

**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

**REPLY COMMENTS OF AT&T**

May 23, 2016

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## INTRODUCTION AND EXECUTIVE SUMMARY

Section 629 of the Communications Act contains an explicit and limited mandate: ensuring the availability of competitive “equipment” that provides “access” to existing MVPD services. The radical unbundling scheme proposed by the Commission in the NPRM bears no relationship to that mandate and, for a variety of reasons discussed below, is simply bad policy. Indeed, the Commission has not even tried to hide its unlawful bait-and-switch.

In April, for example, Comcast announced that it would make its video distribution service available without any set-top box (“STB”) on “connected TVs and other IP-enabled third-party devices.” Comcast’s announcement is the inevitable extension of the Apps Approach, which allows consumers to access MVPD programming over a wide range of third-party devices. The Commission and commenters should have embraced the Comcast proposal with enthusiasm as fulfilling Congress’s goal in Section 629. Instead, an unnamed “Commission official” was immediately dismissive:

While we do not know all of the details of this announcement, it appears to offer only a proprietary, Comcast-controlled user interface and seems to allow only Comcast content on different devices, rather than allowing those devices to integrate or search across Comcast content as well as other content consumers subscribe to.<sup>1</sup>

Taking their cue from this Commission official, various commenters argue that the Apps Approach should still be viewed as an inadequate “closed” and “proprietary” system, so long as the MVPD controls the user interface that the MVPD subscribers use to receive its service. Public Knowledge, for example, argues (at 3) that the Apps Approach “fall[s] short of the vision of Section 629” because it is inherently a “walled garden” that offers a “fragmented” viewing

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<sup>1</sup> Shalini Ramachandran, *Comcast Fires Back at FCC by Making TV Service Available Without a Set-Top Box*, Wall St. J. (Apr. 20, 2016), <http://www.wsj.com/articles/comcast-fires-back-at-fcc-by-making-tv-service-available-without-a-set-top-box-1461188283>.

experience. To these commenters, nothing less than the radical unbundling of the MVPD service itself will do.

The NPRM's proposed scheme is therefore indefensible as a matter of law and nonsensical as a matter of public policy. Without basis in Section 629's text, the scheme deprives MVPDs of established copyright rights, infringes their constitutional rights under the First and Fifth Amendments, and would not survive legal challenge. And, as a matter of policy, it makes no sense to require that one company can commandeer its competitors' assets and branding in the way these commenters suggest. Netflix, Hulu, and Amazon do not permit their licensed content, look and feel, and packaging of their video apps to be distributed through any interface but their own. Instead, the competitive device maker controls the top-level (or "umbrella") interface in which the video apps reside, just as a mall owner controls the look and feel of the larger space in which physical stores reside, and the video provider controls its own app within that environment, just as The Gap controls its own store in a shopping mall. Most importantly, just as customers get to choose in which stores to shop based on the content and the look and feel of those individual stores, it is consumers who choose which apps to use among all the many video services they can access through competitive devices.

This failure to recognize that, in competitive markets, companies must retain control of their products is the key failing in the NPRM. It is hardly the only one, however. The record before the Commission includes a wealth of detailed technical, economic, and statutory analyses showing that the NPRM scheme is unnecessary and unworkable, and that it would damage the quality, quantity, and diversity of programming, dampen innovation, raise consumer costs, undermine existing consumer privacy protections, and facilitate content piracy.

These points have been made not only by MVPDs, but also by a broad cross-section of voices, including more than 150 Members of Congress from both parties, dozens of civil rights and diversity groups, large and small video programmers, privacy advocates, creative community groups (including the MPAA and RIAA), major technology suppliers (including Cisco and TIA), numerous labor unions, and more than 70,000 individual consumers. The vast majority of these commenters have no financial interest in STB revenue. Rather, they are legitimately concerned that the Commission's ill-advised scheme would undermine the video ecosystem, devalue programming and content creation, circumvent privacy expectations, and cost American jobs, among many other deleterious consequences.

To summarize Section I below, the NPRM scheme should be rejected on policy grounds for at least six reasons:

**1. The NPRM proponents cannot explain why the proposal is needed**

AT&T and other commenters submitted extensive analyses and data demonstrating that the markets in which MVPDs participate are robustly competitive, and growing more so every day, with the rapid rise of online video distributors ("OVDs") that are radically altering the marketplace. Consumers can now choose among multiple video providers and view MVPD content where they want, when they want, and on the devices of their choosing.

No commenter makes a serious attempt to show that the video distribution market suffers from market failure. The single economic analysis submitted by NPRM proponents does not even address the relevant market, because it excludes OVDs from consideration. This approach directly contradicts the Department of Justice's finding that the relevant market is "video programming distribution" and that "[b]oth MVPDs and OVDs are participants in this market."<sup>2</sup>

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<sup>2</sup> Compl. ¶ 19, *United States v. Charter Communications, Inc.*, No. 1:16-cv-00759-RCL (D.D.C. filed Apr. 25, 2016), ECF No. 1.

Even with respect to MVPD services alone, the Commission concluded last year that cable operators presumptively face effective competition nationwide.

**2. There are no existing (or even close to existing) standards that can be used to create the “Information Flows” suggested by the NPRM; nor could standards be developed in the proposed two-year time frame**

DLNA, whose VidiPath was identified in the NPRM as a workable standard, has explained that VidiPath is “materially different” from what the NPRM proposes and that it would take 2-4 years to develop the necessary standards and certification programs.<sup>3</sup> After standards are developed, moreover, MVPDs and existing device manufacturers would need, on the Commission’s own estimate, from 18-24 months for product development. Given the rapid evolution in the video marketplace, those navigation devices would be obsolete on arrival. In contrast, the Apps Approach has none of these problems and is wildly successful already.

**3. The proposed scheme would seriously damage the quality, quantity, and diversity of programming**

The NPRM would permit device and platform suppliers to ignore existing arrangements regarding tier and channel placement that are at the core of negotiated contracts between MVPDs and programmers. And, they could likewise strip away the branding, user interfaces, and look and feel in which MVPDs invest enormous resources. These parties would even be permitted to interfere with the advertising supplied to consumers, which is a critical source of revenue for MVPDs and programmers alike. As a wide variety of commenters and economists have demonstrated, the threat posed by the NPRM would be particularly grave for programmers focused on serving diverse populations.

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<sup>3</sup> DLNA Comments at 2.

**4. The proposed scheme would lead to rampant piracy**

The NPRM would result in a least-common-denominator content protection system that can be licensed by any third-party device providers regardless of their relationship with MVPDs or programmers. MVPDs would be unable to monitor all of these devices or effectively shut off access to offending devices. As leading security provider Cisco explains (at 7-8), a “government-mandated, monolithic security requirement like the *NPRM* contemplates is directly contrary to the nimble quality of the highest-level security.”

**5. There is no cost-benefit analysis supporting the proposed scheme**

The radical restructuring mandated by the proposed scheme would impose massive costs on the industry, and ultimately on consumers. Neither the NPRM nor its supporters provide any cost study or cost-benefit analysis at all, much less one that suggests that the alleged benefits to consumers would be greater than these costs. In the absence of such evidence, a Commission decision imposing this enormous dislocation and expense would necessarily be arbitrary.

**6. The proposed scheme would deprive consumers of important privacy protections**

The proposed rules would enable third-party providers to collect information on individuals’ viewing habits and combine that information with data from other sources to create detailed profiles, all without the statutory privacy safeguards that Congress specifically decided apply to MVPD services. Even the NPRM supporters do not dispute this: third-party navigation device providers would not be subject to the comprehensive privacy protections that Congress decided were appropriate in this context. If the Commission were to proceed on the current course, it would be adopting a regime that Congress never intended: one where the same personal information is subject to different protections depending on whether it is held by an MVPD or a third-party interface provider, such as Google.

Moreover, to summarize Section II below, the NPRM scheme is unlawful for four additional reasons:

**1. Section 629 does not authorize the NPRM’s proposed unbundling scheme**

Section 629(a) gives the Commission limited authority to promote the commercial availability of “equipment” that consumers use to “access” existing MVPD services, *i.e.*, “multichannel video programming and other services offered over multichannel video programming systems.”<sup>4</sup> Nothing in that provision authorizes the Commission to promote *new* services or mandate “user interfaces” that permit searching across MVPD services and other providers’ offerings.

Supporters of the NPRM do not even attempt to grapple with the actual language of Section 629. Nor could they. The text of Section 629 simply does not authorize the Commission to promote new services or to require that MVPDs take action in order to enable customers to search for, and gain access to, *non-MVPD* services.

**2. The NPRM’s attempts to stretch the definition of key statutory terms are indefensible**

The NPRM’s suggestion that the word “equipment” as used in Section 629(a) includes software applications by themselves is unsustainable. In its plain meaning, in context, and in its consistent regulatory understanding, the term “equipment” does not refer to software applications on their own. Equipment includes the software used to run it, but that does not turn the software *itself* into equipment, any more than icing by itself is “cake” because it is often part of a cake.

Furthermore, the NPRM’s tortured conclusion that any entity with a “business relationship” with an MVPD is an “affiliate” – so that competitive devices provided by that

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<sup>4</sup> 47 U.S.C. § 549(a).

entity do not “count” toward satisfying Section 629 – is likewise contrary to that term’s plain meaning, as well as long-established regulatory understandings.

Individually each of these clear statutory violations is unjustifiable. When layered on top of each other, they demonstrate that the NPRM proposal is fundamentally incompatible with the statutory scheme.

### **3. The NPRM scheme contravenes other legal regimes**

The Commission has an obligation to interpret Section 629 to avoid conflicts with other statutory regimes. The scheme laid out in the NPRM violates this duty by creating conflicts with the Copyright Act, the Digital Millennium Copyright Act, and the privacy protections in the Communications Act itself. As discussed in detail below, the comments supporting the NPRM’s approach do nothing to question that conclusion.

### **4. The proposed scheme raises significant constitutional concerns under the First and Fifth Amendments**

The constitutional issues raised by the NPRM proposal not only provides an independent basis for judicial invalidation, but would also lead a court to reject the Commission’s statutory interpretation to avoid serious constitutional difficulties. The NPRM proponents provide no serious constitutional analysis. Public Knowledge, for instance, cites no cases and simply asserts that accepting a First Amendment argument here would render all video regulation unlawful. That is nonsense. Free speech analysis requires careful consideration of the specific matter at issue. Here, there is no substantial government interest in ensuring that device makers can offer competing video services, because the Act does not authorize the FCC to promote that. And, by following the Apps Approach, the FCC could satisfy the statutory goal in a way that does not burden free speech.

## ARGUMENT

### I. The Record Could Not Be Clearer That the NPRM Scheme Is Unnecessary, Harmful, and Deeply Flawed

#### A. The Record Shows Extensive Marketplace Competition, Not a Market Failure Justifying the NPRM Proposal

The record leaves no doubt that the NPRM scheme should be doomed at the outset.

Instead of seeking to redress a market failure, it seeks to remake an industry that the record overwhelmingly establishes is already highly competitive and undergoing dynamic, productive change. Today, MVPDs and OVDs are striving to meet consumer demand to watch what they want, when they want, where they want, and on the devices of their choosing.<sup>5</sup> In this circumstance, market regulation – particularly of the drastic variety proposed by the NPRM – is wholly unwarranted.<sup>6</sup>

The Commission's flawed notice did not seriously attempt to show that the video distribution market suffers from market failure and the relatively few supporting commenters follow suit. The NPRM supporters nonetheless claim that radical unbundling of a competitive marketplace is needed because, today, MVPDs do not universally support (i) integrated search capabilities across MVPDs and between MVPDs and OVDs; (ii) modification or elimination of MVPDs' user interfaces by third-party navigation devices; and (iii) permitting every MVPD subscriber to receive *every* MVPD-supplied channel and service using a device of their

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<sup>5</sup> See, e.g., AT&T Comments at 11-14; Declaration of Michael Katz ¶¶ 8, 16, 30 (“Katz Decl.”) (Attachment 2 to AT&T Comments).

<sup>6</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.”).

choosing.<sup>7</sup> But, even if all of those attributes were laudable goals for the marketplace – and the second one clearly is not – the relevant question is not whether the marketplace has *already* fully achieved this or any specific utopian vision. Rather, it is whether the market is rapidly and inexorably moving in a direction that greatly benefits consumers, while also preserving a thriving ecosystem for diverse industry participants, including programmers and content creators.

Despite the wealth of contrary data in the record, the Commission contended just this past week that this proceeding is about helping consumers who are allegedly “chained to their set-top boxes because cable and satellite operators have locked up the market.”<sup>8</sup> That is false. The record shows that cable and satellite operators face significant competition from OVDs and others and that they respond to it by making more and more content available *without* an STB. Thus, as one analyst recently explained, “[i]t’s an odd time to propose new rules for TV boxes” because “cable is already moving to apps that stream video directly to consumer TVs and mobile screens.”<sup>9</sup> The Commission’s proposal thus cannot be about “boxes,” but rather the illegitimate and extra-statutory goal of “forcing television companies to give their video content to Internet companies who want to collect data about consumers’ viewing habits and sell video advertisements without paying for or licensing programming rights.”<sup>10</sup>

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<sup>7</sup> See, e.g., Public Knowledge Comments at 17, 21-29; CVCC Comments at 15-16; CCIA Comments at 8, 13-15; TiVo Comments at 5-7.

<sup>8</sup> Matt Daneman, *FCC Firing ‘Regulatory Ordinance Without Provocation’ at Cable, NCTA’s Powell Says*, Comm. Daily (May 17, 2016), <http://www.communicationsdaily.com/article/view?s=93519&id=494582>.

<sup>9</sup> Fred Campbell, *A Red Pill, Blue Pill Moment for TV*, Baltimore Sun (May 16, 2016), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-regulating-cable-20160515-story.html>.

<sup>10</sup> *Id.*

**1. *The Record Plainly Demonstrates That MVPDs Lack Market Power in the Video Distribution and Navigation Device Markets***

The record demonstrates that a key underlying assumption of the NPRM – that MVPDs have market power that creates an incentive to thwart competition for navigation devices – has no basis in fact or economics.<sup>11</sup> AT&T and other MVPDs submitted extensive economic analyses and data demonstrating that the relevant markets in which MVPDs participate are robustly competitive and growing more so due in large part to the rise of online video alternatives that are radically altering the marketplace at an unprecedented rate.<sup>12</sup> As those analyses and data indicate, video distribution competition is spurring extensive innovation so that consumers can now choose among multiple video providers and view significant and growing amounts of MVPD content where they want, when they want, and on the devices of their choosing. A wide range of other commenters, including device manufacturers (*e.g.*, Cisco and Roku), content owners (*e.g.*, TV One, MPAA, and RIAA), and others, concur that the marketplace is competitive and needs no government intervention.<sup>13</sup>

Indeed, the Commission itself recently recognized that there is extensive and expanding competition in the video distribution marketplace. The Commission concluded that “[t]he continued proliferation of Internet-enabled technology allows consumers to view OVD content on multiple devices” and that many consumers view OVD services as a substitute for MVPD services.<sup>14</sup>

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<sup>11</sup> See NPRM ¶ 12; *see also* Katz Decl. ¶¶ 30-41, 54-56.

