



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 16-42, CS Docket No. 97-80; FCC 20-124; FRS 17231]

Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) eliminates outdated CableCARD support and reporting requirements and terminates related dockets.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Brendan Murray, Brendan.Murray@fcc.gov, of the Media Bureau, (202) 418-1573.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 20-124, adopted and released on September 4, 2020. The full text of this document is available for public inspection via ECFS (<http://www.fcc.gov/cgb/ecfs/>). To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

In this Report and Order, we terminate a proceeding in which we sought comment on the adoption of new regulations for “navigation devices”—devices that consumers use to access multichannel video programming and other services offered over multichannel video programming networks— and eliminate outdated CableCARD support and reporting

requirements. Four years ago, the Commission published a notice of proposed rulemaking (NPRM) (81 FR 14033, March 16, 2016) that proposed a complex framework of regulations which would have required multichannel video programming distributors (MVPDs) to provide unbundled flows of programming information to third-party manufacturers, retailers, and software developers to enable them to create navigation devices in an attempt to assure a commercial market for navigation devices.¹ However, the record submitted in response to the NPRM raises serious and significant questions about whether the proposed rules would adequately protect multichannel video programming content. Moreover, the record fails to convince us that the proposal is necessary to accomplish its intended goal, and we conclude that the proposed regulations do not reflect the past four years of substantial marketplace changes in the delivery and consumption of video programming. Separately, we eliminate the CableCARD consumer support rules and the requirement that large cable operators report to the Commission about support and deployment of CableCARD modules because these regulations no longer serve a useful purpose and thus are no longer necessary.

Section 629 of the Communications Act of 1934, as amended (Act), directs the Commission to adopt regulations to assure the commercial availability of devices that consumers use to access multichannel video programming and other services offered over multichannel video programming networks. Section 629 further directs that the Commission shall not prescribe such regulations “which would jeopardize the security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.” Through a series of rulemakings, the Commission has adopted regulations intended to assure this commercial availability of devices. The bellwether requirement of these rulemakings, which led to the “CableCARD” standard, allows viewers to receive digital cable services by attaching their

¹ *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42 and CS Docket No. 97-80, Notice of Proposed Rulemaking & Memorandum Opinion and Order, 31 FCC Rcd 1544, 1558-82, paras. 25-78 (2016).

own equipment directly to the cable network. In 2005, to better monitor support for the then-nascent CableCARD technology, the Commission required the six largest cable operators to submit status reports to the Commission every 90 days that detail how these cable operators met “their obligations to deploy and support CableCARD.” (70 FR 36048, June 22, 2005).² In 2010, the Commission adopted regulations to further ensure cable operator support for retail CableCARD devices. (76 FR 40263, July 8, 2011).³ In 2016, the Commission’s NPRM proposed a new and complicated regulatory regime for navigation devices.⁴

We conclude that further Commission intervention in the navigation device marketplace is not necessary at this time. We have serious and unresolved concerns about the security of multichannel video programming and copyright licensing under the proposed rules. Moreover, we conclude that the record raises other substantial doubts about the wisdom and necessity of the complex regulations proposed in the NPRM. On the other hand, we find that the CableCARD consumer support rules no longer serve a useful purpose following the D.C. Circuit’s 2013 decision in *Echostar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (*Echostar*), and accordingly eliminate these rules. We also conclude that the 15-year-old CableCARD reporting requirement is no longer necessary.

Closing the 2016 Proceeding. In 2016, the Commission sought comment on the need for new rules to implement section 629. We conclude that we need not adopt any new rules at this time. Although the NPRM tentatively concluded that the Commission “should adopt new regulations to further section 629,”⁵ there is substantial evidence in the record challenging that tentative conclusion. The consequences of adopting the proposed regulations could be

² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, 6814-15, para. 39 (2005) (2005 Report and Order).

³ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80 and PP Docket No. 00-67, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657 (Third Plug and Play Report and Order), *recon. granted in part sua sponte*, Order on Reconsideration, 26 FCC Rcd 791 (2011).

⁴ NPRM, 31 FCC Rcd at 1558-82, paras. 25-78.

⁵ NPRM, 31 FCC Rcd at 1551, para. 13.

substantial and detrimental to consumers, copyright holders, and MVPDs, and thus we are reluctant to adopt these additional regulations to implement section 629, quite apart from the substantial doubts in the record as to whether they will help assure a commercial market for devices that consumers can use to access multichannel video programming. In addition, the Commission last sought comment on these issues more than four years ago, and since then important changes have occurred in the video programming marketplace and delivery of those services via applications that run on subscriber-owned devices. Moreover, we note that since the record closed, the Government Accountability Office (GAO) concluded that the NPRM did not sufficiently analyze “the extent to which Internet-based providers affect consumer choice for video programming and what that change means for the importance of consumer choice for devices in the context of the Act.”⁶

