

Summary

"In this proceeding the Commission proposes to "open" the market for multichannel video programming distributor ("MVPD") set-top box video interfaces. We believe that the Commission's proposed rules fail to take account of the fundamental economic realities that govern the creation of content and its distribution, fail to properly respect copyright and contractual rights, and constitute an inappropriate, to say nothing of unwise, exercise of the Commission's authority under Section 629.

With this NPRM the Commission undertakes an intervention into a market that is robust, competitive, and scarcely in need of regulatory assistance. And Chairman Wheeler is well aware of this reality:

"American consumers enjoy unprecedented choice in how they view entertainment, news and sports programming. You can pretty much watch what you want, where you want, when you want."

Not only is the market robust, but it is rooted in a complicated set of business negotiations (most notably between programmers and distributors) that contain an enormous number of moving parts.

"Content providers negotiate with MVPDs along many dimensions, including the presentation of content in terms of adjacencies; how a content producer's brand will be treated; how and when content can be commercialized with advertised; limitations on the use of content as part of a content producer's larger set of business model innovations; and the legal and regulatory obligations of the content producers themselves, including "self-regulatory initiatives such as the Better Business Bureau's Children's Advertising Review Unit ("CARU") and Children's Food and Beverage Advertising Initiative ("CFBAI"), and contractual agreements with writers', directors', and/or actors' guilds."

And not only are the contracts themselves extremely complex, but the various players in content and distribution markets are interrelated in complex and subtle ways. The notion that the FCC could focus in isolation even on something as seemingly incidental as set-top boxes without unanticipated and far-reaching ramifications throughout the eco-system is misguided.

On the one hand, the Commission's proposed rules seem to dramatically underappreciate and insufficiently assess this underlying complexity, thereby misconstruing the likely effects of the regulation and threatening the investment and innovation that have produced this "Golden Age" of television and home video.⁶ On the other hand, if it does proceed with such rules anyway, the Commission should, and perhaps must under the APA and relevant

judicial decisions like *Michigan v. EPA*,⁷ take much greater care to identify and evaluate the broad consequences—that is to say the costs and benefits—of its rules than it appears to have so far done in this NPRM...”