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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Communication of the American Cable Association; Media Bureau Request for Comment on DSTAC, MB Docket No. 15-64

Dear Ms. Dortch:

The American Cable Association (“ACA”) urges the Commission, as it considers adopting a Notice of Proposed Rulemaking (“NPRM”) based on an approach like the Competitive Navigation Device Proposal (“Device Proposal”) described in the Downloadable Security Technical Advisory Committee’s (“DSTAC”) Final Report,¹ to recognize both the enormous strides that smaller multichannel video programming distributors (“MVPDs”) have made in offering subscribers a superior viewing experience, and the significant burdens that the proposal’s mandates would impose. ACA encourages the Commission to take a balanced approach in its NPRM by, at a minimum, tentatively concluding that analog-only systems are exempt from any new set-top box requirements, and seeking comment on an exemption for MVPDs with one million or fewer subscribers. There is no statutory bar to providing this relief.

Smaller Providers Are Increasingly Offering Innovative Ways for Subscribers to Access Video Services Over a Wide Array of Devices

Smaller MVPDs have been market leaders in consumer choice, working with cutting edge technology to offer their subscribers innovative ways to enjoy video programming. Like their larger counterparts, small and medium-sized providers are acquiring advanced rights from programmers that

¹ See FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation (rel. Jan. 27, 2016), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf; Downloadable Security Technical Advisory Committee, Report of Working Group 4 to DSTAC at 107-126, Attached to Public Notice, *Media Bureau Seeks Comment on DSTAC Report*, DA 15-982 (rel. Aug. 31, 2015) (“WG 4 Report”), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-982A6.pdf. Based on the public description of the Chairman’s proposal, it appears essentially identical in substance to the Device Proposal described in the DSTAC Final Report and the advocacy of Device Proposal supporters as reflected in the record of this proceeding. For this reason, ACA devotes the bulk of this submission to the outlines of the Device Proposal as described in these documents.

provide access to programming available on their MVPD service over mobile devices and retail in-home equipment such as Roku devices and gaming consoles,² and some have developed apps that allow their service to be used on a wide variety of third-party devices.³

Uniquely, however, smaller MVPDs have been moving away from traditional set-top boxes by working closely with retail device manufacturers to develop and deploy next generation set-top boxes that integrate their traditional MVPD service with over-the-top (“OTT”) services, like Netflix. In announcing his company’s decision to work with TiVo, Inc. as far back as 2011,⁴ Grande Communications’ President Matt Murphy explained that the new deal would “enable our viewers to easily navigate, search and discover content from across traditional television channels, the Internet and our own VOD library in a simple, intuitive fashion that is unlike anything else available on the market.”⁵ Since then, a number of smaller operators have made similar investments to bring these next-generation cable/OTT boxes to their subscribers. Today, more than a dozen medium-sized operators have distribution deals with TiVo, including Suddenlink, RCN, Grande, Atlantic Broadband, General Communications Inc. (GCI), Astound, CableOne, Blue Ridge Communication, Mediacom, Midcontinent, Vyve Communications, Wave

² See Press Release, The Walt Disney Company and the National Cable Television Cooperative Announce Robust Long-Term Distribution Agreement (Aug. 1, 2014), available at <https://www.nctconline.org/index.php/news/press-releases/item/159-the-walt-disney-company-and-the-national-cable-television-cooperative-announce-robust-long-term-distribution-agreement> (“Participating NCTC members’ customers will receive broad access to existing authenticated products [that] ... will give customers more opportunities to access live and video-on-demand content, both in-home and out-of-home, on their computers, smartphones, tablets, gaming consoles, and connected devices.”); Press Release, National Cable TV Cooperative & Viacom Reach Deal to Renew Carriage Agreement (Apr. 1, 2014), available at <https://www.nctconline.org/index.php/news/press-releases/item/148-national-cable-television-cooperative-and-viacom-reach-deal-to-renew-carriage-agreement> (“Judy Meyka, NCTC Executive Vice President of Programming, said: “Viacom is and remains one of NCTC’s largest content providers and we are pleased to have reached an agreement that will provide opportunities for our members to distribute their content over multiple platforms.”); Press Release, The National Cable Television Cooperative and Discovery Communications Announce Long-term Distribution Agreement (undated), available at <https://www.nctconline.org/index.php/news/press-releases/item/194-the-national-cable-television-cooperative-and-discovery-communications-announce-long-term-distribution-agreement> (“The deal gives participating NCTC member companies TV Everywhere rights through subscriber authentication on multiple devices.”).

