



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

APR 14 2016

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

Re: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42

Dear Chairman Wheeler:

As the President's principal advisor for telecommunications and information policy, the National Telecommunications and Information Administration (NTIA), on behalf of the Obama Administration, applauds the Commission's decision, pursuant to Section 629 of the Communications Act, to move forward with a proposal to increase competition and expand consumer choice in the market for multichannel video navigation devices.¹ Once unaffiliated device developers are provided with access to program-related information, they will be in a position to offer devices and services that compete with multichannel video programming distributor (MVPD)-provided devices.² The Administration is committed to preserving and expanding competition in all markets, because competition enhances consumer welfare and drives innovation, ultimately benefiting the American economy and its workers via higher productivity growth.³

The Commission seeks to increase competition in the provision of navigation devices for multichannel video programming by implementing a version of the "Competitive Navigation" model set forth in the 2015 report of the Downloadable Security Technology Advisory

¹ Expanding Consumers' Video Navigation Choices, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, MB Docket No. 16-42, FCC 16-18 (rel. Feb. 18, 2016) (*Notice*), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf. See also 47 U.S.C. § 549 (2014). The text of Section 629 refers to competitive provision of "converter boxes, interactive communications equipment, and other equipment." The Section's caption, however, focuses on competitive availability of "navigation devices," indicating its mandate extends beyond the familiar set top box that has long resided by the televisions of video subscribers. Because the term "navigation devices" better captures the range of equipment within the statute's scope, NTIA will use that term throughout this filing.

² The term "MVPD" encompasses "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television-receive only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13) (2014).

³ Council of Economic Advisors, *2016 Economic Report of the President*, Chap. 5, at 209 (Feb. 2016) ("Competition from new and existing firms plays an important role in fostering [productivity] growth."), available at https://www.whitehouse.gov/sites/default/files/docs/ERP_2016_Book_Complete%20JA.pdf.

Committee (DSTAC).⁴ The Administration particularly supports the proposal to implement a critical element of that model – the requirement that MVPDs provide three streams of programming-related information (the three “Information Flows”) that “will allow manufacturers, retailers, and other companies that are not affiliated with an MVPD to design and build competitive navigation devices” (including associated applications and software).⁵ We agree with the Commission that the availability of that information will allow “MVPDs and unaffiliated vendors [of navigation devices] to differentiate themselves in order to effectively compete based on the user interface and complementary features they offer users (*e.g.*, integrated search across MVPD content and licensed over-the-top content, suggested content, integration with home entertainment systems, caller ID, and future innovations.)”⁶ Moreover, navigation devices offered by unaffiliated vendors are likely to facilitate access to a broader range of programming, including over-the-top video, on television screens. Because many consumers watch full-length video programming on large television screens, easing the accessibility of over-the-top programming on those screens will likely result in enhanced competition between over-the-top distributors and traditional MVPDs.

This letter provides the Administration’s initial views on the need for Commission action in this proceeding and some of the issues raised by the “Competitive Navigation” model. We are commenting early in this proceeding to urge all stakeholders to focus their analysis on how to implement the model in a way that promotes competition for multichannel video navigation devices, yet ensures the security of multichannel video programming and permits continued innovation in the development and distribution of that programming.

Section 629 directs the Commission to “adopt regulations to assure” that MVPD customers can obtain navigation devices “used by consumers to access multichannel video programming and other [MVPD] services . . . from manufacturers, retailers, and other vendors not affiliated with any” MVPD.⁷ That specific mandate – that the FCC assure a competitive market for such navigation devices – reflects Congress’s conclusion that competition in navigation devices is “an important national goal” because it will lead “to innovation, lower prices and higher quality.”⁸ Developments since enactment of Section 629 have confirmed that judgment: a number of the most appealing features and functions of current navigation equipment – digital video recording

⁴ *DSTAC Summary Report* at 242-244 (Aug. 28, 2015) (*DSTAC Report*), available at <http://apps.fcc.gov/ecfs/document/view?id=60001515603>.

⁵ See *Notice* ¶¶ 2, 35-37 (the Information Flows comprise (1) information about the programming available to MVPD subscribers (“Service Discovery”), (2) information about what a navigation device may do with that programming, such as record it (“Entitlement Data”), and (3) the programming itself (“Content Delivery Data”)); see also *DSTAC Report* at 242-44.

⁶ *Notice* ¶ 27.

⁷ 47 U.S.C. § 549(a) (2014).

⁸ H. R. Rep. No. 104-204, Pt. 1, at 112, 104th Cong., 1st Sess. (1995). See also H. Conf. Rep. No. 104-458, at 181, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 194 (one purpose of Section 629 is to “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”).

