



THE
AMERICAN
CONSERVATIVE
UNION

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 BY THE AMERICAN CONSERVATIVE UNION
RELATED TO THE NOTICE OF PROPOSED RULEMAKING AND MEMORANDUM
OPINION AND ORDER**

To Whom it may Concern,

The American Conservative Union (ACU) was founded, in part, on the understanding that capitalism is the only economic system compatible with political liberty, having brought a higher standard of living to more people than any other economic system in history. The only way to preserve capitalism, and ordered liberty, is for Americans to ensure that the inherent rights of individuals—and individuals' enterprises—are preserved by limiting government strictly to its permissible functions. The right to property (both intellectual and tangible) and the freedom to engage in free enterprise without undue governmental dictates are essential to preserving the ideas of our nation's founding.

Out of deep concern of the Federal Communication Commission's (FCC) recent Notice of Proposed Rulemaking (NPRM) in the above-referenced matter, ACU submits these comments to address some of the agency's actions we find violative of our vision for the nation.

For many years ACU has observed the growing reluctance of government regulators to value the collection and analysis of economic data in the rulemaking process. However, second only to determining the legal scope of an agency's limited authorization to act at all, agencies must engage in effective cost-benefit analysis if the public is to be served appropriately.

The FCC's NPRM, however, suggests that it has not fulfilled these functions. Rather than engaging in a rigorous analysis, the agency appears to have attempted to identify a plausible narrative about how certain business practices might result in harm. Such an anecdotal approach is an inappropriate substitute for an analytical, evidence-based one.

A general suspicion or concern for hypothetical harms is insufficient for regulatory action. Instead, the FCC must develop a proper factual record and document cognizable, actual harms so that it does not squelch innovation or creativity, or end up causing the very harms it says it wants to avoid.

According to the NPRM, the FCC aims to "assure a commercial market for devices that can access multichannel video programming and other services offered over multichannel video programming

systems.” Yet the FCC fails to make a case for federal intervention based on an economic argument of market failure. Instead, its approach reflects an agency desirous of providing a solution when no problem has been identified.

The FCC’s justification for action appears to be based merely on a press release from Senator Edward Markey claiming that “approximately 99 percent of customers rent their set-top box directly from their pay-TV provider” and that “the set-top box rental market may be worth more than \$19.5 billion per year.”

Average prices like the ones reflected in Senator Markey’s press release are not meaningful unless proven relevant and explained economically. Surprisingly, the NPRM does not even attempt to define the relevant markets for the industry or provide examples of anticompetitive behavior; nor does the agency identify harms to consumers which might provide a basis for the agency to intervene.

The FCC’s sole argument that the market for navigation devices is not competitive appears to rest on its self-contradicted assertion that most consumers have but one source for access to the multichannel video programming. Separately, however, the FCC has estimated that 99 percent of households in America can choose among *at least three* MVPDs.¹

Furthermore, the FCC’s assertion relies on at least two assumptions which it has failed to adequately explore.

- Vertical integration is often a very efficient and legal business model. Without providing any evidence to the contrary, the FCC assumes that this model is inherently inefficient and tends to reduce consumer welfare.
- The market for video distribution is broad, complex and competitive, becoming more so every day. However, the FCC assumes that multichannel video programming is its own distinct market.

Americans have never had more options for TV, streaming services, devices like Roku and Apple TV, and revolutionary new digital apps like those recently announced by Comcast to enable customers to access their TV package through a host of new retail devices and options – including the option not to have a box at all.

In addition, although the FCC cites the Markey press release estimating that consumer spending on set-top box rentals has grown 185% since 1994, it completely fails to adjust this figure for inflation to determine any increases in *real* rental costs. Such an omission calls into question the agency’s interest in utilizing even the most basic cost-benefit analysis.

The FCC also fails to appreciate that the existing contracts between programmers and MVPD’s would be subject to enormous strains by the proposed rules. The programmer and the distributor can negotiate carriage rights today with reasonable certainty, but that would most assuredly change once video, guide data, advertising, encryption and promotional information could no longer be guaranteed.

The FCC should take economic analysis seriously, collect data thoughtfully, and explain any market failures compellingly before proceeding with this highly intrusive rule. ACU does not see evidence that any of this has been done.

¹ Federal Communications Commission, “Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Sixteenth Report,” March 31, 2015.