<sup>12</sup> See, *e.g.*, AT&T Comments at 2-11; Katz Decl. ¶¶ 12-42; NCTA Comments at 9-17; American Cable Association Comments at 29-36; Comcast Comments at 14-19.

<sup>13</sup> See, *e.g.*, Cisco Comments at 2-3; Roku Comments at 3-8; TV One Comments at 18-21; RIAA Comments at 10-11; MPAA/SAG-AFTRA Comments at 28-32.

<sup>14</sup> Seventeenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 15-158, DA 16-510, ¶¶ 10, 69-71 (FCC rel.

In the few weeks since opening comments were filed, the evidence of competition at all levels of the video marketplace, and especially from fast-growing OVD providers, has continued to mount. According to Nielsen data, the number of MVPD subscribers will drop by another 2.2% in the year ending in May 2016, due to the acceleration of cord cutting and cord shaving.<sup>15</sup> A separate report by media analyst Richard Greenfield of BTIG, LLC found that the major publicly traded MVPDs lost 200,000 video subscribers in the first quarter of 2016, nearly four times as many as they lost in the first quarter of 2015.<sup>16</sup> Press reports indicate that both Google's YouTube and Hulu are preparing to offer "skinny" programming bundles to compete with MVPD services nationwide, creating what analyst Craig Moffett calls a "storm" of new OVD competition.<sup>17</sup> AT&T itself announced a new subscription streaming video service, Fullscreen, designed for teens and 20-somethings that typically opt out of MVPD services.<sup>18</sup> And all that is in addition to Comcast's announcement in April that, in a manner similar to Charter and Time Warner Cable, it would make its cable service available without any STB on "connected TVs

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May 6, 2016) ("*17th Annual Video Competition Report*"). Almost every home (99%) has access to at least three MVPDs. *See id.* ¶ 20.

<sup>15</sup> *See* Daniel Frankel, *Nielsen: Pay-TV Homes Dropped Another 2.2% in May*, FierceCable (Apr. 25, 2016), <http://www.fiercecable.com/story/nielsen-pay-tv-homes-dropped-another-22-may/2016-04-25>.

<sup>16</sup> *See* Daniel Frankel, *Pay-TV Subscriber Trends Deteriorated in Q1, Analyst Says*, FierceCable (May 2, 2016), <http://www.fiercecable.com/story/pay-tv-subscriber-trends-deteriorated-q1-analyst-says/2016-05-02>.

<sup>17</sup> *See* Daniel Frankel, *Cable Faces Hulu-spawned Cord-cutting Storm Without Umbrella of Usage Caps, Analyst Says*, FierceCable (May 5, 2016), <http://www.fiercecable.com/story/cable-faces-hulu-spawned-cord-cutting-storm-without-umbrella-usage-caps-ana/2016-05-05>.

<sup>18</sup> *See* Aaron Pressman, *AT&T Wants To Attract Millennials with "The Breakfast Club,"* Fortune.com (Apr. 27, 2016), <http://fortune.com/2016/04/27/att-fullscreen-millennials/>.

and other IP-enabled third-party devices” (the “X1 Partner Program” or “Xfinity TV Partner Program”).<sup>19</sup>

In contrast to the vast record of intense and growing competition in the video marketplace, there is no record evidence demonstrating that the NPRM scheme is necessary to address a failure in any relevant market. Despite the fact that these issues have been debated since at least the 2010 AllVid proceeding through the DSTAC Report and comment cycle, the only attempt at meaningful economic analysis filed in support of the NPRM is a paper from the Consumer Federation of America’s (“CFA”) Research Director, Dr. Mark Cooper, entitled “Cable Market Power.”<sup>20</sup> But that paper fails at a necessary step in any market-power analysis: properly defining a relevant market.<sup>21</sup> For one thing, the paper appears to assume a market for cable services that ignores competition from online video. In recently approving the merger of Charter and Time Warner Cable, however, the Department of Justice found that the relevant market was “video programming distribution” and that “[b]oth MVPDs and OVDs are participants in this market.”<sup>22</sup> That conclusion is consistent with the findings of Dr. Katz and

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<sup>19</sup> Comcast Press Release, *Comcast Launches Xfinity TV Partner Program; Samsung First TV Partner To Join* (Apr. 20, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-launches-xfinity-tv-partner-program-samsung-first-tv-partner-to-join>; Comcast Press 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>. Similarly, DIRECTV recently announced that it would make three streaming services available. See AT&T Comments at 8.

<sup>20</sup> See Mark Cooper, Dir. of Research, CFA, *Cable Market Power: The Never Ending Story of Consumer Overcharges and Excess Corporate Profits in Video and Broadband* (Apr. 2016) (attached to CFA Comments).

<sup>21</sup> See Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* at 7 (Aug. 19, 2010) (noting that “market definition helps specify the line of commerce . . . in which the competitive concern arises,” and that such “evaluation of competitive alternatives available to customers is always necessary at some point in the analysis”).

<sup>22</sup> Compl. ¶ 19, *United States v. Charter Communications, Inc.*

other economists who have submitted testimony in this proceeding that consumers today use online video services not merely as a complement to, but increasingly as a substitute for, MVPD service.<sup>23</sup> Dr. Cooper’s failure to consider the impact of online video services in his analysis is itself fatal to his conclusions.

Even apart from that failure, Dr. Cooper’s conclusion that cable operators possess market power is contrary to the Commission’s own recent finding that cable operators are presumed to face effective competition nationwide.<sup>24</sup> That finding was made without even considering OVD competition. When fast-growing OVD competition is taken into account, as it must be – particularly given that the scheme under consideration could not even be implemented until well into the future – it is even more clear that Dr. Cooper’s conclusions are wrong.

In any event, Dr. Cooper’s argument is irrelevant because the unbundling regime the Commission has proposed would not be limited to only those cable operators that allegedly possess market power, but would apply indiscriminately to *all* MVPDs, regardless of their position in the marketplace. Dr. Cooper provides no basis to justify imposing radical unbundling regulation on MVPDs with no market power, and there is none. To the contrary, as Dr. Katz has shown, even those MVPDs that indisputably lacked market power have utilized an STB leasing model, sometimes after experimenting with alternatives.<sup>25</sup> This fact demonstrates that the

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<sup>23</sup> See, e.g., Katz Decl. ¶ 33; C. Dippon Decl. ¶ 39 (attached to CALInnovates Comments); International Center for Law & Economics Comments at 8; see also Sixteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, ¶ 83 (2015) (“Individual consumers may perceive OVDs as a substitute, a supplement, and a complement to their MVPD video service.”); *17th Annual Video Competition Report* ¶ 132.

<sup>24</sup> See 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, ¶ 10 (2015).

<sup>25</sup> See Katz Decl. ¶¶ 47-51.

prevalence of the STB leasing model is driven by the dictates of the marketplace, not the presence or absence of market power. In fact, historically, the STB leasing model was used because consumers valued its simplicity, efficiency, and other benefits.<sup>26</sup>

For these same reasons, there is no merit to the claim – made in the NPRM and rehashed here by a number of the NPRM supporters – that the prices of leased STBs are indicia of a “monopoly” in need of regulation.<sup>27</sup> As AT&T and many other commenters have demonstrated, the prices customers pay to lease STBs fail to show or even imply market power.<sup>28</sup> The fact that some consumers may pay the same nominal rate that they did in the past does not account for the enormous additional functionalities that STBs now provide, including DVR service, search functions, and many other capabilities. Beyond that, many consumers actually pay *less* for STBs than they do for competitive TiVo devices, which cannot be squared with the notion that MVPDs somehow charge “monopoly” rates for leasing these devices.<sup>29</sup> Independent studies, moreover, have found that most consumers do not believe that STB prices are too high. According to Leichtman Research, only 20% of MVPD customers see leased STBs as a waste of money.<sup>30</sup> Leichtman’s survey also found that pay-TV consumers who have three or more STBs are more

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<sup>26</sup> See, e.g., *id.*; Declaration of Stephen P. Dulac ¶¶ 37-40 (“Dulac Decl.”) (Attachment 1 to AT&T Comments).

<sup>27</sup> See, e.g., CVCC Comments at 7-8; CFA Comments at 22; INCOMPAS Comments at 4-5; Public Knowledge Comments at 16; Writers Guild of America, West Comments at 5.

<sup>28</sup> See, e.g., AT&T Comments at 14-18; AEI Comments at 6-7; Comcast Comments at 22-23; Digital Policy Institute Comments at 5-9; International Center for Law & Economics Comments at 4-5; NCTA Comments at 138-41 & App. C at 7-19.

<sup>29</sup> See AT&T Comments at 16-17.

<sup>30</sup> See Daniel Frankel, *Only 20% of Pay-TV Users Think Leased Set-Tops Are Waste of Money, Survey Says*, FierceCable (May 3, 2016), <http://www.fiercecable.com/story/only-20-pay-tv-users-think-leased-set-tops-are-waste-money-survey-says/2016-05-03>.

satisfied with their video provider than consumers with only one or two STBs (68% versus 54% reporting they are “very satisfied”).<sup>31</sup>

Similarly, while some parties parrot the NPRM’s claim that “99%” of MVPD subscribers still lease an STB from their MVPD,<sup>32</sup> that statistic falls far short of showing market power, as Dr. Katz demonstrated in detail.<sup>33</sup> On the contrary, as Dr. Katz and others have explained, the facts suggest that it has been efficient for consumers to lease STBs.<sup>34</sup> Indeed, for certain providers like DIRECTV and DISH, technology demands that there would always be an in-home device, as the NPRM acknowledges.<sup>35</sup>

Importantly as well, new opportunities and capabilities are driving deployment of alternatives to the traditional STB model. In particular, the 99% figure does not account for the competitive reality and impact of cord cutters, cord shavers, and cord nevers,<sup>36</sup> as well as the

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<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g.*, Digital Media Association Comments at 3; Information Technology Industry Council Comments at 4; TechFreedom & Competitive Enterprise Institute Comments at 15; *see also* CVCC Comments at 11; CFA Comments at 22; CCIA Comments at 5; Engine Advocacy and Fandor Comments at 9; INCOMPAS Comments at 5; Writers Guild of America, West Comments at 5.

<sup>33</sup> *See* Katz Decl. ¶¶ 57-65.

<sup>34</sup> *See id.* ¶¶ 47-51; *see also* NCTA Comments at 169-72; CenturyLink Comments at 20-22; Technology Policy Institute at 11-14; Cox Comments at 11; Larry Downes (Georgetown Center for Business and Public Policy) Comments at 1.

<sup>35</sup> *See* NPRM ¶ 65 (“We recognize that DBS providers specifically will be required to have equipment of some kind in the home to deliver the three Information Flows over their one-way network, even if they also provide programming to devices connected to the Internet via other networks.”). As EchoStar and DISH highlight in their comments, there are also other material differences between satellite MVPD service and other forms of MVPD service about which the NPRM fails to provide adequate APA notice regarding how the Commission will address them. *See also* EchoStar/DISH Comments at 7-18.

<sup>36</sup> *See, e.g.*, *17th Annual Video Competition Report* ¶¶ 61-65 (describing the competitive effects of cord cutters, shavers, and nevers, including that MVPDs increasingly deploy TV Everywhere applications and offer video service without an MVPD subscription).

customers who obtain one box from an MVPD and use third-party devices to connect additional screens.

**2. *The Record Shows That the Apps Approach Is Already Working and Will Only Improve, Further Diminishing Reliance on STBs***

The record overwhelmingly indicates that the success of the Apps Approach is snowballing as more and more consumers access video content through competitive navigation devices. An enormous amount of MVPD content is already accessed not through STBs, but through apps installed on competitive navigation devices, including smartphones, laptops, PCs and Macs, gaming consoles, smart TVs, and tablets. Driven by exploding competition in the video distribution market, MVPDs have been intently negotiating with content owners to expand the amount of content available on their apps.<sup>37</sup> According to a recent SNL Kagan study, 98% of premium films and 94% of premium TV series are now available on at least one or more video services.<sup>38</sup> The “gap” between the content available via STBs and the content available via apps has thus sharply diminished over time, and will continue to do so.<sup>39</sup> This will, in turn, greatly reduce the use of or need for STBs.

Indeed, Comcast’s recent X1 Partner Program and Time Warner’s alliances with Roku allow subscribers to completely replace their STBs with third-party devices that enable the subscriber to receive these MVPDs’ *entire* service,<sup>40</sup> which is more MVPD content than would be available through third parties under the NPRM proposal to unbundle only a subset of MVPD

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<sup>37</sup> See, e.g., Katz Decl. ¶ 8; AT&T Comments at 1-2; NCTA Comments at 16-17; Advanced Communications Law & Policy Institute Comments at 4-5; Roku Comments at 10.

<sup>38</sup> See S&P Global Market Intelligence, *SNL Kagan Study Finds that Films and Television Shows Are More Digitally Accessible than in Previous Years* (Mar. 17, 2016), <http://www.spcapitaliq.com/our-thinking/newsroom/snl-kagan-study-finds-that-films-and-television-shows-are-more-digitally-accessible-than-in-previous-years>.

<sup>39</sup> See Katz Decl. ¶¶ 8, 21.

<sup>40</sup> See Comcast Comments at 28-30.

service (what the NPRM calls “Navigable Services”).<sup>41</sup> Likewise, DIRECTV’s RVU initiative allows consumers to receive the full MVPD service on second, third, and fourth screens in the home without any additional STBs. This evidence further confirms what should already be plain: there is a clear, accelerating, and irreversible marketplace trend toward reducing, and often eliminating, the need for STBs.

MVPDs are supporting the Apps Approach as a matter of competitive necessity to respond rapidly to consumers’ desire to access content on the device of their choosing.<sup>42</sup> DIRECTV also has supported a developer program that allows third parties to integrate DIRECTV content into programming searches.<sup>43</sup> Integrated search capabilities across MVPD and non-MVPD content have become increasingly common through websites and other mechanisms.<sup>44</sup>

These developments run completely contrary to the NPRM’s and its proponents’ unsupported market-power theory and claims that MVPDs have incentives to impede device competition. In this regard, Roku notably states that its experience negotiating with MVPDs “is not consistent” with the “NPRM’s description of MVPDs having no interest in negotiating with competing device manufacturers.”<sup>45</sup> Roku explains that, rather than being coerced into deals, its “arm’s length agreements with MVPDs . . . arose because both sides found common interest in

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<sup>41</sup> See AT&T Comments at 59, 68-69.

<sup>42</sup> See Katz Decl. ¶¶ 16-29.

<sup>43</sup> See DIRECTV LLC, *Developer Platform*, <https://www.directvdev.com/homepage>.