Section 629(b) of the Act prohibits the Commission from adopting regulations under section 629 that would jeopardize the security of multichannel video programming. Several programmers, MVPDs, and the U.S. Copyright Office express serious concerns that the proposed rules and the applications-based alternative would jeopardize the security of programming and licensing contracts between programmers and MVPDs. Although we recognize that some commenters claim that the proposed rules would not interfere with programmers’ copyright interests, we have ongoing concerns about the security risks and licensing issues the proposed rules could introduce. For instance, many commenters argue that the proposed rules would undermine anti-piracy protections, reducing the incentives of parties to invest in new content. In addition, the Commission’s proposal could force MVPDs, programmers, and copyright holders to violate the copyright licensing contract obligations to which they agreed, leading to costly and time-consuming litigation. Further, the record also raises licensing concerns with respect to the applications-based alternative, as commenters contend that this approach might lead to content to

⁶ U.S. Gov’t Accountability Office, GAO-17-785, FCC Should Conduct Additional Analysis to Evaluate Need for Set-Top Box Regulation, at 22 (2017) (GAO Report).

be distributed on terms to which programmers have not agreed and object to Commission involvement in the licensing process. Accordingly, in light of section 629(b) and the impact the proposed rules could have on the video programming marketplace generally, including the availability and quality of programming, we find that we should not adopt the proposed rules or the applications-based alternative.

We also note that it appears the policy goals that the Commission set forth in the NPRM are well underway to being met without additional Government regulation. The Commission stated in the 2016 NPRM that it wanted to “let MVPD subscribers watch what they pay for wherever they want, however they want, and whenever they want, and pay less money to do so, making it as easy to buy an innovative means of accessing multichannel video programming (such as an app, smart TV, or set-top box) as it is to buy a cell phone or TV.”⁷ And according to NCTA--The Internet & Television Association (NCTA), the nine largest MVPDs “support apps that can be used to watch their content on hundreds of millions of consumer-owned devices, such as smart TVs; tablets; streaming sticks and devices such as Apple TV, Roku, Google Chromecast, and Amazon Fire; smartphones; game consoles; and personal computers.”⁸ Therefore, without Commission intervention, many MVPD subscribers can watch the services that they pay for wherever, however, and whenever they want on an array of innovative devices via many different applications. Given the current state of the video programming marketplace, we are concerned that adopting the proposals set forth in the NPRM would risk stifling innovation and deterring investment in this sector and, thus, could ultimately detract from Congress’s overarching goal for a fully competitive market for navigation devices.

The 2017 GAO Report recommended that we “analyze how the ongoing evolution in the video programming market affects competition in the related market for set-top boxes and devices, including how it affects the extent to which consumer choice for devices to access

⁷ NPRM, 31 FCC Rcd at 1551, para. 11.

⁸ NCTA Comments, GN Docket No. 20-60, at 21-22.

MVPD content remains a relevant aspect of the competitive environment”⁹ as part of our competition reports. We will continue to monitor the navigation marketplace to determine whether further regulation is necessary to assure a commercial market for navigation devices, consistent with the requirements of section 629.

CableCARD Support and Reporting Requirements. We are eliminating the CableCARD consumer support rules. We conclude that these rules no longer serve a useful purpose following the D.C. Circuit’s 2013 decision in *Echostar*. We acknowledge that the NPRM tentatively concluded that the CableCARD support rules continue to serve a useful purpose and should be retained. Nevertheless, after further consideration, we are unpersuaded by assertions that these rules remain necessary to ensure that consumers have retail alternatives to leased set-top boxes and that cable operators continue to support retail CableCARD devices during their expected lifetime. The CableCARD support rules were intended to help “assure the development of a retail market for devices that can navigate cable services” by “improv[ing] consumers’ experience with retail navigation devices ... and CableCARDs.” (76 FR 40263, July 8, 2011).¹⁰ However, during the ten years in which these rules have been in effect, consumer demand for retail CableCARD devices never developed as anticipated. Indeed, in the four years since the NPRM in this proceeding was issued, consumer demand for retail CableCARD devices has steadily declined. We agree with NCTA that this decline in demand is partially attributable to the growing popularity of MVPD applications. MVPD applications are ubiquitous today, and consumers have fully embraced the use of such applications to access video programming. We note that the CableCARD support rules were intended to help advance the market for retail navigation devices “[u]ntil a successor technology is actually available.” (76 FR 40265, July 8, 2011).¹¹ MVPD applications are a new technology that is providing consumers an alternative to leased set-top boxes. Given that consumers have demonstrated a clear preference in recent years

⁹ GAO Report at 22-23.

¹⁰ Third Plug and Play Order, 25 FCC Rcd at 14658, para. 1.

¹¹ Third Plug and Play Order, 25 FCC Rcd at 14662, para. 8.

for applications over retail CableCARD devices, we expect that demand for retail CableCARD devices will only continue to fall. Accordingly, we conclude that retention of the CableCARD support rules is not necessary to ensure that consumers have retail alternatives to leased set-top boxes.

