

**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 INCOMPAS

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April 22, 2016

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INCOMPAS, by its undersigned counsel, hereby submits these Comments in response to the Commission’s Notice of Proposed Rulemaking and Memorandum Opinion and Order on expanding consumers’ video navigation choices and fulfilling the purpose of Section 629 of the Communications Act.¹

I. INTRODUCTION AND SUMMARY.

As the preeminent national industry association for competitive communications networks and service providers, INCOMPAS represents companies that provide residential broadband Internet access service (“BIAS”), linear multichannel video programming (“MVPD”), and voice services in urban, suburban, and rural areas.² Most of the association’s BIAS and

¹ *Expanding Consumers Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42, CS Docket No. 97-80 (rel. Feb. 18, 2016) (“*NPRM*”).

² INCOMPAS represents over 130 companies that offer telecommunications network services, equipment solutions and professional services. As with any large trade association that advocates on behalf of companies with diverse interests, the positions taken in this comment are those of the association and do not necessarily reflect the official position of all INCOMPAS members.

MVPD providers are new entrants and provide fiber-to-the-home as the third wireline provider in their communities in competition with the incumbent cable provider and the incumbent telephone company. In addition, INCOMPAS represents device manufacturers, including TiVo, and online video distributors (OVDs), such as Amazon and Twitter, which offer video programming over BIAS directly to consumers.

INCOMPAS supports the Commission's efforts to promote competition and innovation in the retail navigation device market in order to fulfill the purpose of Section 629 of the Communications Act and to benefit consumers. The lack of access to competitive video navigation devices has been a barrier to new entrants seeking to compete and differentiate their services in the video programming market. Small and new entrants are unable to take advantage of the economies of scale that incumbents use to incentivize set-top box manufacturers that focus on large device orders for their nationwide networks. In the absence of competition, incumbents have used this monopolistic power to stifle innovation and require their customers to pay an exorbitant monthly fee to rent a device that only evolves as and when they choose. While the Commission's CableCARD regime provided a competitive pathway, that regime cannot work with Internet Protocol program distribution and requires a successor. The Commission has been instructed by Congress to ensure that competition will thrive for competitive navigation devices, and in 2014 was further instructed in the STELA Reauthorization Act to empanel a Technical Advisory Committee to receive recommendations for a "not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices."³ Doing so is a laudable effort.

³ STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 § 106(d) (2014) ("STELAR").

Under the CableCARD regime when a competitor introduced a new innovation, incumbent MVPDs were required to respond, updating what would have otherwise been stagnant technology. As we discuss below, a competitive regime that permits consumers to choose their preferred device—just as they do in the wireless marketplace—will encourage innovation and lower pricing for the devices, which will promote more choice in the video marketplace.

In this Comment, INCOMPAS explains the need for a competitive retail market for video navigation devices to promote competition in the BIAS and video marketplace, asserts that the Commission has the requisite legal authority to adopt the proposed rules, highlights the various and broad support for the *NPRM*, and addresses the technical feasibility of the Commission’s proposals.

II. ESTABLISHING A COMMERCIAL MARKET FOR VIDEO NAVIGATION DEVICES IS CRITICAL TO THE DELIVERY OF MULTICHANNEL VIDEO PROGRAMMING SERVICES BY COMPETITIVE NETWORK PROVIDERS.

Given consumers’ preference for purchasing BIAS and MVPD services together in a bundled product, competitive wireline providers have found that they must offer both services in order to be competitive in the residential broadband marketplace. With the Commission’s recent focus on the deployment of advanced telecommunications services,⁴ understanding the relationship between providing video service and a competitive provider’s ability to successfully deploy its broadband network and increase its service adoption levels has never been more critical. As mostly small or new entrants in the video market, INCOMPAS members face

⁴ See Fed. Comm’n Comm’n, *Connecting America: The National Broadband Plan*, available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report (rel. Jan. 29, 2016).

significant barriers to the provision of video service that have hindered their abilities to compete head-to-head with other wireline providers in the residential marketplace.

The inability of competitive network operators to access advanced, innovative video navigation devices at reasonable prices remains an impediment to entry and robust participation in the video programming marketplace. The Consumer Video Choice Coalition (“CVCC” or “Coalition”), of which INCOMPAS is a member, has discussed this barrier to entry in comments in other Commission proceedings, including how broadband competitors that are required to offer video programming to compete would benefit from greater competition among navigation devices:

Today, large MVPDs benefit from economies of scale. Set-top box manufacturers are incentivized to focus on orders from these larger MVPDs, while small MVPDs are left with high costs if they want to offer devices different from those of the major operators due to their smaller subscriber bases over which to spread costs. Robust retail competition would allow manufacturers to take advantage of economies of scale over a larger base of retail navigation device users – ultimately lowering costs of new entrants and other small network operators to acquire innovative navigation devices.⁵

Because increasing access to competitive navigation device solutions would further encourage video and broadband competition in the marketplace, INCOMPAS urges the Commission to act expeditiously to adopt the rules proposed in the *NPRM*.