<sup>44</sup> See NCTA Comments at 66; see also, e.g., WhereToWatch, *Frequently Asked Questions* (“WhereToWatch (WTW) offers a simple, streamlined, comprehensive search of legitimate platforms – all in one place and in an ad-free environment.”), <https://www.wheretowatch.com/about>.

<sup>45</sup> Roku Comments at 10.

meeting the growing demand of consumers for the ability to access the programming to which they subscribe on the device or the devices that they chose.”<sup>46</sup>

Echoing the views expressed publicly by an unnamed “Commission official,”<sup>47</sup> some commenters argue that even open platforms like Comcast’s “Xfinity TV Partner Program” do not satisfy the NPRM’s goals because they are supposedly “closed” and “proprietary” systems so long as the MVPD still controls the user interface that the MVPD’s subscribers use to receive MVPD service.<sup>48</sup> In their view, any third-party must be permitted to access and to rebrand an MVPD’s service and supply its own interface to the content, no different than if Netflix were required to let Google offer Netflix’s programming bundle through Google’s interface, search engine, and YouTube brand.

This extraordinary proposal faces insuperable legal barriers. It has no basis in Section 629’s text, deprives MVPDs of established copyright rights, and infringes their constitutional rights under the First Amendment and the Fifth Amendment’s Takings Clause. Beyond that, it makes no sense as a matter of policy. Netflix, Hulu, and Amazon do not permit their licensed content, look and feel, and packaging to be distributed through any interface other than their own. At the same time, however, in today’s open platforms, the competitive device maker *does* control the top-level (or “umbrella”) interface in which the various apps reside, just as a mall owner controls the look and feel of the larger space in which physical stores reside.<sup>49</sup> Most importantly, under this approach, consumers choose which apps to use among all of the many video services they can view through competitive devices.

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<sup>46</sup> *Id.* at 9.

<sup>47</sup> *See* Ramachandran, *supra* note 1.

<sup>48</sup> *See, e.g.*, CCIA Comments at 9; Public Knowledge Comments at 21.

<sup>49</sup> *See* Comcast Comments at 32.

Public Knowledge nevertheless argues (at 17-18) that relying on the Apps Approach is problematic because “for an MVPD to truly support a wide array of consumer devices would be a substantial, and likely infeasible undertaking.” But the marketplace evidence belies such claims. There are already hundreds of millions of devices that consumers can use now to access MVPD content through apps, and MVPDs have every incentive to ensure their services reach as many potential subscribers as possible, which entails support for as many devices as customers want to use.<sup>50</sup> For example, DIRECTV’s mobile TV Everywhere App is available on a wide variety of laptops (including multiple versions of Windows and Mac OS, and all of the major browsers), tablets (including Apple iOS, Android, and Kindle), and smart phones (including the popular Apple and Android phones).<sup>51</sup> DIRECTV’s NFL Sunday Ticket App also is available on multiple other devices, including Xbox, Google Chromecast, Sony Playstation, and Roku devices.<sup>52</sup>

Although there may always be some devices used by small numbers of consumers that some MVPDs do not support, that is also true of any number of apps supplied in the competitive marketplace. The fact that the NPRM proponents can muster only a few minor instances where a particular device lacks MVPD support<sup>53</sup> confirms that MVPDs are highly motivated to support as many devices as possible.

Nor does the fact that MVPDs have invested substantial resources in improving their own STBs suggest that they will not continue to support access through apps installed on a wide

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<sup>50</sup> See AT&T Comments at 6-8.

<sup>51</sup> See DIRECTV LLC, *Overview*, [http://www.directv.com/technology/mobile\\_apps](http://www.directv.com/technology/mobile_apps).

<sup>52</sup> See DIRECTV LLC, *NFL Sunday Ticket App*, [http://www.directv.com/technology/mobile\\_apps/nfl\\_sunday\\_ticket](http://www.directv.com/technology/mobile_apps/nfl_sunday_ticket).

<sup>53</sup> See, e.g., Public Knowledge Comments at 17-19 (giving two examples where MVPDs have not supported their app on a specific device).

variety of competitive devices.<sup>54</sup> On the contrary, that fact confirms the presence of substantial competition on multiple fronts in the video marketplace. Such intense competition compels all market players to improve their own devices *and* to provide multiple other attractive ways for consumers to access their video content. Some customers may want to access content through advanced STBs *and* to use apps at other times. Other customers may prefer one mechanism over the other. Right now, without any regulatory interventions, MVPDs and other video providers are vigorously competing to best serve all customers.

At the end of the day, the fact is that millions of consumers are adopting the Apps Approach, and marketplace competitors – including MVPDs and other players, like Netflix, Hulu, and Amazon – are innovating and providing more and better content through apps to meet consumer demand. The Commission’s approach would ignore these consumer preferences and turn the clock back to a heavily regulatory unbundling regime.

**B. The Record Demonstrates That There Are No Workable Standards To Implement the NPRM Proposal and None Can Be Developed in the Proposed Two-Year Timeline**

Even aside from the lack of any sound policy basis to head backward down the road proposed in the NPRM, the record establishes that there is no reason to believe that this scheme would be workable in any reasonable time frame, and certainly not the two-year timeline suggested in the NPRM. The Apps Approach does not raise any similar practical concern, as it is *already* being broadly implemented and is based on free negotiations between businesses with common interests in swiftly bringing innovation and value to consumers.

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<sup>54</sup> Compare CCIA Comments at 13-14, with NCTA Comments at 11-14 and AT&T Comments at 4-11.

Most basically, there are no existing (or even close to existing) standards that can be used to implement the “Information Flows” suggested by the NPRM.<sup>55</sup> As AT&T and numerous commenters have explained, that process would face intractable problems, and the proposed two-year timeline is unrealistic.<sup>56</sup>

DLNA’s comments in particular leave no doubt that the two-year timetable proposed in the NPRM is infeasible. The NPRM relied on a Public Knowledge submission suggesting that DLNA had already developed a workable standard and thus claimed that “the specifications necessary to provide the[] Information Flows appear to exist today.”<sup>57</sup> But the record now shows the Commission’s reliance on Public Knowledge’s submission was misplaced. As DLNA explained, VidiPath is “materially different” from the standards necessary to implement the NPRM proposal, and “there is a significant amount of work yet to be completed” to develop standards satisfying the NPRM.<sup>58</sup> DLNA estimates that it would take two to four years just to develop the necessary standards and certification programs.<sup>59</sup>

And that is just the first step in the process. Even if standards and certification programs are developed, MVPDs and existing device manufacturers would need significant *additional*

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<sup>55</sup> See, e.g., AT&T Comments at 19-28; Dulac Decl. ¶¶ 10-18; NCTA Comments at 119-23; Comcast Comments at 103-06.

<sup>56</sup> See, e.g., AT&T Comments at 12-26; NCTA Comments at 123-25; ARRIS Comments at 9-10 (two-year timeline is “unrealistic”); DLNA Comments at 2; Cisco Comments at 10-11 (urging the Commission not to adopt the two-year timeline because it “inevitably will lead to a rushed standards process” and noting that “standards often take far longer than two years to be completed”); MPAA/SAG-AFTRA Comments at 30.

<sup>57</sup> NPRM ¶ 35; see *id.* & n.96 (citing Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64, at Attachment (Oct. 20, 2015), which relies on “an extension of DLNA ‘VidiPath’”).

<sup>58</sup> DLNA Comments at 2.

<sup>59</sup> See *id.* (“DLNA’s experience suggests that a robust set of compliance and interoperability certification tools and test plans are necessary. The standards by themselves are insufficient to ensure compliance and interoperability.”).

time to implement those standards and certification programs. As commenters have explained, the proposed Information Flows “differ significantly from the way that MVPDs deliver their services today” and thus would require massive changes to their network architecture and to in-home equipment.<sup>60</sup> The Commission has previously estimated that product development cycles are 18 to 24 months.<sup>61</sup> Thus, even in the best-case scenario, the Commission’s proposal would result in the possibility of third-party navigation devices on the market no sooner than three and a half to six years. By then, given the rapid evolution in the video marketplace, third-party navigation devices developed in accordance with the NPRM scheme would be obsolete on arrival.<sup>62</sup>

Despite years of debate, the NPRM supporters have failed to provide any solutions to these long-identified problems. As far back as the failed AllVid initiative in 2010, many parties warned that it would take “years just to get standards envisioned in the *NOI* developed, at which point products would still have to be designed, manufactured, and brought to market – by which time the ‘right’ solution chosen by the Commission in 2010 likely will have become outdated.”<sup>63</sup> In August 2015, the DSTAC Report acknowledged, after months of work by experts, that the “[c]ompetitive [n]avigation” proposal “would require standardization from a number of different standards and the development and implementation of some new protocols and standards.”<sup>64</sup> And, since August 2015, interested parties have stated on numerous occasions that there are no

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<sup>60</sup> ARRIS Comments at 10-11; *see* Dulac Decl. ¶ 11.

<sup>61</sup> *See* AT&T Comments at 25 & n.92.

<sup>62</sup> *See* ARRIS Comments at 11-12 (noting any standard developed “would almost instantly become obsolete after it is finalized).

<sup>63</sup> NCTA Comments at 32, MB Docket No. 10-91 (FCC filed July 13, 2010).

<sup>64</sup> Downloadable Security Technology Advisory Committee, *Summary Report* at 6 (Aug. 28, 2015).

standards to implement the “competitive navigation” proposal.<sup>65</sup> The NPRM supporters have thus had every chance to develop a record showing that their pipedream is feasible.

They have failed to do so.<sup>66</sup> To be sure, Public Knowledge claims that its prior ex parte submission “would meet the needs of the FCC, competitors, and all MVPDs.”<sup>67</sup> But AT&T and other commenters have shown that Public Knowledge’s submission not only is replete with deficiencies that Public Knowledge makes no attempt to remedy, but also is at most a high-level framework from which one might begin to develop standards, not anything close to a complete set of standards itself.<sup>68</sup>

Similarly, although CVCC submitted a Technical Appendix that “track[s] the ex parte submission filed by Public Knowledge,”<sup>69</sup> neither that Technical Appendix nor CVCC’s comments remedies any of the deficiencies in Public Knowledge’s submission.<sup>70</sup> On the contrary, CVCC’s submission underscores the enormity of work ahead if the FCC were to proceed on this path by identifying multiple additional features that would need to be addressed with new or modified standards and certification programs.<sup>71</sup>

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<sup>65</sup> See, e.g., NCTA Reply Comments at 25-35 & n.68, MB Docket No. 15-64 (FCC filed Nov. 9, 2015).

<sup>66</sup> Several NPRM supporters thus candidly acknowledge that the standards-setting process is likely to be contentious and encourage the Commission’s involvement. See CCIA Comments at 35; TiVo Comments at 21-22.

<sup>67</sup> Public Knowledge Comments at 55.

<sup>68</sup> See AT&T Comments at 20-21; NCTA Reply Comments at 25-35, MB Docket No. 15-64 (FCC filed Nov. 9, 2015); DLNA Comments at 2.

<sup>69</sup> CVCC Technical App. at 1.

<sup>70</sup> See Reply Technical Declaration of Stephen P. Dulac ¶¶ 3-4 (“Dulac Reply Decl.”) (Attachment 1).

<sup>71</sup> See *id.* CVCC’s Technical Appendix is the sole document in the rulemaking record that provides anything resembling an attempt to provide technical support for the NPRM.

CVCC nevertheless asserts that its December 2015 “demonstration” of a third-party navigation device proves that the NPRM proposal is feasible.<sup>72</sup> That is a red herring. AT&T and other commenters are not arguing that third-party navigation devices using the Information Flows can never be made technically feasible, but rather that it would be enormously costly and time-consuming to develop and then implement complete standards.<sup>73</sup> A demonstration showing a subset of functionality – and only for certain MVPDs, potentially not including satellite providers – does not demonstrate a mature standard ready to be deployed across the MVPD industry, any more than the existence of a flight simulator demonstrates that there is a commercial airplane ready to carry passengers.<sup>74</sup>

Moreover, it is impossible to comment on the import of CVCC’s demonstration because, in response to NCTA’s many key questions about the technical characteristics and capabilities of the demonstration, CVCC refused to provide any consequential information, asserting that the “Commission can present technical and policy questions to interested members of the public and receive responses for the record” during a rulemaking.<sup>75</sup> Now that the Commission has initiated a rulemaking and has asked questions, CVCC still provides no information. These hide-the-ball tactics, including as to whether the demonstration used technology that would work for satellite providers, prevent any opportunity for meaningful comment and belie any notion that CVCC intends to work cooperatively to develop a consensus standard. They also demonstrate that standards-setting processes – which necessarily require information sharing and trust – are

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<sup>72</sup> CVCC Comments at 26.

<sup>73</sup> See Dulac Reply Decl. ¶¶ 11-18.

<sup>74</sup> See *id.* ¶ 6.

<sup>75</sup> Letter from CVCC to Marlene H. Dortch, Secretary, FCC, at 1, MB Docket No. 15-64 (Dec. 22, 2015); see also Letter from CVCC to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Dec. 23, 2015); Letter from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Dec. 18, 2015).

doomed to fail when conducted among competitors under government compulsion, as would be the case here. In all events, the Commission would commit reversible error by relying on the supposed demonstration that is not part of the record.<sup>76</sup>

Additionally, although CCIA does not make any technical proposal for a security solution, it claims that the necessary technology is available.<sup>77</sup> In this regard, it relies on a demonstration by cable companies of a downloadable security solution, but that demonstration is even less relevant than CVCC's demonstration because it occurred more than a decade ago and was only for cable systems. As Working Group 3 of the DSTAC acknowledged, content security requires more than the downloadable conditional access.<sup>78</sup> CCIA also cites a decade-old *proposal* for a downloadable security solution made by certain device manufacturers. No one – not even CCIA – claims that this proposal constitutes a full-fledged standard, let alone one that could be used in this context.<sup>79</sup>

Given the lack of any existing standards, the Commission must reject the NPRM supporters' request that the Commission adopt "default" standards to be used in case the

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<sup>76</sup> See, e.g., *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'") (quoting 5 U.S.C. § 706); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, J., concurring) (stating the Commission must disclose redacted portions of the record to petitioners so that they would be able "to mount a substantial evidence challenge"); see also *Smith v. FTC*, 403 F. Supp. 1000, 1008 (D. Del. 1975) ("Allowing administrative agencies to preclude judicial access to materials relied upon by an agency in taking whatever action is then being subject to judicial scrutiny would make a mockery of judicial review.").

<sup>77</sup> See CCIA Comments at 20-22.

<sup>78</sup> See DSTAC, WG3 Report at 5 n.3 (a downloadable security system "must be considered as part of a broadly defined security infrastructure which includes key management, secure manufacturing, audit, testing, standards development, etc."); see also generally *id.* at 2-19; Dulac Reply Decl. ¶ 5.

