

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 AT&T**

April 22, 2016

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## INTRODUCTION AND EXECUTIVE SUMMARY

It is a truism that generals are always fighting the last war. So it is with the FCC in this proceeding. The radical unbundling of MVPD service into three “Information Flows” is an unlawful “fix” to a non-existent problem that, if implemented, would stifle innovation and content creation, reduce diverse and independent content, erode consumer privacy, promote piracy, impair the customer experience, and increase charges to consumers. The Commission does not even have a defined plan to implement this misguided, Rube Goldberg unbundling scheme. That is no surprise: innumerable technical obstacles stand in the way. Those obstacles would trigger an expensive, contentious, multi-year process guaranteed to end in failure.

The Commission’s proposal is all the more radical because it is entirely unnecessary to achieve its desired policy outcome: rapid marketplace evolution to satisfy consumers’ demand to watch video programming when and where they want it, on the device of their choosing. Consumers already can choose to access video programming in myriad ways over a wide range of devices, including Smart TVs; retail devices such as Roku, Google Chromecast, and Kindle Fire; game consoles; PCs and Macs; and smartphones and tablets. MVPDs have already launched “Apps” and other technologies that allow consumers to choose where and how they want to watch their MVPD services and that reduce or eliminate the need for set-top boxes. Competition at all levels of the ecosystem is driving ever more innovative and customer-friendly delivery options for MVPD and online programming – the very trajectory the NPRM<sup>1</sup> claims can be achieved only through intrusive new command and control regulations.

The NPRM seems to be premised entirely on impatience with the speed at which industry is evolving to meet consumer demand for more efficient and more elegant ways to find and

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<sup>1</sup> Notice of Proposed Rulemaking and Memorandum Opinion and Order, *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42 & CS Docket No. 97-80, FCC 16-18 (rel. Feb. 18, 2016) (“NPRM”).

consume video programming. But the pace of innovation is not a reflection of any market failure, but of the very real technical, copyright, privacy, and security challenges that must be addressed. The Commission cannot simply wish those challenges away with vague assurances that all will be worked out in the standards-setting process, and it is folly to believe that consumers will be better served by an inflexible bureaucratic mandate that picks winners and losers and disrupts existing market incentives for innovation.

Requiring MVPD service, alone among video sources competing for consumer attention, to be unbundled into its constituent “Information Flows” would impose new costs and burdens on consumers, while diminishing their privacy rights; it would undermine copyright protections and licensing arrangements, as well as revenue streams from the sale of advertising, on which independent and minority programmers, in particular, depend; and it would create insuperable technical and market barriers to innovation. To be sure, the proposed rules would benefit a few Silicon Valley giants that would seize on the opportunity to add information about what individuals watch – unhindered by the privacy obligations that apply to MVPDs – to the troves of other personal information they already collect and monetize in order further to consolidate their domination of the Internet advertising space. This is neither pro-competitive nor pro-consumer; it is regulatory favoritism at its worst.

The proposed scheme is also demonstrably unlawful and, should it be adopted, will be vacated by a reviewing court. Section 629 of the Communications Act of 1934 requires competitive availability of “equipment used by consumers *to access*” “multichannel video programming” and “other services offered over multichannel video programming systems.” 47 U.S.C. § 549(a) (emphasis added). It creates no authority for the Commission to draft MVPDs into supporting *new* services offered by others. And Section 629 explicitly seeks to

enhance the availability of “converter boxes” and “other equipment” used to access an MVPD’s services, *id.*, not, as the Commission fantasizes, “software.” The Commission’s remarkable suggestion that, in seeking to increase competition from entities “not affiliated” with MVPDs, Congress had the idiosyncratic intent to exclude any entity that had an arm’s-length *agreement* with an MVPD is equally specious. The fact that the Commission must perform such radical surgery on the statute is powerful proof that the FCC proposal is unauthorized. Because the Commission plainly has no authority to undermine copyright rights, to enable circumvention of the consumer privacy provisions of the Communications Act, or to breach First and Fifth Amendment protections, it is all the more clear that Congress has not permitted anything like the misguided regime the Commission has proposed.

While the Commission fixates on a world in which all consumers are forced to access video content through a rented set-top box, that world is fast disappearing – not because of heavy-handed Commission regulations, but because of market-driven innovations. The FCC has a terrible record in anticipating technologies and picking marketplace winners and losers, and it should let the marketplace evolve naturally rather than displacing value-creating innovation with regulatory arbitrage and rent seeking.

#### **I. The Proposed Rules Are Unnecessary Because the Marketplace for Competitive Navigation Devices Is Thriving**

At all relevant levels, competition in the video programming marketplace is thriving. Certainly, there is no evidence of the kind of market failure that would, at a minimum, be necessary to support regulatory intervention here.

*First*, there is intense competition among MVPDs. As of 2013, more than 99% of U.S. consumers could choose from among at least three MVPDs, and roughly 35% of consumers could choose from among four or more. In order to distinguish themselves in the video

marketplace, MVPDs must compete not only in assembling programming packages and other content, but also in developing the most efficient and user-friendly interfaces, platforms, and devices for delivering their programming to subscribers.

*Second*, MVPDs face rapidly increasing competition from online video distributors (“OVDs”) such as Amazon, Netflix, and Hulu, to name just three. OVDs compete fiercely for viewership hours, and consumers also increasingly are cutting their MVPD service entirely or never subscribing in the first place, relying instead on online alternatives. U.S. viewers used downloadable apps legally to access 7.1 billion movies and 66 billion television episodes in 2014, from among the more than 110 lawful online sources that serve the United States today. Netflix streaming alone has vastly more subscribers than any traditional MVPD.

*Third*, there is device competition. Consumers demand their programming when they want it, where they want it, and on the devices they prefer. The market is meeting that demand with an array of competitive navigation devices on which MVPD programming is but one app among many. There have been more than 56 million downloads of MVPD apps to iOS and Android devices alone, with millions more occurring every month. At last count, MVPD apps supported twice as many retail devices as there are leased set-top boxes. Moreover, DIRECTV subscribers can access its services directly from a Smart TV or other device without the need for additional set-top boxes other than the main gateway box in the home. There are seven manufacturers (Sony, LG, Samsung, Pace, Humax, Toshiba, and Technicolor) that have already introduced such RVU-ready (a non-proprietary open standard) TVs and other devices.

Despite all of this competition, the NPRM concludes (at ¶ 12) that MVPDs lack the proper incentives to promote competitive navigation devices “because MVPDs offer products that directly compete with navigation devices and therefore have an incentive to withhold

permission or constrain innovation.” In fact, as Dr. Katz explains, MVPDs are embracing the “Apps Approach” out of competitive necessity. This approach enables them to satisfy consumers’ demand to watch video programming when and where they want it, on the device of their choosing, while also competing more effectively with other MVPDs and OVDs that already offer these advanced capabilities.

The era of the leased set-top box as consumers’ sole gateway to access video programming content is over. A government-imposed technology mandate is therefore completely unnecessary to achieve Congress’s objectives in enacting Section 629. The question is not whether MVPD programming should be available on third-party devices. It already is, and in spades.

## **II. The Proposed Rules Will Harm Consumers, Competition, and Innovation**

The NPRM proposals are not merely unnecessary to promote competition and protect consumers. They are affirmatively harmful in at least five respects.

*First*, the proposed rules are unworkable. There are currently no devices, no standards, and no network architecture to unbundle the three proposed “Information Flows.” Nor could such standards reasonably be developed in two years, given the complexity of the issues, the different system architectures, and the widely divergent economic interests of the participants. It would be impossible to design a process more clearly destined to fail.

*Second*, even if they could be implemented, the proposed rules would dampen innovation. The Commission has long recognized that establishing fixed protocols for navigation devices “is perilous because [such] regulations have the potential to stifle growth, innovation, and technical developments at a time when consumer demands, business plans, and technologies remain unknown, unformed or incomplete.” Report and Order, *Implementation of*

*Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775, ¶ 15 (1998). Even if such standards could be developed after years of work, they would already be – like CableCARD – outdated and doomed to be expensive failures. Moreover, the ability of MVPDs to introduce new technologies would be constrained by the requirement that any such innovations comply with fixed protocols, enabling third parties to exploit the benefits of these innovations despite not sharing in the risks or costs of their development.

*Third*, the proposed rules will undermine contractual agreements that govern how MVPDs present programmers on their service and guard against piracy. Under the Commission’s proposals, third parties can, and have affirmatively stated that they will, ignore license terms regarding such things as channel position, scope of distribution, and consistent presentation of branded content. They will rely on search algorithms that make it harder to find independent, niche, and minority programming; swap out the advertising that pays for the programming with ads of their own; and show pirated content alongside licensed content. As the National Telecommunications and Information Administration (“NTIA”) recognized in its recent filing, such a result would severely harm the quality and diversity of programming, especially for independent and minority programmers and the consumers and communities they serve. By diminishing the value of their advertising and making their programming hard to find, the proposed rules would rob programmers of significant resources for the development of their creative works. For that reason, numerous small and minority programmers, as well as scores of Black and Hispanic legislators, have urged the Commission not to follow this course.

*Fourth*, the proposed rules will erode consumer privacy. Congress enacted extensive privacy protections in the context of MVPD services to protect sensitive information regarding customer viewing habits. As the FCC admits in the NPRM, and as NTIA again concedes in its

filing in this docket, these existing privacy statutes and rules do not apply to third-party device manufacturers and would leave consumers with no recourse. Accordingly, the Commission's proposals would create an enormous loophole in the protections that Congress crafted to protect consumers in this specific context. The Commission's proposed fix for that loophole is unworkable and, in any event, not equivalent to the protections Congress intended to apply here.

*Fifth*, the proposed rules will increase consumer costs and cause customer confusion and frustration. MVPDs will have to undertake a lengthy standards-setting process at the end of which they would have to create new devices for the home, as well as modify their networks, to create three separate Information Flows and to conform to whatever new standards and protocols are ultimately adopted. The NPRM provides no mechanism to recover those costs, which will ultimately be borne by consumers in the form of higher prices for MVPD services. So too will the price of lost advertising as third-party providers take MVPD content and substitute advertisements of their own.

Even beyond that, the proposed rules will impair the customer experience. With third-party providers serving as an intermediary between MVPDs and their customers and repackaging MVPD service however they like, customers are not guaranteed to receive the full array of services and features for which they contracted, including the "look and feel" of the MVPD's service. Nor will they have a single point of contact for problems with their service. Consumers will be frustrated when their MVPDs cannot answer basic questions about how the service works on the third-party device or even determine whether the source of any problem is the MVPD or the device.

By contrast, the Apps Approach that consumers are already adopting by the millions serves all the purposes of Section 629 without creating any of these issues. The ready

availability of this alternative makes the Commission’s proposal to impose all these harms on the public all the more baffling.

### **III. The Proposed Rules Are Unlawful**

The FCC’s proposed unbundling rules are blatantly illegal. As in the recent *EchoStar* case, where the D.C. Circuit reversed a Commission mandate that had only a “tenuous . . . connection to § 629’s mandate,” any Commission departure from the clear limits imposed by Section 629(a) will justly lead to another judicial rebuke. *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 993, 997 (D.C. Cir. 2013).

*First*, Section 629(a) directs the Commission to assure consumer choice in devices used to “access” the “programming and other services” provided by MVPDs. 47 U.S.C. § 549(a). It does not authorize the Commission forcibly to require MVPDs to unbundle their services and assist third parties in creating new services. Where, in the past, Congress has wanted to order unbundling, it has done so explicitly and set forth detailed directions on how that is to be accomplished. No such mandate exists in Section 629.

*Second*, Congress could not have been clearer that the “services” for which the Commission is to assure competitive means of access are the existing “multichannel video programming and other services offered over multichannel video programming systems.” *Id.* Thus, the MVPD services to which Congress intended to increase access include not only programming, but also features and functionalities to enhance the user experience and distinguish their services from their competitors’ offerings, such as the user interface, parental controls, fantasy sports and weather updates, and social media. Yet the Commission proposes to mandate that MVPDs offer an Information Flow containing only “Navigable Services” –

a newly minted term that excludes all these features and functionalities – thus impermissibly ignoring the statutory text.

*Third*, by its plain terms, Section 629(a) seeks to expand access to competing “converter boxes” and “other equipment,” *id.*; it does not, as the Commission would have it, seek to expand competition from “software.” The ordinary meaning of “equipment” involves tangible objects or physical resources, and Congress deliberately placed the term “equipment” at the end of a list – “converter boxes, interactive communications equipment, and other equipment,” *id.* – of hardware devices. Under established canons of construction, therefore, “equipment” also describes hardware, not software. Beyond this, Section 629(a) applies only to the “equipment *used by consumers to access* multichannel video programming *and* other services offered over multichannel video programming systems.” *Id.* (emphases added). As described above, software providing *new* services composed of the disaggregated parts of MVPD services is in no way “equipment used by consumers to access” MVPD services.

*Fourth*, Section 629(a) focuses on equipment provided by entities “not affiliated with” MVPDs. *Id.* The Commission’s suggestion that any entity with an arm’s-length business relationship qualifies as such an “affiliate” is, to say the least, fanciful. Congress has already defined “affiliate” for purposes of Title VI of the Communications Act as a person “who owns or controls, or is owned or controlled by, or is under common ownership or control with” another person. *Id.* § 522(2). In direct contrast with its approach here, the Commission has elsewhere recognized that ordinary contractual relationships do not typically give rise to a relationship of ownership and control. The NPRM’s proposed new definition of “affiliate” is thus unprecedented as well as unsustainable.

*Fifth*, the action contemplated here does not just completely disregard the statutory limits on the Commission’s authority. It exceeds the Commission’s authority by creating extreme tension – indeed, irreconcilable conflict – with at least three other statutory regimes.

*a. The Copyright Act.* The ability to slice, dice, edit, and rearrange an MVPD’s programming compilation, and replace the MVPD’s chosen advertisements, violates the MVPD’s rights to control “derivative works” based on its copyrighted material. In this regard, NTIA recognizes that the Commission’s proposal could have a “deleterious effect on the programming supply market, including that for specialized and minority programming.” Letter from Lawrence E. Strickling, Ass’t Sec’y for Commc’ns & Info., U.S. Dep’t of Commerce, to Chairman Tom Wheeler, FCC, at 5, MB Docket No. 16-42 (Apr. 14, 2016) (“NTIA Comments”).

*b. The Digital Millennium Copyright Act (“DMCA”).* Broadcasters and programmers have a right under the DMCA and Section 629(b) to protect their copyrights using content protection systems of their choosing. Yet the proposed rules would force MVPDs and programmers “to . . . remove . . . or impair” their chosen content protection system and to replace it with another that they have not approved, that may not be as secure, and that may violate their licensing agreements – a plain violation of both the DMCA and Section 629(b).

*c. Consumer Privacy Protections.* Congress has enacted specific provisions to protect the privacy of video subscribers, none of which will apply to third-party navigation devices. The Commission proposes a privacy certification process that is both unworkable and insufficient. The Commission cannot even say to whom makers of navigation devices would “certify” their compliance, nor can it explain how those certifications would be enforced given that MVPDs must make their streams available without having any contractual privity with those third parties. Indeed, NTIA concedes that the NPRM leaves “important questions to be

addressed” as to privacy, including the existence of “legal authority” for the Commission’s approach. NTIA Comments at 5.

*Sixth*, the proposed rules raise serious constitutional concerns under both the First Amendment and the Fifth Amendment’s Taking Clause. Under standard principles of statutory construction, the Commission must avoid an interpretation of Section 629 that imposes such burdens on constitutionally protected interests.

*Seventh*, the proposed rules are arbitrary and capricious in numerous respects developed in the body of these comments, including the Commission’s repeated, inadequately justified reversals of its own prior interpretations of Section 629. The most egregious of these failings is that the Commission has not even attempted to perform a cost-benefit analysis of its proposed rules, despite Congress’s explicit direction that it do so. *See* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 106(d)(1), 128 Stat. 2059, 2063 (“STELAR”). The Commission has utterly failed to explain why the proposed rules are necessary, what they would cost, or even how they would be implemented.

*Finally*, the proposed rules improperly cede government authority to private entities. Under established precedent, “subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). Congress did not authorize such action here. On the contrary, it authorized the Commission only to consult with outside entities, not to cede authority to them.

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The FCC previously devised an extensive unbundling regime under the Telecommunications Act of 1996 (“1996 Act”). The result, as most observers will acknowledge, was not increased competition. It was regulatory arbitrage and rent seeking. New competition came from elsewhere: cable, VOIP, and wireless; and it came in spite, not because, of the unbundling rules. At least in that context, however, the FCC had a clear mandate to unbundle. Here, there is no such statutory mandate, and no justification for the FCC to be picking winners and losers, to be dictating technology, and to be precluding the natural forces of competition in this market. In stark contrast to the Apps Approach that MVPDs and consumers are rapidly adopting, these proposed rules will harm consumers and impede technological progress. They should be rejected in their entirety, and the Commission should continue to let the marketplace offer more choices for consumers.

## ARGUMENT

### **I. The NPRM Proposals Are Unnecessary Because the Marketplace for Competitive Navigation Devices Is Thriving**

The Commission justifies the NPRM proposals on three “fundamental points”: *first*, “the market for navigation devices is not competitive”; *second*, MVPDs have incentives to “constrain innovation” and competition for such devices; and, *third*, “the few successes that developed in the CableCARD regime” bear out the need for “competition in the user interface and complementary features.”<sup>2</sup> These claims are demonstrably false. Indeed, the NPRM provides no evidence of market failure or any other support for these claims.

In fact, rapidly growing competition both among MVPDs, and between MVPDs and OVDs, has brought an end to the era of the leased set-top box (“STB”) as consumers’ sole gateway to access video programming content. The competitive marketplace has adopted an “Apps Approach” that allows consumers to access both MVPD and OVD services through downloadable applications that work on hundreds of different devices, while enabling MVPDs and OVDs to preserve and enhance their brands. With the Apps Approach, MVPDs and OVDs manage the “look and feel” of their services, ensuring a consistent user interface and experience regardless of the device over which it is delivered. MVPDs have strong incentives to embrace this Apps Approach to competitive navigation devices because it enables them to satisfy consumers’ demand to watch video programming when and where they want it, and to compete more effectively with the OVDs that already offer these advanced capabilities.

Thus, the marketplace is already moving inexorably in the direction of drastically reducing dependence on STBs. To be sure, that process is not complete, and it is, in some ways, messy, as MVPDs negotiate with individual programmers for the right to show more and more

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<sup>2</sup> NPRM ¶ 12.

content through applications, while protecting against piracy. But there are far greater technical and other hurdles to implementing the Commission’s proposed approach. The choice is clear. If the Commission stays out of the way and continues to allow market forces to operate, consumers will benefit enormously. Regulatory intervention, on the other hand, will stifle innovation and impose grave consumer harm.

#### **A. The Marketplace for Navigation Devices Is Thriving**

The NPRM premises the supposed “need for rules” on its finding that “consumers have few alternatives to leasing set-top boxes from their MVPDs.”<sup>3</sup> That premise is wrong. There is no market failure – a prerequisite to the type of regulation the Commission has proposed.<sup>4</sup>

As Dr. Michael Katz explains, although the NPRM may accurately describe the market that existed two decades ago when Section 629 of the Communications Act was enacted, it bears little resemblance to the video distribution marketplace of today.<sup>5</sup> In 1996, cable was a protected monopoly, DBS competition was in its infancy and prohibited from retransmitting local broadcasts, and telco entry into MVPD service was legally prohibited.<sup>6</sup> Thus, the Commission’s

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<sup>3</sup> *Id.* ¶ 13; *see id.* ¶ 12 (market is “not competitive”).

<sup>4</sup> *See, e.g.*, Tentative Decision and Request for Further Comments, *Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 F.C.C.2d 1019, ¶ 107 (1983) (imposition of regulation requires “evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public”); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984) (“It is of course elementary that market failure and the control of monopoly power are central rationales for the imposition of rate regulation.”) (citing Stephen Breyer, *Regulation and Its Reform* 15-16 (1982)); *MB Fin. Grp., Inc. v. United States Postal Serv.*, 545 F.3d 814, 819-20 (9th Cir. 2008) (“At bottom, market failure occurs when there is no incentive for private businesses to provide a service.”).

<sup>5</sup> Declaration of Michael Katz § II.A (“Katz Decl.”) (Attachment 2).

<sup>6</sup> *See, e.g.*, Third Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358, ¶ 4 (1997) (“*Video Competition Report*”) (“[I]ncumbent franchised cable systems continue to be the primary distributors of multichannel video programming, although other MVPDs, particularly those using alternative technologies (e.g., DBS, wireless cable and SMATV systems), continue to increase their share

1997 *Video Competition Report* found that “technological alternatives to traditional cable service” accounted for only “11% of total MVPD subscribership.”<sup>7</sup> Today, by sharp contrast, *the majority* of consumers choose MVPD service from a provider other than a cable company.<sup>8</sup> And, as of 2013, more than 99% of U.S. consumers can choose from among at least three MVPDs, and roughly 35% of consumers can choose from among four or more.<sup>9</sup> Based on this MVPD-based competition alone, the Commission has recently adopted a presumption that the video marketplace is effectively competitive nationwide.<sup>10</sup>

Further, the Commission cannot reasonably conclude that MVPDs comprise the full market here. Consumers today use online video services not merely as a complement to, but increasingly as a substitute for, MVPD service.<sup>11</sup> Online video distributors compete with MVPDs heavily for viewership hours, and consumers also increasingly are cutting their MVPD service entirely or never subscribing in the first place, relying instead on online alternatives.

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of subscribers in many markets. Subscribership for distributors using technological alternatives to traditional cable service now accounts for 11% of total MVPD subscribership. . . . Subscribership to DBS services increased . . . to nearly 4 million homes at the end of October 1996.”); S. Rep. No. 104-23, at 3 (1995) (“The 1984 Cable Act prohibited telephone companies from providing video programming directly to subscribers in the same region where they provide telephone service (the so-called cable-telco prohibition), thereby preventing telephone companies from competing with cable operators.”).

<sup>7</sup> *Video Competition Report* ¶ 4.

<sup>8</sup> See NCTA, *Then & Now: Pay TV Competition* (data as of year-end 2014), <https://www.ncta.com/industry-data>.

<sup>9</sup> See Sixteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, ¶ 31, Table 2 (2015) (“*16th Annual Video Competition Report*”) (based on 2013 data).

<sup>10</sup> See Report and Order, *Amendment to the Commission’s Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*, 30 FCC Rcd 6574, ¶ 10 (2015) (“[W]e conclude that adopting a rebuttable presumption of Competing Provider Effective Competition is consistent with the current state of the video marketplace.”).

<sup>11</sup> See Katz Decl. ¶ 33; *16th Annual Video Competition Report* ¶ 83 (“Individual consumers may perceive OVDs as a substitute, a supplement, and a complement to their MVPD video service.”).

According to one estimate, the number of households with cable has fallen 10% in the past five years, and that trend is continuing.<sup>12</sup> This sharply enhanced competition has forced MVPDs to distinguish themselves from both competing MVPDs and OVDs by developing STB platforms that offer consumers advanced capabilities and interfaces, such as DIRECTV's Genie, Comcast's X1, Dish's Hopper, and Google's Android TV, among others.<sup>13</sup> This competition among vertically integrated suppliers is relevant for assessing competition in each horizontal market in which those suppliers compete.<sup>14</sup>

The need to provide an attractive product for consumers who can now choose from multiple MVPDs and OVDs has ushered in an entirely new form of competition for navigation devices, based on third-party devices that run downloadable software applications.<sup>15</sup> This

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<sup>12</sup> See Myles Udland, *Cable TV Subscribers Plunging*, Business Insider (Aug. 18, 2015) (Pacific Crest estimated "that the number of households with cable has fallen 10% in the past five years"), <http://www.businessinsider.com/cable-tv-subscribers-plunging-2015-8>; see also, e.g., Leichtman Research Group Press Release, *Major Pay-TV Providers Lost About 385,000 Subscribers in 2015* (Mar. 10, 2016) ("[T]he thirteen largest pay-TV providers in the US – representing about 95% of [MVPD subscribers] – lost about 385,000 net video subscribers in 2015, compared to a loss of about 150,000 subscribers in 2014, and a loss of about 100,000 subscribers in 2013."), <http://www.leichtmanresearch.com/press/031016release.html>; Deloitte, *US TV: Erosion, Not Implosion* at 1 (2016) ("The number of pay-TV subscribers has been declining slowly since 2012, falling by 8,000 in 2012, 170,000 in 2013, and 164,000 in 2014. The annual incremental change in total subscribers was steady at around 150,000 fewer for most years between 2010 and 2014, but it is accelerating sharply in 2015 with pay-TV subscribers estimated to fall by just under one million.") (footnotes omitted), <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Technology-Media-Telecommunications/gx-tmt-prediction-us-tv-television-market.pdf>.

<sup>13</sup> See, e.g., Mike Snider, *Super DVRs Swoop in To Save Your Shows*, USA Today (Sept. 10, 2013) ("These days, adding new features and functions has become crucial to keep customers satisfied and prevent an exodus to Internet video programmers such as Netflix and Net TV-delivery solutions such as Apple TV. 'You've got to find something new to compete with,' says analyst Bill Niemeyer of The Diffusion Group, 'and this new thing is tech.'"), [http://usatoday30.usatoday.com/MONEY/usaedition/2013-09-11-Super-DVRs-take-pay-TV-versatility-to-new-heights\\_ST\\_U.htm](http://usatoday30.usatoday.com/MONEY/usaedition/2013-09-11-Super-DVRs-take-pay-TV-versatility-to-new-heights_ST_U.htm).

