

April 22, 2016

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

Commissioners,

The Institute for Policy Innovation (IPI) is a non-profit public policy research organization, founded in 1987. We follow policy issues related to economic growth, which includes the regulation of technology and communications policy. The following comments may be attributed to Tom Giovanetti, President. I appreciate the opportunity to share our thoughts with you on the set-top box proceeding.¹

Our observation of regulation in general is that, too often, regulators act in the absence of clear market problems and failures. Some degree of regulation is obviously necessary to protect health and safety, or to attempt to remedy clear market problems or failures. But it seems often the case that regulators, instead of forbearing, attempt to shape markets and industries according to their whims and preferences. This top-down, command-economy approach suffers from the “knowledge problem” so clearly described by Hayek; namely, that markets consist of an enormous amount of information and complexity, and thus any given market is far too complex for a small number of regulators to shape or direct, no matter how big their brains. Better results are achieved by leaving the shaping of markets to the real-time decisions made by millions of consumers and providers than by having a handful of regulators who think they know best impose their will on a market, a product, a service, or an industry.

¹ The Institute for Policy Innovation is also a signatory to comments jointly filed by a number of market-oriented organizations, including 60 Plus Association, American Commitment, American Conservative Union, American Majority, Americans for Job Security, Americans for Prosperity, Americans for Tax Reform, Center for Individual Freedom, Competitive Enterprise Institute, Digital Liberty, Discovery Institute, Independent Women’s Forum, FreedomWorks, Frontiers of Freedom, Grassroots Hawaii Action, Less Government, Log Cabin Republicans, Property Rights Alliance, Taxpayers Protection Alliance, and former FCC Commissioner Harold Furchtgott-Roth.

Further, while regulators do not possess enough information processing power to direct markets, their regulations ARE capable of causing new and unanticipated problems. *This is why regulators should be humble rather than arrogant, and should only intervene when necessary, knowing that there is a greater likelihood of harm than benefit from anticipatory regulations.*

The rulemaking before us regarding set-top boxes is a clear example of such regulatory hubris, which we would like to outline briefly in these comments. We believe the proposed rule is not only unnecessary, but also carries with it several obvious threats that we will enumerate. Our conclusion is that *the Commission should refrain from acting in the set-top box rulemaking.*

1. The proposed rule does not address a matter of health or safety, which eliminates an entire category of regulatory justification.

2. The proposed rule does not address a demonstrated market problem or failure.

This point should be as obvious as the first, at least to anyone who examines the current video marketplace from an unbiased perspective.

Perhaps never before has a regulatory rulemaking been so obviously out-of-touch with the current consumer marketplace. If anything, today consumers are overwhelmed with choice in the video marketplace. Consumers have their choice of video providers, services, and devices. In fact, the average consumer today has many choices for consumption of content. In my own home the complication is not which movie or TV show we should watch—it's where we should get it from! Should we watch it through Netflix, or Amazon Prime, or Hulu, or from our MVPD? And, once we've made that choice, we have to further decide whether to use the smart TV, or the Blu-Ray player, or the X-Box, or the Wii-U, or the Apple TV to access the video provider. And this is likely a typical rather than atypical household situation.

And, of course, consumers also have the choice of “cutting the cord” with their cable, satellite or IPTV provider and going simply with over-the-top video. Increasingly, producers of prime content are making their content available through over-the-top delivery. So it is not as if consumers must pay an MVPD for access to a wide variety of video content.

Consumers are not discontent with the choices available to them. If they are discontent with the choices available, the Commission has supplied no evidence to that fact. The video marketplace is not lacking in competition. If it is, the Commission has supplied no evidence to that fact. Because the Commission purports to be addressing a problem of consumer choice and video competition where there is no demonstrated problem, the proposed rulemaking is thus ill-advised.

3. The proposed rule is unnecessary to address the issue of rental fees.

In both its official NPRM and also in the rhetoric it has used to justify the rulemaking, the Commission has frequently complained about MVPDs requiring customers to rent set-top boxes. Others have pointed out that 1) set-top box rental fees have NOT increased dramatically when subjected to constant-dollar analysis; 2) proprietary set-top boxes have facilitated consumer access to innovative products and services delivered through those set-top boxes, and 3) the cost of set-top boxes must be borne somehow, whether transparently disclosed as rental fees or hidden in the consumer's overall billing. We simply wish to point out that, had the FCC intended to address this issue, it could have done so with a discrete, targeted proceeding. Now, in fairness, IPI would likely have opposed such a rulemaking as well. *But the Commission is rhetorically dishonest when it inflames consumer discontent over rental fees to justify a radical regulation of set-top box technology.*

4. The proposed rule represents the regulation of competition at a granular level inappropriate for federal regulation.

As we have suggested, there is obvious choice in the video marketplace. But the proposed rule asserts that choice in MVPD, choice in device, and choice in streaming options simply isn't enough consumer choice—the FCC now purports to regulate right down to the individual device level which menus and apps are available. We assert that regulation of consumer choice and competition down to the level of the contents of an individual device is a level of regulation far more granular than is appropriate for federal regulation or than is anticipated by underlying legislation. The Commission is no longer purporting to determine how much competition is adequate at the regional, neighborhood, or even building level—now it seeks to regulate competition down to the contents of a device itself. This is intrusive regulatory overreach.

