U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

June 6, 2016

VIA ELECTRONIC SUBMISSION

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

Re: *Ex Parte* Letter; Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42.

Dear Ms. Dortch:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) respectfully submits this *ex parte* letter to the Federal Communications Commission (FCC) regarding the above-referenced proceeding. After conducting outreach with small business stakeholders and reviewing the comments filed with the FCC on their behalf, our office has concerns that the FCC's proposed rules will be disproportionately and significantly burdensome for small multi-channel video programming distributors (MVPDs). Given the impact of the proposed rules on small MVPDs, and the fact that the FCC can achieve its regulatory goals without their compliance, we believe the FCC should exempt small MVPDs when it finalizes its new rules under Section 629 of the Communications Act.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), and the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (RFA) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.[1] Congress crafted the RFA to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with federal laws.[2] In addition, the RFA's purpose is

[1] Pub. No. 96-354, 94 Stat. 1164 (1980).
[2] Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

to address the adverse effect that "differences in the scale and resources of regulated entities" has had on competition in the marketplace.[3]

Background

The FCC recently published a *Notice of Proposed Rulemaking* (NPRM) seeking comment relating to the Commission's obligation under Section 629 of the Communications Act to assure a commercial market for equipment that can access multichannel video programming and other services offered over multichannel video programming systems. The NPRM tentatively concluded that new rules governing multichannel video programming distributors' (MVPDs') provision of content are needed to further the goals of Section 629. The FCC's proposal would require MVPDs to supply certain programming information in formats that conform to specifications set by open standards bodies. These specifications do not yet exist in some cases, and the FCC has not proposed to incorporate any standards by reference at this time.

The FCC published an Initial Regulatory Flexibility Analysis (IRFA) with its NPRM; however, the FCC did not attempt to quantify or describe the economic impact that its proposed regulations might have on small entities. Small MVPDs and their representatives have expressed concerns to the FCC and Advocacy regarding the disproportionate impact that the proposed regulations will have on their operations.[4] These stakeholders, as well as public interest groups and technology companies that strongly support the proposed rules, have also asked the FCC to adopt an exemption for small MVPDs from the regulations.[5]

Advocacy's Comments

The FCC's proposal would have significantly disproportionate economic impacts on small MVPDs if finalized, and the RFA requires that the FCC analyze feasible alternatives that will mitigate the impact of its rules on small entities. Advocacy encourages the FCC to properly analyze the impact of its proposed rules on small entities, as well as significant alternatives that would reduce impacts to small entities, including the exemption for small MVPDs that Advocacy supports.

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[3] Pub. L 96-354, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

[4] *See e.g.* Comments of the American Cable Association (ACA Comments), MB Docket No. 16-42 (April 22, 2016) 1-2 ("…smaller MVPDs have limited capital which they seek to spend on maintaining and upgrading their networks to serve subscribers. Second, smaller MVPDs are making little, if any, profit – and many are losing money – in providing video programming service as they face escalating fees from content providers (in excess of 10 percent annually) and are unable to pass these along to subscribers, who can increasingly obtain content from over-the-top providers or through some other means....Third, smaller MVPDs spend significant portions of the capital available to them to respond to the demands of residential and business consumers for greater broadband performance, and this service has become their anchor offering. Fourth, smaller MVPDs do not have dedicated regulatory personnel and so have less time to follow, understand, and implement Commission decisions").

[5] *See* ACA Comments. *See also* Comments of Public Knowledge (PK Comments) MB Docket No. 16-42, CS Docket No. 97-80 (April 22, 2016) at 55-56. *See also* Reply Comments of TiVo Inc. (TiVo Reply Comments) MB Docket No. 16-42, CS Docket No. 97-80 (May 23, 2016) ("Smaller MVPDs have a completely different economics than large MVPDs. They pay significantly more for programming, equipment and other operating elements, all resulting in little if any profit margin. Indeed, for certain smaller MVPDs, video is a loss leader for their broadband product. Smaller MVPDs need not be included for the FCC's proposed regulations to be successfully implemented").

