

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

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April 22, 2016

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SUMMARY

In today's highly competitive video marketplace, where consumers have endless options for choosing video programming services and devices, the Commission's proposal for a federal mandate to enable third parties to commandeer programming from MVPDs is not the consumer panacea the agency purports. Rather than empowering consumers, the Commission's proposal would instead drive up consumers' bills, threaten the very broadband networks supporting the increasing number of video options that they enjoy, and substantially erode their well-established consumer protections.

Unlike their MVPD hosts, none of the third parties commandeering the Information Streams will have negotiated the underlying programming contracts with the copyright owners; none of these third parties are subject to the Commission's privacy oversight in the MVPD marketplace; none of these third parties are bound by the Commission's rules on emergency alert notifications or children's programming; and none are bound by the MVPD's contractual terms with either its programmers or customers. Nevertheless, these same third parties – with the full backing of the Commission – will be able to strip the MVPDs of their respective offerings and repackage them as their own.

Given statements from the White House in the days leading up to the comment period in this proceeding, USTelecom also notes that the legitimacy of this rulemaking proceeding may have been irreparably compromised. Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit observed that too many federal agencies “choose their policy first and then later seek to defend its legality.” He further noted that predetermined administrative outcomes have it “backwards,” since “whether or not agencies value neutral principles of administrative law, courts do, and they will strike down agency action that violates those principles – whatever the President's party, however popular the administration, and no matter how advisable the initiative.”

Consumers today – benefitting from what many are calling the “golden age of video – can now choose from an ever expanding range of video content from a multitude of MVPDs and a growing number of subscription and transaction-based OVD services. As consumers migrate towards mobility and apps-based functionalities, MVPDs are increasingly responding to this marketplace reality by developing and deploying the applications and services that consumers are increasingly demanding.

Given these marketplace developments, MVPDs, consumer electronics manufacturers and OVDs have embraced – and are aggressively pursuing – an apps based model to deliver video programming to consumers. The apps-based approach empowers consumers who can now watch content from MVPDs and OVDs on a broad and growing range of customer-owned personal devices, including iOS and Android tablets and smartphones, PCs and Macs, Smart TVs, and TV-attached devices, including game stations, Kindle Fire, Google Chromecast, and Roku.

Adoption of the FCC's proposed rules would be particularly harmful to USTelecom's member companies, most of whom are recent entrants into the MVPD marketplace. In recent years, the MVPD marketplace has evolved, particularly as LECs of all sizes have entered the video market in areas throughout the country. Local telephone company competitive video entry has greatly

benefitted consumers by providing them an alternative to incumbent cable providers which has led to lower consumer prices than in areas without a wireline cable competitor. But in almost every aspect of the MVPD marketplace, USTelecom's member companies face significantly higher costs than their established cable competitors. Adoption of the Commission's proposed rules will only further exacerbate the cost differential between ILECs entering the MVPD marketplace and their more established counterparts.

The increased costs associated with the Commission's proposal will make broadband deployment all the more challenging for ILEC MVPDs, particularly those who are at a competitive disadvantage to larger cable incumbents. At the precise time when government is focusing its efforts on increasing broadband deployment, and as industry continues to invest billions of dollars into upgraded networks, the Commission will nevertheless force the redirection of significant capital expenditures away from this effort. Instead, the Commission will redirect industry resources to develop a standard in an unrealistically brief period of time, in order to deploy costly technologies that consumers and industry are currently moving away from.

Moreover, the Commission's proposal will remove the robust public interest protections that consumers have come to expect. The certification proposal lacks any Commission enforcement mechanisms whatsoever against non-compliant third-party Navigation Device manufacturers and places MVPDs in the untenable position as judge, jury and executioner.

Finally, the Commission's proposal exceeds its authority under Section 629 of the Act, and violates the Fifth Amendment. A plain reading of Section 629 reveals that it authorizes the Commission to promote competition among devices, and not among services. While the statute authorizes the Commission to promote a market for retail devices that receive MVPD services, it provides no basis for the broad unbundling mandate proposed by the Commission in its Notice. The Court of Appeals for the District of Columbia Circuit dismissed previous Commission attempts in this area, warning the agency that its authority under Section 629 is neither "unbridled" nor "as capacious as the agency suggests."