³ For example, Canby Telecom, a smaller IPTV provider, is offering streamed local broadcast stations and some other independent stations to their customers in a manner that allows the customer to receive such service using a Roku box. See <https://www.canbytel.com/television/ezvideo/>. IPTV vendors like Minerva are also offering turnkey solutions for IPTV providers, including smaller ones, to make their service available over a range of consumer electronics devices. See <http://www.minervanetworks.com/what-is-your-ott-pay-tv-strategy/>.

⁴ In 2009, RCN became the first company to enter into a strategic relationship with TiVo. See Press Release, RCN Selects TiVo as its Primary DVR Platform (Aug. 4, 2009), available at <http://pr.tivo.com/manual-releases/2009/RCN-Selects-TiVo-as-its-Primary-DVR-Platform>.

⁵ Press Release, Grande Communications Selects TiVo’s Family of Set-Top Boxes as Its Next-Generation Whole Home Solution (Apr. 24, 2011), available at <http://pr.tivo.com/press-releases/grande-communications-selects-tivo-s-family-of-set-nasdaq-tivo-0791176>.

Broadband,⁶ Entouch,⁷ Armstrong,⁸ Frontier Communications,⁹ and WOW!.¹⁰ In 2015, the National Cable Television Cooperative (“NCTC”), a buying group that represents over 800 small and medium-sized operators, entered into an agreement with TiVo entered that will provide a cost-efficient solution for smaller operators to also deploy TiVo-powered products and services with integrated OTT access. Rich Fickle, NCTC’s President & CEO, described the benefits of this innovative collaboration:

Collaborating with TiVo gives NCTC members access to an advanced TV offering with best-in-class multiscreen capabilities, OTT integration, and a personalized user experience. To help drive scale efficiencies, NCTC is investing in a common back office integration platform that will connect with multiple billing systems as well as TV Everywhere authentication platforms. This is a key enabler of the TiVo deal and could also support future IP video and OTT solutions.

Small and medium-sized operators also offer for sale or lease Roku devices that allow subscribers to access over 350 streaming options, including movies, TV shows, kids programming, and more.¹¹

The evidence is clear that smaller MVPDs already invest substantial resources to provide their customers with innovative choices for how they view programming, and they do so in a way that is designed to maximize value while minimizing operator and consumer costs. As it considers how best to encourage consumer choice in the video marketplace, the Commission must take care not to disrupt the innovation that is already flourishing within this segment of the market.

The Commission Must Not Dismiss Concerns Regarding the Burdens Associated with the Chairman’s Proposal

The Commission must weigh carefully the concerns previously raised by ACA in its comments that the proposal’s mandates would prove unduly burdensome, particularly for smaller MVPDs.¹² As

⁶ Press Release, TiVo Surpasses Record 4.5 Million Subs Milestone (Apr. 29, 2014), *available at* <http://pr.tivo.com/press-releases/tivo-surpasses-record-4-5-million-sub-milestone-nasdaq-tivo-1110376>.

⁷ Press Release, TiVo Reports Results for the Second Quarter Ended July 31, 2014 (Aug. 26, 2014), *available at* <http://phoenix.corporate-ir.net/phoenix.zhtml?c=106292&p=irol-newsArticle&ID=1961182>.

⁸ Press Release, TiVo and Armstrong Partner to Deliver Advanced, Whole-Home and Multi-Screen Viewing Experience to Cable Subscribers (Sep. 9, 2014), *available at* <http://pr.tivo.com/press-releases/tivo-and-armstrong-partner-to-deliver-advanced-whole-home-and-multi-screen-view-nasdaq-tivo-1143031>.

⁹ Press Release, Frontier Communications Announces Strategic Relationship With TiVo (Feb. 25, 2015), *available at* <http://pr.tivo.com/press-releases/frontier-communications-announces-strategic-relationship-with-tivo-nasdaq-tivo-1177479>.

¹⁰ Press Release, WOW! Selects TiVo to Power New Set-Top, Web, and Mobile Experience (Jul. 22, 2015), *available at* <http://pr.tivo.com/press-releases/wow-selects-tivo-to-power-new-set-top-web-and-mobile-experience-nasdaq-tivo-1207866>.