In today’s navigation device market, large incumbent MVPDs wield monopolistic control that can make competitive entry into the provision of video programming exceedingly difficult. In 2015, Senators Markey and Blumenthal conducted a study on the state of the navigation device market and discovered overwhelming anti-competitive incumbent MVPD control:

⁵ Consumer Video Choice Coalition Comments, MB Docket No. 15-158, at 7 (filed Aug. 31, 2015).

approximately 99 percent of MVPD subscribers use set-top boxes leased from the MVPD, and these subscribers pay almost \$20 billion per year (\$231 per household) in leasing fees.⁶ In the press release announcing the study, the two Senators decried the lack of competition in the market and called for “a new, national consumer-friendly standard that will allow consumers to choose their own video box irrespective from their pay-TV provider.”⁷

One of the hallmarks of telecommunications competition is the ability to differentiate one’s service from incumbents by offering innovative devices, functions and features. The Commission’s proposal wisely seeks to open the market to competition while still allowing MVPDs to offer customers their own navigation solution. With large incumbent cable’s market power and dominance over navigation device manufacturing, small and new entrants have been unable to provide consumers with a unique viewer experience that would otherwise allow them to increase their share of the video and broadband markets. For example, despite the ability of device manufacturers to make an integrated user interface available that would give customers access to both programming from their MVPD and programming available on the Internet, relatively few devices offer this capability.⁸

⁶ Press Release, Senator Ed Markey, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), available at <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>. As Senator Blumenthal remarked: “The average household is forced into fees of more than \$200 a year on set-top boxes—an expense that is unjust and unjustifiable. As the world becomes increasingly connected and technology advances, new innovations must be able to break into the cable marketplace and provide the vigorous competition that drives down prices for consumers. Consumers deserve competitive options in accessing technology and television—not exorbitant prices dictated by monopoly cable companies.” *Id.*

⁷ *Id.*

⁸ See Letter from Angie Kronenberg, General Counsel & Chief Advocate, INCOMPAS on behalf of the Consumer Video Choice Coalition, to Marlene H. Dortch, Secretary, Federal

Being able to offer a navigation device that distinguishes small and new entrants' services from those of incumbents will increase competition not only in the video programming ecosphere, but in the broadband market as well. Moreover, encouraging the widespread availability of video navigation devices will eliminate or lower other costs for broadband competitors offering MVPD services as well, including upfront expenditures on devices for customers who have purchased their own navigation device and any associated maintenance costs.

Consumers will also experience a legion of benefits from the Commission's proposed rules, including lower prices and service switching costs, greater access to content, and the opportunity to select a device tailored to meet their individual and household video needs. MVPD customers are currently forced to lease their set-top boxes (at an average cost of \$7.43 per box per month), even after the cable systems have recovered the cost of the device, in order to access MVPD's linear and on-demand programming services.⁹ The Commission's sound approach will finally extend the promise of choice to the video navigation device market and allow consumers to decide for themselves if they want to access their subscription video service by continuing to rent a device from an MVPD or to purchase a third-party device. Consumers who purchase a device will presumably enjoy cost savings on their cable or DBS bill since they

Communications Commission, MB Docket No. 15-64 (Dec. 14, 2015) ("CVCC Demonstration Letter") (notifying the Commission that the Consumer Video Choice Coalition hosted a technical demonstration in which it used off-the-shelf equipment and open standards to show that how "the competitive navigation device solution is technically capable of offering consumers linear content from the MVPD to which they subscribe, along with their over-the-top content of choice, in a seamless manner with third-party navigation devices").

⁹ See Press Release, Senator Ed Markey, *supra* note 6.

will no longer be paying “equipment charges”, and the portability associated with the device could potentially lower consumers’ costs when switching service providers.

The innovative features and functions that third-party providers will be able to offer will have ancillary benefits for consumers as well. An integrated user interface will allow consumers to access their pay-TV service, OVD subscription services and lawful content found online in the same menu without switching between devices. Consumers no longer will need to be inconvenienced by switching between inputs on their television or using various remotes to control different devices. Competitive navigation device solutions will also offer greater program search capability, which will increase consumers’ access to content and allow independent and minority programmers to reach an even greater audience. Unforeseen and unpredictable innovation is likely as developers have just begun to scratch the surface of the innovative ways a competitive navigation solution could enhance consumers’ video programming experience—creating opportunities for the innovation of video programming itself as well.

