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Comments of

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In the Matter of

Expanding Consumers' Video Navigation Choices

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&

Commercial Availability of Navigation Devices

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I. Introduction

The FCC claims it is trying to “Unlock the Box” to “empower consumers to choose how they wish to access the multichannel video programming to which they subscribe.”⁵

The Downloadable Security Technology Advisory Committee (“DSTAC”), established by the Commission pursuant to instructions from Congress, recommended two routes for empowering consumers.⁶ The “Apps-Based Proposal”⁷ would have ensured that consumers could access the programming they pay for on devices of their choosing (*e.g.*, smart televisions, smart phones, streaming media players like the Roku box or small dongles that attach to TVs, like Google’s Chromecast) — via an app provided by their Multichannel Video Programming Distributor (“MVPD”). The FCC has ample legal authority to implement this proposal and to address the primary objection raised to it: that MVPDs would drag their feet in approving the use of their app on third party devices. Meanwhile, the market has mooted the other principal objection: that such apps simply will not be developed at all. Time Warner Cable launched such an app last November and Comcast launched its own on Wednesday, April 20, 2016, as part of a larger program to enable third party equipment makers to offer Comcast programming on their devices without a standalone box.⁸

The NPRM does not even propose this app-based approach as an alternative to its preferred course of action: the “Competitive Navigation” proposal, also recommended by the DSTAC. (Nor does the NPRM seriously consider whether regulating MVPDs to promote competitive navigation devices is even appropriate in today’s hyper-competitive video marketplace.⁹) Instead, the NPRM suggests that the Commission has already made up its mind on policy, and is now just trying to work backwards and find legal authority to

⁵ Expanding Consumers’ Video Navigation Choices, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, MB Docket No. 16-42, ¶ 1 (Feb. 18, 2016) [“NPRM”], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.

⁶ Final Report of the DSTAC (Aug. 28, 2015) [“DSTAC Report”], available at <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>.

⁷ Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices, *Notice of Proposed Rulemaking*, 31 FCC Rcd 1544 (2016) [hereinafter NPRM], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1_Rcd.pdf.

⁸ Andrew Russell, Sr. Director, Corp. Comms., Time Warner Cable, *Time Warner Cable Launches TWC TV Roku Trial in NYC* (Nov. 9, 2015), available at <http://www.twcableuntangled.com/2015/11/time-warner-cable-launches-twc-tv-roku-trial-in-nyc/>; Comcast, *Comcast Launches Xfinity TV Partner Program; Samsung First TV Partner to Join: New Xfinity TV Partner App will Leverage Open Standard Technologies to Provide Access to Xfinity TV Content and Guide on Smart TVs and Other IP-Enabled Devices* (Apr. 20, 2016), available at <http://corporate.comcast.com/news-information/news-feed/comcast-launches-xfinity-tv-partner-program-samsung-first-tv-partner-to-join>.

⁹ *Cf.* 47 U.S.C. § 549(e) (sunsetting FCC power to promulgate navigation device regulation when the market for multichannel video programming and interactive communications equipment is fully competitive).

support its planned course of action. The FCC's legal arguments are as sweeping as they are cavalier.

The FCC would do well to heed the caution offered by Judge David Tatel of the U.S. Court of Appeals for the D.C. Circuit in a 2010 speech:

[I]n both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law. In such cases, it looks for all the world like **agencies choose their policy first and then later seek to defend its legality. This gets it entirely backwards.** It's backwards because it effectively severs the tie between federal law and administrative policy, thus undermining important democratic and constitutional values. And it's backwards because whether or not agencies value neutral principles of administrative law, courts do, and they will strike down agency action that violates those principles — whatever the President's party, however popular the administration, and no matter how advisable the initiative....

As its most fundamental inquiry, administrative law calls upon courts to determine whether an agency's action falls within the scope of its authorizing legislation. This task often involves no more than reading the law. Then-Professor Felix Frankfurter, one of the fathers of administrative law, famously admonished his students: "(1) Read the statute; (2) read the statute; (3) read the statute!" This is self-evidently good advice, but **you would be surprised how often agencies do not seem to have given their authorizing statutes so much as a quick skim.**¹⁰

II. The NPRM Claims Sweeping New Powers, in Violation of Recent Supreme Court Decisions

The NPRM is simply the latest in a series of recent "EUREKA!" moments, in which the FCC has suddenly discovered sweeping powers in the 1996 Telecommunications Act and the 1934 Communications Act. The agency is on a collision course with the Supreme Court,

¹⁰ David S. Tatel, Judge, U.S. Ct. of Appeals, D.C. Cir., *The Administrative Process and the Rule of Environmental Law, Address Before the Environmental Law Institute* (Oct. 6, 2009), in 34 HARV. ENVTL. L. REV. 1, 2 (2010), available at http://www.law.harvard.edu/students/orgs/elr/vol34_1/1-8.pdf (emphasis added).

which, in early 2014, *unanimously* blocked the EPA’s attempt to “tailor” the Clean Air Act to address the novel issue of greenhouse gases. The Court ruled that the purported need for such tailoring revealed just how far the agency had strayed from what Congress intended. The Court articulated a second, related reason for declining to review the EPA rule under the deferential standard of *Chevron*:¹¹

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”¹²

The NPRM’s reinterpretation of Section 629 of the Communications Act is as “unheralded” as the powers it would confer upon the agency are sweeping, and as the decisions to be made are significant. In effect, the FCC is attempting to “tailor” craft a new Title VI to invent a new paradigm for distribution of “linear,” channel-based television programming. In a nutshell, MVPDs will be disintermediated: Yes, they will remain the means by programming is bundled into a linear stream (through negotiations with programmers), but the FCC will do everything it can to ensure that the MVPD’s role remains limited to that, by creating a new market for third-party apps that can repackage and rearrange an MVPD’s content into a new interface. Yes, consumers will continue to pay MVPDs for their video content subscription, but third-party apps that will be able to monetize the interface the consumer uses — by adding new advertising, by gathering data on how consumers view video content (and integrating that with other sources of such data), and by charging programmers for premium placement in the new interface.¹³ In short, the FCC is reinventing a market that it declares produced \$61.8 billion in 2013.¹⁴ If this is not a question with vast “economic and political significance,” what is?

But even more “significant,” and thus undeserving of *Chevron* deference under *UARG*, may be the unintended (or at least, non-obvious) consequences of the NPRM’s claims of statutory authority. Declaring apps to be “devices” and “equipment” may be in the short-term interest of certain software companies, who believe they can profit from relegating

¹¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

¹² *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (*UARG*) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)) (citations omitted).

¹³ See *infra* Part X.

¹⁴ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, FCC 15-41, 30 FCC Rcd 3253, 3315, ¶ 137 (2015) [“Sixteenth Video Competition Report”], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1_Rcd.pdf.

MVPDs to common carrier status as the “dumb pipes” through which programming flows from programmers to the new interfaces developed by independent apps-makers. But it invites further FCC regulation of apps. As with “Net Neutrality” regulation, the FCC talks about regulating the “core” in order to protect the “edge,” but its legal theories increasingly erase the line between the two, and give the FCC broad power to regulate the Internet. What question could have vaster “economic and political significance?”¹⁵

We attach hereto as Appendices A and B the briefs filed by TechFreedom as an intervenor in support of challenges to the FCC’s 2015 Open Internet Order,¹⁶ which analyze that order under *UARG* and other recent Supreme Court decisions. The same underlying statutory analysis is highly relevant here.

I. The NPRM Misunderstands What an MVPD Service Is

The DSTAC report includes this revealing passage:

[T]he definition of what is meant by “MVPD service” (multichannel video programming distributor) is a point of disagreement in the group. **Some members of the DSTAC consider MVPD service to include all the various functionalities and features that the MVPD provides to its customers, including the interactive features and the User Interface which they use** in their retail offerings and consider protected by copyright, licensing, and other requirements determining how their service is distributed and presented; retaining these elements is also part of respecting the contractual and copyright terms between content providers and distributors for the commercial distribution of programming.

Other members consider “MVPD Service” to be primarily video transport, and consider the inclusion of the MVPD’s User Interface and other features to prevent retail devices from innovating and differentiating their products, which they believe is essential for success in the marketplace. They also point out the current cable specific CableCARD

¹⁵ *Cf.* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (noting that it is unlikely for Congress to implicitly delegate to an agency a question of “deep economic and political significance,” especially on an issue with which the agency has limited expertise (internal quotation marks and citations omitted)).

¹⁶ Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, GN Docket No. 14-28 (Feb. 26, 2015) [“2015 Open Internet Order”], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf.

system allows consumer electronics (CE) manufacturers to build such products today and are in use by consumers.¹⁷

This debate is easily resolved by, as Judge Tatel urged, simply reading the text of the statute, at least with respect to cable service. That term is defined by 47 U.S.C. § 522(6) as follows:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

The 1996 Telecom Act added the words “or use” to the second paragraph, “reflecting the evolution of video programming toward interactive services,” as noted in the Conference Report.¹⁸ This makes it obvious that Congress understood that cable service included not just the programming stream, but the interface with the user as well. The Apps-Based Proposal would be consistent with this understanding, ensuring that the cable operator would continued to provide the entirety of “cable service.”

This is relevant to the NPRM’s proposal in two ways, developed further below. First (but discussed second below), the NPRM’s proposal rests on the mistaken assumption, embodied in the second paragraph quoted above from the DSTAC Report, that the Section 629(a) allows the FCC to require that MVPDs provide essentially just the first half of the definition of cable service. This, in turn, means the FCC would effectively unbundle cable service by requiring the MVPD to provide the first half without the second.

II. The NPRM Illegally Treats Cable Providers as Common Carriers

The NPRM would illegally relegate multichannel video programming distributors (“MVPDs”) to common carrier status, even though the Supreme Court has recognized that “[t]he Commission may not regulate cable systems as common carriers”¹⁹ and Section 621(c) specifically prohibits the FCC from imposing common carriage status on cable

¹⁷ DSTAC Report, *supra* note 6, at 1–2 (emphasis added).

¹⁸ H.R. REP. NO. 104-458, at 167 (1996) (Conf. Rep.).

¹⁹ FCC v. Midwest Video Corp., 440 U.S. 689, 709 (1979) (“Midwest Video II”).

providers.²⁰ Furthermore, the Communications Act clearly does not include MVPDs within the definition of “common carrier.”²¹

In 2012, the D.C. Circuit upheld the FCC’s data roaming rules, rejecting arguments that the FCC had illegally rendered operators of mobile broadband networks as common carriers. The court laid out a test for determining when the FCC had crossed the line in such cases:

If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.

