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
NTCA–THE RURAL BROADBAND ASSOCIATION

April 22, 2016

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EXECUTIVE SUMMARY

The Commission should abandon the proposals contained in the NPRM. The Commission's only job under Section 629 of the Communications Act is to assure that a particular existing market—the market for consumer access to content provided by MVPDs via devices of the consumers' own choosing—is competitive. It is not authorized to make or create markets.

In addition to exceeding its statutory authority, the Commission is proposing a very dangerous path under which it will adopt a mandate before a standard and the technology to comply with it exist. Under this approach, the Commission itself cannot fully understand the implementation burden (and therefore the full implications) of its own proposal. Moreover, no matter how the prospect of standards development might be spun, the NPRM will inevitably lead to a technology mandate for all providers and impose unreasonable burdens on small MVPDs in particular.

In terms of those burdens, these costs are at present difficult to estimate—in terms of both specific hardware, software, middleware and other network architecture changes as well as the cost thereof—with confidence as no standard has been adopted and no technology actually exists necessary to meet the proposed rules. What is known is that the "horse before the cart" process creates a government mandate that will be fulfilled with a standard "to be named later," thus preventing a thoughtful public interest analysis and comprehensive evaluation and balancing of all of the costs and benefits. It also frustrates the ability of those most potentially affected by such a mandate to comment as effectively as they could on the proposal, calling into question

whether the NPRM's approach is consistent with proper administrative procedure as commenters are asked to assess the impacts of an idea and an outline rather than a concrete proposal.

Legitimate questions have also been raised by MVPDs and content creators as to whether there is a method to address serious content security concerns raised by this proposal. There are also substantial privacy concerns raised in this proceeding, and it is worth noting that even proponents of the NPRM's proposals recognize that the Commission has not proposed serious methods of addressing those concerns.

To make matters worse, the NPRM proposes to use as a "fallback" the "Competitive Navigation" proposal that emerged from the DSTAC process and use it should this NPRM's proposed standards body fail to make a recommendation within an artificially-imposed time schedule. The Commission should not "place its thumb" on the scale in such a manner that enables certain proponents of the Competitive Navigation approach to "run out the clock."

Even worse, the proposal is unnecessary as a practical matter, given that consumers' choices for accessing the video content they purchase continues to expand at a rapid pace. In fact, based upon current trends, it is quite possible that the set-top box itself—whether provided by a MVPD or anyone else—will be viewed as an outdated anachronism in the near future. Such is particularly true in light of the recent Comcast announcement that it is making its *full* TV lineup available via both Roku boxes and certain smart televisions.

Should the Commission move forward despite these concerns, it should adopt a small MVPD exemption or an implementation schedule specific to these providers. The Commission

must also include small MVPD representatives on any standards body created or utilized for advancing the goals of the NPRM.

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COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

I. INTRODUCTION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits comments in response to the Notice of Proposed Rulemaking released on February 18, 2016 in the above-captioned proceeding.[2] The NPRM seeks comment on how to create a commercial market for devices manufactured by third parties that can access multichannel video programming and other services offered over multichannel video programming ("MVPD") networks.

NTCA herein urges the Commission to abandon the proposals contained in the NPRM. The Commission's task under Section 629 of the Communications Act of 1934, as amended (the "Act"), is not to make or create markets. The Commission's only job under Section 629 is to

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers ("RLECs"). All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. More than 80% of NTCA's members offer video services in their rural service territory.

[2] *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42, *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (rel. Feb. 18, 2016) ("NPRM").

assure that a particular existing market—the market for consumer access to content provided by MVPDs via devices of the consumers' own choosing—is competitive. Yet in a rush to judgment, the NPRM proposes a mandate to "unlock the box" before a standard for doing so is in place, preventing it from fully understanding the full scope and costs of its own proposals. The proposal is also seriously flawed from a content security standpoint, failing to propose adequate solutions to serious concerns raised by both MVPDs and the content creators themselves.

To make matters worse, the proposal is unnecessary as a practical matter, given that consumers' choices for accessing the video content they purchase continues to expand at a rapid pace. In fact, based upon current trends, it is quite possible that the set-top box itself—whether provided by a MVPD or anyone else—will be viewed as an outdated anachronism in the near future. It is therefore likely that the proposals will stall, rather than promote, innovation. Put another way, a Commission rule here could effectively mandate unprecedented and still-to-be developed-and-defined standards to "open the market" on buggy whips at a time when consumers are increasingly deciding on their own to move to combustion engines. To top all this off, the Commission's legal authority to adopt its proposal is in doubt as well and raises substantial questions about legal protection of intellectual property of content owners.

Should the Commission move forward despite these concerns, it should adopt a small MVPD exemption or an implementation schedule specific to these providers. The Commission must also include small MVPD representatives on any standards body created or utilized for advancing the goals of the NPRM.

II. THE NPRM PUTS THE REGULATORY CART BEFORE THE HORSE BY FORCING PROVIDERS TO COMPLY WITH A STILL-TO-BE-DEVELOPED AND STILL-TO-BE-DEFINED GOVERNMENT-MANDATED TECHNICAL STANDARD (OR STANDARDS)

The Commission proposes to require all MVPDs to make available three "Information Flows" as discussed by the NPRM to all competitive device manufacturers in a format created by an open standards body.[3] The Commission asserts that the format created by the standards body will provide each MVPD with the "flexibility" to provide these Information Flows in a manner consistent with their existing network architecture.[4] Indeed, the NPRM at one point asserts that the proposal could "give the MVPD the discretion to decide *whether* to modify its system architecture."[5] Unfortunately, compliance with this proposal can best be characterized as an exercise in *how* and not *whether*, as adoption of the proposal will require MVPDs of all sizes to make substantial software, hardware, and middleware and other system architecture modifications to make the Information Flows available to third-party device manufacturers.

A. No Matter How the Prospect of Standards Development Might be Spun, the NPRM Will Inevitably Lead to a Technology Mandate for all Providers and Impose Unreasonable Burdens on Small MVPDs in Particular

The NPRM fails to explain, and in fact cannot explain, how the standards body proposed would avoid imposing a specific technological mandate or, at the very least, avoid requiring smaller MVPDs in particular to choose from a few government-mandated standards before the actual market has had any meaningful opportunity to test and execute upon implementation of such standards.

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3 *Id*., ¶¶ 35-37.

4 *Id*., ¶ 35.

5 *Id*., ¶ 46 (emphasis added).