III. THE FCC HAS THE REQUISITE LEGAL AUTHORITY TO IMPLEMENT THE PROPOSED RULES.

Calling the “transition to competition in network navigation devices” an “important national goal,” Congress expressed a clear intent to expand the set-top box market beyond the control and influence of MVPDs when it enacted Section 629 of the Communications Act.¹⁰ The legislative history plainly indicates that Congress believed that unleashing competition in the manufacturing and distribution of retail navigation devices could result in a panoply of consumer

¹⁰ H.R. Rep. No. 104-204, at 112 (1995).

benefits, including “innovation, lower prices and higher quality.”¹¹ Explaining that competition “has always led” to these benefits is no less than an indirect reference by Congress to the wisdom of the FCC’s *Carterfone* decision, which provided that the public interest is best served when devices and customer premises equipment are dissociated from network operator control.¹²

With the inclusion of Section 629 in the Communications Act, Congress hoped to inject the same type of innovative possibilities that the telecommunications industry experienced following *Carterfone* into the stagnant retail navigation device market. That the legislative history also references making navigation devices available “from a variety of sources” is further indication that Congress concluded that MVPD-control of the navigation device market could harm consumers and have an anti-competitive effect on non-affiliated manufacturers, retailers and vendors.¹³

Section 629 of the Communications Act confirms the FCC’s authority to adopt rules for the commercial availability of “converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming . . . from manufacturers, retailers, and other vendors not affiliated with any [MVPD].”¹⁴ In plainly written language, Congress instructs the FCC to adopt rules developed “in consultation with appropriate industry standard-setting organizations,” that permit MVPDs to offer their own navigation devices, and that protect the security of multichannel video programming.¹⁵ The proposals

¹¹ *Id.*

¹² *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

¹³ H.R. Rep. No. 104-204, at 112.

¹⁴ 47 U.S.C. § 549(a).

¹⁵ *Id.* § 549(a)-(b).

included in the *NPRM* fulfill the statute’s purpose and explicit direction—to bring competition and innovation to the navigation device market—while sufficiently addressing each of the items that protect MVPD interests.

Further, the instruction in Section 629 anticipates adoption of rules by the FCC that apply to competitive software solutions, in addition to traditional set-top box hardware. In the *NPRM*, the Commission seeks comment on its interpretation of the terms “navigation device” and “interactive communications equipment, and other equipment” specifically regarding its finding that these terms should apply to both the hardware and software employed in devices that allow consumers to access multichannel video programming.¹⁶ This is a justifiable and common-sense interpretation given the interrelatedness of hardware and software in widely-available navigation devices both when Section 629 was passed in 1996 and today. In addition, the Commission has previously interpreted “navigation devices” to take into consideration software-based solutions—such as MVPD applications that have been pre-loaded onto a third-party device that provides the same access to multichannel video programming as a typical set-top box.¹⁷

Congress has also drawn an explicit link to the use of software as a navigation solution in STELAR by establishing the Downloadable Security Technical Advisory Committee (“DSTAC”).¹⁸ In STELAR, Congress required the Commission to establish the DSTAC to

¹⁶ See *NPRM* at ¶ 22.

¹⁷ See *Accessibility of User Interfaces, and Video Programming Guides and Menus; Accessibility Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket Nos. 12-108, 12-107, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, 17345-46, ¶ 23 (2012).

¹⁸ STELAR § 106(d).

recommend technical standards for a “software-based downloadable security system designed to promote the competitive availability of navigation devices in furtherance of section 629 of the Communications Act.”¹⁹ The Commission should see arguments that it does not possess the authority to adopt rules for software-based navigation solutions for what they are—arguments intended to maintain the current MVPD-controlled framework.

Section 624A of the Communications Act also plays a complementary role in granting the Commission authority over cable systems to ensure that consumers are able to enjoy the entire menu of features offered via consumer electronics equipment, including navigation devices. Section 624A(d) specifically empowers the Commission to review regulations that ensure consumer electronics compatibility given “improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.”²⁰ Inclusion of the forward-looking term “similar technology” and reference to navigation devices’ abilities to serve as “recorders” indicates that the statute should be applied to the compatibility of video navigation solutions as well. The Commission’s authority to require MVPDs to provide navigable services via the three “information flows” therefore stems not only from the explicit direction of Section 629, but also from Section 624A, and will ensure that the information supplied by MVPDs does not inappropriately disable or inhibit these devices.

Accordingly, the Commission has ample authority to adopt its proposed rules in this proceeding.

¹⁹ *Id.*

²⁰ 47 U.S.C. § 544a(d).

IV. THE PROPOSED VIDEO NAVIGATION DEVICE RULES HAVE BEEN ENDORSED BY THE ADMINISTRATION, MAJOR PUBLICATIONS, INDEPENDENT PROGRAMMERS, & INDUSTRY EXPERTS.