<sup>79</sup> See Dulac Reply Decl. ¶¶ 5-6.

standards-setting process proposed by the NPRM fails.<sup>80</sup> Quite simply, as explained, the record contains no standards to which the video industry could default. In any event, it would be foolhardy to devise new standards without significant vetting by all stakeholders, given the wide-ranging effects of the standard on the entire video ecosystem. Moreover, as commenters have explained, “default” standards are counterproductive because they significantly limit any incentive to develop consensus standards.<sup>81</sup>

Finally, the Commission cannot adopt the NPRM scheme without first conducting a thorough cost-benefit analysis for the standards-setting process and for the implementation of any standards that are developed.<sup>82</sup> There is nothing resembling such an analysis in the record. Nor has the Commission appeared to even consider the enormous costs that the NPRM proposal would impose on MVPDs.<sup>83</sup> The Commission’s failure to “pay[ ] attention to the advantages *and* disadvantages” of the NPRM standard’s proposal is not “reasonable regulation,” and thus would be reversible error.<sup>84</sup>

**C. The Record Shows Overwhelmingly That the NPRM Proposal Would Substantially Harm the Video Ecosystem and Damage the Quality, Quantity, and Diversity of Programming**

The record demonstrates that the Commission’s scheme would undermine key economic components of the video ecosystem that support the creation and marketing of all programming,

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<sup>80</sup> See, e.g., CVCC Comments at 26, 30, 35; Public Knowledge Comments at 55.

<sup>81</sup> See, e.g., AT&T Comments at 25-26; NCTA Comments at 127-29; Comcast Comments at 105-06; MPAA/SAG-AFTRA Comments at 30.

<sup>82</sup> See AT&T Comments at 100-01.

<sup>83</sup> See, e.g., Comcast Comments at 60-70; Cox Comments at 11-12; EchoStar/DISH Comments at 23-26; NCTA Comments at 129-38; Roku Comments at 14; Taxpayers Protection Alliance Comments at 3; TIA Comments at 9-10.

<sup>84</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

including advertising revenues and control over how channels are presented to consumers.<sup>85</sup> Under this scheme, device and platform suppliers would be free to ignore existing arrangements regarding tier and channel placement, which are at the core of negotiated contracts between MVPDs and programmers. And, they could likewise strip away the branding and the look and feel of user interfaces in which MVPDs invest enormous resources in order to provide customers with consistent experiences across screens and devices. They even would be permitted to interfere with advertising supplied to consumers.<sup>86</sup> That would erode a critical source of revenue for MVPDs and programmers, especially for small programmers and those focused on serving minority populations.

Individually and together, these harms would impose enormous costs on MVPDs and programmers – and ultimately the consumers they serve – through lost revenue from advertisers and subscribers, as well as lower content quality and reduced brand loyalty. Neither the NPRM nor its supporters take these claims seriously. Instead, they dismiss them with hand-waving assurances. In the same vein, just last week the Commission issued a statement asserting, with no support whatsoever, that the NPRM proposal would somehow “ensure[] the integrity and security of pay-TV programming” and that MVPD “business arrangements with content providers remain fully intact.”<sup>87</sup> Simply saying that does not make it so, however, and the loud chorus of opposing voices from across the video ecosystem – most of whom obtain no revenue from STBs – establishes that the ill-considered NPRM scheme contains no such guarantees.

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<sup>85</sup> See AT&T Comments at 38-45; Katz Decl. ¶¶ 84-92.

<sup>86</sup> For example, third-party navigation devices could place their advertisements on top of, underneath, or around the ads that programmers and MVPDs might otherwise expect to accompany their content. See, e.g., NCTA Comments at 43-53 (demonstrating how TiVo currently overlays advertisements).

<sup>87</sup> Daneman, *supra* note 8.

In fact, as these commenters explain, the NPRM scheme would create enormous dangers for the existing, highly competitive content ecosystem and the consumers it serves. RIAA, for example, which represents the U.S. recorded music industry, expresses concern that “the Commission’s proposal could undermine the stable music MVPD market by permitting third-party set top box providers to monetize and control the way consumers access music without any say, let alone permission, from those who create that music. . . . The result would be to frustrate the incentives to create and disseminate copyrighted content via MVPD services and stifle innovation in business models that allow consumers access to music.”<sup>88</sup> MPAA and SAG-AFTRA, which represent the motion picture industry and actors, similarly complain that, under the Commission’s proposal, “programmers may lose their negotiated channel position, and their content may be improperly manipul[at]ed or dropped altogether.”<sup>89</sup> They further explain that the proposal “would also unfairly shift advertising revenues from those who invest in, and take considerable risks in, creating the programming, to third parties who seek to build their businesses on content they have not licensed.”<sup>90</sup> Under this scenario, it would make no sense for “a client [to] pay to advertise on a programmer’s network if a third-party navigation device is likely to overlay its own ads before the content reaches its intended audience.”<sup>91</sup> And the Communications Workers of America explains that the “proposed rules threaten the core protections for content creators that are at the heart of the video ecosystem,” which would leave “fewer resources to devote to the development of quality programming.”<sup>92</sup>

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<sup>88</sup> RIAA Comments at 4.

<sup>89</sup> MPAA/SAG-AFTRA Comments at 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> CWA Comments at 3-4.

The threat posed by the NPRM is particularly grave for programmers focused on serving diverse populations and for the consumers who want to view those programmers' content.<sup>93</sup>

Dozens of entities representing minority voices have opposed the Commission's proposal because of the significant dangers it poses to these entities' business models.<sup>94</sup> For example, TV One, one of the largest and most prominent networks targeted at the African American

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<sup>93</sup> See, e.g., International Center for Law & Economics Comments at 23-24; C. Dippon Decl. ¶ 80 (attached to CALInnovates Comments); Content Companies Comments at 11-12; Advanced Communications Law & Policy Institute Comments at 7; Taxpayers Protection Alliance Comments at 4; U.S. Chamber of Commerce Comments at 4-5; Prof. Adonis Hoffman Comments, Attachment at 2; NCTA Comments at 54-58; TV One Comments at 7-9, 14; ASPIRA Comments at 1; Cuban-American National Council Comments at 1-2; Multicultural Media, Telecom and Internet Council et al. Comments at 12; Japanese American Citizens League et al. Comments at 1-2; National Black Chamber of Commerce Comments at 1; National Black Caucus of State Legislators Comments at 2; NOBEL Women Comments at 1; United States Hispanic Chamber of Commerce et al. Comments at 1; Diverse LGBT Technology Partnership Comments at 1; TechLatino Comments at 1; Hispanic Technology and Telecommunications Partnership Comments at 1-2; U.S. Hispanic Leadership Institute Comments at 1; National Hispanic Foundation for the Arts Comments at 1-2.

<sup>94</sup> These include: TV One, Creators of Color, ASPIRA, Cuban American National Council (CNC), Hispanic Leadership Fund, Hispanic Telecommunications and Technology Partnership, Japanese American Citizens League, Asian Pacific American Public Affairs (APAPA), Center for APA Women, Filipina Women's Network (FWN), National Federation of Filipino American Associations (NaFFAA), Asian Pacific American Institute for Congressional Studies (APAICS), National Asian Pacific American Women's Forum (NAPAWF), Sikh American Legal Defense & Education Fund (SALDEF), LGBT Tech Partnership, MANA, Multicultural Media, Telecom and Internet Council et al., signed by: Asian Americans Advancing Justice (AAJC), Asian Pacific American Institute for Congressional Studies (APAICS), Latinos in Information Sciences and Technology Association (LISTA) Multicultural Media, Telecom and Internet Council (MMTC), National Association of Multicultural Digital Entrepreneurs (NAMDE) National Black Caucus of State Legislators (NBCSL), National Organization of Black Elected Legislative Officials (NOBEL) Women OCA – Asian Pacific American Advocates, Rainbow PUSH Coalition, National Puerto Rican Chamber of Commerce (NPRC), National Black Caucus of State Legislators, National Black Chamber of Commerce, National Hispanic Foundation of the Arts, National Puerto Rican Coalition, National Urban League, Multicultural Media, Telecom and Internet Council, Asian American Justice Center, League of United Latin American Citizens, NAACP, National Action Network, OCA – Asian Pacific American Advocates, National Coalition on Black Civic Participation, Rainbow PUSH Coalition, NOBEL Women, TechLatino: Latinos in Information Sciences and Technology Association (LISTA), U.S. Diverse Chambers (U.S. Black Chambers, U.S. Pan Asian Chamber of Commerce, National Gay & Lesbian Chamber of Commerce, U.S. Hispanic Chamber of Commerce), U.S. Hispanic Leadership Institute, and Women Impacting Public Policy.

community, states that the NPRM would “allow[] third parties to dilute TV One’s brand among its well-earned viewers and hamper TV One’s ability to engage advertisers hoping to market to African Americans.”<sup>95</sup> TV One also states that the existing video ecosystem “has created a competitive and diverse market in which niche and special interest programmers are finally finding footing and beginning to thrive,” but that, under the proposed rules, diverse content would be “relegated to the bottom of any new user platform.”<sup>96</sup>

In stark contrast to the diverse coalition of stakeholders opposing the NPRM, some commenters argue that the Commission’s proposal would enhance the opportunities for diverse voices to reach consumers by connecting those voices with parties more open to carrying diverse/minority content.<sup>97</sup> These commenters principally contend that programmers that focus on minority audiences have struggled to obtain carriage on MVPD systems.<sup>98</sup> But these existing difficulties stem from the same marketplace forces that affect all niche programming: it is difficult for such programming to find a sizable audience, and therefore difficult for an MVPD to justify carrying such programming instead of other programming that a greater number of consumers demand. Importantly, however, in the current ecosystem, these programmers have the ability to negotiate for the rights that are most valuable to them, such as being placed in a particular channel neighborhood. Under the NPRM proposal, they would not have any contractual relationship with third-party device providers, such as Google, and thus no ability to protect themselves in these ways.

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<sup>95</sup> TV One Comments at 4.

<sup>96</sup> *Id.* at 18, 19.

<sup>97</sup> *See, e.g.*, CVCC Comments at 49-53; Greenlining Institute Comments at 4-5; INCOMPAS Comments at 15-17; Writers Guild of America, West Comments at 15-17; CFA Comments at 12; CCIA Comments at 29-30; Public Knowledge Comments at 38-39.

<sup>98</sup> *See, e.g.*, CVCC Comments at 49-50; Greenlining Institute Comments at 3; INCOMPAS Comments at 15.

TV One states (at 13), for example, that “[t]he loss of the negotiated right to particular placement – a very difficult right to secure for a diverse programmer – would cause particular harm to TV One and other minority programmers.” The National Hispanic Foundation of the Arts likewise notes (at 2) that, “[i]f technology companies are able to disregard licensing terms, there is no guarantee that minority and independent programming will reach their designated audiences.” Indeed, if it were the case that third-party device providers were more likely than MVPDs to carry diverse voices, one would expect some evidence that existing third-party device providers were doing so now. The record contains no such evidence.

Public Knowledge and others dispute that the NPRM would undermine negotiated channel placement and advertising revenues, claiming that “nothing about the FCC’s proposal will prevent programmers from contracting directly with device or platform vendors over rights and kinds of access the FCC’s proposal does not provide.”<sup>99</sup> Even if that were possible, programmers have *already* negotiated for these rights with MVPDs. Why should they have to “pay” again to ensure that they are honored? Even aside from that, third-party device and platform vendors have made clear that they have no incentive to protect, or interest in protecting, these rights. As TiVo states, “TiVo is not, and never has been, bound to programming agreements entered into by MVPDs to which TiVo is not a party. . . . [I]t makes no sense for competitive device providers to have to adhere to licensing terms that they have no way of knowing and which would vary drastically across MVPDs.”<sup>100</sup>

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<sup>99</sup> Public Knowledge Comments at 45; *see also* CCIA Comments at 24.

<sup>100</sup> TiVo Comments at 19; *see also* Letter from Devendra T. Kumar, Goldberg, Godles, Wiener & Wright LLP, to Marlene H. Dortch, Secretary, FCC, at 1, MB Docket No. 15-64 (Jan. 13, 2016) (TiVo *ex parte* stating that third-party 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”); 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

There is thus no reason to believe that the NPRM scheme would materially increase the number of distributors entering into such contracts with diverse/minority programmers going forward. Unlike in competitive negotiations with MVPDs where the programmer has leverage from being able to withhold its content, there is no such leverage vis-à-vis device and platform vendors, as the NPRM would allow them to repackage the MVPD's service regardless of whether programmers consent.

Nor are the NPRM supporters correct that DFAST-like licenses are a magic bullet that can be used to protect negotiated content rights.<sup>101</sup> As NCTA has explained, the DFAST license is more than a decade old and was designed to work with one-way cable systems.<sup>102</sup> NPRM supporters do not explain how this outdated license can be used to protect modern two-way video systems of all MVPDs with high-value on-demand content. Indeed, the license that eventually evolved for two-way systems more closely resembled the Apps Approach and required devices to present the full cable service.<sup>103</sup> Moreover, satellite MVPDs were never parties to DFAST licenses, so it is particularly inappropriate as a starting point for protecting these important rights in that context.

Even if it were possible to update the DFAST license, that still would not be sufficient to protect valuable content. *First*, the Commission's proposal requires that MVPDs unbundle their

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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"); 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>101</sup> See CVCC Comments at 41-42; INCOMPAS Comments at 21-22; TiVo Comments at 19-20.

<sup>102</sup> See Letter from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2-3, MB Docket No. 15-64 (Dec. 16, 2015) ("NCTA 12/16/2015 Ex Parte"); see also NCTA Comments at 61-62.

<sup>103</sup> See DSTAC, WG4 Report at 150; NCTA 12/16/2015 Ex Parte at 3; NCTA Comments at 61-62.

service for the very purpose of allowing third-party devices to undermine the rights of programmers and MVPDs by creating new user interfaces, modifying advertising, changing channel positions, and stripping away branding and look and feel.<sup>104</sup> No license can resolve that issue without fundamentally altering the NPRM proposal.

*Second*, AT&T has previously explained that there is ample reason to believe that third-party devices would not honor these licenses.<sup>105</sup> As noted, TiVo states bluntly here that it “is not, and never has been, bound to programming agreements” and that it makes “no sense” for TiVo to comply with those agreements.<sup>106</sup> Additionally, under the DFAST license, MVPDs were third-party beneficiaries and could have enforced the license terms, but the NPRM proposal would prevent MVPDs from doing so.<sup>107</sup> NPRM supporters even ask the Commission to remove any certification process for DFAST-like licenses.<sup>108</sup> That would render those licenses a nullity.

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<sup>104</sup> See AT&T Comments at 78-79.

<sup>105</sup> See *id.* at 43-44 (noting, for example, that TiVo overlays advertisements).

<sup>106</sup> TiVo Comments at 19. TiVo requests that the Commission reinstate the Encoding Rules to limit the types of copy protection that programmers and MVPDs may employ. See *id.* at 20-21; CVCC Comments at 42. However, the D.C. Circuit struck down those rules because the Commission had no authority to impose them on satellite providers. See *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013). It makes little sense to reinstate those rules only for non-satellite providers because third-party navigation devices would need to apply all types of copy protection used by any MVPD. See NPRM ¶ 71 (requiring navigation devices to honor Entitlement Data). Moreover, the old Encoding Rules were much simpler and are not sufficient to implement the complex licensing terms that currently exist. See Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 18 FCC Rcd 20885, ¶ 65 (2003).

