

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	
)	

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby responds to the Commission's request for comment on its proposals to assure a commercial market for devices that can access multichannel video programming pursuant to its obligations under Section 629 of the Communications Act.²

NAB supports the Commission's goal of promoting a vibrant market for competitive navigation devices. Loosening MVPDs' grip on the navigation device marketplace holds great promise for consumers, who would benefit from more choices, lower prices and greater innovation.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC No. 16-18, *Notice of Proposed Rulemaking* (rel. Feb. 18, 2016) (*Notice*) at ¶ 1 (citing 47 U.S.C. § 549).

To achieve this worthy goal without damaging other, more competitive markets, however, the Commission cannot simply wave a magic wand. Specifically, it cannot rely on costly and time-consuming litigation to resolve harm to third-party content owners it knows ex ante any rule changes will create. To ensure that broadcasters – and all parties in the programming chain – still have the incentive and ability to innovate, compete and improve upon current offerings, the Commission must take the affirmative step to maintain the provisions programmers negotiate with MVPDs and ensure that advertising is not removed, replaced, altered or otherwise devalued.

The Commission’s proposal contains three separate mechanisms to protect content, which must work in unison to preserve the value of programming. First, the Commission specifies a series of Information Flows that will be provided to retail devices, which will convey necessary information about content rights, among other things. Second, the Commission contemplates a license being developed by a third-party organization that will govern the behavior of devices developed under Section 629. Finally, the Commission can adopt rules to limit the behavior of these devices to ensure that these devices do not behave in a manner that would violate programmers’ rights. The Commission’s proposals in each of these areas are a positive start, but are incomplete and unless altered, will undoubtedly harm the ecosystem.

The Commission’s proposal, if adopted as is, will disrupt existing protections programmers have in place through agreements with MVPDs to maintain the value of content. While we understand the Commission’s stated goal is to protect this content, it falls short because it does not ensure that programming rights and restrictions be respected and carried through without alteration to retail devices developed under its new rules. Among other things, the terms of television broadcast stations’ retransmission consent agreements with MVPDs

must be "passed through" to third-party device manufacturers. These carefully negotiated agreements may require placement on a certain channel, placement in a certain tier or neighborhood of other channels, or promotion of its other shows, multicast channels, or other affiliated programming (including agreements *not* to promote competing content). While we welcome enhancements that will help consumers discover compelling new content, Section 629 should not be used to circumvent the carefully constructed channel lineup and marketing arrangements programmers have negotiated. Similarly, a device manufacturer relying on the licenses and interfaces offered under Section 629 should not be permitted to remove, delete, modify or otherwise manipulate advertising.

In our comments, NAB advances several specific proposals designed to ensure that the consumer experience of video content is protected through the transition to a truly competitive navigation device market. Specifically, NAB urges the Commission to take the following steps to achieve its stated goals:

(1) explicitly hold that all terms and conditions of retransmission consent agreements will apply with equal force in the context of competing navigation devices;

(2) explicitly hold that broadcaster advertising and other promotional matter may not be altered, replaced or sold against by navigation devices absent a separate agreement with a television broadcast station;

(3) modify the Service Discovery Data definition to specify that "channel information" must include a station's negotiated channel position, neighborhood and/or tier and whether the station has negotiated with the MVPD for particular treatment in any search or recommendation features, so that devices/applications can effectuate those agreement terms;

(4) state that Service Discovery Data *may not* include information about the advertising embedded within a program; and

(5) adopt a fourth critical requirement for the licensing and certification process to effectuate broadcaster contracts with MVPDs and advertisers as discussed herein.

* * *

The Commission must take these and related steps if it wants to create vibrant competition in the set top box marketplace without causing third-party harm. In attempting to relieve pay TV's stranglehold on the device marketplace, the Commission should not merely assume that the market will address the issues raised herein. It must ensure – rather than leave to the vagaries of litigation – that third-party device makers cannot use the Commission's rules as a loophole by which to upend broadcaster contracts with MVPDs. Consumers will only truly benefit if the FCC sets clear, enforceable rules of the road from the outset.

In summary, the Commission must ensure that while its rules promote the development of a healthy navigation device marketplace, they also protect what consumers want most – the content itself.

