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FCC Proposes New Rules for Competitive Set Top Boxes

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On February 18, the FCC adopted a notice of proposed rulemaking that proposes new rules intended to open up the market for devices and software used to transmit video programming from multichannel video providers ("MVPDs") to their customers. This rulemaking is a direct result of direction from Congress in the STELA Reauthorization Act of 2014 to consider how the FCC could adopt rules governing downloadable security systems to implement Section 629 of the Communications Act, which was enacted more than 20 years ago. It grows out of a report to the FCC by the Downloadable Security Technology Advisory Committee (known as "DSTAC") in August, 2015.

The proposal has 6 key elements:

1. MVPDs would be required to make three information flows available to providers of competitive customer equipment using a published, transparent format the meets specifications approved by an open standards body. The three information flows are:
    - Service discovery data, or information about the programming available to the customer;
    - Entitlement data, or information about what a device can do with content provided by the MVPD, such as whether it can be recorded; and
    - Content delivery data, or the programming itself and information necessary to make the programming available to people with disabilities, such as closed captioning.
2. Each MVPD would be required to support at least one content protection system for its programming that can be licensed to competitive device providers on reasonable and nondiscriminatory terms by an organization not affiliated with MVPDs. The information flows would be available only to competitive equipment that complied with copying and recording limits under such content protection systems.
3. MVPDs that offer applications to permit customers to see content on the customers' own devices also must allow unaffiliated companies to use the information flows for that purpose.
4. Competitive providers would be required to comply with emergency alert, customer privacy and children's advertising rules via a certification process.
5. Channel placement and treatment of advertising would not be subject to FCC regulation, but instead would be governed by "marketplace forces."
6. There would be exemptions from the rule for analog-only cable systems and potentially for small video providers.

Comments and reply comments on the proposed rules are due 30 and 60 days, respectively, after the notice is published in the Federal Register.

The need for the rules

The central reason that the FCC is proposing new rules is that it has concluded there is no competitive market for set-top boxes and other navigation devices. The notice cites a study conducted by Senators Markey and Blumenthal that found that 99 percent of all MVPD customers rent their set-top boxes from their pay-TV providers, and also notes that nearly all of the apps used to obtain access to MVPD programming come from the providers as well. The notice also determined that devices like AppleTV, Roku and gaming consoles are almost never used to obtain access to multichannel video programming, and so those devices do not currently create any competitive pressure on set-top box rentals from MVPDs.

The notice also posits that a competitive market for navigation devices would create additional opportunities for programmers offering "minority and special interest programming" because it would be "easier for consumers to find and watch" that programming.

Information flows

The information flows are data provided by the MVPD to a competitive navigation device that will be used by the device to perform its functions. They can be thought of as addressing the most important functions of a navigation device.

Service discovery data includes all of the information necessary for the device to tell the customer what programming is available. This requirement covers both linear and on-demand programming. This includes channel listings, program titles, rating and parental control information, program start and stop times (or, for on-demand programming, program length), and the Entertainment Identifier Register ID, which is a unique identifier for movie and television assets.

Entitlement data is information about what content services the customer can use and the specific rights the customer has to use those services. This will include, at least, (1) copy control limits; (2) whether the content can be passed through outputs to other devices (and, if it can, information about what can be passed through, such as resolution, and any additional copy protection); (3) information about the ability to stream the content outside the customer's premises; (4) the resolutions available on various devices; and (5) any information on when recordings expire.

Content delivery data is the combination of the content covered by the rules and any information necessary to make the content accessible to people with disabilities under the FCC's rules. The notice defines the covered content (known as "navigable services" under the proposed rules) as any video programming, including linear and on-demand programming, in every format and resolution that the MVPD sends to its devices and applications, along with all EAS messages passed to customers. The FCC has proposed to exclude other applications that MVPDs might provide, such as headlines, weather, sports scores and social networking, from this definition, but has asked for comments on that proposal.

Under the proposed rules, MVPDs would be required to provide the information flows "in standardized formats" adopted through open standards bodies. The FCC would not choose the formats, and more than one format could be available if more than one standard is adopted. The FCC would define an open standards body as one that is open to consumer electronics companies, MVPDs, content companies, application developers and consumer interest organizations; has a fair balance within its membership; has a published set of procedures and a published appeals process; and sets standards via consensus.

