

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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  
Thomas A. Schatz  
President  
Citizens Against Government Waste

April 20, 2016

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than 1.2 million members and supporters of CAGW, I offer the following comments in opposition to the February 18, 2016 notice of proposed rulemaking (NPRM) that unnecessarily imposes technology mandates on multichannel video programming distributors (MVPDs); forces them to relinquish intellectual property to third parties; makes costly overhauls to the manner in which they currently provide video content to consumers; and, discourages future innovation in a changing video marketplace. I urge the Federal Communications Commission (FCC) to reject this NPRM.

The FCC is currently operating on a \$339.8 million budget for fiscal year (FY) 2016, and has requested \$358.2 million for FY 2017, which includes a transfer of \$9.5 million from the Universal Service Fund to the FCC's general operating account to pay for reducing improper payments and enforcement of the USF, as well as a \$7 million increase to the spectrum cap.<sup>1</sup> Ensuring that the FCC utilizes its money wisely is critical to safeguarding the resources taxpayers have entrusted to the commission through their duly elected representatives. But by proposing to generate and mandate unnecessary technological standards for set-top boxes, which are themselves fast becoming obsolete, it appears that the FCC is not acting in the best interests of consumers and taxpayers.

---

<sup>1</sup> "Statement of Chairman Tom Wheeler, Federal Communications Commission," Hearing on the FCC's Fiscal Year 2017 Budget Request, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives, March 15, 2016, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0315/DOC-338314A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0315/DOC-338314A1.pdf).

On January 27, 2016, FCC Chairman Tom Wheeler announced a proposal, which turned into the February 18, 2016, NPRM, to impose mandated standards to expand consumer video navigation choices.<sup>2</sup> MVPDs would be required to “unlock their set-top box” and provide their channel line-ups, programming guides, subscriber data, and licensed content to third parties interested in building competing set-top boxes.<sup>3</sup>

Chairman Wheeler’s purported reason for the set-top box proposal was to increase competition in the marketplace and reduce costs to consumers, particularly citing the “high cost” of set-top box rentals. The Chairman cited data claiming a set-top box rents for an average of \$7-\$8 per month, and most subscribers rent at least two.<sup>4</sup> As former Federal Trade Commission Policy Director David Balto noted, the chairman’s claim that the cost of set-top boxes has increased by 185 percent in the last 20 years seems “spurious.” According to Balto, “comparing apples to apples, a box that would have cost \$2.50 a month in 1994 would cost just about the same today – that’s a zero percent increase, not 185 percent.”<sup>5</sup>

According to FCC Commissioner Ajit Pai, existing FCC regulations on set-top boxes have cost Americans billions of dollars in additional fees, have increased cable customers’ energy consumption by 500 million kilowatt hours each year, and, have failed to produce robust competition in the winnowing set-top market.<sup>6</sup>

The NPRM currently before the commission would completely restructure a well-functioning marketplace. It places unnecessary burdens on an industry that is already moving away from the need for set-top boxes in a marketplace has become increasingly competitive.

As of April 2016, 60 percent of all households had a TV connected to the Internet through the use of SmartTVs; gaming consoles like the Wii and Xbox; Blue Ray video players; and streaming devices such as Amazon Fire TV, Apple TV, Google Chromecast, and Roku.<sup>7</sup> In addition to the apps currently being deployed by MVPDs, nearly two-thirds of U.S. households subscribe to at least one streaming video service, such as Amazon Prime, Hulu, and Netflix. For example, Time Warner Cable<sup>8</sup> and Charter Communications<sup>9</sup> both have apps that allow customers to access subscribed channels and video on demand without the need for a set-top box,

---

<sup>2</sup> Notice of Proposed Rulemaking seeking comment on rules to Implement Section 629, Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices, Federal Communications Commission, February 18, 2016, <https://www.fcc.gov/document/fcc-proposes-unlock-box>.

<sup>3</sup> Tom Wheeler, “It’s Time to Unlock the Set-Top Box Market,” *Recode*, January 27, 2016, <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>.

<sup>4</sup> Jon Brodtkin, “Cable TV Box Rental Fees Cost Average Household \$232 A Year,” *ars technica*, July 30, 2015, <http://arstechnica.com/business/2015/07/cable-tv-box-rental-fees-cost-average-household-232-a-year/>.

