

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

Public Knowledge submits these Reply Comments in response to the Federal Communications Commission's ("FCC" or "Commission") February 18, 2016 *Notice of Proposed Rulemaking and Memorandum Opinion and Order*¹ regarding the expansion of consumers' video navigation choices pursuant to 47 USC § 629. The record strongly supports the Commission's continued action on this matter.

II. Specific, Reasonable Concerns About the Commission's Proposal Can Be Addressed Through Simple Adjustments to the Proposed Rules.

Many opponents of the Commission's plan to implement its Congressional mandate to introduce competition to the MVPD navigation device market simply oppose competition. They think the FCC should ignore the law and the clear consumer harm this locked-down and uncompetitive market has caused. They may be MVPDs who prefer the control and revenue control over the set-top box gives them, or even some programmers who do not welcome the prospect of consumers being able to more easily access online video, which competes with their programming. Of course, many MVPDs see that a more competitive market for navigation devices will improve their own service and could even save them money, and many programmers welcome a world where fewer barriers stand between creators and viewers. It remains true that some critics of the FCC's plan, though they may attempt to identify what they see as specific shortcomings, would rather the FCC simply do nothing, leaving the market controlled by MVPDs. There is little that the Commission can do to compromise with critics who, for business or other reasons, are opposed to opening this market to competition.

¹ Expanding Consumers' Video Navigation Choices, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, MB Docket No. 16-42 (rel. Feb. 18, 2016) ("NPRM").

On the other hand, some commenters have criticized or commented on some aspects of the Commission's plan in more constructive ways. They may be concerned that the Commission's deliberate choice to avoid imposing specific tech mandates leaves certain questions unanswered, or they may feel the FCC did not adequately discuss issues of particular concern to them in its NPRM. Without endorsing any specific criticism, Public Knowledge notes that the very purpose of the notice and comment process is to help the Commission identify, and if need be, address issues raised by commenters.

For example, Verizon states that the Commission should "Ensure Consumers Get Their Full MVPD Service," and ensure that competitive apps or devices do not "disrupt elements of the MVPD's programming content and/or presentation of that content."² In this proceeding, many different commenters use terms like "presentation" differently. But Verizon provides helpful clarification. It later writes that:

[T]he potential ... exists for third-party navigation devices to modify or disrupt important elements of an MVPD's programming service presentation, such as overwriting the advertising that MVPDs insert to help fund the service, degrading video quality, obscuring or displacing independent or diverse programming, or not delivering PEG programming to consumers. MVPDs also use channel placement to benefit and protect their subscribers' interests, e.g., not placing child-friendly video-on-demand channels next to adult programming channels, and they may have contractual obligations to content providers about how content is positioned within the channel line-up.³

This makes it clear that Verizon does not use the word "presentation" to refer to every element of a competitive device and how it displays programming, but to more narrow concerns related to the integrity of programming itself. Verizon wants to be sure that customers simply get the MVPD package they pay for, that the channel lineup be respected, and that competitors do not somehow interfere with a programmer's ability to show advertisements.

² Comments of Verizon at 2.

The NAB raises some similar points. Among other things, it asks the FCC to “hold that broadcaster advertising and other promotional matter may not be altered, replaced or sold against by navigation devices absent a separate agreement with a television broadcast station” and to “specify that ‘channel information’ must include a station’s negotiated channel position, neighborhood and/or tier....”⁴

Public Knowledge has argued that many of the feared harms that commenters such as NAB and Verizon cite are unlikely to occur, for technological, business, and legal reasons. Nevertheless, the FCC should, if only as a matter of “belt and suspenders” policymaking, clarify that certain behaviors should not be permitted by competitive apps and devices, in order to address legitimate programmer or programming-related concerns, including but not limited to the following:

A. Channel Line-Up

The Commission can require that any device or app that is technically capable of displaying to consumers a channel line-up of MVPD programming should do, with the channels in their numerical position. This should not be the *only* way that competitive apps and devices can display MVPD programming. Just as MVPD devices themselves have search features and integrate MVPD programming with other content the MVPD has licensed, so too should third-party devices and apps be permitted to integrate MVPD content with other content purchased by the consumer, or licensed by the third-party device or app maker. And such a requirement could at no point be interpreted to prevent a competitive app or device from displaying only, for example, family-friendly content. It would not hold back competition to require that competitive

³ Comments of Verizon at 7-8.

⁴ Comments of the National Association of Broadcasters at 3.

devices do what they would be likely to do anyway: offer consumers the ability to view their MVPD channel lineup in its default order.

B. Blocking of Programming

Consumers should be able to determine what programming is available on their devices, and they should be able to purchase devices or apps that, by default, filter out programming they find objectionable. With those caveats, however, the Commission should require that competitive apps and devices make all MVPD channels available to viewers.

C. Integrity of Programming

Consumers should have the right to interact with programming as they see fit. They may want to use on-screen apps in conjunction with watching a TV show (e.g. to view tweets related to a show); they may want to watch multiple programs at once or have a program showing as a picture-in-picture; they may want to see a live preview of a channel in a program guide before switching to it. For there to be a truly competitive marketplace, competitive apps and devices ought to be able to offer consumers features of this kind. However, some programmers have expressed concern that competitive apps and devices would have the technical ability to overlay ads on top of MVPD programming or even to replace live ads wholesale. While Public Knowledge believes these are unlikely hypotheticals, it would not be inconsistent with the Commission's goals for it to specify that competitive apps or devices should not interfere with ads on live programming, replace programmer ads with their own, or overlay ads on top of programming without user interaction when the viewer is watching a program. However, the Commission should not seek to prevent competitive apps or devices from offering to viewers features that already exist on MVPD-supplied devices, such as the ability to skip or fast-forward through ads on *recorded* programming.