<sup>107</sup> See DFAST License Agreement for Unidirectional Digital Cable Products § 11; NPRM ¶¶ 12, 28, 72.

<sup>108</sup> See CCIA Comments at 34. CVCC goes further and proposes an indefensible one-sided certification requirement that would apply to MVPDs but not to third-party devices. See CVCC Comments at 43.

*Third*, even if third-party devices were to faithfully honor content protections in a DFAST-like license, that would not adequately protect content. That is because the NPRM proposal would still gut content protection systems and lead to increased piracy, as discussed below.<sup>109</sup>

Importantly, *none* of these harms would occur if the Commission relied on the market-based Apps Approach that consumers are already embracing. Instead, these harms would be the direct result of a choice voluntarily undertaken by the Commission radically to reshape the video marketplace without any proper and required weighing of the costs and benefits of its actions. Worse yet, the compressed schedule for ex parte meetings announced by the Commission suggests the Commission may be intent on pressing forward with its proposal, no matter what the record reveals. Certainly, at the very minimum, the outpouring of unabated concerns about the likely effects of the Commission's proposal counsel for caution and further study before proceeding recklessly to undermine the current system. As Chairman Walden and many other Members of Congress have suggested, along with numerous commenters and interested parties, the very least the Commission should do to undertake its duties responsibly is to obtain further information on this issue from the pending Government Accountability Office study and other sources – including a rigorous cost-benefit analysis that is subject to scrutiny through notice and comment – before risking destroying the viability of small and minority programmers and depriving many Americans of those entities' content.<sup>110</sup>

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<sup>109</sup> See *infra* pp. 28-33.

<sup>110</sup> See Letter from Rep. Greg Walden and Rep. Yvette D. Clarke to Thomas E. Wheeler, Chairman, FCC (Apr. 1, 2016) (requesting that the Government Accountability Office conduct a study on the proposal's effects on small, independent, and multicultural programmers); Letter from Rep. Juan Vargas et al. to Thomas E. Wheeler, Chairman, FCC (Apr. 22, 2016); Letter from Rep. Yvette D. Clarke et al. to Thomas E. Wheeler, Chairman, FCC (Apr. 22, 2016); ITTA Comments at 29; Multicultural Media, Telecom and Internet Council Comments at 3-4, 16-18;

**D. The Record Amply Indicates the NPRM Scheme Would Facilitate Piracy**

The record further demonstrates that the NPRM proposal would undermine anti-piracy protections, in direct conflict with Section 629(b)'s mandate that the Commission shall not "jeopardize security of multichannel video programming . . . or impede the legal rights of a provider of such services to prevent theft of service."<sup>111</sup> As commenters have explained, current anti-piracy protection is built on a "chain of trust" between MVPDs and programmers. MVPDs' contractual relationships with programmers require MVPDs to implement strong content protection systems and to respond quickly to piracy threats by shutting off access to devices and making any necessary updates to the content protection systems. In stark contrast to the Apps Approach, which maintains the "chain of trust," the NPRM would replace that established and effective mechanism with least-common-denominator content protection systems that can be licensed by any third-party device regardless of their relationship with MVPDs or programmers. MVPDs would be unable to monitor all of these devices and effectively shut off access to offending devices.

Moreover, the use of least-common-denominator content protection systems not only would create a vulnerable single point of attack, but also would frustrate efforts to patch security breaches quickly.<sup>112</sup> As leading security provider Cisco explains, "the safest ecosystem is one

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*see also, e.g.*, Letter from Rep. Yvette D. Clarke et al. to Thomas E. Wheeler, Chairman, FCC (Dec. 1, 2015) (requesting that the Commission consider the effects on independent and minority programmers); Letter from Rep. Shelia Jackson Lee to Thomas E. Wheeler, Chairman, FCC (Nov. 12, 2015); Letter from Rep. Doug Collins et al. to Thomas E. Wheeler, Chairman, FCC (Feb. 16, 2016); Letter from Rep. Tony Cardenas et al. to Thomas E. Wheeler, Chairman, FCC (Feb. 16, 2016); Letter from Rep. Henry C. Johnson, Jr. to Thomas E. Wheeler, Chairman, FCC (May 6, 2016).

<sup>111</sup> 47 U.S.C. § 549(b).

<sup>112</sup> *See* AT&T Comments at 45-47; ARRIS Comments at 12-14 (NPRM would limit the use of "superior security solutions" that are not licensable); Cisco Comments at 7-8; U.S. Chamber of

with multiple security solutions, each of them regularly evolving. [The] government-mandated, monolithic security requirement like the *NPRM* contemplates is directly contrary to the nimble quality of the highest-level security.”<sup>113</sup>

These inadequate content protection systems would increase piracy and reduce the incentive to invest in new content. Numerous content producers and workers in creative industries have expressed these concerns. For example, the producer of *The Walking Dead* – for which the recent season premiere was illegally downloaded by 1.27 million unique IP addresses – warned that, “[i]f the Federal Communications Commission approves Chairman Tom Wheeler’s regulatory proposal to ‘open’ set-top boxes, it will make piracy as easy and dangerous in the living room as it is on laptop and mobile devices” and “would spell disaster for those of us who are trying to figure out how to keep making the movies and TV shows audiences love.”<sup>114</sup> The Directors Guild of America explained that the proposal “will cause substantial economic harm to our members who count on the revenue . . . to sustain a living.”<sup>115</sup> And IBEW expressed concern that the Commission is putting “tens of thousands” of American jobs at risk.<sup>116</sup>

The Commission’s short-sighted proposal does not even attempt to account for these costs. And, again, *NPRM* supporters do not provide any basis to doubt that these costs are substantial and do not provide any solutions to reduce them.

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Commerce Comments at 4; MPAA/SAG-AFTRA Comments at 23-26; *see also* RIAA Comments at 9-10.

<sup>113</sup> Cisco Comments at 7-8.

<sup>114</sup> Gale Anne Hurd, *Stop Piracy Apocalypse: ‘Walking Dead’ Producer*, USA Today (Apr. 12, 2016), <http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/>.

<sup>115</sup> Directors Guild Comments at 2.

<sup>116</sup> John Eggerton, *IBEW Opposes FCC Set-Top Plan*, Multichannel News (May 10, 2016), <http://www.multichannel.com/news/fcc/ibew-opposes-fcc-set-top-plan/404813>.

*First*, the NPRM supporters have not even proposed a compliant content protection system that could be used. CVCC acknowledges that, if the Commission were to prohibit MVPDs’ proprietary content protection systems, “very few options” would remain.<sup>117</sup> Of the remaining options, CVCC claims that DTCP-IP “seems ideal” for in-home link protection and that DTCP-HE “would support cloud delivery.”<sup>118</sup> But, as commenters have explained, DTCP-IP has flaws and cannot currently be used to protect 4K content,<sup>119</sup> and, as even CVCC concedes, DTCP-HE does not yet exist.<sup>120</sup> Google claims that in-home link protection systems used by RVU and VidiPath could be employed to protect content.<sup>121</sup> But RVU and VidiPath rely on DTCP-IP, and the record is clear regarding the limitations of DTCP-IP alone, without the additional security elements that, for example, RVU adds to DTCP-IP.<sup>122</sup> Google provides no suggestions for what content protection system could be used to deliver content to the home. Other NPRM supporters just assume adequate compliant content protection systems exist or could be developed.<sup>123</sup>

*Second*, certain NPRM supporters argue that copyright law would be sufficient to prevent piracy.<sup>124</sup> That is fanciful. It is impossible to prosecute every act of piracy. For that reason, Congress enacted the Digital Millennium Copyright Act (“DMCA”) to support “the efforts of

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<sup>117</sup> CVCC Comments at 39-40.

<sup>118</sup> *Id.*

<sup>119</sup> *See* AT&T Comments at 46 n.166; MPAA/SAG-AFTRA Comments at 24; NCTA Comments at 98, 128.

<sup>120</sup> *See* CVCC Comments at 39-40.

<sup>121</sup> *See* Google Comments at 4-5.

<sup>122</sup> *See* Dulac Decl. ¶ 14.

<sup>123</sup> *See, e.g.*, Public Knowledge Comments at 51 (“[T]he open standards that MVPDs end up supporting are likely to have baked in a number of technologies and protocols . . . with regard to the treatment of content.”).

<sup>124</sup> *See* CCIA Comments at 22-24; Public Knowledge Comments at 11-12.

copyright owners to protect their works from piracy behind digital walls such as encryption.”<sup>125</sup> Here, however, the Commission’s proposal would frustrate the ability of content owners to protect their content, directly contrary to congressional intent.<sup>126</sup>

*Third*, Public Knowledge’s and Google’s claim that the NPRM would reduce piracy by providing consumers with more convenient ways to receive content lawfully. They cite the music industry as an example where streaming services have reduced piracy.<sup>127</sup> Piracy, however, has contributed to severely declining music industry revenues, which fell from \$38 billion in 1999 to \$15 billion in 2014.<sup>128</sup> Even though peer-to-peer piracy may have decreased, music piracy continues to be an industry-wide problem because other forms of piracy have taken its place, such as “stream ripping” from sites like YouTube.<sup>129</sup>

In addition, the evolution of the music industry has created fundamentally different ways of acquiring content (*e.g.*, streaming services like Spotify) that might plausibly steer consumers to lawfully purchase content. The Commission’s proposal would have no similar effect on video consumption. Consumers already demand that content be available on as many devices as

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<sup>125</sup> *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458-59 (2007); *see* H.R. Rep. No. 105-551, pt. II, at 25 (1998) (“[T]he digital environment poses a unique threat to the rights of copyright owners.”); AT&T Comments at 81-82.

<sup>126</sup> *See infra* p. 53.

<sup>127</sup> *See* Public Knowledge Comments at 47-50; Google Comments at 4-5.

<sup>128</sup> *See* Ryan Faughnder, *Music Piracy Is Down But Still Very Much in Play*, L.A. Times (June 18, 2015) (noting approximately 20% of Internet users regularly access sites offering pirated music, and, in the United States alone, 20 million people still use peer-to-peer file sharing), <http://www.latimes.com/business/la-et-ct-state-of-stealing-music-20150620-story.html>.

<sup>129</sup> *See* Russ Crupnick, *Bad Company, You Can’t Deny: 57M in U.S. Still Acquiring Unlicensed Music*, MusicWatch (Feb. 22, 2016), <http://www.musicwatchinc.com/blog/bad-company-you-cant-deny/>; Tim Ingham, *Global Music Piracy Downloads Grew by Almost a Fifth in 2015*, Music Bus. Worldwide (Jan. 21, 2016) (reporting that the amount of music downloaded on piracy sites grew by 16.5% in the latter half of 2015), <http://www.musicbusinessworldwide.com/global-music-piracy-downloads-grew-by-almost-a-fifth-in-2015/>.

possible, and MVPDs have responded by, among other things, deploying TV Everywhere Apps.<sup>130</sup> Accordingly, the Commission’s proposal would not result in content being made available in new settings, at different times, or at lower prices.<sup>131</sup> At best, the proposal would result in the same content being made available in the same setting, at the same time, and at the same price, but just through a different user interface. Thus, Public Knowledge’s and Google’s argument is effectively that a different user interface would meaningfully reduce piracy, which experience and common sense indicate is absurd.

*Fourth*, NPRM supporters fail to grapple with the very real possibility that not all third-party navigation devices would respect copyrighted content. The Commission proposes to require MVPDs to make their unbundled service available to any number of third-party navigation devices and software developers with whom MVPDs have no relationship. As the Directors Guild explained, “[t]hese third parties will not want to protect content. Instead they will view their new ability to distribute copyrighted content as a means to generate revenue for themselves and, most importantly, gain valuable [consumer] information that can be monetized . . . .”<sup>132</sup> For example, third-party devices might display pirated sources of material in search results, thereby depriving content owners of lawful purchases of their content.<sup>133</sup> Likewise, MPAA and SAG-AFTRA note the risk of bad actors – “‘black-market’ boxes or applications that aggregate and facilitate access to pirated content to gain access to MVPD systems, programming, and subscribers.”<sup>134</sup>

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<sup>130</sup> See AT&T Comments at 2-11; see also *supra* pp. 9-13.

<sup>131</sup> Public Knowledge’s claim that the proposal would reduce the cost of MVPD service is incorrect. See AT&T Comments at 54-56.

<sup>132</sup> Directors Guild Comments at 6.

<sup>133</sup> *Id.*

<sup>134</sup> MPAA/SAG-AFTRA Comments at 27; see, e.g., AT&T Comments at 27 & n.101 (noting the

At bottom, because the record shows the NPRM proposal would facilitate piracy, it would be reckless to move forward with the proposal and thereby place the video ecosystem and tens of thousands of jobs at risk. And that recklessness would be all the more extreme in light of the current availability of the Apps Approach, which does not present any of these piracy concerns.

**E. The Commission’s Proposal Would Harm Innovation, Create Customer Confusion, Raise Consumer Costs, and Impose Other Public-Interest Harms**

The record demonstrates that, in addition to the many serious problems described above, the Commission’s proposal would also impose a number of significant additional consumer harms. Like the Commission itself, the NPRM supporters ignore these harms, and, again, the Apps Approach would avoid all of these issues.

*First*, the NPRM would hinder innovation by mandating fixed protocols that would quickly become obsolete.<sup>135</sup> Entities at the heart of this innovation – device makers and content owners – express precisely this concern. Roku explains (at 12-13) that “[t]he establishment of a standard could also have the effect of choosing one business model over another, which risks sapping innovation from this vibrant industry.” MPAA and SAG-AFTRA state (at 29) that

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existence of a Chinese device that strips HDCP content protection).

<sup>135</sup> See, e.g., Larry Downes (Georgetown Center for Business and Public Policy) Comments at 14 (“Even in the best of circumstances, developing the new standards will take years, cost millions, and unintentionally slow or stifle innovations yet to be identified. The FCC took five years just to decide *not* to take action the last time it waded into these roiling waters.”); T. Randolph Beard et al., *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 CommLaw Conspectus 55 (2012) (attached to Digital Policy Institute Comments) (“In our view, satisfying these standards is not a problem. For example, innovation in the set-top box, if important to consumers, is one means by which firms can compete. Commoditizing the technology, or hindering the freedom to innovate, may alter the nature – and impede the intensity – of competition.”); Raymond James Comments at 2 (“We believe this approach could stifle innovation, add costs to consumers, add costs to the network providers, reduce carrier competition, and ultimately limit choice. While the concept of consumers having choice in their STB is a noble one, we believe technology evolutions are making these devices obsolete already and the additional regulation will not benefit customers.”).

mandating fixed standards not only would prevent the “roll out of new content, formats, features, and business models until the associated standards are developed,” but would also delay innovation after that time, because “[t]hird party device and application manufacturers would have the ability to insist that programmers and MVPDs continue to support the formats they need (the proposal contemplates no mechanism for declaring devices or applications obsolete), perpetuating and worsening the problem that exists under the CableCARD regime.”