5. The proposed rule introduces an obvious threat to the pace of innovation.

Contrary to many assertions, proprietary set-top boxes have facilitated the rollout of significant new products and services for consumers. It is unfair to compare existing set-top box technology to the set-top boxes of a decade ago. Nevertheless, innovation continues in this space and video providers are obviously moving toward new ways of delivering their content, including through apps. In a free-market, innovation moves at the pace made possible through technological development, experimentation, and consumer uptake. We can expect this pace of innovation to continue UNLESS government regulation steps in and begins mandating particular standards, requirements and technologies. The proposed rule is best described as an entire regime of yet-unknown technology mandates upon the video industry, which will slow or even stall the pace of innovation. Projecting the implementation of the rulemaking, one can picture major technology development projects being shelved and promising new business models cancelled in company after company throughout the video industry. Regulation doesn't enhance innovation—regulation slows the pace of innovation. It is no accident that the most innovation in our economy takes place in industries that are lightly regulated, or which have as of yet escaped the heavy hand of regulation.

6. The proposed rule looks backward at technology that is being phased-out, rather than forward.

It is clear that video choice in the future will be accomplished through apps available through smart TVs and streaming devices. Essentially, the normal development of video access is leading to a move away from set-top boxes and toward other access methods, including new hardware like Google Chromecast and Apple TV. It's puzzling that, at this moment, the Commission introduces this major rulemaking for a technology that is on the way out, especially after the elimination of the CableCARD requirement for leased set-top boxes. Instead of learning the lesson of CableCARD and its former AllVid proceeding, the Commission is doubling-down on past failures and outdated technology.

7. The proposed rule introduces an obvious threat to intellectual property protection.

The Institute for Policy Innovation (IPI) believes that intellectual property protection is fundamental to functioning markets in content. We thus place a high priority on protecting copyright against piracy, as well as against artificial devaluation through government regulation. The value of content should be determined by private contractual agreements between providers and consumers, and the owners of content should have the final say on how, when, and under

what circumstances their content is used and licensed. Property rights, including intellectual property rights, means control over content, and this is a feature of the IP system, not a bug.

The proposed rule would abrogate existing contracts over how content is presented and used, and would through regulation devalue content in the future. It would allow content to be displayed, manipulated and reprioritized according to the priorities of the set-top box manufacturer rather than the owner of the content. It would also allow pirated content to be displayed alongside legitimate content; indeed, it would allow pirated content to be made available in the place of legitimate, licensed content. This would result in a substantial devaluing of licensed content.

There is already a substantial and harmful amount of piracy going on through existing portals. The Commission should not impose the creation of new portals of piracy such as the ones that would undoubtedly be created as a result of the proposed rule.

We would ask that the Commission pay special attention to the significant input from the creative community in opposition to the proposed rulemaking. Creators and copyright holders want their content to be embraced by consumers. Creators are not in the business of withholding their work from the marketplace. They simply want to retain their rightful place at the negotiating table when their work is being licensed, and they are justly concerned about the threat posed by the proposed rule.

8. The proposed rule introduces an obvious threat to property rights.

Too often, the Commission has demonstrated an insufficient appreciation for the importance of property rights. When a company builds a network or develops a technology, that network or technology is their property, built at their risk with their capital. Companies have the right to leverage their property in order to maximize profits—indeed, that is the incentive to take the risks and build out networks or develop technologies in the first place. When the Commission asserts the right to give other parties access to property that is not theirs, whether it be access to a network, access to a set-top box, or access to data and programming, or when it acts to invalidate existing contracts, the Commission acts in violation of the property rights of those involved. If the Commission’s rulemakings undermine property rights and the contracts based on those property rights, the Commission does untold harm to the economy.

In other words, the set-top box is not yours to unlock.

9. It is not clear that existing law and regulation precludes the creation of third-party set-top boxes

We speculate that the only things stopping a theoretical manufacturer of a third-party set-top box from being able to offer access to cable, satellite and IPTV programming are 1) the development of adequate software applications, and 2) satisfactory licensing and contractual agreements between the parties that address all the concerns of the video provider. We further speculate that such devices WILL be developed along the normal course of the evolution of the video marketplace; in fact, just this week, Comcast announced the development of its Xfinity Partner app, which will be offered initially through partnerships with Samsung and Roku. We speculate that Apple TV could also host a version of the Xfinity Partner app, as could other devices.

The Commission’s posture should be to observe these developments and to forbear from regulation. It is inappropriate for regulators to act as *de facto* representation for hardware manufacturers to use the force of law to help manufacturers evade the reasonable burdens of addressing the concerns of video providers and the appropriate market value of content.

In fact, a risk of the current rulemaking is that it will preclude such anticipated and beneficial voluntary, contractual agreements and technological developments.

10. The Commission is wasting taxpayer dollars

The Commission's set-top box rulemaking, like so many of the Commission's recent actions, are counter to the interests of taxpayers. Asserting authority over a non-existent problem through an unnecessary rule will simply result in years of unnecessary work on the part of Commission staff and enormous wastes of resources defending against the inevitable court challenges. For those of us who believe in limited regulation, the current Commission has become Exhibit A in our case for dramatically reducing the budgets and authorities of federal regulatory agencies.

Conclusion

No, the Institute for Policy Innovation does not support the proposed set-top box rule. We oppose it for a variety of reasons, both specific to this rulemaking but also in general to the aggressive stance of the current Commission, which lately seems to be implementing its own agenda without regard to data, economics, consumer demand or marketplace reality. We urge the Commission to reject the proposed rule, we urge the courts to act swiftly to supply injunctive relief to plaintiffs in opposition to this rule, and we urge Congress to rein in the Commission at its earliest opportunity.