In general, the Commission should be open to ways to assure programmers and MVPD that competitive apps and devices will simply give customers more options to access their programming and services. If necessary to assure programmers that this is the case, it can adopt requirements which ensure that third-party devices present the complete MVPD programming package to consumers, that programs themselves are presented with integrity, and that a channel guide of MVPD programming is available to viewers as an option in the user interface. The Commission should resist calls, however, to regulate the design and features of competitive apps and devices, to insert itself into how consumer electronics companies run their app stores, or to require that certain programming be promoted over other programming in the recommendation and search functions of competitive devices and apps. The Commission can and should protect consumers and promote the public interest while promoting competition, including addressing some of the issues mentioned above. But it should allow consumer demand and competition to guide the precise contours of what a competitive app and device market looks like.

III. Several Commenters Raise Factually or Conceptually Erroneous Copyright Arguments.

Some commenters oppose the FCC's proposal for various reasons, which they collectively describe as "copyright." But these objections are generally factually or conceptually mistaken. For example, the MPAA claims that the FCC's proposal is "tantamount to granting third parties a zero-rate compulsory copyright license"⁵ for copyrighted programming.⁶ This is

⁵ Comments of the Motion Picture Association of America at i, 8-9.

⁶ The "Intellectual Property Law Scholars" also use the MPAA's coinage, and oddly characterize functionality similar to the existing CableCARD regime as some sort of conveyance of a property right. *See* Comments on Behalf of Intellectual Property Law Scholars at 4.

not correct,⁷ because competitive devices and apps do not touch any of the exclusive rights granted to copyright holders under 17 U.S.C. § 106: specifically, they do not distribute or publicly perform copyrighted works.⁸ Similar misconceptions can be found in many arguments from opponents.

A. The FCC Cannot Rewrite Copyright Law in the Ways Some Commenters Suggest

The Copyright Alliance argues that “the Commission’s proposal will force distributors who have paid for the right to disseminate content through their own platforms to make their content streams available to non-paying third parties who can then repackage and stream the content to their users.”⁹ This ignores the distinction between services and devices. The FCC’s proposal does not allow third parties to “repackage and stream” programming, or to somehow “disaggregate” it. Rather, it allows *users* who have *paid for* MVPD programming to watch it using the device of their choice. This is distinct from allowing third parties to “distribute” or publicly perform programming in a way that may implicate copyright. Under the FCC’s proposals, MVPDs, who actually distribute copyrighted programming, will still pay programmers for that privilege, and consumers who wish to access MVPD programming, will still pay for that service.

Under the Copyright Alliance’s analysis, any device that facilitates the rendering, display, or viewing of programming violates the rights of creators. This has never been true, however.

⁷ Moreover, even if it were true, then the same would be the case for the FCC’s existing CableCARD regime, which shares many characteristics with the current proposal to replace it.

⁸ Though not central to the FCC’s proposal, some competitive devices may offer DVR functionality. While this involves reproduction, it is not an infringement. Courts have repeatedly held that home recording is a fair use. *E.g.*, *Sony Corp. of America v. Universal City Studios*, 464 US 417 (1984); *Fox Broadcasting v. Dish Network*, 723 F. 3d 1067 (9th Cir. 2013). “[T]he fair use of a copyrighted work ... is not an infringement of copyright.” 17 U.S.C. § 107. *See also* *Lenz v. Universal Music Corp.*, 801 F. 3d 1126, 1132-33 (9th Cir. 2015) (fair use is permitted by law, not an “affirmative defense that excuses conduct.”).

⁹ Comments of The Copyright Alliance at 12.

The manufacturers of FM radios do not obtain licenses from ASCAP and BMI - radio stations and public venues do. MVPDs, not television set or CableCARD device manufacturers, negotiate with programmers for the right to distribute content. The manufacturers of mobile phones or web browsers do not negotiate with each web site they can access, or the creators of all the media they display. In market after market, the distinction between distribution (which calls for a license) and rendering is crystal clear, and consumer device choice has not impeded the ability of creators to negotiate with actual distributors. By attempting to eliminate the distinction between viewing and distribution, the Copyright Alliance and others that support its view are advancing a theory where end-user devices have to negotiate directly with programmers before they can allow subscribers to watch paid-for MVPD programming. The FCC lacks the authority to radically change copyright law in this way.

Moreover, users themselves have the right to view content as they wish, and to obtain devices and apps that allow them to do so. Viewers should be able to use technology to filter out offensive content, to set “favorites,” or to search out shows by genre. They should be able to compare and search across offerings from different services. None of these things implicates copyright. A device or app maker is not distributing, reproducing, or publicly performing copyrighted programming simply by providing its viewers with the ability to find, compare, and view programming. Copyright is important, and very powerful, which is why the Commission should resist arguments that transform it from a set of statutorily-defined exclusive rights to something that grants major programmers and MVPDs the right to control every aspect of how viewers discover and view programming.

B. Specific Contractual Terms are Not the Same as “Copyright”

As Public Knowledge discussed in its initial comments, it is undeniably true that the Commission’s proposal would change the legal and factual landscape to some extent. This is common sense. Of course, at the outset it should be noted that the Commission’s proposal does not affect the tiering of content by MVPDs, bundles, the rates paid by MVPDs to programmers, or other matters regarding the relationship of MVPDs and programmers.