<sup>5</sup> David Balto, “The Hidden Costs of AllVid,” *The Washington Times*, February 16, 2016, <http://www.washingtontimes.com/news/2016/feb/16/david-balto-the-hidden-costs-of-allvid/>.

<sup>6</sup> Dissenting Statement of Commissioner Ajit Pai, “Expanding Consumers’ Video Navigation Choices, MB Docket No. 16-XX; Commercial Availability of Navigation Devices, CS Docket No. 97-80,” February 18, 2016, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-18A5.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A5.pdf).

<sup>7</sup> Joseph Palenchar, “Internet-Connected TVs Reach Age of Majority,” *TWICE*, April 4, 2016, <http://www.twice.com/internet-connected-tvs-reach-age-majority/61004>.

<sup>8</sup> Erik Gruenwedel, “Time Warner Cable Moving Away from Cable,” *Home Media Magazine*, October 29, 2015, <http://www.homemediamagazine.com/cable/time-warner-cable-moving-away-cable-36949>.

<sup>9</sup> Bernie Arnason, “Charter Roku App is Latest Move Away from Traditional Set-top-Boxes,” *Telecompetitor*, October 13, 2015, <http://www.telecompetitor.com/charter-roku-app-is-latest-move-away-from-traditional-set-top-boxes/>.

and last fall both launched an app for multi-channel video streaming services for the Roku 3 media device. These applications and innovations have given consumers access to an increasing amount of streaming video content and the ability to watch the shows they want at any time, in any place, on any device they choose.

## **Government Technology Mandates**

Government mandates on technology rarely accomplish their intended goals and often cause technology stagnation. Such a result is highly likely based on the proposed mandates in the NPRM. Technology is dynamically changing, and the innovations of today will be quickly out of date. These disruptive advances are among the reasons that the FCC's past technology standard mandates have not been able to keep pace with innovation in the private sector.

As noted by Seth Cooper of the Free State Foundation, the FCC's previous efforts to mandate set-top box standards have failed, including the 1998 Integration Ban, the 2002 FireWire Mandate, and the 2003 CableCARD Mandate. These attempts increased the cost of cable devices to consumers and served only to make the technology more difficult to maintain.<sup>10</sup> Despite the FCC's assertion that it "is the United States' primary authority for communications law, regulation and technological innovation,"<sup>11</sup> the agency has instead stifled innovation.

Rather than increasing government mandates on technology that will soon be nearly obsolete (indeed, the NPRM itself is already out of date before it was even issued by the commission), the goal for the FCC and the marketplace should be to eliminate the need for set-top boxes altogether. This is one reason why the FCC refused to consider a proposal similar to this NPRM in 2010.<sup>12</sup> The advances in technology since then make this effort ridiculously obsolete and out of touch.

In 2002, the National Research Council (NRC) noted the difficulty in setting technology standards: "More generally, both regulators and investors have guessed wrong on many technologies; it has been easy for people to both over- and underestimate the potential of new technology."<sup>13</sup> The NRC added, "The problem of understanding trends and implications of new technology seems especially acute for the Internet, since few regulatory agency staff, at least at the FCC, have been expert in Internet-related technologies."<sup>14</sup>

In January, 2015, the FCC appointed members to the Downloadable Security Technology Advisory Committee (DSTAC) in order to review the set-top box environment and determine if

---

<sup>10</sup> Seth Cooper, "The FCC's Previous Failures Regulating Video Devices Show Folly of New Rules," Free State Foundation, February 8, 2016, <http://freestatefoundation.blogspot.com/2016/02/the-fccs-previous-failures-regulating.html>.

<sup>11</sup> "What We Do," Federal Communications Commission website, <https://www.fcc.gov/general/what-we-do>, (viewed 02/17/2016).

<sup>12</sup> "In the Matter of Video Device Competition and Implementation of Section 304 of the Telecommunications Act of 1996 (MB Docket No. 10-91); Commercial Availability of Navigation Devices (CS Docket No. 97-80); and Compatibility Between Cable Systems and Consumer Electronics Equipment (PP Docket No. 00-67)," Notice of Inquiry, Federal Communications Commission, Adopted April 21, 2010, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-60A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-60A1.pdf).