For example, the standards body could coalesce around the creation of a single standard that would apply to MVPDs of all sizes and utilizing any technology. Such a "single-standard" approach, even if ostensibly aimed at enabling compliance on the part of MVPDs utilizing multiple technologies, would appear to run counter to the assertion that this proceeding will not result in a technological mandate. Particularly given that the technology to implement the Commission's proposal does not actually exist as a tested and validated matter in the marketplace—beyond vague and unsupported claims that a "virtual head-end" might offer some panacea (discussed further below)—such an approach would appear to represent the embodiment of a regulatory technological mandate, even if it might ultimately be applicable to multiple platforms.

An alternative to the "single-standard mandate" could be a standards body recommendation of multiple standards from which equipment vendors and MVPDs could choose to reengineer their networks to make them available to third-party device manufacturers. While ostensibly offering "flexibility" or "choice" to MVPDs, this is little more than a "tailored mandate," but still a mandate nonetheless. In fact, this approach poses a particular danger to smaller MVPDs. Apt analogies here would be the creation of the Blu-ray versus HD DVD standards or, even earlier in time, the emergence of the competing VHS versus Betamax technology standards. In both instances, the emergence of competing standards for consumer owned devices for viewing video in the home led to a multi-year process the culmination of which was an eventual "winner."[6] What gets lost in looking back at the competition among

[6] *Format Wars: Blu-ray vs. HD DVD*, Endgadget.com (Jun. 7, 2014), available at: http://www.engadget.com/2014/06/07/format-wars-blu-ray-vs-hd-dvd/.; Betamax vs. VHS: How Sony

standards and what cannot be forgotten in this proceeding is the stranded investment made by the "losers," that is, those companies that "chose wrong" or invested substantial sums in Betamax only to watch VHS emerge as the market's preference. Applying those lessons here, if small MVPDs were required to come into compliance with the NPRM's proposals by adopting one of the standards produced by the standards body in the near or even medium term while the market is still "settling on" which of the various standards is most effective (or the "winner"), the results could be disastrous for some providers.

In short, the likely result of a "multiple-standard-mandate" is at least some or possibly a substantial majority of small carriers forced to reengineer their networks towards one standard, only to find that the market ultimately chooses the other mandated standard. Small MVPDs would thus find themselves having expended significant amounts of capital on hardware, software, and middleware and other network modifications to comply with the mandate, and *then having to do so again* to comply with the standard that the market ultimately settles upon under the "multiple-standard mandate." This stranded investment represents capital that could have been utilized by small MVPDs to improve the quality and availability of their MVPD networks and/or invest in responding to actual and real consumer demand in terms of the "Apps Revolution" that is already underway.[7]

Lost the Original Home Video Format War, Gizmodo (Jun. 17, 2014), available at: http://gizmodo.com/betamax-vs-vhs-how-sony-lost-the-original-home-video-1591900374

[7] Some may argue that the multiple standards discussed in this paragraph were the product of marketplace demand rather than a statutory mandate, and that the Commission is tasked with finding a way to ensure competitive access to content by Section 629. But this is just the point – rather than looking to create markets and hunt down standards where none exist today, the Commission should be looking to leverage the marketplace that *already* exists and the standards that *already* exist to carry out its statutory directive to promote consumer choice in access to content. If some providers in that actual marketplace choose incorrectly in terms of a standard that ultimately prevails, then that is the product of

Another possible outcome with respect to the standards body process is no less problematic for small MVPDs. The NPRM seeks comment on whether the role of the standards body should be limited to determining the content or parameters of the "Information Flows," thus leaving to MVPDs the need and ability to determine the technology necessary to make them available to third-party device manufacturers. While such an approach might again be viewed as offering MVPDs "flexibility," it is unlikely that any third-party device manufacturer will create set-top boxes compatible with small MVPDs' networks. Indeed, because the total universe of NTCA members' MVPD subscribers does not equal the number of subscribers in certain large cities, no third-party device manufacturer will have the economic incentive to build devices compatible with the diversity of small MVPD networks. In such a case, any small MVPD's network modifications made to comply with the rules proposed in the NPRM would be wasted. In the end, small MVPDs will ultimately have little or no choice but to adopt and implement the same standards as larger providers, resulting in a technology mandate by default.

It should also be noted here that adoption of the NPRM's proposals would represent the very definition of a technology mandate because they would prohibit MVPDs from moving solely to Apps-based platforms—the very real choice that the *actual* market is making—to deliver content. As discussed in Section III. A. *infra*, MVPDs of all sizes and technologies (in response to consumer demand) are rapidly integrating content into set-top boxes and offering consumers greater ability to use Apps and other devices to access MVPD content on all sorts of devices. This, and the recent Comcast announcement that it is making its *full* TV lineup

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their own decision-making. But if providers are forced to choose from among two (or more) government-mandated standards even when the actual market is developing different standards still on its own, this should raise alarm bells as to whether such intrusion is warranted.

available via both Roku boxes and certain smart televisions could represent the beginning of the end of set-top boxes altogether. Yet the NPRM would put a stop to this and force renewed and increased investment into a soon-to-be antiquated box for content flows, an end result that is the very definition of a regulator-induced technology mandate in an evolving marketplace.

B. While the Standards Have Yet Even to be Defined, It is Clear that Compliance With the "Non-Security Elements" of the NPRM Would Almost Certainly Require MVPDs of All Sizes to Make Substantial Modifications to Software, Hardware, and Middleware to Make the Three "Information Flows" Available to Competitive Device Manufacturers

The NPRM seeks comment on the implementation burden of the proposals contained therein and specifically seeks comment on the compliance burdens particular to small MVPDs.[8] As noted above, there are several options under which the standards body process could issue recommendations for either a "single-standard" or "multiple-standard" approach to enabling competitive manufacturers' devices to access MVPD's networks. However, under each mandate, MVPDs of all sizes will incur substantial costs to comply. These costs are at present difficult to estimate—in terms of both specific hardware, software, middleware and other network architecture changes as well as the cost thereof—with confidence as no standard has been adopted and no technology actually exists necessary to meet the proposed rules. This fact highlights the very real danger in the NPRM's approach, which is to adopt a mandate before a standard and the technology to comply with it exist (other than the Apps-based approach that consumers in the real world are actually choosing): in short, the Commission itself cannot fully understand the implementation burden (and therefore the full implications) of its own proposal. The costs that will be imposed on providers—one that all parties involved must acknowledge

[8] NPRM, ¶ 81.

will be passed on to consumers in some form or another—are just as important of a consideration as the goals of Section 629 that the NPRM seeks to promote. Yet this "horse before the cart" process creates a government mandate that will be fulfilled with a standard "to be named later," thus preventing a thoughtful public interest analysis and comprehensive evaluation and balancing of all of the costs and benefits. It also frustrates the ability of those most potentially affected by such a mandate to comment as effectively as they could on the proposal, calling into question whether the course of this docket is consistent with proper administrative procedure as commenters are asked to assess the impacts of an idea and an outline rather than a meaningful concrete proposal.[9]

This inability to fully examine the costs of the NPRM's proposals is compounded by the fact that MVPDs range from nationwide providers to small MVPDs serving only a few hundred (or in some cases, a few dozen) subscribers. There is no single technology that currently does or will meet the needs of every provider. Specific implementation steps and costs (and MVPDs can only guess what those are under the "mandate before a standard approach") will undoubtedly vary across company size and technology, further complicating the already difficult task of quantifying and evaluating the cost of and discussing the technical complexities associated with a proposal that *exists in concept only at this point*.