The Commission's proposal would also violate the Fifth Amendment's mandate that "private property" shall not "be taken for public use, without just compensation." At a minimum, it would effect a regulatory taking by seriously interfering with MVPDs' business operations and investment-backed, economic expectations. The Commission's proposal goes well beyond anything Congress envisioned for the implementation of Section 629, and equates to an unauthorized, uncompensated taking of private property in violation of the Fifth Amendment.

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The United States Telecom Association (USTelecom)¹ submits these comments in response to the Notice of Proposed Rulemaking (Notice)² issued by the Federal Communications Commission (Commission) proposing a federal mandate that would enable third parties to commandeer programming from multichannel video programming distributors (MVPDs). Unlike their MVPD hosts, none of these third parties will have negotiated the underlying programming contracts with the copyright owners; none of these third parties are subject to the Commission's privacy oversight in the MVPD marketplace; none of these third parties are bound by the Commission's rules on emergency alert notifications or children's programming; and none are bound by the MVPD's contractual terms with either its programmers or customers. Nevertheless, these same third parties – with the full backing of the Commission – will be able to strip the MVPDs of their respective offerings and repackage them as their own.

Given today's highly competitive marketplace, where consumers have seemingly endless options for choosing video programming services and devices, the proposal contained in the

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets.

² Notice of Proposed Rulemaking, *Expanding Consumers' Video Navigation Choices*, 80 FR 40923, FCC 16-18 (released February 18, 2016) (*Notice*).

Notice is not the consumer panacea the Commission purports. Rather than empowering consumers,³ the Commission's proposal would instead drive up consumers' bills, threaten the very broadband networks supporting the increasing number of video options that they enjoy, and substantially erode their well-established consumer protections.

At the outset, USTelecom must also note that given the statements from the White House in the days leading up to the comment period in this proceeding,⁴ the legitimacy of this rulemaking proceeding may have been irreparably compromised. In a keynote address delivered by Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit regarding the Administrative Procedures Act, he condemned the prevalence of federal agencies "failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law."⁵ As Judge Tatel observed, too many federal agencies "choose their policy first and then later seek to defend its legality."⁶ He further noted that such an approach severs the tie between federal law and administrative policy, thereby "undermining important democratic and constitutional values."⁷

Judge Tatel emphasized in his speech that the framework established by the Administrative Procedures Act is not about satisfying the courts, but is instead about "being

³ Notice, ¶ 1.

⁴ White House Blog, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, April 15, 2016 (available at: <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>) (visited April 22, 2016).

⁵ Keynote Address, Environmental Law Institute, *The Administrative Process and the Rule of Environmental Law*, the Honorable David S. Tatel, p. 2, October 6, 2009 (available at: http://www.law.harvard.edu/students/orgs/elr/vol34_1/1-8.pdf) (visited April 22, 2016) (*Tatel Speech*).

⁶ *Id.*

⁷ *Id.*

responsible public servants,”⁸ and that predetermined administrative outcomes have it “backwards.” Those proceedings are deemed ‘backwards’ because “whether or not agencies value neutral principles of administrative law, courts do, and they will strike down agency action that violates those principles — whatever the President’s party, however popular the administration, and no matter how advisable the initiative.”⁹ The Commission should keep these admonitions in mind as it moves down this unnecessary path towards regulations that would ultimately do more harm to consumers than good.

I. Consumers Today Benefit from a Competitive Retail Navigation Marketplace, Thereby Fulfilling the Section 629 Mandate.

Consumers today are benefitting from what many are calling the “golden age of video” for content creation, distribution, and access to programming.¹⁰ In just the last few years, access to video content is an area where innovation, choice and competition from a broad range of competitors and technologies have radically changed how consumers view content. Consumers today can now choose from an ever expanding range of video content from a multitude of MVPDs and a growing number of subscription and transaction-based online video distributor (OVD) services.¹¹

⁸ *Tatel Speech*, p. 7.

⁹ *Id.*, p. 2.