Over the past year, a number of prominent national publications have acknowledged the consumer benefits that would result from retail device competition²¹ while encouraging the Commission “to open the way for better devices.”²² Since the Commission announced this rulemaking, the Obama Administration as well as major publications and commentators have joined this chorus to unlock the set-top box and increase consumer choice.²³

²¹ See, e.g., The Editorial Board, N.Y. Times, *Let Consumers Use Better, Cheaper Cable Boxes*, Aug. 31, 2015, at <http://www.nytimes.com/2015/08/31/opinion/let-consumers-use-better-cheaper-cable-boxes.html> (“*Let Consumers Use Better, Cheaper Cable Boxes*”); The Editorial Board, USA Today, *End the Cable-Box Rip-Off: Our View*, Sep. 14, 2015, at <http://www.usatoday.com/story/opinion/2015/09/14/cable-tv-set-top-box-editorials-debates/71892068/> (“*End the Cable-Box Rip-Off*”); Nancy Marshall-Genzer, *Why We Don’t Buy Cable TV Set-top Boxes*, Aug. 31, 2015, at <http://www.marketplace.org/topics/business/why-we-dont-buy-cable-tv-set-top-boxes>; Bourree Lam, *Cable Box Rentals: A Needless \$19-Billion Industry*, Sep. 2, 2015, at <http://www.theatlantic.com/business/archive/2015/09/cable-boxes-fcc-television/403180/>.

²² *End the Cable-Box Rip-Off: Our View*, *supra* note 21.

²³ The Editorial Board, Bloomberg View, *Cheaper Cable TV Starts With a Better Box*, Apr. 20, 2016, at <http://www.bloombergvew.com/articles/2016-04-20/cheaper-cable-tv-starts-with-a-better-box>; The Editorial Board, Los Angeles Times, *Thinking outside the cable box*, Jan. 28, 2016, at <http://www.latimes.com/opinion/editorials/la-ed-cable-boxes-20160128-story.html> (“*Thinking outside the cable box*”); The Editorial Board, The Chicago Tribune, *Imagine your viewing options if the FCC unlocks the cable box*, Feb. 15, 2016, at <http://www.chicagotribune.com/news/opinion/editorials/ct-cable-fcc-box-netflix-espn-edit-0216-jm-20160215-story.html> (“*Imagine your viewing options if the FCC unlocks the cable box*”); The Editorial Board, Boston Globe, *FCC should unlock savings for cable consumers*, Feb. 10, 2016, at <https://www.bostonglobe.com/opinion/editorials/2016/02/09/fcc-should-unlock-savings-for-cable-consumers/2msnvpfsddJbvbiYiX9u2N/story.html> (“*FCC should unlock savings for cable consumers*”); The Editorial Board, N.Y. Times, *The F.C.C. Gets Ready to Unlock the Cable Box*, Feb. 8, 2016, at http://www.nytimes.com/2016/02/08/opinion/the-fcc-gets-ready-to-unlock-the-cable-box.html?_r=0 (“*The F.C.C. Gets Ready to Unlock the Cable Box*”); The Editorial Board, USA Today, *Let TV viewers buy cable boxes*, Feb. 17, 2016, at <http://www.usatoday.com/story/opinion/2016/02/17/cable-tv-set-top-box-fcc-tom-wheeler-editorials-debates/80474618/> (“*Let TV viewers buy cable boxes*”); JR Ball, *Three cheers to FCC for wanting to bust cable box monopoly*, Feb. 2, 2016, at <http://www.nola.com/opinions/baton->

An Obama Administration blogpost recently announced a new initiative to “stoke competition across our economy.”²⁴ Referring to the *Carterfone* decision, the Administration called on the Commission to open set-top boxes to competition.²⁵ According to the Administration, this proceeding will “allow companies to create, new, innovative higher-quality, lower-cost products.” Rather than “spending nearly \$1,000 over four years to lease a set of behind-the-times boxes, American families will have options to own a device for much less money that will integrate everything they want—including their cable or satellite content, as well as online streaming apps—in one, easier-to-use gadget.”²⁶

Major publications also criticized the lack of competition in the navigation device marketplace and applauded Commission efforts to spark change. The *Los Angeles Times* Editorial Board, for example, noted that consumers have “little choice” when it comes to navigation devices. “With limited exceptions, consumers have been stuck with whatever their local cable operator offered, which has slowed innovation in program guides, digital recorders, the integration of online content and other key aspects of TV service.” The Board observed that

rouge/index.ssf/2016/02/fcc_cable_box_requirement.html; The Editorial Board, The Buffalo News, *Consumers are the winners as FCC acts to end cable monopoly on set-top boxes*, Feb. 22, 2016, at <http://www.buffalonews.com/opinion/buffalo-news-editorials/consumers-are-the-winners-as-fcc-acts-to-end-cable-monopoly-on-set-top-boxes-20160222>.

²⁴ Jason Furman & Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, WHITE HOUSE BLOG (Apr. 15, 2016), <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>.

²⁵ *Id.* (“[W]hile the cost of making [set-top] boxes is going down, their price to consumers has been rising. Like the telephones in [the] 1980s, that’s a symptom of a market that is cordoned off from competition. And that’s got to change.”).

