

**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
)	

REPLY COMMENTS OF WRITERS GUILD OF AMERICA, WEST, INC.

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May 23, 2016

Summary

It is often the case that when new technology emerges incumbent providers make alarmist predictions about guaranteed harms resulting from these innovations. While some concerns may be reasonable, the overwhelming majority of outlined harms are never realized. As CBS Chairman and CEO Les Moonves said in 2015, “All these technology initiatives that supposedly were going to hurt us have actually helped us. SVOD has helped us. DVR has helped us. The ability to go online with our own content, CBS.com, and the trailing episodes – all have helped us.”¹ With the entertainment industry currently dominated by a handful of companies that have never been more profitable, it is clear that new technology and forms of content distribution have helped, not hurt the industry.

While new technology can create some business uncertainty, there is strong evidence that pro-consumer developments that make legal content more accessible to viewers benefits both consumers and content creators. The Federal Communications Commission’s proposed rules for a competitive navigation device market follow this path. The current pay-TV set-top box market is controlled by incumbent distributors who charge consumers high fees and exercise their gatekeeping power to limit content competition. The proposed rules appropriately seek to address this market failure and fulfill the Congressional mandate of Section 629 of the Telecommunications Act of 1996. The rules strike a balance between promoting competition and protecting content. They will promote competition by allowing innovation in user interfaces and limiting the ability of multichannel video programming distributors (“MVPDs”) to evade competition through billing practices and control of content security systems. The CableCARD

¹ Josef Adalian, *Network TV’s Ultimate Survivor*, Vulture, Sept. 8, 2015, <http://www.vulture.com/2015/09/leslie-moonves-on-20-years-at-cbs.html>.

regime demonstrates that content can be protected when accessed on third-party devices and the proposed rules will further protect content by giving MVPDs choice in content protection systems. A competitive navigation device market poses no greater risk of piracy than the open Internet, where the legal video streaming market has become lucrative and dominates Internet traffic.

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Writers Guild of America, West, Inc. (“WGAW”) respectfully submits the following reply comments to the FCC’s Notice of Proposed Rulemaking and Memorandum Opinion and Order, “In the Matter of Expanding Consumers’ Video Navigation Choices, Commercial Availability of Navigation Devices,” released February 18, 2016, MB Docket No. 16-42, CS Docket No. 97-80.

I. New Technology and Distribution Methods Have Helped, Not Hurt the Entertainment Industry

In September 2015, CBS Chairman and CEO Les Moonves told *Vulture*, “Look at the CBS revenues [and] what the network has done over the last 20 years. Our profits have gone up considerably. All these technology initiatives that supposedly were going to hurt us have actually helped us. SVOD has helped us. DVR has helped us. The ability to go online with our own content, CBS.com, and the trailing episodes – all have helped us.”²

This statement stands in sharp contrast with how technological developments are often portrayed by media companies in front of the Federal Communications Commission (“FCC” or

² *Id.*

“Commission”). For example, in 2002 comments on the issue of digital broadcast copy protection, a consortium of entertainment industry organizations wrote, “digital television is subject to an extraordinarily high risk of unauthorized redistribution over networks such as the Internet. The threat of such wide scale piracy, if not addressed, will lead content providers to cease making their high-value programming available over broadcast television.”³ The entertainment community (including Writers Guild of America, West) sought approval of the broadcast flag technology to control redistribution and limit the threat of piracy the digital transition presented. While the FCC issued rules to implement the broadcast flag, those rules were ultimately overturned by the DC Circuit Court. Despite this outcome the most watched and valuable programming remains on broadcast television years after the digital transition. With the music industry as a cautionary tale, concerns in 2002 that the entertainment industry could be next were plausible, but the specter of piracy damaging the broadcast business without such regulation remains unrealized. In fact, in 2015 CBS released information demonstrating that its primetime lineup was “delivering more viewers than 11 years ago as multi-platform viewing grows.”⁴