<sup>14</sup> See Katz Decl. ¶¶ 37-41.

<sup>15</sup> See *Tablets – Not DVRs or Game Consoles – Will Be at Heart of Streaming TV Boxes*, TDG

marketplace development – the Apps Approach – responds to consumers’ desire to access content, including video content, when and where they want it, on the device of their choosing.<sup>16</sup> The Apps Approach enables retail devices to receive video services from multiple MVPDs and OVDs with the device manufacturer’s user interface controlling the device, and the MVPD/OVD’s user interface controlling the user experience within the app (and thus controlling the use of the MVPD or OVD brand). This approach thus replicates for MVPD consumers the wildly successful model of online “proprietary” video apps, like Netflix, Hulu, and Amazon TV, all of which allow retail devices (like the Roku device, Google Chromecast, and Apple TV) to access multiple OVDs’ content, while enabling each OVD to ensure a consistent user experience and determine how its content is presented to consumers.<sup>17</sup>

Today, consumers are using the Apps Approach to watch video content on a sweeping array of *customer-owned* devices, including Smart TVs, Kindle Fire, Apple TV, Google Chromecast, and Roku; iOS and Android tablets and smartphones; game consoles; and PCs and Macs.<sup>18</sup> Consumers can use app-enabled devices to access content from a single programmer

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*Analyst Says*, Communications Daily (Sept. 24, 2015) (apps-based “tablets rather than DVRs or videogame consoles” will be the “foundation of living room streaming”; “[c]onsumers are steadily evolving toward a new paradigm of video consumption based on app stores, device home screens (that show multiple apps), app home screens (that show featured content)”); Daniel Frankel, *DSTAC, CableCard, Pay-TV Apps and the Future of the Cable Industry’s \$20B Set-Top Business*, FierceCable (Oct. 5, 2015) (Espelien said: “The interface between services and devices is going to be an app. This is the only approach that works across all types of devices (not just living room STB which is only a part of overall video consumption) and actually relates to the technology ecosystem as it is. Consumers have already voted with their feet in favor of this approach, so there is no point in trying to turn the clock back to the 1990s on this.”), [http://www.fiercecable.com/offer/gc\\_dstac?sourceform=Organic-GC-DSTAC](http://www.fiercecable.com/offer/gc_dstac?sourceform=Organic-GC-DSTAC).

<sup>16</sup> See Report of Working Group 4 to DSTAC at 127-43 (Aug. 4, 2015) (“DSTAC WG4 Report”) & DSTAC Summary Report at 4-5 (Aug. 28, 2015), attached to Public Notice, *Media Bureau Seeks Comment on DSTAC Report*, 30 FCC Rcd 15293 (2015).

<sup>17</sup> See, e.g., DSTAC WG4 Report at 73, Table 8.

<sup>18</sup> See, e.g., David Katzmaier, *What You Can Watch on Apple TV, Roku, Fire TV, Chromecast*

(e.g., HBO Now, CBS All Access, Showtime Anytime, and most recently Starz), new content aggregators and distributors (e.g., Netflix, Hulu, Amazon, PlayStation Vue, Sling TV), and online-only MVPD offerings that are both subscription-based (e.g., Comcast Stream) or entirely ad-supported (e.g., Verizon's go90). Consumers can also access their MVPD services on third-party devices using MVPDs' TV Everywhere apps. As rights have increasingly become available through agreements with content providers, the major MVPDs have introduced TV Everywhere apps that, like OVD apps, enable MVPD subscribers to access from the device of their choosing any of their MVPD's programming for which such TV Everywhere rights have been granted.<sup>19</sup> The marketplace is also delivering a variety of content discovery tools for consumers to perform integrated searches of both OVD and MVPD content. Integrated search functionality is now available on Roku devices, TiVo devices, and various websites, and also is supported on iOS9, Android, Apple TV, and Amazon Fire TV devices.<sup>20</sup>

DIRECTV, U-verse TV, and all other top 10 MVPDs have introduced device-specific TV Everywhere apps to enable subscribers to access their video content and services over the commercially available navigation devices of their choice (e.g., iOS, Android, Samsung, LG, Xbox, PlayStation, Roku).<sup>21</sup> Today, for example, AT&T makes available nationwide an app that allows DIRECTV and U-verse TV subscribers to access much of the programming to which

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*and Android TV*, CNET (Apr. 6, 2016) ("These days just about every major entertainment app is available on just about every living room streaming device. You probably have five ways to stream Netflix."), <http://www.cnet.com/news/what-you-can-watch-on-the-new-apple-tv-vs-roku-vs-fire-tv-vs-chromecast/> (last visited Apr. 15, 2016).

<sup>19</sup> See Report of Working Group 2 to DSTAC at 13 & Table 2 (Apr. 21, 2015) ("DSTAC WG2 Report") ("There have been millions of downloads of MVPD apps and millions of unique users."), attached to Public Notice, *Media Bureau Seeks Comment on DSTAC Report*, 30 FCC Rcd 15293 (2015).

<sup>20</sup> See Letter from Alex Starr, AT&T, to Marlene H. Dortch, FCC, at 1, MB Docket No. 15-64 (Nov. 23, 2015).

<sup>21</sup> See, e.g., DSTAC WG2 Report at 12-13.



MVPDs view the ability to offer their full services through apps as so critical that they consistently seek TV Everywhere rights in negotiations with programmers and now include a significant majority of that content in apps. For instance, DIRECTV currently offers live streaming of more than 100 cable channels and soon will have nearly all of the top 25 cable channels.<sup>27</sup> In addition, AT&T is working to acquire the rights to show nearly all MVPD content on a timeline we believe will be significantly faster than any on which the Commission's proposals can be implemented. DIRECTV is also introducing several new online streaming services (DIRECTV Now, DIRECTV Mobile, and DIRECTV Preview) designed for consumers who do not subscribe to MVPD services.<sup>28</sup>

Consumers have widely adopted apps-based devices and services, producing competition for navigation devices that goes well beyond what the drafters of Section 629 could have imagined. As Apple CEO Tim Cook declared in introducing the latest Apple TV, "the future of TV is apps."<sup>29</sup> There have been more than 56 million downloads of MVPD apps to iOS and Android devices alone, with millions more occurring every month. More than 460

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Release, *Comcast and Roku Bring Xfinity TV Partner App to Roku TVs and Roku Streaming Players* (Apr. 20, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-and-roku-bring-xfinity-tv-partner-app-to-roku-tvs-and-roku-streaming-players>.

<sup>27</sup> See DIRECTV, *Live TV Streaming Channel List*, [https://support.directv.com/app/answers/detail/a\\_id/3624?mydtv=true](https://support.directv.com/app/answers/detail/a_id/3624?mydtv=true).

<sup>28</sup> See AT&T, *AT&T To Launch Three New Ways to Access & Stream DIRECTV Video Content Later This Year* (Mar. 1, 2016), [http://about.att.com/story/three\\_new\\_ways\\_to\\_access\\_and\\_stream\\_directv\\_video\\_content.html](http://about.att.com/story/three_new_ways_to_access_and_stream_directv_video_content.html).

<sup>29</sup> Cat Zakrzewski, *Apple's Tim Cook: "We Believe the Future of TV Is Apps"*, Wall St. J. (Sept. 9, 2015), <http://blogs.wsj.com/personal-technology/2015/09/09/apples-tim-cook-we-believe-the-future-of-tv-is-apps/>. See also Apple, *Apple TV: The Future of Television Is Here* ("It's all about apps. Apps are the future of television. Think about it. On your mobile devices and computers, you already use apps such as Netflix, Hulu, WatchESPN, and iTunes to watch TV shows. And that's exactly where TV in the living room is headed. Apps have liberated television. They allow you to make individual choices about what you want to watch. And when and where you want to watch it."), <http://www.apple.com/tv> (last visited Sept. 30, 2015).

million IP-enabled retail devices in the U.S. market today support one or more MVPD apps, and 66% of them support apps from all of the top 10 MVPDs.<sup>30</sup> At last count, MVPD apps supported twice as many retail devices as there are leased set-top boxes.<sup>31</sup> On average, there are four retail devices with available MVPD apps in consumer homes, well exceeding the 2.6 MVPD set-top boxes per home. “U.S. viewers have used these and other apps and devices to legally access 7.1 billion movies and 66 billion television episodes in 2014 alone, from among the more than 110 lawful online sources that serve the United States today.”<sup>32</sup> Forty percent of U.S. Pay TV subscribers used apps to view their subscription content in 2015, and year-over-year viewing via MVPD app increased 102% in 2015.<sup>33</sup> The number of DIRECTV Everywhere users has nearly doubled in the past year.

Even beyond that, DIRECTV uses an open standard developed by the RVU Alliance – a technology-standards consortium of service providers, consumer electronics manufacturers, and technology providers – that eliminates the need for set-top boxes on the second, third, and fourth televisions in the home.<sup>34</sup> The RVU standard defines a remote-user interface enabling all MVPDs, including one-way services like DIRECTV, to use a single home gateway to distribute

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<sup>30</sup> See NPRM ¶ 13.

<sup>31</sup> See Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, FCC, at 2, MB Docket No. 15-64 (Feb. 11, 2016).

<sup>32</sup> Joint Statement on DSTAC Report at 2, MB Docket No. 15-64 (FCC filed Aug. 28, 2015), <http://apps.fcc.gov/ecfs/comment/view?id=60001099145>.

<sup>33</sup> See Jeff Baumgartner, *TV Everywhere Continues Its Climb*, Multichannel News (Feb. 25, 2016), <http://www.multichannel.com/news/content/tv-everywhere-continues-its-climb/402839>.

<sup>34</sup> DBS will always need a robust gateway device in the home not only to communicate with the one-way satellite service but also to replicate competitive features like video on demand and other interactive services in order to compete with two-way services. See AT&T Comments at 21 n.60, MB Docket No. 15-64 (FCC filed Oct. 8, 2015); DIRECTV Comments at 3, 7, MB Docket No. 10-91 et al. (FCC filed July 13, 2010); DSTAC WG4 Report at 126; DSTAC WG2 Report at 4.

content to multiple televisions or other RVU-compliant client devices, eliminating the need for additional set-top boxes for every television.<sup>35</sup> Each RVU-compliant device manufacturer can display the remote-user interface of rendered graphics and data from DIRECTV or any other MVPD alongside content from other sources to create a “shopping mall” of services – but, just as with a physical mall, the content and the consumer experience within each “store” is up to the individual provider. The MVPD’s content is accessible to consumers via an app that preserves the service functionality and look and feel designed by the MVPD and ensures security of the content, just like the apps of OVD services.

In the case of DIRECTV, a consumer with an RVU gateway can access DIRECTV’s entire MVPD service using the DIRECTV app on any RVU-compliant devices, such as Samsung Smart TVs. RVU is an open standard – not a proprietary app as the Commission describes it;<sup>36</sup> anyone that chooses can build an RVU-compliant device today. There are now at least seven manufacturers (Sony, LG, Samsung, Pace, Humax, Toshiba, and Technicolor) that have introduced RVU-ready TVs and other devices.<sup>37</sup> DIRECTV has launched its new 4K service relying upon these third-party manufacturers’ RVU-compliant TVs, demonstrating its commitment to the use of third-party devices to access its service.

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<sup>35</sup> See, e.g., RVU Alliance Progress Report at 3, MB Docket No. 15-64 & CS Docket No. 97-80 (FCC filed May 28, 2015) (“With RVU capability, a TV that is connected to the home network can discover and play/record content from any compatible source of entertainment content on that network. These sources can be Pay-TV set-top boxes (such as DIRECTV Genie), Blue-Ray Disc Players, game consoles, TiVo DVRs, Roku, A/V receivers . . . basically any CE device that can output audio or video. RVU, and RUI [remote user interface] in general, optimally separates service delivery and service display functions: without having to implement the source device’s menus whatsoever, a client can control that source device and deliver the services requested by the consumer for display.”) (alteration in original).

<sup>36</sup> See NPRM ¶ 47 & n.135.

<sup>37</sup> See RVU Alliance Progress Report at 2, MB Docket No. 15-64 & CS Docket No. 97-80 (FCC filed May 28, 2015); RVU Alliance, *Products*, <http://rvualliance.org/products>.

NTIA acknowledges “there has been an explosion in the number and capabilities of navigation devices,” which has “produce[d] significant consumer benefits” and for which “MVPDs deserve credit.”<sup>38</sup> But it inexplicably claims this is irrelevant because these applications are proprietary to MVPDs. Consumers do not care who makes the applications so long as there is vigorous competition that results in better offerings, which is undoubtedly the case in a market where all MVPDs are offering the ability to view content across a wide range of competitive devices. And, as a statutory matter, the availability of that competitive “*equipment*” on which consumers can view “multichannel video programming and other services offered over multichannel video programming systems” fully satisfies Section 629(a).<sup>39</sup>

**B. AT&T and Other MVPDs Have Strong Marketplace Incentives To Promote Competitive Navigation Devices in Order To Meet Consumer Demand for Advanced Capabilities and Compete More Effectively**

As demonstrated above, MVPDs have already embraced the Apps Approach and other marketplace solutions that provide consumers an alternative to leased set-top boxes, while still preserving the consistent look and feel of their services and ensuring security over the content they provide. Ignoring this evidence, the NPRM concludes that MVPDs lack the proper incentives to promote competitive navigation devices “because MVPDs offer products that directly compete with navigation devices and therefore have an incentive to withhold permission or constrain innovation.”<sup>40</sup> Again, this core premise of the NPRM is both unsupported by evidence and analysis and simply wrong.

Far from lacking the incentives to promote competitive navigation devices, MVPDs must support them as a matter of competitive necessity. MVPDs compete in an increasingly complex

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<sup>38</sup> NTIA Comments at 3.

<sup>39</sup> 47 U.S.C. § 549(a) (emphasis added).

<sup>40</sup> NPRM ¶ 12.

and crowded video distribution marketplace filled not only with other MVPDs, but also a large and growing number of OVDs. Consumers want to watch programming on their smartphones, tablets, and other devices, and, if MVPD services are not also available on those devices, consumers will simply watch programming provided by others. If an MVPD fails to promote the availability of its service on competitive navigation devices, even greater numbers of consumers will choose another MVPD or OVD that offers these capabilities. As Dr. Katz explains, MVPDs' incentives are to have their services available on as many devices as possible, to reach as many eyeballs as possible; they cannot achieve that without allowing consumers to access MVPD services over a device of their choosing.<sup>41</sup>

Of course, MVPDs also need to be able to control their brand and the way consumers perceive them in the marketplace. Accordingly, just like OVDs such as Netflix or Amazon Prime, MVPDs seek to ensure that the look and feel of their services is consistent across the devices and platforms consumers may use to access that service, including the user interface that is a defining aspect of an MVPD's service and the customer experience it provides. And, just as with OVDs, MVPDs are providing TV Everywhere applications that enable their services to be accessed over third-party devices where and to the extent they have secured the rights from content providers to do so. MVPDs do not control how all apps are presented to the user on these third-party devices; the device manufacturers do. MVPDs are responsible, however, for the interface of *their own* particular service (that is, within their own app), which is typically one among many competing apps that consumers may choose on their device.

MVPDs must ensure that the user interface of their services provides consumers with a high-quality experience, including a uniform interface that provides a seamless experience across

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<sup>41</sup> See Katz Decl. ¶¶ 8, 16, 30.

devices. In addition, the MVPD must ensure that the user interface complies with its contractual obligations governing how its linear video programming and its other content (e.g., video on demand, music, interactive features, sports scores, music, photo sharing) are packaged, presented, and protected.<sup>42</sup> For these reasons, AT&T has ensured that its DIRECTV service uses a common interface across devices. By creating a standardized user interface, AT&T is able to guarantee consumers the service they bought and expect is as intended, including all available features. This avoids customer frustration, and, if consumers experience service problems, they know where to seek help and who is responsible for responding to customer complaints.<sup>43</sup>

There are also additional significant incentives for MVPDs to support the development of competitive navigation devices through the Apps Approach. This approach gives MVPDs the tools to innovate with new technologies and to shape and reshape their offerings to meet changing consumer demands.<sup>44</sup> It also reduces the significant costs that MVPDs now incur to maintain a large inventory of STBs and to maintain the embedded base of these devices.<sup>45</sup> The Apps Approach provides consumers with automatic service and feature upgrades as services evolve, which consumers have grown accustomed to on smartphones, tablets, and other devices.

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<sup>42</sup> Programming agreements “can include terms that, among many other things, require the MVPD to (i) put the programmer’s news channel in the same neighborhood with other news channels; (ii) keep all the programmer’s branded channels together; (iii) refrain from putting the programmer’s content next to any adult channel; (iv) put the programmer’s on-demand content in a distinctively branded folder; (v) preclude searches and MVPD recommendations from bringing up lists that include the programmer’s content along with adult or pirated content; (vi) ensure that the programmer’s content is only available until a fixed expiration date; (vii) ensure that the programmer’s content is available only in authorized geographic regions; (viii) ensure that the programmer’s content is secure; and (ix) ensure that appropriate advertising accompanies the programmer’s programming.” Letter from Alex Starr, AT&T, to Marlene H. Dortch, FCC, at 1-2, MB Docket No. 15-64 (Jan. 13, 2016) (“AT&T 1/13/16 Ex Parte”).

<sup>43</sup> See, e.g., DSTAC WG4 Report at 166.

<sup>44</sup> See, e.g., *id.* at 166-67.

<sup>45</sup> See Declaration of Stephen P. Dulac ¶¶ 37-40 (“Dulac Decl.”) (Attachment 1).

This constant cycle of innovation, in turn, helps MVPDs retain customers that recognize the growing value from their branded service provider.

The Apps Approach also enables MVPDs and programmers to supplement a subscription-based commercial model with a significant advertising component, which in turn helps foster and fund diverse programming, service, and competition. For instance, the Apps Approach enables interactive requests for information, telescoping ads, ad lifecycle management, audience measurement, and ad measurement and reporting, all of which are must-haves in today's video advertising market.<sup>46</sup> MVPDs and unaffiliated programmers frequently negotiate to share advertising time, which aligns both parties' interests toward creating revenue streams that fund high-quality content. Allowing third-party device or interface suppliers to upset this regime and supply their own advertising would, by contrast, impede the creation of new content, thereby harming consumers.

Because of these (and many other) benefits, the Apps Approach has quickly become ubiquitous. This ubiquity has helped promote competition in both the MVPD market and the consumer-owned navigation device market, benefiting consumers with greater, and more robust, choices. Faced with competition from other MVPDs embracing these models and from a slew of OVD providers, MVPDs have strong incentives to make their services available on as many competitive navigation devices as possible. A government-imposed technology mandate is therefore completely unnecessary to achieve Congress's objectives in enacting Section 629.

**C. There Is No Evidence That Unbundling MVPDs' Programming and Services Would Benefit Consumers**

The NPRM claims that, because MVPDs "take in approximately \$19.5 billion per year in set-top box lease fees," "MVPDs have a strong financial incentive to use an approval process to

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<sup>46</sup> See, e.g., DSTAC WG4 Report at 152-53, 167.

prevent development of a competitive commercial market and continue to require almost all of their subscribers to lease set-top boxes.”<sup>47</sup> Concerns about the costs of STBs are a red herring.

The issue here is not whether consumers should have an alternative to the leased set-top box model. They should. The question is how to best achieve that goal – through the Apps Approach, which consumers are already adopting and which enables access to MVPD services while permitting MVPDs to preserve their brands and ensure a uniform look and feel of their service, or through the NPRM’s approach, which seeks to create synthetic, government-managed competition by unbundling MVPD services and altering the way they are delivered, creating a host of intractable technical issues, security risks, and consumer harms.

Even on its own terms, however, the NPRM’s claim about set-top box profits is contrary to the facts and economics. There is no reliable evidence demonstrating that MVPDs are reaping monopoly profits for STBs, much less evidence that the NPRM proposals are likely to produce lower equipment prices for consumers. Likewise, although NTIA baldly asserts that consumers “are frustrated by the high cost of leasing” set-top boxes, it does not even attempt to provide evidence of a market failure.<sup>48</sup>

*First*, the \$19.5 billion figure is greatly exaggerated.<sup>49</sup> It is based not on actual revenue figures, which MVPDs do not report, but on an estimate by Senators Markey and Blumenthal that multiplies 2.6 STBs per household by the average rate-card price for an STB, the industry

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<sup>47</sup> NPRM ¶ 28.

<sup>48</sup> NTIA Comments at 3.

<sup>49</sup> See Dr. Christian Dippon, NERA, *Analysis of the “FCC Chairman Proposal To Unlock The Set-Top Box: Creating Choice & Innovation”* at 1 (Feb. 17, 2016) (“Dippon Analysis”), [http://www.nera.com/content/dam/nera/publications/2016/Analysis\\_of\\_the\\_FCC\\_Chairman\\_Proposal\\_To\\_Unlock\\_The\\_Set-Top-Box\\_-\\_Creating\\_Choice\\_and\\_Innovation.pdf](http://www.nera.com/content/dam/nera/publications/2016/Analysis_of_the_FCC_Chairman_Proposal_To_Unlock_The_Set-Top-Box_-_Creating_Choice_and_Innovation.pdf).

equivalent of the MSRP.<sup>50</sup> In reality, however, many consumers do not pay the rate-card price, because they receive discounts and promotions on the equipment.<sup>51</sup> In addition, the 2.6 STBs-per-household figure is based on 2014 data, and that figure is declining as consumers shift away from leased STBs to the other types of third-party devices described above.<sup>52</sup>

*Second*, even accepting the report's average cost per STB at face value, it hardly demonstrates that MVPDs have been using market power to charge consumers too much for equipment.<sup>53</sup> According to the Markey/Blumenthal Report, the average Pay TV household in

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<sup>50</sup> See Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace (July 30, 2015) ("Markey/Blumenthal Report"), and responses from AT&T, Bright House, Cablevision, Charter, Comcast, Cox, DISH, DIRECTV, Time Warner Cable, and Verizon, available at <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>.

<sup>51</sup> See Dippon Analysis at 1 ("This omits the fact that [MVPDs] offer free or discounted STBs and that there are also low-cost STBs available. For example, two of the respondent MVPDs did not charge for the first STB and almost all noted that they offered discounts and promotions on equipment."); Letter from Timothy P. McKone, AT&T, to Sen. Edward Markey & Sen. Richard Blumenthal at 3 (Dec. 11, 2014) ("[E]very customer receives the first receiver at no additional charge."), <http://www.markey.senate.gov/imo/media/doc/Response%20--%20ATT%20%2012-11-14.pdf>; Letter from R. Stanton Dodge, DISH Network L.L.C., to Sen. Edward Markey & Sen. Richard Blumenthal, Attachment 1 (Dec. 11, 2014) ("[t]here is no lease cost for the first DISH receiver"), <http://www.markey.senate.gov/imo/media/doc/Response%20--%20Dish%20%2012-11-14.pdf>; Letter from Emmett O'Keefe, Cablevision, to Sen. Edward Markey & Sen. Richard Blumenthal at 3 (Dec. 11, 2014) ("Cablevision Response to Markey/Blumenthal") ("Note, however, that the actual average cost to customer households is lower than the published price because many customers enjoy promotions, free box offers, or other discounts that reduce the effective cost of set top boxes."), <http://www.markey.senate.gov/imo/media/doc/Response%20--%20Cablevision%2012-11-14.pdf>.

<sup>52</sup> See Dippon Analysis at 1 ("[T]he \$20 billion estimate from 2014 is a backward looking number as the need for leased STBs has dropped as smart TVs, apps and many other innovative consumer options such as Roku and Apple TV have proliferated. No STBs are required at all for many of these STB alternatives."); Cablevision Response to Markey/Blumenthal at 3 ("All data provided for FY 2013 and YE 2013, as appropriate"; "[T]he number of set tops per household is declining relative to the total number of household television viewing devices, as consumers now enjoy programming on an array of devices without set tops, including: CableCard equipped televisions and other devices, iOS devices, Android devices, computers and smart televisions.").

<sup>53</sup> The NPRM's statements regarding STB prices ignore the dramatic improvement in STB functionality that has occurred in recent years. See, e.g., D+R Int'l, *2014 Annual Report*:

the United States spends \$231 per year on STB equipment.<sup>54</sup> By comparison, as economist Hal Singer has demonstrated, TiVo charges upfront fees of \$299.99 to \$599.99 for a DVR, which includes one year of TiVo service, and a monthly service fee of \$14.99 thereafter.<sup>55</sup> For a consumer that keeps the box for three years, that works out to a weighted average of between \$219- \$320 per year for TiVo equipment and related service.<sup>56</sup> As another example, the current Apple TV costs \$199 for a model with 64GB, which is only about 6% of the amount of the one-terabyte storage available in DIRECTV's current Genie boxes.<sup>57</sup> The fact that third-party providers that do not provide MVPD service charge the same or higher prices for comparable equipment and functionality disproves the NPRM's assumption that STB prices are higher due to MVPD market power.<sup>58</sup>

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*Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes* 18 (July 31, 2015) (“The signatories [of the 2012 Voluntary Agreement for Ongoing Improvement to the Energy Efficiency of Set-Top Boxes] . . . reduced energy consumption through successful implementation of strategies to download light sleep capability to existing devices, including automatic power down feature in set-top boxes, and offering whole-home DVR functionality to reduce the number of energy-consuming hard drives in the home. They are working toward additional savings by field testing set-top boxes that include next-generation power management.”), <http://www.cta.tech/CorporateSite/media/Government-Media/STB-2014-Annual-Report-FINAL.pdf>; *id.* at 1 (noting that “the set-top boxes purchased in January 2017 will likely have significantly increased functionality compared to products reported in 2014”).

