

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF FRONTIER COMMUNICATIONS
CORPORATION**

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Frontier Communications Corporation (“Frontier”) hereby submits comments in the above-referenced dockets.¹

I. INTRODUCTION AND SUMMARY

With its roots as a telephone company, Frontier is by definition a new entrant to the multichannel video provider (“MVPD”) market, and Frontier embraces the opportunity to expand video services across its footprint as rapidly as possible. Frontier recently became the eighth largest MVPD with its acquisition of Verizon’s wireline assets in California, Florida, and Texas on March 31, 2016, and Frontier just announced plans to introduce its new Vantage™ video service in more than 40 markets covering approximately 3 million households. This aggressive rollout of a competitive, facilities-based video offering promises substantial benefits to customers in these markets.

Unfortunately, this proposal by the Commission creates a free rider situation where companies with significant assets and resources seek to utilize the infrastructure of much smaller MVPD companies to marginalize MVPD customer relationships and monetize customer data.

¹ *Expanding Consumers' Video Navigation Choices*, Notice of Proposed Rulemaking, 31 FCC Rcd 1544 (2016) (“*NPRM*”).

The issue of consumer costs associated with set top box rentals, while possibly an appropriate issue for regulatory concern a number of years ago, has been overtaken by new technology. Consumers have multiple avenues for accessing video content over multiple devices. Regulatory scrutiny should be reserved for those instances where there is a market failure that harms consumers – a failure of choice, a failure of diverse content, a failure of competition. Such is not the case in 2016. The bundled service offering, whereby customers can purchase voice, broadband, and video content for a single price, is incredibly consumer friendly and exactly the kind of market development that regulators hoped for as little as five years ago.

It is surprising that the Commission introduces this proposal at a time when there has never been more competition in the video and associated set-top box market. When Congress adopted 47 U.S.C. § 549 twenty years ago as part of the 1996 Act, Congress was still concerned about a cable provider monopoly. Congress did not envision a competitive video market, so it used set-top box competition as a proxy for ensuring consumers were not disadvantaged when accessing cable content. Fast forward to the technology of today where customers can almost always choose between four or more video offerings, including one cable provider, two satellite providers, and a telco provider, along with over-the-top and free over-the-air content. With so many options in the MVPD market, customers necessarily have competitive choices in the underlying set-top box market. In addition, MVPDs like Frontier are also ensuring that their content is available on virtually any and every video capable device through applications (“apps”). Indeed, Congress specifically provided that the Commission’s authority in this market would sunset with the growth of this level of competition.

Moreover, while purportedly attempting to save consumers money through the elimination of set-top box fees, the Commission’s proposal perversely risks increasing consumer

costs, especially when considering that the market is already moving away from set-top boxes provided exclusively by the MVPD. Frontier, like other providers, offers its video service on almost any video-capable device, including PCs, Macs, iPhones, Android devices, and Roku, and already sees the market moving organically towards apps with a bring-your-own-device trend and the elimination of set-top rental fees. Regulatory focus on the set-top box market ignores the realities of new technologies and potentially threatens innovation in the dynamic video marketplace.

In addition, the Commission's proposal will undermine carefully negotiated provisions in the underlying content contracts that Frontier has negotiated, including channel lineups and channel access on video-capable devices, and remove advertising and other revenue sources. Additionally, because the proposal would remove MVPD control over almost every aspect of the service, MVPDs will face increased customer service costs when services do not work on devices that Frontier and other MVPDs have not even been able to vet. Unfortunately, in the currently competitive video market, all of these reduced revenues and increased regulatory costs necessarily translate into increased expenses for customers.

Most problematically, the Commission does not have authority for its proposal. Under the plain language of the statute, the Commission only has authority to promote competitive availability of consumer "equipment," not the competitive availability of software offered over third party devices. The Commission nonetheless proposes a creative interpretation, arguing it has authority to promote the competitive availability of hardware *and software*. In addition, the Commission dismisses the existence of competition in the current equipment market, insisting that any business-to-business negotiation between an MVPD and an independent device manufacturer means that the manufacturer is "affiliated" with the MVPD. Such a tortured

reading of the statute would ensure that this proposal and all of the Commission's work going into it are struck down as soon as a court hears the appeal.