³ Joint Comments of the Motion Picture Association of America, Inc.; ABC; ABC Television Affiliates Association; AFMA; American Association of Advertising Agencies, American Federation of Television and Radio Artists; American Society of Composers and Publishers; Association for Maximum Service Television, Inc.; Association of National Advertisers, Inc.; Belo Corp.; Broadcast Music, Inc.; CBS; Director Guild of America; FOX Broadcasting Company; International Alliance of Theatrical and Stage Employees; Motion Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC; National Association of Broadcasters; Screen Actors Guild, Inc.; Writers Guild of America, East, Inc. and Writers Guild of America, West, Inc., In the Matter of Digital Broadcast Copy Protections, MB Docket No. 02-230, (Dec. 6, 2002) at i.

⁴ Press Release, CBS Corporation, CBS’s Primetime Lineup Delivering More Viewers than 11 Years Ago, (Feb. 18, 2015), <http://tvbythenumbers.zap2it.com/2015/02/18/multi-platform-viewing-boosts-cbss-primetime-lineup-3-percent-over-2003-2004-season-9-percent-versus-last-year/>.

The past is prologue and in the instant proceeding on competitive navigation devices, concerns over how technology may upend the entertainment industry have once again been raised. In joint comments, 21st Century Fox, Inc.; A&E Television, LLC; CBS Corporation; Scripps Network Interactive; Time Warner Inc.; Viacom Inc. and the Walt Disney Company (“Content Companies”) write:

“The Notice increases the likelihood that third-party navigation device makers will fail to secure content, weaken the appeal or value of the content to consumers, or otherwise negatively impact content providers’ ability to derive economic returns from investing in content. By weakening content providers’ ability to earn returns on content investments, the FCC’s proposal as drafted decreases their incentives and ability to produce more of the great programming audiences love. As drafted, the Commission’s proposals would thus undermine, rather than expand, consumers’ ability to continue enjoying the diverse, high-quality content that the Content Companies provide over a variety of distribution platforms.”⁵

While new technologies may create some business uncertainty, the more likely outcome of a competitive navigation device market is the one professed by Mr. Moonves. Past technological innovations like the VCR and the DVR have made content more easily accessible to consumers, leading to more time and money spent on content. As Consumer Federation of America (“CFA”) noted in its initial comments, “rather than killing the television industry, every iteration of technological innovation has only opened the market further and allowed consumers to consume more content lawfully.”⁶

Like all other entertainment industry participants, WGAW has strong incentives to protect the health of the business. WGAW members are the creators of intellectual property and

⁵ Comments of 21st Century Fox, Inc.; A&E Television, LLC; CBS Corporation; Scripps Network Interactive; Time Warner Inc.; Viacom Inc. and the Walt Disney Company, MB Docket No. 16-42, CS Docket No. 97-80, (Apr. 22, 2016) at 12. (“Content Companies Comments”)

⁶ Comments of the Consumer Federation of America, MB Docket No. 16-42, CS Docket No. 97-80, (Apr. 22, 2016) at 9. (“CFA Comments”)

their livelihoods depend on the ability of studios to license programming for initial exhibition and generate revenue in secondary markets. As such, WGAW and its members do not take concerns regarding piracy lightly. WGAW has consistently advocated for reasoned measures to protect copyright and address infringement.⁷ But WGAW members are also strong proponents of market competition, because it leads to more and better choices for consumers and more and better opportunities for writers. WGAW's position seeks to strike a balance between these objectives, and led to our support for strong Net Neutrality rules and, ultimately, the need to reclassify broadband Internet access services under Title II of the Communications Act. In our advocacy, we were clear that Net Neutrality rules could protect Internet openness without jeopardizing content, as the rules applied only to lawful content, and outlined ways to address piracy that would not harm a free and open Internet.⁸ We believe the developments resulting from the open Internet, primarily the growth of a robust online video market, demonstrate the success of a balanced approach. The online video market generates significant revenues for media companies and residuals for writers through the licensing of television series and feature films and is projected to see upwards of 100 professional scripted series released for initial distribution on subscription online video distribution ("OVD") services in 2016. We believe a similar balance can be achieved in the Commission's proposed rules. Reasonable concerns can be addressed. Content can be protected while competition is promoted.