See Southwestern Bell, 19 F.3d at 1481; *NARUC I*, 525 F.2d at 642; *NARUC II*, 533 F.2d at 608. But perhaps more importantly, the Commission has significant latitude to determine the bounds of common carriage in particular cases. Moreover, there is an important distinction between the question whether a given regulatory regime is consistent with common carrier or private carrier status, *see, e.g., Orloff*, 352 F.3d at 419–21, and the *Midwest Video II* question whether that regime necessarily confers common carrier status, *see Midwest Video II*, 440 U.S. at 700–02, 99 S.Ct. 1435. Accordingly, even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing — there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se. It is in this realm — the space between per se common carriage and per se private carriage — that the Commission’s determination that a regulation does or does not confer common carrier status warrants deference. *Cf. U.S. Telecom Assoc.*, 295

²⁰ 47 U.S.C. § 541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”).

²¹ *See* 47 U.S.C. § 153(11) (defining “common carrier” as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier”) (emphasis added); 47 U.S.C. § 522(13) (defining “multichannel video programming distributor” as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscriber or customers, multiple channels of video programming”); *see also* 47 U.S.C. § 522(5) (defining “cable operator” as “any person or group of persons (A) who provides cable service over a cable system and directly through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system”).

F.3d at 1331–32 (deferring to Commission's interpretation of "common carrier"). Such is the case with the data roaming rule.²²

But such is most emphatically *not* the case with the NPRM. The FCC's proposal requires MVPDs to provide their content in three information flows to all comers (would-be app-makers), who can resell the MVPDs' content in their own products. If this is not common carriage, nothing is. This is pure open-access unbundling: a requirement that the MVPDs "offer service indiscriminately and on general terms" to third-party app makers.²³

The fact that the MVPD will remain in a subscription relationship with its customers is not enough even to place this in the "gray area" between common carriage and private carriage: the FCC will have forced the MVPD to unbundle its content to third parties, which is the very essence of common carriage. Those third parties will, in their apps, be able to rearrange the MVPD's content into new interfaces, charge programmers for premium placement in those interfaces, insert new advertising, gather valuable information about viewing habits, and so on. And MVPDs must make available their three information flows to third party interface vendors at no cost — with no right to insist on any individualized terms.²⁴

By contrast, the FCC would have been on solid legal footing had it sought comment on some version of the Apps-Based Proposal. Rather than requiring unbundling of the MVPD's licensed content — the entirety of its service, essentially — for some third party to rearrange in a new interface, with new advertisements and new channel placements, the Apps-Based Proposal would simply have required the MVPD to provide its service in an app of its own creation on third party devices. In this scenario, the MVPD would not be required to "offer service indiscriminately and on general terms" to anyone. They would remain in a private carriage transaction with their subscribers. The physical device used by the customer to run the MVPD's app would not be the recipient of the MVPD's service; the MVPD would retain the discretion to control how to configure their app. The discussion in *Cellco* on this point is illustrative:

Midwest Video II clarified, though, that not every limitation on an entity's discretion concerning with whom and how it will deal is necessarily common carriage. In both *United States v. Midwest Video Corp.* (*Midwest Video I*), 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972), and *United*

²² *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012) (emphasis added).

²³ *See id.* at 547.

²⁴ *Id.* at 548 (distinguishing common carriage from less intrusive regulation in that the latter "leaves substantial room for individualized bargaining and discrimination in terms").

States v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), for example, the Supreme Court upheld rules that limited cable operators' discretion to decide who could use their channels and what could be transmitted thereon. *Midwest Video II* expressly distinguished these cases. The origination rule upheld in *Midwest Video I*, the Court explained in *Midwest Video II*, "did not abrogate the cable operators' control over the composition of their programming, as [did] the access rules." *Midwest Video II*, 440 U.S. at 700, 99 S.Ct. 1435. And the signal-carriage rules at issue in *Southwestern Cable*, the Court emphasized, "did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers." *Id.* at 706 n. 16., 99 S.Ct. 1435 By distinguishing the rules upheld in *Midwest Video I* and *Southwestern Cable*, *Midwest Video II* itself makes clear that there is room for permissible regulation of private carriers that shares some aspects of traditional common carrier obligations.²⁵

The FCC's proposal obviously requires MVPDs to "hold out facilities indifferently for public use" and "abrogate the cable operators' control over the composition of their programming."²⁶ The Apps-Based Proposal would, indeed, "limit[] cable operators' discretion to decide who could use their channels" (requiring them to make those channels available to third-party app-developers they would not otherwise deal with), but, as in *Midwest Video II*, this would not have constituted common carriage.²⁷

This is an open-and-shut case, much more straightforward than the 2010 Open Internet Order's non-discrimination rule, which the D.C. Circuit struck down under *Cellco* in its 2014 *Verizon* decision.²⁸ Yet the NPRM does not even so much as mention "common carriage," Section 706 (of the 1996 Act), *Midwest Video I* or *II*, *Cellco*, or *Verizon*. If there were a Rule 11 for administrative agencies, the FCC would deserve to be sanctioned under it for issuing an NPRM whose entire legal premise is so evidently flawed.

²⁵ See *id.* at 548.

²⁶ *FCC v. Midwest Video Corp.* 99 S. Ct. 1435, 1441 (1979).

²⁷ *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012).

²⁸ *Verizon v. FCC*, 770 F.3d 961, 969 (D.C. Cir. 2014)

III. Congress Knew How to Confer Unbundling Authority, but Did Not Do So in Any Section Cited by the NPRM

The fact that the NPRM essentially proposes to require MVPDs to unbundle their content from their interfaces creates an additional legal problem: None of the sections relied upon by the FCC, nor any part of the Communications Act, confers on the agency the power to mandate such unbundling — even though Congress *did* mandate unbundling elsewhere in the 1996 Telecom Act. This is what authority to impose unbundling looks like:

UNBUNDLED ACCESS: The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.²⁹

And:

SUBSCRIBER LIST INFORMATION: Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.³⁰

Statutory grants of authority to require unbundling are not difficult to identify. In fact, they stick out like a sore thumb — as, indeed, anyone would expect them to, given that they are marked deviations from the general principles of private property that are the bedrock of American law (at least, outside of the strange, new world of “open access” to the content and networks of others that the FCC would build).

²⁹ 47 U.S.C. § 251(c)(3).

³⁰ 47 U.S.C. § 222(e).

IV. The NPRM Misinterprets Section 629, which Does Not Grant Authority for What the FCC Proposes

As with common carriage, the FCC could have stayed well within the authority conferred by Section 629³¹ if it had sought comment on some variant of the Apps-Based Proposal. Section 629(a) allows the FCC to regulate in order to assure the:

availability, to consumers of ... multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.³²

The most important of the FCC's misinterpretations of this Section is that of the words "navigation devices" and "equipment," which the FCC re-interprets, absurdly, to mean apps themselves, rather than the physical devices on which the apps run. This interpretation is obviously contrary to the intention of Congress, notwithstanding the FCC's two feeble arguments to the contrary.

We analyze the key provisions of Section 629 in turn.

A. The FCC Reads "To Consumers" Out of the Statute

Section 629(a) requires that the FCC shall:

adopt regulations to assure the commercial availability, **to consumers** of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems[.]³³

³¹ Communications Act of 1934, § 629, 47 U.S.C. § 549 (added by Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56).

³² 47 U.S.C. § 549(a).

³³ 47 U.S.C. § 549 (emphasis added).

The FCC's original attempts to implement this provision involved making the MVPDs' programming available on boxes or televisions produced by independent manufacturers.³⁴ This clearly satisfied the statutory requirement because the content was made "available" directly to consumers via a "navigation device" they could purchase from various companies independent from their MVPD.

Now, effectively, the FCC proposes to do something quite different: make "multichannel video programming and other services" available *to third party app makers*, who will then make *something different* available to consumers. (Critically, the "other services" here now include the proprietary data flows that accompany the programming itself.) In its rush to provide certain players in the market with an advantage, the FCC has simply lost sight of what the words in the statute say: that the FCC shall promote the availability of devices to consumers, not content (and associated data) to app makers.

B. The FCC Reads "Services Offered Over Multichannel Video Programming Systems" Out of the Statute

Section 629(a) constrains the FCC in a second way:

[The FCC shall] adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other **services offered over multichannel video programming systems** of converter boxes, interactive communications equipment, and other equipment used by consumers to access **multichannel video programming and other services offered over multichannel video programming systems**[.]³⁵

Originally, the "services offered over multichannel video programming systems" were offered by the MVPDs. Their meaning is plain from the definition of cable service in 47 U.S.C § 522(6) — which is so important to the overall structure of Title VI, it bears repeating:

- (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service[.]

³⁴ NPRM, 31 FCC Rcd at 1574, ¶ 63.

³⁵ 47 U.S.C. § 549(a) (emphasis added).

The Apps-Based Proposal would ensure that the “services offered over multichannel video programming systems” include both aspects of cable service. (It would be unreasonable for Congress to have understood non-cable MVPD services to be treated any differently).

The NPRM takes a radically different course. The three new “information flows” proposed by the NPRM effectively constitute, either individually or collectively (in the apps wherein consumers would actually use all three), new “other services.” Of course, these *rely on* the MVPDs’ content, but they are no longer “offered over multichannel video programming systems” — insofar as they are, inherently, non-MVPD services. This interpretation effectively reads the phrase “offered over multichannel video programming systems” out of the statute — insofar as that phrase is, on its face, used in reference to the consumer. If these “flows” or “services” are “offered” to anyone under the FCC’s proposal, it is to the third party app maker, not the consumer. (This is essentially the same legal error underlying the previous two sections.)

The first of these three “flows” is “service discovery (information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels)[.]”³⁶ Here, the FCC is no longer talking about “other services offered over” the MVPD’s system. It is inventing a new meta-service: a “service” for services. This is, of course, nowhere to be found in the statute, highlighting how far afield the FCC has deviated from the text of the statute.

C. “Commercial Availability” Does Not Mean Effective Competition or Any Other Standard of Market Competitiveness

Section 629’s economic focus is clear:

[The FCC shall] adopt regulations to assure the **commercial availability** to consumers of multichannel video programming and other services offered over multichannel video programming systems of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services[.]³⁷

The FCC warps this text into “the goal of ensuring a competitive retail market for Navigation Devices as contemplated by Section 629.”³⁸ The NPRM avoids using terms like

³⁶ NPRM ¶ 2.

³⁷ 47 U.S.C. § 549 (emphasis added).

³⁸ NPRM ¶ 69.

“effective competition,”³⁹ because that would make it obvious that the Commission is substituting its own, more demanding standard for the one that Congress deliberately wrote. The FCC claims, for instance, in discussing its interpretation of the definition of “devices” and “equipment,” that:

a broad interpretation is necessary to ensure that these third parties are provided the information they need from MVPDs to facilitate the **commercial development of competing navigation technologies** in order to fulfill the goals of Section 629.