(DVR), remote viewing, and remote DVR management, for example – were introduced by non-MVPD vendors.⁹

Available evidence clearly suggests that consumers have few alternatives to MVPD-supplied navigation devices and are frustrated by the high cost of leasing those devices.¹⁰ Indeed, the Commission cites survey results (based on recent MVPD statements) which confirm that virtually all of their subscribers lease navigation devices from their MVPD.¹¹ Thus, the approximately 100 million American households that currently subscribe to an MVPD service¹² lack the competitive choices that Congress has mandated. As noted above, Section 629 directs the Commission to take steps to ameliorate that situation by fostering competition in the provision of navigation devices for multichannel video services.¹³

Moreover, there is a need for Commission action even though, as MVPDs note, there has been an explosion in the number and capabilities of navigation devices.¹⁴ Indeed, in many instances, MVPDs have themselves been the source of applications that enable a range of devices – most notably mobile devices – to perform navigation functions, either alone or in conjunction with another MVPD device.¹⁵ As the Commission points out, however, MVPD-provided applications are typically proprietary in nature.¹⁶ Thus, although MVPDs deserve credit for expanding the ways in which their subscribers can access the video programming they purchase, the fact remains that those subscribers still typically have limited competitive choice in the ways that they may access or navigate programming or integrate complementary features and services. In other words, although the proliferation of MVPD-provided applications does produce significant consumer benefits, it does not address – let alone resolve – the competitive concerns at the heart of Section 629.

⁹ See Notice ¶ 7; see also *DSTAC Report* at 316-17; Reply Comments of TiVo, Inc. at 2, MB Docket No. 15-64 (filed Nov. 9, 2015) (*TiVo Reply Comments*), available at <http://apps.fcc.gov/ecfs/document/view?id=60001334418>.

¹⁰ See, e.g., Notice, Dissenting Statement of Commissioner Ajit Pai, at 1 (*Pai Dissenting Statement*), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A5.pdf.

¹¹ Notice ¶ 13.

¹² See National Cable & Telecommunications Ass'n, "Industry Data," available at <https://www.ncta.com/industry-data>. Charts entitled "Cable's Customer Base" and "Then & Now: Pay TV Competition" indicate that the cable industry's current subscribership of 53 million translates into a market share of 53 percent. That implies that the listed 34 percent market share for DBS providers and 13 percent for telephone companies translate into subscribership numbers of 34 million and 13 million, respectively.

¹³ 47 U.S.C. § 549(a) (2014).

¹⁴ See, e.g., Reply Comments of AT&T at 9, MB Docket No. 15-64 (filed Nov. 9, 2015) ("navigation device market consists of much more than [set top boxes] . . . consumers use smart TVs, smartphones, tablets, PCs and Macs, game consoles, and many other devices to access video services"), available at <http://apps.fcc.gov/ecfs/document/view?id=60001334247>.

¹⁵ See, e.g., Comments of Comcast Corp. at 2-3, MB Docket No. 15-64, (filed Oct. 8, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001328358>.

¹⁶ See Notice ¶ 10 (noting that the *DSTAC report* presented an approach based on proprietary applications that "would allow MVPDs to retain control of the consumer experience"); see also *DSTAC Report* at 262-78 (outlining an "Application-Based Service with Operator Provided User-Interface").

The evidence demonstrates that the market has not met the congressional mandate for the competitive availability of navigation devices. Like the Commission, the Administration believes that objective can be achieved through a measured and balanced implementation of a “Competitive Navigation” approach. For example, the Commission has proposed a flexible approach entirely appropriate for this evolving marketplace – an approach designed to promote innovation and competition in the market for navigation devices, while preserving and respecting valuable investment and security choices MVPDs have made in service to their customers. We support the Commission’s proposal to afford each MVPD flexibility in developing a standardized format for delivering the programming-related information that unaffiliated firms need to produce competitive navigation devices. We also agree that MVPDs should “retain the freedom to choose the content protection systems they support to secure their programming” so long as they deploy at least one content protection system that is “licensable on reasonable and non-discriminatory terms, and must not be controlled by MVPDs.”¹⁷ The *Notice* commendably proposes further flexibility to allow MPVDs to use different program-related information standards for their own equipment than those made available to navigation device developers. The flexible approach taken in the *Notice* will greatly enhance the potential for individual MPVDs, as well as competitive device developers, to innovate and offer competitive products in this market.

We also urge commenters to propose ways that competitive device providers can access programming information and differentiate their services while respecting the security and integrity of MVPD programming. A central objective of the Commission’s efforts in this proceeding is to allow MVPD customers “to choose how they access the multichannel video programming to which they subscribe.”¹⁸ The selection and organization of that programming, however, reflects investment decisions and market assessments made by MVPDs – with attendant business risks – as well as a constellation of licensing arrangements between MVPDs and program producers. Those agreements typically include a variety of provisions beyond price – issues such as brand protection, advertising, program availability windows, and duration – that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming.¹⁹

As the Commission is aware, MVPDs and programmers contend that if competing navigation device providers were permitted to disregard the programming choices made by MVPDs or the agreements between MVPDs and programmers²⁰ – such as by removing or replacing advertising

¹⁷ The Commission correctly observes that MVPDs’ ability to continue to choose content protection systems will allow MVPDs to choose individual systems most suitable to their needs and reduce the possibility of a “single point of attack for hackers.” *Notice* ¶¶ 58-59. In securing their programming, MVPDs not only seek to prevent theft of service, but also to ensure compliance with their contractual commitments to programming suppliers. *See also id.*, App. A (proposed new section 76.1200(k) of the Commission’s Rules).