II. FRONTIER IS A NEW ENTRANT IN THE VIDEO MARKET AND IS COMMITTED TO PRO-CONSUMER INNOVATION.

With historical roots as an incumbent local exchange carrier, Frontier is by definition a competitive entrant in the video marketplace,² and Frontier has fully embraced this role. Frontier initially entered the video market with its purchase of certain Verizon FiOS® properties in 2010 and expanded its video footprint with the purchase of the Southern New England Telephone Company in Connecticut from AT&T in 2014. Following Frontier's recent March 31, 2016, purchase of Verizon's wireline assets in California, Florida, and Texas, Frontier now provides service to approximately 1.5 million video subscribers, making it the eighth largest MVPD.³

In addition to expanding its video services through acquisition, Frontier is aggressively rolling out new video products. Frontier recently announced plans to introduce its new Vantage™ video service in more than 40 markets covering approximately 3 million households over a three- to four-year period.⁴ Relying on Ericsson's Mediaroom platform,⁵ Vantage™ leverages next generation technology to integrate not only traditional television streams but also

² See, e.g., The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779 (codified at 47 U.S.C. § 533(b)).

³ See, e.g., Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015), <http://bit.ly/1UnFJSD>; Frontier Communications, *Q4 2015 Earnings Call Transcript* (Feb. 23, 2016), <http://bit.ly/1ZaHNNm>. This 1.5 million video subscriber figure excludes satellite customers.

⁴ See Frontier Communications, *Q4 2015 Earnings Call Transcript* (Feb. 23, 2016), <http://bit.ly/1ZaHNNm>.

⁵ See Ericsson, *Ericsson Mediaroom* (last accessed Apr. 17, 2016), <http://bit.ly/1VvoWxz>.

access to over-the-top content, including Netflix, and interactive applications, including Twitter and Facebook.⁶ Vantage™ also offers a total home DVR to record up to four shows at once, with capacity for over 170 hours of HD programming, and the ability for viewers to create a custom list of up to 50 of their favorite channels. Frontier has worked tirelessly to offer a next-generation navigation interface in order to win customers from existing providers, including cable and satellite, and Frontier will continue to develop improved customer interfaces in order to win customers in this very competitive business. As Frontier rolls out this new product, it will be evaluating opportunities to expand this deployment to additional communities in the future.

While expanding its traditional pay TV offerings, Frontier has also been launching innovative TV packages seeking to attract cord cutters and the increasing numbers who have never had traditional pay TV packages.⁷ With FreedomTV™, Frontier broadband customers can purchase a skinny bundle for \$19.99 per month.⁸ Additionally, Frontier was the first video provider to partner with TiVo in offering the TiVo Roamio OTA, an HD-DVR model that provides access to a mix of over-the-air broadcast TV and over-the-top content from sources such as Netflix, YouTube, and Amazon Prime and provides 500 GB of storage to record up to four streams at the same time.⁹

⁶ See, e.g., Frontier, *Frontier Communications Launches Vantage™ Brand* (Mar. 23, 2016), <http://bit.ly/1UrpDHZ>.

⁷ See Frontier, *Freedom TV* (last accessed Mar. 18, 2016), <http://frontierfreedomtv.com/#how-it-works>.

⁸ See *id.*

⁹ See, e.g., Jeff Baumgartner, *TiVo Explores New Over-the-Air Frontier*, Multichannel News (Feb. 25, 2015), <http://bit.ly/1Ablw39>.

With its skinny and traditional TV bundles, Frontier offers customers a plethora of choice for accessing content. Through FrontierTV Everywhere, Frontier FiOS® TV and Vantage™ TV customers can access Frontier content over an ever expanding number of devices, including iPhones, iPads, Android devices, PCs, Macs, Rokus, and Chromecasts, among other devices.¹⁰ Similarly, Frontier FreedomTV™ allows customers to access content on iPads, iPhones, Android devices, and streaming from the web. Frontier continually seeks to expand the availability of its content to make viewing as convenient as possible for its increasingly nomadic customers.

