

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Status of Competition in the Market for the) MB Docket No. 15-158
Delivery of Video Programming)

COMMENTS OF THE CONSUMER VIDEO CHOICE COALITION

The Consumer Video Choice Coalition (the “Coalition” or “CVCC”) responds to the request for comment on the status of competition in the market for the delivery of video programming, focusing on the market for navigation devices used to access and view video content delivered by MVPDs.¹ The market for retail navigation devices has never seen the level of competition envisioned by Congress when it enacted Section 629 of the Communications Act. Nevertheless, the Coalition believes that with the right policies, the Commission can foster the competition and consumer benefits seen in other, vibrantly competitive consumer electronics markets.

I. INTRODUCTION

CVCC is a coalition of leading technology organizations, consumer advocacy organizations, and innovative video device companies that represents the broad support for a more robust marketplace for set-top boxes and other video navigation devices to ensure that consumers, device manufacturers and content providers receive maximum benefits from the rapid changes occurring in how consumers are viewing content. Coalition members have been

¹ *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-158, Public Notice, DA 15-784, at 17-18 (rel. July 2, 2015) (“*Public Notice*”).

providing substantive input to the Commission, and have urged the Commission to “ensure that the [Downloadable Security Technical Advisory Committee (DSTAC)] process results in solutions that enable robust competition among retail and operator-leased navigation devices used to access video programming offered by Multichannel Video Programming Distributors (MVPDs).”² Members of the Coalition include CCIA; COMPTTEL; Public Knowledge; Writers Guild of America, West; New America’s Open Technology Institute; Consumer Action; Common Cause; Ceton; Google; Hauppauge; SiliconDust; TiVo; and VIZIO.

II. THE NAVIGATION DEVICES MARKET HAS NOT SEEN THE LEVEL OF COMPETITION ENVISIONED BY CONGRESS WHEN IT ENACTED SECTION 629 OF THE COMMUNICATIONS ACT

Congress had a straightforward goal when it enacted Section 629 — to ensure that consumers benefit from competition in the devices used to access video programming provided by multichannel video services, much as consumers had benefitted from flexibility to attach devices of their choice to other communications networks. History has shown time and again that when devices are untethered from the network operator’s control, consumers have more choices and benefit from greater innovation, lower prices, and higher quality. The seminal *Carterfone* decision³ established that the public interest is best served when consumers have a wide array of equipment choices and are not limited to equipment supplied by a bottleneck network operator. In enacting Section 629, Congress was clear that it wanted similar benefits for the navigation devices market, stressing that “[c]ompetition in the manufacturing and distribution

² Letter from Amazon et al. to William Lake, Brendan Murray, and Nancy Murphy, May 11, 2015, *available at* https://www.publicknowledge.org/assets/uploads/documents/Coalition_DSTAC_Letter_05-11-15_F.pdf (“*Coalition Letter*”).

³ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

of consumer devices has always led to innovation, lower prices and higher quality.”⁴

Despite Section 629’s requirement for the Commission to assure a competitive retail market for devices used with multichannel video programming, system operators’ resistance and evasion, coupled with inadequate FCC enforcement, have denied consumers the vast range of choices they have available to them in other, competitive consumer electronics markets.

Recent findings released by Senators Markey and Blumenthal highlight the lack of retail competition in the navigation devices market.⁵ The Markey/Blumenthal study found that consumers pay close to \$20 billion per year to MVPDs — an estimated \$231 per household — simply to lease set-top boxes. The Markey/Blumenthal study also found that approximately 99 percent of MVPD subscribers lease set-top boxes from their pay-TV provider rather than purchase a retail device. Both the percentage of MVPD subscribers who lease set-top boxes and the amounts paid by consumers to MVPDs to lease set-top boxes reflect a market in which operators enjoy near monopoly power and not a market subject to the sort of competition envisioned by Section 629.⁶

⁴ H.R. Rep. No. 104-204, at 112 (1995).

⁵ The findings were derived from results of surveys sent to the top ten MVPDs by Senators Markey and Blumenthal. Press Release, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), available at <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>.

⁶ As Senator Blumenthal remarked: “The average household is forced into fees of more than \$200 a year on set-top boxes — an expense that is unjust and unjustifiable. As the world becomes increasingly connected and technology advances, new innovations must be able to break into the cable marketplace and provide the vigorous competition that drives down prices for consumers. Consumers deserve competitive options in accessing technology and television — not exorbitant prices dictated by monopoly cable companies.” *Id.*

III. RETAIL COMPETITION IN THE VIDEO DEVICE MARKET WILL RESULT IN SIGNIFICANT CONSUMER BENEFITS

Consumers derive significant benefits from having options of which devices to attach to a network. A competitive retail market for navigation devices will benefit consumers by increasing competition among device manufacturers, content providers, and network operators.