<sup>54</sup> Markey/Blumenthal Report, *supra* note 50.

<sup>55</sup> See Hal Singer, *Before It “Unlocks the Box,” The FCC Must Solve This Pricing Puzzle*, Forbes.com (Feb. 15, 2016), <http://www.forbes.com/sites/halsinger/2016/02/15/before-it-unlocks-the-box-the-fcc-must-solve-this-pricing-puzzle/#5c4ecf093778>.

<sup>56</sup> See *id.*

<sup>57</sup> See Apple, <http://www.apple.com/shop/buy-tv/apple-tv>.

<sup>58</sup> See NCTA Comments at 38 n.82, MB Docket No. 15-64 (FCC filed Oct. 8, 2015) (“NCTA Comments”) (“The Senators’ estimates also fail to acknowledge that operators incur substantial costs in buying and maintaining set-top boxes. For the 2013 timeframe covered by the Senators’ data request, SNL Kagan, a leading industry analyst, estimates that cable operators spent \$7 billion on CPE. See Ian Olgeirson, *Record CapEx expected for 2014, 5-year forecast points to moderating spending*, SNL KAGAN MULTICHANNEL MARKETING TRENDS, Sept. 8, 2014, subscription service. Cable operators also spent an estimated \$1 billion in set-top box

*Third*, contrary to what the NPRM assumes without analysis, MVPDs' charges for STBs provide no economic evidence that MVPDs are exercising market power in the provision of that equipment or that they have incentives to do so. On the contrary, as Dr. Katz finds, the economic evidence shows that the video marketplace is competitive and that MVPDs are not engaging in foreclosure strategies with respect to STBs, a conclusion that other economists have also reached.<sup>59</sup> As Dr. Katz explains, MVPDs provide customer premises equipment such as STBs because it is more efficient for them to do so than to leave it up to third-party suppliers. If others could distribute STBs more efficiently, an MVPD would have economic incentives to allow those third parties to do so, even assuming (contrary to fact) the MVPD had market power.<sup>60</sup>

## **II. The NPRM Proposals Would Harm Innovation, Consumers, and Competition**

The NPRM proposals are not merely unnecessary to promote competition and protect consumers. They will cause significant and grievous harm to consumers. Even if the proposed rules could be implemented, which they cannot be, they would choke innovation; decrease programming diversity and quality; undermine privacy protections and introduce new security risks; and increase the prices consumers pay while degrading the consumer experience.

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maintenance costs, based on data included in the rate forms that the largest operators file with local regulators.”).

<sup>59</sup> See Katz Decl. ¶¶ 47-51 & § II.C.2; Ralitz A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 Minn. J. L. Sci. & Tech. 279, 305 (2011); T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 CommLaw Conspectus 1, 4 (2012).

<sup>60</sup> See Katz Decl. ¶¶ 57-65.

### A. The Proposed Rules Are Unworkable

In proposing to unbundle MVPD services into three “Information Flows,” the Commission does not even pretend to resolve the complex and foundational issue of what standards will be used to provide these “Information Flows.”<sup>61</sup> The NPRM instead declares that unnamed “Open Standards Bodies” will develop these standards.<sup>62</sup> Nor does the Commission prescribe a specific content protection system, instead proposing that MVPDs make the “Information Flows” available via a content protection system that is “licensable on reasonable and non-discriminatory terms, and must not be controlled by MVPDs.”<sup>63</sup> This pie-in-the-sky approach is doomed to failure and certainly not achievable within the NPRM’s proposed two-year timeline.<sup>64</sup> Indeed, NTIA effectively concedes that the Commission’s proposal is half-baked in suggesting that “all stakeholders” should “focus their analysis on how to implement the model” that is not developed adequately in the NPRM itself.<sup>65</sup>

*First*, no standards for the Information Flows exist today. In August 2015, after months of work, supporters of the so-called “competitive navigation” proposal acknowledged in the DSTAC Report that “[t]his system would require standardization from a number of different

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<sup>61</sup> See NPRM ¶ 35 (stating the Commission will not “prescribe or even approve the standards so long as the Information Flows are available”).

<sup>62</sup> *Id.* ¶ 41.

<sup>63</sup> *Id.* ¶ 58.

<sup>64</sup> See *id.* ¶ 43.

<sup>65</sup> NTIA Comments at 2. Other parties likewise acknowledge that the NPRM does not address key problems raised by the Commission’s proposal. For instance, NRDC highlights the fact that the Commission “did not take into account the energy use and environmental implications of its proposal.” NRDC Comments at 1, MB Docket No. 16-42 & CS Docket No. 97-80 (FCC filed Apr. 13, 2016). NRDC further indicates in this regard that the Apps Approach being followed by MVPDs is an “emerging consumer and environmentally friendly solution[.]” but that, under the FCC proposal, “the service provider might be required to install a new type of set top box,” increasing energy usage. *Id.* at 2.

standards and the development and implementation of some new protocols and standards.”<sup>66</sup>

After another six months, neither the Commission nor commenters proposed any other usable standards.<sup>67</sup> Nor is there any existing licensable content protection system that sufficiently protects all content.<sup>68</sup> Although the NPRM speculates that “a pending DTCP update could fully satisfy the requirements of this proposal and the needs of MVPDs,”<sup>69</sup> that is far from the case.<sup>70</sup>

The NPRM incorrectly claims – on the basis of a single Public Knowledge ex parte – that “the specifications necessary to provide these Information Flows appear to exist today.”<sup>71</sup> The Commission’s faith in the “apparent” existence of such standards is baffling and contrary to the facts. In fact, the Public Knowledge filing merely provides a “description of technologies” that it claims “is an extension of DLNA ‘VidiPath.’”<sup>72</sup> But this proposal is different from the one presented to DSTAC, and it still does not provide the “specifications necessary” to implement the NPRM’s radical proposal. To the contrary, the filing provides little more than a high-level framework from which a collection of experts might be able to *begin* developing standards.<sup>73</sup>

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<sup>66</sup> DSTAC Summary Report at 6; *see id.* at 2 (“DSTAC is not reporting a consensus recommendation”); Downloadable Security Technology Advisory Committee Charter (Dec. 5, 2014), <https://transition.fcc.gov/dstac/dstac-charter.pdf>.

<sup>67</sup> *See* Dulac Decl. ¶¶ 10-11.

<sup>68</sup> *See id.* ¶¶ 12-18.

<sup>69</sup> NPRM ¶ 61; *see* NCTA Reply Comments at 35-36, MB Docket No. 15-64 (FCC filed Nov. 9, 2015) (“NCTA Reply Comments”) (explaining why Digital Transmission Content Protection (“DTCP”) provides insufficient protection); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, at 2-3, MB Docket No. 15-64 (Jan. 21, 2016) (“NCTA 1/21/16 Ex Parte”) (same).

<sup>70</sup> *See* Dulac Decl. ¶¶ 17-18.

<sup>71</sup> NPRM ¶ 35.

<sup>72</sup> Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, FCC, Attachment at 2, MB Docket No. 15-64 (Oct. 20, 2015).

<sup>73</sup> *See* NPRM ¶ 43 (claiming “DLNA has a toolkit of specifications available”); Transcript of August 4, 2015 DSTAC Meeting at 73:9-12 (admitting that many portions of the competitive

Therefore, this submission does not come close to resolving the numerous technical issues the Technical Advisory Commission laid bare to the Commission in the DSTAC Report.<sup>74</sup>

Indeed, Public Knowledge's submission poses numerous problems. For example, it proposes that the server or headend serve as the adaptation point for the Information Flows. That is at odds with the existing DLNA standard, which makes applications the adaptation point.<sup>75</sup> Under Public Knowledge's proposal, therefore, MVPDs would have to re-engineer their networks to make the server or headend the adaptation point.<sup>76</sup> Public Knowledge also suggests relying on DLNA's guidelines for electronic program guides; but these have never been implemented, and DLNA has since abandoned them.<sup>77</sup> Public Knowledge further suggests relying on DTCP+ vaporware, but this technology was announced in November 2010 yet *still* has not been deployed.<sup>78</sup> Thus, Public Knowledge's proposal does not provide a viable, much less a quick, path forward, but instead raises as many questions as it purports to answer.<sup>79</sup>

*Second*, even if "Open Standards Bodies" as defined by the Commission existed, the NPRM's belief (at ¶ 43) that these bodies could develop the necessary standards in two years simply ignores the realities of standards setting. Establishing new standards from scratch has

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navigation device proposal consist of "just suggestions on technologies that come close to fitting the bill or that could be extended in one way or another to satisfy the requirements with them"); "Application-Based Service" Advocates Submission for the Record, *Response to Competitive Navigation System Interoperability Additional Material*, MB Docket No. 15-64 (FCC filed Aug. 10, 2015).

<sup>74</sup> See Dulac Decl. ¶¶ 10-11, 29-32; NCTA Reply Comments at 26-35; DSTAC WG4 Report at 111-26, 144-65.

<sup>75</sup> See Dulac Decl. ¶ 29; NCTA Reply Comments at 33.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See Dulac Decl. ¶ 17; NCTA Reply Comments at 33.

<sup>79</sup> See Dulac Decl. ¶¶ 10-11, 29-32; NCTA Reply Comments at 33-34.

generally taken as long as ten years, even where the parties were aligned in purpose and the task at hand was far simpler.<sup>80</sup> The task proposed here is even more complex given that the parties involved have conflicting goals and incentives as well as different system architectures. It similarly takes years to develop content protection systems and the certification processes that are necessary to determine whether a device should receive a license.<sup>81</sup> In addition, policies and procedures for revoking and reinstating compromised devices must be developed and agreed upon by stakeholders.

DIRECTV's experience with the RVU Alliance illustrates the difficulties of standards setting even where the goal is relatively discrete. This group of consumer electronics manufacturers and DIRECTV had a narrow standards-setting goal that addressed a single use case: developing a home-networked remote-user interface for consumer electronics to connect via a home network to an in-home content server (e.g., DIRECTV's in-home Genie box or a connected Blu-Ray player).<sup>82</sup> Every member of the RVU Alliance had an economic incentive to collaborate, share information, and develop a workable standard that would meet consumer demand.<sup>83</sup> And, yet, it took nearly four years for the first RVU-compatible products to reach

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<sup>80</sup> See Dulac Decl. ¶ 25; DSTAC WG4 Report at 157-58.

<sup>81</sup> See Dulac Decl. ¶¶ 14-17, 22-25; see Transcript of August 4, 2015 DSTAC Meeting at 80:6-8 (competitive navigation device supporter admitting “right now we have no testing and compliance regimes, so these types of operations would have to be defined in the future”).

<sup>82</sup> See Dulac Decl. ¶ 25; RVU Alliance, *What is RVU?* (“RUI allows a single server in the home to provide the same consistent User Interface and feature set to multiple RVU enabled devices.”), <http://www.rvualliance.org/what-rvu>.

<sup>83</sup> See Dulac Decl. ¶ 25.

the market.<sup>84</sup> Likewise, DLNA’s VidiPath was “the culmination of a decade’s work, and tens of thousands of man-hours.”<sup>85</sup>

The standards the NPRM envisions for the three proposed Information Flows would be more complicated. Standards for *all* MVPDs – which use a variety of different system architectures – would need to be developed.<sup>86</sup> For example, to deliver Emergency Alert System (“EAS”) messages, U-verse TV relies on “forced tuning” – that is, automatically tuning the navigation device to a pre-designated channel that carries the required EAS messages.<sup>87</sup> DIRECTV, by contrast, redirects the input sources of the linear channels, feeding every channel instead with a single input source carrying the EAS message. The NPRM-contemplated standards will need to address such differences in MVPD architectures for many different issues. Indeed, “[e]stimates from among the top 10 MVPDs indicate that the number of protocols or [Application Program Interfaces] in each of their systems to deliver the MVPD service range from hundreds to as many as ten thousand.”<sup>88</sup>

Further complicating this process is the uncertainty about how the “Information Flows” would be defined. The NPRM raises (at ¶¶ 38-40) a number of questions about how to define

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<sup>84</sup> *See id.*

<sup>85</sup> DLNA Comments at 4, MB Docket No. 15-64 (FCC filed Oct. 8, 2015).

<sup>86</sup> *See* DSTAC WG4 Report at 148 (“The amended proposal acknowledges that standards do not exist for the interfaces it envisions, which it tries to characterize as a forward-looking virtue. In fact, assuming an un-invented standard ignores the technological variation in systems.”); DSTAC Summary Report at 6 (“This system would require standardization from a number of different standards and the development and implementation of some new protocols and standards.”).

<sup>87</sup> *See* Dulac Decl. ¶¶ 29-32 (listing other technical issues that need to be resolved).

<sup>88</sup> DSTAC WG4 Report at 167 n.76; *see* NCTA Comments at 21-22 (competitive navigation device proposal “references at least 37 standards or interfaces that may require extensions, enhancements, or specific usage constraints to be defined – and many of these are not yet implemented, implemented only in limited ways by a subset of MVPDs, or not intended to work on any DBS systems”).

these “Flows.” That is just the tip of the iceberg. Numerous other interpretative issues are bound to occur when the standards-setting process actually begins, and again when the certification programs are designed and test tools are developed.<sup>89</sup>

Moreover, the circumstances under which this standards-setting process would be conducted are unprecedented. As the NPRM recognizes (at ¶ 15), the economic incentives of the parties – hopeful third-party navigation device manufacturers and MVPDs – are not fully aligned. It is fanciful to believe that all of these parties, many of whom are direct competitors, will have the trust, cooperation, and willingness to share competitively sensitive information that would be necessary for this process to work.<sup>90</sup> For example, one issue even the NPRM anticipates (at ¶ 38) is how to allocate among different devices the limited number of streams that an MVPD can provide. Consider the case of an STB providing DBS service that is capable of tuning three satellite broadcast channels simultaneously; if there are two additional MVPD devices and two third-party devices in that same home requesting a channel, priorities must be set to address scenarios where all four devices are simultaneously requesting a channel. MVPDs and navigation device manufacturers will almost certainly have opposing positions on this issue, both favoring a method for allocating streams that will favor them over their competitors. AT&T is aware of no standards-setting process that has been successful under circumstances such as these.<sup>91</sup>

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<sup>89</sup> See Dulac Decl. ¶ 24.

<sup>90</sup> Validating that a standard works “across multiple classes of devices (servers and clients) has historically proven to be a significant effort involving either massive coordination and co-location of many companies in an interoperability ‘plugfest’ (e.g. UPnP), or purpose-built validation test suites that lead to certification (e.g. CableCARD and DLNA validation and certification).” DSTAC WG4 Report at 163.

<sup>91</sup> See Dulac Decl. ¶ 20.

Even where these unique difficulties are not present, the Commission has recognized that a normal product cycle is 18-24 months.<sup>92</sup> Because of its one-way architecture, DIRECTV would need to make changes to its set-top box (in addition to the network) to include new outputs capable of supplying the three Information Flows.<sup>93</sup> Thus, if these rules must be implemented within two years, at best the NPRM would leave at most six months and as little as no time whatsoever for establishing Open Standards Bodies, developing standards, and creating certification test regimes. That fact alone demonstrates the folly of the Commission's proposed timeline.

Perhaps foreseeing the futility of establishing standards in time to have compliant systems in place within two years, the NPRM questions (at ¶ 43) whether it should adopt as a “fallback” a proposal by the “Competitive Navigation advocates.” This would turn a bad idea into a disastrous one. As explained above, Competitive Navigation advocates have advanced no implementable proposal for working standards that could be used as a fallback; there is at most a general framework that does not address any of the hardest issues.<sup>94</sup> And, even if there were such a proposal, setting that proposal as the fallback would give all the leverage to third-party navigation device manufacturers, which would have no incentive to compromise in the

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<sup>92</sup> See Notice of Proposed Rulemaking, *Commercial Mobile Alert System*, 22 FCC Rcd 21975, 22120 (2007) (“Typical development cycles for a development of this magnitude require up to 12 months of standardization work in the appropriate standards bodies once the requirements are finalized followed by 18-24 months implementation and deployment before availability of the service and supporting mobile devices.”); Report and Order, *Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 13 FCC Rcd 11248, ¶¶ 22-23 (1998) (noting “typical design and production schedules for TV receivers” of 18-24 months).

<sup>93</sup> See Dulac Decl. ¶¶ 7-8, 29.

<sup>94</sup> See *supra* pp. 19-21.

development of workable standards. The Commission is correctly wary to do so, given its prior failures when it has mandated a particular standard.<sup>95</sup>

*Third*, the Commission's proposal ignores technology advances. Even assuming open standards could be developed, it is inevitable that MVPDs will need to revise standards and/or invent new standards to accommodate new technology in their services. The Commission does not address how this would occur or how such a proposal could be consistent with maintaining innovation and investments. Would MVPDs be required to give away competitively sensitive information – the intent to upgrade their systems – so that navigation devices can be updated? Would MVPDs be required to delay updates to their systems so that navigation devices can be updated? What would happen to MVPD subscribers who use a navigation device that does not implement updates?

DIRECTV has firsthand experience with these problems. In 2005, DIRECTV began upgrading its video encoding technology from MPEG2 to MPEG4 in order to deliver more High Definition channels and be more competitive with cable operators and other MVPDs. At that time, TiVo manufactured High Definition STBs for use with DIRECTV that worked solely with MPEG2, and which therefore became incompatible with DIRECTV's service following the upgrade to MPEG4.<sup>96</sup> Rather than potentially lose customers that had purchased TiVo devices (which TiVo was under no obligation to replace), DIRECTV was compelled to replace hundreds of thousands of TiVo devices at its own expense.<sup>97</sup> Problems like this do not generally occur where MVPDs can ensure that customer equipment is updated in tandem with upgrades to the

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<sup>95</sup> See NPRM ¶ 35 & n.97.

<sup>96</sup> See Dulac Decl. ¶ 36.

<sup>97</sup> See *id.*

MVPDs' systems. Under the Apps Approach, by contrast, the MVPD can easily update an app on third-party devices.

Similar problems occur with content protection systems. MVPDs constantly update their content protection systems to address new threats.<sup>98</sup> MVPDs must also satisfy content providers' evolving security requirements. Just to provide 4K on-demand movies, for example, DIRECTV needed to develop a custom security solution to satisfy content producers' security concerns.<sup>99</sup> Licensable content protection systems must be capable of accommodating these frequent changes, even when each update requires re-certification of each navigation device.<sup>100</sup> For this reason, and as discussed more below, *see infra* Part II.C, even licensable security systems like DTCP, which the NPRM appears to consider a candidate for the common security system that MVPDs would be required to implement under the proposed rules, are prone to security breaches. Indeed, one can buy online from China a device to "strip" the licensable High-Bandwidth Digital Content Protection ("HDCP") system.<sup>101</sup> This device will remain viable for months – perhaps years – until the HDCP specification is updated. Thus, the Commission's

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<sup>98</sup> *See id.* ¶¶ 14-16; Cisco Reply Comments at 9, MB Docket No. 15-64 (FCC filed Nov. 9, 2015) ("The safest ecosystem is one with multiple security solutions, each of them constantly evolving. A moving target is harder to hit, and, thus, a government-mandated, monolithic security requirement is directly contrary to the nimble quality of the highest-level security. DRMs evolve quickly against moving targets of attackers and to support moving targets of evolving business models. Security changes cannot wait for a standard to change.").

<sup>99</sup> *See* Dulac Decl. ¶ 14.

<sup>100</sup> *See id.* ¶ 16; DSTAC WG4 Report at 163 ("[W]hen problems are found in either protocols or in specific implementations of protocols, changes to existing devices and systems are required. Coordination of changes to deployed devices is a significant task for each MVPD working within its own, entirely managed system. Coordination of changes across multiple MVPDs with asynchronous update practices, plus across fielded and still-on-the-shelf devices, plus next-year-model devices is a necessary function where the Device Proposal is silent.").

<sup>101</sup> *See* <https://www.hdfury.com>; *see also* Compl., *Digital Content Protection, LLC v. LegendSky Tech Co.*, No. 1:15-cv-10169-JSR (S.D.N.Y. filed Dec. 31, 2015) (lawsuit against the manufacturer of HDFury).

proposal to require the use of licensable content protection systems would undermine MVPDs and programmers' efforts to protect their content.<sup>102</sup>

In sum, adopting the Commission's proposals will create numerous complex implementation issues that will, in the very best case, take many years to resolve. The Apps Approach creates none of those problems, and it is being adopted by consumers in droves without the kind of massive regulatory intervention the NPRM contemplates. In such a circumstance, it is truly bewildering that the Commission is even considering again going down the road of government-directed competition, where it has tried and failed before.

## **B. The Proposed Rules Will Hinder Innovation**

The NPRM proposals will impede innovation in the development of competitive navigation devices at a time when the technology for these devices is rapidly changing. Allowing marketplace forces to operate free of government intervention is, therefore, more critical than ever right now.

### ***1. Mandating Fixed Protocols and Interfaces Will Stifle Innovation***

As long ago as its *First Plug and Play Report & Order* in 1998, the Commission recognized that regulating navigation devices "is perilous because regulations have the potential to stifle growth, innovation, and technical developments at a time when consumer demands, business plans, and technologies remain unknown, unformed or incomplete."<sup>103</sup> The Commission specifically acknowledged that its "objective thus is to ensure that the goals of Section 629 are met *without fixing into law the current state of technology.*"<sup>104</sup>

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<sup>102</sup> See *infra* Part III.B.2 (explaining that the proposed rules are unlawful because they deprive MVPDs and programmers of the ability to develop their own security measures).

<sup>103</sup> Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775, ¶ 15 (1998) ("*First Plug and Play Report & Order*").

<sup>104</sup> *Id.* ¶ 16 (emphasis added).

The Commission was right then, and it has identified no reason to turn its back on that important insight now. Yet that is precisely what the Commission will do if it adopts its proposed rules. As the DSTAC WG4 Report noted, “[t]he demands that the proposal would make on MVPDs would force MVPDs not only to lose the ability to deliver new and improved services to the customers who use retail devices, but would also force MVPDs to make changes to their overall networks that would impair their ability to innovate for all customers.”<sup>105</sup>

In particular, the NPRM would require the industry to adopt fixed protocols and interfaces – the “published, transparent formats that conform to specifications set by ‘Open Standards Bodies.’”<sup>106</sup> No such standards currently exist, and there is no industry consensus on what they should look like. As discussed above,<sup>107</sup> even under an optimistic scenario, these standards would require many years to develop, by which time they will almost certainly be inadequate to address the evolving needs of a competitive marketplace. Thus, current innovation would necessarily be hamstrung while these new standards are developed.

Moreover, even if standards can be made available in the timeframe the NPRM envisions, they will be unable to anticipate the new services, features, and technologies that MVPDs would otherwise implement quickly to improve their product and meet consumer demand. Such static standards cannot accommodate future innovations that companies may wish to bring to market, because companies do not wish to tip their hand to the competition regarding

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<sup>105</sup> DSTAC WG4 Report at 162; *see id.* at 164 (“Premature government standardization reduces competition, experimentation, and creativity, thereby limiting options for consumers. The need to adhere to a standard limits firms’ product design choices and ability to invest in new technological approaches. The loss of innovation and variety that can be the result of standardization is a loss to consumers. If such a government-mandated standard is imposed, it risks locking consumers into obsolete and/or inferior products.”).

<sup>106</sup> NPRM ¶ 41.

<sup>107</sup> *See supra* Part II.A.

the new services and features they might wish to introduce or to share the benefits of those innovations with others. It is one thing for the marketplace to converge on standards *voluntarily* following competition among competing alternatives, which has occurred with great success in, for instance, the U.S. wireless marketplace. It is quite another thing to impose the development of standards on the marketplace by government fiat, where there is no way to determine whether such standards will prove efficient or even viable.<sup>108</sup>

Developing standards for competitive navigation devices would be particularly complex because of the large variety of industry participants involved. Any industry standards must accommodate different types of MVPD technology, such as DBS and IPTV, as well as multiple classes of devices, including servers, clients, STBs, and mobile devices.<sup>109</sup> This is a far cry from other standards that certain segments of the MVPD marketplace have embraced, such as DOCSIS, which was developed by an organization (CableLabs) that is fully funded and otherwise supported by the cable industry. As the DSTAC WG4 Report recognized, “[t]he cost and complexity of developing and administering test suites for particular protocols is typically managed and paid for by an organization such as CableLabs or DLNA.”<sup>110</sup> Here, by contrast, the NPRM purports to rely on as-yet created Open Standards Bodies, which are intended to represent multiple different types of entities whose interests are not aligned. The NPRM makes no attempt to demonstrate how this will be successfully accomplished, including how MVPDs

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<sup>108</sup> See Dulac Decl. ¶ 20.

<sup>109</sup> See DSTAC WG4 Report at 163 (“[A] retail device that works across all cable systems but fails to interoperate with the particular features of a DBS transport stream or IPTV system may be a commercial success, but would not be interoperable or portable.”); Dulac Decl. ¶¶ 29-32.