*Second*, implementing the complex, Rube Goldberg regime the NPRM envisions would impose large costs on the industry that would ultimately be passed on, at least in part, to consumers.<sup>136</sup> The U.S. Chamber of Commerce recognizes that, “[i]n order to comply with the newly mandated ‘open standards’ proposed by the Commission, TV distributors may need to invest heavily to re-engineer their delivery networks and develop, manufacture and maintain new in-home adapter hardware.”<sup>137</sup>

None of the NPRM supporters comes to grips with the astronomical costs entailed in implementing this radical restructuring of the video marketplace. Again, while AT&T and other opponents of the NPRM scheme have provided extensive evidence of costs the NPRM would impose on MVPDs, and ultimately consumers,<sup>138</sup> the NPRM proponents have provided no cost

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<sup>136</sup> See ARRIS Comments at 11-12 (“The Commission’s proposed rules would only burden the industry with another costly technology mandate that cannot keep pace with today’s rapidly changing marketplace and technologies. . . . And these unnecessary costs to comply with the Commission’s latest technology mandate ultimately would be borne by MVPD customers.”).

<sup>137</sup> U.S. Chamber of Commerce Comments at 2; see National Association of Manufacturers Comments at 1 (“The proposed rulemaking on video navigation choices may result in increased compliance costs, re-engineering of networks, and new hardware requirements therefore diverting critical resources away from enhancements to the telecommunications networks the manufacturing sector is dependent on for driving innovation.”).

<sup>138</sup> See, e.g., AT&T Comments at 54-56; NCTA Comments at 130-32; ARRIS Comments at 8-12; Comcast Comments at 60-73; Roku Comments at 12-14; National Association of Manufacturers Comments at 1; U.S. Chamber of Commerce Comments at 2.

study or cost-benefit analysis that would even suggest that the alleged benefits to consumers would be greater than these costs. In the absence of any such evidence in the record, any FCC conclusion that the massive dislocation and expense created by this regime is worthwhile would necessarily be arbitrary.<sup>139</sup>

*Third*, the record confirms that consumers would also experience greater confusion, disruption, and frustration under the NPRM proposal, which inserts third-party providers between MVPDs and their customers. As Dr. Katz explains, the Commission’s proposal would make it difficult for consumers to determine the source of a problem or degradation in service quality, and therefore to know which provider to contact.<sup>140</sup> Beyond harming MVPDs’ brands and consumer relationships, this system would aggravate consumers, as device makers such as Roku acknowledge: “A mandated system that requires problems to be addressed and resolved by parties without any direct relationship is unlikely to serve consumers as effectively as the current system of device manufacturers and content providers working cooperatively in the common service of consumers.”<sup>141</sup>

*Fourth*, as NRDC emphasized in its submission to the Commission, the NPRM proposal threatens to cause substantial environmental harm because the Commission’s inadequately considered scheme does “not take into account the energy use and environmental implications of its proposal.”<sup>142</sup> The Commission’s approach threatens to undermine more than \$500 million in consumer energy-bill savings that have been gained through a voluntary agreement of all the

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<sup>139</sup> See AT&T Comments at 100-01.

<sup>140</sup> See Katz Decl. ¶¶ 99-102.

<sup>141</sup> Roku Comments at 13.

<sup>142</sup> NRDC Comments at 1.

MVPDs.<sup>143</sup> Indeed, “the additional energy consumption” from the proposal could add as much as “\$1.6 billion to residential energy bills . . . and add 9 million tons of extra CO<sub>2</sub> emissions annually.”<sup>144</sup>

**F. The NPRM Proposal Would Undermine Statutory Privacy Protections**

The record shows that the NPRM proposal would deprive consumers of the privacy protections that Congress has put in place to protect consumers’ viewing decisions. This proposal would enable third-party providers to collect information on individuals’ viewing choices and combine that information with data from other sources to create detailed profiles, all without the statutory privacy safeguards that Congress specifically decided are applicable to MVPD services that obtain the same information.<sup>145</sup>

An overwhelming number of commenters expressed concerns about the privacy implications of the NPRM proposal.<sup>146</sup> For example, Digital Citizens Alliance explains that “[t]he FCC’s proposals will likely upset consumers’ settled expectations about which of their family’s media consumption habits are private and which are public. . . . Imagine, for instance, if a married couple started to receive television advertisements for divorce attorneys or online dating websites based on one of the spouse’s Internet browsing histories. Or if a child was exposed to television advertisements about divorce, terminal illness, or other sensitive topics that

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<sup>143</sup> See NCTA Comments at 133.

<sup>144</sup> *Id.* at 134.

<sup>145</sup> See AT&T Comments at 48-53.

<sup>146</sup> See Free State Foundation Comments at 2-3; Taxpayers Protection Alliance Comments at 4-5; Directors Guild Comments at 8-9; National Hispanic Foundation of the Arts Comments at 2; ASPIRA Comments at 2; Japanese American Citizens League Comments at 2; NOBEL Women Comments at 1-2; MANA Comments at 2; TechLatino Comments at 2; LGBT Technology Partnership Comments at 2; International Center for Law & Economics Comments at 31, 35.

one of her parents may have recently researched.”<sup>147</sup> The National Black Caucus of State Legislators warned that “minority and low-income communities face heightened risk of data-driven discrimination in pricing and services . . . . Currently, personal TV viewing data is protected by federal privacy laws under the Communication[s] Act, but the large tech companies your proposed mandate seeks to empower are not subject to these same restrictions.”<sup>148</sup> And even some NPRM supporters agreed that “viewing habits and personally identifiable information of consumers should not be improperly disclosed, and protections should be enforceable by administrative and private rights of action in the event of a violation.”<sup>149</sup>

NPRM supporters’ principal response to these concerns is that third-party navigation devices would still be subject to *some* legal protections.<sup>150</sup> But, as even many NPRM supporters are forced to recognize, third-party navigation device providers are not cable or satellite providers, and thus would not be subject to the *same* comprehensive privacy protections that Congress decided were appropriate in this context. Thus, Google candidly states that “limitations on the FCC’s jurisdiction . . . prevent it from applying the rules that apply to ‘cable operators’ and ‘satellite carriers’ to suppliers of devices.”<sup>151</sup>

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<sup>147</sup> Digital Citizens Alliance Comments at 9; *see* Sue Scheff, *Are You and Your Family’s Privacy Now At-Risk From Simply Watching TV?*, Huffington Post (May 10, 2016) (73% of the public state they oppose targeted advertisements on their television), [http://www.huffingtonpost.com/sue-scheff/are-you-and-your-familys-privacy-now-at-risk-from-simply-watching-tv\\_b\\_9871278.html](http://www.huffingtonpost.com/sue-scheff/are-you-and-your-familys-privacy-now-at-risk-from-simply-watching-tv_b_9871278.html).

<sup>148</sup> National Black Caucus of State Legislators Comments at 1-2.

<sup>149</sup> CCIA Comments at 25; *see also* EFF Comments at 5-7; Public Knowledge Comments at 36; NTIA Comments at 5.

<sup>150</sup> *See, e.g.*, CVCC Comments at 44-46; Google Comments at 5-8; Amazon Comments at 7-8; TiVo Comments at 25-29.

<sup>151</sup> Google Comments at 7 (footnote omitted).

Accordingly, if the Commission were to proceed on this course, it would be actively circumventing the rules that Congress intended to apply here and adopting a regime that Congress could never have intended: one where the same personal information is subject to different protection depending on whether it is held by an MVPD or a third-party interface provider, such as Google. If anything, Congress surely would have been significantly *more* concerned with entities, such as Google, that seek (and now essentially possess) “data dominance.” Google already compiles detailed sets of information on consumers through non-video sources such as search results, email, operating systems, browsers, online video services, travel apps, and many other mechanisms that ordinary MVPDs, including the many small providers that would be affected by the NPRM, lack.<sup>152</sup> The NPRM thus turns existing privacy law and policy on its head.<sup>153</sup> The Apps Approach, by contrast, relies on applications developed by MVPDs, and thus ensures that consumers continue to receive the same level of privacy protection as provided when consumers use STBs.

Even the NPRM proponents do not endorse the specific privacy proposal stated therein. Instead, they claim that the Commission can reasonably rely on state laws and the possibility of Federal Trade Commission (“FTC”) enforcement.<sup>154</sup> Neither is a sufficient substitute.

*First*, as to state law, Congress found it “important that *national* cable legislation establish a policy to protect the privacy of cable subscribers.”<sup>155</sup> As NTIA itself has noted, a

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<sup>152</sup> See Declaration of Michael Kearns ¶¶ 16-25, 54-63 (Attachment 3 to AT&T Comments).

<sup>153</sup> See, e.g., Letter from Reps. Diana DeGette and Joe Barton to Thomas E. Wheeler, Chairman, FCC (May 11, 2016) (co-chairs of the Congressional Privacy Caucus express “concern” that “existing privacy protections enjoyed by cable and satellite subscribers will not be retained as the Commission moves forward on a rulemaking regarding third party navigation devices”).

<sup>154</sup> See *supra* note 1500.

<sup>155</sup> H.R. Rep. No. 98-934, at 30 (1984) (emphasis added), *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

hodge-podge of state laws is no substitute for that uniform national policy. “[T]he baseline privacy protection a subscriber receives should not hinge on where the consumer lives.”<sup>156</sup>

*Second*, the FTC itself suggests that third-party devices should be required to “provide[] *consumer-facing* statements promising to comply with the privacy obligations that apply to MVPDs,” which the FTC allegedly would be able to enforce.<sup>157</sup> In this regard, the FTC’s proposal goes beyond the NPRM by ensuring that third parties take public positions and “pledge” that they would comply with existing privacy requirements. The FTC’s proposal, however, still falls short of the protections that Congress intended to apply here. Under the Communications Act’s privacy protections, consumers have both agency oversight (through the FCC) *and* a private right of action to supplement agency enforcement.<sup>158</sup> The FTC’s proposal would remove the private right of action (because there is none under the FTC Act) as well as water down consumers’ substantive privacy protections.<sup>159</sup> This cobbled-together scheme thus would still deprive consumers of the rights that Congress granted them under federal law.

Public Knowledge effectively concedes these deficiencies by encouraging the Commission to adopt “privacy by design” rules.<sup>160</sup> It proposes to require third-party licensing bodies to ensure third-party navigation devices are complying with existing privacy

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to abide by the same privacy obligations that section 631 of the Communications Act . . . applies to cable operators.”).

<sup>156</sup> NTIA Comments at 6 n.27.

<sup>157</sup> FTC Comments at 6; *see also* CVCC Comments at 44-45.

<sup>158</sup> *See* 47 U.S.C. §§ 338(i), 551; *see also* AT&T Comments at 82-83.

<sup>159</sup> *See* AT&T Comments at 52-53; Digital Citizens Alliance Comments at 14; NCTA Comments at 80-81.

<sup>160</sup> Public Knowledge Comments at 33-35 (arguing “the Commission can specifically ensure that viewers using competitive app[s] and devices have the same or greater privacy protections as viewers using MVPD-supplied devices and apps” by enacting additional rules).

protections.<sup>161</sup> Public Knowledge identifies no legal basis for imposing this requirement on licensing bodies, nor does it even attempt to say how this would work in practice. As AT&T previously explained, the NPRM would prohibit MVPDs from being involved in “testing and certification,”<sup>162</sup> and Public Knowledge identifies no suitable licensing body that is independent from MVPDs or specifies who would fund the licensing and privacy certification process.<sup>163</sup> Nor does any other commenter describe an effective way for MVPDs to police whether third-party navigation devices are complying with third-party requirements.<sup>164</sup>

In all events, the NPRM’s proposed solution of having an MVPD shut off content to a consumer because an independent third-party interface provider failed to adhere to privacy protections would punish innocent consumers, contributing significantly to consumer confusion, anger, and inconvenience when their navigation device stops working. That customer frustration, moreover, would likely be misdirected at an innocent MVPD that has done nothing to diminish consumers’ privacy rights.<sup>165</sup>

NPRM supporters attempt to deflect these significant privacy concerns by claiming that MVPDs currently “collect and monetize viewer data” and that the introduction of third-party

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<sup>161</sup> *See id.* at 35 (acknowledging concerns about the Commission’s jurisdiction over third-party devices and stating that “the Commission need only use its authority over MVPDs themselves in this matter”).

<sup>162</sup> NPRM ¶ 72.

<sup>163</sup> Public Knowledge also suggests (at 36) in two sentences that the Commission can regulate third-party navigation devices directly either by deeming them to be part of a “cable system” under 47 U.S.C. § 522 or through its ancillary jurisdiction. Such sweeping assertions of Commission authority have repeatedly failed in court, especially as to ancillary authority, and, in any event, cannot rest on so little analysis. Moreover, even other NPRM supporters refute Public Knowledge’s argument. *See* TiVo Comments at 25; Google Comments at 7; Amazon Comments at 8.

<sup>164</sup> *See* AT&T Comments at 85-86.

<sup>165</sup> *See id.* at 85.

navigation devices would increase “privacy” competition and therefore enhance privacy protections.<sup>166</sup> These parties do not provide a shred of evidence, however, that MVPDs are not already fully complying with the comprehensive privacy restrictions that apply to them. Instead, they rely on news articles describing MVPD conduct that is fully consistent with the existing privacy protections, because the conduct discussed there does not involve collecting or disclosing personally identifiable information without prior consent.<sup>167</sup> In any event, the NPRM proposal would result in device providers gaining unprecedented access to consumers’ personally identifiable information outside the statutory privacy framework, which can only *increase* the risk of misuse of data regarding consumers’ video viewing habits.

## **II. The NPRM Proposal Is Unlawful**

### **A. Section 629 Does Not Authorize the NPRM’s Proposed Unbundling**

Supporters of the NPRM’s proposed approach disregard the fundamental and irreconcilable conflict between their extraordinarily expansive understanding of the FCC’s power to interfere with private video markets and the limited statutory authority that Congress actually granted the Commission. In particular, by its terms, Section 629(a) gives the Commission limited authority to promote the commercial availability of “equipment” that consumers use to “access” existing MVPD services, *i.e.*, “multichannel video programming and other services offered over multichannel video programming systems.” Nothing in that provision authorizes

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<sup>166</sup> See CVCC Comments at 44; TiVo Comments at 29-30; Public Knowledge Comments at 30-32.