II. PROTECTING CONTENT AND EFFECTUATING UNDERLYING CONTRACTS IS CRITICAL TO THE SUCCESS OF A COMPETITIVE DEVICE MARKETPLACE

Consumers' appetite for wide-ranging, quality *content* drives their interest in video distribution, equipment and applications. A navigation tool—whether it is a bike map printed on paper, a GPS device in a car or a device for navigating video content—only has value if the user actually wants to reach a destination. The Commission must ensure that its rules promoting the development of a market for equipment and software to access video programming do not ultimately result in harm to consumers' intended “destination”—the video content to which they have lawful access. If navigation devices are not required to operate in a manner that passes through the terms of broadcasters' agreements with MVPDs, program suppliers, advertisers and others; if the devices can manipulate the format or presentation of content or advertising, then the development of a competitive device marketplace will result in serious harm to what is now the beating heart of a flourishing marketplace for video programming.

A. Today's Video Programming Market Offers Consumers an Unprecedented Array of High-Quality Content Options

Consumers of video programming have never enjoyed more or better choices than they do in the current “platinum age” of television.³ The number of primetime scripted shows (comedy and drama) increased from roughly 211 in 2009, to more than 370 shows in 2014, to a record 409 shows in 2015.⁴ According to The Hollywood Reporter, there are more than 1,700 total shows on television in primetime (8 to 11 p.m.), which does not include sports, news or late night shows.⁵ The explosive growth of television content options includes not only myriad television broadcast stations and cable networks, but also over-the-top (OTT) services such as Netflix, Amazon Prime and Hulu, which are investing heavily in original programming.⁶ Competition in video programming is yielding not only an unprecedented quantity of options, but also a measurable rise in *quality* of program offerings. From the rising number of Emmy nominees—and winners—that originated on cable networks and OTT video,⁷ to audience

³ See, e.g., Comments of NAB in MB Docket No. 15-216 at 8-11 (Dec. 1, 2015); Yvonne Villarreal, “FX Networks CEO John Landgraf: 'There is simply too much television,’” The Los Angeles Times (Aug. 7, 2015); Tim Goodman, “TCA Journal No. 6: Welcome to the Platinum Age of Television — And Good Luck With That,” The Hollywood Reporter (Aug. 9, 2015).

⁴ John Koblin, “How Many Scripted Shows in 2015? A Precise Number, and a Record,” The New York Times (Dec. 16, 2015).

⁵ See Tim Goodman, “TCA Journal No. 6: Welcome To the Platinum Age of Television — And Good Luck With That,” The Hollywood Reporter (Aug. 9, 2015).

⁶ See, e.g., Jon Lafayette, “Netflix Main Cause of TV Ratings Drop,” Broadcasting and Cable (April 23, 2015); Tom Huddleston, Jr., “Here's All the New Shows Debuting on Netflix, Amazon in March,” Fortune.com (Mar. 2, 2016).

⁷ See Comments of NAB in MB Docket No. 15-216 at 9-10 (Dec. 1, 2015) (discussing how a rising number of Emmy nominees—and winners—are cable network and OTT original programs). See also Tim Goodman, “TCA Journal No. 6: Welcome To the Platinum Age of Television — And Good Luck With That,” The Hollywood Reporter (Aug. 9, 2015) (According to one TV critic: “So many great shows don't get seen at all — series that would have been festooned with accolades and Emmys in the [previous] Golden Age.”).

fragmentation across television broadcast stations, the pay TV lineup and beyond,⁸ there has never been a better time to be a consumer of television programming.

Local television broadcasters are active, innovative participants in this thriving video programming market. Stations invest in high-quality, expensive programming content from networks and syndicators.⁹ In today's competitive environment for top-quality programming, costs are on the rise—which affects television broadcast networks and local stations to at least the same extent as cable networks and OTT providers.¹⁰ Stations combine national programming with locally-focused news and public affairs content—which is also very costly to produce.¹¹ To support these investments, stations rely on the ability to sell advertising and (to

⁸ See Comments of NAB in MB Docket No. 15-216 at 10-11 (Dec. 1, 2015). (In the mid-1990s, *Seinfeld*, one of the top-rated shows on TV, enjoyed a 20-plus rating for several seasons; today, the top-rated show, *Sunday Night Football* on NBC, typically receives a 12-13 rating. Thus, today's top-rated TV shows would have barely cracked the top 30 two decades ago.)

⁹ The average U.S. television station spends \$2.97 million per year on national network and syndicated programming. See *NAB Television Financial Report* (2015) at 3, Table 1 (reporting 2014 financial data). Programming expenses represent, on average, 22.4 percent of the average station's expenses (closely trailing the leading expense of news production). *Id.* Programming-related expenditures vary greatly. For example, Big Four network affiliates in the largest markets (ranked 1-10) spend an average of \$16.6 million per year. *Id.* at 39, Table 19.