¹¹ See Wave Broadband High Speed Internet Packages Page, <http://www.wavebroadband.com/for-home/internet/packages/>.

¹² See, generally, *Media Bureau Seeks Comment on DSTAC Report*, MB Docket No. 15-64, Comments of the American Cable Association (filed Oct. 8, 2015) (“ACA Comments”); Reply Comments of the American Cable Association (filed Nov. 9, 2015).

noted above, based on public descriptions of the proposal under consideration in the NPRM, it appears to be closely modeled upon, if not essentially identical in substance to, the Device Proposal described in the DSTAC Final Report and the recent advocacy of Device Proposal supporters as reflected in the record of this proceeding.¹³ This is unfortunate, as ACA demonstrated in its comments that the Device Proposal, if adopted, would result in significant technical and financial burdens on MVPDs, particularly providers whose networks serve smaller numbers of customers and are often not as technologically sophisticated as their larger counterparts.¹⁴ ACA's concerns are both well-supported and unrebutted in the record before the Commission.¹⁵

¹³ FCC Chairman Wheeler's description of his proposal broadly claims that "nothing in this proposal changes a company's ability to package and price its programming to its subscribers, or requires consumers to purchase new boxes." See Tom Wheeler, Chairman, Federal Communications Commission, *It's Time to Unlock the Set-Top Box Market*, RECODE (Jan. 27, 2016), available at <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>. See also Wheeler Blog, *FCC Chairman Proposal To Unlock The Set-Top Box: Creating Choice and Innovation*, (Jan. 27, 2016), available at <https://www.fcc.gov/document/fcc-proposal-unlock-set-top-box> (describing the proposal as requiring only that MVPDs pass through to "creators of competitive devices or apps" "three core information streams" – "service discovery," "entitlements," and "content delivery"). These descriptions elide the critical fact that in order to render their systems capable of passing through to "three core information streams" from MVPDs to "creators of competitive devices or apps," a cable operator's system must be capable of generating the three streams, something no system operated by a smaller MVPD is capable of today. The cost of developing and implementing the necessary software, which includes ensuring its compatibility with existing equipment and back-end infrastructure, would fall directly on the MVPD while providing benefits solely retail device manufacturers. ACA has previously explained that to ensure the compatibility of new technologies, "MVPDs must undertake software upgrades at every headend, and in many cases must upgrade hardware and firmware as well." This is not a simple or inexpensive undertaking. See ACA Reply Comments at 14.

¹⁴ See ACA Comments at 7-11; ACA Reply Comments at 13-14. This is unsurprising, given the Commission's decision not to appoint any of the highly qualified individuals from small and medium-sized MVPDs that ACA nominated to serve on the DSTAC. The resulting DSTAC Report failed to reflect smaller MVPD's concerns about the Device Proposal. This problem has since been compounded first, by the proponents of Device Proposal who have repeatedly ignored in their own comments and ex parte filings the concerns raised by ACA, and second, by the Commission, which has solicited the views of DSTAC participants but has not sought input from the smaller providers that will be most profoundly impacted by any new rules. See, e.g., *Media Bureau Seeks Comment on DSTAC Report*, MB Docket No. 15-64, Letter to Marlene H. Dortch from Jennifer A. Manner, Vice President, Regulatory Affairs, EchoStar Satellite Operating Corporation (filed Jan. 22, 2016) (responding "to a request from Commission staff" to "supplement the record and provide further examples of technical and legal hurdles the Commission must consider should it decide to initiate further action in this proceeding"). As a result, the concerns raised by ACA that the proposal, if implemented, have been lost in the larger discussion of the Device Proposal.

¹⁵ *Media Bureau Seeks Comment on DSTAC Report*, MB Docket No. 15-64, Comments of AT&T at 21 (filed Oct. 8, 2015) ("AT&T Comments") ("The virtual headends and standardized protocols envisioned by the Device Proposal would require each MVPD to mount a monumental effort to re-architect and duplicate its networks to expose [the Proposal's] as-yet-undefined Interfaces."); Comments of Comcast Corporation at 11 (filed Oct. 8, 2015) ("Under this proposal, MVPDs would be forced to overhaul their networks (notwithstanding the consensus view in the Report that such a requirement is unnecessary) and to develop an undefined piece of equipment[.]"); Comments of the National Cable & Telecommunications Association at 27 (filed Oct. 8, 2015) ("[A]lthough DSTAC reached consensus that it is unacceptably burdensome to rebuild all MVPD systems, the AllVid proposal nonetheless would require re-architecting much of the MVPDs infrastructure, from back-office systems, to headends, uplinks, and central offices, delivery platforms, network equipment, content servers, and security components, as well as creating new devices for the home."); Comments of ARRIS Group Inc. at 7 (filed Oct. 8, 2015) ("MVPDs would have to develop a parallel network to support AllVid devices; develop an in-home service device to deliver content to AllVid-compatible devices; and develop a raft of protocols and standards to enable access to disaggregated elements of MVPD service."); Comments of the Motion Picture Association of America 7 (filed Oct. 8, 2015) ("The Device