²⁶ *Id.*

two decades ago, Congress decided that cable operators “shouldn’t be the ones controlling the evolution of set-top boxes.”²⁷ Rather than “trusting cable operators to promote indie networks, limit consumers’ exposure to advertising and protect their privacy, it’s far better to let consumers decide such things for themselves in an open, competitive market.”²⁸

In endorsing retail navigation device competition, the *Chicago Tribune* Editorial Board described the potential impact that the Commission’s proposal could have on a consumer’s viewing experience:

Even if this simply means getting rid of a few remotes or paying less for an ugly, required contraption, we’re all in. . . . Give us the option of buying a box, the way we buy a cheap router for home Wi-Fi, and give us fewer remotes, and we’ll be happy enough.

But that should be just the beginning. It’s reasonable to expect that competition will mean much bigger changes to the TV experience . . .

Imagine buying a device or service that simplifies and integrates the experience of watching cable TV and Internet-based streaming video programming. Imagine, too, the ability to channel surf easily between ESPN, Hulu, Netflix and other offerings.²⁹

Noting that the “FCC can’t pull the plug on [navigation device leasing schemes] fast enough,” the *Boston Globe* Editorial Board stated that the Commission’s “common-sense proposal” would end the “regressive era of never-ending payments” and “could give way to greater innovation, and savings for consumers.”³⁰ Likewise, the *New York Times* Editorial Board asserted that “Americans have waited long enough for more and better choices than the cable

²⁷ *Id.*

²⁸ *Thinking outside the cable box, supra* note 23.

²⁹ *Imagine your viewing options if the FCC unlocks the cable box, supra* note 23.

³⁰ *FCC should unlock savings for cable consumers, supra* note 23.

box” and urged rules to enable innovative new devices and technologies.³¹ In addition, the Editorial Board of *USA Today* pointed out that the proposed rules can eliminate “absurdly anti-competitive business practices that stifle innovation and force most consumers to rent instead of buy.”³²

Several other media and telecommunications industry experts endorsed the Commission’s actions and contend that consumers will benefit from having an increased number of competitive retail navigation device options.³³ The National Hispanic Media Coalition addressed the panoply of consumer benefits in *USA Today*, noting that Commission action “could potentially allow consumers greater access to the content that they pay for, granting greater control over when, where, and how they want access to it, on the device they choose, without being locked into constant, unnecessary fees and excruciating installation and repair appointments.”³⁴ *The Washington Post*’s consumer technology reporter wrote that unlocking the cable set-top box presents a unique opportunity to create positive change in the current video

³¹ *The F.C.C. Gets Ready to Unlock the Cable Box*, *supra* note 23.

³² *Let TV viewers buy cable boxes*, *supra* note 23.

³³ See, e.g., Brian Barrett, *Cable Boxes Suck. One Day They’ll Die. Until Then We Have To Fix Them.*, WIRED (Apr. 22, 2016, 6:49 AM), at <http://www.wired.com/2016/04/cable-box-dying-still-needs-fixed/>; Sarah Hope, *Big Win for Cordcutters: FCC decides to “unlock the box*, SYRACUSE NEW TIMES (Feb. 25, 2016), at <http://www.syracusenewtimes.com/big-win-for-cordcutters-fcc-decides-to-unlock-the-box/>; Robert Evatt, *Bits and Bytes: Will we still get freedom from cable boxes?*, TULSA WORLD (Feb. 7, 2016, 12:00 AM), at http://www.tulsaworld.com/business/technology/bitsbytes/bits-and-bytes-will-we-still-get-freedom-from-cable/article_c9accf4f-eaf3-5b2b-b40e-822bf4b1f020.html.

³⁴ Mike Snider, *FCC Chairman wants openness for TV set-top boxes*, USA TODAY (Jan. 27, 2016, 4:47 PM), at <http://www.usatoday.com/story/tech/news/2016/01/27/fcc-chairman-wants-openness-tv-set-top-boxes/79403894/> (quoting Michael Scurato, vice president of policy for the National Hispanic Media Coalition).

market as “none of the options on offer have proved so far to be the perfect solution.”³⁵ Proprietary apps offered by cable “aren’t necessarily the greatest solution for video streaming,” she wrote, “since they’re really just aggregating lots of little buckets into the same place, rather than creating one great menu of all your options.”³⁶ Publications, like *Slate* and *TechnoBuffalo*, praised the Commission’s attempts to stimulate device competition and lower consumer cable bills, while forecasting that the proposed rules could counteract the similarities that consumers experience in MVPD service, pricing and quality.³⁷

Furthermore, contrary to MVPDs’ arguments, unlocking the cable box could generate significant benefits for independent and minority programmers that have had a difficult time negotiating for carriage on incumbent systems. Stephen Davis, the founder of Black Education Network, opined:

It is disingenuous to argue that programmers—specifically those that cater to minorities – will be harmed by the FCC’s plan to unlock the set-top box. The truth is that the pay TV channel guide and lineup will be left unchanged as a result of the FCC proposal. If a channel has negotiated marquee placement and promotion with Comcast, Time Warner Cable or DirecTV, its business agreement

³⁵ Hayley Tsukayama, *I don’t care how you do it. Someone has to fix the cable box.*, THE WASHINGTON POST (Feb. 5, 2016), at <https://www.washingtonpost.com/news/the-switch/wp/2016/02/05/i-dont-care-how-you-do-it-someone-has-to-fix-the-cable-box/>.