<sup>110</sup> DSTAC WG4 Report at 163.

with incompatible practices and technology will coordinate the implementation of new features and functionality that are key to future innovation and growth.<sup>111</sup>

The NPRM, moreover, appears to contemplate that MVPDs will be permitted to introduce *new* services only if they conform to a format that allows their delivery across the standardized interface. But, given that this standardized interface will be fixed in time, any new services will be required to conform to this interface, even if more efficient and advanced capabilities have subsequently been developed.<sup>112</sup> Even in the best-case scenario, innovative services from MVPDs and others will be delayed while they are adapted to the single standard. More likely, the level of innovation will be greatly reduced and consumers will suffer. Imagine, for example, if the computer industry were required to keep producing laptops or chargers with the same uniform connectors it developed a decade ago, rather than the faster, more efficient, and more convenient ones found in personal computing products today. Had the Commission adopted that approach when Section 629 first became law, MVPD services might resemble forever what they were in 1996. There would be no digital cable service, no IPTV services, no integration of broadband service and video, and none of the new applications that MVPDs typically offer today.<sup>113</sup>

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<sup>111</sup> *See id.*

<sup>112</sup> *See* Comments of the Digital Living Network Alliance ¶ D.2, *Video Device Innovation NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51 & 09-137, MB Docket No. 97-80 (FCC filed Dec. 21, 2009) (noting that all new services would have to be translated into a format that the consumer device understands and can display).

<sup>113</sup> *See* Dulac Decl. ¶¶ 34-35.

**2. *The Commission Has Tried Imposing a Fixed Standard Interface on the MVPD Industry Before, and It Has Proven Unsuccessful and Counterproductive***

In 2003, in response to a proposal from some industry participants, the Commission imposed a uniform national digital video technology, CableCARD.<sup>114</sup> The NPRM touts “the few successes that developed in the CableCARD regime” as evidence that “competition in the user interface and complementary features . . . is essential to achieve the goals of Section 629.”<sup>115</sup> In fact, the experience with CableCARD demonstrates nothing of the sort. As Dr. Katz explains, the CableCARD regime was an unmitigated failure and is relevant only in showing the dangers of imposing industry standards, not that government-imposed standards are necessary in the current video marketplace.<sup>116</sup>

CableCARD was largely irrelevant by the time it was ultimately introduced – the same fate that likely awaits the standards the Commission seeks to have imposed here. Only a small number of consumers have purchased third-party CableCARD devices.<sup>117</sup> Consumers have instead embraced consumer devices that offer apps. Accordingly, MVPDs and OVDs now provide customers with multichannel and online video services on millions of IP-enabled devices via those apps.<sup>118</sup> None of these IP-based approaches uses CableCARD, relies on government-imposed technology mandates, or follows a uniform technology.<sup>119</sup>

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<sup>114</sup> See Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd 20885 (2003).

<sup>115</sup> NPRM ¶ 12.

<sup>116</sup> See Katz Decl. ¶¶ 42-46.

<sup>117</sup> Although DIRECTV does not provide CableCARD devices, it still complies with Section 629 and the Commission’s rules. See, e.g., Letter from Maureen R. Jeffreys, Arnold & Porter LLP, and William M. Wiltshire, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, FCC, MB Docket No. 14-90 (Mar. 13, 2015).

<sup>118</sup> See DSTAC WG4 Report at 163 (“One percent (1%) of today’s 52 million CableCARDS are

### 3. *Parity Requirements Will Further Undermine Innovation*

The NPRM proposal (at ¶ 63) that MVPDs “provide parity of access to all Navigation Devices” will further deter innovation and impose enormous costs on MVPDs. The NPRM proposes three distinct parity requirements. First, where an MVPD makes available an application that allows access to its programming without requiring the use of additional MVPD-specific equipment, it would be required to provide the three Information Flows to all competitive Navigation Devices without also requiring the use of additional MVPD-specific equipment.<sup>120</sup> As the NPRM suggests (at ¶ 65), however, this requirement cannot apply to DBS providers like DIRECTV because that video-delivery technology is unidirectional and therefore always requires equipment in the home for two-way communications with an upstream network.<sup>121</sup> Second, MVPDs would be required to “make available complete access to all purchased programming, on all channels, at all resolutions, on at least one Compliant Security System that it chooses to support.”<sup>122</sup> Third, if an MVPD “makes available an application to access its programming, it must support at least one Compliant Security System that offers access to the same Navigable Services with the same rights to use those Navigable Services as the MVPD affords to its own application.”<sup>123</sup>

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used in the retail devices for which they were originally intended.”).

<sup>119</sup> See also Comcast Comments at 13-14, MB Docket No. 15-64 (FCC filed Oct. 8, 2015) (explaining how mandated inclusion of IEEE 1394 outputs on cable boxes were an “unnecessary – and costly – failure[.]”).

<sup>120</sup> See NPRM ¶ 64.

<sup>121</sup> Nor should the requirement apply to any MVPD service that requires, as a technical matter, equipment in the home to deliver the MVPD’s service to its subscriber.

<sup>122</sup> NPRM ¶ 67.

<sup>123</sup> *Id.* ¶ 68.

These ill-conceived requirements would effectively preclude MVPDs from moving forward with new or innovative services until a solution is developed for third-party navigational devices, using as-yet non-existent industry-wide standards.<sup>124</sup> This would greatly increase the MVPD's costs for introducing any new features and significantly delay the introduction of new features and functionality, while reducing the incentives for doing so in the first instance, because this innovation could then more easily be replicated by others. If an MVPD has to present a new business opportunity to a standards-setting group and wait for the group to develop standards before the MVPD may introduce it, OVD competitors that are part of this group but not subject to the same restrictions will be able to use the idea and bring it to market immediately. MVPDs could, in the alternative, eschew proprietary interfaces and instead “commonly rely” on the non-existent industry standards. This will not likely happen in practice, however. It is no accident that the technologies being used by MVPDs and OVDs today for app-based platforms are entirely incompatible with the three Information Flows architecture. The technologies in use today are fine-tuned to the capabilities of any given platform, optimized for performance and security as well as to ensure security and timely deployments.

One example of the parity requirements' innovation-stifling effect involves cloud-based services, which are viewed as a critical component of next-generation MVPD services.<sup>125</sup> Under the proposed parity rules, if an MVPD wanted to introduce a service that stores video programming in the cloud, it could be required to permit third-party devices and applications to access that new cloud-based service. As a practical matter, therefore, the MVPD could not

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<sup>124</sup> See Dulac Decl. ¶¶ 34-35.

<sup>125</sup> See, e.g., Eli Noam, *TV or Not TV: Market Trends and Outlook of Online Video* at 7-11, Presentation to FCC (Mar. 21, 2016), <http://apps.fcc.gov/ecfs/document/view;NEWECFSSSESSION=G2KFXLBXvhP2SyCV7N71Wthyz3f4Zr8D1LIQY7Jx0khyL60BDCGc!1749169674!-1651119231?id=60001568908>.

launch a cloud-based service that works for one type or class of retail device, unless it simultaneously developed the three proposed Information Flows to support that service on all third-party devices. This makes the development task much more complex and costly, while simultaneously reducing the benefits the MVPD would gain if it decided to proceed despite the higher costs.<sup>126</sup> The parity rules would thus erect a huge hurdle for the deployment of innovative solutions like cloud-based services that will further reduce dependence on STBs.<sup>127</sup>

A second example of how the parity rules would deter innovation involves the delivery of advanced video formats, an important issue for DIRECTV and the consumer electronics industry. In April 2016, DIRECTV launched live 4K UltraHD broadcasts (such as Masters Golf, a 24-hour channel),<sup>128</sup> following up its late-2014 launch of 4K UltraHD VOD services.

DIRECTV provides this service using an interface from the RVU Alliance that connects the DIRECTV Genie<sup>®</sup> Whole Home HD-DVR to compatible client devices, including 4K UltraHD televisions from Samsung, LG, Sony, and other manufacturers.<sup>129</sup> If the parity rules had been in place today, DIRECTV's service launch would have to be delayed until DIRECTV also made available the three Information Flows using a set of as-yet non-existent industry-wide standards that were compatible with (1) third-party apps running on Samsung 4K UltraHD television platforms, (2) a possibly different set of industry standards that were compatible with third-party apps running on LG 4K UltraHD television platforms, and (3) possibly yet another set of standards for third-party apps running on Sony 4K UltraHD television platforms. In addition,

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<sup>126</sup> See Dulac Decl. ¶¶ 34-35.

<sup>127</sup> See Statement of Chairman Tom Wheeler at 2 (recognizing that one of the supposed purposes of the proposal is to “eliminate the need for any box at all”), *attached to NPRM*.

<sup>128</sup> See DIRECTV, <http://www.directv.com/technology/4k>.

<sup>129</sup> See *id.*; AT&T, *AT&T Puts Golf Fans “On The Green” at the Masters with First Live 4K Ultra HD Broadcast on DIRECTV* (Mar. 9, 2016), [http://about.att.com/story/first\\_live\\_4k\\_ultra\\_hd\\_broadcast\\_on\\_directv.html](http://about.att.com/story/first_live_4k_ultra_hd_broadcast_on_directv.html).

DIRECTV would have needed to wait for the availability of a Compliant Security System that met content owners' requirements for such high value content.<sup>130</sup> Such requirements would quite obviously add cost and delay to the process of introducing a new capability to benefit consumers.

Going forward, additional enhanced video formats are being developed to provide increased dynamic range, wider color gamuts, higher frame rates, and more immersive audio. Parity rules that oblige MVPDs to integrate with so many platforms by implementing many sets of Information Flows will again impede MVPDs' ability to offer these services in a way that timely meets consumer demand and that responds to competitive threats from OVDs that may launch 4K services, unimpeded, on their own apps running on these same platforms and using proprietary interfaces.

The parity rules will further harm innovation by interfering with the agreements with programmers that have been critical to developing new types of services. In introducing TV Everywhere services, MVPDs have negotiated bilateral TV Everywhere agreements with programmers that typically address, among other things, whether customers can copy the programming, how long the copy can be retained, whether the copy can be shared on different devices, and whether programming can be streamed outside the home. Under the proposed parity rules, any rights an MVPD has licensed from a programmer with respect to that MVPD's own devices and apps apparently must also be extended to third-party devices and third-party

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<sup>130</sup> The NPRM overlooks the lessons laid out in the DSTAC Report. DIRECTV explained in detail to the DSTAC Working Group 3 how several enhancements around DTCP-IP had to be quickly devised and implemented so that content owners would allow these high-value 4K UltraHD services to be offered with their programming. See Steve Dulac, Director, Engineering, DIRECTV, *RVU Alliance Update: DTCP-IP Protection for 4K/Ultra HD Services* (June 3, 2015), submitted by DIRECTV in MB Docket No. 15-64 on June 8, 2015; AT&T 1/13/16 Ex Parte at 5. As of the date of these comments, 18 months have passed since the DIRECTV 4K VOD service launched, and DTLA has yet to produce the DTCP2 license update that would be approved for 4K UltraHD services.

apps. Thus, contrary to what Chairman Wheeler claims, the parity rules most certainly *will* “interfere with the business relationships or content agreements between MVPDs and their content providers.”<sup>131</sup> Indeed, the parity obligations will fundamentally abrogate the terms of those agreements and make it much more difficult to reach future ones that are a prerequisite to delivering innovative services to consumers.

Finally, the parity requirements will discourage innovation because they are extraordinarily one-sided and unfair. Netflix, YouTube, Amazon, and any other OVD can update and enhance their services simply by upgrading their app, which can be distributed to all users instantaneously. As explained above, if an MVPD wishes to update its service, it will first have to ensure that the upgrade will comply with the parity requirements. For example, as described earlier, if an MVPD wanted to introduce a new 4K UltraHD format to a given platform, it would be required to allow unaffiliated vendors such as Google the same ability to provide the format on that platform, even though Google and others have no reciprocal obligation with respect to MVPDs’ apps.

Thus, in all these respects, the Commission’s proposal will reduce MVPDs’ incentives to invest because they would be required to internalize all the costs of innovation, but share the benefits with third parties.<sup>132</sup> When equipment is made solely to an MVPD’s own specifications and is used to provide the MVPD’s own services, the MVPD can internalize both the costs and the benefits of investment in that equipment.<sup>133</sup> But if MVPDs are required to make investments that benefit their direct competitors, they will not consider those benefits in determining whether

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<sup>131</sup> Statement of Chairman Tom Wheeler at 2, *attached to NPRM*.

<sup>132</sup> *See* Katz Decl. ¶¶ 93-98.

<sup>133</sup> *See id.* ¶ 97.

to invest, which has the effect of decreasing investment incentives, to the detriment of consumers.<sup>134</sup>

### **C. The Proposed Rules Will Hurt the Quality and Diversity of Programming**

The Commission’s proposal would undermine programmers’ ability to provide high-quality programming that serves all elements of our diverse population, and thus significantly harm consumers who will have reduced access to the kind of quality, diverse programming they currently receive. *First*, the NPRM proposals would do nothing to protect programmers’ service presentation, including the channel or channel neighborhood in which their programming appears and the advertising provided with that programming.<sup>135</sup> *Second*, the proposals require MVPDs to treat programmers’ copyrighted content not in accordance with the negotiated safeguards that currently exist, but through at least one least-common-denominator “compliant” security system that the MVPD does not control. That would undermine existing protections against piracy, prevent programmers and MVPDS from acting quickly and decisively when a third-party device poses a piracy threat, and ultimately devalue programming.

#### ***1. The NPRM Proposal Will Undermine Content Agreements and Threaten Independent Programmers’ Advertising Revenue***

Distribution agreements between MVPDs and programmers often specify how a channel will be presented to consumers, such as a requirement that it be placed in a “neighborhood” of similar channels (sports channels, for instance). Agreements may also specify how the channel is displayed in search results, what types of advertising may be inserted where the channel is promoted, and other arrangements regarding how channels are presented. Programmers negotiate for these rights, and they are important for promoting the channel to potential viewers

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<sup>134</sup> *See id.*

<sup>135</sup> *See* NPRM ¶¶ 2, 80.

and obtaining advertising revenue. ¡HOLA! TV has thus emphasized that “[w]here and how our channel appears on pay TV providers[’] systems is critical to our success.”<sup>136</sup> Other parties, including a group of 60 Democratic Members of Congress, likewise stress the importance of these bargained-for rights to the success of programmers’ businesses.<sup>137</sup> NTIA agrees, noting that these agreements include terms “beyond price” that are “important to enabling parties to defray the costs of producing, acquiring, and distributing” content.<sup>138</sup> As NTIA rightly emphasizes, MVPDs’ services reflect “investment decisions and market assessments made by MVPDs – with attendant business risks” – and thus urges “respect[ ] [for] the security and integrity of MVPD programming.”<sup>139</sup> Importantly as well, these negotiated conditions also protect consumers, by ensuring that family-oriented programming is not placed next to adult-only content.<sup>140</sup>

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<sup>136</sup> Letter from Ignacio Sanz de Acedo, ¡HOLA! TV, to Chairman Thomas Wheeler, FCC, at 1, MB Docket No. 15-64 (Feb. 3, 2016) (“¡HOLA! 2/3/16 Ex Parte”), <http://apps.fcc.gov/ecfs/document/view?id=60001425531>.

<sup>137</sup> *See, e.g.*, Letter from Rob Rader, Ovation LLC, to Commissioner Tom Wheeler, et al., FCC, at 1, MB Docket No. 15-64 (Feb. 11, 2016) (“Ovation 2/11/16 Ex Parte”) (“Ovation has successfully created an independent network devoted to connecting viewers to the arts and culture through programming that includes art-related series, documentaries, films and Ovation original productions. . . . We rely on negotiated channel positions and the ability to be positioned in genre-based ‘channel neighborhoods’ to capitalize on channel surfing and to help maintain and increase our viewership for viewers. This discovery mechanism is critical for Ovation and other independent networks.”); Letter from Tony Cardenas, et al., House of Representatives, U.S. Congress, to Chairman Tom Wheeler, FCC, at 1 (Feb. 16, 2016) (“Any proposal must respect existing contracts so that independent and minority programmers can control the presentation of their content and secure funding essential for diverse voices to thrive in the marketplace.”), <http://futureoftv.com/wp-content/uploads/2016/02/Cardenas-FCC-STB-Letter-2.16.16.pdf>.

<sup>138</sup> NTIA Comments at 4.

<sup>139</sup> *Id.*

<sup>140</sup> *See* DSTAC WG4 Report at 160 (“[U]sing native architectures or apps, MVPDs may assure that programming is kept in the right neighborhood, such as a news channel placed in a news ‘neighborhood’ or a premium service kept adjacent to its multiplex channels. They may assure that search returns do not place a programmer next to an X-rated offering.”); NCTA Comments

The NPRM does nothing, apart from offering empty assurances, to protect these important contractual rights.<sup>141</sup> For example, there is nothing to stop a third-party provider of hardware or software from changing the channel lineups that the MVPD has negotiated with its programmers or from relying on search algorithms that will make it harder to find independent, niche, or minority programming.<sup>142</sup> As Dr. Katz explains, this will lead to higher prices for consumers. Contract negotiations between MVPDs and programmers involve many trade-offs, and if an MVPD is unable to guarantee valuable channel placement to a programmer, then all else being equal the programmer can be expected to seek higher total fees for its content, which will ultimately result in higher prices charged to consumers.<sup>143</sup>

The NPRM proposals would be particularly devastating for independent and minority programmers – and for the consumers and communities they serve. As Ovation, an independent programmer focused on the performing arts, explained, “[t]he Commission’s proposed . . . regulations will . . . *threaten the stability and success of our network*. By supporting this new rule, Commissioners would allow third-party resellers to utilize our content for their own business purposes without following any of the critical terms and provisions that we have negotiated with our current affiliate partners – especially in the areas such as channel placement.”<sup>144</sup> The League of United Latin American Citizens (“LULAC”) has echoed this point, saying that interface makers would be free to “exploit” MVPD programming by, among

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at 18 (“Many [distribution agreement] terms protect viewers from unexpected surprises, such as requirements that a search for a particular title will not place a family-friendly programmer’s title next to an X-rated offering.”).

<sup>141</sup> See NPRM ¶ 80.

<sup>142</sup> See Dulac Decl. ¶ 42; Declaration of Michael Kearns ¶¶ 55-56 (“Kearns Decl.”) (Attachment 3).

<sup>143</sup> See Katz Decl. § III.A.3.

<sup>144</sup> Ovation 2/11/16 Ex Parte at 1 (emphasis added).

other things, “[h]aving diverse minority owned and/or themed channels lost in a sea of channels ranked by search engine algorithms that . . . rank[] the choices of minority populations at the bottom.”<sup>145</sup> Other minority voices, such as the Japanese American Citizens League, Aspira, the National Hispanic Foundation for the Arts, the Hispanic Technology and Telecommunications Partnership, MANA (a National Latina Organization), TechLatino: Latinos in Information Sciences and Technology Association, the National Organization of Black Elected Legislative Women, the LGB Technology Partnership, and the National Urban League, have expressed similar concerns.<sup>146</sup>

The NPRM proposals will further harm independent and minority programmers by reducing these programmers’ ability to rely on advertising revenues to support their programming.<sup>147</sup> The NPRM proposals would enable third parties to overlay their own

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<sup>145</sup> Letter from Brent Wilkes, LULAC, to Chairman Tom Wheeler, FCC, at 3, MB Docket No. 15-64 (Feb. 17, 2016); *see* Letter from Melanie L. Campbell & Joycelyn Tate, National Coalition on Black Civic Participation & Black Women’s Roundtable, to Chairman Tom Wheeler, FCC, at 1, MB Docket No. 15-64 (Feb. 11, 2016) (“We are concerned that your proposal does not address how tech and video streaming companies will ensure that consumers’ viewing data does not fall victim to algorithms that steer us to certain video content, while burying our ability to choose other programs amid layers of predetermined and targeted programming and advert[is]ing.”); Letter from Gabriel Horwitz, The Economic Program, Third Way, to Chairman Tom Wheeler, FCC, at 1, MB Docket No. 16-42 (Mar. 17, 2016) (“We agree with the 60 Democrats in Congress who have voiced concern with the proposal and, specifically, with over two dozen who wrote to you asking that any FCC proposal ‘respect existing contracts so that independent and minority programmers can control the presentation of their content and secure funding essential for diverse voices to thrive in the marketplace.’ These providers, and others, share their work through carefully negotiated agreements, and we are worried about the fate of these in your proposed regulation.”).

<sup>146</sup> *See* these parties’ comments in MB Docket No. 16-42.

<sup>147</sup> *See* Letter from Rep. Greg Walden & Rep. Yvette D. Clarke to the Hon. Gene L. Dodaro, Comptroller General, U.S. Gov’t Accountability Office (Apr. 1, 2016) (expressing concerns that the Commission’s proposed rules would “greatly threaten[] and undermine[]” the “business models” of “independent and diverse networks,” and asking the Government Accountability Office to examine “the impact of the FCC’s proposal . . . on small, independent, and multicultural media programmers and content providers”), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160401GAO.pdf>;

advertising on top of the programmers’ or sell advertising on search results when consumers are looking for programs to watch.<sup>148</sup> As Dr. Michael Kearns explains, for example, the NPRM would enable Google to use consumer data regarding viewing together with its vast trove of other data to create targeted advertising.<sup>149</sup> This would diminish the value of programmers’ own advertising, forcing them to recover the lost revenues by charging higher fees for their programming, thereby raising costs for consumers. But smaller, niche programmers, for which advertising is often the primary source of revenue, may be unable to command those higher fees. For them, the loss of advertising revenue could spell doom. In this respect, the Commission’s proposals are a direct threat to program diversity. As ¡HOLA! aptly puts it, the Commission’s “proposal would allow some large Internet companies to unilaterally take our content without our approval, or compensation, [and] . . . to sell intrusive advertising absent a mechanism to share any revenue with programmers.”<sup>150</sup> And the Multicultural, Media, Telecom, and Internet Council (“MMTC”) has specifically “cautioned” the Commission against such proposals that

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Letter from Sen. Catherine Pugh (MD), President, Nat’l Black Caucus of State Legislators, to Chairman Thomas Wheeler, FCC, at 1, MB Docket No. 16-42 (Apr. 1, 2016) (requesting that the Commission hit the “‘pause’ button” and take a “deeper look at the potential negative consequences regarding th[e] proposal’s impact on minority programmers”); *see also* Letter from Rosa Mendoza, Exec. Director, Hispanic Tech. & Telecomms. P’ship, to Chairman Thomas Wheeler, FCC, at 2, MB Docket No. 16-42 (Apr. 4, 2016) (likewise asking the FCC to “postpone proceeding” until there are “further studies on how it will impact the marketplace”).

<sup>148</sup> *See* Dulac Decl. ¶ 42; DSTAC WG4 Report at 155-56 (“Under the Device Proposal, third party devices could rearrange channel or program placement, insert different advertising into or on top of programs or use search functionalities to promote illegitimate content sources over legitimate ones.”).

<sup>149</sup> *See* Kearns Decl. ¶¶ 55-56.

<sup>150</sup> ¡HOLA! 2/3/16 Ex Parte at 1; *see* Ovation 2/11/16 Ex Parte at 1 (“[R]esellers would also be in a position to display competing advertising and even direct viewers to a competing network, just like the search and social sites currently do online to promote their own services.”).

“disproportionately affect the advertising revenue used by existing programmers and new content creators to develop, market and distribute quality programming.”<sup>151</sup>

NTIA again concedes the validity of these concerns. It specifically notes that weakening “the ability of programmers to recover their costs” could have a “deleterious effect on the programming supply market, including that for specialized and minority programming.”<sup>152</sup>

For its part, the NPRM fleetingly acknowledges concerns about “disrupt[ing] elements of service presentation” such as “channel lineups and neighborhoods,” as well as concerns that third parties will “replace or alter advertising,” but cavalierly asserts there is no “evidence that regulations are needed.”<sup>153</sup> That assertion fails as a matter of both fact and law.

As a factual matter, there is substantial evidence that third parties can and will engage in exactly these behaviors. Indeed, proponents of the NPRM proposals have already indicated they do not intend to honor the licensing agreements between MVPDs and programmers regarding neighborhooding and similar requirements. TiVo, for instance, claims navigation device manufacturers “are not and should not have to be bound to programming contracts entered into by MVPDs to which they were not a party.”<sup>154</sup> Just this week, in response to the concern that the NPRM proposal would allow parties to disregard negotiated agreements and copyright protections, a TiVo representative stated only that “[p]rotecting copyright is really about

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<sup>151</sup> Letter from Nicol Turner-Lee, MMTC, to Marlene Dortch, FCC, at 3-4, MB Docket No. 15-146 et al. (Feb. 16, 2016).

<sup>152</sup> NTIA Comments at 4-5.

<sup>153</sup> NPRM ¶ 80.

<sup>154</sup> Letter from Devendra T. Kumar, Goldberg, Godles, Wiener & Wright LLP, to Marlene H. Dortch, FCC, at 1, MB Docket No. 15-64 (Jan. 13, 2016); *see also* Video of March 24, 2015 DSTAC Meeting at 110:30-50 (TiVo representative stating that “operators have made agreements where there’s not a disaggregation perhaps with the content owners, but those [agreements] should not necessarily apply to a third party device which should have the freedom not to be bound”), <https://www.fcc.gov/news-events/events/2015/03/downloadable-security-technology-advisory-committee>.

protecting monopolies.’”<sup>155</sup> Numerous other parties have similarly argued that the beneficiaries of the Commission regime need not respect such rights.<sup>156</sup>

Just as clearly, third parties have both the intent and the ability to insert their own advertisements or to remove existing ones in a way that will diminish ad revenue to programmers. Indeed, TiVo already offers several types of advertisement overlays onto existing programming.<sup>157</sup> And, even beyond TiVo’s existing conduct, as Dr. Kearns explains, Google’s business model is founded on using customer information to maximize the efficiency of its targeted advertising, so the NPRM proposals, if adopted, will greatly exacerbate the existing issue here.<sup>158</sup>

As a legal matter, as discussed in detail below,<sup>159</sup> the Commission has no authority to adopt regulations that would negate the negotiated limits on programmers’ licensing of their content. Moreover, even if the Commission did have that authority, it would need to abrogate

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<sup>155</sup> *Third Party Set-tops That Change or Remove Ads not a Concern, TiVo CTO Says*, Communications Daily, at 11 (Apr. 20, 2016) (quoting Joseph Weber).