⁷ See Comments of the WGAW, In the Matter of Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, (Apr. 26, 2010); Comments of WGAW to Victoria Espinel, United States Intellectual Property Enforcement Coordinator regarding the Joint Strategic Plan, (Mar. 24, 2010); Comments of WGAW on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, Docket No. 130927852-3852-01 (Jan. 17, 2014).

⁸ Comments of the WGAW, In the Matter of Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, (Apr. 26, 2010) at 10-13.

What will not happen absent new, stronger rules is a competitive market for navigation devices. Initial comments highlight how consumers have a number of choices for an Internet-connected video device, but almost none can be used to replace their pay-TV set-top box. Comments, including those from multichannel video programming distributors (“MVPDs”) opposed to the proposed rules, also make clear that a competitive market as envisioned by Congress will not materialize without FCC action.

II. The MVPD Navigation Device Market is Not Competitive

The comments filed in this proceeding confirm the Commission’s finding that the pay-TV navigation device market lacks competition.⁹ The comments and the history of CableCARD also demonstrate that a truly competitive market is unlikely to develop absent FCC rules. Even the National Cable and Telecommunications Association (“NCTA”), perhaps the most vocal opponent of the FCC’s proposed rules, cannot substantiate the claim that the set-top box market is competitive as Congress intended. Rather, NCTA and others highlight the availability of complementary devices where consumers, based on MVPD discretion, may access MVPD programming.¹⁰ But such access is *in addition to* the requirement of a set-top box, of which 99% of customers rent from their cable provider.¹¹

⁹ Comments of Amazon, MB Docket No. 16-42 (Apr. 22, 2016) at 3 (“Amazon Comments”); CFA Comments at 9-10; Comments of TiVo Inc., MB Docket No. 16-42 (Apr. 22, 2016) at 4. (“TiVo Comments”)

¹⁰ Comments of the National Cable & Telecommunications Association, MB Docket No. 16-42, CS Docket No. 97-80, (Apr. 22, 2016) at 12 (“NCTA Comments”); Content Companies Comments at 5-6.

¹¹ Press Release, Senator Ed Markey, Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace, (July 30, 2015), <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>.

According to the guidelines of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) as well as FCC analysis of product markets in merger reviews, the navigation device market for MVPD programming is not competitive. The DOJ and FTC Horizontal Merger Guidelines state that a “market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”¹² In merger proceedings the FCC has found that an appropriately defined market must include products that are “reasonably interchangeable by consumers for the same purpose.”¹³ Customers are unable to substitute these devices for the primary set-top box because of MVPD policies, leading to the outcome of 99% of customers renting a set-top box from their pay-TV provider. Similarly, the fact that consumers have not switched from the leased set-top box to an Internet-connected device to access MVPD programming, despite price increases, provides further evidence of the inability to substitute. Consumer Federation of America and Public Knowledge found that the average subscriber fee for an MVPD-leased set-top box has increased 185% since 1994.¹⁴ Meanwhile, Internet-connected set-top devices have seen falling prices resulting from competition, but this has not had an effect on the cost of MVPD set-top boxes.¹⁵ The simple fact is that the Internet-connected

¹² U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (Aug. 19, 2010), at 7, available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

¹³ Applications of AT&T Inc. and DIRECTV for Content to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 14-90, 30 FCC Rcd. 9131, 9159, fn. 178 (2015) (internal citations omitted). (“AT&T-DirecTV Order”)

¹⁴ In the Matter of Downloadable Security Technical Advisory Report, MB Docket No. 15-64 *Letter from Consumer Federation of America and Public Knowledge, to Marlene H. Dortch, FCC Secretary* (Jan. 20, 2016) at 1-2.