¹⁰ See, e.g., Sophie Estienne, "The Cost to Produce Original TV Shows is Skyrocketing," *Business Insider* (Feb. 22, 2015) (discussing rising costs of producing original scripted television series and investment in original shows by OTT providers, cable networks and broadcast networks). Stations now compete not only with cable networks but also OTT providers for leading syndicated programming. Cynthia Littleton, "Hulu Sets Mammoth 'Seinfeld' Licensing Deal," *Variety* (Apr. 28, 2015) (reporting that Hulu paid approximately \$875,000 per episode for subscription video on demand rights to all 180 episodes of the series). Perhaps the largest increases in programming costs stem from the rising cost of sports rights. See, e.g., Deana Myers, "NFL Squeezes More From CBS, NBC With 'Thursday Night Football' Split," *SNL Kagan* (Feb. 2, 2016) (reporting that CBS and NBC will pay \$450 million, or \$225 million on average per season over the next two years, an average per game price of \$45 million, up from 37.5 million paid by CBS in 2015); Deana Myers, "NBA Strikes Stunning \$24B Deal with Disney and Turner," *SNL Kagan* (Oct. 8, 2014) (discussing a multi-year agreement for NBA rights at a cost of 180.9 percent over the previous agreement term and observing that a major reason for the cost increase was an increase in competition among programming networks for the content).

¹¹ The largest expense for the average U.S. television broadcast station is news production. According to the most recent available data, the average station in the U.S. spends \$3.2 million per year producing local news—representing 24.3 percent of a station's expenses, on average. See *NAB Television Financial Report* (2015) at 3, Table 1 (reporting 2014 financial data). News-related

a lesser extent) compensation arising from retransmission consent agreements with MVPDs. The terms of stations' agreements with MVPDs for retransmission of their signals are multifaceted and complex, addressing everything from how the broadcast signal will arrive at the cable headend or local DBS receive facility, to cross-promotion of programming and services, to the placement of broadcast channels in certain programming "neighborhoods," to monetary fees.¹² Detailed security terms and provisions regarding permissible uses of programming also are a major part of these negotiations. The final agreement reflects a delicate balance of give and take, where the broadcaster might, for example, accept lower monetary compensation in exchange for the placement on the MVPD's most widely viewed tier, or an MVPD might have paid lower retransmission consent fees because it agreed to provide in-kind promotional opportunities. The ability of an unaffiliated third-party to upset the balance or unwind these terms diminishes their value to the parties that negotiated them.

While the multichannel video distribution market is highly consolidated¹³ and the commercial market for competitive navigation devices has yet to fully develop,¹⁴ the video programming market is a competitive success story. The Commission must be careful not to harm this dynamic marketplace while attempting to promote competition in another. Undermining any of the business arrangements and agreements that allow the creation and

expenditures vary widely across markets. For example, the average news production expense for a "Big Four" network affiliate in the largest markets (i.e., ranked 1-10) is just over \$17 million. *Id.* at 39, Table 19. The cost of producing local news is on the rise, up 25% since 2010. *NAB Television Financial Report* (2011).

¹² See, e.g., Comments of NAB in MB Docket No. 10-71 at 36-37 (May 27, 2011).

¹³ Comments of NAB in MB Docket No. 15-216 at 15-19 (Dec. 1, 2015) (discussing data on national, regional and local MVPD concentration, including a Multichannel News analysis which shows that the largest single MVPD in 2015 exceeds the subscribership of the top 25 MVPDs combined in 1985).

¹⁴ *Notice* at ¶¶ 1-15.

production of quality content would be harmful to the video marketplace and consumer choice. Instead of promoting consumer choice, a system that doesn't give effect to content providers' agreements runs the risk of doing nothing more than trading one set of gatekeepers (the pay TV industry) for another (Google, Amazon).

Those developing devices or applications who do not wish to honor agreement terms or want to modify content or advertising must be required to negotiate for such rights in the marketplace with individual content providers.¹⁵ Navigation device providers must be exactly that. If they can instead use a free license to bootstrap themselves into the role of a virtual station, network, syndicator, MVPD, advertiser or ratings service – without making the investments and agreements that those business operations require – the video ecosystem, and particularly the local broadcast station model, will be harmed.