And

we do not believe that the goals of Section 629 would be met if the commercial market consisted solely of Navigation Devices built by developers with a business-to-business relationship with an MVPD, because such an approach would not lead to Navigation Device developers being able to innovate independently of MVPDs.⁴⁰

But this is precisely what “commercial availability” means: that consumers have options “from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.” The Merriam-Webster dictionary defines “available” as follows:

3: present or ready for immediate use <available resources>

4: accessible, obtainable <articles available in any drugstore>

5: qualified or willing to do something or to assume a responsibility
<available candidates>

6: present in such chemical or physical form as to be usable (as by a plant)
<available nitrogen> <available water>⁴¹

³⁹ Several provisions in the Communications Act turn on whether the FCC has found “effective competition” in a particular marketplace. Section 629 itself provides for the FCC’s regulatory power to sunset if, among other things, the market for MVPDs and navigation devices is “fully competitive.” 47 U.S.C. § 549(e). *See also* 47 U.S.C. § 332(c)(1)(C) (FCC required to analyze whether there is “effective competition” in commercial mobile services); *id.* § 543(a)(2) (FCC power to regulate the rates charged by a cable system turns on whether it is subject to “effective competition”).

⁴⁰ NPRM ¶ 23.

⁴¹ “Available.” *Merriam-Webster Online Dictionary*. 2016. <http://www.merriam-webster.com/dictionary/available>.

None of these definitions is quantitative; instead, each involves a qualitative assessment. But that qualitative assessment turns on whether something can be obtained — *i.e.*, the ability to get some, not how many different choices or flavors are available. In other words, the plain meaning of “availability” (of a product) is unrelated to the competitiveness of the market for that product.

If Congress had intended the FCC to parse just how competitive the market for navigation devices was in determining whether it needed to intervene, the 1996 Act would have said so explicitly. For instance, Section 254 (Universal Service) requires that “universal service is **available** at rates that are just, reasonable, and affordable” (254(i)) and that all Americans “should have access to telecommunications and information services ... that are reasonably comparable to those services provided in urban areas and that are **available** at rates that are reasonably comparable to rates charged for similar services in urban areas.”⁴²

Other examples from the 1996 Act illustrate how Congress used the word “available”:

- Section 336: “The term ‘high definition television’ refers to systems that offer approximately twice the vertical and horizontal resolution of receivers **generally available** on the date of enactment of the Telecommunications Act of 1996...”
- Section 502 (since vacated by the courts) creates an immunity from prosecution for “obscene or harassing use of telecommunications facilities,” for anyone who has acted in good faith “to restrict or prevent access by minors to [such communication] ... including any method which is feasible under **available** technology”
- Section 551 (“Requirement for Manufacture of Televisions that Block Programs”) requires the FCC to ensure that televisions with screens larger than 13 inches are equipped with parental control technology that can block programming based on content ratings “continue to be available to consumers.” Here, the statute says nothing of price — simply availability. But the statute goes on to allow use of “alternative blocking technology” (i.e., not based on ratings—but, say, on detecting nudity) if the Commission determines that it “is **available** to consumers at a cost which is comparable to the cost of [rating-based parental control technology]” and that it “will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings.”

⁴² 47 U.S.C. § 254(b)(3).

The Commission dwells on how few consumers have actually purchased a competitive navigation device from an unaffiliated vendor to date, noting that “99 percent of customers rent their set-top box directly from their pay-TV provider.”⁴³ That most consumers have opted to use an MVPD-supplied box, however, is no basis for concluding that other competitive devices are not commercially available. If such devices are not “commercially available,” then how can the Commission explain the one million (or more) U.S. MVPD subscribers who rely on a competitive navigation device?⁴⁴

To be sure, the “sunset” provision of Section 629(e) sets a higher bar, requiring that the FCC find to be “fully competitive” both (1) the “market for the multichannel video programming distributors” and (2) “the market for converter boxes, and interactive communications equipment.”⁴⁵ But this higher bar is *not* the test for whether the FCC its regulations meet the statutory requirements — rather, it is the test the agency must use to determine whether it must abolish its existing regulations regarding competitive navigation devices.⁴⁶ The FCC seems to believe it has the power to impose any rules it deems necessary to create a “fully competitive” market for interactive communications equipment, yet the Communications Act contains no such grant of authority.

D. Software Interfaces and Apps May Be Part of “Devices” and “Equipment” but Are Not “Devices” or “Equipment” Themselves

The NPRM’s most significant reinterpretation of Section 629 involves the category of “equipment,” which the title of the section paraphrases as “navigation devices”:

[The FCC shall] adopt regulations to assure the commercial availability to consumers of multichannel video programming and other services offered over multichannel video programming systems of **converter boxes, interactive communications equipment, and other equipment** used by consumers to access multichannel video programming and other services[.]⁴⁷

⁴³ NPRM, 31 FCC Rcd at 1551, ¶ 13.

⁴⁴ See *id.*; see also Maria Armental, *TiVo Revenue Rises on Record Quarterly Subscriber Additions*, WALL ST. J., Nov. 26, 2015, available at <http://www.wsj.com/articles/tivo-revenue-rises-on-record-quarterly-subscriber-additions-1448402557> (for the quarter ending October 31, 2015, TiVo reported 6.5 million subscribers, of which “more than four million” resided outside the United States).

⁴⁵ 47 U.S.C. § 549(e).

⁴⁶ See 47 C.F.R. § 76.1200 et seq.

⁴⁷ 47 U.S.C. § 549(a).

The meaning of the statute is plain: the FCC must ensure the “commercial availability” of physical “equipment” or “devices” by which consumers can view video content. This is statutory construction 101: Under “the principle of *noscitur a sociis*” (*i.e.*, a thing shall be known by its surroundings) courts must “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.”⁴⁸

The FCC could have ensured the “commercial availability” of physical “devices” by embracing the DSTAC Working Group 4 (“WG4”) Application-Based proposal (the “Apps-Based Proposal”). Instead, the FCC reinterprets the words “equipment” and “devices” (generally simplified herein to “devices” for convenience) to mean that apps or other software can constitute “devices” separate and apart from the “devices” on which they run:

We propose to interpret the terms “manufacturers, retailers, and other vendors” broadly to include all hardware manufacturers, **software developers, application designers, system integrators, and other such entities** that are not affiliated with any MVPD and who are involved in the development of navigation devices or whose products enable consumers to access multichannel video programming over any such device. We believe a broad interpretation is necessary to ensure that these third parties are provided the information they need from MVPDs to facilitate the commercial development of competing navigation technologies in order to fulfill the goals of Section 629.

The Act does not define the terms “navigation device” or “interactive communications equipment, and other equipment,” but we believe that Congress intended the terms to be far broader than conventional cable boxes or other hardware alone; **Section 629 is plainly written to cover any equipment used by consumers to access multichannel video programming and other services, and software features have long been essential elements of such equipment.** Exercising our authority to interpret ambiguous terms in the Communications Act, we tentatively conclude that these terms **include both the hardware and software (such as applications)** employed in such devices that allow consumers to

⁴⁸ *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

access multichannel video programming and other services offered over multichannel video programming systems.⁴⁹

In short, the NPRM says not merely that software can be part of a “device,” but that software is *itself* a “device” — the availability of which the FCC must ensure under Section 629. The NPRM justifies this interpretation with two historical references — one to the history of set-top-boxes before the 1996 Act, and the other to the FCC’s 2013 interpretation of “navigation devices.” Neither supports the enormous weight the FCC places upon it.

1. The Use of Software in Set-Top Boxes Before the 1996 Act Does Not Support the FCC’s Redefinition of “Devices” and “Equipment”

First, the NPRM claims that “when Congress adopted Section 629, it intended the term to include software because set-top boxes have run software since before 1996.”⁵⁰ Yes, it should have been obvious to the Congress that enacted Section 629 that “navigation equipment” ran software. Surely, even the most technologically illiterate Congressman of the day would have understood that “running software” is simply what *all* computers do (and even the clunky set-top boxes of the day were computers of a sort). But it simply does not follow that Congress intended Section 629 to allow the FCC to issue rules to promote the availability of apps or other intangible platforms, as distinct from physical devices. Rather, Congress simply realized that, in promoting third party devices, this would necessarily involve software — potentially developed in whole or in part by third-party device vendors.

This authority would allow the FCC to use some variant of the Apps-Based Proposal to govern certain aspects of what an MVPD’s app must do to be considered sufficient to qualify as making MVPD content “available” to consumers, such as regulating the accessibility features that must be offered along with the app. Further, the FCC could regulate how much control the MVPD can exercise in making its app available for installation by third party OEMs, or by users in app marketplaces (*e.g.*, Google Play, iTunes, Amazon, Windows), by mandating the use of one or more open standards, such as HTML5 or DLNA VidiPath.

CableCARD, for instance, required cable companies to offer “technical interface information so manufacturers, retailers, and subscribers could determine device compatibility” and a “separate security element that would allow a set-top box built by an unaffiliated manufacturer to access encrypted multichannel video programming without jeopardizing

⁴⁹ NPRM, 31 FCC Rcd at 1555–57, ¶¶ 21–22. (emphasis added).

⁵⁰ *Id.* ¶ 22 n.65.

security of programming or impeding the legal rights of MVPDs to prevent theft of service.”⁵¹ The FCC was, obviously, regulating software. It is difficult to imagine how the FCC could have regulated boxes at all without regulating software, at least indirectly.

In short, the FCC’s citation to history does nothing to prove its point.

2. The FCC’s Citation to Its Past Decisions Merely Confirms the Obvious: Third-Party Devices Are Covered by Section 629

The NPRM also claims that its interpretation is “consistent with the Commission’s prior interpretation of the term ‘navigation devices.’”⁵² In 2013, in its *Accessibility of User Interfaces, and Video Programming Guides and Menus* Order, the Commission had said:

Third-party devices with MVPD applications that are installed by the device manufacturer are also navigation devices because the MVPD application performs conditional access functions in a software-based manner that allows consumers to access multichannel video programming.⁵³

In other words, the FCC held that a physical device manufactured by a third party was still subject to the accessibility rules because the OEM had installed the MVPD’s software upon it. This precedent has no bearing on whether software *itself* constitutes a “device.” In this 2013 Order, the FCC was simply noting that devices produced by third parties could be considered “navigation devices” because, given the software installed upon them, they served the same function as the MVPD’s own navigation devices. This is essentially a tautology.

It is obvious that such third-party devices must be considered “navigation devices,” because ensuring the availability of third-party devices is the *entire purpose of Section 629*! Indeed, as the FCC notes in its first argument, Congress must have known that it was the *software* on those third-party devices that would allow them to work with the MVPD’s network.

⁵¹ *Id.* ¶ 6.

⁵² *Id.* ¶ 22 n.66.