<sup>167</sup> See Mike Shields, *AT&T Plans To Sell Linear TV Programmatically*, Wall St. J. (Mar. 3, 2016) (explaining that AT&T’s advertising proposal is “[u]nlike many digital ads, which are delivered to people in milliseconds and targeted to them based on their Web surfing history”), <http://www.wsj.com/articles/at-t-plans-to-sell-linear-tv-programmatically-1457002801>; Shalini Ramachandran & Suzanne Vranica, *Comcast Seeks To Harness Trove of TV Data*, Wall St. J. (Oct. 20, 2015) (reporting that Comcast “is in talks to license portions of [its] data to other companies on an aggregated and anonymized basis”), <http://www.wsj.com/articles/comcast-seeks-to-harness-trove-of-tv-data-1445333401>.

the Commission to promote *new* services or the creation of competition in “user interfaces” that might permit searching across MVPD services and other providers’ offerings. And, if there were any doubt as to the limited scope of the Commission’s authority, Congress specified that Section 629 should not be “construed as expanding . . . any authority that the Commission may have under law” at the time of that provision’s enactment.<sup>168</sup>

Moreover, as AT&T and many others have explained, the legislative history of Section 629 established that Congress specifically *rejected* a House version of the bill that potentially would have given the Commission broader authority than assuring access to existing MVPD services.<sup>169</sup> And, in 2014, Congress *again* rejected a proposal that would have authorized the Commission to require unbundling so that third parties could access an MVPD’s “programming, features, functions, and services.”<sup>170</sup>

Supporters of the NPRM proposal do not grapple with any of these points. Instead, they merely recite the language of Section 629, and then pretend that the statutory text somehow justifies the breathtaking sweep of what the Commission proposes to mandate here. Public Knowledge, for instance, quotes Section 629(a) and then declares, without analysis, that “Congress has told the FCC what to do and how to do it.”<sup>171</sup> The “what to do” apparently includes cataclysmic changes in the video ecosystem, including forced unbundling of MVPD services into “Information Flows” and the truncating of those existing services into “Navigable Services” (a term Congress never used) to support new third-party services, even though one can

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<sup>168</sup> 47 U.S.C. § 549(f).

<sup>169</sup> *See, e.g.*, AT&T Comments at 64-65; NCTA Comments at 162-63 & App. A at 24-25; International Center for Law & Economics Comments at 13-14; Comcast Comments at 40; CenturyLink Comments at 6-7.

<sup>170</sup> *See* AT&T Comments at 65 & n.228.

<sup>171</sup> Public Knowledge Comments at 5.

search Section 629 in vain for any statutory text that authorizes those extreme regulatory measures. INCOMPAS likewise asserts that the “proposals included in the *NPRM* fulfill the statute’s purpose and explicit direction”<sup>172</sup> but, again, does not explain where or how Congress authorized the promotion of new services, the paring of MVPD service down to “Navigable Services,” or the unbundling of MVPD service into discrete Information Flows.

NPRM supporters hazard no explanation on these issues because no explanation is possible. The extraordinarily intrusive regulatory scheme the Commission is contemplating goes far beyond Section 629’s explicit and limited mandate: ensuring the availability of competitive “equipment” that provides “access” to existing MVPD services. Indeed, the NPRM expressly states (§ 15) that it seeks to reduce MVPD control over “user interfaces,” a goal that is nowhere mentioned in Section 629. And, as the supporting comments make clear, the whole point of the NPRM proposal is to allow Google and other third parties to create their *own* services that combine piece-parts of existing MVPD services with new “user interfaces” and access to *other* video offerings. To Google, the NPRM’s goal is to allow “viewers . . . seamlessly [to] discover and select lawful content online alongside programming from their pay-TV offerings.”<sup>173</sup> And CVCC proclaims that the NPRM would lead to “unique user interfaces, enhanced search functionality, and improved means for recording and viewing content.”<sup>174</sup>

Leaving aside the fact that there is every reason to believe that the market would provide these features in STBs and other navigation devices if they are what consumers want,<sup>175</sup> the key point for present purposes is that the text of Section 629 does not authorize the Commission to

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<sup>172</sup> INCOMPAS Comments at 8-9.

<sup>173</sup> Google Comments at 3.

<sup>174</sup> CVCC Comments at 15.

<sup>175</sup> *See supra* p. 9.

promote new services or to require that MVPDs take action in order to enable customers to search for, and gain access to, *non*-MVPD services. As NTCA has explained, the Commission’s proposal would have the “opposite effect” of what the statute intended by “allowing third parties to offer their own derivative services” and “actually *preventing* consumers from accessing ‘MVPD services’ as the statute intended.”<sup>176</sup> And, as the D.C. Circuit specifically reminded the Commission in *EchoStar*, the Commission has no authority to go beyond the limits created in Section 629, much less to contravene the explicit intent of that provision.<sup>177</sup>

Further demonstrating their departure from the statutory text (but echoing the recent statement of an unnamed “Commission official”<sup>178</sup>), supporters of the NPRM scheme perversely claim that the Apps Approach that allows consumers to do *exactly* what Section 629 seeks to encourage – “access” “multichannel video programming” through competitive “equipment” – is somehow legally irrelevant. To these parties, as long as the millions of competitive devices use allegedly “proprietary” apps and do not permit search of non-MVPD content, they are insufficient to meet Section 629’s goals. Thus, Public Knowledge, for instance, argues that the Apps Approach “fall[s] short of the vision of Section 629” because it is inherently a “walled garden” that allegedly offers a “fragmented” viewing experience.<sup>179</sup>

That assertion is wrong as both a factual and a legal matter. Factually, as discussed above, MVPD apps are no more a “walled garden” than those provided by Netflix, Amazon, Hulu, and innumerable others. Instead, consumers choose an “umbrella” environment by picking which of the many available competing devices they want to use. Within that larger

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<sup>176</sup> NTCA Comments at 39.

<sup>177</sup> See *EchoStar*, 704 F.3d at 997 (FCC cannot impose requirements with a “tenuous . . . connection to § 629’s mandate”).

<sup>178</sup> Ramachandran, *supra* note 1.

<sup>179</sup> Public Knowledge Comments at 3.

environment, each provider controls the look and feel of its own app to best meet consumers' demands. Consumers are then free to choose which service they want to use based on the competing apps' available content and features. And, just like Netflix, Hulu, Amazon, and other competitors, MVPDs are responding to market demand for robust apps-based access, making more programming available to consumers on more devices every day.<sup>180</sup>

Legally, arguments like Public Knowledge's are irrelevant. The bottom line is that MVPD apps allow consumers to "access" "multichannel video programming" through innumerable pieces of competitive "equipment" (smartphones, gaming consoles, tablets, laptops, smart TVs, etc.) not obtained from an MVPD. That is precisely what the statute is intended to promote, and that should be the end of the matter.

Nor do the supporters of the FCC's regulatory approach gain anything by analogizing the current proposal to the CableCARD regime and the judicial decisions upholding aspects of that scheme.<sup>181</sup> Far from merely being a "successor to CableCARD,"<sup>182</sup> the current proposal is fundamentally different. In accord with Section 629, CableCARD attempted to ensure that competitive "equipment" could perform the security functions necessary to show *existing* "multichannel video programming." The issue in those cases was whether cable operators themselves had to separate the security functions in the STBs they used to show existing MVPD programming.<sup>183</sup> Thus, the separation of the discrete security function at issue there from the rest of the STB did not seek to promote *new* services that combine aspects of MVPD services

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<sup>180</sup> See *supra* pp. 9-13.

<sup>181</sup> See, e.g., CFA Comments at 6; Public Knowledge Comments at 10.

<sup>182</sup> Public Knowledge Comments at 10.

<sup>183</sup> See, e.g., *General Instrument Corp. v. FCC*, 213 F.3d 724, 729 (D.C. Cir. 2000) ("Petitioners' primary argument is that the FCC exceeded its authority under Section 629 by precluding cable operators from offering integrated converter boxes to their customers.").

with other video programming and alternative “user interfaces.” Accordingly, it is the *contrast* between CableCARD and the current proposal that is legally significant. Perhaps that is why the NPRM does not cite any of the CableCARD cases highlighted by these parties as support for what the Commission proposes here.

Similarly, rote incantations of *Carterfone*<sup>184</sup> by the NPRM supporters do not change the analysis.<sup>185</sup> As AT&T has emphasized, *Carterfone* did not involve the language of Section 629, so it sheds no light on this statutory text. Nor did *Carterfone* involve MVPD networks, which the Commission has recognized are fundamentally different from voice telephone networks.<sup>186</sup>

Even as a loose analogy, *Carterfone* fails. This matter does not involve permitting non-harmful devices to access an MVPD’s service. Rather, it involves the Commission mandating that a service be broken completely apart so that other entities can employ parts of the service under their own names. By correct analogy, *Carterfone* would have required not only the ability to attach an alternative telephone to the network, but also that the switching and signaling functionalities be provided as separate information flows to the telephone device manufacturer. *Carterfone* involved no such thing. As NCTA has explained, the proposal here would have the “opposite” effect of *Carterfone*: “*Carterfone* was intended to enable consumers to attach *compatible* telephones; it did not grant a right to telco competitors to demand that AT&T replace or change its central office switches and its signaling network to become compatible with otherwise *incompatible* services and equipment that the competitor sought to offer.”<sup>187</sup> Indeed, as we have stressed, when Congress (in the same Telecommunications Act of 1996) did intend to

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<sup>184</sup> Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) (“*Carterfone*”).

<sup>185</sup> See, e.g., INCOMPAS Comments at 8.

<sup>186</sup> See AT&T Comments at 67.

<sup>187</sup> NCTA Comments at 160-61.

mandate this kind of aggressive unbundling of the piece-parts of a service so that third parties could create their own new, branded services, it did so in a detailed and explicit fashion that bears no resemblance to Section 629.<sup>188</sup>

**B. No Other Statutory Provision Authorizes the NPRM Proposal**

Like the NPRM itself, commenters make only cursory attempts to suggest that statutory provisions other than Section 629 could supply legal authority for the extraordinary regulatory intervention that the Commission proposes. Those half-hearted arguments fail.

A few parties point to Congress’s enactment of the STELA Reauthorization Act of 2014 (“STELAR”)<sup>189</sup> as supporting the NPRM proposal.<sup>190</sup> That statute, however, does not provide the FCC *any* new authority at all; much less does it authorize what the Commission has proposed here. Rather, STELAR requires only a “report” and “recommendation” from outside experts, and even that is limited to the topic of a “not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system.”<sup>191</sup> That statutory language does not even authorize the much broader report that DSTAC ultimately issued, and it certainly does not grant substantive authority to intervene in private markets in ways that go far beyond “downloadable security systems,” much less in the extravagantly “burdensome” way the NPRM suggests.

Section 624A likewise cannot authorize this proposal. As CVCC concedes, Section 624A does not apply to satellite providers.<sup>192</sup> The plain text of that provision confirms that

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<sup>188</sup> See AT&T Comments at 63-64 (discussing Sections 251 and 252).

<sup>189</sup> Pub. L. No. 113-200, 128 Stat. 2059.

<sup>190</sup> See CVCC Comments at 22; CCIA Comments at 6-7; TiVo Comments at 10-11.

<sup>191</sup> STELAR § 106(d)(1), 128 Stat. 2063.

<sup>192</sup> See CVCC Comments at 24.

fact.<sup>193</sup> Nor, in any event, does CVCC, or any other party, explain how the sort of massive regulatory re-engineering of the video ecosystem that the NPRM contemplates could possibly be construed to be “narrow technical standards” necessary to ensure “compatibility” between cable systems and “televisions and video . . . recorders.”<sup>194</sup> That is all that Section 624A authorizes.

Section 335, also cited by CVCC,<sup>195</sup> is equally far afield. The text of Section 335 makes clear that the provision is limited to “public interest or other requirements *for providing video programming*.”<sup>196</sup> The provision is exclusively about ensuring a minimum level of “noncommercial, educational, state public affairs, and informational programming.”<sup>197</sup> CVCC wrenches that language from context in seeking to turn a limited PEG-like requirement into a license to take any action the Commission might decide would further the “public interest.”<sup>198</sup> It cites no prior case supporting that sweeping interpretation of Section 335, and none exists.

### **C. Other Aspects of the NPRM’s Proposed Statutory Interpretation Are Also Indefensible**

As AT&T explained in its Comments, the NPRM also proposes to warp the statutory language in additional significant respects to reach the Commission’s desired policy goal.<sup>199</sup> Individually, each of these clear statutory violations is unjustifiable. When layered on top of each other, they demonstrate even more clearly that the NPRM proposal is fundamentally incompatible with the statutory scheme and would lead to a judicial rebuke of any order adopting

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<sup>193</sup> See 47 U.S.C. § 544a(b)(1) (referring to “cable service,” “cable subscribers,” and “cable systems”).

<sup>194</sup> *Id.* § 544a(a)(4), (b)(1).

<sup>195</sup> See CVCC Comments at 24 & n.46.

<sup>196</sup> 47 U.S.C. § 335(a) (emphasis added).

<sup>197</sup> *Id.* § 335(b) (heading).

<sup>198</sup> NPRM ¶ 20.

<sup>199</sup> See AT&T Comments at 68-74.

this proposal.<sup>200</sup> To the extent commenters even address these issues – and they hardly do so – their arguments do nothing to alter that conclusion.

1. The NPRM’s suggestion that the word “equipment” as used in Section 629(a) includes software applications by themselves (and not only as an adjunct to physical hardware on which they are installed) is unsustainable.<sup>201</sup> In its plain meaning, in the context of a phrase referring to other physical items (“converter boxes” and other “interactive communications equipment”), and under consistent regulatory understanding, the term “equipment” does not refer to software applications by themselves.<sup>202</sup>

Without addressing any of that statutory and regulatory evidence, INCOMPAS suggests that a contrary conclusion would be “justifiable” because of the “interrelatedness of hardware and software in widely-available navigation devices both when Section 629 was passed in 1996 and today.”<sup>203</sup> That is beside the point. Equipment can and does include the software used to run it, but that does not turn the software *itself* into equipment, any more than icing by itself is “cake” because it is often part of a cake. Nor does STELAR’s reference to a “software-based downloadable security system” change the meaning of the word “equipment.”<sup>204</sup> Congress understood that software-based security solutions might be used with – and enhance the viability of – competitive equipment, but that does not change the fact that the equipment itself is a physical item, such as an STB, iPhone, or tablet.

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<sup>200</sup> See *id.* at 60-61.

<sup>201</sup> See NPRM ¶ 22.

<sup>202</sup> See AT&T Comments at 70-72.

<sup>203</sup> INCOMPAS Comments at 9.

<sup>204</sup> *Id.* at 9-10.

Even more clearly, contrary to CFA’s claim, one does not “fulfill the purpose of the Act” by ignoring the plain text of the statute Congress adopted.<sup>205</sup> On the contrary, as the Supreme Court has long established, “the legislative purpose is expressed by the ordinary meaning of the words used.’”<sup>206</sup> That principle is dispositive here.

2. The NPRM’s tortured conclusion that any entity with a “business relationship” with an MVPD is an “affiliate” – so that competitive devices provided by that entity do not “count” under Section 629 – is likewise contrary to that term’s plain meaning, as well as long-established regulatory understandings, including the specific definition of “affiliate” that Congress created for Title VI of the Communications Act.<sup>207</sup> Indeed, if this reading were correct, it would lead to absurd results such that an independent third-party maker of tablets and other competitive devices already offered in the market could become an “affiliate” simply because it later entered into an arm’s-length deal also to supply equipment to an MVPD.