The FCC has not adequately attempted to quantify or describe the economic impact of its proposed rules on small entities; however, stakeholders have filed comments expressing concerns about the economic impact of the proposal on small MVPDs.[6] Section 607 of the RFA requires agencies to develop a quantitative analysis of the effects of a rule and its alternatives using available data.[7] If quantification is not practicable or reliable, agencies may provide general descriptive statements regarding the rule's effects.[8] In its RFA analysis, the FCC simply describes compliance requirements, without making any attempt to explain what kinds of costs small MVPDs might incur in order to comply, and without any discussion of how those costs might be disproportionately burdensome for small entities.[9] Several commenters have stated that the rule will disproportionately affect small MVPDs, and even cause large numbers of MVPDs to exit the video industry.[10] These commenters believe that the availability and cost of technological solutions necessary to bring MVPDs into compliance with the proposed rules are prohibitive for small MVPDs. To comply with the RFA, the FCC must acknowledge and discuss the small business impacts described by commenters when it publishes the Final Regulatory Flexibility Analysis (FRFA), as required under Section 604 of the RFA.[11]

The FCC's FRFA should also reflect the extent to which the FCC has mitigated the impacts discussed above by adopting additional regulatory flexibilities for small MVPDs. Section 604 of the RFA requires that the FCC provide an analysis of significant alternatives to the proposed rule.[12] This analysis should include "a description of the steps the FCC has taken to minimize impacts to small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."[13] Several commenters and small business stakeholders have asked the FCC to exempt small MVPDs from its final regulations.[14] In its FRFA, the FCC must analyze this alternative and explain its reasons for adopting or rejecting it.

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6 *See* Reply Comments of the American Cable Association (ACA Reply Comments), MB Docket No. 16-42, CS Docket No. 97-80, at 8-13 (May 23, 2016) ("…based on just the estimated costs of components that ACA has identified, as set forth in Section B below, implementing the Commission's proposal would cost no less than $1.1 million per cable system. This cost does not include the costs associated with supplying gateway devices – approximately $350 for each household -- to subscribers adopting a third party navigation device. Based on these costs, ACA estimates that the Commission's mandate would force hundreds of smaller MVPDs, covering at least 40 states, to go out of business or cease video operations").

7 5 U.S.C. § 607

8 *Id.*

9 *In the Matter of Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42, *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC (NPRM) (rel. Feb. 18, 2016) at 55.

10 *Supra* note 6. See *also* Reply Comments of Small Business and Entrepreneurship Council (SBEC Reply Comments), MB Docket No. 16-42 (May 23, 2016) ("Even those small businesses that do manage to continue operations would be faced with the difficult choice of forgoing investments in future innovations and broadband expansion, passing along significant costs to customers, or both. These outcomes would have a negative ripple effect on consumers in rural communities who rely on services provided by smaller operators to stay connected to the rest of the country").

11 5 U.S.C. § 604

12 *Id.*

13 *Id.*

14 *Supra* note 4.

Advocacy believes that the FCC has the legal authority and factual basis to exempt small MVPDs from its proposal, and encourages the FCC to adopt such an exemption. Because of their relatively low revenues and market share, small MVPDs will face significantly steeper compliance burdens than larger MVPDs under the proposed rules. Stakeholders, including technology companies that support the rule, have expressed concerns that the proposed rules will have a negative impact on the ability of small MVPDs to enter, compete, and maintain their existing presence in the video market—all of which is ultimately harmful to consumers. As these commenters suggest, the FCC can meet its stated goal of assuring a "competitive market for competitive Navigation Devices"[15] without subjecting small MVPDs to the proposed requirements. The vast majority of the video market is served by larger MVPDs that can afford to comply with the rule. Large entities' compliance will ensure an adequate and competitive market for devices. Small MVPDs will ultimately adopt technology solutions developed by larger MVPDs as it becomes cost-effective to do so. Given the disparities between large and small MVPDs, the FCC should exempt small MVPDs from its final regulations. The FCC can choose to revisit the issue in the future to determine whether small MVPD compliance has become more feasible.

Conclusion

The Office of Advocacy appreciates this opportunity to forward the concern of small businesses and advocate for regulatory flexibility on their behalf. The FCC must analyze the impact of its proposed regulations on small entities, as well as alternatives that would mitigate those impacts. Given the significant and disproportionate impact that the FCC's proposals would have on small MVPDs, Advocacy encourages the FCC to adopt an exemption for small MVPDs when it issues final regulations. Please do not hesitate to contact me or my staff should you require further information.

Sincerely,

/s/
Darryl L. DePriest
Chief Counsel for Advocacy

/s/
Jamie Belcore Saloom
Assistant Chief Counsel

cc: Hon. Howard Shelanski
Office of Information and Regulatory Affairs

15 *Supra* note 9.