⁵³ *Id.*

3. The FCC's Interpretation Is Inconsistent with the Plain Meaning of "Devices" and "Equipment"

Here, again, the FCC is not merely claiming that it can regulate the software on navigation devices as a part of an integrated whole (akin to what it did in the 2013 Order). Instead, it claiming that it can mandate that MVPDs provide their programming content and associated data to third parties to be presented to consumers in new apps created by third parties — which the FCC claims are “devices.” By this logic, it would not be enough that every MVPD in America began running ads telling its customers that they no longer needed to pay for a set-top box, and encouraging them to install the MVPD’s app on a smart television, Roku, Chromecast, computer, or smart phone of their choosing. The FCC would still insist that Section 629 required it to ensure the commercial availability of *independent* apps. The enemy, it seems, is not the set-top box after all, but the MVPDs themselves — and the FCC is determined to make any legal claim, however shaky, to mount this attack on today’s video programming market. As Judge Tatel remarked: “it looks for all the world like agencies choose their policy first and then later seek to defend its legality.”⁵⁴

If Congress had intended the FCC to regulate the software on the navigation device, it could easily have said so. Instead, Congress used the term “device” in the title of Section 629, which Merriam-Webster defines simply as: “an object, machine, or piece of equipment that has been made for some special purpose.”⁵⁵

The body of the statute uses the terms “converter boxes” and “equipment,” the latter of which Merriam-Webster defines as:

the set of articles or physical resources serving to equip a person or thing:
as

(1) the implements used in an operation or activity : apparatus <sports
equipment>

(2) all the fixed assets other than land and buildings of a business
enterprise

(3) the rolling stock of a railway.⁵⁶

Both “device” and “equipment” clearly refer to physical objects. The statute’s meaning is plain on its face. The FCC cannot claim *Chevron* deference to interpret these terms to mean

⁵⁴ Tatel, *supra* note 10, at 2.

⁵⁵ “Device.” Merriam-Webster Online Dictionary. 2016. <http://www.merriam-webster.com/dictionary/device>.

⁵⁶ “Equipment.” Merriam-Webster Online Dictionary. 2016. <http://www.merriam-webster.com/dictionary/equipment>.

software (independent of the physical hardware) because the terms simply are not ambiguous. But even, *arguendo*, if a court were to accept the FCC's argument that the terms are ambiguous, the FCC's interpretation is patently unreasonable — for all the reasons laid out below.

4. The Other References to “Equipment” and “Devices” in the 1996 Act Are Inconsistent with the FCC’s Statutory Interpretation

It is a well-established canon of statutory construction that Congress, in using statutory language, is presumed to act consistently, with identical words used in different parts of the same act intended to have the same meaning.⁵⁷ The corollary canon to “consistent usage” is “meaningful variation”: Where Congress could have used the same word in two different places in the same act, but chose to use a different word instead, that variation in wording is presumed to have been intentional, and that Congress therefore intended a different meaning than what the same word would have conveyed.⁵⁸

The 1996 Telecom Act uses the word “equipment” 104 times and “device” 21 times.⁵⁹ Each of these references — save one — clearly refers to physical devices or otherwise implies that Congress believed it necessary to clarify when it intended these terms to include software.

47 U.S.C. § 573: “[The FCC may] prohibit an operator of an open video system from omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide, or menu.”

The juxtaposition of “device” with “guide or menu” makes clear that guides, menus and other software-based functionalities and interfaces are not themselves “devices.” When Congress wanted to include software functionalities or interfaces in the definition of “equipment,” it did so explicitly — in five instances in the 1996 Telecom Act:

47 U.S.C. § 153(35): The term ‘network element’ means a facility or equipment used in the provision of a telecommunications service. **Such term also includes features, functions, and capabilities that are**

⁵⁷ See, e.g., OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE, 9–10 (Nov. 1995), available at http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf; *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986).

⁵⁸ *Id.*

⁵⁹ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56–161 (1996), available at <http://transition.fcc.gov/Reports/tcom1996.pdf>. Citations are to the U.S.C. for ease of reference.

provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(52): The term ‘telecommunications equipment’ means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and **includes software integral to such equipment** (including upgrades).

47 U.S.C. § 259(c): A local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, **including any software or upgrades of software integral to the use or operation of such telecommunications equipment**.

47 U.S.C. § 273(d)(8)(B): The term ‘generic requirement’ means a description of acceptable product attributes for use by local exchange carriers in establishing product specifications for the purchase of telecommunications equipment, customer premises equipment, and **software integral thereto**.

47 U.S.C. § 273(e)(4): Neither a Bell operating company engaged in manufacturing nor a manufacturing affiliate of such a company shall restrict sales to any local exchange carrier of telecommunications equipment, **including software integral to the operation of such equipment and related upgrades**.

Elsewhere, Congress specifically mentioned software in the same breath as mentioning equipment, thus making clear its general understanding that the two are distinct:

47 U.S.C. § 273(e)(2): Each Bell operating company or any entity acting on its behalf shall make procurement decisions and award all supply contracts for **equipment, services, and software** on the basis of an objective assessment of price, quality, delivery, and other commercial factors.

47 U.S.C. § 302 distinguishes *ten times* between “devices or home electronic equipment” and “systems,” immediately juxtaposing the two. Elsewhere, it is simply obvious that the

generic term “equipment” or “device” (absent some other clarifying adjective) refers to physical hardware:

47 U.S.C. § 251(c)(6): The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of **equipment** necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations

47 U.S.C. § 274(b)(7)(B): [Bell Company may not...] perform the purchasing, installation, or maintenance of **equipment** on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section;

Overall, the 1934 Communications Act, as amended, uses the term “manufacture” in the same paragraph with “equipment” twenty-two times. The primary meanings of the word “manufacture” are intertwined with the literal meaning of the word:

ORIGIN: Middle French, from Medieval Latin *manufactura*, from Latin *manu factus*, literally, made by hand

1: something made from raw materials by hand or by machinery

2a: the process of making wares by hand or by machinery especially when carried on systematically with division of labor

2b: a productive industry using mechanical power and machinery

3: the act or process of producing something⁶⁰

The point is simple: The 104th Congress understood “device” and “equipment” to mean physical objects.

5. That Congress Clarified that the Communications Decency Act Did Not Include Software in “Device” In No Way Supports the FCC’s Claims

Only once in the entire 1996 Telecom Act did Congress feel the need to clarify that the term “device” did not include software. In Section 502 of the Act, Congress said:

⁶⁰ "Manufacture." *Merriam-Webster Online Dictionary*. 2016. <http://www.merriam-webster.com/dictionary/manufacture>.

(1) The use of the term ‘telecommunications device’ in this section—

(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

(B) does not include an interactive computer service.⁶¹

That term, in turn, is defined in Section 230(e)(2):

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.⁶²

Does this mean that the term “device” is, in general, ambiguous and that it might at *least* sometimes mean software, absent *explicit* statements from Congress to the contrary?

Remember, the question is not (1) whether software is subsumed into the meaning of device. As discussed above, this is obviously true. Rather, the question is (2) whether software can *itself* constitute a device *separate from the physical device on which it runs*. The plain meaning of “device” (and “equipment”) is equally clear on both questions: The answer to the first is “yes,” and the answer to the second is “no.” In Section 502, Congress simply specified that it was over-riding what would otherwise have been the *first* plain meaning of “device” — *i.e.*, to include software run on physical devices.

That Congress felt it necessary to clarify this point is not surprising, given the monumental sensitivity of the Communications Decency Act — the bill that included Section 502, which was merged into the 1996 Telecommunications Act late in the drafting process. At issue was nothing less than Congress’s first attempt to censor the Internet — an effort the Supreme Court quickly blocked, striking down all of the CDA other than Section 230.⁶³ Section 503 imposed criminal penalties of up to two years in prison and stiff fines. Obviously, it would not have been adequate for Congress to assume courts could parse between the two very different aspects of the plain meaning of “device” (to ensure that software was neither considered part of device nor a device unto itself). The fact that Congress bent over backwards to avoid any possible misinterpretation of the term “device”

⁶¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 135 (1996).

⁶² *Id.* § 509, 110 Stat. at 139.

⁶³ *See Reno v. ACLU*, 521 U.S. 844 (1997).

says nothing about the meaning of the word “device” and everything about the inherent vulnerability of the Communications Decency Act to challenge on First Amendment grounds.

The legislative history of the Communications Decency Act further confirms the plain meaning of “device.” The bill as originally introduced, Communications Decency Act of 1995 (S.314), simply used the word “telecommunications device” (where 47 U.S.C. § 223 had previously said “telephone”).⁶⁴ The bill was merged into the Telecommunications Act of 1996 only because a legislative compromise was reached to marry the CDA with the Internet Freedom and Family Empowerment Act sponsored by Reps. Chris Cox (R-CA) and Ron Wyden (D-WA)⁶⁵ — which became what is now Section 230, the only part of the CDA left standing.⁶⁶ Stitching together the two completely antithetical bills — one a mandate *for* censorship and the other *against* it — produced a Frankenstein’s Monster in conference. Besides adding Section 230, Conference also found it necessary to clarify that the term “device” did not include “interactive computer service,” because that term was really a stand-in for Internet Freedom — for the idea that the FCC could not censor the Internet. The stakes could not have been higher, so Congress erred on the side of utmost caution.

6. The Legislative History of Section 629 Is Inconsistent with the NPRM’s Interpretation of That Section

Congress actually considered wording Section 629(a) as follows:

The Commission shall adopt regulations to assure competitive availability, to consumers of **telecommunications subscription services**, of converter boxes, interactive communications devices, and other customer premises equipment from manufacturers, retailers, and other vendors not affiliated with any telecommunications system operator....

The term ‘telecommunications subscription service’ means the provision directly to subscribers of video, voice, or data services for which a subscriber charge is made.⁶⁷

This would have covered the third-party apps contemplated by the NPRM. But Congress ultimately rejected this definition. The conference report also notes that, through the

⁶⁴ S. 314, 104th Cong. § 2(a) (1995).

⁶⁵ H.R. 1978, 104th Cong. (1995).

⁶⁶ 47 U.S.C. § 230.

⁶⁷ H.R. 1555, 104th Cong. § 203 (1995), available at <https://www.congress.gov/bill/104th-congress/house-bill/1555/text>.

House Amendment, “The scope of the regulations are narrowed to include ***only equipment*** used to access services provided by multichannel video programming distributors.”⁶⁸

Furthermore, the Conference Report on the 1996 Telecom Act declares that Congress intended the FCC “to assure the competitive availability to consumers of converter boxes, interactive communications devices, and other customer premises equipment [from third parties].”⁶⁹ The term “customer premises equipment” is defined by 47 U.S.C. § 153(16) to mean “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications” — and has always been understood to refer to physical equipment.