Commenters barely defend the NPRM’s fanciful interpretation. Public Knowledge asserts that apps created in “partnership with MVPDs” do not qualify under the statute, but it never explains how an arm’s-length contractual relationship to support an app’s creation produces an “affiliation” under any ordinary understanding of that term. Even more to the point, it does not try to square that conclusion with 47 U.S.C. § 522(2), 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>208</sup> In any event, it is not the app but

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<sup>205</sup> CFA Comments at 6.

<sup>206</sup> *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

<sup>207</sup> See AT&T Comments at 72-74.

<sup>208</sup> 47 U.S.C. § 522(2); see Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780 (“Cable Act”). Congress demonstrated the same understanding of the scope

the competitive “equipment” (the iPad, smartphone, Roku, etc.) that allows “access” to the MVPD programming that is relevant in determining whether there are “commercial[ly] availabl[e]” alternatives under Section 629(a), so Public Knowledge’s argument is irrelevant.

#### **D. The Commission’s Reading Would Contravene Other Legal Regimes**

The Commission has an obligation to interpret Section 629 to avoid conflicts with other statutory regimes.<sup>209</sup> Many commenters described how the proposal in the NPRM violates this duty in multiple respects.<sup>210</sup> The Apps Approach, by contrast, furthers the goal of Section 629 without presenting any such conflicts.

##### ***1. Copyright***

MVPDs have protected copyright and contractual interests in their service, including its branding, channel lineup, user interface, and advertisements.<sup>211</sup> In contravention of those rights, the proposal in the NPRM would require MVPDs to unbundle their service so that third-party devices can create unauthorized derivative works.<sup>212</sup> As Comcast has aptly explained, the NPRM would, if adopted, “deprive[ ] MVPDs of copyright interests in their own creative works by interfering with their creative judgment in the selection and arrangement of content and illegally mandating a new ecosystem in which third parties are permitted to break up and recast

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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>209</sup> See AT&T Comments at 76-77 (citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985) (per curiam), and *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974)).

<sup>210</sup> See, e.g., MPAA/SAG-AFTRA Comments at 4-12 (Copyright Act and DMCA); Comcast Comments at 46-51 (Copyright Act), 87 n.239 (DMCA), 94-97 (privacy); NCTA Comments, App. A at 36-40 (privacy), 41-54 (Copyright Act and DMCA); Content Companies Comments at 35-40 (Copyright Act).

<sup>211</sup> See AT&T Comments at 77-78.

<sup>212</sup> See *id.* at 78-79.

discrete components of each MVPD's distinctive bundle of programming and user interface."<sup>213</sup> No party supporting the proposal is able to show that these aspects of the NPRM are consistent with copyright law.

*First*, Public Knowledge claims that "the FCC's current proposal is simply a successor to CableCARD that gives competitors the same rights and abilities they enjoyed under that system."<sup>214</sup> But CableCARD devices did not permit third parties to alter channel lineups, rearrange content, or insert advertisements in anything like the way the Commission's current proposal would allow.

*Second*, Public Knowledge argues that "both the Copyright Act and Section 629 were enacted by Congress," and thus they must be read consistently.<sup>215</sup> This is correct, but it severely undercuts the NPRM proposal. The Copyright Act is clear that MVPDs have protected copyright interests in their service, and the Commission may not interpret Section 629 to destroy those protections.<sup>216</sup> Put differently, it is the Commission's duty to read Section 629 in light of that established understanding of MVPD's rights.

*Third*, the Electronic Frontier Foundation and Public Knowledge assert that the NPRM does not "authorize" copyright violations and that competitive navigation devices would not infringe because they merely display content in the manner of a television set.<sup>217</sup> That drastically understates what third-party navigation devices would be able to do under the NPRM proposal. These devices would be able to actively alter the constituent parts of MVPDs' services – creating

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<sup>213</sup> Comcast Comments at 50; *see* NCTA Comments at 167-68.

<sup>214</sup> Public Knowledge Comments at 10.

<sup>215</sup> *Id.*

<sup>216</sup> *See* AT&T Comments at 76-77.

<sup>217</sup> EFF Comments at 3; Public Knowledge Comments at 11-12.

unauthorized derivative works<sup>218</sup> – and then display the reconstituted service to consumers. That is infringing conduct.<sup>219</sup> In all events, whether the proposal technically “authorizes” copyright violations is beside the point. The proposal facilitates significant copyright violations, and it is absurd to believe that Congress intended the Commission to adopt a reading of Section 629(a) that would have that result.

## 2. *DMCA*

Congress enacted the DMCA to protect MVPDs’ and programmers’ ability to use content protection systems of their choice.<sup>220</sup> In particular, Congress specifically enacted the “anti-circumvention protections” in the DMCA “to accommodate the content protection software that [is] used in relation to audiovisual works on digital networks.”<sup>221</sup> Thus, MVPDs have a statutory right to choose the content protection software that they believe best protects copyrighted material. The NPRM proposal would undermine that DMCA right by requiring MVPDs to support a least-common-denominator “compliant” security solution.<sup>222</sup>

Notably, CCIA concedes the relevance of the DMCA and its protections. Then, however, without addressing the text of the DMCA or the rights it grants MVPDs, it simply asserts that the NPRM would retain “strong copyright protections.”<sup>223</sup> CCIA’s (incorrect) evaluation of the strength of the copyright protections is no substitute for adherence to the regime that Congress chose, and it does nothing to demonstrate that the NPRM is consistent with the DMCA.

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<sup>218</sup> See *supra* pp. 19-20; AT&T Comments at 43-44.

<sup>219</sup> See 17 U.S.C. § 106(1), (2), (4), (5); AT&T Comments at 78.

<sup>220</sup> See AT&T Comments at 81-82; see also NCTA Comments at 42-44.

<sup>221</sup> CCIA Comments at 22-23.

<sup>222</sup> See AT&T Comments at 27-28, 46-47.

<sup>223</sup> CCIA Comments at 22 (heading).

### 3. *Privacy*

As discussed above, there is no dispute that the NPRM proposal would result in different privacy protections for customers using MVPD devices and those using third-party devices.<sup>224</sup> MVPDs would be subject to the explicit restrictions on use of customer information contained in Sections 338 and 631 of the Communications Act.<sup>225</sup> Other parties would not be subject to those requirements, even though they have obtained the same information from the same sources.<sup>226</sup> Separate and apart from the significant policy issues raised by this asymmetry, there is a fundamental question of statutory interpretation: why would Congress have intended two different privacy regimes to apply to consumers depending on whether they use an MVPD or third-party device? The silence from the Commission's supporters on this point is deafening. Congress intended Sections 338 and 631 to set forth "national" privacy requirements applying to all consumers; the NPRM proposal would create an enormous loophole in that national regime.<sup>227</sup> That cannot have been Congress's intent, and a reading of Section 629 that creates that result must be rejected.

#### **E. NPRM Supporters Do Not Grapple with the Real First Amendment Concerns That Further Undermine the NPRM's Statutory Interpretations**

AT&T explained in its comments that the NPRM proposal raises significant additional concerns. These include significant constitutional issues under both the First Amendment and the Fifth Amendment<sup>228</sup> that not only provide an independent basis for judicial invalidation, but

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<sup>224</sup> See *supra* pp. 37-38; AT&T Comments at 82-86.

<sup>225</sup> See 47 U.S.C. §§ 338, 551.

<sup>226</sup> See *supra* pp. 37-38.

<sup>227</sup> See H.R. Rep. No. 98-934, at 30, 1984 U.S.C.C.A.N. 4667; see also H.R. Rep. No. 108-634, at 19 ("Section 338(i) obligates satellite operators to abide by the same privacy obligations that section 631 of the Communications Act . . . applies to cable operators.").

<sup>228</sup> See AT&T Comments at 87-95.

also would lead a court to reject the Commission’s statutory interpretation under the established principle that statutes must be construed to avoid “serious constitutional difficulties.”<sup>229</sup> On top of those constitutional concerns, adopting the NPRM scheme would be arbitrary and capricious and violate established principles of non-delegation.<sup>230</sup> Moreover, as EchoStar and DISH have pointed out, the NPRM fails to provide adequate APA notice as to the specific requirements that would apply to satellite MVPDs. As EchoStar and DISH correctly state, “while the [NPRM] recognizes differences in satellite technology – and *references* the need for a gateway device in each DBS subscriber’s home – it makes no effort to explain how satellite carriers might possibly implement the rules as proposed.”<sup>231</sup>

To the extent commenters take on these issues at all, they focus on the First Amendment. Their arguments, however, are again insubstantial.

At the outset, commenters do not, and cannot, contend that MVPDs lack First Amendment rights in this context. In fact, the Supreme Court has established that MVPDs engage in protected speech when they select and organize programming services.<sup>232</sup> And MVPDs likewise have speech interests in their presentation of content to customers, the look and feel of their service, and the interface used to present their content, among other things. Thus, as AT&T has explained, the NPRM’s statement that the proposed rules “simply require MVPDs to

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<sup>229</sup> *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003). The Commission would thus receive no *Chevron* deference from a reviewing court in this circumstance. 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>230</sup> See AT&T Comments at 96-104.

<sup>231</sup> EchoStar/DISH Comments at 7.

<sup>232</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).

provide content of their own choosing to subscribers to whom they have voluntarily agreed to provide such content,”<sup>233</sup> does not address the actual speech infringement here.<sup>234</sup>

To be sure, Public Knowledge asserts that the First Amendment “does not limit FCC or Congressional authority . . . in any way that opponents suggest,” but it provides no analytical support for that conclusory statement.<sup>235</sup> Without citing a single case, it claims that any First Amendment claim here “proves too much” because, “[i]f the First Amendment prohibited Congress and the FCC from promoting a competitive market for video navigation services, it would also prohibit much of existing media policy.”<sup>236</sup>

That is nonsense. First Amendment analysis in this context requires careful consideration of the specific infringement at issue, the substantiality of the government’s asserted interest, and whether the infringement is no greater than essential to further the allegedly substantial interest.<sup>237</sup> How that analysis comes out depends on the facts of each case.<sup>238</sup> Here, there is no substantial government interest in ensuring that device makers can offer competing video services, programming guides, user interfaces, and applications, because neither the

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<sup>233</sup> NPRM ¶ 45.

<sup>234</sup> See AT&T Comments at 88-89; see also Comcast Comments at 54-56 (“The Commission’s proposal would violate MVPDs’ . . . First Amendment rights by interfering with their right to exercise control over the selection and presentation of their content and services and by compelling the altered presentation of their services.”); NCTA Comments, App. A at 69-74 (“The proposed rules severely interfere with these rights by compelling MVPDs and programmers to endorse and associate with messages that are not their own, and by restricting their own protected editorial expression.”).

<sup>235</sup> Public Knowledge Comments at 13.

<sup>236</sup> *Id.*

<sup>237</sup> See *Turner I*, 512 U.S. at 662 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>238</sup> Compare *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (per curiam) (upholding certain Cable Act requirements), with *Time Warner Entm’t Co.*, 240 F.3d at 1139 (finding that agency had failed to justify regulation “as not burdening substantially more speech than necessary”).

Communications Act in general, nor Section 629 in particular, authorizes the Commission to promote any of that. And, by following the Apps Approach, the FCC could clearly satisfy the statutory 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 (indeed, not at all). Thus, whatever the case in other contexts, under established standards, the Commission's proposal here cannot withstand scrutiny.

Nor does it matter in this regard that MVPDs "will retain the ability to create their own proprietary apps and devices, and to structure their programming bundles just as they do today."<sup>239</sup> The fact that the government may not abridge *all* MVPD speech in no way forgives the violation of established free speech rights that the NPRM imposes, yet fails even to acknowledge.

#### **F. There Is No Basis in the Record To Alter MVPD Billing Practices**

The Commission previously recognized that "subsidies by entities lacking market power present little risk of consumer harm and to impose [billing and cross-subsidization] restrictions would create market distortions."<sup>240</sup> Since that decision, competition in the video marketplace has exploded.<sup>241</sup> This competitive marketplace prevents MVPDs from cross-subsidizing their STBs (because MVPDs already charge competitive rates), and it prevents MVPDs from charging the same rate regardless of whether a consumer purchases his or her own navigation device (because MVPDs do not have such market power). In this context, regulations would serve no purpose, and, worse, they would impose needless costs and market distortions.

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<sup>239</sup> Public Knowledge Comments at 13-14.

<sup>240</sup> Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775, ¶ 92 (1998) ("*First Plug and Play Order*"); see AT&T Comments at 97-100.

<sup>241</sup> See AT&T Comments at 2-4.

The commenters that advocate for a different result provide no basis for the Commission to reverse its prior decision.<sup>242</sup> *First*, CVCC and Public Knowledge argue that Section 629 requires billing and cross-subsidization restrictions in all cases.<sup>243</sup> The Commission has previously rejected this interpretation of the statute, and commenters provide no basis to reverse that decision.<sup>244</sup> As the Commission explained, Section 629 does not impose a “statutory ban on subsidization [that is] absolute, with no exceptions, even for non-cable MVPDs and cable companies that face effective competition.”<sup>245</sup>

*Second*, CVCC argues that cross-subsidization restrictions are necessary to prevent MVPDs from “driv[ing] out competition from new entrants to the set-top box marketplace.”<sup>246</sup> This argument falsely presupposes that MVPDs have market power and, in all events, is directly contradictory to commenters’ simultaneous (and equally incorrect) argument that STB rates are too high.<sup>247</sup>

*Third*, Public Knowledge asserts that MVPDs should be prohibited from charging for in-home equipment that is necessary to enable third-party navigation devices.<sup>248</sup> The Commission cannot impose massive costs on MVPDs and then completely restrict their ability to recoup those costs. That would confirm that this regime creates an unconstitutional taking.<sup>249</sup> It is also

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<sup>242</sup> See CVCC Comments at 46-47; Public Knowledge Comments at 52; TiVo Comments at 30-31.

<sup>243</sup> See CVCC Comments at 47; Public Knowledge Comments at 52-53.

<sup>244</sup> See *First Plug and Play Order* ¶ 92; NPRM ¶ 82.

<sup>245</sup> *First Plug and Play Order* ¶ 92.

<sup>246</sup> CVCC Comments at 46.

<sup>247</sup> See *id.* at 11.

<sup>248</sup> See Public Knowledge Comments at 52-53.

<sup>249</sup> See AT&T Comments at 93-95.

particularly inappropriate as applied to DBS providers, which, as the Commission recognizes, must place equipment in all consumers' homes.<sup>250</sup>

### CONCLUSION

For the reasons set forth above and in AT&T's Comments, the Commission should withdraw the rules it has proposed in the NPRM.

May 23, 2016

Respectfully submitted,

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<sup>250</sup> See NPRM ¶ 65.