B. The Commission Cannot Lawfully Rely on Existing Experience with Navigation Devices to Set Rules and Policies for the Robust, Competitive Marketplace it Seeks to Achieve

NAB welcomes the Commission's statements in news releases and fact sheets about the navigation device proceeding that the Commission intends to "maintain programmers' existing agreements with MVPDs and full copyright protections and remedies;" preserve channel lineups;¹⁶ "honor[] the sanctity of contracts," and ensure that "deals made between MVPDs and content providers are not affected" by rule changes to "unlock the set-top box."¹⁷

¹⁵ We note that NAB is not proposing to disclose the specific prices, terms and conditions contained in retransmission consent or other programming agreements. Rather, the terms and conditions would be conveyed to third-parties through the various information flows as metadata—not through review or sharing of actual agreements.

¹⁶ FCC, *FCC Moves to "Unlock The Box" to Spur Competition, Choice, & Innovation in Set-Top Box and App Marketplace*, News Release (Feb. 18, 2016) ("Proposal will protect copyright agreements, channel-lineups while giving consumers options.").

¹⁷ *FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation*, DOC-337449 (Jan 27, 2016) (Fact Sheet) ("Existing content distribution deals, licensing terms, and conditions will

NAB fully agrees with these goals. However, modifications to the Commission’s navigation device proposals are needed to ensure that these goals can be met.

The *Notice* contains proposals that specify the minimum information that MVPDs must share with competing device providers,¹⁸ security elements,¹⁹ and rules of the road for licensing and certification.²⁰ Some of these proposals take helpful steps to achieving the unique balance of honoring contracts and protecting content while providing what is necessary for a competitive navigation device developer to build a competitive system. However, the proposals in the *Notice* fall short of ensuring that the terms of broadcaster agreements with MVPDs are also honored by competing devices and applications. Rather, the Commission proposes to punt several important matters to “marketplace forces” and the courts, and even proposes to ban certain contractual terms.

The Commission states expressly that rules are not necessary to ensure that competitive navigation devices will not “disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content” and that the marketplace and copyright law are sufficient to protect content creators.²¹ The Commission justifies this view primarily on the notion that such

remain unchanged. These deals made between MVPDs and content providers are not affected by this proposal.”)

¹⁸ *Notice* at ¶¶ 35-49.

¹⁹ *Notice* at ¶¶ 50-69.

²⁰ *Notice* at ¶¶ 70-80.

²¹ *Notice* at ¶ 2 (the Commission “[p]ropos[es] to leave licensing terms such as channel placement and treatment of advertising to marketplace forces, just as we did during the CableCARD regime.); ¶ 80 (“We do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers 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. We have not seen evidence of any such problems in the CableCARD regime, and based on the current record, do not believe it is necessary for us to propose any rules to

disruptions have not occurred under the CableCARD regime.²² This rationale, among other problems, is based on an unreasonable assumption and lacks factual support, and would not satisfy Administrative Procedure Act (APA) standards.²³

It would be arbitrary and capricious for the Commission to conclude that Section 629's goals are unmet because a device market has failed to develop, but then assume, based only on the evidence of an admittedly failed market, that content and advertising will not face new risks in a functioning, competitive market. As the *Notice* carefully details for nearly 15 paragraphs, Americans *do not* currently enjoy a competing device marketplace.²⁴ A total of 618,000 CableCARDS have been deployed for use in consumer-owned devices.²⁵ There are currently an estimated 100.9 million MVPD subscribers.²⁶ Many MVPD subscribers have

address these issues. We seek comment on this view. We also seek comment on the extent to which copyright law may protect against these concerns, and note that nothing in our proposal will change or affect content creators' rights or remedies under copyright law. In the event that commenters submit evidence indicating that regulations are needed, we seek comment on whether we have the authority and enforcement mechanisms to address such concerns.”).

²² *Notice* at ¶ 80.

²³ “Fundamental principles of administrative law require that agency action be ‘based on a consideration of the relevant factors,’ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and rest on reasoned decisionmaking in which ‘the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000), citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .”). See also, e.g., *U.S. Telephone Ass’n v. FCC*, 188 F.3d 521, 524-26 (D.C. Cir. 1999) (reversing FCC where its decision relied on a questionable assumption and failed to give a rational explanation of its choice); *MCI Telecomm. Corp. v. FCC*, 842 F.2d 1296, 1305 (D.C. Cir. 1988) (finding FCC action to be arbitrary and capricious where its findings appeared premised on an unsupported assumption and FCC lacked sufficient evidence and data).