<sup>156</sup> *See, e.g.*, EFF Comments at 2, MB Docket No. 15-64 (FCC filed Oct. 9, 2015) (navigation devices will not be required to honor the conditions of “rightsholders or intermediaries”); Transcript of March 24, 2015 DSTAC Meeting at 38:22-39:12 (Public Knowledge representative stating that “channel numbers and channel line ups . . . may not make any sense in a retail [market]place”); Public Knowledge Comments at 15, MB Docket No. 15-64 (FCC filed Oct. 7, 2015) (navigation devices will be “answerable to the marketplace, not network operators or programmers”); CCIA Reply Comments at 10, MB Docket No. 15-64 (FCC filed Nov. 9, 2015) (“[d]evice manufacturers” have free reign to do what they desire because they “cannot violate contracts to which they are not a party”).

<sup>157</sup> *See, e.g.*, TiVo Advertising (“Pause Menu: Capture Your Audience! Want to get their full attention? The TiVo® Pause Menu gives advertisers an unprecedented opportunity to reach viewers as they are tuned-in and interacting with live and time-shifted programming. When viewers hit pause, additional ad messaging appears in a screen overlay, making it easy and convenient for them to access your ad content.”), <https://www.tivo.com/tivoadvertising/pausemenu.html>.

<sup>158</sup> *See* Kearns Decl. ¶¶ 9, 12, 55-57, 61, 63.

<sup>159</sup> *See infra* Part III.B.1.

the existing contracts between MVPDs and programmers, so that MVPDs cannot be legally liable for adhering to the Commission’s rules. The Commission, moreover, must require the third parties that benefit from its regime to stand “in the shoes” of the MVPD and post a bond to ensure they can indemnify both MVPDs and programmers from any losses they will suffer as a result of lost advertising, failure to respect neighborhooding terms, and other harms.<sup>160</sup> Any other result would be both arbitrary and unfair.

**2. *The NPRM Proposal Will Lead to Greater Piracy and Thus Reduce the Value of Programmers’ Assets***

Equally important, the NPRM proposals would undermine strong anti-piracy protections, thereby reducing the incentives of parties to invest in creating new content. In fact, the NPRM takes an approach that is completely contrary to the National Institute of Standards and Technology’s (“NIST”) Cybersecurity Framework.<sup>161</sup> The NIST framework recommends that network operators segregate their networks from third parties in order to secure their “supply chain,”<sup>162</sup> whereas the NPRM proposes to integrate MVPD and third-party networks and remove the ability of MVPDs to control consumer’s access to their licensed content.

In the existing video-programming ecosystem, programmers protect the value of their content by negotiating to ensure adequate security both to protect against piracy and to provide

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<sup>160</sup> Cf. Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund; ETC Annual Reports and Certifications*, 29 FCC Rcd 8769, ¶¶ 54-71 (2014) (requiring irrevocable stand-by letters of credit to ensure compliance with terms and conditions of program and performance obligations).

<sup>161</sup> See NIST, *Framework for Improving Critical Infrastructure Cybersecurity*, Version 1.0 (Feb. 12, 2014) (“NIST Cybersecurity Framework”), <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf>; Jon Boyens et al., NIST, Special Publ’n 800-161, *Supply Chain Risk Management Practices for Federal Information Systems and Organizations* (Apr. 2015) (“NIST Special Publ’n 800-161”), <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-161.pdf>.

<sup>162</sup> See NIST Cybersecurity Framework at 23-24 (PR.AC-5); NIST Special Publ’n 800-161, at 38, Table 2-6, & 111.

prompt redress (including pulling down a signal) if there is a security breach.<sup>163</sup> As the DSTAC Report explains, these kinds of contractual relationships create a “chain of trust” that is a core part of the current video ecosystem.<sup>164</sup> For example, if content is licensed solely for display as an early release VOD title, there are contractual protections in place so that the VOD title is not transmitted to an insecure platform or device from which it might then be accessed through a pirate Internet site, resulting in potentially unrestricted distribution.

Even if it were workable – which it is not, *see supra* Part II.A – the proposed regime would negate these protections and thus reduce significantly the value of programming. Programmers would no longer be able to rely on negotiated contractual protections (and the well-established chain of trust those contracts create) to prevent piracy and to ensure prompt action to deny access to programming if there is an actual security vulnerability (or known incident of piracy). Instead, MVPDs and programmers would have to support at least one least-common-denominator content security system – that is, a system “licensable on reasonable and non-discriminatory terms, and . . . not be controlled by MVPDs”<sup>165</sup> – that will be stuck in place, at least until whatever allegedly independent entity that controls it changes it through what are likely to be time-consuming processes.<sup>166</sup> That cumbersome and slow process to address

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<sup>163</sup> *See* Dulac Decl. ¶ 13.

<sup>164</sup> *See* DSTAC WG2 Report at 7 (chain of trust “from the content supplier to the distributor to the consumer” provides contractual “protections . . . to respect the license restrictions on the content”).

<sup>165</sup> NPRM ¶¶ 50, 58, 60.

<sup>166</sup> *See* Dulac Decl. ¶¶ 14-16. One of the content security systems the NPRM appears to contemplate, DTCP-IP, suffers from numerous flaws and, in AT&T’s view, does not appear to meet the Commission’s definition of a compliant content security system. *See id.* ¶¶ 17-19; Letter from Rick Chessen, NCTA, to Marlene H. Dortch, FCC, at 2-3, MB Docket No. 15-64 (Jan. 15, 2016); NCTA 1/21/16 Ex Parte at 2-3; Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, at 2-4, MB Docket No. 15-64 (Dec. 14, 2015); NCTA Reply Comments at 27.

evolving security risks contrasts starkly with the current regime where the variation in security systems and the ability to change them quickly are key protections against piracy.<sup>167</sup> The Commission’s proposal thus significantly increases piracy risks.<sup>168</sup>

Moreover, absent the contractual relationships that specifically define rights and responsibilities in the face of piracy, unauthorized use of protected content will be significantly harder to detect and mitigate. MVPDs and programmers will be in no position to monitor the innumerable devices, created by third parties with whom they have no contractual privity, for piracy threats, and will be powerless under the proposed rules to ensure that the devices are not creating a piracy threat. Thus, the proposal would compromise the ability both to detect and to address these threats, which will inevitably lead to more piracy, again reducing the value of programming.<sup>169</sup>

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<sup>167</sup> See DSTAC WG2 Report at 4-5 (“Diversity of conditional access can be a source of strength in security by reducing the target size (and raising the proportional costs to an attacker) and by reducing the consequences of a breach. For example, both satellite companies have designed their conditional access to accommodate ongoing and continual evolution in the [Conditional Access Systems] used with their customer base. . . . MVPDs refresh their entitlement messaging in order to limit the amount of service that may be illegally consumed before a new entitlement message is required.”); NCTA 1/21/16 Ex Parte at 2-3 (“By selecting DTCP-IP as the single protection technology, [the Commission’s proposal] would create a single point of attack on all content on all MVPD networks . . . . Even worse, because DTCP-IP does not support common encryption, MVPDs would be unable to switch quickly among competing DRMs in response to a successful hack.”).

<sup>168</sup> See Dulac Decl. ¶ 16. Nor does the CableCARD (DFAST) licensing regime suggest that such a scheme will be adequately protective. That regime has not even sufficed for one-way services. See NCTA 1/21/16 Ex Parte at 2 (“[T]he DFAST warranty has not even sufficed for one-way services. It has not stopped TiVo from overlaying ads on top of broadcast signals carried on cable or streaming signals out of the home without license. The fact that TiVo’s practices have not invited litigation may merely reflect TiVo’s limited market share, rather than demonstrating the success of the DFAST model.”). Beyond that, the very type of security used in CableCARD would be *non-compliant* under the Commission proposal. See, e.g., DSTAC WG4 Report at 109 (“The deficiencies of the CableCARD system are also well-documented . . . . The DSTAC task is to recommend solutions that improve rather than recapitulate or degrade the existing environment, in light of the deficiencies and coming changes to the CableCARD environment.”).

<sup>169</sup> See Dulac Decl. ¶ 16.

## **D. The Proposed Rules Will Erode Consumer Protections**

### ***1. The Proposed Rules Undermine Statutory Privacy and Personal Information Security Protections***

More than 30 years ago, Congress enacted legislation to protect consumer privacy in the context of MVPD services. This legislation prohibits cable systems and satellite providers from “collect[ing]” and “disclos[ing] personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber.”<sup>170</sup> It also provides a strong deterrent to the misuse of consumers’ private viewing habits – including statutory damages of at least \$100 for each day of a violation and punitive damages – that is enforceable by both the Commission and private parties.<sup>171</sup> Because of these protections, consumers have grown to expect that their individual viewing habits will remain private and subject to oversight by the Commission.<sup>172</sup>

The NPRM proposals would undermine the privacy and personal-information protections that Congress has put in place to protect consumers. Under these proposals – but *not* under the Apps Approach that consumers and providers are voluntarily adopting – third parties that make competitive devices or user interfaces would have access to the same information that MVPDs receive about consumer viewing habits, but would *not* be subject to the same protections that Congress put in place.<sup>173</sup> As NTIA recognizes, “MVPDs generally have more rigorous statutory

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<sup>170</sup> 47 U.S.C. §§ 338(i)(3)-(4), 551(b)-(c); *see infra* pp. 82-83 (describing Congress’s privacy protections in more detail).

<sup>171</sup> *See* 47 U.S.C. §§ 338(i)(7), 551(f); NPRM ¶ 78.

<sup>172</sup> *See* Chris Matyszczyk, *Vizio Smart TVs Watch You While You’re Watching Them. What’s the Deal?*, CNet (Nov. 13, 2015) (reporting on the “scrutiny” of Vizio’s “intrusive technology”), <http://www.cnet.com/news/vizio-smart-tvs-watch-you-while-youre-watching-them-whats-the-deal/>.

<sup>173</sup> *See* NPRM ¶ 73.

obligations concerning their collection and use of personally identifiable subscriber information than do non-MVPD providers of navigation equipment.”<sup>174</sup>

The proposed regime would therefore enable third-party providers to combine information on individuals’ viewing habits with data from other sources to create detailed profiles, all without the statutory privacy safeguards applicable to MVPD services. As Dr. Kearns details, the implications for consumer privacy are truly astonishing. Google, for example, the principal champion of the Commission’s proposal, would be able to combine information on the video programming consumers watch inside their homes with the troves of information it already collects regarding the thoughts, interests, concerns, plans, locations, and movements of hundreds of millions of specific individuals.<sup>175</sup> This includes, in addition to its longstanding and massive data on its users’ search behavior (via Google’s first product, its desktop search engine), data on its users’ web surfing (via Chrome), physical location and movements (via Android, Google Maps, and other services), device usage (via Android), future travel plans (Google Flights), reading and musical tastes (Google Books and Play), video consumption (YouTube), schedules (Google Calendar), personal documents and photographs (Google Docs and Drive), social activity (Google Plus), activity within the home (Nest), personal health (Google Fit), and virtually any other proprietary or personal information that users “volunteer” to provide via Gmail or Google Voice.<sup>176</sup> The extraordinary volume and diversity of information that Google possesses, combined with MVPD viewing data, gives it uniquely detailed profiles of individual Americans. The fact that, under the NPRM proposal, Google

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<sup>174</sup> NTIA Comments at 5.

<sup>175</sup> See Kearns Decl. ¶¶ 15-29, 54-60.

<sup>176</sup> See, e.g., *id.* ¶ 3.

would not be subject to the same statutory rules protecting personal data as MVPDs creates a direct threat to consumer privacy.

Even beyond that, Google’s ability to combine existing, extraordinarily detailed user profiles with information regarding viewing choices would give Google unmatched ability to sell targeted advertising in a way that competitors could not hope to match. As Dr. Kearns explains, the data that Google would be able to acquire under the Commission’s proposal “would be perhaps the single most valuable data asset” Google “do[es] not already possess.”<sup>177</sup> Google will be able to combine those data with the information it is already obtaining from other sources, including, among many other things, “browsing behavior, the contents of your Gmail, the physical locations you visit over time and where you travel.”<sup>178</sup> Because of the volume and diversity of data that Google retains – its “data dominance” – it would be uniquely able to provide targeted advertising to video customers (as well as users of its other services).<sup>179</sup> MVPDs do not have that ability and, as discussed, are subject to statutory restrictions that would not apply to Google. The result would be to tilt the playing field wildly in favor of a company that is already one of the richest and most powerful on Earth.<sup>180</sup>

The NPRM proposes to address the fact that its proposal would allow this extreme circumvention of the Communications Act scheme governing use of personal information by requiring navigation device providers to “certify” their compliance with the existing statutory privacy protections.<sup>181</sup> NTIA, however, again is forced to acknowledge that this half-baked

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<sup>177</sup> *Id.* ¶ 54.

<sup>178</sup> *Id.* ¶ 57.

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See* NPRM ¶¶ 73-79.

proposal “leaves important questions to be addressed – most importantly, who will ensure compliance . . . and through what legal authority.”<sup>182</sup>

*First*, consistent with NTIA’s statements, the NPRM identifies no viable compliance mechanism. It suggests (at ¶ 74) that it might require navigation devices to “self-certif[y]” compliance. This would render Congress’s privacy laws toothless by replacing an enforceable legal prohibition with an unsubstantiated promise. The Commission alternatively states (at ¶ 74) that it might require an “independent entity” to certify a navigation device, but the Commission provides no details how such a process would work, nor could it. An “independent entity” would need to be selected and paid by somebody. The Commission has already ruled out participation by MVPDs in stating (at ¶ 72) that MVPDs should not be involved in “testing and certification.” This leaves navigation device manufacturers to arrange for their own certification process. Given the financial incentives that exist to circumvent the statutory protections, the Commission cannot trust the fox to guard the hen house.<sup>183</sup> Indeed, Vizio recently began selling Smart TVs that tracked consumers’ viewing habits because this information is so valuable.<sup>184</sup>

*Second*, and again as noted by NTIA, the Commission does not identify any valid *legal* authority to enforce compliance with any proposed privacy requirements, and, in any event, none of its proposed enforcement mechanisms provides the same level of protection that currently exists as to MVPDs (Commission oversight and a private right of action). The Commission proposes (at ¶ 73) to foist an enforcement role on MVPDs, which will be required to “authenticate and provide the three Information Flows only to Navigation Devices that have

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<sup>182</sup> NTIA Comments at 5.

<sup>183</sup> See DSTAC WG2 Report at 9-10 (“Some members hold the position that a[n] [MVPD’s] [privacy] obligations do not apply to retail devices.”).

<sup>184</sup> See Greg Tarr, *Data-Mining Litigation Builds Against Vizio Smart TVs*, HDGuru (Apr. 7, 2016), <http://hdguru.com/data-mining-litigation-builds-against-vizio-smart-tvs>.

been certified by the developer.” This flatly contradicts the Commission’s requirement elsewhere that MVPDs should not be involved in “testing and certification” and that navigation devices need not “obtain[] approval from MVPDs.”<sup>185</sup> Moreover, if MVPDs did turn off Information Flows to third parties that did not respect some extra-statutory privacy standard, it is customers who would be harmed. They would be paying for both MVPD service and the third-party device that would be left without the services for which they have paid. It is unreasonable to force MVPDs into that position, as MVPDs’ brands and reputations will suffer due to misdirected consumer confusion and frustration.

No less important, the NPRM’s approach is not feasible. MVPDs have no business relationship with the navigation device makers and thus have no means to determine what navigation devices are doing with consumers’ private information. Even if the Commission did make them the “privacy police,” they would lack the information needed to perform that function. As a result, the FCC’s proposal will lead to absurd situations where customers watching the exact same show in different rooms of their home using set-top boxes from different providers will have different levels of protection of their personal information. That result cannot be squared with reasonable customer expectations.

The Commission next suggests (at ¶ 78) the Federal Trade Commission (“FTC”) might be able to enforce the certifications. This proposal ignores that substituting FTC enforcement for the Communications Act enforcement scheme that Congress intended to apply here would leave consumers without the private right of action that they currently have and that exists to supplement scarce agency enforcement resources.<sup>186</sup> Finally, the Commission claims (at ¶ 78)

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<sup>185</sup> NPRM ¶¶ 28, 72.

<sup>186</sup> See *Wolf v. S. D. Cohn & Co.*, 521 F.2d 225, 227 (5th Cir. 1975) (per curiam) (observing that, where “scarce enforcement resources of the S.E.C. are adequate only to police the most

that state laws might be sufficient substitutes for Congress’s privacy protections. But the NPRM does not (and could not) suggest that state laws uniformly provide protections equal to that in the Communications Act, and Congress enacted national privacy protections to avoid what the Commission proposes – reliance on a hodge-podge of state laws.<sup>187</sup>

## **2. *The Proposed Rules Undermine the Commission’s EAS Messaging and Children’s Advertising Regulations***

The Commission’s regulations require that MVPDs implement the Emergency Alert System (“EAS”).<sup>188</sup> The EAS provides federal, state, and local governments with critical means of delivering life- and property-saving information to the public. “The Commission’s rules ensure that this information is delivered to the public in an accessible manner, primarily by requiring that EAS Participants deliver EAS alerts in both audio and visual formats.”<sup>189</sup> The Commission vigorously enforces compliance with these regulations, including through a comprehensive regime that requires monthly EAS tests by MVPDs.<sup>190</sup>

Congress and the Commission have also imposed limitations on the amount of advertising that MVPDs can display during children’s television programming as well as restrictions on host selling and on displaying web links.<sup>191</sup> These restrictions prevent

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flagrant and widespread abuses,” the “private action therefore arguably occupies an even more important place”), *vacated and remanded on other grounds*, 426 U.S. 944 (1976).

<sup>187</sup> See *infra* p. 86 & note 312; see also NTIA Comments at 6 n.27 (agreeing that “the baseline privacy protection a subscriber receives should not hinge on where the consumer lives”).

<sup>188</sup> See generally 47 C.F.R. pt. 11.

<sup>189</sup> Sixth Report and Order, *Review of the Emergency Alert System*, 30 FCC Rcd 6520, ¶ 34 (2015) (citing 47 C.F.R. § 11.51(d)); see 47 C.F.R. § 11.1.

<sup>190</sup> See Forfeiture Order, *Viacom Inc. and ESPN Inc.*, 30 FCC Rcd 797, ¶¶ 1-2 (2015).

<sup>191</sup> See 47 U.S.C. § 303a(b); 47 C.F.R. §§ 25.701(e), 76.225.

“expos[ing] a significant number of children to the risk of over-commercialization.”<sup>192</sup> The Commission “regular[ly] . . . monitor[s] compliance with children’s programming rules.”<sup>193</sup>

Recognizing that these regulations embody “important public policy goals” and will not apply to third-party navigation devices, the NPRM proposes (at ¶ 73) that the same vague “certification” requirement apply for EAS requirements and children’s advertising limits. This proposal fares no better here than it does for “certification” of compliance with Congress’s privacy protections. Self-certification provides no assurance of compliance with the EAS and children’s advertising requirements whatsoever, and certification by an “independent” third party is unworkable and ineffective.<sup>194</sup>

**E. The Proposed Rules Will Raise Prices for Consumers and Harm Them in Additional Ways**

All of the problems discussed above would cause direct and substantial injuries to consumers – from robbing them of the benefits of continuing innovation to ensuring that they will have less diverse programming choices to creating enormous new threats to their private information. But that is not all. The NPRM proposals will directly harm consumers in at least three further respects.

***1. The Commission’s Proposals Would Increase Rates for Consumers***

For reasons even beyond those discussed above, the proposed rules will necessarily increase the costs of MVPD services for consumers – a factor the NPRM ignores completely.

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<sup>192</sup> Second Order on Reconsideration of First Report and Order, *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 19 FCC Rcd 5647, ¶ 48 (2004).

<sup>193</sup> Public Notice, *Enforcement Bureau Reports on Cable and Satellite Compliance with Children’s Programming Requirements Under the Children’s Television Act and Associated Public File Rules*, 27 FCC Rcd 8066, 8067 (2012).

<sup>194</sup> *See supra* p. 51.

MVPDs will incur significant new expenses if the NPRM proposals are adopted. MVPDs will have to upgrade or replace devices, as well as modify their networks – including back-office systems, headends, uplinks, central offices, delivery platforms, network equipment, content servers, and security components – to create sets of Information Flows and to conform to whatever new standards and protocols are ultimately adopted as the interface between the MVPD and third-party devices.<sup>195</sup> The NPRM provides no mechanism to recover those costs. Accordingly, the costs of these redesigns will ultimately be shared with consumers, in the form of higher prices for MVPD services.

Other aspects of the NPRM proposals would raise the costs of MVPD services to consumers further still. As discussed above, the NPRM would allow third parties to insert their own advertising into the stream that consumers receive and impose no limit on how much advertising there may be.<sup>196</sup> This increased supply in total advertising will not only harm programmers, especially independent and minority programmers, but, as Dr. Katz explains, also reduce MVPD advertising revenues, which will put upward pressure on subscription fees.<sup>197</sup>

Given the broad scope of the NPRM proposals, the costs imposed will be even greater than prior attempts at imposing regulatory interfaces, which have proven expensive and wasteful. For example, NCTA has shown that cable operators paid more than \$1 billion and expended enormous personnel and technical resources to support unidirectional CableCARD devices (UDCPs), even though the Consumer Electronics industry indicated there would be limited

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<sup>195</sup> See Dulac Decl. ¶¶ 7-8, 29-32.

<sup>196</sup> See *supra* Part II.C.1.

<sup>197</sup> See Katz Decl. ¶¶ 77-78, 84-85. The potential for lower prices for third-party navigation services will not offset these effects. See *id.* ¶ 82.

demand for these devices.<sup>198</sup> In defending the integration ban in 2005, the Commission stated “[w]e do not take lightly the imposition of additional costs on consumers,” but “it seems likely that the potential savings to consumers from greater choice among navigation devices will offset some of the costs.”<sup>199</sup> That technology mandate was an expensive failure and ultimately was repealed by Congress. The NPRM proposals would likewise establish an unnecessary technology mandate that likely would be obsolete by the time it is developed.

## 2. *The Anti-Subsidy Rule Would Further Increase Consumer Costs*

The NPRM’s proposed anti-subsidy rule will further raise costs to consumers.<sup>200</sup> Economics teaches that, when there are common fixed costs of production to be allocated among consumers, it is efficient if prices vary according to customers’ sensitivity to price changes.<sup>201</sup> It may therefore be efficient for an MVPD to load more costs on to equipment than on to service for some consumers. By prohibiting such practices, some consumers would be required to pay more than they wish while leaving other customers paying less than they would be willing to pay. This result is not only economically inefficient, but also contrary to the NPRM’s own stated goal of reducing STB prices for all consumers.<sup>202</sup>

For these same reasons, the Commission also should reject the proposals of Montgomery and Anne Arundel Counties to prohibit service charges on more than one device.<sup>203</sup> Such arrangements not only may be an efficient way to allocate cost, but also are cost justified,

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<sup>198</sup> See Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, FCC, MB Docket No. 15-64 (Jan. 13, 2016).

<sup>199</sup> Second Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 20 FCC Rcd 6794, ¶ 29 (2005).

<sup>200</sup> See NPRM ¶ 84.

<sup>201</sup> See Katz Decl. ¶ 62.

<sup>202</sup> See NPRM ¶ 13.

<sup>203</sup> See *id.* ¶ 86.

because providing consumers additional outlets, streams, or devices entails greater costs. In addition, there is generally a correlation between how many devices a consumer uses and the amount of content is consumed, which (depending on the network design) could add more congestion to the network. In this scenario, per-stream or per-device charges can be effective means for MVPDs to manage congestion. This is in fact how OVDs often price their services; Netflix, for example, imposes additional charges based on the number of simultaneous screens on which the consumer seeks to watch programming.<sup>204</sup> By contrast, limiting the ability of MVPDs to charge more to consumers who have access to content through many devices would effectively discriminate against consumers with fewer devices who impose fewer costs and should therefore pay lower prices.

### **3. *The Proposed Rules Will Lead to Customer Confusion and Frustration***

The proposed rules will impair consumers' experience in using MVPD services, inevitably adding layers of needless and unwanted complexity to high-touch customer care functions such as service installation, repair, and maintenance. In a variety of contexts, the Commission has recognized the benefits of consumers having a single point of contact to address any problems they may experience with a service to which they subscribe.<sup>205</sup> The DSTAC

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<sup>204</sup> See Netflix, <https://www.netflix.com/> (Netflix Basic is \$7.99 for 1 screen at the same time; Netflix Standard is \$9.99 for two simultaneous screens; and Netflix Premium is \$11.99 for four simultaneous screens).