That the report specifically refers to “interactive communications devices” merely underscores that Congress understood full well that it was dealing with “smart” devices, which include software, but that their interactivity was part of the device, rather than a separate “device” or form of “equipment” that the FCC could, through Section 629, require MVPDs to supply with their naked programming.

“One purpose of this section,” the report goes on to note, “is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator.”⁷⁰ Again, this purpose would be amply served by the Apps-Based Proposal, but has nothing to do with the NPRM’s proposal except by the FCC’s contorted reinterpretation of “other equipment” to mean apps.

The Conference Report could hardly be more clear in its conception of Section 629 as focusing on physical devices:

The Committee believes that the transition to competition in network navigation devices and other customer premises equipment is an important national goal. Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution sources. A competitive market in navigation

⁶⁸ H.R. REP. NO. 104-458, at 181 (1996) (Conf. Rep.), *available at* <https://www.gpo.gov/fdsys/pkg/CRPT-104hrpt458/pdf/CRPT-104hrpt458.pdf> (emphasis added).

⁶⁹ *Id.* at 180.

⁷⁰ *Id.* at 181.

devices and equipment will allow common circuitry to be built into a single box or, eventually into televisions, video recorders, etc.⁷¹

“Common circuitry” is a quintessential aspect of hardware.

7. Section 624A’s Discussion of “Interfaces” Implies that Congress Did Not Intend “Devices” in Section 629 to Cover Interfaces

The law most relevant in understanding what Congress intended in Section 629 (of the 1996 Telecom Act) is probably Section 624A of the 1992 Cable Act. The headings of the two sections say much about what the two different Congresses intended:

- Section 624A: Consumer electronics equipment **compatibility**⁷²
- Section 629: Competitive **availability** of navigation devices⁷³

Section 624A is intended to assure “compatibility among televisions, video cassette recorders, and cable systems”⁷⁴ by ensuring that “cable operators [can] use technologies that will prevent signal thefts,”⁷⁵ thus avoiding what would otherwise happen: the “premium features and functions” of “new and recent models of television receivers and video cassette recorders” would be “disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices.”⁷⁶ To do this, Section 624A(b) requires the FCC to issue rules to ensure “Compatible Interfaces” (the heading of that subsection, the operative part of the statute).⁷⁷ Notably, the word “interface” appears just once in the 1996 Act — in an amendment (discussed below) to Section 624A.

What does all of this, and the way Congress amended Section 624A through the 1996 Telecom Act, say about what Congress intended in Section 629?⁷⁸

In choosing the word “equipment” in Section 629, Congress must have had in mind, but chose not to use, five key terms used in Section 624A: “interface(s)” (2 uses, including one subsection heading), “features” (8 uses), “functions” (12 uses), “protocols” (3 uses), and other “product and service options” (3 uses). Instead, Section 629 speaks of “equipment”

⁷¹ *Id.* at 112.

⁷² 47 U.S.C. § 544a.

⁷³ 47 U.S.C. § 549.

⁷⁴ 47 U.S.C. § 544a(a)(4).

⁷⁵ 47 U.S.C. § 544a(a)(3).

⁷⁶ 47 U.S.C. § 544a(a)(1).

⁷⁷ 47 U.S.C. § 544a(b)

⁷⁸ Whether Section 624A itself confers the authority the NPRM requires is discussed below. *See infra* p. 26.

(11 times), “device” (2 uses, including the section title) and “converter boxes” (5 times). The contrast could hardly be more clear: As discussed below, Section 624A is also focused on physical devices (not apps),⁷⁹ but since its concerned with compatibility, rather than availability, it used appropriate vocabulary to describe the software that those physical devices must be able to “interface” with (at the MVPD side). If Congress had intended for Section 629 to concern the availability of software, rather than physical devices, it would have used the same sort of language. That it chose not to do so, and instead used language in Section 629 significantly different from that in Section 624A, must be presumed to have been deliberate, and the FCC is duty-bound to give meaningful effect to this deliberate variation.

The 1996 Act made three amendments to Section 624A that further undermine the NPRM’s interpretation of Section 629:

1. Adding, to the factors the FCC must consider under 624A(c)(1), a new factor: “the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters unrelated to the descrambling or decryption of cable television signals.” Congress could have specified that Section 629 focus on the availability of such things but did not do so (and, again, specifically chose not to do so⁸⁰).
2. Adding, to the regulations required by 624A(c)(2), that the FCC must “ensure that any standards or regulations ... to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options other than those specified in paragraph (1)(B) [“providing effective protection against theft or unauthorized reception of cable service”]... .”⁸¹ Here, again, Congress showed that it clearly understood the difference between hardware and software as separate objects for the FCC’s attention.
3. Adding, to the findings in 624A(a), that “compatibility among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for

⁷⁹ See *infra* p. 21.

⁸⁰ See *supra* p. 22.

⁸¹ 47 U.S.C. § 544a(c)(2)(d).

selection through open competition in the market.”⁸² Here, the FCC again emphasized its preference for minimal regulatory intervention.

E. Excluding Interfaces from “Video Content and Other Services” Is Inconsistent with the FCC’s Implied Definition of the Market under Section 629(e)

In essence, the FCC presumes that the market that matters is the one for Internet video apps/interfaces. As the NPRM summarizes the basis for the rules:

our proposed rules are based on three fundamental points. First, the market for navigation devices is not competitive. Second, the few successes that developed in the CableCARD regime demonstrate that competitive navigation — that is, **competition in the user interface and complementary features** — is essential to achieve the goals of Section 629. Third, entities that build competitive navigation devices, including applications, need to be able to build those devices without seeking permission from MVPDs, because MVPDs offer products that directly compete with navigation devices and therefore have an incentive to withhold permission or constrain innovation, which would frustrate Section 629’s goal of assuring a commercial market for navigation devices.⁸³

In other words, Section 629(a) must promote competition in Over-the-Top video services. Yet at the same time, the FCC implicitly excludes such services from its analysis under Sunset 629(e), limiting *that* market solely to MVPDs. If it did not do so, it would be difficult for the FCC to argue that the market was not competitive, especially given the FCC’s own grudging admission that cable operators are, in general, subject to effective competition.⁸⁴ This is arbitrary and capricious.

⁸² 47 U.S.C. § 544a(a)(4).

⁸³ NPRM, 31 FCC Rcd at 1551, ¶ 12. (emphasis added).

⁸⁴ Amendment of the Commission’s Rules Concerning Effective Competition, Implementation of Section 111 of the STELA Reauthorization Act, *Report and Order*, 30 FCC Rcd 6574, 6577–79, ¶ 6 (2015), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-62A1_Rcd.pdf.

V. Section 624A Provides No Authority for the FCC’s Proposal

The NPRM asks “could we adopt the rules we propose below pursuant to our authority under Section 624A of the Act?”⁸⁵ The operative part of that statute, Section 624A(b)(1), provides that

the Commission ... shall report to Congress on means of assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders. ... [T]he Commission shall issue such regulations as are necessary to assure such compatibility.⁸⁶

As with its reinterpretation of “devices” and “equipment” under Section 629, the FCC must reinterpret “televisions and video cassette recorders” to mean, effectively, any device that can run an app capable of displaying video — including smart phones. The NPRM notes, citing the D.C. Circuit’s 2013 decision in *Echostar v FCC*:

Whereas Section 629 applies to all MVPDs, the D.C. Circuit has stated that “§ 624A’s reach is limited by its plain language to cable systems.” See *Echostar*, 704 F.3d at 999. Although the D.C. Circuit observed that Section 624A “[referred] to ‘video cassette recorders,’ now a largely antiquated technology,” it did not decide the question of that provision’s continued applicability to new technologies. *Id.* at 999, n.4. We note that Section 624A(d) authorizes the Commission to apply that provision to successor technologies. See 47 U.S.C. § 544a(d) (directing the Commission to modify its regulations “to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology”).⁸⁷

So far, the Commission is on stronger legal grounds, because of the differences in the text of Sections 624A and 629. But what does it mean to assure the “compatibility” of today’s equivalent of “televisions” with cable systems? The Apps-Based Proposal would do this by ensuring that MVPDs made their content available to run on third-party (physical) devices. The FCC could well argue that Section 624A would go further, allowing the FCC to bar cable companies (but not other MVPDs) from declining to make their app available for

⁸⁵ NPRM, 31 FCC Rcd at 1554, ¶ 18.

⁸⁶ 47 U.S.C. § 544A(b)(1).

⁸⁷ NPRM, 31 FCC Rcd at 1557 n.77.

installation on those third party devices, either by the OEM itself or by the consumer, downloading it from an apps store onto their device. This would certainly ensure that today's many video-capable devices are "compatible" with cable systems.

But the NPRM does not do this. Instead of ensuring the compatibility of third-party *devices* with cable systems, which could be accomplished through the Apps-Based Proposal, the NPRM attempts to ensure the compatibility of third-party *apps* with cable systems. Yes, it is true that Section 624A(d) requires the FCC to update its rules to keep pace with "changes in cable systems, television receivers, video cassette recorders, and similar technology" but this does not change the focus of the operative provision of the statute, Section 624A(b)(1), on *physical devices*. That focus is even clearer than in Section 629: here, the FCC refers not generally to "devices" and "equipment," but to "televisions and video cassette recorders" — two specific examples of physical devices.

Immediately before seeking comment on Section 624A as a source of authority, the NPRM also asks: "Are 'premium features and functions' of devices such as televisions and recording devices limited due to 'cable scrambling, encoding, or encryption technologies?'"⁸⁸ The FCC quotes here from Section 624A(a)(1):

The Congress finds that ... new and recent models of television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices, including converter boxes and remote control devices required by cable operators to receive programming.

This citation is irrelevant in two respects. First, this is a Congressional finding; it does not change the meaning of Section 624A(b)(1)'s operative terms ("televisions and video cassette recorders"), except perhaps to reinforce the point made in 624A(d), and, as summarized above, that the Commission should not hesitate to assure the compatibility of other *physical devices* that have become "similar" to televisions and VCRs.

Second, the problem (if there is one) that the NPRM purports to solve is not that today's video-capable devices "contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies."⁸⁹ If this were a problem, the FCC could, under the Apps-Based Proposal, assure the user's ability to run an app on their video-capable device simply by ensuring that cable companies made their

⁸⁸ *Id.* ¶ 24.

⁸⁹ *Cf.* 47 U.S.C. § 554A(a)(1).

own app available on third party devices, and that that app provided a sufficiently complete version of the MVPD's service for the device to be deemed "compatible" with the cable system *by virtue of running the app* — which would constitute a "feature or function." Instead, the FCC is relegating cable companies to common carriers, forcing them to allow third parties to build apps that can repack the MVPDs' programming.