³⁶ *Id.*

³⁷ See Lily Hay Newman, *The FCC Just Voted to Break the Chains Binding You to Your Cable Box*, SLATE (Feb. 18, 2014, 2:46 PM), at http://www.slate.com/blogs/future_tense/2016/02/18/fcc_votes_3_2_in_favor_of_proposal_to_open_cable_boxes_to_third_parties.html; Brandon Russell, *FCC votes to move forward with plan to free the cable box*, TECHNOBUFFALO (Feb. 18, 2016), at <http://www.technobuffalo.com/2016/02/18/fcc-votes-to-move-forward-with-plan-to-free-the-cable-box/> (“Wheeler’s plan would make it so consumers can choose whatever set top box they want, rather than being forced to use what a cable company provides. Not only will this be better for you and me, but it’ll make for some good competition among companies vying for a spot in your living room. Also, part of the FCC’s goal is to lower bills for cable viewers and provide consumers with more Internet-based programming. That sounds good to me . . .”).

with company will remain fully intact. What changes is that streaming channels not on TV today would be more easily accessible to their subscribers and therefore would have a better chance that I did in 1996 with the Black Education Network to reach an audience. . . .

Had the proposed set of top box rules been in place fifteen years ago, we would have had a much better chance of success. We would have had access to millions of viewers, an ability to charge for content and the opportunity to compete as equals in the video programming marketplace.³⁸

Claiming that independent programmers have developed “hundreds of thousands of hours of quality programming . . . that don’t fit well within the traditional ad-based TV model,” Eric Easter, the Chairman of the National Black Programming Consortium, commended the Commission for providing these programmers with an opportunity to reach new audiences.³⁹ According to Easter, under the open standards model proposed in the NPRM, “two guys in their basement could create a new set-top software model that makes it easier for anyone to launch a new channel . . . without a cable system deciding whether one is worthy to reach an audience.”⁴⁰

Finally, Robert L. Johnson, the founder of BET, emphasized in *The Hill* that independent and minority programmers would likely enjoy greater success in reaching underserved populations if set-top boxes were to integrate streaming and OTT content and provide a competitive user interface with enhanced search and program recommendation mechanisms.⁴¹

³⁸ Stephen Davis, *Unlocking the cable box will help minority programming to thrive*, WASHINGTON EXAMINER (Feb. 18, 2016, 12:02 AM), at <http://www.washingtonexaminer.com/unlocking-the-cable-box-will-help-minority-programming-to-thrive/article/2583468>.

³⁹ Eric Easter, *FCC’s set-top box proposal is really about a level playing field*, THE HILL (Feb. 17, 2016, 8:00 AM), at <http://thehill.com/blogs/congress-blog/technology/269588-fccs-set-top-box-proposal-is-really-about-a-level-playing>.

⁴⁰ *Id.*

⁴¹ Robert L. Johnson, *Consumers deserve choice and minority programmers deserve opportunity*, THE HILL (Jan. 22, 2016, 4:00 PM), at <http://thehill.com/blogs/congress->

This “would allow consumers to navigate among a wide variety of choices, without a bias toward programming favored by the network operator.”⁴² According to Johnson, the introduction of competitive navigation device solutions would not disadvantage minority programmers as “the frontier of new media and innovative access to programming through streaming and OTT content, allows newcomers, particularly minority programmers, to have a voice in the age of digital content.”⁴³

Each of these endorsements of the Commission’s proposal lends substantial weight to the argument that consumers are ready to embrace choice and the policy framework the FCC proposes to promote a competitive retail navigation device market is in the public interest.

V. TO ENSURE COMPETITION, AN OPEN STANDARDS BODY MUST BE ALLOWED TO DEVELOP AND PUBLISH TRANSPARENT STANDARDS FOR THE PROVISION OF NAVIGABLE SERVICE FROM MVPDs.