III. THE COMMISSION’S PROPOSAL WOULD ENABLE THE NATION’S LARGEST COMPANIES TO FREE RIDE ON THE INFRASTRUCTURE AND SERVICES OF SMALLER MVPDS, LIKE FRONTIER, AND UNDERMINE MARKETS FOR VIDEO CONTENT.

The Commission’s proposal would create a significant free rider problem. It would allow the nation’s largest companies to appropriate the infrastructure and services of smaller MVPDs to marginalize MPVD customer relationships and monetize customer data. Under the proposed rules, the two largest U.S. companies – Google, with a market capitalization of \$533 billion, and Apple, with a market capitalization of \$581 billion – would have the right to use the infrastructure and appropriate the content contracts of Frontier, a company roughly one one-hundredth of the size, so that they could control the customer relationship and, most likely, capitalize on this additional window into consumer behavior. Specifically, as Roku’s CEO Anthony Wood explains, the rules would allow a company like Google to “decouple the user interface” and “do to the TV what it did on the Web—build an interface without the

¹⁰ See, e.g., FrontierTV Everywhere (last accessed April 14, 2016), <http://bit.ly/1Wb6Sba>.

‘inconvenience’ of licensing content or entering into business agreements with content companies such as ABC, FOX, HBO, or video distributors like pay TV operators.”¹¹

While companies like Google and Apple have launched and continue to explore their own video offerings,¹² the Commission’s proposal effectively says “don’t bother.” Under the proposed rules, rather than investigating additional markets for Google Fiber and its associated pay TV service, Google can simply use Frontier and MVPD infrastructure and services. Similarly, rather than trying to develop a new streaming service, Apple can simply appropriate the content of an MVPD that did the hard work of assembling all of the contracts. Of course, allowing companies to free ride in the pay TV market reduces demand and competition for the underlying video content, ultimately taking profits from the actual content creators and reducing the incentives for content creation. The *NPRM*, however, does not analyze this very large free rider problem and its competitive effects.

This free rider problem also undermines one of the greatest pro consumer offerings in the current pay TV market – the double or triple play bundle. With bundled services, consumers enjoy not only significant cost savings, but also the convenience of a single bill and simpler shopping.¹³ Indeed, the importance and pro-consumer nature of bundles were driving forces

¹¹ Anthony Wood, CEO, Roku, *How the FCC’s ‘Set-Top Box’ Rule Hurts Consumers*, Wall Street Journal (Apr. 22, 2016).

¹² See Google Fiber (last accessed April 21, 2016), <https://fiber.google.com/about/>; Lewis Painter, *Apple TV Streaming Service Release Date Rumours* (February 17, 2016), <http://bit.ly/1poYckz>.

¹³ See, e.g., Consumer Reports, *The Benefits of Bundling and Bargaining* (May 2011); William Lehr, MIT, *Benefits of Competition in Mobile Broadband Services* (2014), <http://bit.ly/1SgHkYP>.

behind the Commission’s decision to approve the recent AT&T and DIRECTV merger.¹⁴ The benefits of a bundled offering also appear to be particularly important for rural customers, who rely more than others on pay TV subscriptions.¹⁵ With such a vibrant market already, including the value of consumer bundles, regulatory intervention here will do more harm than good. Regulatory scrutiny should be reserved for those instances where there is actually a market failure that harms consumers, whether it is a failure of choice, a failure of diverse content, or a failure of competition – none of which is present in the market today.

IV. THE PROPOSED RULES ARE BACKWARDS-LOOKING AND DIVORCED FROM CURRENT MARKETPLACE REALITIES.

Twenty years ago, when Congress adopted the statute granting Commission authority over the competitive availability of navigation devices as part of the 1996 Act, Congress specifically recognized that video service would become sufficiently competitive such that rules governing the competitive availability of navigation devices would be entirely unnecessary.¹⁶ Specifically, Congress provided that the authority granted in § 549 would sunset when the Commission found that the market for MVPDs is fully competitive, the market for converter

¹⁴ See generally *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131 (2015).