To some opponents, any change the FCC makes to the functioning of the MVPD marketplace somehow violates copyright, because certain licensing terms may become moot or unnecessary. This is not true, and is not how copyright law works. The exclusive rights of a copyright holder under 17 U.S.C. § 106 do not include a right of absolute control over the manner in which a viewer accesses programming, and a copyright holder cannot change the legal or factual backdrop in which it operates simply by conditioning its licensing of the rights it does have.

Right now, a major programmer might negotiate with a cable TV provider for preferential treatment on its set-top box. The major programmer’s offerings might appear as recommendations over content that is actually more suited to the viewers’ interests, or be giving priority in search results. A contract between an MVPD and a programmer may contain terms of this sort. Cable MVPDs, of course, cannot guarantee that consumers will see promotions of this kind, since they already support CableCARD, a system that allows the device manufacturers and users to customize the user experience as they see fit, irrespective of any contracts between programmers and MVPDs that demand special placement. Non-cable MVPDs, who have tighter control over the end-user experience, can currently agree to give some programmers preferential treatment on the device that all of their subscribers use. Under the FCC’s proposal, which allows

different devices to offer different user interfaces and does not require that competitive devices give some programming preferential treatment, this would no longer be the case.

The fact that CableCARD is not as widely-used as the FCC's current proposal is expected to be does not change the basic fact that competitive devices already exist and already offer differentiated user experiences that neither programmers nor MVPDs control. Moreover, and more fundamentally, the fact that a programmer and an MVPD might agree between themselves that they would like the marketplace, the law, or the world to be a particular way does not give them the authority to bring it about via private contracts or as license conditions, nor do privately-negotiated agreements supersede FCC rules. If, for instance, a movie studio demanded that a movie theater turn off its emergency exit signs during a movie as part of its license to the theater, the theater could not legally comply. This is not an abrogation of the studio's copyright.

This situation is the same. The FCC's rules will change the factual landscape that is the backdrop to negotiation, but it will not expand or take away a programmer's right to negotiate, nor eliminate its exclusive rights under the Copyright Act. An MVPD cannot agree to legally impossible contractual provisions, such as refusing to provide certain programming to competitive set-top boxes. Nor can an MVPD agree with a programmer to block emergency alerts or to display programming only on a particular brand of television. Under the FCC's proposal, an MVPD will not be able to specify to programmers in advance the precise manner in which its content will be displayed, since in a competitive market different devices and apps will offer different user experiences, except as discussed in Section II, *supra*.

As discussed elsewhere in this document,¹⁰ programmers or even MVPDs might request that certain requirements be placed on competitive apps or devices, relating to issues such as

¹⁰ See Section II, *supra*.

channel positioning or live ads. The best way for the Commission to address this issue is with consistent rules that apply to all MVPDs and all programmers, not by requiring some kind of unworkable system where specific contractual terms that vary from MVPD to MVPD, from programmer to programmer, and over time are passed along to third parties who were not party to the contract or license. This is particularly true insofar as opponents of device and app competition might place terms into agreements that make effective competitive navigation devices impossible. Instead, the Commission should provide reasonable protections to programmers and broadcasters to address legitimate concerns related to inappropriate interference with programmer rights. Such measures should include, for example, requiring that competitive devices and apps, where technically feasible, offer to consumers the opportunity to receive the MVPD channel line-up and advertising in its MVPD-determined, numerical order and presentation. The Commission should address any specific issues that truly reflect a legitimate right of programmers under current copyright law.

C. The FCC's Proposal Allows MVPDs to Use Familiar and Established Copyright Protection Technologies

The proposal will not increase the piracy of cable content itself. For example, Creative Future argues that it would “forc[e] [programmers and MVPDs] to use ‘least common denominator’ digital rights management technologies that may be less robust than those already used in the marketplace.”¹¹ However, as CVCC explained in its comments, the FCC’s proposal would allow MVPDs to continue using the same content protection technologies they already use in their own devices.¹² Indeed, with respect to content protection technology, the FCC’s current proposal is not materially different from the established CableCARD proposal. Unless

¹¹ Comments of Creative Future at 7.

¹² See Comments of the Consumer Video Choice Coalition at 38.

commenters can adequately explain why technologies that are already currently widely deployed are inadequate, their claims that the FCC’s proposal will facilitate the piracy of MVPD content should be disregarded.

D. The FCC’s Current Proposal Offers Creators Similar Protections to What They Have Under CableCARD

Some commenters attempt to distinguish CableCARD from the current proposal. But these efforts fail. For example, the MPAA claims that “The CableCARD is a unidirectional solution that facilitates security functionality so a third party device can render the subscriber’s MVPD service. The CableCard regime is not a two-way, Internet-based solution that facilitates manipulation of content so device or application providers can offer a different service from the one the subscribers obtain from their MVPD.”¹³ Nearly every phrase the MPAA has underlined in its filing demonstrates a misunderstanding of the FCC’s proposal. It is true that CableCARD is unidirectional, as currently deployed. This simply means that CableCARD devices (without extra equipment) cannot send signals “upstream” to a cable system, meaning they cannot, for instance, request on-demand movies or switched digital channels. How this relates to potential copyright infringement is unclear. It is also true that the FCC’s proposal facilitates third-party apps, as well as devices. This is because the Commission sees its proposal as one way to free consumers from needing to have a specific “box” solely devoted to watching MVPD programming, a goal shared even by opponents of the FCC’s proposal, such as Commissioner Pai.¹⁴

CableCARD, *like the FCC’s current proposal*, simply allows third-party devices to “render” MVPD service. This simply means that, after the CableCARD verifies that a customer

¹³ Comments of the Motion Picture Association of America at ii-iii.