[9] *Small Refiner Lead Phase-Down Task Force v. Environmental Protection Agency*, 705 F.2d 506, 549 ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making").

This being said, industry responses to the DSTAC Final Report released in August 2015,[10] which discuss the fundamental network reengineering that will be necessary for MVPDs to make the Information Flows available to third-party device manufacturers, serve as a useful baseline for initial analysis of the costs and burdens implicated in the NPRM's proposal. In response to the DSTAC Final Report, MVPDs of all sizes and utilizing a variety of technologies discussed the significant expense of implementing various approaches discussed in the report. For example, the American Cable Association, noted that to "ensure that new devices are compatible with existing equipment, MVPDs must undertake software upgrades at every headend, including complex and expensive changes to their billing systems, and in many cases must upgrade hardware and firmware as well."[11] In discussing the complexities with respect to more specific proposals contained in DSTAC, ACA also notes that "[i]ncorporating the 'virtual headend' device contemplated by the AllVid approach is likely to be substantially more difficult, since it will serve a function unlike any other equipment operated by most MVPDs."[12] AT&T too notes that "[t]he 'virtual headends' and standardized protocols envisioned by the Device Proposal would require each MVPD to mount a monumental effort to re-architect and duplicate its networks to expose these as-yet undefined interfaces."[13] Comcast and the National Cable & Telecommunications Association discuss at length as well the substantial network reengineering

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10 Downloadable Security Technology Advisory Committee Final Report (rel. Aug 28, 2015) ("DSTAC Final Report"), available at: https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf.

11 Reply Comments of the American Cable Association ("ACA") ("ACA DSTAC Reply Comments"), MB Docket No. 15-64 (fil. Nov. 9, 2015), p. 14.

12 *Id*.

13 Comments of AT&T, MB Docket No. 15-64 (fil. Oct. 8, 2015), p. 21.

that will be necessary to make available the "Information Flows" to competitive device manufactures.[14] Finally, a diverse group of MVPDs and equipment manufacturers pointed to the "significant cost, massive re-architecting of MVPDs' networks and development of new not-yet-invented protocols and standards"[15] with respect to the DSTAC proposals. This is only a sampling of the record in response to the DSTAC proposal, and much of this discussion was speculative, as there was no consensus emerging from DSTAC as to a standard or technology necessary to comply with the "Information Flows" concept that emerged as *a concept only*.

NTCA members too report that the NPRM's proposals will require a near total overhaul of their existing MVPD networks, at the very least including software and hardware upgrades throughout their networks. Of course, like MVPDs of all sizes and technologies, an exact accounting of those costs and the evaluation of specific implementation steps is, at this time, impossible. To return to a point made earlier, the "Information Flows" proposal contained in the NPRM *exists in concept only at this point*, as no implementable standard(s) exist at this time to comply with what is shaping up to be a mandate by the Commission. Thus, as discussed in Section II. E. *infra*, the Commission should not move forward with the NPRM's proposals based

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[14] Comments of Comcast Corporation ("Comcast DSTAC Comments"), MB Docket No. 15-64 (fil. Oct. 8, 2015), pp. 16-20; Reply Comments of the National Cable & Telecommunications Association ("NCTA"), MB Docket No. 15-64 (fil. Nov. 9, 2015), pp. 27-36.

[15] Joint Statement on the DSTAC Report of the ACA, ARRIS Group Inc., AT&T/DIRECTV, Atlantic Broadband, Bright House Networks, Buckeye Cablevision, Inc., Cable Television Laboratories, Inc., Cable ONE Inc., Cablevision Systems Corporation, Centurylink, Charter Communications, Inc., Cisco Systems, Inc., Comcast Corporation, Cox Communications, DISH Network, Eagle Communications, Evolution Digital, General Communications Inc., Independent Telephone & Telecommunications Alliance (ITTA), Mediacom Communications Corporation, Midcontinent Communications, Motion Picture Association of America (MPAA), National Cable & Telecommunications Association (NCTA), Sjoberg's Inc., Suddenlink Communications, TDS Baja Broadband, Time Warner Cable, Verimatrix, Verizon, Communications, Vyve Broadband, MB Docket No. 15-64 (fil. Aug. 28, 2015) ("Joint Statement"), p. 2.

on the untested, unsupported and indeed highly controversial "virtual headend" scheme that has emerged as a purported "cure all" technological solution.

C. While the Standards Have Yet Even to be Defined, It is Clear that Compliance with the "Compliant Security System" Proposal Would Almost Certainly Also Require Network Modifications; it is also Unclear Whether Any Licensable Content Protection System Can Meet Content Creators' Security Requirements Imposed on MVPDs

The NPRM also seeks comment on the "security elements" of the proposal to enable the proliferation of consumer-owned competitive navigation devices.[16] The specifics of the NPRM's proposals and its overall approach to content security raise several important and troubling questions that must addressed before moving forward.

Much like the "Information Flows" proposal contained in the NPRM, it is difficult to quantify with precision the costs of the "Compliant Security System" scheme also discussed therein. This is once again the logical outgrowth of placing the regulatory cart before the horse by proposing to enact a mandate before a standard to carry out such a mandate is in place. In fact, it is unclear whether what the "Compliant Security System" issue will be referred to the standards body or how the Commission will ultimately determine if a MVPD has met this requirement.