¹⁵ 82% of rural households subscribe to pay TV service, while only 1% rely exclusively on OTT. This 1% of OTT-only subscribers in rural America compares to about 8% of all US households that “have canceled their pay-TV subscriptions and turned to OTT video services instead.” See Andrew Burger, *Study: Cord Cutting in Rural Markets Has Less Appeal*, Telecompetitor (Apr. 13, 2016), available at <http://bit.ly/1Xy666O>.

¹⁶ Telecommunications Act of 1996, Pub. L. 104–104, § 304(e), 110 Stat. 125 (1996); 47 U.S.C. § 549(e).

boxes is fully competitive, and elimination of regulations would promote competition.¹⁷ Today, a full twenty years later, the market has reached the level of competition envisioned by Congress, and the Commission's proposed interventions will only harm competition in the video market.

A. The Video Provider Market Is Competitive and Only Growing More So.

With all of the activity in the video market over the past twenty years – from the development of two robust satellite video providers, the growth of cable, the introduction of telco video, the launch of over-the-top, and the rise of the likes of Netflix – it is unsurprising that the Commission has found the market for video is fully competitive.¹⁸ In every market Frontier seeks to enter to provide video service, there are already at least two providers – DISH and DIRECTV – in addition to a cable company. These two to three facilities-based competitive alternatives do not include the growing options available to cord cutters, include expanding over-the-top libraries, new a la carte options, and traditional over-the-air broadcast.

Indeed, the market for MVPDs is already so competitive that analysts and commentators debate whether or not we have reached the end of cable and the facilities-based MVPD.¹⁹ At the same time, studies show that we are in a golden age of TV and film availability, with content

¹⁷ See 47 U.S.C. § 549(e).

¹⁸ See, e.g., *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, 30 FCC Rcd 6574 (2015) (establishing a presumption that cable operators are subject to one type of effective competition, referred to as competing provider effective competition, unless a franchising authority demonstrates otherwise).

¹⁹ See, e.g., Greg Satell, *The Future of TV Is Here. Can Cable Survive?* Forbes (June 6, 2015), available at <http://onforb.es/1Sd7PyI>; Mathew Ingram, *Pay TV Industry: Yes, Cord-Cutting Is Accelerating, But It Could Be Worse!* Fortune (Nov. 10, 2015), <http://for.tn/1TkMyoa>; Megan Garber, *The Nightmare of Cable TV Is Over*, The Atlantic (July/Aug. 2015), <http://theatln.tc/1MyIVtR>.

ubiquitously available online.²⁰ Content is not only more widely available, but there is also more content overall for viewers to access. For example, a study from FX Networks found that the number of scripted series has increased 94 percent from 2009 to 2014.²¹ All of the evidence shows that video distribution is competitive and only growing more so.

B. Likewise, the Set-Top Box Market is Competitive and Only Growing More So.

Because the MVPD market is competitive, the set-top box market is necessarily also competitive. When choosing a pay TV provider, a consumer can choose among several providers if it believes that the pricing of one provider's set-top box is not competitive or the interface is not compelling. Put differently, pay TV customers are free to choose among several providers and the set-top boxes they offer.

While § 549(a) itself focuses on ensuring the availability of set-top boxes from “vendors not affiliated with any [MVPD],” Congress never envisioned the robust level of competition available today, suggesting that Congressional focus was on the introduction of any competition into the market, not varied devices for each and every provider. As evidenced by the sunset provision, § 549(e), which includes MVPD competition in the analysis, Congress was legislating at a time when the cable provider was the only MVPD option for many customers. Indeed, Congress sought to provide competition in the set-top box market precisely because there was no immediate vision for wider MVPD competition. Competition in the set-top box market served as a proxy for real competition in the facilities-based video provider market. With robust MVPD competition today, the concerns embodied in the statute evaporate.

²⁰ See Michael Horney, *Content Availability in U.S. at an All Time High*, The Free State Foundation (Mar. 28, 2016), <http://bit.ly/1WUzSm4>.