VI. Section 335 Provides No Authority for the FCC's Proposal

Noting that Section 624A applies only to cable systems, the NPRM also asks whether the FCC could impose its proposed rules on Direct Broadcast Satellite ("DBS") video providers under 47 U.S.C. § 335(a) (authorizing the Commission to "impose on providers of direct broadcast satellite service, public interest or other requirements for providing video programming").⁹⁰

This section has nothing to do with device compatibility, set-top boxes or any contemporary equivalent thereof. Its focus is on content carriage, which is plain from the text of Section 335(a):

(a) Proceeding required to review DBS responsibilities

The Commission shall, within 180 days after October 5, 1992, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, **public interest or other requirements for providing video programming**. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) of this title and the use of facilities requirements of section 315 of this title to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the **principle of localism** under this chapter, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.⁹¹

The term "other requirements" does not mean *any* "other requirements" the Commission may conjure up in its desperate grasp for legal authority. It simply means that the "requirements for providing video programming" may be even broader than those traditionally labeled "public interest."

⁹⁰ NPRM, 31 FCC Rcd, ¶ 24, n.77.

⁹¹ 47 U.S.C. § 335(a) (emphasis added).

The three key headings of Subsection (b) makes the Section's focus on programming abundantly clear:

(b) Carriage obligations for noncommercial, educational, State public affairs, and informational programming....

(1) Channel capacity required ...

(2) Use of unused channel capacity ...

(3) Prices, terms, and conditions; Editorial control[.]⁹²

Subsection (b) governs how much channel capacity a satellite provider must dedicate to “noncommercial programming of an educational or informational nature.”⁹³

That the FCC would suggest that this section could possibly support the NPRM's proposal simply illustrates how FCC is grasping at straws. If, “[a]fter all, even a federal agency is entitled to a little pride[.]”⁹⁴ it ought to have a little shame, too. If the FCC had any shame left, it would not stoop so low.

VII. The Commission Cannot Use Ancillary Jurisdiction to Implement the NRPRM's Proposal

In the Authority paragraph of the NPRM's section on Procedural Matters, the Commission cites a litany of statutory provisions as the purported authority for its proposed rules.⁹⁵ Among the cited statutory provisions is 47 U.S.C. § 154(i), traditionally the main source of the FCC's so-called “ancillary authority” or “ancillary jurisdiction.” Notably, this provision is not cited outside the section on Procedural Matters, and nowhere in the NPRM does the Commission discuss the possibility of trying to use its ancillary authority to achieve what the authority granted in Title VI does not provide. Yet the FCC cites 47 U.S.C. § 154(i) nonetheless, clearly showing that it is willing to throw even the kitchen sink of legal authority into the fray to justify its predetermined policy outcome. Our discussion of the

⁹² See 47 U.S.C. § 335(b).

⁹³ *Id.* § 335(b)(1)(A).

⁹⁴ *Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014).

⁹⁵ NPRM, 31 FCC Rcd at 1588, ¶ 93.

agency's ancillary authority in these comments does not entitle the FCC to rely on this authority as if it had properly explained it in the NPRM.⁹⁶

We would, however, note the D.C. Circuit's skepticism of the FCC's previous claims of ancillary jurisdiction based on Sections 629 and 624A:

we refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices. See also *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C.Cir. 1994) (en banc) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."). The FCC's ancillary jurisdiction may be broad, but it is not unbounded.⁹⁷

Central to the D.C. Circuit's *Echostar* decision was its finding that "there are strong indications that agency flexibility was to be sharply delimited."⁹⁸ We have identified a number of such "indications" in the statutory analysis laid out above — terms Congress choose deliberately, in light of the other language of the 1996 Telecom Act, which the NPRM would read out of the Act.

VIII. The Commission Cannot Use Section 706 to Implement the NPRM's Proposal

The NPRM's ordering clauses declare that the agency is empowered to issue the proposed rules "pursuant to the authority contained in Sections 4(i), 4(j), 303, 303A, 335, 403, 624, 624A, 629, 631, 706, and 713 of the Communications Act of 1934."⁹⁹ For all the FCC's ingenuity in inventing ever-more creative theories of legal authority to justify its ever-more over-bearing (and unnecessary regulations), this reaches new heights of creativity.

Is President Obama planning really planning to issue a "proclamation ... that there exists a state or threat of war involving the United States" so that he may "deem[] it necessary in

⁹⁶ An agency that fails to provide notice in a regulatory proposal "cannot bootstrap notice from a comment." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

⁹⁷ *Echostar*, 704 F. 3d at 999.

⁹⁸ *Id.* (quoting *Midwest Video II*, 440 U.S. at 708).

⁹⁹ NPRM, 31 FCC Rcd at 1590, ¶ 101.

the interest of national security or defense” to “amend the rules and regulations applicable to any or all facilities or stations for wire communication?”¹⁰⁰ Or, since the NPRM goes to such pains to declare that apps are devices, is the President planning to invoke the even lower standard of Section 706(c) to issue a “proclamation ... that there exists a state of public peril or disaster” — because, presumably, in the Apps-Based Proposal, Americans would still bear the crushing burden of *having to switch between multiple video apps*, rather than have all their video content delivered to them in a single, integrated video app — and thus “amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices?”¹⁰¹ (We do note that this section requires that “devices” subject to such a proclamation must be “capable of emitting electromagnetic radiations,” but trust that the FCC will find a clever way to argue that, because apps control physical devices, apps themselves are “capable of emitting electromagnetic radiations.”)

Or did the FCC not, in fact, intend to invoke the “War Emergency Powers of the President” — the veritable Internet kill switch that has so long lain dormant? Is it possible that the FCC could have *intended* to cite Section 706 of the *1996 Telecommunications Act*, codified at 47 U.S.C. § 1302? The agency has certainly managed to cite that provision correctly in the past.¹⁰² Surely, if it meant to cite that provision, it would have done so — or, if it had made an error, at least issued an erratum. We would not want to wound whatever “little pride” the agency might have¹⁰³ by suggesting that it could not distinguish between its two principal statutes — an error that President Obama could be forgiven for making in his November 2014 speech, urging the FCC to invoke Title II of the 1996 Telecommunications Act, when he meant Title II of the 1934 Communications Act.¹⁰⁴ After all, the President is a (Nobel Prize-winning) constitutional scholar, not a telecom lawyer. And it is apparent that none of his advisors who pushed him to insist on Title II — and that the FCC forge ahead with this ill-conceived NPRM¹⁰⁵ — are (telecom lawyers), either.

¹⁰⁰ 47 U.S.C. § 606(d).

¹⁰¹ 47 U.S.C. § 606(c).

¹⁰² See, e.g., 2015 Open Internet Order, ¶ 583 (“Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 3, 4, 10, 201, 202, 301, 303, 316, 332, 403, 501, and 503, of the Communications Act of 1934, as amended, and **section 706 of the Telecommunications Act of 1996**, as amended, 47 U.S.C. §§ 151, 152, 153, 154, 160, 201, 202, 301, 303, 316, 332, 403, 501, 503, and **1302**, this Report and Order on Remand, Declaratory Ruling, and Order IS ADOPTED.”)(emphasis added”).

¹⁰³ Verizon v. FCC, 740 F.3d 623, 637 (D.C. Cir. 2014).

¹⁰⁴ <https://www.whitehouse.gov/net-neutrality> (“I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act”).

¹⁰⁵ Jason Furman & Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, THE WHITE HOUSE BLOG (Apr. 15, 2016, 6:00 AM), <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>.

No, we would expect much more careful attention to legal detail from the FCC, which regularly claims *Chevron* deference for its interpretations of these two statutes as the “expert agency” charged with administering them. Surely, when Judge Tatel said that “you would be surprised how often agencies do not seem to have given their authorizing statutes so much as a quick skim,”¹⁰⁶ he must have been referring to all those *other* regulatory agencies!

On the off chance that our great confidence in the FCC is misplaced, and the single most important paragraph of any NPRM — the “Authority” — is, in fact, so poorly drafted as to mistake the President’s emergency war powers (from 1934) for the provision of the 1996 Telecommunications Act that the FCC recently discovered — in one of those “EUREKA!” moments — gives the FCC the power to regulate any form of communications in any way that the FCC asserts will promote broadband deployment and is not specifically forbidden, we must make three points for the record.

First, *this* Section 706 cannot possibly confer any substantive authority whatsoever, as we have explained in comments filed to the FCC¹⁰⁷ and in our brief to the Sixth Circuit in pending litigation over the FCC’s use of Section 706 to preempt state laws that authorize municipal broadband, subject to certain restrictions.¹⁰⁸ The discussion of this question in the Tenth Circuit’s decision on point is, incontrovertibly, dicta (as the decision rested on Section 254),¹⁰⁹ as is the D.C. Circuit’s *Verizon* somewhat longer discussion, which was also unnecessary to that court’s decision to uphold the OIO’s Transparency Rule — a rule *Verizon* did not challenge and which, as Judge Silberman noted in his dissent, could have been sustained under other authority.¹¹⁰ The FCC has yet to respond to our arguments on this point (it certainly did not do so in the final Open Internet Order, or in its 2015 Preemption Orders). As the most succinct summary of our arguments, we attach hereto as Appendix C our Sixth Circuit brief on the municipal broadband preemption case. Any reliance upon Section 706 in this proceeding would not only be illegal as an incorrect

¹⁰⁶ Tatel, *supra* note 10, at 3.

¹⁰⁷ Protecting and Promoting the Open Internet, *Legal Comments of TechFreedom & Int’l Ctr. for Law & Economics*, GN Docket No. 14-28, 62–91 (July 17, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521706377>.

¹⁰⁸ Brief for Scholars of Law and Economics et al. as Amici Curiae Supporting Petitioners, *Tennessee v. FCC*, nos. 15-3291 & 15-3555 (6th Cir. Sept. 25, 2015), available at http://docs.techfreedom.org/TechFreedom_Amici_Brief_Section706.pdf.

¹⁰⁹ *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014); see also Brief for Scholars of Law and Economics et al. as Amici Curiae Supporting Petitioners, *supra* note 108, at 10.

¹¹⁰ *Verizon v. FCC*, 740 F.3d 623, 668 n.9 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

statutory interpretation, it would also, if the FCC fails to respond to our arguments about Section 706, be arbitrary and capricious.

Second, the NPRM does not even assert that its proposal would somehow promote broadband deployment. If Section 706 *were* a grant of authority, the FCC would at least have to do this much to invoke it in any particular case.

Finally, even if the NPRM had correctly cited *this* Section 706, a passing reference to this section cannot possibly constitute adequate notice that the FCC plans to ground its rules in Section 706. The FCC cannot cure this failure of notice — let alone its citation of the wrong Act — without issuing a Further NPRM clearly explaining why it believes it can use Section 706 to do what Section 629 does not allow.

