

Remarks of Michael O’Rielly, FCC Commissioner
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“The Black Box of the FCC’s Set Top Box Proposal”

Thank you for that warm introduction and for having me here today. It is somewhat refreshing to know that in seeing me, the smiles on many of your faces are genuine and you are saving any opposite feelings for others at the FCC. I should start by saluting the work of the entire broadcasting community, as I recognize the contributions that you bring to the communities where you and your families live and the people for whom you provide service. With this premise firmly in mind, the Commission can best determine the regulatory treatment for your industry while still ensuring the public interest is fully met.

Set Top Box Debate

When asked to discuss the topic of set top boxes at the NAB Show, I didn’t realize that my simple comments would generate such a massive effort by the current Administration to counter my views. I’m kidding, of course. For those of you who didn’t notice, on Friday the Administration let loose a multi-pronged offensive in support of the Commission’s set top box item. In fact, the president, himself, gave an interview to Yahoo! Finance about this topic and more. It seems like there are some bigger ticket policy issues and self-inflicted blunders to which this Administration should dedicate its time, but who am I to judge their priorities?

So let’s delve into the issue a bit deeper and set the stage for the subsequent panel of distinguished experts to further debate the topic.

Most people are calling this the set top box item, but this informal title is a complete misnomer. You might think from hearing it that the Commission is merely tweaking the current rules on set top boxes. But in fact, this initiative is really all about taking a 90’s regime and redefining all of its terms to let the Commission get its hooks into all of the new technology that has developed since then, outside of the Commission’s authority.

The Commission, itself, refers to this item not as the “Set Top Box” NPRM, but rather as the “Navigation Devices” NPRM, a term borrowed from section 629, which charged the Commission to adopt regulations to ensure availability of competitive “converter boxes, interactive communications equipment, and other equipment” used by MVPD customers to access programming and services. The language there – devices, boxes and equipment – seems about as clear as it is possible to be that the statute is talking about 90’s set top boxes. But what good does that do the Commission when consumers and programmers are increasingly cutting set top boxes – and the Commission – out of the loop completely?

Almost everyone can agree that today's video consumers have more options than ever before, many of these powered by software apps that content providers of all stripes – networks, local broadcasters, over-the-top providers, and yes, even MVPDs – are developing to offer ever more programming on more devices. And all of this is happening without a set top box anywhere to be seen. So in order to maintain its power in this hyper-competitive video space, the Commission needs to extend its reach to the new apps community. And the Commission's massive overreach abuses section 629 for that purpose.

If you think the Commission would have a hard time defining 90's language clearly talking exclusively about *hardware* to mean an *app*, maybe you're just reading the wrong dictionary. But then, again, maybe the problem is that you are reading any dictionary at all. Remember, this is the same Commission that can't read and follow an Appropriations provision that it helped write pertaining to Joint Sales Agreements.

What we are dealing with here can only be described as a much more "flexible" approach to logic and reasoned thinking. The argument is this: people are sometimes using apps now instead of devices. Therefore, an app is a device. And under section 629, the FCC can do whatever it thinks necessary to promote the development of more competitive apps. I can think of a few choice words to describe this lunacy, but I'll settle for "fatally flawed."

With the statutory discussion under our belts, let's turn to the media campaign. It seems no major FCC initiative these days is complete without a hashtag to gin up a supportive Twitter echo chamber. So I'm sure many of you here have heard the hype about #unlockthebox. Ironically, this left a big opening for the reference made in the title of this panel to the classic story of unintended consequences involving Pandora. Suffice it to say that sometimes you should be careful what you wish for, and nowhere more so than at the Commission. More importantly, underneath the fantastical rhetoric that advocates wrap around themselves are real policy problems that are not easily resolved by sound-bites and catch phrases. Instead, they involve decades of careful policy decisions – on topics such as piracy, privacy and advertising – that should matter to everyone in this room.

Hopefully, I won't belabor the "box" analogies too much by adding another one that I think captures one of the biggest problems relevant for this audience. The Commission's proposal itself is a black box, a giant question mark from the perspective of broadcasters, MVPDs, and consumers alike. Though at first glance the main target might seem to be the MVPDs, this proposal would be harmful, to some extent, for consumers as well as almost every type of business involved in producing or distributing video content today. Broadcasters have been rightfully skeptical, and I would argue should be even more so. Because the Commission has no real answers to many of the significant questions that have been raised, and apparently intends to take this black box all the way to final order stage with many of the uncertainties and inconsistencies still in place.

How will the billions and billions of dollars-worth of video content be protected from theft? Well, it turns out you don't need to worry about that at all. Some other people are going to

figure that out. Which other people? No one quite knows. The Commission proposes the security system to be used by every MVPD will be created by “an organization that is not affiliated with MVPDs.” This magical all-knowing benevolent “organization” may not, and probably does not, even exist yet. Some people have suggested a couple of existing standard setting organizations but there is no evidence that they can or will serve this purpose. What type of security system will it come up with? No one knows. Are you feeling comfortable yet? No? Well, rest assured, the Chairman says that under whatever content protection scheme this “organization” invents, all the content will be protected. If you have read any Commission item recently, that should raise questions for you about their definitions of “content” and “protected,” just for a start.

Maybe you’re concerned about what will happen to your advertising, or all of those deals on channel placement you have taken great pains to hammer out with MVPDs. Under the proposed item, the MVPD has to pass through a “flow” of all of its content to any third party who can write an app and sync up with the imaginary security system I just mentioned, which is a third party you, the broadcaster, have no contractual relationship with. What is to stop such a third party from reorganizing the channel lineup, framing your video with its own ads, or even just overwriting your ads in real time with its own?

The proposal would ultimately devalue all content produced by programmers large and small. No one knows more than broadcasters that video production and distribution are both very expensive businesses to be in. Today, local broadcasters contribute mightily to their affiliated networks’ cost for programming, and the networks are competing for viewers with a plethora of new entrants, like Netflix and Amazon.com, and a rejuvenated HBO and Showtime. Added demand means content producers are now in a cat bird’s seat, driving increased content costs for everyone every year.

With full recognition of the costs and challenges that broadcasters face in creating and selling content, I would ask that for just a moment you consider the perspective of an MVPD. While they are not your natural ally and I realize there is history on both sides, these companies build video packages that hopefully some consumer will want to buy. Smaller cable operators have less ability to obtain bulk discounts and in some cases their video offerings now actually lose money for them. Many only keep providing the service as a link to build their broadband businesses. That doesn’t mean they deserve your sympathy but you should begin to see the picture of what it means for you.

Under the Commission’s proposal, MVPDs will be expected to allow any number of third party app developers to tap directly into their networks and grab a free stream of video that the MVPD has bought and paid for from you or your brethren. I would submit to you that at some point, for some of these providers, the video business will just not be worth it any more. And I will leave it to you to consider what having fewer buyers in the marketplace does to the price of the product broadcasters are selling. Content protections and recognition of intellectual property rights are not niceties but necessary ingredients to a successful video marketplace.

No amount of Commission promises should distract from the Commission's real mission: to use government to artificially cheapen the value of video content.

I believe the FCC should embrace the future, not the past. For good or bad, times are changing. The app economy is weakening the MVPD video package formula every day, and broadcasters are moving, adjusting and finding innovative and creative ways to reach consumers directly or via over-the-top providers. The entire video industry is moving away from a "box" mentality and toward competition on many new levels. As such, the fundamental need for regulation to maintain a competitive set top box marketplace should be questioned and revisited. The video marketplace seems to be working better than ever before due to disruptive technologies, not disruptive regulation. There's no need for the FCC to photobomb the picture.