¹⁴ See Dissenting Statement of Commissioner Ajit Pai, *Expanding Consumers’ Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 16-18, MB Docket No. 16-42 (rel. Feb. 18, 2016).

is entitled to cable programming, that programming is made available to the device. Neither CableCARD nor any associated licensing dictates the design, user interface, or functionality of CableCARD devices. CableCARD devices are free to, and do, integrate online content and present custom user interfaces and differentiated features (e.g. advanced DVR and home recording options). CableCARD does nothing more than allow third party devices to access MVPD programming, just as the FCC's current proposal does. The FCC's plan does not authorize the "manipulation of content" any more than CableCARD does.

The MPAA is wrong to claim that the FCC's current proposal is "Internet-based." Rather, the FCC's proposal is that MVPDs provide access to their MVPD programming, as delivered over their existing specialized video delivery networks, not that they deliver it over the Internet. The best way for devices and apps to talk to each other within a consumer's home is indeed using the Internet Protocol, but use of the Internet Protocol does not mean programming is being delivered over the "Internet." Just as consumers can subscribe to cable service today without a broadband connection, consumers will be able to take advantage of the FCC's proposal without a broadband connection. Devices of course may work better with broadband connectivity - to retrieve the weather and sports scores, for instance, or to give viewers access to online programming. The mere fact that viewers may use the Internet for other things does not transform the Commission's proposal to open up MVPD programming into some kind of "Internet" proposal.

The MPAA is also wrong to claim that the FCC's current proposal allows third parties to create a "new service." Consumer electronics and software are not "services" in the sense that the MPAA suggests. They are not distributing or publicly performing programming, but merely allowing viewers to watch the programming they are already paying for from their MVPD

service. MPAA’s reasoning would redefine television sets, speakers, mobile devices, and radios as “services.” While services can be tied to devices and apps, devices and apps themselves are not services. The MPAA’s attempt to invent a distinction between the FCC’s current proposal and the established and uncontroversial CableCARD system by creating a new definition of “service” that has no support in the law, the dictionary, or common sense, should be rejected.

It bears mentioning that CableCARD devices today are not limited to providing programming just on one “device.” Certified CableCARD “gateway” devices are available today that make cable programming available to various devices on a customers’ home IP network, without the need for a separate CableCARD installed in each viewing device.¹⁵ The Commission’s current proposal refines the basic idea behind CableCARD but does not fundamentally permit things that are not already technologically and legally possible with CableCARD. It is, rather, CableCARD done right. It would be consistent for opponents to object both to the FCC’s current proposal and CableCARD, rather than opposing one proposal and not the other.

E. The FCC’s Proposal Will Discourage Piracy

Various commenters have made arguments that suggest that open devices and competitive device and app markets themselves are bad, in that they encourage or at least permit piracy. For example, Creative Future argues that “[t]he rules proposed in this proceeding ... would allow technology and platform providers and pirate box manufacturers to import the piracy problem into the pay-TV services environment for the first time....”¹⁶ This argument overlooks the fact that the FCC’s proposal would be of interest only to paying MVPD subscribers and misunderstands the incentives of competitive app and device makers.

¹⁵ See e.g., SiliconDust’s HD HomeRun PRIME, <https://www.silicondust.com/products/hdhomerun/prime/>

A person who purchases a competitive device specifically to watch MVPD programming is unlikely to turn to unlawful sources, since this person, by definition, is an MVPD subscriber. As long as lawful content is convenient and available, users are unlikely to turn to unlawful sources. The FCC's proposal makes piracy less likely, since it makes lawful content more accessible and convenient for MVPD subscribers. The FCC's proposal will even make piracy less common among non-MVPD subscribers, by giving them new reasons to become MVPD subscribers. There are many customers who would be more interested in paying for the compelling programming that is often available only through MVPDs if they could use devices and apps other than those designed by MVPDs and their partners. Thus, even accepting the premise that a competitive market or open devices would somehow enable piracy, it remains the case that competitive app and device users will have less reason to engage in piracy than any other category of TV viewer.

There is no reason to accept the premise that open devices, or Internet-connected devices in general, promote piracy. First, piracy is not rampant on internet-connected TV devices today. Opponents can point to a few obscure devices they characterize as "pirate boxes" that would be unlikely to meet the strict certification requirements necessary to obtain access to MVPD programming under the FCC's proposal. Devices like this represent a negligible portion of the market. Devices from companies like Apple, Sony, Microsoft, Nvidia, and Amazon, that comprise the vast majority of the TV-connected market today, offer no such "pirate"-oriented features. Furthermore, competitive apps and devices will be part of the MVPD ecosystem. They will be competing with MVPD-provided apps and devices, to be sure, but not with MVPD

¹⁶ Comments of Creative Future at 8.

services. They will succeed when MVPDs succeed. They will have no incentive to undermine the MVPD ecosystem in the way opponents suggest.