But all this, of course, is assuming that the FCC did not, in fact, mean to invoke the “war powers” of the President. If it did, we are very concerned, indeed. This is quite literally the only claim of authority more sweeping than what the FCC has claimed by reinterpreting Section 706 (of the 1996 Telecom Act) as it has done, reclassifying broadband under Title II, and, now in the NPRM, claiming that, when Congress said “devices” and “equipment” in Section 629, it really intended the FCC to regulate apps and software after all!

IX. Regulating Software as “Equipment”: The FCC’s Trojan Horse

Once again, this FCC seems dead-set on launching a major regulatory power grab to increase its authority and discretion. By interpreting “interactive communications equipment, and other equipment” to encompass software, the FCC has claimed for itself the requisite authority to impose the proposed three information flows mandate on MVPDs, but this interpretation has potential consequences that are both far-reaching and disturbing.

If “equipment” can be read to encompass “software,” then “navigation devices” can be read to encompass user’s smartphones, which increasingly are the tools used to initiate and control the playback of video programming on consumers’ TVs and other devices. Indeed, the FCC proposes this very reading in the NPRM.¹¹¹ Does the FCC really believe it has the relevant authority and expertise to begin dictating decisions over software design to companies like Apple, Google, and Amazon? If, through Section 629, Section 706 (of the 1996 Act) and ancillary authority, the FCC is able to regulate the behavior of edge providers and application developers, what left will be beyond its ambit? Although the FCC has been

¹¹¹ NPRM, 31 FCC Rcd at 1555, ¶ 21.

very careful in the context of the Open Internet Order to disclaim any intent or authority to regulate edge providers, we and others have been very skeptical of those claims, and, as evidenced by this proceeding, with good reason. The FCC seeks merely to maximize its own authority and discretion to pursue “the public interest” in any way it likes, regulating not just ISPs, but also the equipment consumers use to access the Internet and the content flowing over it.

The NPRM’s proposals do not stand in isolation. In December 2014, the FCC proposed to reclassify Over The Top (OTT) video services as MVPDs.¹¹² This would not only ensure that, for instance, Verizon’s FiOS service remains subject to MVPD rules even as the company plans to transform it into an all-Internet based video service,¹¹³ it would cover *all* “distributors of multiple linear video programming streams, including Internet-based services” — even if they do not “have control over a transmission path.”¹¹⁴ Thus, if Netflix or Amazon wanted to offer a linear video programming stream, it would clearly be subject to the NPRM’s rules. Although this Chairman Wheeler told a House Committee on Energy and Commerce panel that the agency does not plan to “move[d] forward” with the rule “until situations change,” the FCC has not changed course since issuing the OTT NPRM.¹¹⁵

Rather than cheering on the FCC’s power grab in the mistaken belief that the NPRM’s goal is to empower consumers,¹¹⁶ groups like the Electronic Frontier Foundation (“EFF”) would do well to remember their own warnings that the FCC’s claims of broad legal authority could be a Trojan Horse for other forms of control over the Internet. As EFF noted in 2009:

EFF’s concerns are born from more than just a general skepticism about government regulation of the Internet. Experience shows that the FCC is particularly vulnerable to regulatory capture and has a history of ignoring

¹¹² Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, 29 FCC Rcd 15995 (2014), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf.

¹¹³ Nick Statt, *Verizon Reportedly Plans FiOS Overhaul With New Internet-Based Set-Top Box*, THE VERGE (Apr. 15, 2016, 6:54 PM), <http://www.theverge.com/2016/4/15/11441680/verizon-fios-internet-cable-set-top-box-overhaul>.

¹¹⁴ 29 FCC Rcd at 15997–998, ¶ 6.

¹¹⁵ Mario Trujillo & David McCabe, *FCC Puts Online Video Regs on Hold*, THE HILL (Nov. 17, 2015, 5:32 PM), <http://thehill.com/policy/technology/overnights/260499-overnight-tech-online-video-regs-on-hold-for-now>.

¹¹⁶ Comments of the Electronic Frontier Foundation, *Expanding Consumers’ Video Navigation Choices* (Apr. 22, 2016), available at https://www.eff.org/files/2016/04/22/eff_unlock_the_box_comments_0.pdf.

grassroots public opinion (see, e.g., media consolidation). That makes the agency a poor choice for restraining the likes of Comcast and AT&T.¹¹⁷

And, in 2010:

if “ancillary jurisdiction” is enough for net neutrality regulations (something we might like) today, the FCC could just as easily invoke it tomorrow for any other Internet regulation that the Commission dreams up (including things we won’t like, like decency rules and copyright filtering).¹¹⁸

Such groups could, instead, focus their efforts on ensuring that the FCC develops a version of the Apps-Based Proposal that really does serve consumers.

X. The FCC’s Proposal Would Violate Copyrights and Void Contracts

The Constitution empowers Congress to “promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings.”¹¹⁹ Accordingly, Congress passed the Copyright Act to give authors of original expressive works, including audiovisual works, certain exclusive rights to monetize their creations.¹²⁰ Among these is the exclusive right to “perform the[ir] copyrighted work[s] publicly.”¹²¹ The vast majority of video programming that MVPDs distribute is owned by a third-party content provider, who licenses its copyrighted works to MVPDs in exchange for payment, pursuant to a contractual agreement.¹²² When consumers pay their monthly cable or satellite television bill, therefore, they indirectly compensate content creators who spend a considerable and growing sum to develop and acquire programming.¹²³

¹¹⁷ Corynne McSherry, *Is Net Neutrality a FCC Trojan Horse*, ELECTRONIC FRONTIER FOUNDATION (Oct. 21, 2009), <https://www.eff.org/deeplinks/2009/09/net-neutrality-fcc-perils-and-promise>.

¹¹⁸ Fred Von Lohmann, *Net Neutrality: FCC Trojan Horse Redux*, ELECTRONIC FRONTIER FOUNDATION (May 3, 2010), available at <https://www.eff.org/deeplinks/2010/05/net-neutrality-fcc-trojan-horse-redux>.

¹¹⁹ U.S. CONST. art. 1, § 8, cl. 8.

¹²⁰ See 17 U.S.C. § 106.

¹²¹ *Id.* § 106(4) (the public performance right encompasses, among other things, “motion pictures and other audiovisual works”).

¹²² Sixteenth Video Competition Report, *supra* note 14, at 3291, ¶ 88.

¹²³ *Id.* ¶ 88 & n.269 (“SNL Kagan’s data show that MVPD programming expenses as a percent of MVPD video revenue have risen from 34.6 percent in 2006, to 41.6 percent in 2012, and increased again to 44.6 percent in 2013.2).”

The FCC’s proposed rules would introduce a novel set of participants into this marketplace: firms that offer a “competitive user interface” through which consumers can access their MVPD’s video programming.¹²⁴ Currently, as the NPRM acknowledges, a “retail navigation device developer must negotiate with MVPDs to get permission to provide access to the MVPD’s multichannel video programming.”¹²⁵ The proposed rules would eliminate the need for such negotiation, allowing firms to provide an interface capable of accessing an MVPD’s “three flows” without entering into any binding agreement with the MVPD — or, for that matter, the owners of copyrights in the underlying programming.¹²⁶ In other words, the companies that supply competitive user interfaces under the proposed rules would facilitate the public performance¹²⁷ — and, perhaps, the reproduction¹²⁸ — of audiovisual works without permission from the owners of such works.

A. The Proposed Rules Would Force MVPDs to Make Programming Available to Vendors that Ignore Content Licensing Terms

The proposed rules would require MVPDs to supply “the[ir] ‘three flows’ to all comers”¹²⁹ without prior approval,¹³⁰ unless an unaffiliated vendor failed to “implement content protection to ensure that the security of MVPD services is not jeopardized” or did not “respect licensing terms *regarding copyright, entitlement, and robustness*.”¹³¹ In all other cases, an MVPD could not lawfully refuse to supply programming to an unaffiliated vendor of a competitive user interface if the vendor’s interface ran afoul of MVPDs’ copyright licensing agreements with program owners — unless such a violation entailed a violation of terms regarding “copyright, entitlement, and robustness.”¹³² The text of the federal regulations proposed by the NPRM elaborate on this point, stating that:

No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available

¹²⁴ See NPRM, 31 FCC Rcd at 1558, ¶ 25.

¹²⁵ *Id.* ¶ 16.

¹²⁶ See *id.* ¶¶ 17–18.

¹²⁷ *Cf.* *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506–08 (2014).

¹²⁸ NPRM, 31 FCC Rcd at 1553, ¶ 16 & n.50; see also 17 U.S.C. § 106(1) (giving copyright owners the exclusive right to “reproduce” copies of their works).

¹²⁹ NPRM, 31 FCC Rcd at 1608 (O’Rielly, Comm’r, dissenting).

¹³⁰ NPRM, 31 FCC Rcd at 1560, ¶ 28.

¹³¹ *Id.* ¶ 29 (emphasis added).

¹³² See *id.*

pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.¹³³

If an individual MVPD subscriber were not entitled to access a particular television channel under her subscription package, therefore, the proposed rules would require an unaffiliated vendor to respect this restriction: it could not give the subscriber access to that channel.¹³⁴ Nor, in theory, would the rule permit an unaffiliated vendor to offer a competitive user interface that undermines the content protection used to secure the programming distributed by MVPDs.¹³⁵

Yet the proposed rules contain nothing to ensure that vendors of competitive user interfaces respect the myriad terms contained in copyright agreements between content providers and MVPDs that do not relate to “robustness” and “entitlement.”¹³⁶ For instance, an MVPD may contractually agree to give particular television channels prominent placement in its channel lineup, or help market certain programs to its subscribers.¹³⁷

The FCC dismisses the importance of preserving such agreements with respect to competitive user interfaces,¹³⁸ explaining that it lacks “evidence that regulations are needed to address concerns ... that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content.”¹³⁹ But the absence of such evidence is to be expected in “today’s world” in which “retail navigation device developer[s]” enter into “business-to-business arrangements” with MVPDs to access their programming,¹⁴⁰ as device developers that enter into such deals are in privity with content providers. It is precisely because the proposed rules would obviate these commercial arrangements that MVPDs and content providers fear that unaffiliated vendors would

¹³³ NPRM, 31 FCC Rcd at 1593 (Appendix B, to be codified at 47 C.F.R. § 76.1204(c)).

¹³⁴ *Id.*

¹³⁵ NPRM, 31 FCC Rcd at 1560, ¶ 29.

¹³⁶ *See id.*

¹³⁷ *See, e.g.*, Comments of Motion Picture Association of America at 7, Request for Comment by the Media Bureau on the Report of the Downloadable Security Technology Advisory Committee, MB Docket No. 15-64 (Oct. 8, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001328337>.