²⁴ *Notice* at ¶¶1-15.

²⁵ *Notice* at ¶ 7.

²⁶ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3256 ¶ 2 (2015).

multiple navigation devices in their homes—with one source estimating that there are 260.7 million set-top boxes in digital pay TV homes.²⁷ This means that today, *less than one-quarter of one percent* of navigation devices in operation is a competing navigation device. Navigation device deployment to date thus falls far short of even something that could be called a “nascent” market. Deciding that there is no risk of harm to content and advertising based on this tiny sample would be akin to deciding not to adopt air traffic control standards for today’s commercial airlines based on the number of crashes involving biplanes in the 1920s. In a healthy marketplace for competing navigation devices, which the Commission expressly seeks to promote, one would expect to see much higher rates of adoption, more innovation and experimentation and more product differentiation. The number of players and opportunities for different business models – legal or otherwise – would increase exponentially. Accordingly, it would be unreasonable to presume that what has occurred with regard to manipulation of content and advertising to date is in any way relevant to, much less predictive of, what would occur in a functioning device marketplace.

Second, it is factually incorrect that manipulation of programming content has not yet occurred. For example, TiVo sells “pause menu” advertising that allows advertisers to “tie-in [advertising] content with related programming” by purchasing a banner ad that appears directly over programming content when a consumer pauses a show.²⁸ Earlier TiVo products placed ads onscreen during fast forwarding.²⁹ Although broadcasters and other programmers have not yet challenged these practices in court, they are still harmful to broadcasters and

²⁷ Analysis of SNL Kagan Data, 2015.

²⁸ See, TiVo Advertising Pause Menu page, available at: <https://www.tivo.com/tivoadvertising/pausemenu.html> (last visited Apr. 4, 2016).

²⁹ See, e.g., Tim Conneally, “TiVo Debuts Ads During Fast-Forward and Pause,” BetaNews (Dec. 9, 2008).

ultimately to consumers. Given that litigation is extremely costly, time consuming and unpredictable, litigation is often an unattractive option to enforce rights that could otherwise be more efficiently enforceable at the FCC.

Third, litigation is an imperfect solution to a readily foreseeable, and easily avoided, problem. It is unreasonable to expect content providers to shoulder the logistical and economic burden of monitoring many competing consumer device and application options, litigating to protect the value of their content with third-parties in “whack-a-mole” fashion, and tolerating outcomes that may vary from one geographic location to another.³⁰ This level of uncertainty would also directly harm all but the very largest device and application makers, who will be less likely to attract investment if there is a significant risk of litigation. Greater certainty will benefit both the suppliers of content and device makers, thereby creating the conditions for a successful, competitive device marketplace.³¹

The Commission states that, in addition to the courts, it is leaving matters such as channel placement and treatment of advertising to “marketplace forces.”³² But without

³⁰ The lengthy litigation between broadcasters and Internet video providers Aereo and FilmOn X illustrated all of these problems. Starting in 2012, several television networks and local broadcast stations brought multiple lawsuits, asserting that Aereo and FilmOn X violated the broadcasters’ exclusive rights under the Copyright Act. The multiple cases spanned a half-dozen federal district courts in five states and the District of Columbia, and generated appeals in the First, Second, Ninth, Tenth and D.C. Circuits. These various litigations produced conflicting results; three district courts preliminarily enjoined Aereo’s or FilmOn X’s services and two refused to do so. This litigation would have undoubtedly been extended to additional jurisdictions, and caused further substantial expenditures of time and resources by all parties, had the Supreme Court not decided to review the Second Circuit’s decision despite the absence of a final decision from any other federal appellate court.

³¹ This is not unlike the Commission’s rationale for adopting its Open Internet Rules. See, e.g., *Protecting and Promoting the Open Internet*, Report and Order, 30 FCC Rcd 5601, 5606-07 ¶ 13 (2015)(“There is general consensus in the record on the need for the Commission to provide certainty with clear, enforceable rules.”); *Id.* at 5914, Statement of Tom Wheeler (“The Open Internet Order achieves those goals, giving consumers, innovators, and entrepreneurs the protections they deserve, while providing certainty for broadband providers and the online marketplace.”).