IV. The Commission has Ample Authority to Address Commenters' Concerns Regarding Third-Party Devices and Apps.

The Commission has many ways to ensure that third-party devices and apps comply with various public interest requirements, such as privacy, accessibility, or even the channel guide and advertising-related issues discussed above. The NPRM outlined the Commission's overall approach to issues of this kind:

we propose to require that MVPDs authenticate and provide the three Information Flows only to Navigation Devices that have been certified by the developer to meet certain public interest requirements. We tentatively conclude that this certification must state that the developer will adhere to privacy protections, pass through EAS messages, and adhere to children's programming advertising limits. This proposal would mean that MVPDs are not required to enable the Information Flows unless they receive this certification, and also that they are prohibited from providing the Navigable Services to a Navigation Device that does not have such a certification. MVPDs cannot withhold the three Information Flows if they have received such certification and do not have a good faith reason to doubt its validity. This will ensure that the public policy goals underlying these requirements are met regardless of which device a consumer chooses to access multichannel video programming.¹⁷

This is the right approach. The Commission's authority over MVPDs and the process by which MVPDs will make the information flows available to third parties provides it with the means to ensure that devices comply with public interest requirements. (Of course, the Commission's accurate discussion of the fact that MVPDs would not be obligated to connect with non-compliant apps or devices be read to mean that MVPDs would be in charge of enforcement, monitoring, and compliance of third-parties.) Additionally, the FTC's submission to the FCC noting its role in protecting consumer rights is relevant and, combined with an FCC

¹⁷ See NPRM at ¶ 73.

requirement that competitive apps and devices post privacy policies that make certain representations, will do much to ensure that consumers see no difference between MVPD and third-party devices (or find that third-party devices are better) when it comes to important issues like privacy.

However, this should not preclude the Commission from exploring other avenues of authority, as Public Knowledge discussed in its initial comments. Specifically, ensuring that competitive apps and devices are subject to the same consumer protection rules as MVPD apps and devices would be a textbook application of ancillary authority. Ancillary authority is strongest when the Commission has clear and specific statutes to which its authority is ancillary, as it does in this case. To the extent that the Commission grounds its authority on such statutes or is only regulating a device or app's communication and interaction with MVPD programming, such an application would not run afoul of *American Library*.¹⁸ Alternatively, the Commission could require that apps or devices that want to take advantage of the Commission's framework agree that the Commission has the authority to enforce certain public interest obligations.

In the end, however, consumers do not care about the precise mechanism by which their rights are protected, as long as they are protected. Technical as well as legal mechanisms should be explored. Above all else, the Commission's approach should ensure that:

- Public interest obligations like accessibility and privacy apply to third parties.
- Individual subscribers can bring a complaint if they feel like competitive apps and devices are not compliant.
- Complaints are decided by neutral third parties, not by either the MVPD or the competitive app or device maker.

Provided it ensures equal compliance with important public interest protections between MVPD devices and third-party apps and devices, the Commission can be assured that its proposal to enhance competition and ensure consumer choice in the navigation device market will benefit consumers.

V. The Commission’s Proposal Will Benefit Independent and Diverse Programming

A. Opening the Set-Top Box Market Will Allow Independent Programmers to Reach a Wider Audience

Independent programmers are at the mercy of MVPDs when it comes to distributing their content. Currently, MVPDs operate as gatekeepers to the video market; without their blessing, programmers struggle to reach viewers and succeed in the marketplace.¹⁹ Opening up the set-top box market will provide programmers with additional avenues to distribute their content.²⁰ In a competitive set-top box market, programmers will succeed by appealing to the customer directly, succeeding based on the merits of their programming and ideas rather than relying exclusively on their ability to get carriage by an MVPD. As long as MVPDs are able to act as gatekeepers, independent and diverse programmers will continue to struggle in the market.²¹

This is why many programmers and content creators continue to rally behind the Commission’s proposal. The Writers Guild of America, West, representing writers of motion pictures, television, radio, and Internet programming, wrote that “set-top box rules that increase

¹⁸ See *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2006).

¹⁹ See Comments of The Townsend Group at 2; Comments of GFNTV at 2 (explaining the need for a path to greater distribution for diverse and independent programmers).

²⁰ Independent and minority-produced and owned content has long struggled to obtain carriage from established pay-TV operators. As Dr. Donahue Tuitt, CEO and Founder of UNIFYme.tv, relates, “In 2004, I set out to launch my own cable channel to bring these alternative images to mainstream consumers, however my channel was refused carriage by satellite and cable channels alike. The common statement was “We carry BET.” or “We have TV One.” Cable provider programmers see race and culture through one lens and have not realized there are multiple aspects within an ethnic culture that cannot be captured solely by 2 or 3 channels. Being shutout of the cable marketplace left me and hundreds of other content owners with programs with no place to share our creative voice in mainstream outlets.” Comments of UNIFYme.tv at 2.

competition and enable the integration of television programming and online video on one device will greatly expand consumer access to a wider range of diverse and independent programming and help level the playing field that has been dominated by too few companies for too long.”²² Other stakeholders emphasized in their initial comments opening the market to competitive devices and apps will lower the barriers to entry for content creators and innovators alike, thereby opening up countless possibilities for programmers and consumers.²³ As one programmer explained, the Commission’s proceeding is an opportunity to “provide our country’s diverse and independent video programmers and technology entrepreneurs an open media platform that will free us from our big cable past.”²⁴

The proposal benefits the video marketplace from both sides: not only will it be easier for new and diverse programmers to reach their target audience, but it will also elevate the visibility of that content to the consumers those programmers want to reach. The increased array of competitive devices available to consumers will enhance consumers’ ability to search for and locate content they may not have otherwise found in the walled-garden of the incumbent gatekeepers.²⁵ In their comments to this proceeding, TV One erroneously concludes that

²¹ Comments of the Townsend Group at 2 (“Unless we eliminate the gatekeeper system, we will forever be just talking about how to improve markets for independent and diverse programmers.”)

