

May 23, 2016

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Michael O’Rielly  
Commissioner Ajit Pai  
Commissioner Jessica Rosenworcel  
Federal Communications Commission  
445 12th Street SW  
Washington DC, 20554

*Re: MB Docket No. 16-42, Expanding Consumers’ Video Navigation Choices; CS Docket No. 97-80, Commercial Availability of Navigation Devices*

Dear Chairman Wheeler and Commissioners:

We write to reiterate our strong opposition to the Federal Communications Commission’s unnecessary and unlawful set-top box proposal,<sup>1</sup> which will unintentionally widen the Digital Divide, especially in rural America, and reduce video and broadband competition in many markets. The proposal would also harm minority, religious, and other niche programmers by arbitrarily and illegally disrupting their business models. We believe this proposal is illegal and unwise in any form.<sup>2</sup> But should the FCC ignore the proposal’s many flaws, despite the absence of meaningful economic analysis of the issue, and enact its unnecessary regulatory mandates anyway, we urge you to lessen the damage it would inflict by exempting small multichannel video programming distributors (MVPDs), as defined in comments by the American Cable Association (ACA).<sup>3</sup>

Smaller MVPDs embody the entrepreneurial spirit that drives innovation and competition in the marketplace. These network operators bring vital communications services (television, broadband and telephony) to rural communities, and offer consumers a competitive alternative to the industry’s largest providers in urban and suburban markets. This same entrepreneurial spirit has led smaller providers to work with third-party device manufacturers, such as TiVo and Roku, to offer consumers more choices with the availability of innovative set-top box solutions, including some that seamlessly integrate their video services with “over-the-top,” Internet-based video services such as Netflix and Hulu.<sup>4</sup>

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1 Expanding Consumers’ Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42 (Feb. 18, 2016), available at <https://goo.gl/8J7NW2>.

2 Expanding Consumers’ Video Navigation Choices, Comments of TechFreedom and the Competitive Enterprise Institute, MB Docket No. 16-42 (Apr. 22, 2016), available at <http://goo.gl/UrVfV1>.

3 Expanding Consumers’ Video Navigation Choices, Comments of American Cable Association, MB Docket No. 16-42 (Apr. 22, 2016), available at <http://goo.gl/qlkYJ3> (proposing to exempt from the rules MVPD systems serving 600,000 or fewer subscribers that are not affiliated with larger MVPDs or other entities).

4 See, e.g., Steve Donohue, Canby Telecom Using Roku and Elemental to Stream Local TV Channels, FIERCECABLE (May 22, 2013), available at <http://goo.gl/QixZUs> (detailing Oregon MVPD Canby’s new service offering over-the-top access to, inter alia, eight local TV channels).

The FCC's flawed plan would undermine today's incredibly dynamic market for video programming, and would have a particularly devastating impact on small businesses, which operate with limited capital. As a result of the proposal's burdensome technical mandates, ACA estimates that at least 200 small MVPDs would either go out of business or stop offering video service altogether.<sup>5</sup> Others might sell their networks to large cable companies, thus reducing competition. Those small MVPDs that do manage to hold on would have to forgo fully investing in broadband networks and other innovative services, and also pass along significant new compliance costs to their customers through higher cable bills. Even if the FCC ultimately loses in court, much of this damage may already have happened, and be irreversible.

Ultimately, it is the customers of small MVPDs who would suffer: nearly 7 million consumers in all 50 states. These Americans have the most to lose if this rulemaking is adopted without an exemption for small MVPDs.

For all these reasons, if the FCC moves forward with its ill-advised proposal, we urge you not to impose new set-top box rules on these small businesses. While this exemption would *not* substantially reduce the harm inflicted upon minority, religious and other niche video programmers — something that deserves careful economic analysis<sup>6</sup> and a Further Notice of Proposed Rulemaking — it would at least avoid harming small MVPDs.

Sincerely,

TechFreedom  
International Center for Law & Economics

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<sup>5</sup> John Eggerton, ACA: FCC Plan Would Drive 200 MVPDs Out of Video, MULTICHANNEL NEWS (May 23, 2016), available at <http://goo.gl/Ln54Ch>.

<sup>6</sup> Expanding Consumers' Video Navigation Choices, Comments of Comments of 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), MB Docket No. 16-42 (Apr. 22, 2016), available at 4, <http://goo.gl/ByfYW5>.