³² *Notice* at ¶ 2.

modifications to its current proposal, there will no longer *be* a marketplace for these rights. The Commission is mandating the development of open standards, specifying what sort of entity can establish the standards, requiring certain very specific and extensive information to be shared under the standards and setting forth a licensing and certification regime that will place programming content into the hands of parties who—as a result of this license—will not be required to negotiate with anyone for any of the material within an MVPD’s programming package. If the Commission contemplates that this license would protect all of the rights that content providers need to protect the value of its content, without the need for individual negotiations between device manufacturers and operators, the Commission should specify that the license does not confer a legal right and ability to manipulate channel lineups, MVPD contracts and advertising. Parties that do not wish to comply with contractual terms from using this license must be prepared to negotiate such rights in the marketplace. Otherwise, the “marketplace” for such rights will be subsumed into this license, and that market simply will not exist.

Instead of relying on litigation or other licensing arrangements, the Commission should expressly require that that all relevant aspects of broadcaster agreements with MVPDs must pass through – without alteration – to commercially available competitive navigation devices and applications. Similarly, competing devices and applications cannot be permitted to dilute the value of advertising by modifying the presentation of advertising purchased on stations or displaying other advertising as part of the user interface. This would interfere with the largest revenue driver of the local broadcast station business model—local advertising.³³ If competing

³³ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3331 ¶ 173 (2015) (“Television broadcast stations earn about 80 percent of their revenue through the sale of advertising time during their programs . . .”).

devices and applications are permitted to interfere with local stations' promotion of their programming (e.g., snipes or bugs) through modifying the presentation of programming or display of other promotional matter—particularly competing programming—they would severely undercut a station's ability to promote its own content (or content it has a contractual obligation to promote). The Commission should explicitly prohibit such conduct and modify the Information Flows and licensing standards as discussed below.

C. Modifications to the Commission's Proposals Are Necessary to Effectuate Contracts and Protect Content in the Navigation Device Marketplace

The *Notice* takes important first steps towards the Commission's goals of protecting content and honoring contracts. Achieving those goals will, at a minimum, require specific modifications to the Commission's proposals.

1. Information Flow Proposals

The Commission proposes to require MVPDs to make available three types of information in standardized formats that conform to specifications set by Open Standards Bodies—Service Discovery Data, Entitlement Data and Content Delivery Data (the three "Information Flows").³⁴ NAB agrees that one of the three Information Flows must be "Entitlement Data," which the *Notice* proposes to define as information about which programming a subscriber has the rights to access and the rights the subscriber has to use that programming.³⁵ The *Notice* states that this should include at least: (1) copy control information; (2) whether the content may be passed through outputs, and if so, any information pertaining to passing through outputs such as further content protection and

³⁴ *Notice* at ¶ 35-36.

³⁵ *Notice* at ¶ 39.

resolution; (3) information about rights to stream the content out-of-home; (4) the resolutions that are available on various devices and (5) recording expiration date information, if any.³⁶ NAB supports the Commission’s proposed definition of Entitlement Data and urges it to resist any calls for a less comprehensive standard. Each element of the Commission’s proposal is critical to ensuring the protection of content from piracy and other forms of misappropriation. NAB further agrees with the Commission’s proposal that this data must “reflect identical rights that a consumer has on Navigation Devices that the MVPD sells or leases to its subscribers.”³⁷ Significantly, NAB also reads this definition to ensure that the geographic boundaries inherent in the current system of distribution of television broadcast signals by MVPDs, including the enforcement mechanisms available through the Commission’s network nonduplication and syndicated exclusivity rules,³⁸ will be preserved in the transition to a competitive device market. Because the content a subscriber can view is directly tied to that subscriber’s underlying MVPD subscription service, the geographic boundaries inherent in stations’ agreements with program suppliers will continue to be effectuated and stations will continue to reach their local viewers.

The Commission proposes to define “Service Discovery Data” as “information about available Navigable Services and any instructions necessary to request a Navigable

³⁶ *Notice* at ¶ 39.

³⁷ *Notice* at ¶ 39.

³⁸ See 47 C.F.R. §§76.92-76.95 (cable network non-duplication); 47 C.F.R. §§76.101-110 (cable syndicated exclusivity). In the direct broadcast satellite context, geographic exclusivity is effectuated through the statutory “unserved household” restriction. Satellite Home Viewer Act of 1988, § 202, Pub. L. No. 100-667, 102 Stat. 3935 (1988) (“SHVA”). As Congress observed in renewing the unserved household restriction in 2014, “[t]he reason for [the unserved household restriction] was to preserve ‘localism’ and to prevent non-local or ‘distant’ signals from taking viewers away from local broadcast television stations that provide community-focused programming such as local news and weather.” S. Rep. No. 113-322 (2014) at 2.

