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FCC Unveils New Apps-Based Approach in Set-Top Box Proceeding

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In a marked shift from its initial proposal, FCC Chairman Tom Wheeler announced on September 8 that later this month the FCC would be considering new rules to require cable operators to create apps that could be used on competitive television set-top boxes, permitting customers to purchase their own boxes and avoid renting from their cable and satellite TV companies.

The FCC's original proposal, released in February, would have required (1) cable operators and other multi-channel video programming distributors ("MVPDs") to make various data flows available to providers of competitive equipment (including information about the programming available to the customer, information about how the customer can use the content provided by the MVPD, and the content itself); (2) MVPDs to support content protection systems developed by third party organizations; and (3) competitive equipment providers to comply with various FCC requirements for public safety, privacy, and children's advertising. The February proposal would have left channel placement and advertising to be governed by "marketplace forces."

The new proposal, based loosely on a compromise suggested by the cable industry in June, abandons the "data flow" approach. Instead, the rules would require MVPDs to develop apps that can be deployed on consumer equipment, such as Roku, Amazon Fire TV Stick, AppleTV, and Chromecast. Under the proposed rules:

- MVPDs will be required to offer free apps to allow their customers to have access to video content on competitive devices and other platforms.
- Apps will support "widely deployed" platforms.
- Apps will permit integrated search across all of the content available on a platform or device, and must not require the pay-TV provider's content to be promoted ahead of other programming.
- Apps will be required to make it as easy to access programming as it would be on a standard set-top box.
- Existing content distribution agreements will be unaffected.
- Apps will be required to comply with existing FCC rules governing emergency alerts, privacy, and accessibility for people with disabilities.
- Large providers will get two years for implementation; medium-sized providers will get four years; and operators with fewer than 400,000 subscribers will be exempt. The announcement did not define the line between large and medium-sized providers.

One of the most contentious elements of the new proposal also calls for development of a "standard license" that will govern how an app can be placed on a device or platform. One express purpose of the license is to protect the rights of programmers and other content owners, while facilitating access to the programming apps. It appears that this license will be negotiated among MVPDs, programmers and device and platform developers, with the FCC acting "as a backstop" to ensure that the standard license will not "harm the marketplace for competitive devices."

While this proposal signals an apparent shift towards the cable industry's compromise position, it does not mean that the cable industry or other interested parties agree with the proposal. Notably, MVPDs continue to support rules that require development only of HTML5 apps, rather than apps that support multiple platforms, and are opposed to the proposed "standard license," arguing that there are legal and practical constraints that make that approach impractical. Programmers also are concerned that the standard license or other requirements in the rules could have the effect of changing the terms of their agreements with MVPDs. Programmers have argued that the FCC lacks the power to establish what they describe as a "compulsory license" for third party use of their programming content.

Although there is strong Republican opposition to this proceeding and to adopting any rules (indeed, Commissioner O'Reilly described the proposal as appearing "to exist in a fantasy world"), it is likely that the

proposal or something close to it will be adopted at the FCC's September 29 public meeting. In particular, this approach addresses some of the concerns raised by Commissioner Rosenworcel when the FCC first opened the proceeding, and it is unlikely that Chairman Wheeler would have released it if he did not believe he had support of all the Democratic commissioners.

If adopted, the proposed rules will have no immediate effect, as MVPDs will not be required to offer an app for two years after the effective date. In addition, apps likely will not be available until the "standard license" negotiations are complete, which could delay implementation. The rules also likely would be challenged in court by programmers or MVPDs. Nevertheless, the new rules could result in significant changes in the consumer equipment marketplace, which to date has been relatively dormant, with nearly every MVPD subscriber using equipment obtained from the MVPD.

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