¹⁰ See e.g., Pando, *Fifteen years after it was promised, the golden age of video has begun*, July 22, 2015 (available at: <https://pando.com/2015/07/22/ugvideo/>) (visited April 22, 2016); see also Ad News, *The golden age of video or the death of TV?*, November 2, 2015 (available at: <http://www.adnews.com.au/news/the-golden-age-of-video-or-the-death-of-tv/>) (visited April 22, 2016) (referring to Director Steven Soderbergh’s statement that “in terms of cultural real estate, we’re in a ‘second golden age of television.’”); see also, PBS News Hour, *Is Netflix the new TV*, July 10, 2014 (available at: <http://www.pbs.org/newshour/bb/netflix-new-tv/>) (visited April 22, 2016). (noting that “critics frequently refer to this era as a new golden age of television.”).

¹¹ See e.g., Notice of Proposed Rulemaking, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, 29 FCC Rcd. 15995, FCC 14-210, ¶ 13 (released December 19, 2014).

A. Many MVPDs Are Transitioning Away from Set Top Boxes Towards App-Based Consumer Solutions.

In today's competitive video marketplace, consumers' are increasingly migrating towards mobility and apps-based functionalities. This migration is evident in the growing number of OVD services available in the marketplace, as well as the trend in consumers' embracing the flexibility offered through the multitude of consumer electronic devices for consuming the video programming of their choosing.

MVPDs are increasingly responding to this marketplace reality by developing and deploying the applications and services that consumers are increasingly demanding. For example, DIRECTV uses the "Remove Viewing" – or "RVU" technology – that enables Remote User Interface (RUI) technology to allow a single server in the home to provide the same consistent user interface and feature set to multiple RVU enabled devices. In other words, the RVU technology allows DIRECTV's MVPD customers to get the same DVR experience at every TV in the home, but without the need for a set-top box at every TV. And RVU is an "open standard" that other MVPDs, competitive navigation device manufacturers, and other video product manufacturers can employ.

And just this week, Comcast announced the launch of a new program that will expand the range of retail devices their customers can use to access Xfinity TV cable service without the need to lease a set-top box.¹² Comcast will be using the HTML5 standard that has been widely adopted across the industry. Like the RVU technology, HTML5 is an open standard that other TV and device manufacturers can utilize to deploy the Comcast app to customers on their devices.

¹² Comcast Press Release, *Comcast Seeks TV and Other Consumer Electronics Partners to Bring Xfinity TV Cable Service to More Retail Devices*, April 20, 2016 (available at: <http://corporate.comcast.com/comcast-voices/comcast-seeks-partners-to-bring-xfinity-tv-cable-service-to-more-retail-devices>) (visited April 22, 2016).

Additional MVPDs are also embracing the apps-based approach, as evidenced by statistics showing that there have been more than 56 million downloads of MVPD apps.¹³ There are more than 450 million IP-enabled retail devices in the U.S. market today, and 96 percent of them support one or more MVPD apps, while 66 percent of them support apps from all of the top 10 MVPDs. On average there are four retail devices with available MVPD apps in consumer homes.¹⁴

B. The Apps-Based Model is Driving the Evolution of Consumer Video Consumption.

Given these marketplace developments, MVPDs, consumer electronics manufacturers and OVDs are rapidly moving in the direction that consumers are heading. For this reason, these groups have embraced – and are aggressively pursuing – an apps based model to deliver this bounty of video programming to consumers.

The apps-based approach empowers consumers who can now watch content from MVPDs and OVDs on a broad and growing range of customer-owned personal devices, including iOS and Android tablets and smartphones, PCs and Macs, Smart TVs, and TV-attached devices, including game stations, Kindle Fire, Google Chromecast, and Roku.¹⁵ These retail devices deliver value to consumers through their ability to be used for enjoyment of a wide variety of service offerings, including video entertainment from MVPDs and OVDs.

The increasing ubiquity of broadband infrastructure has enabled consumers to use their

¹³ See, e.g., Report of Working Group 2 To DSTAC, p. 13, Table 2 (April 21, 2015) available at: <https://transition.fcc.gov/dstac/wg2-report-01-04212015.docx> (visited April 22, 2016) (*DSTAC WG 2 Report*).

¹⁴ See, e.g., Report of Working Group 4 to DSTAC, pp. 72 - 74 (August 4, 2015) available at: <https://transition.fcc.gov/dstac/wg4-draft-report-08042015.pdf> (visited April 22, 2016) (*DSTAC WG 4 Report*).