None of the justifications or explanations advanced by proponents of the Device Proposal acknowledge that its implementation would require MVPDs make significant changes to their network architecture,¹⁶ which would prove particularly costly for those that operate systems that, for technical or financial reasons, cannot make the transition to IP-delivery, or can do so only at a much slower pace than their more sophisticated counterparts. Although ACA does not believe that adopting the mandates outlined in the Device Proposal are necessary to promote the market for retail navigation devices,¹⁷ to the extent that Commission moves forward with rules based on this proposal, it must take account of the actual burdens such requirements would impose on smaller MVPDs as it considers what to propose in the NPRM.

ACA's concerns are legitimate and deserve the Commission's serious attention. Despite the anodyne tone of the Chairman's description of the technological changes entailed in the delivery of MVPD services through IP-based virtual headends contained in the forthcoming NPRM, the reality is that the proposed mandates would require significant expenditures by all MVPDs that would be particularly difficult for smaller providers, especially those operating systems relying on older technologies. And, there is no guarantee that the proposal will work, as the standards on which it will be based have yet to be developed and will likely take years to roll-out. At best, the proposal represents an experiment to test consumer demand for a specific type of navigation devices, and one that must be conducted, if at all, with great caution.

Accordingly, ACA urges the Commission, if it moves forward with a proposal to impose any mandates based on the Device Proposal, to simultaneously propose adequate relief from such far reaching and disruptive requirements by (i) reaching a tentative conclusion that analog-only systems should be permanently exempt from all Device Proposal-based requirements, and (ii) seeking comment on permanently exempting MVPDs serving one million or fewer subscribers from all of the Device Proposal-based requirements.

Proposal "would ... impose significant costs, require restructuring of networks, and necessitate standards yet to be developed.").

¹⁶ *Media Bureau Seeks Comment on DSTAC Report*, MB Docket No. 15-64, Letter from the Consumer Video Choice Coalition to Marlene H. Dortch, Secretary at 3 (filed Dec. 23, 2015). Neither the Consumer Video Choice Coalition ("CVCC") nor any other advocates of the Device Proposal have acknowledged ACA's concerns, as it is clear that they cannot reasonably claim that their proposal would not be "unduly burdensome" to MVPDs in general, and smaller MVPDs in particular. CVCC characterizes this proposal as "simply software" that relies on "off-the-shelf" technology that "could be implemented by any existing MVPD without changes to its network architecture or service." *Id.* Furthermore, even assuming this description and the Chairman's description of the proposal under discussion were accurate, the proposal would impose significant burdens on MVPDs, as described above, contravening Congress's mandate that technical standards for downloadable security not be "unduly burdensome." *See* Satellite Television Extension and Localism Act Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat 2059, § 106(d) (2014) ("STELAR").

¹⁷ 47 C.F.R § 629. Although proponents of the Device Proposal insist that Section 629 is intended solely to promote those businesses that make traditional set-top boxes available at retail, AT&T has correctly noted that "the present degree of navigation device competition far exceeds what the drafters of Section 629 could have possibly imagined, and without any need for market intervention by the Commission." AT&T Comments at 11-12. If, however, the Commission chooses to adopt the narrow view of CVCC that Section 629 refers solely to traditional set-top boxes, exempting providers who, collectively, serve less than seven percent of subscribers nationwide still offers retail devices manufacturers ample opportunity to stimulate the market for their products.