Security

The FCC rejected two approaches to security included in the DSTAC report in light of concerns that they were not sufficiently flexible and could give MVPDs too much control over the ability of companies to make and sell navigation devices. Instead, the notice proposes to adopt requirements for security without specifying any particular mechanism or approach. Under the proposed rules, an MVPD must deploy a content protection system that supports the three information flows, that is "licensable on reasonable and non-discriminatory terms," and that is not controlled by MVPDs. This means, among other things, that a content protection system developed and controlled by CableLabs would not meet the requirements of the rules. A security system that meets these requirements would be known as a compliant security system. An MVPD may use multiple content security systems – for instance, it could have one for its own set-top boxes and one to be used by other navigation device providers – so long as at least one is a compliant security system.

Compliance with the security requirements will be verified through a certification process. The notice proposes following the approach used for CableCARD, in which one or more qualified test laboratories provide certification.

Parity

The notice proposes rules to ensure that MVPDs provide what it describes as "parity of access to content to all Navigation Devices." These rules are intended to ensure that providers of competitive navigation devices will have exactly the same flexibility as MVPDs in deploying devices – specifically including applications – without affecting the ability of MVPDs to offer what the FCC refers to as "subsets of content" in different circumstances.

The proposed parity rules have three elements:

- If an MVPD makes programming available to devices other than its own equipment, such as to a tablet or a smart TV application, it must make the information flows available to competitive navigation devices and applications without requiring MVPD-specific equipment. This requirement would apply, for instance, if the MVPD has a smart phone application that allows customers to watch its programming.
- At least one compliant security system used by the MVPD must enable access to all programming (including all entitlement data) that it carries on its own equipment, without discriminating between devices controlled by the MVPD and devices that are not. Under this rule, all resolutions and formats made available via navigation devices the MVPD provides to its customers would have to be available to third party navigation device providers. However, MVPDs would be able to impose limitations based on the size of the device used to view the content.
- If the MVPD supports an application to provide access to its programming on a device, it must support at least one compliant security system that would allow third party navigation device providers to support an application on the same type of device. For instance, if the MVPD application worked on a Galaxy 6+ Edge, its compliant security system would have to allow third party navigation device providers to design apps that worked on a Galaxy 6+ Edge.

Additional requirements for providers of navigation devices

In addition to certification of compliance with security requirements, the notice proposes that navigation devices be certified to comply with specific public interest requirements. First, the devices would be required to comply with privacy obligations applicable to MVPDs, specifically the requirement to maintain privacy of customers' viewing habits. Second, the devices would be required to pass through EAS messages directed to the MVPD's subscribers. Third, makers of navigation devices would be required to comply with the limits on advertising during children's programming.

The FCC asked for comment on the certification process, which could be separate from the certification process for compliant security systems.

Other issues

The notice also addresses a series of other issues related to the proposal:

- *Licensing:* The notice indicates that, based on the CableCARD experience, the FCC has found no evidence that regulations are needed to ensure that competitive navigation solutions will not disrupt what the FCC calls "elements of service presentation," such as channel lineups, replace or alter advertising, or otherwise manipulate content inappropriately. It asks for comment on these issues and on whether copyright law is sufficient to provide necessary protection.
- *Billing Transparency:* The FCC asks whether it should require MVPDs to unbundle the charges for video service and navigation devices on consumer bills, so that consumers know how much they are paying in rental fees for any equipment they obtain from an MVPD. It also asks whether it should adopt rules to prevent cross-subsidies between video services and equipment and, if so, how it should address the issue.
- *CableCARD Rules:* The notice asks whether the remaining CableCARD rules, which address the support to be provided by MVPDs to customers who use third-party navigation devices, in place. The FCC proposes to retain those rules.
- *Integration Ban:* As required by Congress, the FCC eliminated the portion of its rules that banned integration of security protections into navigation devices.

Applicability of the rules

The rules would apply to cable operators, DBS providers and any other MVPDs, with only limited exceptions. The most significant exception proposed by the FCC is for analog-only cable systems, which also were exempted from the CableCARD rules. The FCC also asked for comment on additional exemptions for small MVPDs, including MVPDs with fewer than one million customers.

The rules would affect both set-top boxes and applications used to provide access to MVPD programming. The notice suggests that self-certification may be an option, but also suggests that the FCC may keep a registry of the certificates.

While the proposed rules would require MVPDs to make the information flows available to third parties providing navigation devices, the MVPDs themselves would not be required to use the information flows or to modify existing navigation devices in their networks or applications they provide to customers in any way. In this way, the proposed rules are unlike the CableCARD rules, which essentially required a card in every navigation device. However, cable operators have expressed concern that, in practice, the proposed rules could require some intermediate device in every customer location.

The FCC has proposed to require compliance with the rules within two years of when they are adopted. This proposal is based, in part, on an assumption that the industry could adopt standards for the information flows within a year of the time rules are in place.

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