²¹ See *id.*

However, even putting aside the fact that the pay TV market is competitive, the set-top box market itself is competitive and only growing more so every day. As the Commission recognizes, the DSTAC Report “gave an account of the increasing number of devices on which consumers are viewing video content, including laptops, tablets, phones, and other ‘smart,’ Internet-connected devices.”²² The Commission further explains: “There is evidence that increasingly consumers are able to access video service through proprietary MVPD applications as well. According to NCTA, consumers have downloaded MVPD Android and iOS applications more than 56 million times, more than 460 million IP-enabled devices support one or more MVPD applications, and 66 percent of them support applications from all of the top-10 MVPDs.”²³ Frontier, like other providers, continues to grow these options.

The FCC, however, appears to conflate all MVPD apps as a single choice for the consumer equipment available to access MVPD content: According to the Commission, “almost all consumers have one source for access to the multichannel video programming to which they subscribe: the leased set-top box, or the MVPD-provided application.”²⁴ In other words, although a Frontier customer can watch Frontier TV on a Frontier set-top box, an iPad, an Android device, Google Chromecast, a PC, or many other devices, the Commission asserts that a Frontier customer has but one choice for “converter boxes, interactive communications

²² *NPRM* ¶ 9 (citing Final Report of the DSTAC, at 38-39, *available at* <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>).

²³ *NPRM* ¶ 13.

²⁴ *Id.*

equipment, and other equipment used by consumers to access multichannel video programming.”²⁵ This analysis is difficult to follow.

Of course, MVPD consumers have many choices to access MVPD content. Frontier, like many other providers, recognizes that the MVPD market is quickly shifting to allow consumers to access content on virtually any video-capable Internet device in addition to an MVPD-provided box. Indeed, this Commission has overseen the greatest diversification in the equipment used to view MVPD content. Moreover, independent analysts predict— without any additional Commission action – that set-top boxes “will disappear as services move to the cloud.”²⁶ This explosion of available consumer equipment begs the question of why the need now to disaggregate MVPD services and undermine the MVPD business model. The essential question is what “problem” is the regulatory intervention trying to solve.

V. THE COMMISSION’S PROPOSAL WOULD INCREASE CONSUMER COSTS AND UNDERMINE CONSUMER PROTECTIONS.

A. The Proposal Does Not Adequately Address How MVPDs Will Continue to Provide Content Under Current Agreements.

In the *NPRM*, the Commission recognizes the concerns of MVPD and content providers that the Commission’s proposal would allow device manufacturers to “disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content” as provided for in the carefully negotiated agreements between MVPDs, content providers, and advertisers.²⁷ The Commission does not

²⁵ See 47 USC § 549(a).

²⁶ See Jason Bazinet, Mark May, Michael Rollins, and Jim Suva, *Paradoxes & Trojan Horses*, Citi Research at 1 (Mar. 6, 2016).

²⁷ *NPRM* ¶ 80; see also, e.g., Letter from Alex Starr, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 15-64 at 5 (Jan. 13, 2016)

dispute that any of these actions – disrupting channel lineups, replacing advertising, or improperly manipulating content – would be very problematic. Instead, the Commission simply asserts that it has not seen any evidence of this type of behavior in the CableCard regime, and thus, it believes regulation is unnecessary.²⁸ This assertion flips the required analysis entirely on its head, assuming no problems will occur despite every incentive otherwise.

There is substantial evidence in the record that device manufacturers would and indeed intend to ignore MVPD programmer agreements.²⁹ The Commission’s analysis here appears to willfully disregard this evidence and the fact that device manufacturers have very large incentives to disaggregate video streams, remove and disrupt channel lineups, and insert their own advertising. Indeed, it is these potential advertising revenues and the disaggregation of MVPD products that drive this rulemaking – those potential revenues attract the companies seeking to free ride on the infrastructure and investment of other companies. If the Commission believes that these are not problems for the underlying video market, reasoned decisionmaking requires that it explain why.³⁰ The Commission cannot simply ignore this evidence and the underlying incentives by saying it hopes that device manufacturers do not take certain actions.