¹⁵ Fiona Agomuoh, *With Price Cut, Amazon Fire TV Now Cheaper Than Apple TV, Roku, Google, Nexus Player*, International Business Times, Dec. 22, 2014, <http://www.ibtimes.com>

devices where consumers may access MVPD applications cannot be interchanged with the set-top box. They may expand viewing options but cannot replace the primary set-top box. As such these devices are complements rather than substitutes and do not fall within the same product market.

Similarly, citing devices that offer access to online video distributors (“OVDs”) such as Netflix and Amazon does not demonstrate market competitiveness because the FCC has repeatedly noted that these OVDs are not substitutes for MVPD service.¹⁶ Rather, what the comments demonstrate is that there is a proliferation of devices offering access to OVDs, but only selective access to MVPD programming. The availability of these devices highlights the possibilities if the Commission designs rules to promote competition. As consumers may now choose between Roku, Apple TV, Chromecast, Amazon Fire and numerous other devices to access OVDs, the rules would allow a similar level of choice for access to MVPD programming.

III. The Proposed Rules Will Protect Content

WGAW strongly agrees with the need to protect content and to limit piracy. No less than our members’ livelihoods depend on it. However, WGAW believes that a competitive navigation device market can and will protect content and, consistent with our position in Net Neutrality, we approach the proposed rules by assessing the likely benefits of competition and the risk of piracy. We find that the risks of this proposal are no greater than those presented by an open Internet, where there is strong evidence of a flourishing legal market that is very attractive to consumers.

/price-cut-amazon-fire-tv-now-cheaper-apple-tv-roku-google-nexus-player-1764740; Jon Brodtkin, *Apple TV price dropping for \$99 to \$69*, Ars Technica, Mar. 9, 2015, <http://arstechnica.com/gadgets/2015/03/apple-tv-price-dropping-from-99-to-69/>.

¹⁶ AT&T-DirecTV Order, 30 FCC Rcd. at 9159-9160, ¶ 68.

WGAW believes that the FCC’s proposed rules can protect MVPD programming on third-party devices. The CableCARD regime demonstrates that subscribers can use third-party devices to access MVPD programming without threatening security. Further, CFA notes that the proposed rules do not prohibit deployment of content protection systems used by cable operators such as conditional access systems and digital rights management.¹⁷ The Commission, in acknowledging content security concerns, has proposed “that MVPDs retain the freedom to choose the content protection systems they support to secure their programming” as long as at least one content protection system they deploy is licensed on reasonable and non-discriminatory terms and not controlled by an MVPD.¹⁸ This approach is reasonable because it prevents MVPDs from using the process to thwart competition while providing flexibility in how content can be protected. Amazon notes that “robust media protection technology is already available and in use by MVPDs” and that many consumer electronics devices are already trusted by movie studios to deliver movies because of the media technology protections in place.¹⁹ In addition, the Consumer Video Choice Coalition outlines a process for addressing any breach of representations, warranties or covenants, including denial of authentication if a third-party device provider is found to be not compliant.²⁰ While some may claim that end-to-end control of the security system is the only acceptable way to protect content, such an approach is unlikely to prevent piracy.²¹ For instance, the industry approach to copy protection has failed to prevent widespread availability of infringing copies of films and TV shows. It has also failed to prevent the availability of DVD and Blu-Ray ripping software soon after the commercial roll out of these

¹⁷ CFA Comments at 25 (internal citations omitted).

¹⁸ NPRM at ¶ 58.

¹⁹ Amazon Comments at 5-6.

²⁰ Comments of the Consumer Video Choice Coalition, MB Docket No. 16-42 (Apr. 22, 2016) at 43-44. (“CVCC Comments”)

²¹ See Comments of the Motion Picture Association of America and SAG-AFTRA, MB Docket No. 16-42, (Apr. 22, 2016) at 23.

new disc formats.²² Content protection is not absolute, but a process that allows third-party devices that comply with content protection requirements to access MVPD programming should not facilitate content theft.