<sup>205</sup> See, e.g., Second Report and Order, *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, CG Docket No. 05-231, FCC 16-17, ¶ 82 (rel. Feb. 19, 2016) (“We agree with Consumer Groups and other parties that [video programming distributors (VPDs)] may be in the best position to take primary responsibility for complaint resolution, given the more direct relationship they have with viewers and subscribers, the opportunity for consumers to utilize existing VPD processes for receiving, processing, and resolving closed captioning complaints, and the ability of VPDs to provide a single point of contact for consumers.”) (footnote omitted); Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 1508, ¶ 57 (1998)

Report likewise recognizes the importance of this for consumers in the context of video programming services.<sup>206</sup>

The NPRM eliminates this single point of contact for MVPD service by inserting third-party providers between MVPDs and their customers and enabling these third parties to repackage MVPD service however they like, notably including their decision to provide any meaningful customer support function for their device or not. As Dr. Katz explains, this unbundling will make it difficult for consumers to determine the source of a problem or degradation in service quality, and therefore will not know which provider to contact.<sup>207</sup> MVPDs may not be able to answer even simple questions as to the basic operations of the consumer's device because the customer service representatives and technicians cannot reasonably be expected to be trained to support each and every device in the marketplace, especially those of which they are otherwise unaware. The providers themselves may have difficulty sourcing the problem because neither entity will have full visibility into all of the elements that comprise the complete service the consumer receives. And device providers will have incentives to eschew responsibility and instead blame the MVPD, which will frustrate customers and make it more difficult to resolve service problems. Moreover, there is no guarantee that each third-party

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(“We encourage carriers to develop a plan that ideally enables the consumer to resolve his or her slamming problem with a single contact. We find that it would be greatly beneficial to provide the consumer with the ability to call one entity to explain the slamming problem, and have that entity switch the consumer back to the proper carrier, re-rate bills, provide refunds, and determine whether a slam has occurred in the event that a carrier claims that a change was authorized. This would provide the consumer with a convenient way to undo the damage caused by slamming.”); Further Notice of Proposed Rulemaking and Report and Order, *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 3752, ¶ 120 (2002) (requiring affiliated universal service contributors reporting data on a consolidated basis to certify that customers have a single point of contact).

<sup>206</sup> See, e.g., DSTAC WG4 Report at 166.

<sup>207</sup> See Katz Decl. ¶¶ 99-102.

device provider will provide adequate customer service support to address issues that arise with their devices.

What is known is that the MVPD will ultimately bear the brunt of this burden as customers will continue to expect that their MVPD provide support for all components of their service, even for those parts for which they no longer exercise any control. In addition, subscribers who are paying an MVPD for its entire service would not receive all the features and functionality of such service if they are using a third-party box.<sup>208</sup> Consumers are not going to understand why their neighbor can get highlights of their fantasy football team or can use “look back” features to record content they missed, but they cannot, even though they are subscribing to and paying for the same service.

### **III. The NPRM Proposals Are Unlawful**

#### **A. The Proposed Rules Exceed the Commission’s Statutory Authority**

The NPRM asserts that Section 629 – which includes its own rule of construction that “[n]othing” therein “shall be construed” to expand the Commission’s authority in effect when that provision was enacted<sup>209</sup> – nonetheless authorizes the Commission to force MVPDs radically to restructure their video programming services in ways that will fundamentally alter the video programming distribution marketplace. Specifically, it claims that Section 629(a) grants the Commission authority to force MVPDs to rip apart their services into separate “Information Flows” and to make those piece-parts available to third parties at no cost, so that the third parties can integrate those streams into their own service offerings in any way they

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<sup>208</sup> See NPRM ¶ 26 (proposing to define “Navigable Services” as “an MVPD’s multichannel video programming (including both linear and on-demand programming), every format and resolution of that programming that the MVPD sends to its own devices and applications, and Emergency Alert System (EAS) messages”) (footnote omitted).

<sup>209</sup> 47 U.S.C. § 549(f).

choose without regard to negotiated agreements between programmers and MVPDs. Nothing in that provision authorizes the Commission to impose such sweeping changes to the video marketplace.

The text of Section 629(a) demonstrates that Congress had a much more modest goal: to ensure consumers would enjoy a choice of devices through which they could receive *existing MVPD services*. Section 629(a) explicitly seeks to assure consumer choice in devices used to “access” the “programming and other services” provided by MVPDs. It does not, contrary to the NPRM’s suggestion, authorize the Commission to create or subsidize new services that rely on the programming provided by the MVPD, but substitute the competitor’s brand and eliminate the look and feel of the MVPD service. Nor does it authorize the Commission to truncate the existing “multichannel video programming and other services” identified in the statute into a newfangled category of “Navigable Services” – a category that Congress never even mentioned or contemplated. And, by its plain terms, Section 629(a) seeks to expand access to competing “converter boxes” and “other equipment”; it does not, as the Commission would have it, seek to expand competition from “software.” Finally, Section 629(a) focuses on equipment provided by entities “not affiliated with” MVPDs.<sup>210</sup> The Commission’s suggestion that any entity with an arm’s-length business relationship qualifies as such an “affiliate” is, to say the least, fanciful.

As the D.C. Circuit made clear in the recent *EchoStar* case, the FCC does not have “unbridled” authority under Section 629 and may only impose requirements that have an “actual connection to § 629’s mandate.”<sup>211</sup> Taken individually, each reimagining of the language of Section 629 is unsustainable under *EchoStar*. Taken as a whole, the multiple, independent

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<sup>210</sup> *Id.* § 549(a).

<sup>211</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013).

departures from the text constitute a complete disregard of the statutory limits on Commission authority and will lead inevitably to reversal of any order adopting such an unlawful scheme.<sup>212</sup>

Notably in this regard, the Apps Approach that consumers are already adopting in enormous numbers fulfills Congress's purposes in Section 629 without creating any of these same issues. That fact renders the NPRM proposals all the more mystifying – and legally indefensible.

***1. Section 629 Seeks To Ensure the Availability of Equipment Used To Access MVPD Services, Not To Promote the Development of New Services***

Congress adopted Section 629 in 1996 to assure that consumers have choices in the equipment they use to receive the services offered by MVPDs. Thus, Congress directed the Commission to assure competitive availability of “equipment” that consumers use “to *access* multichannel video programming and other services *offered over multichannel video programming systems*.”<sup>213</sup> Indeed, the very title of Section 629(a) specifies that the provision governs the “[c]ommercial consumer availability of equipment used to *access services provided* by multichannel video programming distributors.”<sup>214</sup>

The Commission itself has repeatedly recognized that Section 629(a)'s scope is limited. For example, in 2010, it described the goal of Section 629 as fostering a “vigorous market for devices used with MVPD services” and a “competitive market for retail navigation devices that

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<sup>212</sup> See, e.g., *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002) (noting that, even if one weak argument could prevail, the agency faced additional hurdles).

<sup>213</sup> 47 U.S.C. § 549(a) (emphases added).

<sup>214</sup> *Id.* (emphasis added); see *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (“‘[T]he title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.”) (quoting *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R. Co.*, 331 U.S. 519, 528-29 (1947)).

connect to subscription video services.”<sup>215</sup> Earlier, in 2005, it described the goal as “assur[ing] the commercial availability of navigation device[] equipment used by consumers to access services from MVPDs.”<sup>216</sup> And the Commission has previously defined “navigation devices” for purposes of Section 629 as “[d]evices such as 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.*”<sup>217</sup>

Ignoring those prior statements, the NPRM attempts to rewrite the statute in support of a different goal, which it describes as enhancing competition in “user interface[s]” and “develop[ing] innovative ways to access multichannel video programming.”<sup>218</sup> NTIA likewise seeks to put “unaffiliated device developers . . . in a position to offer devices and *services* that compete” with MVPDs.<sup>219</sup> There is not a word of support for that goal in the text of Section 629, which, as described above, seeks to foster access to the “services” “offered” or “provided by” MVPDs. Nothing in that text directs the Commission to order MVPDs to unbundle their

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<sup>215</sup> Third Report and Order and Order on Reconsideration, *Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd 14657, ¶¶ 2, 4 (2010).

<sup>216</sup> Second Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 20 FCC Rcd 6794, ¶ 5 (2005) (footnote omitted); see Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd 20885, ¶ 46 (2003) (“Section 629 also applies to any type of equipment used to access MVPD programming and services, including televisions, VCRs, cable set-top boxes, personal computers, program guide equipment and cable modems. . . . [T]he scope of Section 629 . . . authorizes the Commission to adopt regulations that aim to ensure the commercial availability of a wide range of consumer electronics equipment used in conjunction with MVPD systems.”); see also *First Plug and Play Report & Order* ¶ 1 (“In this *Report and Order* . . . we adopt rules to address the mandate expressed in Section 629 of the Communications Act to ensure the commercial availability of ‘navigation devices,’ the equipment used to access video programming and other services from multichannel video programming systems.”) (footnote omitted).

<sup>217</sup> 47 C.F.R. § 76.1200(c) (emphasis added).

<sup>218</sup> NPRM ¶ 15.

<sup>219</sup> NTIA Comments at 1 (emphasis added).

services into their component parts and make those parts available to competitors so that they can offer their own services through competitive “user interfaces.” Simply put, Section 629(a) is about making available competitive *equipment* to access *existing* services, not forcibly requiring MVPDs to assist in creating new services offered by third parties. As the Commission previously conceded, the statute does not require MVPDs to engage in “carriage of services outside of those chosen by [them] in order to assure retail availability of navigation devices.”<sup>220</sup> Accordingly, as in *EchoStar*, where the D.C. Circuit reversed a Commission mandate that had only a “tenuous . . . connection to § 629’s mandate,”<sup>221</sup> the Commission’s departure from the clear limits imposed by Section 629(a) will lead to a judicial rebuke.

Indeed, the Commission’s error is all the more clear here, because the Commission’s proposals are simply mandated unbundling under another name, *i.e.*, they require a private entity to disaggregate its retail service into component parts so that its competitors can use those services to “compete” with those entities. Unbundling is very strong medicine. It is an extraordinary intervention into the private marketplace, and, where Congress has wanted to authorize such an extreme government mandate for some companies to assist their competitors, it has done so explicitly. In particular, in Section 251 of the Communications Act – which was added by the same 1996 Act that included Section 629 – Congress imposed upon incumbent local exchange carriers a “duty to provide . . . nondiscriminatory access to network elements on an unbundled basis.”<sup>222</sup> Sections 251 and 252 then set out a complex, reticulated scheme

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<sup>220</sup> Memorandum Opinion and Order, *Gemstar Int’l Group, Ltd. and Gemstar Dev. Corp.*, 16 FCC Rcd 21531, ¶ 31 (2001).

<sup>221</sup> *EchoStar*, 704 F.3d at 997.

<sup>222</sup> 47 U.S.C. § 251(c)(3).

defining that duty, the *compensation* required for such access, and how disputes as to it would be resolved, including a provision for judicial review.<sup>223</sup>

Section 629 contains no analog to those detailed provisions. The omission of any such language is powerful evidence of Congress's intent: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>224</sup>

If that were not enough, the legislative history underscores that Congress specifically rejected rules akin to, albeit not as intrusive as, the ones the Commission has now conjured. The House version of the bill that became Section 629 authorized the Commission "to assure competitive availability, to consumers of telecommunications subscription services," of third-party equipment used with such services.<sup>225</sup> "[T]elecommunications subscription service" was defined broadly to mean "the provision directly to subscribers of *video, voice, or data services* for which a subscriber charge is made,"<sup>226</sup> and thus was not limited to the MVPD's "programming and other services." Congress rejected this language, however, and instead adopted a final bill that, as the Conference Committee expressly stated, was "*narrowed* to include only equipment used to access services provided by multichannel video programming distributors."<sup>227</sup> The legislative history therefore confirms what the text of Section 629

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<sup>223</sup> See *id.* § 252(c), (d), (e).

<sup>224</sup> *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and alteration omitted).

<sup>225</sup> H.R. 1555, 104th Cong. § 203 (1995).

<sup>226</sup> *Id.* (emphasis added).

<sup>227</sup> H.R. Conf. Rep. No. 104-458, at 181 (1996) (emphasis added).

expressly provides: that Congress had the “narrow” intent of ensuring access to existing MVPD services via competitive navigation devices, not to subsidize the creation of new services.

Moreover, Congress recently refused yet again to enact legislation that would have required anything like unbundling by MVPDs. In the legislative proceedings that led to Congress’s 2014 enactment of STELAR, Senator Markey offered an amendment that would have established a group of technical experts to propose standards for unbundling MVPD services and required the Commission to promulgate unbundling rules.<sup>228</sup> Congress, however, declined to adopt Senator Markey’s drastic proposal.<sup>229</sup> On the contrary, STELAR merely directs the Commission to set up an advisory body to produce a non-binding report on the narrow issue of creating a “not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system.”<sup>230</sup> Thus, in legislating in this precise area just two years ago, Congress did not remotely contemplate the kind of heavy-handed government intervention in a working marketplace that the Commission has proposed.

The Commission’s attempt to expand Section 629(a) beyond its plain text also cannot be reconciled with the rule of construction that Congress adopted in that same provision. Section

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<sup>228</sup> Amendment of Sen. Edward Markey to S. 2799, 113th Cong. § 203(a)(1) (2014) (requiring the Commission to establish a group of technical experts to report on “performance objectives, technical capabilities, and technical standards . . . for access to a system’s programming, features, functions, and services”) (emphasis added), [http://www.commerce.senate.gov/public/\\_cache/files/2812a1c3-9606-4144-8f0e-fc7c41f3f384/5D7D0E8B69AA8E628F19A87181D253EC.s.2799-markey1.pdf](http://www.commerce.senate.gov/public/_cache/files/2812a1c3-9606-4144-8f0e-fc7c41f3f384/5D7D0E8B69AA8E628F19A87181D253EC.s.2799-markey1.pdf); *id.* § 203(b) (requiring the Commission to “issue final rules that promote a not-unduly-burdensome, uniform, and technology- and platform-neutral methodology for access to a system’s programming, features, functions, and services”) (emphasis added).

<sup>229</sup> See The Capital Forum, *CableCARD Policy: TiVo and Other Set-Top Box Retailers Likely To Win Current Fight vs. Cable on CableCARD Provision in Satellite Television Reauthorization Bill; Fight to Continue in Next Congress in Telecom Rewrite* (Nov. 11, 2014) (listing policy options before Congress), <https://thecapitolforum.com/wp-content/uploads/2015/05/CableCARD-2014.11.11-1.pdf>.

<sup>230</sup> STELAR § 106(d)(1), 128 Stat. 2063.

629(f) provides that nothing in Section 629 “shall be construed as expanding . . . any authority” of the Commission beyond its pre-1996 limits.<sup>231</sup> The Supreme Court has squarely held that the nearly identical language of Section 2 of the Communications Act (stating that “nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction” with respect to specific matters<sup>232</sup>) barred the Commission from adopting a “broad” interpretation of its statutory authority.<sup>233</sup> Just so here. Unless Section 629(a) clearly gives the Commission authority over the matter – and it emphatically does not do so here – the Commission is without power to act.

Beyond this, the Commission’s analysis leads to absurd results that Congress plainly did not intend. Under the Commission’s perverse approach, it is *irrelevant* to a statute seeking to enhance competition in “equipment” that consumers can and do use a wide variety of equipment – iPads, Samsung phones, laptops, etc. – not provided by an MVPD to access MVPD services. Under the plain text of the statute, the existence of that equipment competition should be the end of the matter. To the Commission, however, the ability to use this competitive equipment to access MVPD service is beside the point because consumers use a “proprietary, [MVPD]-controlled user interface” that does not allow them to “integrate” or “search across” non-MVPD content.<sup>234</sup> Of course, these “proprietary” apps are no different from the ones that Netflix and other providers use. Even more to the point, the statute is explicit about assuring “equipment”

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<sup>231</sup> 47 U.S.C. § 549(f).

<sup>232</sup> *Id.* § 152(b).

<sup>233</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 377 (1986); *see Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010) (making the same point about nearly identical language in 47 U.S.C. § 256(c)).

<sup>234</sup> Shalini Ramachandran, *Comcast Fires Back at FCC by Making TV Service Available Without a Set-Top Box*, Wall St. J. (Apr. 20, 2016) (quoting FCC official), <http://www.wsj.com/articles/comcast-fires-back-at-fcc-by-making-tv-service-available-without-a-set-top-box-1461188283>.

competition and says nothing whatsoever about enhancing “integration” between MVPD and other services.

Nor do analogies to the Commission’s *Carterfone* decision<sup>235</sup> suggest that the Commission has authority to enact the proposed rules. *First*, *Carterfone* had nothing to do with Section 629 or, even more broadly, the regulatory duties of MVPDs. *Second*, even aside from that basic legal distinction, unlike the situation addressed in *Carterfone*, MVPDs are not barring third-party devices from accessing their services. In fact, as we have emphasized, there are hundreds of millions of third-party devices that access MVPDs’ services today.<sup>236</sup> The issue here is thus nothing like the one that prompted that regulatory action. *Third*, and more generally, the Commission has recognized that the appropriate regulatory frameworks for regulation of telephone networks and MVPDs are not the same. As the Commission stated, “the telephone networks do not provide a proper analogy . . . due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.”<sup>237</sup> Because the networks of MVPDs vary significantly, the proposed rules require MVPDs dramatically to restructure their networks (at their own cost) to enable the unbundling of their services for the use of third-party navigation devices, which will then profit by modifying MVPDs’ services. That is far afield from *Carterfone*, which did not require the telephone networks to do anything and merely prohibited them from restricting attachment of non-harmful devices to their system.<sup>238</sup>

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<sup>235</sup> Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) (“*Carterfone*”).

<sup>236</sup> See *supra* pp. 8-9.

<sup>237</sup> *First Plug and Play Report & Order* ¶ 39.

<sup>238</sup> See *Carterfone*, 13 F.C.C.2d at 423-24.

2. *The Commission's Redefinition of "Services" Is Likewise Contrary to Plain Statutory Text*

The Commission compounds its core statutory error by ignoring Congress's direction as to the applicable "services" to which multiple sources of equipment need to provide access. Congress could not have been clearer that the "services" for which the Commission is to assure competitive means of access are the existing services currently offered by MVPDs. Section 629(a) refers to the services at issue as "multichannel video programming and other services offered over multichannel video programming systems."<sup>239</sup>

In direct conflict with that congressional direction – and in notable contrast to the result under the Apps Approach – under the Commission's regime, consumers would actually be hindered from obtaining the "services" "offered" and "provided by" MVPDs. More specifically, as described above, MVPD services include not only programming, but also features and functionalities such as the user interface, parental controls, fantasy sports, weather updates, and social media.<sup>240</sup> MVPDs provide these and other features to enhance the user experience and distinguish their services from their competitors' offerings. Instead of ensuring consumer access to the full array of "services offered over multichannel video programming systems," as Congress directed, the Commission proposes to mandate that MVPDs offer an Information Flow containing only "Navigable Services" – a newly invented term that Congress never used and that thus has no legal relevance under Section 629. The Commission then defines these "Navigable Services" to *exclude* parts of the MVPD's service, including the user interface, search functionality, "news headlines, weather information, sports scores, and social networking,"

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<sup>239</sup> 47 U.S.C. § 549(a).

<sup>240</sup> *See supra* pp. 12-13.

on the wholly irrelevant basis that some of the same information is allegedly “available from other sources.”<sup>241</sup>

The Commission’s proposal may be consistent with its desire to allow third parties to slice and dice piece-parts of MVPD service and combine them together with their own content to create new services, but it is, once again, unsupported by the statutory language that constrains the Commission’s authority. The statute refers to “multichannel video programming and other services offered over multichannel video programming systems.”<sup>242</sup> Whether these additional functions are considered as “multichannel video programming” or as part of the “other services” identified in Section 629, the Commission’s understanding reads them out of the statute and hinders consumers’ ability to access them.<sup>243</sup> Congress’s definition of “cable service” confirms the error in the Commission’s proposed interpretation. There, Congress defined “cable service” as not only “the one-way transmission to subscribers of . . . video programming” but also “the one-way transmission to subscribers of . . . other programming service” and “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>244</sup> Thus, properly construed, “service” includes the user interface (the “subscriber interaction”) and content additions like news headlines, sports scores, and weather (the “other programming service”).<sup>245</sup>

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<sup>241</sup> NPRM ¶¶ 26, 27, 40.

<sup>242</sup> 47 U.S.C. § 549(a) (emphasis added).

<sup>243</sup> See, e.g., *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013).

<sup>244</sup> 47 U.S.C. § 522(6).

<sup>245</sup> See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (“[I]dential words used in different parts of the same act are intended to have the same meaning.”) (internal quotation marks omitted).

### 3. *The Commission Cannot Lawfully Define Software as “Equipment”*

In proposing to require MVPDs to offer access to the piece-parts of their services to third-party software applications, the Commission’s interpretation yet again crashes headfirst into the plain text of Section 629(a). The relevant statutory language directs the Commission to assure commercial availability of “converter boxes, interactive communications equipment, and other *equipment*.”<sup>246</sup> Despite that language, the NPRM claims that the plain terms “navigation device” and “equipment” include software applications because “software features have long been essential elements” of the hardware devices that consumers use to access multichannel video programming.<sup>247</sup>

That is nonsense. While it may well be true that much (or even all) of the hardware that consumers use to access MVPD programming and services *includes* software elements,<sup>248</sup> this does not magically transform software applications themselves into “equipment.” The ordinary meaning of “equipment” involves tangible objects or physical resources. *Webster’s Third New International Dictionary*, for example, defines equipment as “the *physical resources* serving to equip a person or thing.”<sup>249</sup> This understanding is reinforced by the fact that Congress placed the term “equipment” at the end of a list – “converter boxes, interactive communications equipment, and other equipment” – of hardware devices, meaning, under established canons of construction, that “equipment” should be given a similar meaning to the other terms, which

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<sup>246</sup> 47 U.S.C. § 549(a) (emphasis added). Although the Commission purports to interpret both “navigation device” and “equipment,” the Commission defines “navigation device” to mean “[d]evices such as converter boxes, interactive communications equipment, or other equipment” used by consumers to access MVPD services. 47 C.F.R. § 76.1200(c). This means that the definition of “device” turns on the definition of “equipment.”

<sup>247</sup> NPRM ¶ 22.

<sup>248</sup> *See id.* ¶ 22 & n.66.

<sup>249</sup> *Webster’s Third New International Dictionary* 768 (2002) (emphasis added).

describe hardware, not software.<sup>250</sup> Indeed, the most popular OVD app for streaming video – Netflix – acknowledges this basic distinction between software and hardware in its own FAQs where it distinguishes between “Netflix streaming software” and “devices”: “Netflix streaming software enables you to instantly watch content from Netflix through any Internet-connected device that offers the Netflix app. . . . For example, this software may be embedded in a Netflix ready device or we may offer this software as an app to be downloaded onto a device such as the Apple iPad.”<sup>251</sup> The Commission has previously adopted precisely the understanding of “equipment” reflected in all those statements. As the Commission has explained, “[e]quipment used to access video programming and other services offered over multichannel video programming systems include televisions, VCRs, cable set-top boxes, personal computers, program guide equipment and cable modems.”<sup>252</sup> Similarly, and contrary to the NPRM’s suggestion (at ¶ 22 n.66), the Commission’s prior interpretation of the term “navigation devices” in its 2013 order implementing the CVAA’s<sup>253</sup> accessibility rules also confirms that the term does not apply to software. There, the Commission “interpret[ed] the term ‘navigation devices’ as encompassing only *devices* that support conditional access to control consumer access to programming and services,” and listed as examples “digital cable ready televisions . . . , set-top

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<sup>250</sup> See *United States v. Williams*, 553 U.S. 285, 294 (2008) (“In context, . . . those meanings are narrowed by the commonsense canon of *noscitur a sociis* – which counsels that a word is given more precise content by the neighboring words with which it is associated.”).

<sup>251</sup> Netflix, How does the Netflix app work?, <https://help.netflix.com/en/node/412>.

<sup>252</sup> *First Plug and Play Report & Order* ¶¶ 24-27; see also Report on Cable Industry Prices, Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 21 FCC Rcd 15087, ¶ 1 n.2 (2006) (“[E]quipment’ refers to a set-top converter box, remote control unit, and other equipment used to access cable television programming.”).

<sup>253</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751.

boxes . . . , computers with CableCARD slots, and cable modems.”<sup>254</sup> There, as here, there must be a physical device to satisfy the statute.<sup>255</sup>

Moreover, even if “equipment” could, contrary to its plain meaning and statutory context, be construed to mean “software,” Section 629(a) does not grant the Commission the authority to regulate *any* “equipment.” Rather, Section 629(a) applies only to the “equipment *used by consumers to access* multichannel video programming *and* other services offered over multichannel video programming systems.”<sup>256</sup> As described above, software providing *new* services composed of the disaggregated parts of MVPD services is in no way “equipment used by consumers to access” MVPD services.

#### ***4. The Commission’s Definition of “Affiliate” Is Unprecedented and Unsustainable***

The NPRM blatantly misreads Section 629(a) in another respect as well. To justify the need for regulatory intervention despite the existence of half a billion retail devices that currently support access to MVPD content, the Commission suggests that this flourishing competition is irrelevant because many of these device makers are “affiliated with” an MVPD such that they do not “count” within the meaning of Section 629(a). To reach that conclusion,

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<sup>254</sup> Report and Order and Further Notice of Proposed Rulemaking, *Accessibility of User Interfaces, and Video Programming Guides and Menus*, 28 FCC Rcd 17330, ¶ 23 (2013) (emphasis added).