A. Devices

In most consumer electronics markets, consumers have enjoyed the benefits of competition, with the ability to choose from a wide array of innovative devices and falling prices. In the navigation device market, however, almost 99 percent of MVPD subscribers lease set-top boxes, denying them the fruits of competition. Lack of competition from retail navigation devices in turn has led to diminished innovation in set-top boxes compared to other consumer electronics products. Even in these stifled competitive conditions, innovations such as the DVR and streaming and side-loading video content to tablets and smartphones have emerged from retail navigation devices and were only introduced in operator-leased set-top boxes after substantial delay.

Other consumer electronics markets demonstrate that innovation in the video device marketplace will spread exponentially with the advent of more competition. In turn, consumers will benefit from more choices and lower costs. For example, *Carterfone* led to the Part 68 rules governing direct connection of terminal equipment to the PSTN, which in turn led to an explosion of choice in telephones available to consumers and to innovations such as cordless phones, fax machines, and modems — which, of course, played a vital role in the early growth of the Internet. All the while, the cost of these consumer electronics devices has fallen as one would expect in a competitive market.

Device competition today means more than different manufacturers producing devices

that perform the same basic functions. Consumers benefit from product and user interface differentiation, giving them more choices in how they access, view, interact with, and organize content. For example, in the smartphone market, the Apple, Android, and Microsoft operating systems — and the various Android-based OEM systems — differentiate from each other, offering consumers a wide variety of choices with respect to features, user interfaces, price, etc. Consumers can buy the device of their choice and use it with their wireless carrier, and in many cases can keep the same device — with its features, user interface, and stored information — when they switch carriers.

Similarly, consumers have a variety of choices among browsers used to access the Internet. Microsoft's Internet Explorer/Edge, Mozilla's Firefox, Google's Chrome, and Apple's Safari offer consumers differentiated interfaces and features to access online content. Indeed, Firefox first developed as an alternative to the then-dominant Internet Explorer, and features such as a search bar and tabbed browsing were first introduced by Firefox before being incorporated into IE.⁷

These other markets illustrate the advantages likely to flow if Section 629's goal of retail competition in the navigation devices market is fulfilled. As the smartphone and Internet browser markets illustrate, competition is best served when device manufacturers can differentiate retail products from leased products. Now and in the future, retail navigation device manufacturers should be able to provide innovative and distinctive features, including unique user interfaces, enhanced search functionality, and improved means for recording and viewing

⁷ See Scot Finnie, *In Depth Review: What Makes Firefox 1.0 So Compelling*, Nov. 19, 2004, available at <http://www.informationweek.com/in-depth-review-what-makes-firefox-10-so-compelling/d/d-id/1028554>.

content consistent with copyright law.⁸ Ultimately, consumers will be the beneficiaries of the greater choice enabled by retail competition, as envisioned by Congress when it enacted Section 629.

B. Content

The growing abundance of video available online has led to a shift in consumer viewing habits. Now, many consumers view content from a mix of cable/IPTV/DBS (including Video on Demand), broadcast, and over-the-top providers. The growth of OTT video options has given consumers greater choice in programming and subscription packages. Likewise, content producers have more options to distribute their content, and are no longer locked into linear distribution models or pre-scheduled television programming.

As long as incumbent MVPDs control the development and distribution of navigation devices, however, they can steer consumers toward their own content offerings at the expense of alternative offerings that viewers may prefer. MVPD-supplied set-top boxes generally do not allow users to view third-party OTT content, and MVPD control over set-top boxes ultimately influences what many consumers watch. These concerns are heightened in an era of increased industry consolidation and efforts to control the available user interface and user experience.⁹

Unaffiliated retail navigation devices, on the other hand, do not have the same incentive

⁸ *Coalition Letter* at 1.