What is clear and known, however, is that content creators require MVPDs to adopt stringent content security and quality assurance provisions as part of their content licensing agreements. These include, among many others in terms of content security, Digital Rights Management systems, User Level Authentication and Authorization, Stream Control (which enables content to stream to a pre-defined number of users or log-ins per household) and the

[16] NPRM, ¶ 50.

ability to black-out content based on geo-location and programmer requirements. Small MVPDs will likely need to make substantial modifications to their content delivery networks to ensure that these and other similar programmer-imposed provisions are sufficient when MVPDs move toward a "Compliant Security System," that is "licensable on reasonable and non-discriminatory terms." Moreover, because the Commission appears most concerned that the "Compliant Security System" also "not [be] controlled by MVPDs,"[17] content creators are likely to react by imposing even stronger security requirements prior to entering into any content licensing agreement with an MVPD. The cost of such increased security requirements will fall on MVPDs and not content creators or the third-party device manufacturers.

What is also clear is the substantial concern expressed by content creators as to whether the DSTAC Final Report or the NPRM sufficiently accounts for their contract, licensing and intellectual property rights. For example, a large group of content creators noted that one proposal emanating from DSTAC would "allow third parties, with no ownership rights in the programmers' content, to divorce that content from critical, interdependent, negotiated-for elements such as branding, channel assignment, or advertising."[18] These parties went on to state that "[b]y focusing on the terms of negotiated agreements between programmers and MVPDs exclusively, proponents of the Coalition Proposal ignore key aspects of copyright

[17] *Id*., ¶ 58.

[18] Letter from A&E Television Networks, LLC, Discovery Communications, LLC, Scripps Networks Interactive Inc., AMC Networks Inc., NBCUniversal, The Walt Disney Company and ESPN, Inc,, Time Warner, Inc., Viacom, Inc. and 21st Century, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 15-64, (Feb. 12, 2016) ("Content Creators' February 12 *ex parte*"), p. 5.

law meant to uphold carefully negotiated copyright licenses as the content is passed to consumers."[19] Moreover, Disney noted in response to the NPRM that:

> given their lack of contractual privity with the third-party set top box manufacturers, programmers are concerned that any enforcement mechanisms that could be adopted by the FCC as part of this proceeding would not adequately assure adherence to the terms governing the distribution of content to the MVPDs, in the first instance.[20]

In terms of programmers' concerns, it may be consumers that pay the price. As Disney, *et al*. has noted:

> content companies carefully manage the terms under which content is provided to consumers, as failure to do so could undermine the viewing experience and thus the value of the content. These include, but are not limited to: presentation; branding; the treatment of advertising; and the careful consideration of how new distribution models impact the delivery of content that consumers already enjoy…By enabling other companies to circumvent these licensing decisions, the Coalition Proposal would fundamentally alter content companies' ability to manage these important elements and thus *impede the progress that is being made today in enhancing consumers' viewing experience, and ultimately leave consumers far worse off.*[21]

Finally, MVPDs too have concerns with respect to the questions raised above, particularly considering the lack of contractual privity between content creators and third-party device manufacturers. In short, will content creators look to MVPDs with whom they do have a contract in place should an instance of copyright infringement arise? The Commission should look as a model to the Digital Millennium Copyright Act ("DCMA"), which includes

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19 *Id*.

20 Letter from Susan Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 16-42, (Apr. 8, 2016), p. 1.

21 Content Creators' February 12 *ex parte*, p. 2 (emphasis added).

provisions offering Internet Service Providers ("ISPs") a "safe harbor"[22] shielding them from acts of infringement by their subscribers. Congress clearly saw the wisdom of including in the DMCA certain, well-defined protections to ensure that those merely "passing along" content are not liable for claims of infringement by other parties involved in the transmittal or publication of that content. Thus, even if one were to breeze past the legitimate concerns of content owners about their intellectual property, it is unclear how the proposals in the NPRM could possibly be deemed reasonable for MVPDs in the absence of some kind of legally sustainable "safe harbor" to ensure that MVPDs cannot be held in any way liable for the acts of downstream parties such as competitive device manufacturers that infringe on any content providers' copyrights as a result of MVPDs' compliance with this new technology mandate.

While some level of standardization could help provide solutions to these issues by providing more robust and sufficient protection for the copyrights of content providers, it may be several years in the making – demonstrating yet again the perils of considering a mandate that is subject to a still-to-be-defined and still-to-be-developed standard or set of standards.

[22] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), codified at 17 U.S.C. 512, 1201-05, 1301-22; 28 U.S.C. 4001. The "safe harbor" provision is codified at 17 U.S.C. § 512.

D. It is Unclear Whether Any Certification/Authentication Process Proposed in the NPRM Can Allay Privacy Concerns or Whether the Commission is Even Concerned with Ad Insertion by Third-Party Device Manufacturers

Beyond content security issues, a number of parties[23]—including *proponents* of the NPRM's proposal—note the serious privacy implications at issue in this proceeding. As the National Telecommunications and Information Administration ("NTIA") points out:

> [p]roviders of devices -whether MVPDs or others - will have access to large amounts of personal information about the users of those devices, not limited to the programming that they search for, watch, or purchase. MVPDs generally have more rigorous statutory obligations concerning their collection and use of personally identifiable subscriber information than do non-MVPD providers of navigation equipment." [24]

Echoing the thoughts of many others with respect to intellectual property rights, NTIA goes on to correctly note that the NPRM's proposal for resolving this issue "leaves important questions to be addressed – most importantly, who will ensure compliance with a certification and through what legal authority."[25] Particularly considering that the Commission is conducting a parallel proceeding at this time into privacy issues[26] (highlighting its commitment to the issue), it is curious that privacy would appear to be of such little concern in a quickly-paced march to "unlock the box."

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[23] Letter from Paul Glist on behalf of the Future of TV Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 16-42, (Feb. 11, 2016), p. 4; ACA DSTAC Reply Comments, p. 16; Comcast DSTAC Comments, p. 19.

[24] Letter to Federal Communications Commission Chairman Tom Wheeler from Lawrence Strickling, National Telecommunications and Information Administration ("NTIA"), MB Docket No. 16-42 (fil. Apr. 14, 2016) ("NTIA Letter"), p. 5.

[25] *Id*.

[26] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 16-39 (rel. Apr. 1, 2016).

NTIA is also correct that a number of other important, related issues remain to be considered.[27] These include the liability that could extend to MVPDs that authenticate devices later found to violate consumers' privacy. Such important questions again highlight the peril of a "rush to judgment" in this proceeding, pursuant to which the Commission will issue a mandate and sort out the details later.

Also absent from the NPRM is a consideration of whether the "Information Flows" proposal would prevent device manufacturers from overlaying their own advertisements. In fact the NPRM does not even solicit comment on these concerns[28] even though such matters were clearly flagged by the DSTAC Final Report. On a related note, absent a privacy regime that prevents third-party-devices from using consumers' viewing habits to enable targeted advertising, MVPD subscribers utilizing third-party devices may be inundated with unwanted and/or inappropriate ads. If this proceeding is truly about the interests of the consumer rather than representing an effort to create competition merely for competition's sake, such issues must be addressed thoughtfully.