The Commission Must Consider Relief for Smaller MVPDs from Unduly Burdensome Technical Mandates

Regulatory requirements based on the Device Proposal would impose extraordinary burdens on *all* MVPDs, but those burdens undeniably would fall the hardest on smaller MVPDs, smaller cable systems, and those systems relying on the oldest technologies. It is important for the Commission to take account of today's market realities:

- There are 843 smaller cable operators with fewer than one million subscribers each. In total, these operators serve roughly seven million MVPD subscribers. 80 percent of these operators serve fewer than 5,000 subscribers and 397 serve fewer than 1,000 subscribers.¹⁸
- A single cable operator may distribute its service across multiple cable systems. In some cases, each system may serve as few as a couple dozen subscribers.
- Most systems operated by smaller MVPDs are not IPTV or digital-only, but instead are hybrid analog/digital or analog-only systems. 92 percent of smaller cable operators do not offer any IPTV service.¹⁹

It is also important for the Commission to recognize that the economics of multichannel video service for small scale-MVPDs have been getting worse. Across the industry, the underlying cost of programming acquisition has in recent years been rising much more rapidly than the prices MVPDs can charge subscribers for video service, hitting smaller-scale MVPDs, who usually pay higher video programming fees than other MVPDs, especially hard. If current trends for traditional multichannel video service continue, free cash flow for MVPDs will decline, reducing the overall amount of capital available for investment in new broadband deployment, or even for sustaining continued operation.²⁰

As history has shown, regulatory burdens associated with technical requirements impose additional costs that small MVPDs are ill-equipped to bear. This was demonstrated in 2007 when the Commission adopted the now-repealed set-top box integration ban without providing an exemption for small operators. The ban required cable operators to purchase set-top boxes with separable security that cost significantly more than devices previously purchased, causing particular harm to smaller MVPDs, who generally pay higher fees for equipment than larger MVPDs. As a result, small cable operators were forced to charge higher set-top box rental fees than they would otherwise have preferred, set-top and available resources were diverted away from system upgrades (from analog to digital and from hybrid analog-digital to digital-only), which in turn slowed (and in some cases halted altogether) the deployment of advanced services to their customers.²¹ These higher costs were likely a contributing factor to the

¹⁸ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association, Exhibit B, Connecting Hometown America, How Small Operators of ACA are Having a Big Impact, a paper by American Cable Association, Research and Analysis by Cartesian at 3 (filed July 17, 2014).

¹⁹ *Id.* at 4.

²⁰ These trends have already affected more than 1,000 cable systems that have shut down over the past five years as reported in the latest Video Competition report.

²¹ Although the Commission did not provide initial relief, over time it recognized the need to ease the burden for smaller operators. For example, the Commission granted operators permission to deploy HD Digital Terminal Adapters without CableCARDS. *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a*

closure of more than 1,000 smaller cable systems over the past five years, as reported in the latest Video Competition report. It is vital that the Commission remember this lesson as it considers imposing new set-top box mandates on MVPDs.

Moreover, the Commission need not subject small and medium-sized operators and systems to any new rules in order to create a more robust marketplace for retail devices. Competition within the MVPD marketplaces is already robust, providing every subscriber in the nation would still have the opportunity to use a retail device by subscribing to one of at least MVPD services that compete with smaller operators (AT&T/DirecTV and DISH).²² The ninety percent of television households that are also served by at least one of the eight largest cable operators would have access to at least three MVPDs that would be subject to the rules. As described above, small and medium-sized operators have already proven themselves to be market leaders in providing competitive choices in navigation devices. Many customers whose providers might be exempt under ACA's proposal already have access to advanced TiVo set-top boxes that integrate their cable programming with OTT content, including Netflix. If the Commission's experiment with new set-top box regulations does lead to significant consumer demand for retail devices, small and medium-sized operators will undoubtedly embrace that approach on a voluntary basis in order to attract and retain subscribers.

Finally, as explained below, there is ample precedent providing an exemption for smaller cable operators and systems, as the Commission has increasingly recognized the unique challenges that technical mandates, even those that do not require use of a specific technology, present for smaller operators. It should continue that trend in this proceeding.