Service.”³⁹ The Commission tentatively concludes that the Service Discovery Data must include, at a minimum, channel information (if any), program title, rating/parental control information, program start and stop times (or program length for on-demand programming) and an “Entertainment Identifier Register ID” so that competitive navigation devices can accurately convey to consumers the programming that is available.⁴⁰

The *Notice* does not specify what is meant by “channel information” for purposes of the Service Discovery Data. NAB urges the Commission to specify that Service Discovery Data must include a station’s channel number, any related information about the station’s tier or channel “neighborhood” information and whether the station has negotiated with the MVPD for particular treatment in any search or recommendation features. This information is critical to ensuring that the terms and conditions of broadcaster retransmission agreements with MVPDs can be and will be given effect by competing navigation devices.

The Commission tentatively concludes that Service Discovery Data need not include descriptive information about the advertising embedded within the program.⁴¹ NAB supports this tentative conclusion and urges the Commission to take the further step of affirmatively excluding such data from this Information Flow. The sharing of descriptive information about advertising within programming could make it easier for competing navigation devices to replace or alter advertising within a program, or to add banners, overlays, bugs or crawls with other advertising sold by the device manufacturer. While limiting Service Discovery Data in

³⁹ *Notice* at ¶ 38. Elsewhere, the Commission defines “Navigable Service” as “an MVPD’s multichannel video programming (including both linear and on-demand programming), every format and resolution of that programming that the MVPD sends to its own devices and applications, and Emergency Alert System (EAS) messages.” *Id.* at 26.

⁴⁰ *Notice* at ¶ 38.

⁴¹ *Notice* at ¶ 38.

this manner is a helpful first step, it is not sufficient to protect programmers. Commission rules should specify that advertising and other promotional matter may not be altered, replaced or sold against by navigation devices absent a separate agreement with a programmer or television broadcast station.

As a related matter, a station's ability to successfully sell advertising depends in large part on its ability provide an advertiser with relevant viewership data for its programming. There is encoding embedded in the audio feed accompanying broadcast programming, including watermarks and other material native to that feed, which enable measurement of the viewing audience. NAB urges the Commission to ensure that such encoding is required to be passed through in one of the Information Flows and that this encoding may not be removed by third-party devices/applications. Impeding stations' continued access to this important audience data would hinder their ability to sell advertising—still the leading source of revenue supporting local station operations.

2. Licensing Proposals

NAB agrees with the Commission's view that licensing and certification will play important roles under its proposed approach. NAB urges the Commission to consider other ways to promote its goals of honoring contracts and protecting content in the context of its licensing and certification proposals.

The *Notice* identifies three subject matter areas to be addressed as part of licensing and certification: (1) robustness and compliance, which ensure that content is protected as intended; (2) prevention of theft of service and harm to MVPD networks, which ensures that devices do not allow the theft of MVPD service or physically or electronically harm networks;

and (3) important consumer protections in the Act and the Commission's rules.⁴² NAB supports the Commission's proposal that licensing and certification address compliance and robustness.⁴³ Under this proposal, MVPDs must employ a security system that validates only Navigation Devices that are sufficiently robust to protect content and honor the Entitlement Data that the MVPD sends to the device.⁴⁴ This proposal is critical to protecting content from piracy, hacking and other forms of manipulation and misappropriation.

Along these lines, NAB proposes that the Commission specify a fourth critical matter to be addressed in the licensing and certification process: (4) assuring adherence to programmer contracts (this includes but is not limited to contracts between stations and MVPDs; stations and advertisers; stations and program suppliers; stations and other stations; etc.) and promotional material. Under this fourth criterion, the license established under the FCC's proposal should preclude a Navigation Device that utilizes the Section 629 license from actions such as the following:

1. Refusing to honor or recognize negotiated channel position/neighborhood placement.
2. Modifying channel's daily line-up (e.g., providing some but not all of the programming; providing some but not all multicast streams, even where an MVPD is contractually required to carry all).
3. Use of search or recommendation engines or approaches that drive viewers to other content where a station has negotiated protection against such search/recommendation features with an MVPD.

⁴² Notice at ¶ 70.