¹⁵ In fact, Roku has sold millions of its retail set-top boxes that rely entirely on apps, including an MVPD app with an MVPD supplied guide. See, e.g., *DSTAC WG4 Report*, p. 72, Table 8.

wireless and Wi-Fi supported connections with an ever-expanding array of applications and activities that support the viewing of video content. As a result, data traffic is exploding. Wireless traffic alone grew more than 20-fold between 2009 and 2014, and is expected to increase another six-fold or more by 2019.¹⁶

OVDs (like Netflix, Hulu, and Amazon) and retail device manufacturers (like Sony and Apple) are now entering into direct distribution contracts with content providers and use the same apps-based approach for delivering their own video entertainment services on retail devices and platforms. U.S. viewers have used these and other apps and devices to legally access 7.1 billion movies and 66 billion television episodes in 2014 alone, from among the more than 110 lawful online sources that serve the United States today.¹⁷

The growing universe of apps-based programming also crosses multiple sectors and interests. For example, consumers today can access their favorite programming through a growing menu of *program* specific apps. These include marquee names in original programming (such as HBO Go, Showtime, PBS, Crackle, and Lifetime),¹⁸ sports programming (such as MLB At Bat and ESPN), as well as growing array of lifestyle programming options, including Vice, the Gardening Channel and the Fashion Channel.¹⁹ In addition, consumers can access a broad range of programming options through *service* specific

¹⁶ See CTIA, *Annual Wireless Survey* (June 2015); Thomas K. Sawanobori & Dr. Robert Roche, CTIA, *Mobile Data Demand: Growth Forecasts Met*, at 1 and 7 (June 22, 2015).

¹⁷ See, e.g., Joint Statement on DSTAC Report, p. 2, MB Docket No. 15-64 (dated Aug. 28, 2015) (available at: <http://apps.fcc.gov/ecfs/document/view?id=60001123722>) (visited April 22, 2015).

¹⁸ See e.g., Roku website, *Movies and TV*, (available at: <https://channelstore.roku.com/browse/movies-and-tv>) (visited April 22, 2016).

¹⁹ See e.g., Roku website, *Movies and TV*, (available at: <https://channelstore.roku.com/browse/lifestyle>) (visited April 22, 2016).

apps, such as Netflix, Hulu, Amazon Prime Video, and Sling Television.²⁰

II. The FCC's Proposed Rules Would Negatively Impact Recent Entrants into the MVPD Marketplace.

Adoption of the FCC's proposed rules would be particularly harmful to USTelecom's member companies, most of whom are recent entrants into the MVPD marketplace. In recent years, the MVPD marketplace has evolved, particularly as LECs of all sizes have entered the video market in areas throughout the country.

The Commission's most recent video competition report notes that LEC MVPDs alone had 11.3 million video subscribers at the end of 2013.²¹ The Commission's report notes that during the same time period, AT&T's U-Verse had approximately 5.5 million subscribers, Verizon's FiOS had approximately 5.3 million subscribers, and CenturyLink had only recently entered the market. The Commission also noted, however, that during the same timeframe, smaller LECs were also extending their reach into the MVPD marketplace, particularly with respect to the deployment of Internet Protocol Television (IPTV) technologies.²²

In all areas where LECs have deployed MVPD services, they compete with other video services offered by cable, satellite and other MVPD providers. Local telephone company competitive video entry has greatly benefitted consumers by providing them an alternative to the cable incumbent which, as the Commission has previously found, has also led to lower consumer prices than in areas without a wireline cable competitor.²³ The Commission has also recognized

²⁰ By the end of 2014, more than 40 percent of U.S. households subscribed to online video streaming services like Netflix, and that number is expected to grow in the immediate future. See, Remarks of FCC Chairman Tom Wheeler, International Institute of Communications Annual Conference, Washington, D.C., p. 5 (October 7, 2015).

²¹ Sixteenth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 15-41, ¶ 133, Table 7 (*Sixteenth Report*).

²² *Sixteenth Report*, ¶ 27.

²³ See e.g., Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for*

that a successful video offering is directly related to an ILEC's ability to deploy robust broadband facilities.²⁴

But in almost every aspect of the MVPD marketplace, USTelecom's member companies face significantly higher costs than their established competitors. Adoption of the Commission's proposed rules will only further exacerbate the cost differential between ILECs entering the MVPD marketplace and their more established counterparts. The Commission's proposal would be a costly and unnecessary burden for all MVPDs, and it would be particularly acute for ILECs who are just recently entering the MVPD marketplace.