Ultimately, the effects of the proposal’s complete disruption of underlying content agreements will fall hardest on consumers in the form of disrupted programming and higher

(“*AT&T Jan. 13 Ex Parte*”); Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information and Administrator, National Telecommunications Information Administration, to Marlene Dortch, Secretary, FCC, Docket No. 16-42 (Apr. 14, 2016).

²⁸ *NPRM* ¶ 80.

²⁹ *See, e.g., AT&T Jan. 13 Ex Parte* at 2.

³⁰ *See, e.g., Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that reasoned decisionmaking requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action[s]”).

costs. If the Commission adopts rules that render portions of contracts void and lead to the unbundling of services, MVPDs will be required to expend significant resources to renegotiate contracts. Given the contentious and complicated environment for content negotiations, there are no guarantees that consumers will still receive the same programming at the same price. Of course, because video is a competitive market, these higher regulatory costs will in the end fall on consumers.

B. The Commission’s Proposal Would Undermine Consumer Privacy.

The Commission’s proposal does not assert or claim any direct authority over set-top box manufacturers to ensure consumer privacy.³¹ Instead, the Commission proposes that set-top box manufacturers certify that they will comply with all of the privacy rules that currently apply to MVPDs.³² MVPDs would then have to ensure that set-top box manufacturers have provided up-to-date privacy certifications before sharing video stream information.³³ As, for example, NTIA recognizes, this approach will not protect consumer privacy.³⁴ And the FCC clearly lacks jurisdiction over set-top box manufacturers.

This proposed framework presents several problems. Most importantly, the proposed privacy framework would not actually be enforceable as to any set-top box manufacturer that violates consumer privacy. Even if the company openly ignores the privacy rules, the Commission apparently would have no way to address these violations. This is especially

³¹ *NPRM* ¶¶ 73-78.

³² *See id.*; *see also, e.g.*, 47 U.S.C. §§ 551, 338(i).

³³ *See NPRM* ¶¶ 73-78.

³⁴ *See Ex parte* letter from Lawrence E. Strickling, NTIA, to Chairman Wheeler, MB Docket No. 16-42 at 5 (April 14, 2016).

problematic because, under the proposal, virtually any company could certify that they will comply with the proposals to receive MVPD video streams and, by extension, customer's private data. Even if, for example, the Commission could revoke the certification on a going-forward basis, devices would already be publicly on the market, and the manufacturer would continue to have the information necessary to pass through the video streams. Put differently, the Commission would be able to provide limited deterrence and no redress for blatant violations of customer privacy.

Additionally, the Commission's proposed framework risks adding substantial additional costs with minimal effectiveness to the extent it would require MVPDs to police set-top box manufacturer privacy practices. MVPDs do not have the resources or infrastructure to ensure that set-top box manufacturers comply with the Commission's privacy rules or to scrutinize certifications. To the extent that the Commission proposes to require MVPDs to police privacy certifications and privacy compliance, the Commission will add significant consumer costs with limited benefit.

C. The Commission's Proposal Will Create Customer Confusion and Increase Customer Service Costs.

As an Internet and voice provider, in addition to a video provider, Frontier recognizes that the service provider – not the device manufacturer – is the first point of contact for a customer when service is not working properly. For example, when a customer's WiFi is not performing as expected, the customer does not call the router manufacturer; the customer calls the underlying provider. Even if a customer were to call the manufacturer, it is unclear whether manufacturers generally have dedicated customer service teams capable of addressing service issues, and they certainly do not have the local teams in all served markets that can make customer visits.

The Commission’s proposal, however, presents a much greater challenge than creating customer confusion by attaching third party devices to customer networks. Instead, the Commission’s proposal would remove almost any control the service provider has over service delivery. Even the best of set-top boxes and third-party equipment have operational failures, but under the apps approach³⁵ that is already organically developing in the market, Frontier and other service providers can work sufficiently closely with device manufacturers to ensure the product works with the underlying infrastructure.