E. The Commission Should Not Move Forward with the NPRM's Proposals Based on Unsupported Assertions that Certain "Solutions" are a Panacea that Can Overcome Serious Technological and Security Concerns

In seeking comment on the timeframe in which the standards body would operate, the NPRM also discusses various aspects of the "Competitive Navigation" proposal produced by

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[27] NTIA letter, p. 5.

[28] *See*, Letter from Nicol Turner-Lee, Vice President and Chief Policy and Research Officer, Multicultural Media, Telecom and Internet Council ("MMTC") to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 15-64, *et al*. (fil. Feb. 16, 2016) ("caution[ing] against models that disproportionately affect the advertising revenue used by existing programmers and new content creators to develop, market and distribute quality programming, particularly given the absence of viable business models available for diverse programmers to fund their online content.").

DSTAC.[29] The NPRM also points to assertions placed in the record claiming that the standardization necessary to implement this approach could be completed "within a single year,"[30] and that the "virtual headend" is some kind of "magical silver bullet," – an easy-to-implement or "off the shelf"[31] cure-all to MVPDs' and programmers' concerns. The NPRM also points to two unsupported statements in DSTAC that "[m]any of the major MVPDs either support DLNA VidiPath today or plan to in the near future."[32] Each of these assertions are, at best, the subject of much debate. In any case, the Commission should not move forward based solely upon unsubstantiated and untested promises, the source of which often seem to be those farthest removed from the actual architecture of networks and provision of services to consumers.[33]

The assertion that the "Competitive Navigation" approach is a single year away from achieving the NPRM's goals is belied by the very DSTAC report from which this proposal emerged. Competitive Navigation was the subject of a lengthy section in the DSTAC Final Report critiquing its shortcomings, a discussion that touched on many of the same points found in MVPDs' critiques of the overall DSTAC process. This discussion noted the significant

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29 NPRM, ¶ 43.

30 *Id*., citing Letter from Consumer Video Choice Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 21, 2016), p. 6.

31 Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 15-64 (Dec. 16, 2015).

32 NPRM, fn. 123.

33 *See*, Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 15-64, at attachment (Oct. 20, 2015).

implementation burden that the Competitive Navigation proposal would impose on MVPDs of all sizes and technologies and noted that it relies on a "virtual headend" that does not exist today.[34] Perhaps more importantly, this discussion stated that "[t]he Device Proposal fails to offer *essential procedures for testing and certification*. Even after this was pointed out, the Device Proponents leave the matter 'to be determined.' Based on past experience, the effort necessary to create a functional and operating testing regime is a multi-year process."[35] Absent even a regime under which Competitive Navigation can be tested and validated, it is difficult if not impossible to see how it can be viewed a single year away from implementation. Yet again this highlights the danger in the NPRM's approach; the regulatory cart and horse are set off down a path of "mandate now, standards and technology needed to do it later" that fails to even account for the testing necessary in any new, significant technological approach. Moreover, the fact that DSTAC—which included a diverse group of members and a process similar in substantial respects to the standards body proposed in the NPRM—produced after eight months a proposal that failed to achieve anything approaching true technical consensus further contradicts the assertion that Competitive Navigation is the panacea it is promised to be.

NTCA therefore urges the Commission to adopt a more thoughtful and deliberative process that acknowledges the lack of consensus with respect to promised silver bullets and at the very least subjects the "Competitive Navigation" and "virtual headend" proposals to a standards body that includes the rigorous testing and validation lacking thus far.

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34 DSTAC Final Report, pp. 279-300.

35 *Id*., p. 293.

F. The Commission Should Not Set an Arbitrary Timeline on the Work of the Standards Body or "Put its Thumb on the Scale" by Proposing a "Fallback" Standard that Undermines Incentives for Collaborative, Inclusive Standard-Setting

The Commission repeatedly professes that the goal of this proceeding is not the creation of a technological mandate. Indeed the NPRM specifically discusses how its standards body process as proposed in the NPRM is intended to address concerns that the "Competitive Navigation" approach places too much emphasis on a required set of standards.[36] Yet in that very same paragraph the Commission proposes to use the "Competitive Navigation" approach as a "safe harbor" or "fallback" should the standard-setting body not come up with a technical means to fulfill the earlier mandate. The use of such a "fallback" is effectively an open invitation to proponents of Competitive Navigation—an approach that found *no consensus* as part of the DSTAC process—to "run out the clock" on finding a truly workable solution so that the "fallback" becomes the *de facto* standard.

Indeed, it is doubtful that the level of standardization that is needed to successfully achieve the NPRM's goals can be accomplished within one or even two years. The DSTAC process that produced competing visions of how to expand consumers' options for accessing video content outside of the MVPD-leased set-top box did not produce anything approaching an implementable standard. Instead, it produced dueling proposals and two very divergent opinions on whether the Competitive Navigation approach is workable in the near or even medium term. It also produced the numerous technological questions that remain to be answered in *the wake of* a mandate. As such, it is curious why the Commission assumes that a one or even two-year

[36] NPRM, ¶ 42 (seeking comment on seek comment on "whether our proposed approach, *which does not mandate specific standards,* balances these critiques against the need for some standardization.").

process that includes "Competitive Navigation" as a "fallback" will lead to anything other than adoption of that proposal. Such a process would diminish the credibility of the standards body and NTCA urges the Commission to reject such a process.

G. The Commission Should Learn From Prior Proceedings in Which it Has Mandated a Standard Before the Technology to Meet it Existed

As discussed in greater detail above, there is a lack of consensus as to how to achieve the current proposal for enabling the greater use of competitive navigation devices. A number of complicated technological questions have been raised as to whether the "non-security elements" of the NPRM are technologically achievable and at what cost. Legitimate questions have also been raised as to whether there is a method by which to address the serious content security concerns that remain unanswered at this time. Addressing each of these issues is complicated, indeed hamstrung, by the fact that there is no standard on which the Commission can seek comment. This pattern of facts—this lack of basic understanding among stakeholders as to standard, scope, and cost to comply with a pre-established mandate—should give the Commission pause.