For example, as new entrants to the MVPD marketplace, ILEC MVPDs already face higher programming costs given their comparatively smaller market share, particularly with respect to their larger cable counterparts. In addition, ILEC MVPDs entering the video marketplace are also likely to face higher initial marketing costs. Given their status as new market entrants, they must traditionally spend more than their competitors to gain market-share.

Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 FCC Rcd 20235, ¶17 (concluding that access to programming results in a "significant increase" in MVPD competition, which "usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources."); Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that "broadband deployment and video entry are 'inextricably linked'") (*Franchise Reform Order*); (concluding that increased MVPD competition, "is necessary and appropriate to achieve increased video competition and broadband deployment.").

²⁴ See e.g., *Franchise Reform Order*, ¶51 (2006) (concluding that "broadband deployment and video entry are 'inextricably linked'"); *Franchise Reform Order*, ¶62 (stating that, "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."); *MDU Order*, ¶20 (stating that "broadband deployment and entry into the MVPD business are 'inextricably linked.'"); First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that "a wireline firm's decision to deploy broadband is linked to its ability to offer video.").

In addition, standardization costs for certain ILEC MVPDs will also be more significant since in many instances these companies operate hybrid networks consisting of cable plant, IP and RF technologies.²⁵ As a result, MVPDs with such hybrid networks will need to develop and deploy standards for each network (*e.g.*, IP networks, traditional coaxial cable, and RF) in order to deliver the Commission’s proposed three Information Streams (*i.e.*, content, security, permissions) to third party set-top-box manufacturers.²⁶ In effect, any MVPD with hybrid networks will need to develop and deploy up to nine separate standards in order to satisfy the requirements of the Commission’s proposal.

To the extent the Commission’s proposed standards body establishes its regulatory mandated standard (or standards), all MVPDs – regardless of size – may be required to redesign their respective networks to support the standard, and replace existing customer set top boxes. While the costs for all MVPDs to retrofit their networks and customer premises equipment will be substantial, they will be particularly acute for smaller ILEC MVPDs. Such MVPDs could be uniquely impacted since they would “be forced to adopt and implement the same standards as larger providers, resulting in a technology mandate by default for the former.”²⁷

MVPDs will also bear the additional costs and burdens that will inevitably arise from customer service issues that are solely attributable to the third party’s set top box. As a result, it will be the MVPD that will be required to expend the resources to resolve any such issues, even in instances where the problem resides with the third party set-top-box manufacturer. This problem will be particularly acute for smaller MVPDs, which do not have the resources to

²⁵ *Sixteenth Report*, ¶ 27.

²⁶ The Commission’s proposal would mandate that MVPDs deliver three core information streams from their video services: 1) program guide information; 2) information about what a device is allowed to do with content, such as recording; and 3) the video programming itself.

²⁷ *See e.g.*, Ex Parte Notice, NTCA – The Rural Broadband Association, MB Docket No. 16-42; CS Docket No. 97-80, p. 3 (April 12, 2016).

address such inquiries, and already face a challenging competitive environment. Even for larger MVPDs, these misdirected customer inquiries will be difficult (if not impossible) to resolve, and will only serve to increase the monthly service rates to consumers.

Given the competitive realities of the video marketplace today, the Commission's proposal is a solution in search of a problem. Rather than providing more choices for consumers, it will instead lead to substantial expenditures by MVPDs that could be better utilized on new and innovative products and services that truly benefit consumers. To the detriment of consumers, these substantial expenditures will decrease the ability of ILEC MVPDs to more effectively compete against their cable counterparts.

III. Adoption of the Rules Will Act as a Disincentive to Wireline Broadband Deployment.

As ILECs continue deploying and upgrading their wireline facilities – particularly in rural areas – video remains an essential component to offering a compelling alternative to cable. As previously noted, the Commission has acknowledged that a successful video offering is directly related to an ILEC's ability to deploy robust broadband facilities.²⁸

The increased costs associated with the FCC's proposal will make broadband deployment all the more challenging for ILEC MVPDs. At the precise time when government is focusing its efforts on increasing deployment of broadband capable of delivering the speeds necessary for video services that customers demand,²⁹ and as industry continues to invest billions

²⁸ See e.g., *Franchise Reform Order*, ¶¶ 51, 62; *MDU Order*, ¶20; First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that “a wireline firm's decision to deploy broadband is linked to its ability to offer video.”).