Under the Commission’s proposal, Frontier and other service providers have no control over either the software or the device hardware, and the Commission appears to affirmatively prohibit such cooperation.³⁶ Not only does this pose greater risks of customer service calls related to service on devices manufactured by well-established companies, but it also introduces a whole new and much less trusted group of businesses that will not have the same incentives or abilities to guarantee service. Ultimately, service providers like Frontier will be blamed when third party software or hardware does not work properly, and customers will have to shoulder the increased customer service costs.

³⁵ Following the convention in the report of the Downloadable Security Technology Advisory Committee (“DSTAC”), Frontier refers to the approach where the Commission would still allow MVPDs to retain control over their product through customer apps as the “apps approach.” See DSTAC, *Final Report* (Aug. 28, 2015), <http://bit.ly/1Vce9Zx>.

³⁶ See, e.g., *NPRM* ¶ 23 (proposing to interpret § 549 to find that a device is not competitive if an MVPD and a device manufacturer have a “business-to-business” relationship). Among other things, allowing a business-to-business relationship between an MVPD and set-top box manufacturers serves the very practical purpose of eliminating customer confusion by establishing a process for repair by the MVPD when the service is not working properly, regardless of whether the MVPD or the set-top box manufacturer is the cause.

VI. THE COMMISSION DOES NOT HAVE AUTHORITY TO UNBUNDLE MVPD SOFTWARE.

Under the plain language of the statute, the Commission does not have authority to adopt regulations to assure the commercial availability of MVPD software. The statute unambiguously gives the Commission authority to promote the availability of hardware, not software: “The Commission shall . . . 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.”³⁷ In other words, the Commission can adopt regulations to assure that there is a wide array of equipment available to access MVPD video streams, such as the PCs, Macs, Androids, and Rokus available to view Frontier’s and other MVPDs’ content. At the same time, the Commission does not have authority to adopt regulations to require availability of third-party software completely unassociated with an MVPD.

As the Commission explains, however, it proposes regulations that allow developers to build “*software solutions* that can navigate the universe of multichannel video programming.”³⁸ The Commission explicitly rejects the apps approach, arguing that it does not promote the competitive availability of equipment under the statute despite the widespread availability of MVPD content on video capable devices. Under its reading of the statute, the Commission proposes that providers cannot maintain *any* control over software if there is to be competitive availability of equipment. In other words, the Commission would find that it does not actually

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

³⁸ *NPRM* ¶ 1.

matter that a consumer no longer has to purchase a set-top box from an MVPD – it can promote the unbundling of the software, and thus the services, that MVPDs already provide. Under this interpretation, MVPDs cannot have control over the customer interface, despite the fact that MVPDs have negotiated all underlying content agreements.

The Commission argues that it has authority to fully prevent MVPDs from retaining any control over software through some complex legal gymnastics. Without seriously contending that the terms “navigation device” or “interactive communications equipment, and other equipment” are ambiguous, the Commission asserts: “Exercising our authority to interpret ambiguous terms in the Communications Act, we tentatively conclude that these terms include both the hardware and software (such as applications) employed in such devices.”³⁹ That is, the Commission tentatively concludes it has authority to assure not only competitive availability of hardware – what the statute actually says – but also software.

Perhaps recognizing the shaky legal ground for asserting authority to promote competition over pure software – the authority that would seem to be necessary to unbundle provider apps on third-party devices – the Commission searches other parts of the statute to reject the apps approach. Specifically, the Commission proposes an expansive interpretation of the term “affiliated” in the statute, which requires the competitive availability of equipment to access MVPD services from “manufacturers, retailers, and other vendors *not affiliated* with any” MVPD.⁴⁰ In particular, the Commission proposes to interpret the term “affiliated,” such that any third-party manufacturer that allows an MVPD app on a device is affiliated with the MVPD.⁴¹

³⁹ *NPRM* ¶ 22 (emphasis added).

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

⁴¹ *See NPRM* ¶ 23.

Under this interpretation, the Commission need not regulate pure software to find that competitive equipment and associated software is not competitively available because all third-party manufacturers are affiliated with MVPDs simply by allowing MVPD apps on their equipment. Thus, under the Commission’s proposed interpretation of “affiliated,” even if there is competitive availability of hardware, there is not competitive availability of hardware and software because all hardware manufacturers are affiliated with MVPDs. If this is difficult to follow, it is because the Commission’s rationale is tenuous at best.