For one, the mandate-before-standard approach places the entire MVPD and device manufacturer industry on a path toward a standard (or standards) without any technology—most critically one that has been *tested and proven*—in existence. While some might argue that such a process will force parties with disparate interests to find a solution ("force them to figure it out" so to speak), such a process in practice leaves little to no room for failure. Particularly should there be an artificial timeline on the standards body as the NPRM seems inclined to adopt, it is difficult to see a process that is not quickly beset by numerous waivers, failures to meet deadlines, and, mostly importantly, dashed consumer expectations. In the end, the rush to move

forward could lead to MVPDs' and equipment manufacturers' investment in technology to comply with a standard and competitive navigation devices that fail to meet the Commission's and consumers' expectations.

Past is prologue here, and a good example of the perils of this approach can be found in the Commission's Enhanced 911 ("E911") location accuracy proceeding. Beginning in 1996, the Commission sought to ensure that calls to emergency services from consumers' mobile wireless devices conveyed accurate and timely data as to the specific location of the party placing the call.[37] While indeed an important goal, substantial technical hurdles needed to be addressed, and yet the Commission adopted a mandate that required mobile wireless carriers to meet certain milestones. Because the Commission adopted a mandate before a standard was adopted, several years of waivers and delay ensued.[38]

Taking a lesson from this mandate-before-standard experience, the Commission should direct the standards body process to undertake and complete the important and complicated work of identifying technology issues and defining standards *prior to* the issuance of any regulatory mandate. As discussed herein and as is evident from the DSTAC process, there are numerous complicated technological hurdles that must be overcome to ensure the proliferation of competitive navigation devices. While NTCA continues to believe that this NPRM is unnecessary to improve consumer choice in terms of how to access the video content they have paid for, once the Commission moves down this path, it must at the very least ensure that a

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[37] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676 (1996).

[38] *See generally*, Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Order to Stay (rel. Jul. 26, 2002).

thoughtful process protects consumers from dashed expectations in the form of delays or even set-top boxes that fail to meet their needs or even function altogether. The Commission must also ensure that small MVPDs are not disproportionately burdened by a process that forces them to seek multiple waivers in the face of compliance deadlines that simply cannot be met. In sum, a thoughtful and measured process that looks first to a standards body *before* a mandate is the best path forward.

III. THE NPRM FAILS TO CONSIDER WHETHER THE PROPOSAL IS NECESSARY FROM BOTH A POLICY AND STATUTORY STANDPOINT IN LIGHT OF CURRENT CONSUMER TRENDS AND TECHNOLOGY CAPABILITIES

A. The NPRM is a Solution in Need of a Problem at a Time When Consumers' Options for Accessing Video Content are Rapidly Expanding

Throughout the NPRM, the Commission repeatedly asserts that the proposals contained therein are necessary to empower consumer choice and promote innovation in the manner in which consumers view MVPD services.[39] What the NPRM fails to consider is whether that level of consumer choice and innovation are already here and, just as importantly, whether the standards body process will inhibit rather than promote a continued move away from the set-top box altogether, or at the very least, continued rapid innovation in devices and consumer choice. Moreover, it seems that this proceeding is aimed primarily at injecting "competition for competition's sake" without any consideration of the benefits consumers are already receiving in the market as it exists today and that which could exist in the future absent Commission intervention.

[39] NPRM, ¶ 1.

At bottom, the ultimate goal of competition is to serve as a substitute, where possible, for regulation to ensure that consumers receive better, increasingly innovative services at lower rates.[40] Regulation in this space can and should be aimed at ensuring that innovative services emerge from providers and that they are available at reasonable prices, rather than ensuring that competitors of a specific kind and business plan exist just for the sake of having those competitors exist. Section 629 of Act does not task the Commission with making or creating markets.

With respect to the instant proceeding, there is no indication that the market is failing to produce the very results that Section 629 contemplates and demands. The NPRM's focus on promoting the emergence of a specific kind of access device—a competitive set-top box—all but ignores the actual video marketplace in which this proceeding is taking place, and certainly avoids any discussion or attempts at informed predictive judgment of what that marketplace is likely to look like in just a few short years. Providers and content owners of all sizes and technologies have embraced the "Apps Approach," which enables consumers to view myriad video content on a competitive and ever-growing menu of tablets, laptops, and other devices. The emergence of Roku, Amazon Fire TV, Apple TV, Google's Chromecast, and gaming consoles—not to mention Netflix, Hulu, and HBOGo, Sling TV, Skitter TV—not only provide consumers with a dizzying array of choices, they demonstrate that consumers (as well as

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[40] *See, e.g.,* Statement of Chairman Tom Wheeler, *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53 ("For the last several years, we have been able to watch real world examples of what happens when cable rate regulation is removed. In the thousands of cable systems subject to Effective Competition, we have a sizable cohort of real life examples, not hypotheses. Significantly, our most recent report on cable industry prices concludes that the average rate for basic service is lower in communities with a finding of Effective Competition than in those without such a finding. *This is not surprising since competitive choice is the most efficient market regulator*.") (emphasis added).

content providers and MVPDs) are rapidly making their own choices in the market to move away from the set-top box as the single (or even a preferred) point of interface. Comcast correctly pointed out earlier in this proceeding that "[t]here are hundreds of millions of these connected devices in the marketplace – far outpacing the number of traditional MVPD-supplied set-top boxes – and the popularity and use of these devices continue to soar."[41] Moreover, as ACA has noted, small cable providers have in large numbers been moving away from traditional set-top boxes "by working closely with retail device manufacturers to develop and deploy next generation set-top boxes that integrate their traditional MVPD service with over-the-top ("OTT") services, like Netflix."[42] Clearly, to the extent that consumers rely at all on any set-top device, their choices are exploding absent Commission action.

A Commission spokesperson's summary and premature dismissal of the recent Comcast announcement that it is making its *full* TV lineup available via both Roku boxes and certain smart televisions is telling in showing that this proceeding is focused less on consumers' choices and more on seeking a certain kind of competition.[43] It is particularly disappointing considering that in the NPRM, the Commission dismissed the available consumer choices noted above

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41 Comcast DSTAC Comments, p. 2.

42 Letter from Ross Lieberman, Senior Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, p. 1 (Feb. 11, 2016) ("ACA Feb. 11 *ex parte*").

43 *Comcast Fires Back at FCC by Making TV Service Available Without a Set-Top Box***,** Wall Street Journal, April 20, 2016, available at: http://www.wsj.com/articles/comcast-fires-back-at-fcc-by-making-tv-service-available-without-a-set-top-box-1461188283. (An official at the FCC responded that "[*w*]*hile 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.") (emphasis added).