Some opponents of the rules claim, “The Commission’s approach would import internet piracy problems into the now relatively protected MPVD [*sic*] environment.”²³ While the Internet has made pirated material easier to access, it has also facilitated the dramatic growth of new, legal markets for content. According to industry analyst SNL Kagan, subscription OVD services in the United States, such as Amazon Prime, Hulu Plus and Netflix, have approximately 89 million subscribers generating \$6.4 billion in revenue, and are expected to grow to 114 million subscribers in 2020.²⁴ The Interactive Advertising Bureau reports that the United States digital video advertising market, “reached \$4.2 billion in 2015, a 30 percent rise over \$3.3 billion in 2014.”²⁵

The Internet has also facilitated the rise of a new market for professional original video programming that competes with what is offered on television. In 2013, Netflix premiered its first original series, *House of Cards*, which it reportedly licensed for \$100 million for the first two seasons.²⁶ The show’s success proved the viability of the online video market for original

²² Andy Patrizio, *Why the DVD Hack Was a Cinch*, Wired, Nov. 2, 1999, <http://www.wired.com/1999/11/why-the-dvd-hack-was-a-cinch/>.

²³ Comments of Creative Future, MB Docket No. 16-42, (Apr. 22, 2016) at 9.

²⁴ Ali Choukeir, *State of US Online Video: SVOD*, SNL KAGAN (July 24, 2015).

²⁵ Interactive Advertising Bureau, Press Release, U.S. Internet Ad Revenues Hit Landmark \$59.6 Billion in 2015, a 20% Uptick Over Record-Breaking Numbers in 2014, Marking Sixth Consecutive Year of Double-Digit Growth (Apr. 21, 2016), <http://www.iab.com/news/us-internet-ad-revenues-hit-landmark-59-6-billion-in-2015/>.

²⁶ Rebecca Greenfield, *The Economics of Netflix’s \$100 Million New Show*, The Wire, Feb. 1, 2013, <http://www.thewire.com/technology/2013/02/economics-netflixs-100-million-new-show/61692/>.

high-budget programming. The growth of this segment has been robust as we project upwards of 100 original scripted series will be released on subscription OVD services in 2016.

The traditional media companies have also expanded their businesses to include online offerings. This includes making television and film programming available to consumers through company websites and applications as well as licensing to third-party sites and services. Hulu, which is owned by Comcast, The Walt Disney Company and 21st Century Fox, has recently announced that it will offer access to linear TV channels along with its current Internet-delivered on demand offering.²⁷

The growth of the legal online video market highlights the continued consumer demand for legal services despite the availability of pirated material. As the Recording Industry Association of America has said “the best anti-piracy strategy is a vibrant legitimate marketplace rich with content and innovative business.”²⁸ The results of the open Internet support this strategy. According to Sandvine, Netflix now accounts for 37% of downstream Internet traffic in North America, and in combination with Amazon Video, iTunes and Hulu, account for close to 50% of traffic, while BitTorrent represents only 4.4% of total traffic during peak periods and only 5% of total traffic during the entire day.²⁹ In contrast, Sandvine notes that BitTorrent accounted for 31% of total traffic in 2008³⁰ and a number of entertainment industry organizations cited estimates of infringing traffic accounting for 50% to 80% of all Internet traffic in comments

²⁷ Lance Whitney, *Hulu takes on cable, confirms plan to offer live TV service*, Cnet, May 4, 2016, <http://www.cnet.com/news/hulu-confirms-plan-to-offer-live-tv-service/>.

²⁸ Steven Marks, *RIAA Responds: Nesson More Like P.T. Barnum than David*, Ars Technica, May 31, 2009, <http://arstechnica.com/tech-policy/2009/05/riaa-responds/>.

²⁹ *Global Internet Phenomena*, Sandvine (Dec. 2015) at 3, <https://www.sandvine.com/downloads/general/global-internet-phenomena/2015/global-internet-phenomena-report-latin-america-and-north-america.pdf>.