We also find that retention of the CableCARD support rules is unnecessary to ensure that cable operators continue to support retail CableCARD devices during their expected lifetime. As NCTA points out, cable operators are still required to provide separable security, and industry complies with this obligation through the use of CableCARDS, even after Echostar eliminated the mandate that the CableCARD standard be used by all MVPDs in implementing the separation of security requirement. NCTA also asserts that since there are tens of millions of CableCARDS currently deployed in cable operator-provided devices, “[c]able operators have strong business incentives to ensure that CableCARDS continue to function properly.”¹² We agree and further find that competitive market forces should incentivize cable operators to continue to support retail CableCARD devices. Given the continuing decline in cable subscribership and the vast array of streaming service options available to consumers today, we expect that cable operators will make every effort to retain subscribers by continuing to support retail CableCARD devices, even in the absence of the CableCARD support rules. We further note that one of the major concerns leading to the adoption of the CableCARD support rules was the cable industry’s poor performance with regard to subscriber premise installations of CableCARDS in retail devices. Cable subscribers have come to expect self-installation options and we think it is exceedingly unlikely that cable operators will revert to requiring professional installations for retail CableCARD devices, particularly in light of issues raised by the current coronavirus pandemic.

Finally, we conclude that it is appropriate to eliminate the requirement that the largest cable operators report about CableCARD support and deployment on a quarterly basis. Much of

¹² NCTA Comments at 173.

the information required to be included in the reports is either repetitious or has little relevance today, and the reports filed in recent years reveal few problems with CableCARD deployment and the processes for resolving CableCARD implementation problems are generally unchanged from report to report. Thus, we see little practical utility in continuing to require the cable operators to report this information. We accordingly conclude that the quarterly status reports are no longer necessary to ensure that cable operators support retail CableCARD devices and we eliminate them.

Paperwork Reduction Act. This document does not contain any proposed, new, or modified information collection subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

Final Regulatory Flexibility Act Analysis. The Report and Order interprets Section 629 of the Communications Act, 47 U.S.C. 549, and terminates the proceedings CS Docket No. 97-80 Commercial Availability of Navigation Devices and MB Docket No. 16-42 Expanding Consumers’ Video Navigation Choices because of serious and significant questions about whether the proposed rules would protect programming outweigh the speculative benefits of proposed set-top box rules. The Report and Order also eliminates the CableCARD consumer support rules, concluding that these rules no longer serve a useful purpose following the D.C. Circuit’s 2013 decision in *Echostar*. Finally, the Report and Order eliminates the requirement that the largest cable operators submit status reports to the Commission every 90 days that detail show the cable operators meet “their obligations to deploy and support CableCARDs.” (70 FR 36048, June 22, 2005).¹³

Several commenters raised concerns that the proposed rules would be disproportionately and significantly burdensome on small MVPDs and asked the Commission to exempt small

¹³ 2005 Report and Order, 20 FCC Rcd at 6814-15, para. 39.

MVPDs from the final regulations. The Report and Order concludes, however, that the proposed rules should not be adopted and that the proceeding should be terminated. Accordingly, there is no need to address these comments.

Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel filed comments expressing concern that “that the FCC’s proposed rules will be disproportionately and significantly burdensome for small [MVPDs]” and urging the FCC to “exempt small MVPDs when it finalizes its new rules.”¹⁴ The Report and Order concludes that the proposed rules should not be adopted and that the proceeding should be terminated. Accordingly, there is no need to respond to the comments of the Chief Counsel.

The rule changes adopted herein will directly affect small cable television operators by eliminating the regulatory CableCARD support requirements.

Ordering Clauses. For the reasons stated above, IT IS ORDERED that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 629 of the Communications Act of 1934, as amended, 47 U.S.C 154(i), 154(j), 303(r), and 549 that this Report and Order IS ADOPTED. IT IS FURTHER ORDERED that the Commission’s rules ARE AMENDED as set forth below. IT IS FURTHER ORDERED should no petitions for reconsideration or petitions for judicial review be timely filed, CS Docket No. 97-80 and MB Docket No. 16-42 SHALL BE TERMINATED and the dockets CLOSED. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

¹⁴ Letter from Darryl L. DePriest, Chief Counsel for Advocacy, U.S. Small Business Administration, Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, at 1 (June 6, 2016).

Administrative practice and procedure, Cable television, Communications, Equal employment opportunity, Internet, Political candidates, Reporting and recordkeeping requirements, Telecommunications.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Revise § 76.1205 to read as follows:

§ 76.1205 Availability of interface information.

Technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems shall be provided by the system operator upon request in a timely manner.

[FR Doc. 2020-25143 Filed: 12/3/2020 8:45 am; Publication Date: 12/4/2020]