²² WGAW Supports FCC Action on TV Set-Top Box Competition, (Jan. 27, 2016), <http://www.wga.org/content/default.aspx?id=6141>

²³ *See generally* Comments of UnifyMe.TV; Comments of the Townsend Group at 2; Comments of GFNTV at 2.

²⁴ Comments of New England Broadband, Inc. at 2.

²⁵ As one minority programmer, Broderick C. Byers, CEO of iSwop Networks, puts it, “Cable programming “gatekeepers” have the absolute power to decide what they think minorities should and should not be viewing. Their programming decisions have traditionally led to the distribution of “entertainment-based” programming. Our community has long desired self-help, motivational and instructional programming content. Despite numerous requests to carry more uplifting content, Big Cable has always responded that minority communities are NOT interested in and will not support this kind of programming. But, who are they to decide. If given a chance and marketed correctly, this type of programming will find an appreciative audience.” Comments of iSwop Networks at 2, *available at* <http://apps.fcc.gov/ecfs/document/view?id=60001690781>. Experiences like this one are not unique. *See* Comments of New England Broadband at 1 (Relating the response from Big Cable to requests for carriage of the Black Education Network, specifically that “We were repeatedly told there was no market for positive, uplifting programming targeting the African American community”).

independent, diverse programmers will be “buried, making it even harder for a viewer to come across and be exposed to TV One’s programming or any other minority content, even if it is technically available on that platform.”²⁶ But there is no reason to expect this to happen. To the contrary, competitive devices and apps have every incentive to present compelling content to their users, and in a competitive market, no one device or platform will be able to dictate the terms of success to any programmer.

By contrast, in today’s MVPD-dominated world, MVPDs can and do promote some content and make other content less easy to discover.²⁷ Competitive devices will likely continue to offer the traditional program guide with its numerical channel lineup to consumers as one of the ways to discover and interact with programming. In short, a competitive navigation solution gives anyone who wants a foot in the door, the opportunity to have their voice heard, and to have a chance to succeed or fail on their own merits, rather than the whims of a gatekeeper. Traditional cable and other MVPDs will retain autonomy over the content that they themselves create or elect to distribute, while the universe of independent, niche, and diverse content will be able to grow as consumers are empowered to explore.

It is also important to remember that these proposed rules are but one means by which diversity issues in the video marketplace must be addressed. As Eric Easter, Chairman of the National Black Programming Consortium and CEO of BLQBOX, a streaming video service, pointed out in his comments, diversity of ownership of both producers, distributors, and innovators represents another essential element in addressing media diversity concerns.²⁸ As he writes, “... [f]or those content creators and the entrepreneurs who want to distribute that work,

²⁶ See Comments of TV One, LLC at 14-15.

²⁷ See Comments of Public Knowledge at 22-29.

²⁸ See Comments of Eric Easter at 1.

the only viable market is direct to consumers in the streaming world.”²⁹ He continues: “But as long as the streaming world is locked out from the mainstream, many audiences will never find them and they will not succeed. Set-top box innovation would open that system.”³⁰

B. Opening Up the Set-Top Box Market Will Not Result in Programmers Losing Protections Negotiated For in Contracts with MVPDs

Some commenters claimed that opening up the device and app market should not proceed because programmers do not enter into direct contracts with each end-user device.³¹ This argument fails on several grounds. First, programmers have never felt the need to enter into direct contracts with the makers of devices consumers use to watch programming.³² Second, MVPDs have consistently used restrictive contract terms to make it more difficult for small programmers to succeed, not as tools to protect them. Third, requiring competitive app and device makers to enter into or honor contracts that may vary widely from MVPD to MVPD and programmer-to-programmer is simply an argument against a competitive market. A competitive market requires stability and scale, and the ability for consumers to use the same equipment with different MVPDs. Since Congress directed the Commission to promote a competitive market in navigation devices, arguments that would undermine the possibility of a competitive market must be rejected.

The use of oppressive terms by MVPDs in contracts with independent and diverse programmers is ubiquitous and the harms are well documented.³³ The comments in the Diverse Video Programming Notice of Inquiry revealed that one way that MVPDs limit the ability of

²⁹ Id.

³⁰ Id. at 1-2

³¹ See, e.g., Comments of TV One at 18.

³² See Section III, *supra*.

³³ See Reply Comments of Public Knowledge, *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, MB Docket No. 16-41, 3 (February 18, 2016).

independent programmers to reach audiences is through the pervasive use of most favored nation clauses (MFNs) and alternative distribution method clauses (ADMs). Those opposed to this proceeding argue that contracts are there to protect programmers. However, the record shows that these very contracts are an effective mechanism for MVPDs to leverage their market power into excluding programmers from the broader video market, not the means by which programmers are protected from large MVPDs.

The best way for the Commission to ensure that programmers are protected is to ensure they are not at the mercy of MVPDs. To achieve this, the Commission should adopt rules which ensure that competitive apps and devices can serve consumers and achieve scale while respecting the legitimate rights of programmers. If necessary, this can include a requirement that, where appropriate, competitive apps and devices present the MVPD programming lineup in its default order, among other things. However, a system where extensive contractual terms are passed along to third parties who were not party to the contract or license is unworkable. This is particularly true for contract terms that favor MVPDs or otherwise make effective competitive navigation devices impossible. Alternatively, to protect programmers, broadcasters, or MVPDs, the Commission should promote sensible rules that enable a nationwide market for competitive devices and apps.³⁴ Applying a consistent standard across devices will serve the dual purposes of protecting the rights of programmers and promoting an open, competitive set-top box market.