²⁹ See e.g., Federal Communications Commission website, Connect America Fund (CAF) available at: <https://www.fcc.gov/general/connect-america-fund-caf> (visited April 22, 2016).

of dollars into upgraded networks,³⁰ the Commission will nevertheless force the redirection of significant capital expenditures away from this effort. Instead, the Commission will redirect industry resources to develop a standard in an unrealistically brief period of time, in order to deploy costly technologies that consumers and industry are currently moving away from.

Specifically, the Commission proposes requiring that MVPDs agree on protocols for future set-top boxes within a year, and to support new boxes and services to millions of customers within two years. As noted by others in this proceeding, the Commission's previous efforts to mandate the technology of set-top boxes all "failed to enhance competition and wound up costing MVPDs – and ultimately their customers – millions if not billions of dollars, all the while distracting critical engineering resources from more productive and pro-competitive product development."³¹ Consumers would be better served if resources are directed towards these and other of the Commission's and industry's shared goals of increased broadband deployment.

Moreover, the Commission's proposed timeline of two years within which MVPDs would be required develop and comply with established standards is wildly unrealistic, especially for USTelecom's smaller MVPDs.³² The development of even a single standard can take years to accomplish. In stark contrast, to implement the Commission's proposal it will be necessary to

³⁰ USTelecom website, *Broadband Investment* (available at: <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>) (visited April 22, 2016) (stating that "Private sector broadband investment reached \$78 billion in 2014, and the industry has invested \$1.4 trillion since 1996.").

³¹ Comments of Larry Downes, Project Director, Georgetown Center for Business and Public Policy, MB Docket No. 16-42; CS Docket No. 97-80, p. 3 (April 14, 2016) (citing, Larry Downes, *For Outmoded Set-Top Boxes, the FCC Doubles Down on Failure*, FORBES, March 1, 2016 (available at <http://www.forbes.com/sites/larrydownes/2016/03/01/for-outmoded-set-top-boxes-the-fcc-doubles-down-on-its-own-failures/#7b61e1e36a27>) (visited April 22, 2016); see also, Larry Downes, *The Danger the FCC Can't See in its New Video Proposal*, The Washington Post, January 29, 2016 (available at: <https://www.washingtonpost.com/news/innovations/wp/2016/01/29/the-danger-the-fcc-cant-see-in-its-new-video-proposal/>) (visited April 22, 2016).

³² Notice, ¶ 34.

develop multiple standards given that today's MVPD marketplace is characterized by a wide diversity in delivery networks, conditional access systems, bi-directional communication paths, and other technology choices across MVPDs – and even within MVPDs.

IV. Consumers Will Lose a Broad Range of Statutory Protections.

Federal statutes applicable to MVPD providers currently protect consumers on a broad range of issues. USTelecom member companies deploying MVPD services must ensure full compliance with these consumer protection mandates which address privacy, emergency alerts, disability access, and children's programming. However, the Commission acknowledges in its Notice that it cannot enforce these same laws against any third-party entities that use the MVPD's three Information Streams to deploy identical services to the MVPD's customers.³³ In essence, at the same time that the Commission mandates the transmission of the three Information Streams by MVPDs to unaffiliated third parties, it is effectively removing the robust public interest protections that consumers have come to expect.

While stating that these statutory protections are “so important”³⁴ to consumers, the Commission nevertheless proposes reliance upon mere certifications from developers that they will adhere to privacy protections, pass through EAS messages, and commit to children's programming advertising limits. Of course, the Commission has no choice but to rely on mere promises from developers over whom it has no jurisdiction, and to acknowledge that these “important public policy goals” can only be achieved by “means of requirements imposed on MVPDs.”³⁵ The FCC seeks to surmount its complete absence of jurisdiction over third party set-top box providers through a self-certification mechanism that effectively deputizes MVPDs, and

³³ Notice, ¶ 73.

³⁴ *Id.*

³⁵ *Id.*

through its reliance on a patchwork of state laws.³⁶ Each of these approaches is unworkable, and neither will offer MVPD consumers the protections mandated by Congress.