(Roku, Apple TV, etc), because "it appears that those devices are not 'used by consumers to access multichannel video programming,' and are even more rarely used as the sole means of accessing MVPDs' programming."[44] While the Comcast announcement would seem to allay this concern (as it does allow access to *all* of a large MVPD's content) and even seemingly negates the need for any continued action in this proceeding, the Commission appears to have prejudged the very rulemaking process in which the parties are now involved.

At the very least, the Commission should examine whether the current marketplace is characterized by a level of choice and competition in consumer navigation devices and methods by which consumers can access the content of their choosing when and where they so choose consistent with what the drafters of Section 629 of the Act contemplated. Most importantly, the Commission should also consider whether the Comcast announcement—the announcement that the nation's largest MVPD is moving away from the set-top box—will spur others to do so as well.

B. The Proposal Exceeds the Scope of the Commission's Authority Under Section 629 of the Communications Act

The NPRM's proposal to require MVPDs to create three "Information Flows" and make them available to third-party manufacturers of navigation devices exceeds the scope of the Commission's authority granted under Section 629 of the Act. Section 629(a) states that:

> the Commission shall…adopt regulations to assure the commercial availability, *to consumers* of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel

[44] NPRM, ¶ 14.

> video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[45]

Any reading of Section 629(a) reveals that its purpose is to provide *consumers*, not third-parties, access to MVPD services. In other words, it was adopted to ensure that MVPD subscribers could exercise choice in accessing the MVPD services which they paid for. The unbundling of the "Information Flows" as proposed by the NPRM is an entirely different proposition altogether that vastly exceeds the scope of the Commission's mandate. Specifically, the Information Flows proposal is at bottom a disaggregation of MVPDs' services into separate services, to which device manufactures will be given access, allowing them to in turn package those MVPD services into a user interface and service all their own. Indeed, the NPRM at one point tentatively concludes that MVPD-provided:

> applications that include news headlines, weather information, sports scores, and social networking…[are] unnecessary to include in the definition of Content Delivery Data because that information is freely available from other sources on a variety of devices, whereas multichannel video programming is not. The provision of such applications may allow MVPDs *and unaffiliated companies* to distinguish themselves in a competitive market.[46]

In other words, the NPRM proposes to enable content manufacturers to access MVPD services (specifically MVPD video programming as a Commission-defined separate service) and package that service into one all their own, adding features to enable such entities to differentiate themselves. The NPRM further notes that cable providers allow subscribers "'to switch between multiple sports games or events or camera angles, view[] video-on-demand with full interactive

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45 47 U.S.C. § 549(a) (emphasis added).

46 NPRM, ¶ 40 (emphasis added).

'extras,' shopping by remote, or see[] the last channels they tuned.'"[47] The NPRM asks "[i]s there anything in our proposed definition that would foreclose the possibility that a competitive navigation device could offer these services?"[48] These "services" to which the NPRM refers are features offered by cable providers, in other words. part of the service offered to end-users. Yet the NPRM proposes to enable third-party device manufacturers to access MVPD programming as a separate service. Indeed nothing in the NPRM prevents this, nor does the NPRM prevent third-party made devices from altering channel lineups or integrating advertising into their third-party created user interface. Nothing in the plain language or legislative history or Section 629(a) can be reasonably interpreted to provide the Commission with the authority to enable third-parties to access and repackage MVPD programming as a separate service in such a manner.

IV. SHOULD THE COMMISSION MOVE FORWARD WITH THE NPRM'S PROPOSALS, IT SHOULD ADOPT A SMALL COMPANY EXEMPTION OR A TRANSITION PERIOD FOR SMALL CARRIERS AND AN "ANALOG-ONLY" EXEMPTION

The NPRM seeks comment on whether the Commission should adopt an exemption from the proposed rules for small MVPDs or whether it should consider alternative implementation deadlines for these providers.[49] NTCA supports an exemption or an alternative implementation deadline for small MVPDs that recognizes the unique circumstances under which small, rural

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47 *Id*., citing Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1 (Jan. 21, 2016) ("NCTA Jan. 21 ex parte").

48 NPRM, ¶ 40.

49 *Id.*, ¶ 81.

MVPDs operate and the disproportionate burden that the NPRM's proposal will impose on these providers.[50]

As an initial matter, NTCA supports an exemption from the NPRM's proposals for small MVPDs. Small MVPDs do not have the same level of technological capabilities and resources as large and mid-size providers. This could exacerbate the already disproportionate compliance burden for these small businesses.[51] An exemption for MVPDs with 100,000 or fewer subscribers would be consistent with similar exemptions granted in other Commission proceedings.[52]

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[50] Should the Commission adopt a small MVPD exemption, it must also adopt the NPRM's proposal to limit the "Information Flows" requirement to competitive navigation devices only. NPRM, ¶ 37. In other words, this provision would ensure that MVPDs are *not* required to "commonly rely" on the three Information Flows for their own devices leased to consumers today or in the future. This proposal, first raised in the DSTAC final report, is intended to ensure that MVPDs would not need to replace their own set-top boxes leased to end-users. Adoption of this specific carve-out and applying it to *all* MVPDs regardless must be paired with a small company exemption to ensure that such exemption is not undermined by the market moving towards the standards adopted for competitive devices and adopting it for all set-top boxes. Specifically, adoption of the NPRM's proposed rules is likely to initiate a wholesale shift in the set-top box market. As the market for set-top boxes undergoes such a significant change, and if large and mid-size carriers (but not small MVPDs with an exemption in place) are required to replace the devices they currently provide to subscribers, existing set-top boxes leased to subscribers by small carriers are likely to be outdated in short order, and replacement models that work with small MVPDs' existing network architectures may not be available. In the end, such a result would undermine if not eliminate any value to a small company exemption.

[51] *See*, Joint Statement, p. 1 ("All of the proposals in the Report advance solutions for retail devices that rely on an IP connection, rather than expecting devices to connect directly to the multiple technologies that underlie MVPDs' different access networks").

[52] Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, FCC 15-24 (rel. Mar. 12, 2015), ¶ 173 (granting an "exemption from the enhancements to the transparency rule for those providers of broadband Internet access service (whether fixed or mobile) with 100,000 or fewer broadband subscribers."). *See also, See Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (2013) (exempting providers with 100,000 or fewer subscriber lines, aggregated across all affiliates, from certain recordkeeping, retention, and reporting rules).

Small MVPDs already face significant challenges in the video business, particularly as content prices continue to strain their ability to remain viable. A 2015 survey of NTCA's small MVPD members and other new entrants found that 95 percent of respondents agreed that the single biggest barrier to providing video service is obtaining access to reasonably priced programming.[53] The cost of content continues to rise unabated by Commission action. The additional costs of compliance with the NPRM's proposals may be the "tipping point" that leads a number of NTCA members to consider exiting an already break-even (at best) video services market—thereby *reducing* rather than enhancing competition in the availability of video products.