<sup>255</sup> To be sure, the Commission may modify an existing interpretation so long as the modification is consistent with the statute, but the Commission must “display awareness that it *is* changing position” and “show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Here, the Commission has done neither, nor has it explained how its new reading is consistent with the clear meaning of the relevant statutory text.

<sup>256</sup> 47 U.S.C. § 549(a) (emphases added).

the Commission must read the term “affiliated” to include any “entities that have [a] business relationship with any MVPD.”<sup>257</sup>

That conclusion is contrary to the plain meaning and established understanding of the term in this and related contexts. Indeed, Congress adopted Section 629 against the backdrop of a pre-existing definition of this same term, which states that, for purposes of Title VI, an “affiliate” is a person “who owns or controls, or is owned or controlled by, or is under common ownership or control with” another person.<sup>258</sup> Nothing in Section 629 indicates that that definition, which is directly contrary to the NPRM’s interpretation, should not control here. In a wide variety of contexts as well, the Commission has defined “affiliate” in terms of ownership and control.<sup>259</sup> The Commission currently defines “affiliate” for purposes of Section 629 itself as “[a] person or entity that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.”<sup>260</sup> And, in direct contrast with its approach here, the Commission has elsewhere recognized that ordinary contractual relationships do not typically give rise to a relationship of ownership and control. It has thus defined “[a]ffiliation through contractual relationships” as limited to relationships

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<sup>257</sup> NPRM ¶ 23.

<sup>258</sup> 47 U.S.C. § 522(2); *see* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780. Congress demonstrated the same understanding of the scope of “affiliate” in Title I of the Communications Act, which defines “affiliate” as a “person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person,” unless the context otherwise requires. 47 U.S.C. § 153(2).

<sup>259</sup> *See, e.g.*, 47 C.F.R. § 1.990(d)(2) (“*Affiliate* refers to any entity that is under common control with a licensee . . . .”); *id.* § 1.2110(c)(5) (defining “affiliate” in terms of “control[.]” and “power to control”); *id.* § 20.20(e) (“owns or controls, is owned or controlled by, or is under common ownership with”); *id.* § 52.12(a)(1)(i) (“controls, is controlled by, or is under the direct or indirect common control with another person”).

<sup>260</sup> 47 C.F.R. § 76.1200(d). The definition further defines “control” through the notes accompanying § 76.501.

where “one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.”<sup>261</sup>

The Commission nevertheless claims – based on the House Report of the bill that was rejected in favor of the “narrowed” text before final passage<sup>262</sup> – that “the statute was intended to encourage the availability” of equipment from a “‘variety of sources’” and “‘various distribution sources.’”<sup>263</sup> Those general statements do the Commission no good as, under the ordinary meaning of the term “affiliate,” there remain an enormous number of sources from which consumers may access an MVPD’s services, including Smart TVs, Roku, smartphones, game consoles, and PCs and Macs.<sup>264</sup> Indeed, applying the natural meaning of the term *expands* the universe of potential competitive distribution sources, *i.e.*, the universe of “unaffiliated” companies that Congress intended the Commission to consider as competitive providers of set-top boxes is significantly broader than the NPRM’s arbitrarily narrow inquiry suggests.

**5. *No Other Provision of the Communications Act Authorizes the Proposed Rule***

The Commission fleetingly suggests that two other provisions could provide an alternative source of authority.<sup>265</sup> Neither provision remotely authorizes the Commission’s proposal here.

The first provision the NPRM offers is Section 624A. That provision directs the Commission to identify the “means of assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service,

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<sup>261</sup> 47 C.F.R. § 1.2110(c)(5)(ix).

<sup>262</sup> H.R. Conf. Rep. No. 104-458, at 181.

<sup>263</sup> NPRM ¶ 23 (quoting H.R. Rep. No. 104-204, at 112 (1995)).

<sup>264</sup> *See supra* pp. 5-6.

<sup>265</sup> *See* NPRM ¶¶ 18, 24.

so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders.”<sup>266</sup>

As the text of Section 624A makes clear, it is a narrow provision that applies only to cable systems, not to other MVPD systems such as those provided by AT&T’s subsidiaries.<sup>267</sup> Even as to cable systems, the provision only addresses the need for, in Congress’s words, “compatibility among televisions, video cassette recorders, and cable systems” and authorizes only “narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market.”<sup>268</sup> Congress further specified that any rules adopted under this provision could “not affect features, functions, protocols, and other product and service options other than those specified” in the provision.<sup>269</sup> Thus, that language does not authorize the Commission to promulgate rules, such as those at issue here, that go beyond ensuring compatibility of cable systems with video cassette recorders.

The Commission also suggests that Section 335 of the Communications Act provides an alternative source of authority with regard to direct broadcast satellite.<sup>270</sup> Section 335, however, only authorizes the Commission to impose “public interest or other requirements *for providing video programming*.”<sup>271</sup> Congress then specified that the requirements as to that programming involve a minimum level of “noncommercial, educational, state public affairs, and informational

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<sup>266</sup> 47 U.S.C. § 544a(b)(1).

<sup>267</sup> See *EchoStar*, 704 F.3d at 999-1000.

<sup>268</sup> 47 U.S.C. § 544a(a)(4).

<sup>269</sup> *Id.* § 544a(c)(2)(D).

<sup>270</sup> See NPRM ¶¶ 20, 24, 71, 75.

<sup>271</sup> 47 U.S.C. § 335(a) (emphasis added).

programming”<sup>272</sup> – not whatever requirements the Commission can in some way describe as serving the “public interest” broadly.<sup>273</sup> This plain text is confirmed by the Conference Report, which states that the purpose of the section is “to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming.”<sup>274</sup> Unsurprisingly, the Commission can identify no prior order or decision suggesting that the “public interest” obligations under Section 335 go beyond the noncommercial programming obligations with which it is plainly concerned.

### **B. The Proposed Rules Are Incompatible with Other Statutory Objectives**

For the reasons discussed above, the text of Section 629 by itself negates the Commission’s attempt to claim extraordinary authority to mandate MVPD unbundling. Even beyond that, the Commission action contemplated here would create significant tension – indeed, irreconcilable conflicts – with multiple other statutory regimes, further confirming that the Commission lacks discretion to impose these requirements.<sup>275</sup> The Commission has an affirmative duty to “minimize[]” any such potential conflicts.<sup>276</sup> As demonstrated below, the Commission’s proposal is inconsistent with that duty and creates actual conflicts with the text and policies of (1) the Copyright Act by facilitating infringement of MVPDs’ services, (2) the Digital

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<sup>272</sup> *Id.* § 335(b) (heading).

<sup>273</sup> NPRM ¶ 20.

<sup>274</sup> H.R. Conf. Rep. No. 102-862, at 100 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1282.

<sup>275</sup> *See Storer Commc’ns, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985) (per curiam) (“The Commission has a duty to implement the Communications Act but also must attempt to do so in a manner as consistent as possible with [other laws].”).

<sup>276</sup> *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974) (“[A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.”).

Millennium Copyright Act (“DMCA”)<sup>277</sup> and Section 629(b) by inhibiting MVPDs’ and programmers’ ability to protect their content from piracy, and (3) the privacy protections Congress enacted for the benefit of consumers.

### ***1. The Proposed Rules Undercut MVPDs’ Copyright Interests***

The Copyright Act grants exclusive rights to content creators in order to promote creative efforts.<sup>278</sup> MVPDs’ services are creative works entitled to that protection. They make creative choices about which channels to show, in what order, how to present those channels to subscribers, and what ads to include with particular subscribers.<sup>279</sup> MVPDs also provide a user interface that focuses subscribers on certain channels and allows them to search for their favorite programming.<sup>280</sup> And they enhance the underlying channels by incorporating, among other things, “news headlines, weather information, sports scores, and social networking.”<sup>281</sup>

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<sup>277</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>278</sup> See U.S. Const. art. I, § 8, cl. 8; see, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

<sup>279</sup> See, e.g., *New York Times Co. v. Tasini*, 533 U.S. 483, 493-94 (2001) (publisher has a copyright interest in the selection and arrangement of articles); *NAB v. Copyright Royalty Tribunal*, 675 F.2d 367, 377 n.13 (D.C. Cir. 1982) (recognizing copyright interest in their assembly of linear programming from constituent parts; “select[ion] [of] the optimum mix and arrangement of their programming, based on audience demographics, competing broadcasts, seasonal changes, and ‘audience flow’ from one program to the next,” merits copyright protection); *Roy Export Co. Establishment of Vaduz, Liechtenstein v. CBS, Inc.*, 672 F.2d 1095, 1103 (2d Cir. 1982) (holding the creator of a montage of classic scenes from Charlie Chaplin movies has a copyright in that montage due to the “skill and creativity in selecting and assembling an original arrangement of those works, even if no new material is added”); *Caffey v. Cook*, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006) (set list for a concert performance was protected by copyright).

<sup>280</sup> See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1445 (9th Cir. 1994) (user interfaces protected by copyright).

<sup>281</sup> NPRM ¶ 40; see, e.g., *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 674, 680 (2d Cir. 1998) (alterations to pre-existing works may constitute a derivative work subject to copyright).

MVPDs thus have exclusive rights “to reproduce the copyrighted work in copies,” “to prepare derivative works,” “to perform the copyrighted work publicly,” and “to display the copyrighted work publicly.”<sup>282</sup> These exclusive rights ensure that no one makes another service that is “substantially similar” “as a whole” to the MVPDs’ service.<sup>283</sup>

NTIA correctly recognizes that MVPDs’ services reflect “investment decisions and market assessments made by MVPDs – with attendant business risks” – and urges commenters to propose ways to “respect[] the security and integrity of MVPD programming.”<sup>284</sup> The fact that these problems still exist even after the DSTAC Report, significant ex parte filings, and issuance of an NPRM just shows that the current proposal is not well conceived. Moreover, NTIA’s belief that these problems can be adequately addressed ignores that the Commission’s proposal creates these problems by its very design.

The Commission’s proposed unbundling rules will necessarily violate MVPDs’ exclusive rights. The proposed rules require MVPDs to unbundle their services and make them available to their direct competitors so that these competitors can produce their own competing services based on the MVPDs’ copyrighted materials. They will be able to strip the MVPDs’ service of all the look and feel elements in which the MVPD has invested and re-brand the MVPD-provided content as part of their own branded retail service. And they will remove key features that MVPDs provide as part of their service, including social networking, sports scores, and interactive features. Competitors, moreover, will be able to change the organization and lineup of channels, alter how programming can be found, and add advertising that the MVPD has not

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<sup>282</sup> 17 U.S.C. § 106(1), (2), (4), (5).

<sup>283</sup> *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (internal quotation marks omitted); see, e.g., *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010).

<sup>284</sup> NTIA Comments at 4.

authorized. All of this violates the MVPD’s rights to control “derivative works” based on its copyrighted material.<sup>285</sup>

The NPRM purports to address (at ¶ 80) concerns “that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content” by claiming there is no “evidence” that such misconduct will occur.

The Commission itself notes, however, that navigation devices will seek to “differentiate themselves . . . based on the user interface and complementary features they offer users (*e.g.*, integrated search . . . [and] suggested content . . .).”<sup>286</sup> Such alterations to the interface or features would violate MVPDs’ agreements with programmers that impose specific restrictions on channel placement and search functionality. The changes would also create a competitive imbalance by allowing third-party navigation devices to implement features (*e.g.*, search results specific to a subscriber’s viewing tastes) that licensing agreements may prohibit MVPDs from implementing. These powerful incentives expose the fault in the Commission’s proposal to leave these issues “to marketplace forces.”<sup>287</sup>

Indeed, as discussed above, numerous proponents of the Commission’s proposed rules have already strongly suggested that they do not intend to honor the agreements between

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<sup>285</sup> *Atkins v. Fischer*, 331 F.3d 988, 993-94 (D.C. Cir. 2003) (“[a]lthough all derivative works have differences from the original, it is the similarities” in “[t]he original way that the author selected, coordinated, and arranged the elements of her work, . . . rather than the differences, that inform whether the total concept and feel of the works and their aesthetic appeal is the same”) (internal quotation marks omitted); *see* 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a[n] . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, . . . elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”); 1 *Nimmer on Copyright* § 3.01 (2014).

<sup>286</sup> NPRM ¶ 27.

<sup>287</sup> *Id.* ¶ 2.

MVPDs and programmers.<sup>288</sup> Navigation device manufacturers likewise have strong economic incentives to insert their own advertisements and/or to remove existing advertisements.<sup>289</sup> Indeed, TiVo currently offers several types of advertisement overlays onto existing programming.<sup>290</sup>

The Commission suggests (at ¶ 80) that existing copyright law provides a sufficient remedy for any infringement on MVPDs' copyright interests. But this conflicts with the Commission's own proposal, which requires MVPDs to provide to navigation device manufacturers the unbundled "streams" *for the very purpose* of allowing the creation of unlicensed derivative works. As the Commission explained, MVPDs must "offer three flows of information" to "allow manufacturers, retailers, and other companies . . . to design and build competitive navigation devices."<sup>291</sup> The Commission cannot lawfully enact rules whose very purpose is to encourage flouting of copyright protections.<sup>292</sup> That fundamental flaw in the Commission's statutory approach is not corrected by saying that, if third parties do exactly what the Commission expects, MVPDs and others can seek to bring a flood of litigation. There is no evidence that Congress, in enacting Section 629, authorized such a bizarre and unreasonable regulatory approach. And the fact that Section 629 can reasonably be interpreted to authorize

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<sup>288</sup> See *supra* pp. 43-44.

<sup>289</sup> See NPRM ¶ 7 (noting that "automatic commercial skipping" is an "innovation[] that consumers value greatly").

<sup>290</sup> See, e.g., TiVo Advertising ("Pause Menu: Capture Your Audience! Want to get their full attention? The TiVo® Pause Menu gives advertisers an unprecedented opportunity to reach viewers as they are tuned-in and interacting with live and time-shifted programming. When viewers hit pause, additional ad messaging appears in a screen overlay, making it easy and convenient for them to access your ad content."), <https://www.tivo.com/tivoadvertising/pausemenu.html>.

<sup>291</sup> NPRM ¶ 2.

<sup>292</sup> See *Storer Commc'ns*, 763 F.2d at 443.

the Apps Approach, which advances Congress’s intent without creating any of these issues, makes the Commission’s proposal all the more unreasonable.

In sum, the inherent and extreme tension between the proposed rules and the Copyright Act compels the conclusion that Congress did not authorize anything like the regime the Commission has created out of whole cloth in the NPRM.

**2. *The Proposed Rules Deprive MVPDs and Programmers of Their Right Under the DMCA and Section 629(b) To Protect Their Content from Piracy***

Broadcasters and programmers have a right under the DMCA and Section 629(b) to protect their content using content protection systems of their choosing. The DMCA prohibits the circumvention of (or trafficking in technologies that circumvent) measures that control access to a copyrighted work.<sup>293</sup> The DMCA thus “‘back[s] with legal sanctions the efforts of copyright owners to protect their works from piracy behind digital walls such as encryption codes or password protections.’”<sup>294</sup> Congress enacted this provision because “the digital environment poses a unique threat to the rights of copyright owners.”<sup>295</sup>

In the same vein, in the 1996 Act, Congress made clear that MVPDs have a “legal right[] . . . to preempt theft of service” that the Commission may not “impede.”<sup>296</sup> For that reason,

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<sup>293</sup> See 17 U.S.C. § 1201(a)(1).

<sup>294</sup> *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458-59 (2007) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001)).

<sup>295</sup> H.R. Rep. No. 105-551, pt. II, at 25 (1998); see H.R. Rep. No. 105-551, pt. I, at 9-10 (1998); see also *United States v. Reichert*, 747 F.3d 445, 448 (6th Cir. 2014) (“Due to the ease of digital piracy, copyright owners feared that the ability to pursue only infringers, rather than those who ‘picked the lock’ and enabled the infringement to occur in the first place, was inadequate to protect their copyrighted material.”).

<sup>296</sup> S. Conf. Rep. No. 104-230, at 181 (1996).

Section 629 itself prohibits the Commission from promulgating set-top box regulations that will “jeopardize security of multichannel video programming.”<sup>297</sup>

MVPDs currently exercise their legal rights to preserve the integrity, and prevent the theft, of their multichannel video programming and other services through the use of proprietary content protection systems that provide the most security and flexibility.<sup>298</sup> The proposed rules negate the statutory right to rely on such protections. Those rules would force MVPDs “to . . . remove . . . or impair” their chosen content protection system and to replace it with another one that they have not approved, that may not be as secure, and that may violate their licensing agreements – a plain violation of both the DMCA and Section 629(b).<sup>299</sup> Thus, circumventing established security methods not only will harm the value of programming;<sup>300</sup> it is unlawful. By contrast, the Apps Approach creates none of these issues and ensures, as the DMCA guarantees, that MVPDs can use the content protection system of their choosing fully to protect their content from piracy.

### **3. *The Proposed Rules Undermine Congress’s Privacy Protections***

Congress has found it “important that national cable legislation establish a policy to protect the privacy of cable subscribers.”<sup>301</sup> To that end, Congress has enacted specific provisions to protect the privacy of video subscribers. Sections 338 and 631 generally prohibit

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<sup>297</sup> 47 U.S.C. § 549(b).

<sup>298</sup> *See supra* pp. 27-28.

<sup>299</sup> 17 U.S.C. § 1201(a)(3)(A); *see* 47 U.S.C. § 549(b) (forbidding regulations that compromise MVPD “security”); NPRM ¶¶ 50, 58, 60.

<sup>300</sup> *See supra* Part II.C.2.

<sup>301</sup> H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667; *see also* H.R. Rep. No. 108-634, at 19 (2004) (“Section 338(i) obligates satellite operators to abide by the same privacy obligations that section 631 of the Communications Act . . . applies to cable operators.”).

satellite providers and cable systems from “collect[ing]” and “disclos[ing] personally identifiable information” without consumers’ choice to opt-in by “prior written or electronic consent.”<sup>302</sup> Additionally, at least once a year, satellite providers and cable systems must provide a written statement of (1) “the nature of personally identifiable information collected or to be collected,” (2) “the nature, frequency, and purpose of any disclosure which may be made of such information,” (3) “the period during which such information will be maintained,” (4) “the times and place at which the subscriber may have access to such information,” and (5) notification of subscribers’ legal rights under these privacy protections.<sup>303</sup> Each of these requirements is enforceable by a private right of action in which actual damages, statutory damages of \$100 a day for each day of a violation (at a \$1,000 minimum), and punitive damages are available.<sup>304</sup>

The Commission’s proposed rules undermine those statutory privacy protections. Navigation devices will have access to the three “Information Flows” and therefore will be able to collect personally identifying information (e.g., viewing habits) without the restrictions imposed by Congress.<sup>305</sup> Congress could not have intended to “create a loophole in the statute” that results in viewers’ personal information being protected only when they use an MVPD-provided set-top box, and not when third parties are providing the navigation device.<sup>306</sup> That, however, is exactly what would happen under the Commission’s proposals. Because third-party navigation devices are generally not satellite providers or cable systems, they will not be subject to the

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<sup>302</sup> 47 U.S.C. §§ 338(i)(3), 551(b)(1).

<sup>303</sup> *Id.* §§ 338(i)(1), 551(a)(1).

<sup>304</sup> *See id.* §§ 338(i)(7), 551(f).

<sup>305</sup> *See supra* Part II.D.1; *see* H.R. Rep. No. 98-934, at 29 (noting the “enormous capacity to collect and store personally identifiable information about each cable subscriber,” including “viewing habits and other significant personal decisions”), *reprinted in* 1984 U.S.C.C.A.N. 4666.

<sup>306</sup> *United States v. Naftalin*, 441 U.S. 768, 777 (1979).

privacy protections that Congress adopted for this specific context. In this way as well, the Commission's actions are in irreconcilable conflict with federal law and will be overturned by a reviewing court.

To be sure, the Commission gives lip service to the importance of Congress's privacy scheme.<sup>307</sup> To protect that interest, it proposes to require that navigation devices "certify" compliance with Sections 338(i) and 631.<sup>308</sup> That the Commission must concoct an entirely new, extra-statutory, and, in all events, toothless certification requirement to attempt to protect the interests that elsewhere are protected by statute proves that it is creating a scheme that Congress neither envisioned nor authorized.

Even beyond that, the Commission's slapdash certification requirement is entirely unworkable and insufficient. The Commission cannot even say to whom navigation device providers would "certify" their compliance (though it asks (at ¶ 74) whether the certifications should be made to some unnamed third party), nor can it explain how those certifications would be enforced given that MVPDs must make their streams available without having any contractual privity with those third parties.

Indeed, the NPRM incongruously suggests (at ¶ 74) that the Commission may require only "self-certifications." That would mean no enforcement mechanism at all. It also cannot be squared with the Commission's strident assertions that it must adopt "legally-binding principles" to protect the privacy of broadband Internet access service customers against the risk that their "intimate, personal details could become grist for the mills of public embarrassment or harassment or the basis for opaque, but harmful judgments" because providers of those services

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<sup>307</sup> See NPRM ¶ 73 ("it is essential that any rules we adopt . . . do not undermine other important public policy goals underlying the Communications Act").

<sup>308</sup> *Id.*

purportedly “have the commercial motivation to use and share extensive and personal information about their customers.”<sup>309</sup> The Commission cannot reasonably maintain that legally binding privacy protections must be imposed on broadband providers, but are not necessary to protect the intimate, personal details of consumers’ viewing habits that equally could become “grist for the mills of public embarrassment or harassment” (for example, if a competitive device provider disclosed that a particular consumer regularly watched video content that some might find offensive). That is especially so here insofar as the Commission proposes to hand over such sensitive information to companies like Google, whose entire business has been built upon monetizing the mass of intimate personal information it collects from consumers, and device manufacturers (including foreign device manufacturers like Huawei) that may be beyond the reach of any American authorities if they misuse that information.

The Commission also, somewhat bizarrely, suggests MVPDs might police the certifications, without explaining how they could do so and what mechanism they could use to prevent navigation devices from violating their “self-certifications.”<sup>310</sup> Without any relationship to the navigation device developers, MVPDs have no way to know whether they are complying with their self-certifications. Moreover, the Commission’s proposed remedy for a violation of the self-certification is for the MVPD to disconnect service to the offending navigation device, which will only serve to harm the customer who purchased the device, as well as to create consumer confusion and misdirected complaints for MVPDs. In all events, it is clear that the Commission does not have authority under Sections 338 and 631 to enforce these certifications

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<sup>309</sup> Notice of Proposed Rulemaking, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, FCC 16-39, ¶ 3 (rel. Apr. 1, 2016).

<sup>310</sup> Compare NPRM ¶ 73 (asserting without explanation that “[MVPDs] are prohibited from providing the Navigable Services to a Navigation Device that does not have such a certification”) with *id.* ¶ 72 (“We do not believe that each MVPD should have its own testing and certification processes.”).

because navigation devices are neither satellite providers nor cable systems. Nor would a private right of action be available to consumers under either Section 338(i) or Section 631.

The Commission also asks (at ¶ 78) whether other privacy regulations – such as California’s Online Privacy Protection Act, Cal. Bus. & Prof. Code § 22575 *et seq.* – and the FTC’s enforcement powers may provide an adequate substitute.<sup>311</sup> Relying on state law is directly contrary to what Congress intended when it established a national privacy framework.<sup>312</sup> Moreover, the California law and the FTC enforcement powers are different than the privacy regime Congress created. The Commission provides no reason why Congress would have intended third-party navigation devices to be subject to different privacy requirements than cable systems and satellite providers.

Finally, where, as here, the Commission can reasonably avoid undermining the specific privacy protections in Sections 338 and 631, the FCC’s approach is all the more unjustifiable as a matter of law and policy. The Supreme Court has long made clear that a statute must be interpreted “as a symmetrical and coherent regulatory scheme,”<sup>313</sup> in which all parts “fit, if possible, . . . into an harmonious whole.”<sup>314</sup> The Commission’s proposal flunks that basic test. The Apps Approach, by contrast, raises none of those issues and achieves the goal of Section 629 in a manner that also preserves the statutory privacy protections of Sections 338 and 631.

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<sup>311</sup> See also NTIA Comments at 6 n.27 (agreeing that “the baseline privacy protection a subscriber receives should not hinge on where the consumer lives”); Letter from Consumer Video Choice Coalition to Marlene H. Dortch, FCC, at 4, MB Docket No. 15-64 (Jan. 26, 2016).

<sup>312</sup> See H.R. Rep. No. 98-934, at 30 (“A national policy is needed because, while some franchise agreements restrict the cable operator’s use of such information, privacy issues raise a number of federal concerns, including protection of the subscribers’ First, Fourth, and Fifth Amendment rights.”), *reprinted in* 1984 U.S.C.C.A.N. 4667.

<sup>313</sup> *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

<sup>314</sup> *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959) (internal quotation marks omitted).

### **C. The Proposed Rules Raise Serious Constitutional Concerns**

The Commission’s proposed rules create serious constitutional difficulties under both the First Amendment and the Takings Clause of the Fifth Amendment. These constitutional concerns not only are independent barriers to the Commission’s action, but also will lead a reviewing court to overturn the Commission’s proposed rules because that court will be “obliged to construe [Section 629] to avoid constitutional difficulties,” and it will give the Commission no “deference when its regulations create serious constitutional difficulties.”<sup>315</sup> Indeed, the D.C. Circuit has previously instructed the Commission that its authority is at its lowest ebb when its regulations “significantly implicate program content” – as the NPRM does – “because such regulations invariably raise First Amendment issues.”<sup>316</sup> And that court has also made clear that “[w]here administrative interpretation of a statute” gives rise to a taking – as is the case here – “use of a narrowing construction” is necessary to “prevent[] executive encroachment on Congress’s exclusive powers to raise revenue.”<sup>317</sup>

#### ***1. The Proposed Rules Would Violate MVPDs’ First Amendment Rights***

AT&T and other MVPDs engage in protected speech when they select and organize programming services.<sup>318</sup> As the Supreme Court has explained,

a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First

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<sup>315</sup> *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003); see *National Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (“[t]h[e] canon of constitutional avoidance trumps *Chevron* deference”) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988)).