The Commission Should Tentatively Conclude that Analog-Only Systems Are Exempt from Device Proposal-Based Requirements. At a minimum, the Commission should include in the NPRM a tentative conclusion that any rules based on the Device Proposal are technically infeasible for analog-only systems to implement and that these systems should be permanently exempt for all Device Proposal-based requirements. Alternatively, it should tentatively conclude that any new regulations, if adopted, should not apply to analog-only systems. Unsurprisingly, proponents of the Device Proposal have not suggested any methodologies by which MVPDs that operate analog-only systems can use a virtual headend to deliver their entire service to subscribers. Further, operators of analog-only systems lack research and

division of Time Warner Cable, Inc., Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System; Cox Communications, Inc., Fairfax County, Virginia Cable System; Cable One, Inc.'s Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14756 (2010). The Commission also granted a petition by ACE for permission for operators to deploy a limited number of lower cost, refurbished integrated set-top boxes, citing the fact that it would be particularly helpful for smaller operators. Adams Cable Equipment, Inc.; Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Memorandum Opinion and Order, 28 FCC Rcd 11011 (2013).

²² As the Commission has recognized nearly 100 percent MVPDs face competition from at least two other MVPDs. *Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, ¶ 4 (2015). To the extent that the Commission does not grant an exemption for only a subset of operators with fewer than 1,000,000 subscribers, it should consider whether these operators should receive a delayed compliance deadline. *See Accessibility of User Interfaces, and Video Programming Guides and Menus; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, ¶ 114 (2013) ("User Interface Order"). *See also Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fourth Report and Order, 23 FCC Rcd 13618 (2008) ("HD Small Cable Exemption Order") (granting initial compliance delays).

development budgets to develop the in-home gateway equipment necessary to implement the requirements under discussion, and because there are so few analog-only systems currently in operation, vendors that develop and offer equipment to larger providers are unlikely to create solutions that will work specifically with analog-only systems. Therefore, MVPDs that operate analog-only systems would be forced to upgrade their systems to digital in order to comply with such requirements. Not only would this contravene Congress' direction in STELAR to avoid unduly burdensome proposals, in the face of what would likely be the prohibitive cost of such upgrade, nearly all of these operators would simply shut down their analog-only systems, eliminating a low-cost video service option that roughly 100,000 households currently depend on. Nothing would be gained, but much would be lost.

The Commission has previously recognized that analog-only systems face particular challenges in implementing technical mandates, and has consequently exempted these systems from such requirements. For example, the Commission initially delayed compliance, extended that delay, and ultimately exempted all-analog systems entirely from the obligation to offer any broadcast signals to their subscribers in HD.²³ The Media Bureau also recognized the unique challenges faced by analog-only systems lacking the equipment to pass through a secondary audio program with respect to implementing its emergency information video description rules and provided appropriate relief.²⁴ Given that requiring analog-only systems to comply with requirements based on the Device Proposal would result in hundreds of system closures, the Commission should tentatively conclude in the NPRM that analog-only systems should be completely and permanently exempted from such requirements.

The Commission Should Seek Comment on an Exemption for MVPDs with One Million or Fewer Subscribers. In addition, the Commission should seek comment on adopting a permanent exemption, or adopting rules that do not apply to MVPDs with one million or fewer subscribers from any new requirements based on the Device Proposal. A one million subscriber threshold is appropriate because it would still allow 100 percent of all MVPD subscribers to enjoy whatever benefits the proposal might provide with at least two different MVPDs in the market, and 93 percent of all MVPD subscribers with at least three different MVPDs in the market,²⁵ while protecting small and medium-sized operators from the burdens of the requirements.

²³ See HD Small Cable Exemption Order; *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, 27 FCC Rcd 6529 (2012); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Sixth Report and Order, 30 FCC Rcd 6653 (2015).

²⁴ *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications Act and Video Accessibility Act of 2010*, Memorandum Opinion and Order, 30 FCC Rcd 5012 (2015) (granting with conditions ACA's request for waiver of the audible emergency information rule compliance deadline for certain analog-only cable systems in recognition of the facts that "analog-only cable systems may face unique difficulties" in complying with technical mandates, and s "are generally very small in size, often serve rural areas, and generally lack resources and utilize outdated technologies;" such systems "frequently provide a value-priced option for subscribers that only need very basic service;" that the per-subscriber cost of upgrading their systems "might cause them to shut down").

²⁵ According to SNL Kagan, there were over 100 million MSO subscribers in 2015. Tony Lenoir, Analyst, *U.S. Multichannel Subscriber Update and the Rise of Broadband-Only Homes*, SNL KAGAN (Apr. 2015). All MVPDs with over 1 million subscribers serve a total of 93.4 million subscribers. See Mike Farrell, *Eat or Be Eaten: Consolidation Creates A Top-Heavy List of 25 Largest MVPDs*, MULTICHANNEL NEWS (Aug. 17, 2015), available at http://www.multichannel.com/sites/default/files/public/pdf/Coverstory_8_17_15_0.pdf.