An exemption for small MVPDs would be entirely consistent with the language of Section 629. In short, nothing in Section 629 requires regulations adopted pursuant to that provision to apply to all MVPDs, nor does it require that commercially available equipment that becomes available as a result of those regulations be compatible with every single MVPD. In fact, the most that Section 629 can be argued to require is that a market for navigation devices manufactured by parties other than MVPDs be allowed to develop.

It must be noted that a small company exemption, while critical as a short-term measure to ensure that a number of small MVPDs are not forced to exit the market due to the compliance costs of the NPRM's proposals, might be of limited long-term value. This is because any mandate, even one ostensibly made applicable *only* to large and mid-size MVPDs is likely to

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[53] NTCA–The Rural Broadband Association and INCOMPAS' 2015 Video Competition Survey, available at: http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/NTCA_2015VideoCompetitionSurvey.pdf. This survey also found that "72% of survey respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering a market altogether as a result of rising programming costs."

"trickle down" to smaller providers as well. Such will inevitably be the case considering the fundamental reengineering of MVPD networks and set-top devices and the technology necessary to connect the two that will result from adoption of the "Information Flows" proposal. In short, the MVPD world is likely to look far different when the dust settles from adoption and eventual implementation of this proposal, and it is unlikely that small MVPDs will be shielded from that dust. It is therefore incorrect to assume that the technology used by small MVPDs today, in terms of both their networks themselves and the set-top boxes they lease to subscribers, will not become outdated thus forcing such providers to adapt to whatever standard is mandated here.

Thus, a perhaps better approach would be a small company-specific implementation schedule. Such a process is particularly critical should the Commission move forward with a "multiple standards" approach as discussed above, yet is critical too for any mandate adopted. Small carriers should be permitted to delay implementation of the NPRM's proposals until such time as the market "settles on" an eventual standard for both the "Non-Security" and "Security" elements addressed in these comments. The Commission could, for example, delay implementation for small carriers until competitive navigation devices achieve 15 percent market share of all set-top boxes used by all MVPD subscribers. Small MVPDs should under such a scenario be given no less than three years from the determination that competitive devices have reached that requisite market penetration threshold. Such a delayed implementation schedule would ensure that small MVPDs can begin a move towards implementation once the standards body process has been completed and the market that results is close to maturity, saving them from the consequences of choosing a standard ultimately rejected by the market. A transition period to then come into compliance after a standard has been adopted by the market will also

ensure that small MVPDs are not confronted with an immediate need to reengineer their networks, thus enabling these providers to spread these significant costs over several years.

Finally, the Commission should move forward with its tentative conclusion to exempt analog-only MVPDs. As ACA has noted, "proponents of the Device Proposal have not suggested *any* methodologies by which MVPDs that operate analog-only systems can use a virtual headend to deliver their entire service to subscribers."[54] While NTCA continues to believe that the virtual headend is a concept in need of substantial development and testing, at the very least those proposing it have considered its application to the majority of MVPDs in this country. Because no standard for analog-only providers has even been considered, the Commission's tentative conclusions to exempt such providers is correct.

V. SHOULD THE COMMISSION MOVE FORWARD WITH THE NPRM'S PROPOSALS, IT SHOULD ADOPT A COLLABORATIVE, INCLUSIVE STANDARDS BODY PROCESS THAT TAKES REALISTIC ACCOUNT OF THE STATE OF TECHNOLOGY GENERALLY AND THE CHALLENGES OF SMALL COMPANIES IN PARTICULAR

The Commission proposes to utilize a standards body as defined in the NPRM to enact the "non-security elements" of its competitive navigation device proposal.[55] NTCA urges the Commission to include small company representatives on any standards body created (or existing standards body utilized) to further the goals of this proceeding.

As an initial matter, one of the most glaring weaknesses of the DSTAC process was its lack of any small MVPD representatives whatsoever.[56] It was therefore not surprising that the

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54 ACA Feb. 11 *ex parte*, p. 7.

55 NPRM, ¶ 41.

56 The DSTAC membership included: AT&T, Sony Electronics, EchoStar Technologies, DISH Network, Amazon, Cablevision, Public Knowledge, Comcast, Hauppauge, Vizio, Motion Picture

final report failed to even acknowledge, must less seek to mitigate in any way, the unique burdens faced by small operators. The Commission must not allow such an unbalanced process to carry through any standards body process envisioned by the NPRM.

Only by including small MVPD representatives can the standards body truly understand the current technological state of the entire market, especially in rural areas, and the numerous unique burdens these providers face in providing video service. The Commission cannot assume that small MVPDs have the same level of technological capabilities or resources as large and mid-size providers, and thus having a sizeable contingent of small company representatives is vital to ensuring that any recommendations that emanate from the standards body would be technologically feasible for small carriers and would not impose disproportionate burdens or even burdens of such impact that some choose to exit the MVPD market. The stakes are too high, and the price of failure in terms of adopting a standard that is unworkable for small carriers and which dashes consumer expectations is too severe, should the standards body fail to produce a recommendation that has been sufficiently vetted and tested by a diverse group of experts. Failure to include small company representatives in a process that has such significant implications for this segment of the industry could not only be disastrous for these companies and their subscribers, it would severely undermine if not strip away all credibility from the standards body and the administrative procedure under which this proposal moves forward.

Association of America, ARRIS, Google, Samsung, Charter, Columbia University, Evolution Digital, TiVo, NAGRA. *Appointment of Members to the Downloadable Security Technology Advisory Committee*, Federal Communications Commission, Public Notice, DA 15-114 (rel. Jan. 27, 2015). *See also*, ACA Feb. 11 *ex parte*, fn. 14 (discussing "the Commission's decision not to appoint any of the highly qualified individuals from small and medium-sized MVPDs that ACA nominated to serve on the DSTAC" and noting that the "resulting DSTAC Report failed to reflect smaller MVPD's concerns about the Device Proposal.").

VI. CONCLUSION

For all of the reasons discussed above, NTCA urges abandonment of this legally dubious and backward-looking NPRM. At the very least, if the Commission moves forward, small MVPDs should be granted an exemption or a transition period that lets the market define, develop, and settle on a standard before any rules are applicable to these providers. Should the Commission move forward, it must also include small MVPD representatives as equal members of any standards body used to further the NPRM's goals.

Respectfully submitted,

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