



April 12, 2016

Ex Parte Notice

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

**RE: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42
Commercial Availability of Navigation Devices, CS Docket No. 97-80**

Dear Ms. Dortch:

On Friday, April 8, 2016 the undersigned and Jill Canfield and Brian Ford with NTCA–The Rural Broadband Association (“NTCA”),¹ along with Denny Law with Golden West Telecommunications Cooperative in Wall, South Dakota, spoke via telephone with the following Federal Communications Commission (“Commission”) staff: Mary Beth Murphy, Media Bureau Deputy Bureau Chief, Nancy Murphy, Media Bureau Associate Bureau Chief, Susan Singer, Media Bureau Chief Economist, Martha Heller, Media Bureau Policy Division Chief, Steven Broeckaert, Policy Division Senior Deputy Division Chief, Brendan Murray, Policy Division Assistant Division Chief, Kathy Berthot, Policy Division, Susan Aaron with the Office of General Counsel, and Antonio Sweet from the Office of Strategic Planning and Policy Analysis. The parties discussed the Notice of Proposed Rulemaking released on February 18, 2016,² in which the Commission seeks comment on how to create a commercial market for devices manufactured by third parties that can access multichannel video programming and other services offered over multichannel video programming (“MVPD”) networks.

NTCA and Golden West first sought to understand better the Commission’s proposals to create and utilize a “standards body” proposed in the NPRM.³ In particular, NTCA and Golden West noted that it is unclear how the Commission’s processes would avoid imposing technological mandates, or at the very least, avoid requiring smaller MVPDs in particular to choose from a few

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers (“RLECs”). All of NTCA’s members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

² Expanding Consumers’ Video Navigation Choices, MB Docket No. 16-42, Commercial Availability of Navigation Devices, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (rel. Feb. 18, 2016) (“NPRM”).

³ *Id.*, ¶¶ 34, 35, and 41.

regulator-driven standards before the market has had any meaningful opportunity to test and execute upon implementation of such standards.

For example, NTCA asked whether the Commission will charge the standards body created for the purposes of advancing the NPRM's goals with the creation of a single standard that would apply to MVPDs of all sizes and utilizing any technology. Such a "single-standard" approach, even if ostensibly aimed at enabling compliance via multiple technologies, would appear to run counter to the assertion that this proceeding will not result in a technological mandate.⁴ Particularly given that the technology to implement a single standard does not actually exist as a proven matter in the marketplace – beyond claims that a "virtual head-end" might offer some panacea – such an approach would appear to represent the embodiment of a regulatory technological mandate, even if it might ultimately be applicable to multiple platforms.

As an alternative to the "single-standard mandate," we asked whether the NPRM might contemplate that the standards body instead produce multiple standards from which equipment vendors and MVPDs could choose to reengineer their networks to make them available to third-party device manufacturers. NTCA and Golden West discussed how such a "multiple-standard mandate" could pose substantial risks to smaller MVPDs in particular. An apt analogy would be the creation of the Blu-ray and HD DVD standards.⁵ Such an approach here, particularly if small MVPDs were required to come into compliance with the NPRM's proposals in the near or even medium term while the market is still "settling on" which of the various standards is most effective, could result in carriers reengineering their networks towards one standard in an effort to comply with Commission mandates, only to find that the market ultimately chooses the other standard. Small MVPDs would thus find themselves having expended significant amounts of capital on hardware, software, and middleware upgrades to comply with the mandate, and then having to do so again to comply with the standard that the market ultimately chooses under the "multiple-standard mandate."

NTCA and Golden West also noted that the NPRM seeks comment on whether the role of the standards body should be limited to determining the content or parameters of the "Information Flows,"⁶ thus enabling MVPDs to determine the technology necessary to make them available to third-party device manufacturers. While such an approach might be viewed as offering MVPDs flexibility, it is unlikely that any third-party device manufacturer will create set-top boxes compatible with small carriers' networks. Indeed, because the total universe of NTCA members' MVPD customers likely does not equal the total number of customers in some large cities, it is unlikely that any third-party device manufacturer will have any incentive to build devices compatible with the diversity of small MVPD networks. In such a case, a small MVPD's network modifications made to comply with the rules proposed in the NPRM would be wasted.