VI. Implementation

The Commission has concluded that it should “revise [its] rules to require all MVPDs to state separately a charge for leased navigation devices and to reduce their charges by that amount to customers who provide their own devices...with respect to all navigation devices, including

modems, routers, and set-top boxes, and we invite comment on that tentative conclusion.”³⁵

Public Knowledge agrees with this conclusion, and also supports Zoom Telephonics’ emphasis (which is supported by the Commission itself) that this include cable modems, as well as other navigation devices.³⁶

Public Knowledge continues to believe that MVPDs should not be permitted to charge for specialized, MVPD specific equipment, such as any equipment an MVPD decides to use to support third-party video devices or apps. However, cable companies should be able to continue their current practice of charging for equipment for which there is a competitive market, such as cable modems or their own proprietary set-top boxes, provided they list those charges separately to consumers. Finally, to the extent that a cable company incorporates video-specific functionality into a cable modem, it should not charge extra for that functionality, nor create obstacles to customers from supplying their own cable modems.

VII. The Commission’s Proposal Will Not Undermine Ongoing Efforts to Improve Video Navigation Accessibility

Public Knowledge supports efforts by consumer groups advocating on behalf of those with sensory disabilities, to ensure that new and innovative video navigation devices and software include adequate support for accessibility features. One major goal of the FCC’s proposal is to ensure that third-party navigation device and app creators have the necessary data available through MVPD data streams to facilitate their provision of accessibility features on par with those required of existing MVPD navigation solutions. Accessibility for the “48 million

³⁴ See Section II, *supra* (e.g., requiring that competitive devices and apps, where technically feasible, offer to consumers the option of exploring the MVPD channel line-up in its MVPD-determined, numerical order.)

³⁵ See NPRM at ¶ 84.

³⁶ See Comments of Zoom Telephonics, Inc. at 13.

Americans who are deaf, hard of hearing, late-deafened, or deafblind”³⁷ or “blind [or] visually impaired”³⁸ is an important objective in the FCC’s endeavor to promote not only competition in the video navigation marketplace, but also access to independent, diverse, and niche content.

To the extent concerns exist that third-party manufacturers might see some incentive to bring to market a device which fails to make programming it displays accessible to all its users, the Commission has ample authority to ensure that competitive navigation solutions are provided with the same necessary accessibility input, through the three MVPD data streams, which facilitates MVPD set-top box accessibility. Public Knowledge has no objection to the Commission exercising its ample authority in this area to ensure that competitive navigation solutions achieve parity in accessibility requirements with existing set-top box efforts.

VIII. Privacy

The Commission’s detractors in this proceeding complain that consumer privacy could be jeopardized if third party devices makers do not follow the same privacy rules as MVPDs.³⁹ Fortunately for consumers, the Commission already addressed privacy concerns in the NPRM, proposing to ensure parity between privacy standards for MVPDs and third party devices and apps.⁴⁰ Under the Commission’s already-articulated plan, it can ensure that consumers have the same rights and protections, regardless of whether they rent a device from their MVPD or use competitive devices or apps.

Opponents also claim that the FTC is the only proper agency to address consumer privacy in the communications marketplace (seemingly ignoring statutory mandates directing the

³⁷ Comments of Telecommunications for the Deaf and Hard of Hearing, et al, at 1-2.

³⁸ Comments of the American Council of the Blind at 1.

³⁹ See Comments of the Director’s Guild of America at 8-9 (“Under this NPRM, not only do third parties gain access to proprietary and copyrighted content, they also gain a huge window into consumers’ viewing habits and personal data at home.”)

Commission to address privacy issues itself). The FTC and FCC operate as complementary consumer protections agencies. While the FTC can address consumer harms by holding companies accountable, the FCC has prophylactic consumer protection responsibilities that the FTC does not. Where the FTC is an enforcement agency, the FCC has a duty to proactively act to protect and promote the public interest. In few areas is this obligation more necessary than regarding privacy in the MVPD marketplace, where incumbent cable and satellite providers have already demonstrated their eagerness and ability to catalogue and monetize the information they have about their subscribers' activities and interests.⁴¹ Recognizing this, the FCC's proposal would extend at least those baseline protections that already apply to MVPDs, to the full scope of the competitive device and app marketplace. As discussed elsewhere in this filing, Public Knowledge believes the Commission has sufficient authority to ensure certain public interest protections with respect to competitive devices and apps.

Moreover, a competitive device marketplace is likely to lead to more opportunities for consumers to exercise control over their privacy than they have at the hands of MVPDs. The FCC's proposal will at the very least confer privacy parity with the status quo, but it may also raise the bar on consumer protection because a competitive marketplace may incentivize innovators to offer stronger protections on the devices they offer, as a means of product differentiation.

Of course, if the Commission decides that the rules that currently apply to MVPDs are insufficient to protect consumer privacy in a digital age, it can always elect to increase privacy protections across all platforms, including cable and satellite providers. The key, as always, will

⁴⁰ See NPRM at ¶¶ 73, 77-78.

⁴¹ Steven Perlberg, *Targeted Ads? TV Can Do That Now Too*, Wall Street Journal (Nov. 20, 2014), available at <http://www.wsj.com/articles/targeted-ads-tv-can-do-that-now-too-1416506504>.

be to ensure parity and enforceability, regardless of provider or platform, to promote an improved consumer experience.