⁹ Several parties, including members of the Coalition, raised related concerns in the context of the proposed Comcast-Time Warner Cable merger, but the concern that MVPD control of navigation devices leads to control over what consumers watch applies across the industry. See Susan Crawford, *The Big Lock-In*, MEDIUM, Feb. 16, 2015, at <https://medium.com/backchannel/the-clock-is-ticking-on-comcasts-plan-to-take-over-internet-tv-460295f8d33a>; Petition to Deny of Netflix, Inc., MB Docket No. 14-57, at 73-75, 88-89 (Aug. 27, 2014) (discussing Comcast's ability and incentive to discriminate against OVDs based on its control of consumer set-top boxes); Petition to Deny of COMPTTEL, MB Docket No. 14-57, at 22-27 (Aug. 25, 2014) (same); Petition to Deny of Public Knowledge and Open Technology Institute, MB Docket No. 14-57, at 36-40 (Aug. 25, 2014) (same).

to favor MVPD content offerings. For example, TiVo's products allow users to watch both MVPD-supplied content and content from OTT sources including Netflix, Amazon Prime, YouTube, Hulu Plus, VUDU, etc., as well as to search for content across MVPD and OTT sources. Thus, retail device competition enables competition from online video content providers by allowing consumers to use neutral user interfaces to search for content across different sources.

C. Network Competition

Greater competition in the last mile networks providing MVPD and broadband services would afford numerous benefits to consumers and the digital economy. Over the years, the Commission has realized limited success in promoting competition among network operators because of the high costs faced by new entrants. In particular, new entrants or smaller network operators are hampered by the high costs of procuring video navigation devices.¹⁰

A competitive retail market for navigation devices would help to lower costs for differentiated devices in the wholesale market. Today, large MVPDs benefit from economies of scale. Set-top box manufacturers are incentivized to focus on orders from these larger MVPDs, while small MVPDs are left with high costs if they want to offer devices different from those of the major operators due to their smaller subscriber bases over which to spread costs. Robust retail competition would allow manufacturers to take advantage of economies of scale over a larger base of retail navigation device users — ultimately lowering costs for new entrants and other small network operators to acquire innovative navigation devices.

Where consumers can choose from several MVPDs, device competition would have the

¹⁰ See Sean Buckley, *Google Fiber Says TV Service is Essential to Compete in the Broadband Game*, Apr. 15, 2015, at <http://www.fiercetelecom.com/story/google-fiber-says-tv-service-essential-compete-broadband-game/2015-04-15>.

added benefit of lowering switching costs. Consumers could change service providers without being forced to switch navigation devices. Consumers who can keep their own navigation devices can keep the content they have purchased, settings they have calibrated, etc. even after switching MVPDs. Here, too, the analogy to consumers' use of smartphones and web browsers is apt. Just as consumers should be able to keep their contacts even after switching wireless providers, or keep their bookmarks, privacy settings, etc. after switching ISPs, consumers should be able to keep their recording preferences, parental supervision settings, etc. even after switching MVPD services.

IV. WITH THE RIGHT POLICIES, THE COMMISSION CAN PROMOTE VIBRANT RETAIL COMPETITION IN THE NAVIGATION DEVICE MARKET, UNLEASHING SIGNIFICANT CONSUMER BENEFITS

Fostering robust retail competition in the navigation device market remains a valid and vital goal. Congress recognized this when it recently mandated the creation of the DSTAC to propose an updated standard to allow consumers to use navigation devices of their choice.

The DSTAC has grappled with the technological challenges of enabling device competition while ensuring that video programming remains secure and lawfully accessed. One proposal the DSTAC has produced, the “Competitive Navigation” system authored by Hauppauge, Google, and others,¹¹ presents a detailed and practical solution to facilitating retail competition in consumer navigation devices on a going forward basis. The “Application-based Service with Operator-Provided User Interface” proposal¹² put forward by some other members of the DSTAC, however, would only entrench MVPD control of the market via leased devices.¹³

¹¹ Report of Working Group 4 to DSTAC, August 4, 2015, at 106-25, *available at* <https://transition.fcc.gov/dstac/wg4-draft-report-08042015.pdf> (“Working Group 4 Report”).

¹² *Id.* at 126-42.

¹³ The reasons are generally the same as were discussed in the *Coalition Letter* at 1-2.

For example, even though MVPD sources claim that approximately 56 million MVPD apps have already been downloaded by consumers,¹⁴ the Markey/Blumenthal report still found that consumers spend almost \$20 billion per year (or an estimated \$231 per household) leasing set-top boxes. This fact illustrates the reality that apps are used on secondary, companion devices and do not result in competition in the primary device used to access MVPD signals. Moreover, MVPD apps merely allow consumers to view programming on different screens, and do not allow recording of programming and other features that consumers have come to expect from navigation devices, whether retail or leased.

CONCLUSION

The Coalition urges the Commission to act expeditiously and adopt the appropriate policies and rules that would unleash competition in the retail navigation device market. Then, the Commission can finally fulfill the Congressional objectives underlying Section 629.

Respectfully submitted,

_____/s/_____

CONSUMER VIDEO CHOICE COALITION

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¹⁴ Working Group 4 Report at 126.