The Commission has taken a variety of approaches when granting relief from technical mandates to small and medium-sized MVPDs. In doing so, the Commission typically uses a number of factors to determine the exact scope of the exemption, including the actual burden of implementing the technical mandate, the number of subscribers served by an operator or system, the available channel capacity of a system, the mandates' public interest benefits, and the likelihood that future market changes might create greater incentives for smaller operators to voluntarily adopt new technologies.

For example, in its *Basic Tier Encryption Report and Order* the Commission refrained from requiring that smaller MVPDs deliver their programming streams in a certain way so that IP-based third-party devices would work. The Commission recognized that the largest operators had a significant advantage in scale over even medium-sized operators, and considered it sufficient to accept a commitment from only the six largest NCTA member companies to implement a supplemental solution to provide basic service tier access to third-party provided IP-enabled devices.²⁶ In doing so, the Commission rejected arguments that this approach would not be sufficient to support the operation of IP-enabled devices, noting that the six largest operators served eighty-six percent of all cable subscribers and so a commitment from those six operators would "achieve[] the objectives of 624A of the Act – *i.e.*, to ensure compatibility between cable service and consumer electronics equipment."²⁷ The same logic should apply in this case: to the extent that any requirements are necessary "to assure commercial availability" of retail navigation devices, the Commission can achieve its objective even if smaller operators that serve less than seven percent of all MVPD subscribers are not subject to those requirements. Further, if this experiment is ultimately successful in the marketplace, smaller MVPDs will have significant incentives to provide that functionality as well to their consumers in order to stay competitive.

The Commission has, in other cases, taken a "wait and see" approach to imposing technical mandates on smaller providers. For example, in the User Interface Order, the Commission recognized that the burdens of compliance with technical mandates related to the accessibility of video service may be significant for smaller MVPDs, and adopted relief accordingly. In doing so the Commission reasoned first, that "most consumers should have access to satellite systems," second, that smaller MVPDs have a difficult time with new technical mandates because "large cable operators [] generally dictate equipment features to manufacturers,"²⁸ and third, that "small systems have a smaller customer base across which to spread costs."²⁹ As a result, the Commission opted to delay the compliance deadline for MVPDs with 400,000 or fewer subscribers and to systems with 20,000 or fewer subscribers that are not associated with an MVPD with an operator serving more than 10 percent of all MVPD subscribers, and, most importantly, committed to undertaking a review of the marketplace prior to that deadline to determine whether market conditions to determine whether that deadline should be extended further.

²⁶ *Basic Service Tier Encryption, Report and Order*, 27 FCC Rcd 12786, ¶ 20 (2012). The Commission refrained from granting additional relief from compliance obligations to smaller cable operators on the grounds that the decision to encrypt the basis tier was voluntary, not mandatory, so that an operator wishing to avoid the added costs of the conditions the Commission placed on operators who encrypt could be avoided if the operator determined they outweighed the benefits of encryption. With respect to the Device Proposal, in contrast, the need to re-architect a cable system would be a direct result of a technical mandate rather than an operator's own cost-benefit analysis. The Commission specifically rejected arguments that this approach would not be sufficient to support the operation of IP-enabled devices, noting that the six largest operators served 86 percent of all cable subscribers. *Id.*, ¶ 21.

²⁷ *Id.*

²⁸ User Interface Order, ¶ 114.

²⁹ *Id.* (citations omitted).

Similarly, while the Commission did not exempt MVPDs with fewer than 400,000 subscribers from basic commercial loudness mandates adopted pursuant to the CALM Act, it did refrain from requiring them to purchase specific equipment necessary to conduct spot testing unless and until it finds a pattern and practice of complaints concerning commercial loudness.³⁰ Both of these approaches allow the Commission to observe the impact of its regulations on the broader marketplace prior to imposing significant costs on those operators that can least afford.

Given the experimental nature of the approach under consideration and the numerous unanswered technical and operational questions that remain open, the Commission should seek comment on exempting operators with fewer than one million subscribers. As explained above, if the experiment does result in greater consumer demand for retail devices, small and medium-sized operators will voluntarily embrace the same standards that are used by MVPDs that are subject to the rules, or else run the risk of falling behind their competitors.