<sup>316</sup> *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002).

<sup>317</sup> *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

<sup>318</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”). See also *BellSouth Corp. v. FCC*, 144 F.3d 58, 67-68 (D.C. Cir. 1998); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001).

Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, *the presentation of an edited compilation of speech generated by other persons* is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper.<sup>319</sup>

Just like broadcasters, MVPDs exercise “substantial editorial discretion in the selection *and presentation* of their programming,” and programming decisions that “involve the compilation of the speech of third parties . . . constitute communicative acts.”<sup>320</sup> MVPDs have the right to control their own message, keep that message distinct from others' speech, and promote their speech under their own unique service and brand. Because the Commission's proposed approach would interfere with MVPDs' ability to do all of these things, it triggers at least intermediate First Amendment scrutiny.<sup>321</sup> Indeed, as the D.C. Circuit has made clear, essentially *any* regulation that affects the offering of MVPD service is subject to at least intermediate scrutiny.<sup>322</sup>

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<sup>319</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995) (emphasis added; citations omitted).

<sup>320</sup> *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 674 (1998) (emphasis added).

<sup>321</sup> *See Turner I*, 512 U.S. at 636, 653-62 (applying intermediate scrutiny to must-carry statutory provisions and noting that the provision of “original programming” or the exercise of “editorial discretion” triggers First Amendment protection); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (infringements on commercial speech are subject to a four-part test that is materially indistinguishable from intermediate scrutiny); *Time Warner*, 240 F.3d at 1129 (applying intermediate scrutiny to ownership restrictions and recognizing that cable operators “exercise[] editorial discretion in selecting the programming [they] will make available to [their] subscribers, and are entitled to the protection of the speech and press provisions of the First Amendment”) (internal quotation marks and citations omitted; alterations in original).

<sup>322</sup> *See, e.g., Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010); *Time Warner*, 240 F.3d at 1137 (applying intermediate scrutiny to ownership restrictions on cable operators).

The Commission’s proposal would require the unbundling of the programming stream such that the MVPD would no longer be providing a package of channels arranged according to its editorial judgment. Rather, an MVPD will be forced to offer separate channels and other content that could be reorganized, rearranged, and even removed by third-party navigation device manufacturers.<sup>323</sup> The Commission’s proposals authorize parties to strip away the look and feel of the MVPD service, the branding the MVPD has given to the service, the organization of channels and the interface consumers use to find them, and even the MVPD’s decision as to which ads to deliver with which programming. Indeed, the Commission’s arbitrary and narrow definition of Navigable Services essentially guarantees that some MVPD-curated content will not be passed on by third parties. By allowing third parties to modify MVPDs’ presentation of content, the Commission’s proposal would thus violate the “principle of autonomy to control one’s own speech.”<sup>324</sup>

In this respect, the Commission’s proposals thus not only threaten the existing video ecosystem that supports diverse and independent programming;<sup>325</sup> they also abridge MVPDs’ established speech rights. The Commission’s suggestion that the proposed rules “simply require MVPDs to provide content of their own choosing to subscribers to whom they have voluntarily agreed to provide such content”<sup>326</sup> does not resolve this constitutional problem with the NPRM’s approach. If the Proposed Rules had required only that MVPDs provide their programming service as is – that is, the separate video channels and interactive content organized and

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<sup>323</sup> As explained in the DSTAC Report, the Commission’s proposed rules would enable third parties to “rearrange channel or program placement, insert different advertising into or on top of programs or use search functionalities to promote illegitimate content sources over legitimate ones.” DSTAC WG4 Report at 155.

<sup>324</sup> *Hurley*, 515 U.S. at 574.

<sup>325</sup> *See supra* Part II.C.1.

<sup>326</sup> NPRM ¶ 45.

presented in a manner of the MVPDs' choosing without any ability for third parties to rearrange the channels, to pick and choose among them, to replace the user interface, to remove the branding and look and feel, or to substitute their own advertising – the Commission's dismissive response to the First Amendment argument might have made some sense. But the Commission's exclusive focus on the "MVPD's choice of content" betrays a fundamental misunderstanding of the First Amendment issues at stake here. The First Amendment protects not only an MVPD's choice of the particular video channels to offer its customers, but also how the MVPD presents its entire service to subscribers, including branding, look and feel, the interface used to present the content, the arrangement of the channels, the search functionality, the decision as to which ads to include with which content, and other features that the Commission's decision takes away from MVPDs' editorial control and places in the hands of third parties.

As the Court discussed in striking down the requirement that the parade organizers in *Hurley* permit a gay pride group to march in their parade, the group's participation "would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."<sup>327</sup> That same principle applies to MVPDs' right to control the presentation of their services. It makes no difference in this regard that MVPDs may also continue to offer their own interfaces and program lineup; customers who subscribe to the MVPD service and receive their programming through an alternative interface will still believe that the programming comes from

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<sup>327</sup> *Hurley*, 515 U.S. at 575. The same was not true in *Turner*, where the Court found little risk that the substance of the broadcast programming would be attributed to the cable operator. *See Turner I*, 512 U.S. at 655 (stressing, too, that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility").

their MVPD and will reasonably assume that the MVPD is responsible for the look and feel of the service presented by the third party.

Even if the distinct video stream that the MVPDs are required to provide under the proposed rules is *not* branded with their logo, subscribers would nonetheless assume that the video programming they receive reflects the choices and editorial control of the providers to whom they pay a monthly fee. Indeed, as discussed in Part II above, the Commission’s proposal may well create confusion with consumers wrongly attributing problems with the third-party interface to the MVPD with which they have contracted for service. As the Commission notes, these customers are receiving the programming only because they “voluntarily entered into a subscription agreement” with their MVPD.<sup>328</sup>

Intermediate scrutiny requires that the restriction on First Amendment freedoms be no greater than is essential to the furtherance of an important or substantial governmental interest.<sup>329</sup> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the government’s interests. “Rather, the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”<sup>330</sup> Narrow tailoring in this context requires, in other words, that the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>331</sup>

Although the interests reflected in Section 629 may be both legitimate and substantial, Section 629 nowhere suggests that the goal of the Commission regulations should be to ensure

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<sup>328</sup> NPRM ¶ 45.

<sup>329</sup> See *Turner I*, 512 U.S. at 662 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>330</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (ellipsis in original).

<sup>331</sup> *Turner I*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799).

that device manufacturers can offer competing *video* services, programming guides, user interfaces, and applications. Rather, as discussed above, Congress’s purpose in enacting Section 629 was to promote competition in set-top boxes and other equipment that could be used to access the services offered *by MVPDs*.<sup>332</sup> Under intermediate scrutiny, the Commission must demonstrate that the legitimate and substantial governmental interest reflected in Section 629 would be achieved less effectively absent the proposed rules and that its proposed rules do not burden substantially more speech than is necessary to further that interest.<sup>333</sup> In other words, do the Commission’s proposed rules impose a burden on speech that is greater than essential to the furtherance of the government’s interest?

As demonstrated above,<sup>334</sup> the Commission could clearly satisfy the goal of ensuring that an MVPD’s service can be viewed on multiple competitive platforms and through competitive equipment in a way that burdens protected First Amendment interests far less than through its proposed rules. The Apps Approach would allow retail devices to receive video services from multiple MVPDs, with the device manufacturer’s user interface controlling the device, and the MVPD’s user interface controlling the user experience within the app. Indeed, this is already happening today, with hundreds of millions of devices that offer customers access to MVPD content. This approach therefore protects the MVPD’s First Amendment interests while also ensuring that unaffiliated equipment manufacturers are able to compete with the MVPDs’ own navigation devices. Given this “‘constitutionally acceptable less restrictive means’ of achieving [its] asserted interests,”<sup>335</sup> the Commission cannot enact the proposed rules.

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<sup>332</sup> See *supra* Part III.A.

<sup>333</sup> See *Turner I*, 512 U.S. at 662 (citing *Ward*, 491 U.S. at 799).

<sup>334</sup> See *supra* Part I.A-B.

<sup>335</sup> *Turner I*, 512 U.S. at 668 (plurality) (quoting *Sable Commc’ns of California, Inc. v. FCC*,

## 2. *The Proposed Rules Would Be a Taking of MVPDs' Service*

The Takings Clause's "guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>336</sup> The Commission's proposed rules violate this guarantee. The rules force MVPDs to provide their services – for which they have paid handsomely – to their direct competitors without charge, and then require MVPDs to bear all of the costs of re-engineering their systems to provide the three "Information Flows." These one-sided burdens not only harm consumers, as discussed above,<sup>337</sup> by severely dampening incentives for investment and innovation, but also are both a physical and regulatory taking of MVPDs' property.

The Supreme Court has held that a *per se* rule makes any physical taking of property a taking within the meaning of the Fifth Amendment.<sup>338</sup> For tangible property, physical takings occur when the government physically occupies property.<sup>339</sup> For *intangible* property – like the MVPDs' service – physical takings occur when the government "appropriat[es]" that intangible property.<sup>340</sup>

Here, the proposed rules would appropriate MVPDs' services by requiring them to unbundle their services for other navigation devices. This deprives MVPDs of their right under

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492 U.S. 115, 129 (1989)).

<sup>336</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (internal quotation marks omitted; alterations in original).

<sup>337</sup> *See supra* Part II.B.

<sup>338</sup> *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-24 (2002).

<sup>339</sup> *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 438 (1982) (noting "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests").

<sup>340</sup> *Horne v. Department of Agric.*, 135 S. Ct. 2419, 2427 (2015) (citing *James v. Campbell*, 104 U.S. 356, 358 (1882) (appropriation of a patent)).

the Copyright Act to exclude others from using their service. It allows third parties, without paying any compensation, to take the MVPD service, strip it of its branding and the look and feel in which the MVPD has invested, and present the MVPD service as part of their own distinct service. At bottom, therefore, the FCC's proposals are no different than if the government deprived a landowner of the right to exclude by requiring a public easement, which, "[w]ithout question," is a taking.<sup>341</sup> Indeed, MVPDs' only property right in their service is the "right to exclude *others* from using the copyrighted work."<sup>342</sup> The proposed rules take away that property right and therefore are a physical taking of intangible property.<sup>343</sup>

The proposed rules are also a regulatory taking. For regulatory takings, "the principal focus of inquiry is whether a regulation 'reaches a certain magnitude' in depriving an owner of the use of property."<sup>344</sup> The Supreme Court has developed "three primary factors" weighing on that "*ad hoc*" inquiry: "the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action."<sup>345</sup> This "inquiry turns in large part, albeit not exclusively, upon the

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<sup>341</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

<sup>342</sup> *University of Alabama Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1280 (11th Cir. 2012) (quoting 1 *McCarthy on Trademarks and Unfair Competition* § 6:14 (4th ed. 2011)); see *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 463 (1922) ("From an early day it has been held by this court that the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee."); *Capital Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 662 (2d Cir. 1955) ("Literary property is in essence a right to exclude, to a greater or lesser extent, others from making some or all use of the expressed thoughts of an author.").

<sup>343</sup> See *Loretto*, 458 U.S. at 435.

<sup>344</sup> *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 878 (D.C. Cir. 1999) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

<sup>345</sup> *Id.* at 878-79 (citing *Penn Central*, 438 U.S. at 124).

magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”<sup>346</sup>

Each of these factors demonstrates how the proposed rules are a regulatory taking. *First*, these rules have enormous financial impact on MVPDs. They require MVPDs to give away their service for free to their competitors, which will be able to re-brand the services and profit from them, even though MVPDs have paid substantial programming costs. They also force MVPDs to bear all of the costs of re-engineering their networks and services to provide compliant “Information Flows” according to a yet-to-be-determined standard.<sup>347</sup> To do so, MVPDs will likely need to upgrade or replace existing devices just to enable the customer to purchase a third-party navigation device.<sup>348</sup> *Second*, MVPDs have invested substantial resources in their own set-top boxes and service delivery systems on the reasonable expectation that they would be able to decide which technology to implement. Notably, it has been years since the Commission decided not to proceed with its similar AllVid proposal, and companies have continued to invest in the understanding that they would not be required to adhere to the kind of drastic unbundling the Commission now proposes.<sup>349</sup> *Third*, the proposed rules deprive MVPDs of the most treasured property right – the right to exclude others from using their service.<sup>350</sup>

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<sup>346</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

<sup>347</sup> *See supra* Part II.E.1.

<sup>348</sup> *See id.*

<sup>349</sup> *See* NPRM ¶ 8.

<sup>350</sup> *See Loretto*, 458 U.S. at 435 (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”).

**D. The Proposed Rules Are Arbitrary and Capricious**

***1. There Is No Basis for the Commission's Decision That It Needs To Regulate, Nor for the Discriminatory Regulations It Adopts***

As detailed extensively in these comments, there is no need for the proposed regulations. The navigation device marketplace is flourishing. Consumers use millions of devices other than MVPD-provided set-top boxes to access MVPDs' services, and the notion that the cost of MVPD set-top boxes demonstrates a market failure is a shibboleth.<sup>351</sup> Nonetheless, the Commission claims that the proposed unbundling rules are necessary so that third-party devices can make derivative user interfaces in order to compete with MVPDs.<sup>352</sup> That explanation is arbitrary and capricious because it "runs counter to the evidence."<sup>353</sup>

Beyond that, the proposed scheme is so convoluted and incomplete that it could not possibly be the result of rational decision-making. The NPRM proposals are dependent on, among other things, rapid agreement by entities with wildly divergent interests on a slew of standards by an unnamed Open Standards Body; the creation from whole cloth of a "certification" regime that will supposedly protect crucial privacy and public-safety interests; the adoption of a least-common-denominator "compliant" security system that will adequately protect billions of dollars of content; and, in the absence of any regulation, the marketplace somehow ensuring that negotiated terms between MVPDs and programmers as to program-placement, advertising, and other issues will be respected. And that just scratches the surface of the magical thinking that infects the Commission's proposals. The Commission should not, as NTIA blithely suggests, attempt to fix these problems in a haphazard way during this comment

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<sup>351</sup> See *supra* pp. 8-9, 16-17.

<sup>352</sup> See NPRM ¶ 27.

<sup>353</sup> *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

process.<sup>354</sup> Such a Rube Goldberg approach to regulation would be facially unreasonable in any case, but it is particularly arbitrary where the alternative Apps Approach is already working well and is fully consistent with the statutory scheme.

And the Commission's reasoning is all the more arbitrary in that it imposes burdens only on MVPDs, but not the OVDs with which they compete, and thus skews the marketplace in favor of some competitors.<sup>355</sup> The NPRM does not justify this asymmetrical regulation or explain why it is reasonable to tilt the competitive playing field so significantly. If adopted, the NPRM proposal will be arbitrary and unreasonable for this reason as well.<sup>356</sup>

**2. *The Commission Cannot Require MVPDs To State Set-Top Box Charges Separately on Their Bills or To Regulate the Prices They Can Charge***

After directing the Commission to adopt regulations to assure the commercial availability of set-top boxes and other equipment provided by manufacturers not affiliated with any MVPD, Section 629 provides that such regulations shall not prohibit any MVPD from offering its own equipment to access its own service and that of others “if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.”<sup>357</sup>

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<sup>354</sup> See NTIA Comments at 4-5 (“urg[ing] commenters to propose” solutions to problems that remain unaddressed after more than a year of effort at resolving them).

<sup>355</sup> See *16th Annual Video Competition Report* ¶ 3 (noting the effect on MVPDs of increased competition from OVDs).

<sup>356</sup> See *LePage’s 2000, Inc. v. Postal Regulatory Comm’n*, 642 F.3d 225, 232 (D.C. Cir. 2011) (agency decision that there was a “public need” for one program but not a “seemingly like” program at least requires reasoned explanation); see also *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”).

<sup>357</sup> 47 U.S.C. § 549(a).

The Commission recognized in the NPRM that this provision “does not appear to affirmatively require the Commission to require [a] separate statement or to prohibit cross-subsidies.”<sup>358</sup> This view is consistent with the position taken by the Commission since 1998, where it expressly rejected an interpretation of Section 629(a) that would have imposed an absolute ban on subsidizing equipment cost with service charges, “even for non-cable MVPDs and cable companies that face effective competition.”<sup>359</sup> As the Commission recognized, “subsidies by entities lacking market power present little risk of consumer harm and to impose restrictions would create market distortions.”<sup>360</sup> Nothing in this record would justify the Commission’s decision to reverse itself on this issue and to impose now, for the first time, a rule that would require MVPDs alone to establish separate charges for their equipment or to limit their ability to price that equipment as the market requires.

In the CMRS and the DBS industries, where carriers have subsidized equipment purchases or bundled service and equipment into a single package, consumers avoid high up-front expenditures, and subscribership numbers have grown significantly. As the Commission has noted, “there is minimal concern with below cost pricing because revenues do not emanate from monopoly profits. The subsidy provides a means to expand products and services, and the market provides a self correcting resolution of the subsidy.”<sup>361</sup> Where an MVPD “lacks market power in the market for multichannel video programming, subsidies do not present the circumstances encountered in the non-competitive regulated market.”<sup>362</sup> The Commission has

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<sup>358</sup> NPRM ¶ 82.

<sup>359</sup> *First Plug and Play Report & Order* ¶ 92.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* ¶ 87.

<sup>362</sup> *Id.*

sensibly applied the separate billing and anti-subsidy requirements set forth in 47 C.F.R.

§ 76.1206 only to rate-regulated cable operators – ones that do not face effective competition.<sup>363</sup>

Nothing has changed to warrant a different approach now. The Commission has concluded that there is a “rebuttable presumption that cable operators are subject to ‘Effective Competition’ ”<sup>364</sup> and that the billing and price-regulation requirements now apply to very few cable operators. Where an MVPD lacks market power, subsidizing equipment through the charging of higher rates for service cannot succeed. So the Commission’s proposal in the NPRM (at ¶ 84) to require all MVPDs (even those subject to effective competition) to state separately a charge for leased navigation devices and to reduce their charges by that amount to customers who provide their own devices would impose costly and artificial pricing requirements for no benefit.

The Commission appears disinclined in the NPRM to go even further and expressly regulate the prices that MVPDs may charge for their services and equipment.<sup>365</sup> Given that that approach would effectively import Title II rate regulation (designed to apply to monopoly providers of basic telecommunications services) into the highly competitive market for video programming, rate regulation under these circumstances cannot be legally justified. Indeed, the Department of Justice has cautioned the Commission that “price regulation would be appropriate only where necessary to protect consumers from the exercise of monopoly power and where such

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<sup>363</sup> *See id.* ¶ 90 (“We interpret Section 629(a) in this context as reflecting congressional intent that DBS providers and cable systems that are subject to effective competition, because they are not subject to rate regulation provisions of Section 623, were not a class of providers to which the anti-subsidy rules were directed.”).

<sup>364</sup> Report and Order, *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, 30 FCC Rcd 6574, ¶ 1 (2015).

<sup>365</sup> *See* NPRM ¶ 85.

regulation would not stifle incentives to invest in infrastructure deployment.”<sup>366</sup> Moreover, to impose these obligations only on MVPDs, leaving other device manufacturers and providers of video programming free from any similar limitation on how best to price their products and services, would create precisely the kinds of “market distortions” the Commission sensibly declined to impose back in 1998. The Commission should continue to reject any argument to impose such burdensome, one-sided, and inefficient requirements.

**3. *The Commission’s Failure To Perform a Cost-Benefit Analysis Violates Statutory Requirements and Is Arbitrary and Capricious***

“Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* disadvantages of agency decisions.”<sup>367</sup> Consistent with this ordinary practice, Chairman Wheeler has stated that it is the Commission’s policy “to act consistently with the cost-benefit analysis principles . . . in its rulemaking proceedings,” including “consideration of quantifiable, monetized costs and benefits associated with a proposed regulatory approach, as well as careful consideration of those costs and benefits that are not as easily quantifiable or monetized.”<sup>368</sup> And, for Section 629 in particular, Congress has directed the Commission to consider the costs of any regulation.<sup>369</sup>

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<sup>366</sup> *Ex Parte* Submission of the U.S. Dep’t of Justice at 28, GN Docket No. 09-51 (FCC filed Jan. 4, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/01/04/253393.pdf>.

<sup>367</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

<sup>368</sup> Letter from Chairman Tom Wheeler, FCC, to Rep. Marsha Blackburn (May 19, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327470A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327470A1.pdf); *cf.* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (requiring executive agencies to make “a reasoned determination that [a regulation’s] benefits justify its costs”).

<sup>369</sup> *See* STELAR § 106(d)(1), 128 Stat. 2063 (creating a working group “to identify . . . performance objectives, technical capabilities, and technical standards of a *not unduly burdensome*, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices in

But the Commission has not even questioned what the costs of its proposed rules might be, let alone has it made any attempt to account for them. The Commission proposes that MVPDs provide three “Information Flows” to navigation devices, notwithstanding the absence of any existing industry standard. The Commission states that an “Open Standards Body” will devise that standard, but does not identify any such group.<sup>370</sup> And the Commission proposes that MVPDs use a “compliant” content protection system that is “licensable on reasonable, nondiscriminatory terms,” but no content protection system meets those requirements and also satisfies the security concerns of programmers and MVPDs.<sup>371</sup>

Though the rules will be expensive and burdensome, these gaping holes in the proposed rules make it impossible for MVPDs to know with certainty just how significantly they will need to re-engineer their systems, and, thus, the Commission cannot – and has not even attempted to – account for these costs in a cost-benefit analysis. Nor has the Commission considered the substantial costs to smaller and minority programmers, the loss of advertising revenue and the corresponding effects on MVPDs and programmers, or the costs of consumer confusion and frustration caused by not knowing who is responsible for problems with their service. The Commission’s failure to consider such “an important aspect of the problem” renders its proposed rules arbitrary and capricious and contrary to Congress’s direction to account for the costs of any regulation of navigation devices.<sup>372</sup>

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furtherance of section 629”) (emphasis added).

<sup>370</sup> NPRM ¶ 41.

<sup>371</sup> *Id.* ¶ 60.

<sup>372</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; see *Michigan v. EPA*, 135 S. Ct. at 2712 (vacating rule for failure to consider costs as required by statute).

### **E. The Proposed Rules Are an Improper Delegation of Commission Authority**

The proposed rules do not resolve many important issues concerning how MVPDs' services need to be unbundled. What is the standard used to provide the Information Flows?<sup>373</sup> What content protection systems may be used?<sup>374</sup> What is the certification process used to ensure navigation devices comply with the unspecified (and not-yet-developed) open standards and content protection systems work properly with whatever open standard and content protection system is used?<sup>375</sup> What is the certification process for compliance with the Commission's consumer protection provisions?<sup>376</sup> In each instance, the Commission contemplates letting a private third party develop the rules.<sup>377</sup>

These open questions not only show the half-baked nature of the proposed rules, but also demonstrate that the proposals will be an unconstitutional delegation of authority. The Supreme Court has established that agencies may not delegate authority as the Commission proposes to do because such delegation "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."<sup>378</sup> For this reason, the D.C. Circuit has also warned the Commission not to "cede to private parties . . . either the right to decide contests between themselves and their opponents or even the opportunity to narrow the margins of the debate."<sup>379</sup> These principles expose the folly in the

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<sup>373</sup> See *supra* pp. 19-21.

<sup>374</sup> See *id.*

<sup>375</sup> See *id.*

<sup>376</sup> See *supra* pp. 50-52, 54.

<sup>377</sup> See *supra* pp. 19, 51, 54.

<sup>378</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

<sup>379</sup> *NARUC v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (per curiam).

Commission’s belief that Open Standards Bodies – composed of competitors – will unite to develop a reasonable standard, when, in fact, some segment of the industry will force others to accept whichever proposal is best for its business (if the process produces any results at all).<sup>380</sup>

At the very least, “subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”<sup>381</sup> There is no such congressional authorization here. To the contrary, Section 629 explicitly states that “[t]he Commission shall, in *consultation* with appropriate industry standard-setting organizations, *adopt regulations*.”<sup>382</sup> Thus, while it may be appropriate for the Commission to collaborate with standards-setting bodies, the Commission must make the ultimate decision as to what the rules will be.

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<sup>380</sup> *See supra* pp. 24-25.

<sup>381</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“*USTA*”).

<sup>382</sup> 47 U.S.C. § 549(a) (emphases added). The Commission may not rely on a “plea for *Chevron* deference” in support of an alternative interpretation because “[a] general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates.” *USTA*, 359 F.3d at 566.

## CONCLUSION

For the reasons set forth above, the Commission should close this proceeding without adopting the rules proposed in the NPRM. That will allow the competitive market to continue to work, as it is already doing, to bring choice and innovation to consumers of video programming. If the Commission decides not to close this proceeding, it should, consistent with the recognition by NTIA and other parties that there are important factual issues and legal problems that remain undeveloped and unresolved here, pause the proceeding and issue an NOI as to these many significant questions.

April 22, 2016

Respectfully submitted,

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