¹³⁸ The FCC explains that its “goal is to preserve the contractual arrangements between programmers and MVPDs, while creating additional opportunities for programmers, who may not have an arrangement with an MVPD, to reach consumers.” NPRM, 31 FCC Rcd at 1582, ¶ 17.

¹³⁹ *Id.* ¶ 80.

¹⁴⁰ *Id.* ¶ 16.

ignore these terms.¹⁴¹ After all, if an unaffiliated vendor could lawfully generate additional revenue by ignoring the strictures of contracts between MVPDs and content providers, why *wouldn't* it do so? This, of course, is the FCC's real purpose: to redirect revenue from MVPDs to a new class of companies enabled by the FCC's fiat.¹⁴²

The FCC maintains that the proposed rules will spur “competition in interfaces, menus, search functions, and improved over-the-top integration,” thus preserving the beneficial effects of MVPD-content provider arrangements while allowing other “opportunities” to “reach consumers.”¹⁴³ This claim reveals the FCC's deep misunderstanding of vertical competition, in which voluntary *and enforceable* agreements between suppliers (*i.e.*, content providers) and retailers (*i.e.*, MVPDs) are essential pro-competitive ingredients.¹⁴⁴ Under the NPRM, if a content provider wishes to license its programming to an MVPD subject to the condition that it be placed in a particular channel position — regardless of the device on which the programming is accessed — an MVPD that agreed to such a contract would be in violation of the Commission's rules.¹⁴⁵ Of course, a content provider could attempt to strike a deal with an unaffiliated user interface vendor, but the content provider could not withhold its programming from such a vendor — that is, unless the provider also withheld its programming from *all MVPDs*.¹⁴⁶ This, in turn, gives the app-maker a new revenue opportunity: charging programmers directly for rearranged channel placements or for prominence in new kinds of navigation interfaces that do not rely on numbered channels. Depending on their provenance, such arrangements could well have beneficial effects — but only if they arise from genuinely voluntary negotiations, not a quasi-compulsory licensing regime concocted by an overreaching FCC.

Moreover, in a world of competitive user interfaces, MVPDs and content providers might wish to bargain over terms that they previously had no need to consider. For instance, a competitive user interface vendor might augment an MVPD's programming with

¹⁴¹ See *id.* ¶ 80.

¹⁴² See *infra* at 3; see also UARG, 134 S. Ct. at 2446 (“We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”).

¹⁴³ NPRM, 31 FCC Rcd at 1582, ¶ 17.

¹⁴⁴ See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92 (2007) (discussing pro-competitive benefits of vertical agreements); see also Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59, 59–60 (2007).

¹⁴⁵ See NPRM, 31 FCC Rcd at 1593 (Appendix B, to be codified at 47 C.F.R. § 76.1204(c)).

¹⁴⁶ Cf. NPRM, 31 FCC Rcd at 1579–80, ¶ 73 (“MVPDs cannot withhold the three Information Flows if they have received ... certification [that a competitive user interface is in compliance with FCC rules] and do not have a good faith reason to doubt its validity.”).

advertisements of its own, perhaps on its menu screen or as an overlay accompanying video content. Some commenters have suggested that interface vendors might “insert different advertising into or on top of programs.”¹⁴⁷ Such practices could seriously hurt the television ecosystem, given that MVPDs and content providers rely on advertising — in addition to subscription fees — to monetize content and cover distribution costs.¹⁴⁸

B. The Proposed Rules Conflict with the Copyright Act and Exceed the FCC’s Statutory Authority to Rewrite Copyright Law

The NPRM suggests that “copyright law may protect against these concerns,” noting that “nothing in [the FCC] proposal will change or affect content creators’ rights or remedies under copyright law.”¹⁴⁹ But to the extent that the proposed rules are permissible as a matter of copyright law, there is reason to doubt that a competitive user interface vendor would face copyright infringement liability if it inserts different advertisements into MVPD programming. Although the Copyright Act protects both television shows and the advertisements interspersed within them, these copyrights are distinct from one another: each television show constitutes a copyrighted work, and so does each advertisement. Thus, if a competitive user interface vendor were to insert its own ads into television programming on the fly, in lieu of the ads originally supplied by the MVPD in its three flows, it is unclear which, if any, copyright holder would have a legitimate claim against the vendor. Of course, the Copyright Act protects, among other things, “compilations” of preexisting works¹⁵⁰ — but the transmission of a television program as a whole, including advertisements, might not be independently copyrightable as a compilation of the underlying works.¹⁵¹ The creative choices embodied in an arrangement of programming and advertisements may not meet the Copyright Act’s requirement of originality,¹⁵² while

¹⁴⁷ See, e.g., Comments of the Nat’l Cable & Telecommunications Ass’n at 35, Media Bureau Seeks Comment on DSTAC Report, MB Docket No. 15-64 (Oct. 8, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001328253>.

¹⁴⁸ John W. Schoen, *How Do Cable Companies Make Their Money?*, CNBC.COM (Apr. 20, 2015, 5:33 PM), <http://www.cnbc.com/2015/04/20/how-do-cable-companies-make-their-money.html/>.

¹⁴⁹ See NPRM, 31 FCC Rcd at 1583, ¶ 80.

¹⁵⁰ 17 U.S.C. § 103.

¹⁵¹ See generally Ned Snow, *The Tivo Question: Does Skipping Commercials Violate Copyright Law?*, 56 SYRACUSE L. REV. 27 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901062.

¹⁵² See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (discussing the test for determining when a compilation is “sufficiently original to merit protection” under the Copyright Act).

the advertisements accompanying a television program may not be sufficiently “related” to the program itself.¹⁵³

Given the NPRM’s substantial implications for copyright holders, the FCC’s failure to analyze, let alone discuss, how its assertion of authority under Title VI of the Communications Act can be reconciled with the Copyright Act is damning. Whereas Congress has empowered the FCC to administer the Communications Act,¹⁵⁴ of which Title VI relates to cable systems and MVPDs,¹⁵⁵ Congress has *not* empowered the FCC to administer the Copyright Act.¹⁵⁶ As such, reviewing courts owe the FCC no deference to the extent that the agency construes provisions of the Copyright Act.¹⁵⁷ In this proceeding, although the FCC does not purport to rely on the Copyright Act,¹⁵⁸ it has nevertheless proposed a rule that would significantly alter the scope of television program owners’ exclusive rights to decide who may publicly perform their audiovisual works.¹⁵⁹

Today, a content provider is free to insist that MVPDs abide by particular terms as a prerequisite for carrying its programming, and refuse to license its content to MVPDs with which it cannot come to an enforceable agreement.¹⁶⁰ Now, however, the FCC proposes to require that MVPDs make available all their programming to third party interface vendors, who may in turn repackage that programming free from contractual limitations — subject only to a narrow set of FCC rules.¹⁶¹ In short, the proposed rules purport to rewrite the Copyright Act, rendering invalid a vast array of copyright licensing terms between content providers and their primary distributors (*i.e.*, MVPDs). Congress never authorized the FCC to make this sweeping policy decision, and the courts are unlikely to allow the agency get

¹⁵³ *Cf.*, *e.g.*, *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 626–28 (7th Cir. 1982) (upholding injunction sought by copyright holder with respect to a television broadcast where overlay teletext was “intended to be viewed in conjunction with” the underlying news programming).

¹⁵⁴ “Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication ...” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

¹⁵⁵ Communications Act §§ 601–653, 47 U.S.C. §§ 521–573.

¹⁵⁶ *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283 (2d Cir. 2012) (Congress has not delegated the authority to administer the Copyright Act, although courts should consider opinions of the Copyright Office by looking to “the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140 (1944))).

¹⁵⁷ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (*Chevron* deference applies only when Congress has expressly authorized an agency to engage in rulemaking or adjudication pursuant to a statute it administers).

¹⁵⁸ NPRM, 31 FCC Rcd at 1590, ¶ 101.

¹⁵⁹ *Cf.* 17 U.S.C. § 106(4).

¹⁶⁰ *See* NPRM, 31 FCC Rcd at 1553, ¶ 16.

¹⁶¹ *Id.* ¶ 17.

away with such an egregious form of self-aggrandizement.¹⁶² In fact, Congress declared that any action by a “governmental body” to “expropriate ... any of the exclusive rights under a copyright” is invalid, except as provided expressly in the Copyright Act.¹⁶³ Yet the FCC’s proposed rules would significantly curtail content providers’ exclusive right to publicly perform their television programs.

XI. The Proposed Rules Would Likely Reduce Video and Broadband Competition

The FCC has a statutory duty under Section 706 to promote broadband investment and deployment. At a minimum, any time it proposes to regulate the MVPDs that are also ISPs, it has an affirmative duty to study the economics of the market. It should have done so here through a Notice of Inquiry — but did not.

Basic economic intuition would suggest that the NPRM’s proposal could harm broadband deployment and investment: requiring network operators to unbundle part of their network *might* achieve other ends, but it does not make the networks themselves more attractive opportunities for investment.

The Apps-Based Proposal would have raised far fewer concerns about unintended consequences for broadband investment and deployment – though it, too, should be preceded by an economic study of the market.

XII. Conclusion

If the FCC plows forward with the approach proposed by the NPRM, it will simply waste at least two years in litigation, only to lose for lack of legal authority for all the foregoing reasons. Thus, we urge the FCC to go back to the drawing board and seriously consider whether regulating MVPDs to promote competitive navigation devices is even appropriate in today’s hyper-competitive video marketplace.¹⁶⁴ Short of this, if the Commission insists on proceeding with rulemaking, it should re-examine the Apps-Based Proposal, and issue a Further Notice of Proposed Rulemaking based solely upon that proposal. (It would be even wiser to issue a Notice of Inquiry to better understand the market, the need for regulation,

¹⁶² See *City of Arlington*, 133 S. Ct. at 1874 (courts should prevent agency self-aggrandizement “by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority”).

¹⁶³ 17 U.S.C. § 201(e).

¹⁶⁴ Cf. 47 U.S.C. § 549(e) (sunsetting FCC power to promulgate navigation device regulation when the market for multichannel video programming and interactive communications equipment is fully competitive).

and the effects of any regulations the FCC might issue.) Any new NPRM should use only the authority clearly conferred by Section 629 to promote competition among physical “navigation devices” by ensuring the “commercial availability to consumers of [the MVPD programming they subscribe to]” via apps provided by MVPDs.

That means ensuring that such apps offer as much of the MVPD’s programming as its contracts with programmers permit, and that such apps are reasonably available to consumers, either pre-installed by OEMs upon third-party, video-capable devices, or installable by consumers themselves upon their own devices by downloading the app from the app store.

This is the most the statute permits — and all the FCC needs to do to truly “unlock the box.”