There is No Statutory Bar to Providing Relief to Smaller MVPDs

Finally, there is no statutory bar to exempting smaller providers from the requirements of the Chairman's proposal, adopting rules that do not apply to a class of MVPDs, or providing delayed compliance deadlines. To the extent that the Commission has legal authority under Section 629 to adopt the proposed rules,³¹ the Commission also has the discretion to limit the scope of their application. In Section 629, Congress directed the Commission to take steps "to assure the commercial availability, to consumers of [MVPDs] ... of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming[.]" This provision places no specific regulatory burdens on MVPDs, nor does it direct the Commission to do so. It also does not require regulations adopted pursuant to Section 629 to apply to all MVPDs,³² or require the Commission to ensure that commercially available equipment that becomes available as a result of regulations adopted pursuant to Section 629 to work with all MVPDs in the market. The statute's only requirement is that the regulations "assure the commercial availability" of retail devices. Exempting smaller operators from any new set-top box requirements, adopting rules that do not apply this class of operators, or providing delayed compliance deadlines, will in no way impede that statutory objective.³³

³⁰ *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, ¶ 37 (2011).

³¹ ACA takes no position at this time on the extent of the Commission's authority under Section 629 or any other provision of the Act to impose the rules contemplated in this rulemaking on MVPDs.

³² In 1998, the Commission adopted rules to address the mandated expressed in Section 629 to ensure the commercial availability of "navigation devices," but did not apply these rules to direct broadcast satellite providers, evidencing the Commission's discretion to adopt rules that do not apply to all types of MVPDs or all MVPDs of the same type. See *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775 (1998).

³³ It is also worth noting that Section 629, unlike some other statutory provisions that contain limitations on the size of provider that the Commission can exempt, contains no such express limitations on the Commission's exemption authority. For example, Section 205(b) of the CVAA limits the Commission's authority to create exemptions for providers from accessible user guide requirements to those serving 20,000 or fewer subscribers. See *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751, § 205(b)(2) (2010) (as codified in various sections of 47 U.S.C.); *User Interface Order*, ¶ 118.

As discussed above, an exemption for analog-only systems and for MVPDs serving 1 million or fewer subscribers from any new requirements based on the Device Proposal would still allow 100 percent of all MVPD subscribers to enjoy whatever benefits the proposal might provide, because all consumers would have the ability to purchase whatever commercially available equipment that becomes available and use it with at least AT&T/DirecTV and DISH Network because neither would qualify for the exemption. In 93 percent of the country, consumers could connect these new devices to at least three different MVPDs. Consumers served by exempt systems that wish to purchase their own navigation devices would have the option of switching to one of two or more competitive MVPD options in every market. Moreover, an addressable market that large is more than adequate to spur the commercial availability of devices built to the standards the Commission contemplates will be developed to enable MVPDs to provide the three streams of information MVPDs will be required to pass to creators of competitive devices or apps reference in the Chairman's Proposal, thus fulfilling the Commission's duty under Section 629.

Further, in the Satellite Television Extension and Localism Act Reauthorization Act of 2014 ("STELAR"), which directed the Commission to establish the DSTAC, Congress specified that the group's recommendations concerning "performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigations devices."³⁴ It is undeniable that the burdens associated with the proposal under discussion will fall most heavily on smaller MVPDs, suggesting that the exemptions described above would comport well with Congress' objectives in both Section 629 and STELAR.

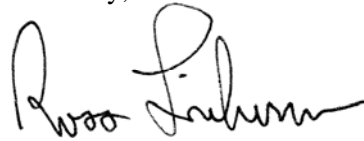
* * *

³⁴ STELAR, § 106(d).

For these reasons, ACA believes that the Commission should: (1) adopt a tentative conclusion that analog-only systems should be exempt from any new set-top box requirements, and (2) seek comment on an exemption for MVPDs with fewer than one million subscribers, which would serve the public interest by ensuring that the cost of MVPD service does not dramatically and unnecessarily increase, as it most certainly would if small and medium-sized MVPDs are forced to take the difficult and costly steps necessary meet the demands of the Chairman's proposal.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross J. Lieberman". The signature is fluid and cursive, with a large initial "R" and "L".

Ross J. Lieberman

cc: Robin Colwell
Jessica Almond
Gigi Sohn
Louisa Terrell
Matthew Berry
Bernie Archbold
Holly Saurer
Marc Paul