⁴ *Id.*, ¶ 42 (seeking comment on seek comment on "whether our proposed approach, *which does not mandate specific standards*, balances these critiques against the need for some standardization."). *See also*, FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation (rel. Jan. 27, 2016) ("Fact Sheet") (stating that the proposal is not "a government-specific standard for these three information flows"), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-337449A1.pdf.

⁵ *Format Wars: Blu-ray vs. HD DVD*, Endgadget.com (Jun. 7, 2014), available at: <http://www.engadget.com/2014/06/07/format-wars-blu-ray-vs-hd-dvd/>.

⁶ NPRM, ¶¶ 38-40.

The end result is likely to be that small MVPDs will ultimately be forced to adopt and implement the same standards as larger providers, resulting in a technology mandate by default for the former.

As the above discussed points demonstrate, the NPRM is placing the entire MVPD industry on an inexorable march towards a regulatory mandated standard (or standards) “to be named later” and technological changes of some undefined scope and cost to meet it (or them). Such a process – which puts a new mandate in first and only determines after the fact whether and to what degree it can actually be implemented – is likely to lead to substantial expenditures by MVPDs that could be better utilized on new and innovative products and services that benefit consumers. It is also a solution in need of a problem at a time when consumers are seeing more options than ever by which to access content of their tailored choosing. The costs of pursuing and then implementing a “single-standard mandate” or a “multiple-standard mandate” are at present difficult to quantify with precision as no technology actually exists necessary to meet the proposed rules. That said, they almost certainly will include not only the direct costs of creating and implementing technology to satisfy the mandate but also the societal consumer-affecting costs associated with a lack of investment and innovation in video platforms as providers await the announcement of standard(s) and the scope of the mandate. Nonetheless, it is clear enough from the responses to the Downloadable Security Technology Advisory Committee (“DSTAC”)⁷ report released in August 2015 that a fundamental network reengineering will be necessary for MVPDs of all sizes and technologies to make the proposed Information Flows available to third-party device manufacturers. Even worse, the end point of the proposed standards process is likely a technology mandate at odds with repeated promises to the contrary or “flexibility” in name only for small MVPDs forced by market realities to follow the same standard as that adopted by the nation’s larger MVPDs.

NTCA and Golden West further cautioned the Bureau against an artificial “shot clock” on the standards body that would enable proponents of the “Competitive Navigation” approach to ensure that some standard (or set of multiple standards) is approved. The NPRM proposes to adoption of a “fallback” or “safe harbor” method (the Competitive Navigation approach)⁸ by which MVPDs can make their networks available to third-party device manufactures should the standards body fail to complete its work in the timeframe the Commission sets. Adoption of such a shot clock and default provision – and in particular setting forth as a fallback a proposal that was the subject of much debate and a lack of consensus by DSTAC participants⁹ – provides proponents of such a standard every incentive to ensure that the standards body is bogged down by delay. The Commission should not “put its thumb on the scale” in such a manner, picking

⁷ Downloadable Security Technology Advisory Committee Final Report (rel. Aug 28, 2015), available at: <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>.

⁸ NPRM, ¶43.

⁹ The DSTAC final report contained competing sections in which both proponents and opponents of the Competitive Navigation approach discussed its merits and limitations. DSTAC, pp. 242-261 and 279-300. A thorough reading of these sections demonstrates a lack of consensus and indeed controversy over the whether the Competitive Navigation approach can be implemented in the near or even medium term and whether it addresses service quality, product differentiation, content security and numerous other concerns.

winners in the standards-setting process and thereby creating a technology mandate by default. This process is too complex, and the stakes and costs too important, for such an overly simple result.

Finally, NTCA and Golden West noted that the Commission cannot move forward with a standards body process without the presence of small MVPD representatives as equal members. The DSTAC process did not include any small MVPDs in its deliberations, and its recommendations fail to discuss or even acknowledge the unique burdens faced by small operators. The Commission must not allow such an unbalanced process to carry through any standards body process envisioned by the NPRM. Only small MVPD representatives truly understand the current technological state of these providers and the numerous unique burdens they face in providing video service.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,
/s/ Michael Romano
Michael Romano
Senior Vice President – Policy

cc: Mary Beth Murphy
Nancy Murphy
Susan Singer
Martha Heller
Steve Broeckaert
Brendan Murray
Kathy Berthot
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