<sup>13</sup> "Broadband Bringing Home The Bits," Committee on Broadband Last Mile Technology, Computer Science and Telecommunications Board, Division on Engineering and Physical Sciences, National Research Council, National Academy Press, Washington, D.C., 2002, pp. 172-173, <http://www.nap.edu/read/10235/chapter/8>.

<sup>14</sup> Ibid. p. 173.

technical standards should be issued to ensure that the marketplace remains competitive.<sup>15</sup> In its final report to the FCC, the DSTAC Committee provided several points of common agreement, which included a finding that the FCC should not disturb the present and future delivery networks across MVPDs. The DSTAC report rejected a common reliance or mandated standards solution for navigation devices, finding that it was “unreasonable” to expect retail devices to connect directly to the various MVPDs.

The DSTAC report recommended that the FCC leave in place several proprietary systems for delivering programming and services and allow the use of an Internet protocol to access the MVPDs’ cloud. The report also suggested that it is unreasonable to expect all MVPDs to re-architect their networks in order to converge on a common mandated standard. They should not be expected to modify their access networks in order to use a single common security solution, and the MVPDs need to remain in control of downloaded security components. Finally, the DSTAC report determined that forcing retail manufacturers to equip devices with RF tuners for cable and satellite feeds is not a step forward or economically viable.<sup>16</sup>

In proposing the NPRM, Chairman Wheeler has chosen to ignore the recommendations made in the DSTAC report.

## **Market Competition**

In November, 2015, Sen. Edward Markey (D-Mass.) claimed that “the time has arrived for the FCC to enable millions of Americans to access the enormous amount of content in new, innovative and less costly ways.”<sup>17</sup> As someone who helped to write the Telecommunications Act of 1996 when he was the ranking member of the House Commerce Subcommittee on Telecommunications and Finance, Sen. Markey should know better. Content is already being delivered to hundreds of millions of Americans in less costly and innovative ways. Involving the government in that process, particularly if the FCC approves the NPRM, will only stifle innovation and raise costs.

Sen. Markey should also be aware that the streaming video marketplace has become more expansive and is rapidly evolving away from the need for renting set-top boxes. One reason for this change is that Internet speeds across the country have increased, allowing for a larger number of dedicated streaming services to propagate. Over-the-top (OTT) services such as Acorn TV, Amazon Prime Instant Videos, CBS All Access, Crackle, Hulu, HBO GO and HBO Now, Mubi, Netflix, Showtime, and Sling TV all provide programming options to consumers.<sup>18</sup>

According to the Motion Picture Association of America, there are 115 online services from which consumers can view full length films or television shows. U.S. consumers watched

---

<sup>15</sup> Downloadable Security Technology Advisory Committee (DSTAC), Federal Communications Commission, <https://www.fcc.gov/about-fcc/advisory-committees/general/downloadable-security-technology-advisory-committee>.

<sup>16</sup> DSTAC Summary Report, Federal Communications Commission, Final August 28, 2015, <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>.

<sup>17</sup> Jim Puzanghera, “Is the FCC ready to think outside the set-top box?” *Los Angeles Times*, November 8, 2015, <http://www.latimes.com/business/technology/la-fi-set-top-box-future-20151109-story.html>.

<sup>18</sup> Chandra Steele and Chloe Albanesius, “Which Streaming Service Is Best For You?” *PC Magazine*, December 9, 2015, <http://www.pcmag.com/article2/0,2817,2489103,00.asp>.

more than 80,000 online films or television shows online in 2015, with that number expected to reach more than 100,000 by 2018.<sup>19</sup> In addition, cable companies themselves are giving customers the opportunity to view content at any time on any device, including tablets and smartphones in an increasingly mobile world.