Regarding its self-certification framework, the Commission’s proposal would require MVPDs to provide the three Information Flows only to Navigation Devices that have been “certified by the developer to meet certain public interest requirements.”³⁷ The Commission maintains that any such certification must state that the developer will adhere to privacy protections, pass through EAS messages, and adhere to children’s programming advertising limits. MVPDs may not withhold the three Information Streams if they have received such certification. Moreover, the three Information Streams can only be withheld by the MVPD if it has a “good faith reason to doubt” the validity of the certification.³⁸ This self-certification proposal, however, lacks any Commission enforcement mechanisms whatsoever against non-compliant third-party Navigation Device manufacturers and places MVPDs in the untenable position as judge, jury and executioner.

However, while the Commission has plans to deputize MVPDs, they have no feasible way to monitor the behavior of device manufacturers to ensure these third parties’ compliance with the Commission’s rules. Congress provided the Commission – not MVPDs – with the authority to enforce these rules, and MVPDs cannot and should not be expected to do so. Even in the event that a non-compliant third-party Navigation Device manufacturer commits an egregious violation of the Commission’s public interest rules, the agency lacks jurisdiction over such manufacturers.

Of course, the Commission seeks to sidestep this absence of jurisdiction by deputizing the MVPDs over which it does have jurisdiction through the establishment of its “good faith”

³⁶ *Notice*, ¶¶ 73 – 78.

³⁷ *Notice*, ¶ 73.

³⁸ *Id.*

standard. Under this approach, MVPDs could withhold the three Information Streams if they have a “good faith” reason to doubt the validity of a third party’s certification. The Commission, however, provides no guidance whatsoever to MVPDs regarding what constitutes “good faith” in any instance where an MVPD withholds the Information Streams. Absent any type of formal Commission adjudication against a third party provider – which the agency lacks any jurisdiction to carry out – MVPDs would be placed in an impossible position to make such determinations.

For example, if an MVPD terminates the Information Streams based on a ‘good faith’ analysis the Commission subsequently deems unfounded, the MVPD will be subject to enforcement actions from the Commission, and potential civil liability from the third party provider. In contrast, if an MVPD has valid reason to but *fails* to terminate the Information Streams, the MVPD may once again find itself subject to a Commission enforcement action for failing to act on the agency’s opaque good faith standard. Of course, the MVPD may very well find itself subject to civil liability from its own subscribers for its ‘negligence’ in failing to protect their privacy, or pass through EAS information.

With respect to its concerns over potential consumer privacy abuses, the Commission pins part of its hopes on a patchwork of state laws. In this regard, the Commission identifies only a single state – California – and its sole statute governing “online privacy” that it asserts may be relevant in the MVPD context.³⁹ That law however, only applies to an “operator of a commercial Web site or online service” that collects personally identifiable information “through the Internet” about individual consumers residing in California.⁴⁰ The California law would not even apply to a company like Google, since any information it collects about consumers would be collected

³⁹ *Notice*, ¶ 78.

⁴⁰ California Bus. & Prof. Code, §§ 22575 – 79 (available at: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=22001-23000&file=22575-22579>) (visited April 22, 2016).

through the MVPD's service, and not "through the Internet."

V. The Proposal Exceeds the FCC's Authority Under Section 629.

A plain reading of Section 629 reveals that it authorizes the Commission to promote competition among *devices*, and not among *services*. The FCC's proposal therefore exceeds the scope of Section 629 of the Act, which speaks to the availability of retail devices that can receive multichannel and other video services "offered" and "provided" by MVPDs. Section 629 of the Act cannot be read so broadly as to support the disassembly of those services for third parties to use to create new services.

While the statute authorizes the Commission to promote a market for retail devices that receive MVPD services, it provides no basis for the broad unbundling mandate proposed by the Commission in its Notice. Indeed, a 2013 opinion from the Court of Appeals for the District of Columbia Circuit places significant limitations on the ability of the Commission to implement such an approach. When the Court vacated the rules at issue in that case, the D.C. Circuit specifically warned the Commission that its authority under Section 629 is neither "unbridled" nor "as capacious as the agency suggests."⁴¹ The Court also warned the Commission that Section 629 does not encompass measures with only a "tenuous . . . connection to § 629's mandate;" and that it does not "empower the FCC to take any action it deems useful in its quest to make navigation devices commercially available."