¹⁸ *Notice* ¶ 26.

¹⁹ *See, e.g.*, Comments of the Motion Picture Ass’n of America at 7, MB Docket No. 15-64, (filed Oct. 8, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001328337>.

²⁰ *See, e.g.*, Reply Comments of the Computer and Communications Industry Ass’n at 10, MB Docket No. 15-64 (filed Nov. 9, 2015) (“Device manufacturers, of course, cannot violate contracts to which they are not a party”), available at <http://apps.fcc.gov/ecfs/document/view?id=60001334443>.

– the ability of programmers to recover their costs might be weakened, which could ultimately have a deleterious effect on the programming supply market, including that for specialized and minority programming.²¹ On the other hand, there may be elements of MVPD-programmer agreements that could hinder development of competitive navigation devices. If such elements exist, the Administration urges commenters to identify them and to propose ways to address the potential adverse competitive effects. In taking action to expand consumers’ video navigation choices, it is also important to consider the potential for an effect on specialized and minority programmers that may lack the finances or audience to attract the attention of competitive navigation providers.²² We appreciate the Commission’s recognition of this concern,²³ and we urge stakeholders to identify and propose ways to address it.²⁴

Finally, the Commission should take steps to ensure that expansion of competition in navigation devices does not diminish existing privacy protections for multichannel video programming subscribers. Providers of devices – whether MVPDs or others – will have access to large amounts of personal information about the users of those devices, not limited to the programming that they search for, watch, or purchase. MVPDs generally have more rigorous statutory obligations concerning their collection and use of personally identifiable subscriber information than do non-MVPD providers of navigation equipment.²⁵

The Commission has proposed to address these concerns via a licensing process, whereby MVPDs “authenticate and provide the three Information Flows only to Navigation Devices that have been certified by the developer” to comply with the MVPD’s privacy obligations.²⁶ This approach has appeal, but leaves important questions to be addressed – most importantly, who will ensure compliance with a certification and through what legal authority.²⁷ Again, we urge stakeholders to propose ways to ensure robust privacy protections.

²¹ See Notice ¶ 80 and n.230; see also Letter from Multicultural Media, Telecom, and Internet Council to Chairman Wheeler at 3 (Feb. 10, 2016), available at <http://apps.fcc.gov/ecfs/document/view?id=60001426667>; *Pai Dissenting Statement* at 2. See also Notice, Dissenting Statement of Commissioner Michael O’Rielly at 1, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A6.pdf.

²² The Commission could help to address this concern by, for example, requiring providers of competitive navigation services and devices to be able to present to consumers groupings of channels that reflect the channel “neighborhoods” that are at times negotiated by MVPDs and programmers.

²³ See, e.g., Notice ¶ 17 and n.51.

²⁴ Commenters have asserted that non-MVPD providers with licenses to access video programming under the CableCARD regime typically have not altered or otherwise interfered with the programming streams received. See Letter from the Consumer Video Choice Coalition to Commission Secretary Marlene Dortch at 4, MB Docket No. 15-64, (filed Jan. 21, 2016), available at <http://apps.fcc.gov/ecfs/document/view?id=60001409705>; see also *TiVo Reply Comments* at 2. Consequently, prescribing “programming integrity” requirements in this proceeding will likely have no significant adverse effects on competitive navigation providers. It is also worth noting that both the cable compulsory license and the “must carry” statute – which give cable systems access to other firms’ programming streams – require the systems to carry that programming without alteration. See 17 U.S.C. § 111(c)(3) (2014); see also 47 U.S.C. §§ 534(b)(3), 535(g)(1) (2014).

²⁵ See 47 U.S.C. §§ 338(i) (privacy obligations of satellite video providers), 551 (cable operators) (2014).

²⁶ See Notice ¶ 73.

²⁷ The Commission asks whether the Federal Trade Commission (FTC) and state privacy laws may be adequate to protect consumers’ privacy interests. See Notice ¶ 78. We appreciate that there may be a constructive role for the

The Administration submits that the principal objective of this proceeding should be to maximize the potential for navigation device providers to compete on user interfaces and other complementary features and services, while respecting the security and integrity of MVPD programming agreements.²⁸ Increasing choice in this market holds the promise not only of reducing costs to consumers, but also stimulating beneficial innovation in the features and functions of navigation devices. Thank you for your consideration of these views.

Respectfully submitted,



Lawrence E. Strickling

cc: The Honorable Mignon Clyburn
The Honorable Jessica Rosenworcel
The Honorable Ajit Pai
The Honorable Michael O'Rielly

FTC to play here. As for state laws, the baseline privacy protection a subscriber receives should not hinge on where the consumer lives.

²⁸ See 47 U.S.C. § 549(b) (“[t]he Commission shall not prescribe regulations . . . which would jeopardize security of multichannel video programming and other services offered [by MVPDs], or impede the legal rights of [MVPDs] to prevent theft of service”).