According to data released by ComScore in October 2014, nearly 24 percent of millennials do not subscribe to pay-TV. They have either “cut-the-cord” or had never had pay-TV services to begin with.<sup>20</sup> *Consumer Reports* estimated that during the second quarter of 2015, more than 658,000 subscribers terminated their pay-tv subscriptions.<sup>21</sup>

Even with cord cutting, most consumers continue to subscribe to Internet service to receive over-the-top video content. Some of these subscriptions may be through the very cable companies from whom they unsubscribed for television. Other consumers are choosing to receive broadcast video content through the use of DTV antennas, which can receive transmissions from up to 30 stations without a cable television subscription.

As noted by former Clinton administration Under Secretary of Commerce Ev Ehrlich, “The idea that TV needs government regulation to become competitive is absurd on its face. Apple and Roku boxes and Web-based streaming services are winning the competition with cable and satellite as cord-cutting booms.”<sup>22</sup>

Ehrlich suggested the reason for the NPRM may be that because companies like Google and others want the same access to consumers’ viewing habits that they already have to e-mail and search history, without being required to negotiate or pay for programming rights.<sup>23</sup>

If the goal of the NPRM is to increase competition and choice for consumers, the FCC proposal falls short of the mark. As additional mobile apps and other innovations are developed to work on various devices and SmartTVs, the set-top box could very well be heading down the path of the dodo bird, just as the FCC is attempting to mandate new requirements and tie more consumers to the devices.

## **Abrogation of Intellectual Property Rights**

Perhaps one of the most pernicious and disturbing mandates in the NPRM is the requirement that MVPDs turn over proprietary information and data to third-party manufacturers of alternative set-top box devices. This requirement lays the groundwork for gross violations of intellectual property rights by government officials under the guise of consumer benefit.

---

<sup>19</sup> Neil Fried, “The FCC Should Say ‘No’ to AllVid: Part Two,” *Policy Focus*, Motion Picture Association of America, February 3, 2016, <http://www.mpa.org/allvid/#.VsylfuZyPo0>.

<sup>20</sup> Peter Kafka, “Good News, TV Guys: ComScore Found Your Missing TV Watchers,” *re/code*, October 14, 2014, <http://recode.net/2014/10/14/good-news-tv-guys-comscore-found-your-missing-tv-watchers/>.

<sup>21</sup> James K. Willcox, “More People Are Cutting the Pay-TV Cord,” *Consumer Reports*, September 4, 2015, <http://www.consumerreports.org/cro/tvservices/more-people-are-cutting-the-pay-tv-cord>.

<sup>22</sup> Ev Ehrlich, “With Market Forces Doing the Job, TV Doesn’t Need Federal Regulation to Push Competition,” *The Boston Globe*, February 17, 2016, <https://www.bostonglobe.com/opinion/letters/2016/02/17/with-market-forces-doing-job-doesn-need-federal-regulation-push-competition/QcE0IaURNFK0c3KMX5UrPP/story.html>.

<sup>23</sup> *Ibid.*

The NPRM requires the MVPDs to turn over specific contractually protected information such as software programming, video guides, and licensed video content to third party device manufacturers with little regard to the end result for customer experience or consequences to content creators. These third parties would then be able to use this proprietary information to formulate their own video guides, provide advertising based on a user's viewing habits, and further mine individual data.

The NPRM offers no protection to content creators or their negotiated agreements with the MVPDs relating to how their content is presented to viewers, creating an avenue of unintended harm to the creative process, and offers little protection to independent and minority owned broadcasters and their content. As noted by the Congressional Black Caucus in December 2015, "AllVid will cause irreparable harm to independent and minority programmers by allowing third parties to strip programming from visible channel placements and relegate it to the bottom of the pile. These merchants would also be allowed to sell intrusive advertising without sharing any revenue with programmers, cutting off the needed revenue to continue producing quality content."<sup>24</sup>

### **Opening the Door to Increased Video Piracy**

The violations of content providers' intellectual property rights that would occur under the NPRM could be exacerbated by mixing illegal online content with legitimate pay-TV services, as there is nothing in the NPRM banning this practice.