Ultimately, the Commission's proposal to open a competitive device and app marketplace will not adversely affect current consumer privacy protections. To the extent that it has any effect at all, it is only likely to increase protections consumers currently enjoy by providing a competitive environment where consumers can seek out alternative means to access programming besides those under the umbrella of MVPD control.

IX. The FCC's Proposal Will Not Increase Overall Set-Top Device Energy Consumption

Regarding concerns⁴² that the FCC's proposal may negatively affect energy efficiency efforts in the consumer electronics space, Public Knowledge notes that this proposal will result in a reduction in overall energy usage. This reduction will result from giving consumers and MVPDs opportunities to reduce the overall amount of hardware required, particularly in households with multiple televisions, creating opportunities to remove boxes entirely, and opening up competition for newer, lower-power hardware to replace inefficient legacy cable boxes.

MVPDs may opt to comply with the FCC's rules either by augmenting an existing gateway device, such as a cable modem or router, to provide access to MVPD information flows, or may opt instead to replace all of the set-top boxes in a home with a single device which would make the data streams available. In either case, devices such as tablets and computers would not require additional hardware to access programming - the Commission's proposal can help bring about a world where display screens no longer require separate converter devices. Mobile

phones, tablets, and smart TVs would be able to access content directly, and both new and existing low-power consumer electronics such as Apple TVs, Google Chromecasts, or future innovative devices not yet available, will be able to access this content at the consumer's direction.

Instead of needing both a Smart TV and a cable box in order to access both over-the-top content and MVPD programming, for example, only a single device - the Smart TV - would be necessary. As the number of viewing locations in a home increases, whether through the use of mobile devices, computers, or additional TVs, hardware needs compared to current systems substantially decline, as each location accessing MVPD programming will not require its own discrete piece of inefficient MVPD-provided hardware.

Regardless of whether the number of devices required remains stable, or as is more likely, is reduced, energy usage will still decline as a result of the FCC's proposal. Innovation in low-power computing devices has moved at a breakneck pace in the past few years, particularly in the video space, with low-power devices like Google's Chromecast, Amazon's Fire TV, Apple's AppleTV, and Roku's offerings, offering consumers energy-efficient, innovative, low-cost devices. The current MVPD regime prevents consumers from using these devices to access MVPD content, forcing them instead to rely on MVPD set-top devices which are substantially larger, fail to "sleep" as efficiently, and consume substantially more energy in general, while offering little added consumer utility in exchange. The FCC's proposal opens up innovation and puts choice in the hands of consumers, letting them choose to access the MVPD content they're

⁴² Noah Horowitz, *FCC Proposal Could Undermine Efforts to Bring Down National Set-Top Box Energy Use*, *NRDC Expert Blog* (May 4, 2016), <https://www.nrdc.org/experts/noah-horowitz/fcc-proposal-could-undermine-efforts-bring-down-national-set-top-box-energy>.

already paying for through modern, innovative mechanisms born out of a competitive marketplace.

X. Emergency Alerts, Parental Controls, and Other Public Interest Considerations

There are several additional public interest considerations highlighted by commenters. Specifically, these include ensuring competitive devices cannot violate advertising limits during programming for children, are guaranteed to properly display emergency alerts and closed captioning, and enable parental controls as current MVPDs are required to do. We agree that these are important considerations and are certain that the FCC has ample authority to address these concerns where appropriate.⁴³ The Commission’s proposal to require that MVPDs authenticate that the three Information flows only to Navigation devices that have been certified by the developer to meet certain public interest requirements appears to accomplish that goal,⁴⁴ as long as such requirements are truly enforceable.⁴⁵

Opponents of the competitive navigation solution have also claimed that there are technological barriers that would make it either impossible, or too onerous for third parties, to program devices that would display emergency alerts or enable sufficient parental controls. It is worth noting that, as the FCC points out in its NPRM, “retail navigation devices, such as TiVos, have been deployed in the market for over a decade without allegations of... violations of advertising limits during programming for children or problems with emergency alerts or accessibility.”⁴⁶ Furthermore, not only do current third party devices already carry out these key functions, but technological demonstrations of innovative new devices and apps illustrate that these functions are not only possible, but fairly easy to implement to ensure provision of EAS

⁴³ NPRM at ¶ 37; 47 U.S.C. § 629.

⁴⁴ NPRM at ¶ 73.

⁴⁵ See Section IV, *supra*.

messages and parental controls through competitive devices.

Fundamentally, the Commission's objective when it comes to consumer protection in the competitive device marketplace must be to establish parity between proprietary devices and third party apps and devices, and to ensure any necessary protections are strongly enforceable.

XI. Conclusion

In closing, Public Knowledge reiterates its support for the Commission moving forward with its proposal to promote competition and consumer choice in the video navigation marketplace, while respecting the concerns of content creators, diverse and independent voices, and other affected parties. Public Knowledge urges the Commission to distinguish those arguments that reflect genuine concerns from those offered simply to cloak an underlying objection to competition.⁴⁷ Competition benefits both business interests and consumers, and increased competition and consumer choice were the objectives sought by Congress in direction the Commission to open up this marketplace. The Commission's plan is well-suited to achieving these important goals.

Respectfully Submitted,

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⁴⁶ NPRM at ¶ 73.

⁴⁷ As Dr. Donahue Tuitt, a minority programmer and CEO & Founder of UNIFYme.tv puts it, "There have been unsubstantiated arguments that suggest having one set-top box to organize network shows on one window and granting an easy portal to internet channels is a bad idea. That's simply corporate greed that fears competition and a disruption in a business model that has reaped a few cable companies billions of dollars annually." Comments of UNIFYme.tv at 3.