

## DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80.

As someone with three set-top boxes in my home, I share the frustrations felt by millions of Americans across this country. These boxes are clunky and expensive, and I feel the pain each and every month when I pay my video bill. And as an FCC Commissioner, I know that the current set-top box marketplace is the product of an intrusive regulatory regime. Something has to change.

What should that change look like? What should our aim be when it comes to this marketplace? What would be best for consumers? My view is pretty simple. **Our goal should not be to unlock the box; it should be to eliminate the box.** If you are a cable customer and you don't want to have a set-top box, you shouldn't be required to have one. This goal is technically feasible, and it reflects most consumers' preferences—including my own.

But in this *Notice*, the FCC takes a much different tack. It doubles down on the necessity of having a box, substituting one intrusive regulatory regime for another. Essentially, it would introduce an entirely new set of boxes into consumers' homes. Because this proposal moves us further away from the objective of dropping the box and because it takes a 20th century approach to this 21st century problem, I cannot support this *Notice*.

Let's start with one indisputable fact: When it comes to navigation devices, the FCC has not embraced free-market policies. Instead, it has embraced a form of centralized planning. By implementing the CableCARD regime and the integration ban, the FCC sought to mold the set-top box marketplace to its desired shape. But there is widespread agreement that the Commission's regulatory intervention has been a massive failure. Indeed, this *Notice* repeatedly admits the rules failed to achieve their objective. The FCC's regulations have raised the price of set-top boxes, costing Americans billions of dollars in additional fees. They have increased cable customers' energy consumption by 500 million kilowatt hours each year, enough to power all the homes in Washington, DC for three months. And they have failed to produce robust competition in the set-top box market. Less than 2% of customers have purchased their set-top box at retail.

Indeed, the failure of the FCC's policies is what brings us here today. But as we seek to trade one complex regulatory scheme for another, we should pause and ask ourselves a simple question: Will the result be any different this time around? Will the sequel be any better than the original? In my judgment, the answer is no.

*First and foremost*, this proposal is likely to produce a stalemate—not a newly competitive market. The cornerstone of the *Notice* is the heavy reliance on open standards bodies operating through consensus. According to the Commission's proposal, MVPDs will be required to supply certain information in “formats that conform to specifications set by ‘open standards bodies.’”<sup>1</sup> These open standards bodies, in turn, would consist of members representing all stakeholders and would develop standards by consensus. But would this consensus ever really happen?

To date, the defining characteristic of this proceeding has been vigorous disagreement, with video distributors and content creators on one side and the consumer electronics industry on the other. We saw this in the Downloadable Security Technology Advisory Committee (DSTAC). We have seen this in the run-up to today's vote. And I'm sure that we will see it in the comments that will be filed in response to this *Notice*. Should we have confidence that a highly heterodox open standards body will become harmonious after the Commission issues final rules? If anything, when it is time to get down to the

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<sup>1</sup> *Notice* at para. 41.

technical nitty-gritty of implementing such controversial regulations, I believe that it will be harder, not easier, to reach consensus. Indeed, the odds are probably better that Mark Zuckerberg will agree to Kanye West's request for \$1 billion.

*Second*, there's a problem of timing. The Commission's rules will not have any impact for years. For example, the *Notice* proposes that MVPDs would not have to implement these regulations until two years after their adoption. So even if all goes according to plan, and I am extremely skeptical that it will, consumers probably would not feel the effects for another three years.

Just think about what three years means in the dynamic video marketplace. Thirty-six months ago, there was no such thing as the Google Chromecast or Amazon Fire TV Stick. There's no telling what further innovation will occur over the course of the next three years, but we do know it'll happen, and fast. So while MVPDs, the consumer electronics industry, and content creators spend years trying to implement the Commission's rules, technology could render all of that work obsolete by the time it's ready to roll out. That would be a waste of time, energy, and money for all involved.

*Third*, if the standards envisioned by the Commission's proposal are ever actually implemented, the likely result is that consumers will have to deal with two boxes instead of one. Much of the controversy surrounding this proposal has centered on whether it would require an additional box to be deployed in Americans' homes. Now, to be sure, the *Notice* doesn't say in so many words that MVPDs would be required to provide customers with another box. But that unfortunately is likely to be the outcome if these rules are adopted and implemented.

Here's why. In order to carry out the standards called for in this *Notice*, MVPDs would probably have one of two options. First, they could make substantial changes to their network architecture. Or second, they could provide each customer with an additional box. And during my discussions with MVPDs in the weeks leading up to this meeting, each and every company has told me that it would be less expensive to deploy additional boxes in their customers' homes. So if the Commission's proposal is implemented, the American people will probably end up paying for more boxes, not fewer.