The disaggregation mandate proposed by the Commission goes well beyond the rules at issue in the EchoStar case, which involved a single standard relating to encoding standards. The Commission's current proposal goes far beyond a single encoding standard, capturing a broad range of functions including the programming guide information, entitlements, as well as the programming itself.

⁴¹ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

The strained comparisons of the Commission’s proposal to Carterphone are wholly inaccurate. To begin with, as detailed in these comments and throughout the record of this proceeding, consumers today are benefitting from a broad range of choices provided by a wide variety of stakeholders, for accessing and consuming programming content.⁴² Most MVPD subscribers today can already watch what they pay for wherever they want, however they want, and whenever they want on an increasing number of devices, provided through a wide variety of applications and devices.

Moreover, the Commission has previously concluded that “the telephone networks do not provide a proper analogy to the issues in this proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.”⁴³ The Carterphone analogy fails because while telephone networks provide only bare transport, individual MVPDs deliver a much more complex offering that combines a broad range of unique features and services.⁴⁴ Finally, under the Carterphone framework, equipment manufacturers did not – and could not – force telephone providers to reengineer their software and networks to facilitate such connections. That is exactly what the Commission’s proposal would entail for MVPDs – a situation made all the more challenging given the wide variety of networks employed by MVPDs. Given these realities, the proposal greatly exceeds the Commission’s authority under the limited scope of Section 629.⁴⁵

⁴² Indeed, cable operators now constitute TiVo’s fastest growing market, and comprise approximately 80% of TiVo’s customers. Thus, because many (if not most or all) MVPDs do not own any of their set-top box vendors, an apps-based approach fosters device competition not just in the consumer market, but in the MVPD market, as well.

⁴³ First Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, ¶ 39 (1998).

⁴⁴ And for DBS providers, in particular, satellite spectrum is just one means of delivering their unique content; DBS providers use broadband to deliver on-demand programming, for example.

⁴⁵ See, e.g., DSTAC WG4 Report at 149, 172; Comments of AT&T Inc., MB Docket No. 10-91,

VI. The FCC’s Proposal Amounts to an Unconstitutional Taking Under the 5th Amendment.

The Commission’s proposal would likely also violate the Fifth Amendment’s mandate that “private property” shall not “be taken for public use, without just compensation.”⁴⁶ The Commission’s proposal would, at a minimum, effect a regulatory taking by seriously interfering with MVPDs’ business operations and investment-backed, economic expectations. It would effectively force MVPDs to operate their business as wholesale providers – without any compensation – by supplying and populating third parties’ equipment with the Commission’s mandated three Information Streams. Such a mandate goes well beyond anything Congress envisioned for the implementation of Section 629, and equates to an unauthorized, uncompensated taking in violation of the Fifth Amendment.

Regulatory changes that interfere with an entity’s legitimate investment-backed expectations and significantly reduce the value of the entity’s business enterprise constitute a taking that is unlawful unless appropriately compensated.⁴⁷ The absence of any compensation to MVPDs under the Commission’s proposal, and the significant financial harm that would be caused by its adoption, would constitute a taking in violation of the Fifth Amendment.⁴⁸

VII. Conclusion.

The Commission should reject the proposal contained in its Notice. Consumers are benefitting from the robust competition in today’s video marketplace, thereby fulfilling the

CS Docket No. 97- 80, PP Docket No. 00-67 (July 13, 2010) at 43-49; Reply Comments of AT&T Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (Aug. 12, 2010) at 15-19, 37-38; Reply Comments of DIRECTV, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (Aug 12, 2010) at 15-27.

⁴⁶ U.S. Const. amend. V.

⁴⁷ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

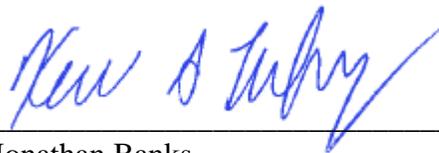
⁴⁸ *Id.*

mandate contained in Section 629 of the Act. Adoption of the Commission's proposed rules would negatively impact USTelecom's members given their recent entrance into the MVPD marketplace.

Adoption of the Commission's rules would also act as a disincentive to broadband deployment, and would deprive consumers of a broad range of statutory protections. Finally, the Commission's proposal exceeds the agency's authority under Section 629 of the Act, and would also amount to an unconstitutional taking under the 5th Amendment.

Respectfully submitted,

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April 22, 2016

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