Section 629 requires the Commission to adopt regulations assuring the commercial availability of non-MVPD affiliated navigation devices “in consultation with appropriate industry standard-setting organizations.”⁴⁴ Given this requirement, requiring MVPDs to provide

blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve; *see also* Joe Torres & Michael Scurato, *Unlocking Opportunities for Video Programmers of Color*, HUFFINGTON POST (Feb. 18, 2016, 4:45 PM), at http://www.huffingtonpost.com/joe-torres/unlocking-opportunities-f_b_9266944.html (“Set-top boxes that integrate cable programming and streaming services would also make it easier for Black and Latino media makers to distribute their own work directly to households across the country. It would give communities of color – who stream video for a significant portion of their TV-viewing time – the ability to find culturally relevant programming without having to depend on gatekeepers to determine what they should watch. The status quo hasn’t worked for diverse programmers.”).

⁴² Johnson, *supra* note 41.

⁴³ *Id.*

⁴⁴ 47 U.S.C. § 629(a).

navigable device information in formats that conform to specifications that are largely standards-based is appropriate and well within the Commission’s statutory responsibility. Assuming that MVPDs agree to participate in good faith, navigation system developers should be able to establish clear standards and have confidence that “their devices will be able to access multichannel video programming.”⁴⁵

In the *NPRM*, the Commission seeks comment on the defining characteristics of the open standards body that will publish the specifications used by MVPDs to provide the three information flows. Because an ideal standards development and certification process requires equal representation of stakeholders, an equal opportunity to contribute to the standards development process, and equal voting rights on any technical solution, INCOMPAS supports the characteristics that the Commission has proposed. In assigning this process and role to an existing organization, however, the Commission must ensure that the open standards body is completely independent of MVPD and programmer control. Cable network operators have maintained their monopoly position in the navigation device market through regulatory maneuvering and resistance to previous Commission and industry efforts to open the market to competition. Failure to remove the process from undue MVPD and programmer influence and/or outright control could jeopardize standards setting and turn NCTA’s claims that it would take “years” to develop standards for a Competitive Navigation approach into a self-fulfilling prophecy.⁴⁶

The Commission should also be wary of turning the standards development process over to any organization that creates barriers to participation for non-MVPD affiliated retailers,

⁴⁵ *NPRM* at ¶ 41.

⁴⁶ *NPRM* at ¶ 43.

manufacturers, and distributors of navigation devices. Participation in an open standards body should be reasonably available beyond membership without a significant financial bar. A requirement that a company or organization must contribute more than \$1,000 annually to participate in a voluntary, standards-setting body should be a red flag for the Commission. A number of small companies and entrepreneurs are participating in this proceeding, and each should have a legitimate opportunity to participate in an open standards-setting body. The Commission cannot allow smaller manufacturers to get shut out of the standards development process because the costs of joining a standards body are prohibitive. The best way to bring new products to the navigation device market is to allow companies interested in developing competitive solutions to participate in the open standards body's deliberative process. Engaging a variety of sources with expertise in content protection systems and security will allow the standards setting body to move quickly towards implementing solutions that protect MVPD intellectual property while opening the market to new companies and innovators.

Moreover, clear policies must be in place to allow each member to participate in the deliberations. The process should provide for clear communications between all participants, the body should be required to publish its deliberative process, and any votes should be properly noticed and taken, allowing all participants an opportunity to vote for or against a standard. Furthermore, an open standards body should accept participation by competitive MVPDs, software and application developers, equipment manufacturers, consumer and public interest organizations, and trade associations representing any of the aforementioned.

VI. THE PROPOSED RULES ARE TECHNICALLY FEASIBLE AND CAN BE IMPLEMENTED IN A MANNER THAT ADDRESSES MVPD SYSTEM SECURITY AND THE FCC'S UNDERLYING PUBLIC POLICY GOALS.

In 2015, the CVCC demonstrated that a competitive navigation device solution using off-the-shelf equipment and open standards was technically capable of seamlessly integrating video programming from an MVPD with lawful content obtained via the Internet, including from over-the-top services.⁴⁷ This demonstration reinforced that the competitive solution could integrate video services while preserving portability, channel placement, consumer protections, emergency alerts and advertising.

Taking what the Coalition learned from its initial attempt to develop a competitive navigation solution, including the duration of the development process, the CVCC's comments in this proceeding contend that the Commission's proposed rules are technically feasible and can be implemented in a non-burdensome and interoperable manner assuming interested industry participants provide good faith cooperation during the standards development process.⁴⁸ The CVCC responds to the Commission's request for comment on the non-security elements of the agency's proposal and includes an in-depth discussion of key terms the Commission has used to define Navigable Services.⁴⁹ The CVCC also offers technical solutions to the issues raised in the *NPRM* regarding the content protection system MVPDs should be required to support,⁵⁰ endorses

⁴⁷ See CVCC Demonstration Letter at 1.

⁴⁸ See Consumer Video Choice Coalition Comments, MB Docket No. 16-42, *et al.*, Section III (A)-(K) (Apr. 22, 2016).

⁴⁹ See *NPRM* at ¶¶ 35-49.