³⁰ *Id.*

filed in 2009.³¹ The data suggest that the legal availability of content has had a dramatic effect on online piracy as legal video consumption now dominates Internet traffic.

While the Commission's proposed rules would allow third-party devices to provide MVPD subscribers with access to both MVPD and online video programming, there is strong evidence to suggest that consumers will continue to choose legal services for viewing content. As such, the benefit to consumers and content creators of a competitive navigation device market that appropriately protects content outweighs the potential risk of increased piracy.

IV. Innovation in the User Interface and Complementary Features is Integral to Fulfilling the Mandate of Section 629

In the NPRM, the Commission proposes “rules intended to allow consumer electronics manufacturers, innovators, and other developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface.”³² The Commission found that the few successes under CableCARD were driven by competition in the user interface and complementary features, making competitive navigation essential to achieving the goals of Section 629.³³ WGAW, public interest organizations and device

³¹ Joint Comments of American Federation of Television and Radio Artists, AFL-CIO; American Society of Media Photographers; The Copyright Alliance; The Directors Guild of America; Graphic Artists Guild; The International Alliance of Theatrical Stage Employees; Motion Picture Association of America; Professional Photographers of America and Alliance of Visual Artists; Property Rights Alliance; Recording Industry Association of America and The Screen Actors Guild, In the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-51, (June 8, 2009) at 5.

³² Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80, *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (Feb. 18, 2016) at ¶ 1. (“NPRM”)

³³ *Id.* at ¶ 12.

manufacturers, among others, agreed with this proposal.³⁴ While opponents have suggested that innovation in the user interface may exceed the Commission’s authority or violate copyright or private contracts, it is clear that allowing such innovation is both reasonable and necessary to promote competition and can be done without infringing on copyright.

INCOMPAS writes that “[o]ne of the hallmarks of telecommunications competition is the ability to differentiate one’s service from incumbents by offering innovative devices, functions and features.”³⁵ Even MVPDs recognize the importance of navigation devices in differentiating with the competition. In 2010, NCTA noted that “[n]avigation devices power many of the features that video providers now use to distinguish their service and as a result, set-top boxes have grown from devices that merely extended the tuning range of consumers’ televisions into high-definition devices and DVRs, offering on-demand content, interactive program guides, e-commerce, voting, polling and other interactive and cross-platform services.”³⁶ In the same filing, NCTA also stated that “[c]onsumers should have the option to purchase video devices at retail that can search for video content across multiple content sources, including content from their multichannel provider, the Internet, or other sources.”³⁷ To compete, third parties must be able to innovate in the same fashion. As other commenters have noted, innovation and competition in user interfaces have been key drivers of competition in other device markets such

³⁴ TiVo Comments at 14-15; Amazon Comments at 6-7; CVCC Comments at 15; Comments of INCOMPAS, MB Docket No. 16-42, (Apr. 22, 2016) at 5 (“INCOMPAS Comments”); Comments of Public Knowledge, MB Docket No. 16-42 (Apr. 22, 2016) at 2. (“PK Comments”)

³⁵ INCOMPAS Comments at 5.

³⁶ Comments of the National Cable & Telecommunications Association, In the Matter of Video Device Competition, MB Docket No. 10-91; Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67, (July 13, 2010) at 7.

³⁷ *Id.* at 4.

as smartphones, tablets and computers.³⁸ Some commenters argue that innovation in the interface would harm contractual provisions such as channel placement, but this ignores the reality that consumers today may engage in some customization that ignores channel placement. For example, Time Warner customers may create a list of favorite channels and choose to view the programming guide information of only the selected channels. Giving consumers choice in interfaces that makes it easier to find programming benefits both viewers and creators and presenting programming information in new ways does not violate the underlying copyright in the content.