The Commission’s attempt to circumvent the plain meaning of the statute here will not withstand legal review. Not only is Commission authority over pure software absent from the statute, but the Commission’s proposed definition of “affiliated” is also divorced from the standard definition of the word and any previous interpretation the Commission has taken. The Commission here interprets entities “not affiliated” with MVPDs to mean “entities that have no business relationship with any” MVPD.⁴² The Commission further explains that “not affiliated” means devices “built by developers with [no] business-to-business relationship with an MVPD.”⁴³ This proposed definition, however, is radically broad. Under the standard dictionary definition, affiliated means “closely associated with another typically in a dependent or subordinate position,”⁴⁴ not any arms-length business-to-business relationship. The Communications Act, consistent with the standard meaning of the word, defines “affiliate” as “a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See Merriam Webster, Affiliated* (last accessed Apr. 16, 2016), <http://bit.ly/1qxYoPq>.

common ownership or control with, another person,” with the term “own” meaning “to own an equity interest (or the equivalent thereof) of more than 10 percent.”⁴⁵ The Commission does not even cite to this controlling definition, much less try to square its proposed definition with the statute’s required focus on actual control. Under the Commission’s proposed definition, the Commission does not examine control or negotiating power at all. So, for example, even if Frontier were to have to struggle to have its app placed on a device and exercises no control or power over the device manufacturer, the manufacturer would still be an affiliate of Frontier. The Commission does not attempt to cite authority for this proposition, instead relying solely on legislative history and what it believes was Congressional intent.⁴⁶

If the Commission is concerned about the exercise of market power by the very largest MVPDs over device manufacturer negotiations, it should adopt a narrowly tailored interpretation of affiliated, not one that unnecessarily sweeps in smaller players like Frontier under these regulations. Even with its recent growth, Frontier does not have the scale to coerce, control, or unduly influence well-capitalized device manufacturers. Rather, the bigger challenge is ensuring that Frontier’s app is available on the device.

Ultimately, the Commission’s proposed interpretation of its authority under the statute places the entire proposed framework at substantial risk. When Congress was legislating to

⁴⁵ See 47 U.S.C. § 153(2); see also 47 C.F.R. § 1.2110(c)(5) (“An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity – (A) Directly or indirectly controls or has the power to control the applicant, or (B) Is directly or indirectly controlled by the applicant, or (C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or (D) Has an “identity of interest” with the applicant.”); 47 CFR § 64.2003(c); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, FCC 16-39, WC Docket No. 16-106 ¶ 30 (Mar. 31, 2016).

⁴⁶ See *NPRM* ¶ 23.

ensure that cable customers have an alternative physical set-top box in 1996, no one in Congress could have envisioned the apps market today. The drafters would have been thrilled that the long ago cable monopoly has been attacked from all sides by telcos, satellite, and over-the-top. No matter how creative the legal interpretation, the statute simply does not give the FCC authority over pure software when there are a plethora of set-top boxes available.

VII. CONCLUSION

Fortunately, the Commission can avoid all of the pitfalls with its proposed approach while at the same time achieving its and the Administration's publicly stated policy goal of freeing consumers from monthly set-top box fees. Under the apps approach, the Commission can leverage what is already naturally occurring in the market. MVPDs like Frontier are rapidly deploying apps for all video-capable devices, and encouraging MVPDs to continue to do so will give consumers the option to purchase any one of a multitude of devices and eliminate set-top box rental fees. At the same time, the apps approach will preserve incentives for new video rollout and associated broadband deployment by ensuring providers maintain ownership of their services. Likewise, the apps approach respects contracts for content and allows the provider to ensure a quality product without the risk of ballooning customer service costs. And perhaps most importantly, the apps approach is on sound legal footing and will most quickly ensure the Commission's stated desire to give consumer's the option to end set-top box fees. In short, the apps approach offers all of the benefits and none of the problems of the Commission's proposal to unbundle a video provider's product.

Respectfully submitted,

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