⁵⁰ *Id.* at ¶¶ 50-62.

in principle the Commission’s app parity proposal,⁵¹ and encourages the Commission to craft rules for licensing and certification that balance consumer protection with enabling an environment for video navigation device innovation.⁵² As a member of the CVCC, INCOMPAS has contributed to and fully supports the Coalition filing in this proceeding.

a. Current License Regimes Can Inform the Commission’s Development of Compliance and Robustness Rules.

With specific regard to the Commission’s proposals on licensing and certification, any rules adopted by the Commission should be based on industry-accepted protocols that ensure adherence to compliance and robustness, such as those identified in a Dynamic Feedback Arrangement Scrambling Technology (“DFAST”) license. The current DFAST licensing regime includes compliance and robustness formulations that are employed by competitive navigation device manufacturers with products on the market today, such as TiVo, and has been a non-controversial model that affords third-party beneficiary rights to content providers. DFAST compliance rules aid content protection by listing the technologies with the rights to receive content for display or streaming. The DFAST robustness rules protect network operators from electronic harm and have done so without incident. Modeling compliance and robustness rules on this current framework is the most sensible way to strike a balance between consumer and content protection and creating an innovative environment for navigation device solutions.⁵³ In

⁵¹ *Id.* at ¶¶ 63-68.

⁵² *Id.* at ¶¶ 70-80.

⁵³ In practice, CableLabs also has approved various DRMs and link protection technologies for output from CableCard devices. This implies that those output protection technologies have compliance and robustness rules that are as stringent as those in DFAST, otherwise they would not allow output utilizing those protection technologies. Therefore, if similar protection technologies are used to secure content that is being transmitted to a competitive navigation

turn, adoption of a similar rule framework will ensure MVPDs do not have too much authority to determine which competitive solutions will be permitted to receive a hand-off of the three information flows, while still enabling them to protect their systems from electronic harm.

The DFAST regime also includes remediation rules that the Commission should consider that allow providers to cure issues related to technical conformance with compliance and robustness formulations.⁵⁴ These rules provide devices accused of non-conformance with a period of consultation and cure of 30- or 60- days. Adopting this framework would allow providers to address any breach of covenants in the license without cutting off consumers' access to their multichannel video programming.

b. Existing Privacy Protections Are Sufficient To Safeguard Consumers Who Use Competitive Navigation Devices.

Developers of navigation devices have a strong incentive to abide by existing legal protections for customer privacy in a competitive marketplace. Under the proposed rules, MVPDs are not required to give access to the three information flows to a navigation device unless they are able to authenticate, based on certification, that the product's developer maintains a robust privacy policy that complies with Sections 631 and 338 of the Communications Act.⁵⁵ Third-party manufacturers and developers of navigation devices risk access to an MVPDs "navigable services" by not instituting a privacy policy that provides protection over the

device there should be no need for further definition of compliance and robustness rules beyond the ones that are already tied to licensing these protection technologies.

⁵⁴ See DFAST Technology License Agreement for Unidirectional Digital Cable Products (Jan. 2014), § 8.2, *available at* <http://apps.fcc.gov/ecfs/document/view;ECFSSESSION=4JkIXVFSYYr9hRDzTRQHMHYs3tB1v2nJ2Zd1Tp1KN6bL7QyjTJYb!2129651121!634993814?id=60001515605>.

⁵⁵ 47 U.S.C. §§ 551, 338(i).

collection, use, and distribution of customers' personally identifiable information ("PII"). Consumers will also drive developers to institute robust privacy policies. In a competitive market, consumers can decide which product to purchase based on any number of factors, including the manufacturers' commitment to protecting their personal information.

That aside, developers of competitive navigation solutions, as consumer electronics manufacturers, are already subject to a number of federal- and state-level legal requirements that resemble the privacy protections required of MVPDs under the Communications Act. For instance, companies must comply with Section 5 of the Federal Trade Commission ("FTC") Act prohibiting "unfair or deceptive acts or practices in or affecting commerce"⁵⁶; the FTC has applied Section 5 to incidents in which a company has violated the terms of its privacy policy. Additionally, the Video Privacy Protection Act and Children's Online Privacy Protection Act apply to navigation device manufacturers. Companies that operate in California are subject to the California Online Privacy Protection Act, and those that operate in Europe (including most consumer electronic developers) are subject to the European Data Privacy Directive, which regulates how companies collect PII through the Internet. Given the relative strength of privacy rules in the *NPRM* and legal protections available to consumers through other statutes, concerns over consumer privacy should not keep the Commission from adopting the proposed rules.

⁵⁶ 15 U.S.C. § 45(a)(1).

VII. CONCLUSION.

The Commission's balanced and technically-feasible rules will bring competition, innovation, and most importantly, choice to consumers and network operators seeking to give their subscribers an enhanced viewing experience. INCOMPAS urges the Commission to address the high barriers to video and broadband competition by promoting retail competition in the video navigation marketplace.

Respectfully submitted,

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April 22, 2016