Innovation in the user interface, particularly permitting integration of MVPD and OVD content, is essential to protect competition and prevent future anti-competitive behavior by MVPDs. MVPDs have made it clear they intend to use their existing proprietary platforms to integrate MVPD and OVD content. Failure to permit other platforms to do the same would create a competitive disadvantage and likely lead to anti-competitive gatekeeping conduct that has characterized MVPD behavior in the past. WGAW noted in its initial comments that Charter has said that its Spectrum Guide could be expanded to include OVDs within the program grid.³⁹ Comcast also recently announced that Crackle, Sony's ad-supported streaming service, would be available to Comcast customers through the MVPD's video on demand service and its authenticated Xfinity application and website.⁴⁰ To compete with MVPDs, third parties will need the ability to develop similar offerings. As such, it is reasonable for the Commission's rules to

³⁸ CVCC Comments at 14.

³⁹ Comments of WGAW, MB Docket No. 16-42, (Apr. 22, 2016) at 9.

⁴⁰ Todd Spangler, *Comcast to Launch Sony's Crackle on Xfinity on Demand*, Variety, Apr. 18, 2016, <http://variety.com/2016/digital/news/comcast-sony-crackle-xfinity-on-demand-1201755520/>.

allow third parties to innovate in the user interface in order to fulfill the mandate of a competitive market.

V. Rules for a Competitive Market for Navigation Devices Must Address MVPD

Billing Practices

The opposition MVPDs have raised to the proposed rules makes it reasonable to assume that once the rules are implemented, MVPDs will work to limit the effect of new competition. Therefore, it is necessary for the Commission to limit the ways in which MVPDs may undermine the process. TiVo offers strong evidence that the Commission must be unequivocal about MVPD behavior in the rules. TiVo notes that retail CableCARD devices cannot access bidirectional services without a specific agreement between the device maker and the MVPD and that after almost a decade, only Comcast and Cox have allowed such access.⁴¹ All other MVPDs do not allow retail navigation devices to access any portion of the MVPD service that the subscribers have paid for beyond what is enabled by the CableCARD standard.⁴²

WGAW echoes the concerns raised by Public Knowledge, TiVo and others regarding MVPD billing practices.⁴³ We agree with Public Knowledge that MVPDs should not be allowed to charge consumers for the right to use their own devices.⁴⁴ All MVPDs should be required to state separately a charge for leased navigation devices and to reduce their charges by that amount to customers who provide their own devices.⁴⁵ WGAW believes this requirement should apply regardless of the applicability of rate regulation. Findings of effective competition relate to local

⁴¹ TiVo Comments at 16-17.

⁴² *Id.* at 17.

⁴³ PK Comments at 52-53; TiVo Comments at 31-32.

⁴⁴ PK Comments at 53.

⁴⁵ NPRM at ¶ 84.

area control by an MVPD or the level of local choice in MVPD service. Competition in the set-top box market will be between incumbent MVPDs and device firms rather than between MVPDs, making this designation less relevant. In addition, despite the FCC finding that many cable systems are subject to effective competition, the status of competition in the set-top box market has not changed. This suggests that competition and choice between MVPDs in a local area is not a determining factor in set-top box competition. Finally, as both WGAW and CFA noted in initial comments, the MVPD market is highly concentrated at a national level, with large MVPDs that have both the incentive and ability to undermine competition that threatens the billions they collect in set-top rental fees.⁴⁶ We also agree with TiVo that the rules should explicitly prohibit cross-subsidization of device charges with service fees.⁴⁷ While the NPRM notes that the current practice is charging high fees for the device rental itself, the advent of competition may cause MVPDs to shift fees in an attempt to undermine new entrants.

VI. Conclusion

WGAW strongly supports the Commission's efforts to promote competition. As deregulation and consolidation created a video distribution market controlled by only a handful of companies at each stage of the value chain, consumers and content creators have suffered. With the open Internet we are beginning to see what is possible in a more competitive landscape. The proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content.

⁴⁶ Comments of WGAW, MB Docket No. 16-42 (Apr. 22, 2016) at 4; CFA Comments at 20.

⁴⁷ TiVo Comments at 31.