDIX



Source: <http://cordcutting.com/wp-content/uploads/2016/10/cable-prices-vs-inflation.png>