Piracy is a real concern. The following examples are just a small part of the staggering extent of the video piracy marketplace:

- On June 15, 2014, HBO aired the Season 4 finale of its hit series *Game of Thrones*. Within 12 hours of its initial televised showing, the episode had "roughly" 1.5 million online downloads worldwide, the equivalent of two petabytes of data.<sup>25</sup> This occurred despite HBO making *Game of Thrones* legally available online simultaneously with its release on pay-TV platforms.
- In July 2014, a DVD quality copy of *The Expendables 3* appeared online and was downloaded millions of times before a single ticket was sold at theaters in September. The movie then flopped at the box office.<sup>26</sup>

On average, pre-release piracy cuts box office revenues by 19 percent compared to piracy that occurs after a movie is released in theaters.<sup>27</sup>

---

<sup>24</sup> John Eggerton, "Black Caucus Members Tell FCC AllVid Would Be Disaster," *Broadcasting & Cable*, December 2, 2015, <http://www.broadcastingcable.com/news/washington/black-caucus-members-tell-fcc-allvid-would-be-disaster/146156>.

<sup>25</sup> Nic Healey, "Game of Thrones finale piracy hits 2 petabytes in 12 hours," *C/Net*, June 16, 2014, <http://www.cnet.com/news/game-of-thrones-finale-piracy-hits-2-petabytes-in-12-hours/>. According to Tru Optik, "Game of Thrones" has been subject to 289.9 million illegal downloads, more than any other television program; <http://truoptik.com/>. NB: A petabyte of data contains enough capacity to store 233,000 DVDs.

<sup>26</sup> Jenna Wortham, "The Unrepentant Bootlegger," *The New York Times*, September 27, 2014, [http://www.nytimes.com/2014/09/28/technology/the-unrepentant-bootlegger.html?\\_r=0](http://www.nytimes.com/2014/09/28/technology/the-unrepentant-bootlegger.html?_r=0).

<sup>27</sup> Liye Ma, Alan Montgomery, Param Vir Singh, and Michael D. Smith, "An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box-Office Revenue," Carnegie Mellon University, July 8, 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1782924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782924).

On September 27, 2014, *The New York Times* reported that according to Tru Optik, a media analytics company, “nearly 10 billion movies, television shows and other files, including games and pornography, were downloaded globally in the second quarter of 2014.”<sup>28</sup> At that time, the company estimated that there were about 400 million illegal downloads monthly just in the United States.

The existing services of some of the proposal’s proponents routinely facilitate access to illegal content.<sup>29</sup> As noted by film and television producer Gale Anne Hurd, “Chairman Wheeler’s set-top box proposal places no restrictions on search results. If approved, it would allow device-makers to prominently display pirated content from the Internet alongside legitimate options – just like in my ‘watch *Fear the Walking Dead*’ Google search.”<sup>30</sup> Hurd warned of the pending disaster for the industry that would be brought on by approval of the NPRM, stating “I’m not talking about just the actors and producers. Hundreds of thousands of crewmembers across the country will be out of jobs, too. Studios and networks can’t keep making content if they stop receiving revenue from legitimate sources.”

By opening the door to increased video piracy, the FCC will be harming a vibrant economic ecosystem and condoning illegal activity.

## **Conclusion**

It is unfortunate that the FCC has decided to move forward with the NPRM. Not only are these new rules unnecessary, but the time and effort required to issue the rules by FCC staff are a waste of taxpayer funds. The FCC even admits in the NPRM that the need for set-top boxes is going away and being replaced by MVPD-provided apps that can be used on any device, at any time, in any location.

The proposed set-top box mandates will prevent technological advances and attempt to solve a problem that doesn’t exist. Indeed, these regulations, if adopted, may set the nation’s leadership in video innovations on a backward spiral and make it impossible for consumers to ditch the box entirely. Instead of supporting disruptive technological changes, this mandate leaves the industry in a time warp heading in the wrong direction.

In conclusion, for the reasons stated in these comments, I again strongly urge the commission to reject the NPRM.

---

<sup>28</sup> Jenna Wortham, “The Unrepentant Bootlegger.”

<sup>29</sup> “Understanding the Role of Search in Online Piracy,” Compete, Inc., Millward Brown Digital, March 2014, <http://www.mpa.org/wp-content/uploads/2014/03/Understanding-the-role-of-search-in-online-piracy.pdf>.

<sup>30</sup> Gale Anne Hurd, “Stop piracy apocalypse: ‘Walking Dead’ producer,” *USA Today*, April 12, 2016, <http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/>.