DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

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

Over the years, I have spent considerable time on the policy issues involving set top boxes. Past experience, along with surveying the current video landscape, has led me to conclude that set top boxes are a relic of the past. They are already well on their way to the fate of the video rental store. So why, in 2016, would the Commission be doing a set top box item? If the idea of an agency maintaining its regulatory control by placing outdated regulations on new technologies sounds familiar, you may be on the right track.

In recent weeks we have been subjected to a steady stream of hype about this item "unlocking the box." Let it never be said that this Commission's propagandists have a hard time staying on message, but this particular catchphrase only papers over the destructive results to come in the video marketplace if the Commission proceeds to adopt the rules proposed today. 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, in many predictable ways, to say nothing of unpredicted and unpredictable effects.

It could open multichannel video programming distributor ("MVPD") networks to serious security vulnerabilities, exposing them to potential network damage and content theft. It could strip content producers of their rights to control the distribution and presentation of their content. It could ultimately subject over-the-top ("OTT") providers to the same regime, as I will discuss later. Worst of all, it would certainly devalue the content produced by programmers large and small, by enabling anyone capable of writing a compliant app to turn on a free stream of video content painstakingly cobbled together by an MVPD at great expense – the ultimate free-rider problem. MVPDs, broadcasters, and independent programmers alike would all lose some incentives to keep doing what they do, and some would opt for the sidelines, leaving consumers with fewer video options.

The Commission's response to most of these concerns boils down to: "trust us, it will be OK." Or rather, trust currently non-existent entities like "an organization that is not affiliated with MVPDs"[1] to come up with a security system that will protect content, and trust "open standards bodies"[2] to set up acceptable specifications for any app developer to interact directly with an MVPD's network. Trust "marketplace forces"[3] to keep presentation standards and advertising intact. (Interesting that this is the only issue the majority believes should be left to the marketplace to decide). The item is forced onto a few detours from its prescriptive path, resigned to merely seek comment on such basic questions as "whether licensing can ensure adherence to copy control and other rights information … and adequate content protection." Can it even be done? We don't know. Yet somehow, despite all of the open questions about who, how, where, and when, the majority has so much faith in the ability of outside, unformed entities to save the day that the item tentatively concludes that there should be a two-year deadline for compliance with all of the new rules. This is regulation by pure speculation.

The statutory authority on which this fantasy rests is equally as far-fetched. The section that discusses authority will long live as a testament to the level of absurdity that can be achieved in four short paragraphs when two defenseless statutes fall down a rabbit hole into a land where words have no

[1] *Id.* at para. 2.
[2] *Id.* at para. 2.
[3] *Id.* at para. 2.

meaning. While billed as an attempt to enhance competition in the set top box market, the item shoots miles beyond that narrow frame on the very first page, redefining statutory terms plainly referring to hardware, such as "navigation device," "interactive communications equipment," and "other equipment"[4] to mean either hardware *or* software (including apps). I don't know how much clearer the terms "device" or "equipment" could be in their intent to reference tangible, physical hardware. If those words don't work to restrict the Commission, are there any that ever could? And I don't think that anyone here believes for a second that STELAR could ever have made it out of a single Congressional committee in 2014 if the members had known it would be interpreted to allow the FCC to force MVPDs to stream all of their content for free to any app developer willing to jump through a few hoops.

Getting back to the original question: why this proposal? The rationale stated is to achieve parity among competing interfaces, but at first glance anyone can see that the exact opposite is what would result. The free content flow mandated by this item would be a one way street from MVPDs to OTTs. In order to ever have parity, in order for an MVPD's interface to ever be competitive with an OTT solution that integrates video from the MVPD and other services, OTTs would need to be bound by the same rules and sending all their content to the MVPDs for free, and indeed, to each other for free. In fact, I was told that at one of the early DSTAC meetings this idea was brought up. It was quickly dismissed as outside the scope of both STELAR and the Commission's Title VI authority. So no one here is talking about making the one way street a two way... or are we?

Just as with a 3D movie you need to look through both the red and blue sides of the glasses to see the whole picture, to make any sense of this item it must be viewed together with its other half, the Commission's proposal to reclassify OTTs as MVPDs. If both of these NPRMs are followed to their logical conclusions, an entire class of innovators who bear no similarities to MVPDs, except that they also offer video, will be redefined as MVPDs and subsumed into Title VI. Meanwhile, all MVPDs, whether existing or newly minted, will be forced to provide all of their content to each other under an FCC mandated scheme. And providing the "three flows" to all comers will be only the beginning of the new regulatory burdens on OTTs captured by Title VI. Who wins? Why, the FCC, of course.

This entire item is about trying to superimpose a 1990s concept on the current technology, when the basic idea itself is no longer relevant due to the innovations now available. Set top boxes, or navigation devices, effectively have been overtaken by events, or OBE. Today's consumers want access to video on any device they own. In response, content providers are meeting this demand through numerous offerings, including over-the-top and Internet-based apps. Isn't it telling that consumers can already watch video from multiple sources on all of their devices without a FCC mandated set top box regime? They can even stream what they are watching between devices. The video marketplace seems to be doing just fine. And yet, somehow when it comes to an MVPD subscription video service, we need to step in and regulate the interface? Nonsense.

Instead, I argue that we should embrace the future, not the past. The application economy is weakening the MVPD video package formula as we speak. In fact, it's no longer about channels at all. Many consumers are watching programming by the individual program or even shorter segments. The entire video industry is moving away from a box mentality and as such we should reconsider the need for regulation to maintain a competitive set top box marketplace.

Change is a real challenge when the goal is to maintain control over the future using the paradigms of the past. As we have seen, the pursuit of this goal can lead to policy proposals based on

[4] 47 U.S.C. § 549(a).

Orwellian statutory interpretations and substantive thin air. But given the choice between disruptive technologies and disruptive regulations, no one should have any doubt which side I'm on.