⁴³ Notice at ¶ 71. Specifically, the Commission's regulations will "ensure that Navigation Devices (1) have content protection that protects content from theft, piracy, and hacking, (2) cannot technically disrupt, impede or impair the delivery of services to an MVPD subscriber, both of which we consider to be under the umbrella of robustness (i.e., that they will adhere to robustness rules), and (3) honors the limits on the rights (including copy control limits) the subscriber has to use Navigable Services communicated in the Entitlement Information Flow (i.e., that they adhere to compliance rules)."

⁴⁴ Notice at ¶ 71.

4. Advertising practices that interfere with the station’s advertising or promotion of programming (including such actions as super-imposing ads over or around station content, selling ads against station content (or in abrogation of advertising exclusivities negotiated by stations), or selling ads that are harmful to station branding).

D. The Commission’s Rules and Policies Should Honor Contracts—Not Ban Contractual Terms

As discussed above, a central tenet of the *Notice* and materials associated with its release is the ability of programmers to control their content and the protection of contractual terms surrounding the distribution of that content.⁴⁵ This commitment to honoring the terms of contracts that programmers reach with MVPDs is of vital importance. Programmers negotiate with MVPDs to provide a particular set of rights at a particular price; the Commission should not make rules that upend those contracts or require programmers to provide a different set of rights than those they negotiate with MVPDs. For this reason, the Commission should not rewrite existing contracts by eliminating carefully negotiated provisions that define the types of devices on which programming may be displayed, as long as those terms are nondiscriminatory.⁴⁶

Programmers may have myriad reasons for including contractual terms governing the devices on which their programming may be displayed, including a desire to control formatting and picture quality. They may reasonably seek to negotiate separately for distribution on other platforms based on screen size or in- or out-of-home viewing. Indeed, the Commission expressly recognized the legitimacy of such provisions, noting that, “these business decisions

⁴⁵ See, *supra* Section II.B.

⁴⁶ The Commission seeks comment on whether some programmers prohibit MVPDs from displaying their content on certain devices and, if so, whether the Commission should ban such prohibitions to assure the commercial availability of navigation devices. *Notice* at ¶ 18.

are made for a variety of reasons, including security and contracts with content providers.”⁴⁷ For the Commission to reverse course and insert itself into contractual negotiations would be a remarkable about-face. It would be the very opposite of honoring contracts.

Beyond the fact that it would be a poor policy choice that would contradict the Commission’s intended goals and public statements concerning its proposal, the Commission lacks the legal authority to take such a step. Nothing in Section 629 authorizes the Commission to abrogate contractual terms designed to protect legitimate interests in how content is distributed and viewed. Critically, leaving such contract terms in place will not discourage or prevent the competitive availability of equipment used to view MVPD programming. Device manufacturers seeking to display content on classes of devices not authorized by MVPD contracts are free to negotiate with programmers for the display of that content.

Similarly, Section 624A provides no legal authority for the Commission to second guess business decisions made by programmers concerning the types or classes of devices to which an MVPD is authorized to distribute content. Section 624A seeks to prevent MVPDs from scrambling or encrypting signals in a manner that disables or inhibits premium features and functions of television receivers and recording devices.⁴⁸ Section 624A does not, however, prohibit content creators from negotiating terms to protect their content from unauthorized distribution, including distribution to classes of devices that may, for example, result in an altered or degraded viewing experience.

⁴⁷ *Notice* at ¶ 66.

⁴⁸ 47 U.S.C. § 544A.

If the Commission truly seeks to honor contracts and protect content providers' investments in valuable programming, it should not interfere in business decisions and carefully tailored contractual protections. We urge the Commission not to attempt to substitute its judgment for that of the marketplace.

III. CONCLUSION

NAB applauds the Commission for taking a close look at ways to increase consumer choice and spur the development of a competitive marketplace for navigation devices and applications. Establishing a competitive marketplace for navigation devices cannot come at the expense of content creators—navigation devices are only valuable if there is a destination worth reaching. Ensuring that terms and conditions of agreements concerning carriage and advertising will also apply in the competing device context is critical to the success of the Commission's effort. Consumers have come to expect the unprecedented levels of quality, quantity and diversity of content available in today's flourishing marketplace. Altering the value of any of the agreements that undergird the creation of that content will ultimately impede investment in content and harm consumers. By establishing clear rules of the road at the outset, the Commission can set the stage for continued competition, investment and

innovation by broadcasters and others in the content supply chain while fostering a new marketplace for competing navigation devices.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

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