*Fourth*, the proposal will hurt content creators. This proposal would allow set-top box manufacturers to profit from the content produced by others without paying those programmers at all. For example, nothing in this proposal would prevent a set-top box manufacturer from replacing the commercials in a television show with commercials sold by that manufacturer. And nothing in this proposal would prevent a set-top box manufacturer from adding commercials to a program. To be clear, we could have foreclosed those possibilities. The drafters of this *Notice* could have addressed content creators' legitimate concerns without compromising the core of this proposal. But they did not.

Minority programmers are perhaps most at risk. That's why a wide array of civil rights organizations, including the Rainbow PUSH Coalition, League of United Latin American Citizens (LULAC), Multicultural Media, Telecom and Internet Council (MMTC), and LGBT Technology Partnership, have expressed their opposition to this proposal. And that's why minority programmers are opposed to it as well.

This morning, Victor Cerda of VMe TV is with us. VMe TV is the first national Spanish-language television network in the United States to partner with public television, and it brings high-quality entertainment to Latino families. Along with representatives of other Latino organizations, Mr. Cerda signed a letter this month opposing the Commission's proposal. He said that the Commission's proposal could "lead to a new round of TV 'redlining' in which [set-top box developers] pick and choose what networks to show and drop Latino programming or bury it deep in the channel lineup or search results."<sup>2</sup> Nothing in this proposal addresses that concern.

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<sup>2</sup> Letter from Victor Cerda, Senior Vice President, VMe TV and VMe Kids, et al. to Chairman Tom Wheeler et al., FCC, at 2 (Feb. 4, 2016).

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Taking a step back, this *Notice* promises a lot, but probably will not deliver much. And most of what it will deliver is likely to be bad for American consumers and content creators. None of this had to be.

Right now, we are en route to eliminating the need for a set-top box. An app can turn your iPad or Android phone into a navigation device. MVPDs have deployed these apps and are in the process of developing more advanced ones. The Commission should be encouraging these efforts.

But this proposal would do precisely the opposite. It would divert the industry's energies away from app development and toward the long-term slog of complying with the Commission's new regulatory scheme for unwanted hardware. And the *Notice* goes further; it actually proposes imposing a number of regulations that would discourage the development and deployment of MVPD apps. That's not what the American people want. I'm confident that most consumers would rather eliminate the set-top box altogether than embrace a complex regulatory scheme that will require them to have *another* box in their home and won't take effect for at least three years.

All of this might explain the deep bipartisan concern on Capitol Hill about the FCC's approach to this issue. Senator Bill Nelson, the ranking member of the Senate Committee on Commerce, Science, and Transportation, has told us to avoid "taking any action that could ultimately threaten the vibrant market for quality video programming."<sup>3</sup> A diverse group of 25 Democratic Representatives, led by Congressman Tony Cardenas, has counseled restraint, saying that "[i]t is important for the government . . . to not be overly prescriptive in regulation."<sup>4</sup> Congressmen Tom Marino and Ted Deutch have warned us that this proceeding could "upset the delicate system that underlies the creation, licensing, and distribution of copyrighted television programming and potentially jeopardize efforts to prevent copyright infringement."<sup>5</sup> And Representatives Doug Collins, Judy Chu, Lamar Smith, Adam Schiff, and Mimi Walters have expressed their concerns "over the proposal's potentially adverse impacts on independent, minority, and religious content creators."<sup>6</sup>

I wish that the Commission had listened to these voices rather than plowing ahead with this deeply flawed proposal. As a result, I respectfully dissent.

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<sup>3</sup> Letter from Senator Bill Nelson, Ranking Member of the U.S. Senate Committee on Commerce, Science, and Transportation, to the Honorable Tom Wheeler, Chairman, FCC (Feb. 12, 2016).

<sup>4</sup> Letter from Representatives Tony Cardenas et al., U.S. House of Representatives, to the Honorable Tom Wheeler, Chairman, FCC (Feb. 16, 2016).

<sup>5</sup> Letter from Representatives Tom Marino and Ted Deutch, U.S. House of Representatives, to the Honorable Tom Wheeler, Chairman, FCC, MB Docket No. 15-64 (Feb. 12, 2016).

<sup>6</sup> Letter from Representatives Doug Collins et al., U.S. House of Representatives, to Chairman Tom Wheeler et al., FCC (Feb. 16, 2016).