



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 14, 2016

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

Thank you very much for your letter requesting information about the Administration's role in the Federal Communications Commission's (FCC) current proceeding to update its rules implementing section 629 of the Communications Act. The goal of this rulemaking is to give American consumers real choices in how they enjoy the pay-television content to which they subscribe. More than 280,000 Americans have participated in this proceeding so far, including the Obama Administration and nearly 200 Members of Congress. I welcome this participation and believe it reflects the importance of this issue for American consumers.

Background on the FCC's Section 629 Proceeding

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content ("navigation devices"). On February 18, 2016, the FCC adopted a Notice of Proposed Rulemaking (NPRM) to update the rules implementing section 629.¹ The NPRM proposes allowing device manufacturers and other innovators to develop devices or software that will give pay-television subscribers new ways to access the content they have purchased. We took this action because we determined that in the current marketplace, consumers have few alternatives to leasing set-top boxes from their pay-television providers. A copy of this NPRM is attached to this letter.

The proceeding we initiated with the February 18 NPRM is a so-called "informal rulemaking" governed by section 553 of the Administrative Procedure Act (APA).² Also referred to as "notice-and-comment rulemaking," section 553 requires agencies to publish proposed rules in the Federal Register and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."³

¹ *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd 1544 (2016).

² 5 U.S.C. § 553(c).

³ *Id.*

In addition to comments, the FCC allows interested parties to make written or oral *ex parte* presentations to FCC decision makers.⁴ Under the FCC's rules, informal rulemakings governed by section 553 of the APA are considered "permit-but-disclose" proceedings.⁵ Interested parties may make *ex parte* presentations directed to the merits or outcome of a proposed rule, but these presentations must be publicly disclosed. In the case of presentations made by Members of Congress or their staffs or by an agency or branch of the Federal Government or its staff, *ex parte* presentations only need to be publicly disclosed if "they are of substantial significance and clearly intended to affect the ultimate decision."⁶

In accordance with the APA requirements discussed above, the FCC published a summary of the navigation devices NPRM in the Federal Register on March 16, 2016.⁷ A copy of this Federal Register notice is attached to this letter. One day later, on March 17, 2016, the FCC's Media Bureau announced April 22, 2016 as the deadline for comments in the proceeding, and May 23, 2016 as the deadline for reply comments.⁸ A copy of this announcement is attached to this letter. According to the FCC's Electronic Comment Filing System (ECFS), more than 281,000 comments and *ex parte* notices have been filed so far in the docket (MB Docket No. 16-42) of this proceeding. In addition to these submissions, the FCC has also received more than two dozen letters signed by almost 200 Members of Congress expressing their views about the FCC's proposed navigation device rule.

The Obama Administration's Participation in this Proceeding

One of the submissions the Commission received during the initial comment period was from Lawrence E. Strickling, Assistant Secretary for Communications and Information and head of the National Telecommunications and Information Administration (NTIA) at the Department of Commerce. One of Assistant Secretary Strickling's statutory duties is "to ensure that the views of the executive branch on telecommunications matters are effectively presented to the [Federal Communications] Commission."⁹

Writing pursuant to this authority on behalf of the Obama Administration, Assistant Secretary Strickling's April 14, 2016 comments expressed his support for the Commission's NPRM and observed that increasing consumer choice in the navigation device market "holds the promise not only of reducing costs to consumers, but also stimulating beneficial innovation in

⁴ The APA defines "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter." 5 U.S.C. § 551(14).

⁵ 47 CFR § 1.1206(a)(1).

⁶ 47 CFR § 1.1206(b)(3).

⁷ FCC, Expanding Consumers' Video Navigation Choices: Commercial Availability of Navigation Devices, 81 Fed. Reg. 14033 (Mar. 16, 2016).

⁸ *Media Bureau Announces Comment and Reply Deadlines for Video Navigation Choices NPRM and Establishes Schedule for Ex Parte Meetings*, Public Notice, 31 FCC Rcd 2072 (2016).

⁹ 47 U.S.C. § 902 (b)(J).

the features and functions of navigation devices.”¹⁰ A copy of these comments is attached to this letter. At about the same time, President Obama and two of his economic advisors also made public comments in support of the FCC’s proposed navigation device rule.¹¹

It is not unprecedented for Presidents and executive branch agencies to express their views about policy matters that are under consideration at the FCC. For example, President Ronald Reagan personally lobbied one of my predecessors on the FCC’s syndicated television rules, while President Bill Clinton repeatedly urged the FCC – through public statements and written submissions to the agency – to adopt rules requiring broadcasters to air a minimum of three hours of educational programming a week.¹²

Furthermore, a formal legal opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice has determined that such communications between White House officials and the FCC are permissible. In response to criticisms during the presidency of George H.W. Bush that interventions by senior executive branch officials in FCC proceedings were somehow improper, OLC examined and published a memorandum opinion on this issue on January 14, 1991.¹³ The opinion found that it was appropriate for senior White House officials to have *ex parte* communications with FCC officials during an ongoing rulemaking proceeding. Even though the FCC is an independent agency, the opinion found, the President (either directly or through staff) has the clear constitutional authority to inform the agency of his Administration’s policies.¹⁴ Citing the D.C. Circuit case, *Sierra Club v. Costle*,¹⁵ the memo concluded that “it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking.”¹⁶ These communications would need to be publicly disclosed if they met the “permit-but-disclose” criteria established in the FCC’s rules.¹⁷ A copy of this 1991 OLC opinion is attached to this letter.

Conclusion

¹⁰ U.S. Department of Commerce, Assistant Secretary for Communications and Information Comments, MB Docket No. 16-42 at 6 (Apr. 14, 2016).

¹¹ See e.g., Obama Presses for Open Market for Cable Set-Top Boxes, New York Times (Apr. 15, 2016); Jason Furman and Jeffrey Zients, Thinking Outside the Cable Box: How More Competition Gets You a Better Deal, White House Blog (Apr. 15, 2016), <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>.

¹² See e.g., Reagan Role in F.C.C. Case Assailed, New York Times (Feb. 14, 1984); President William Jefferson Clinton, Remarks at the Children’s Television Conference (July 29, 1996), <http://www.gpo.gov/fdsys/pkg/WCPD-1996-08-05/pdf/WCPD-1996-08-05-Pg1362.pdf>.

¹³ *Ex Parte Communications during FCC Rulemaking, Memorandum Opinion for the Deputy Counsel for the President*, 15 O.L.C. Op. 1.

¹⁴ *Id.* at 3, n. 2.

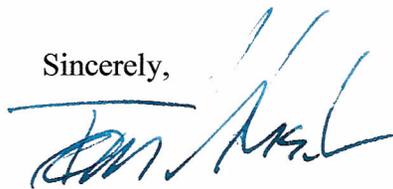
¹⁵ 657 F.2d 298 (D.C. Cir. 1981).

¹⁶ *Id.* at 3.

¹⁷ As discussed above, an executive branch *ex parte* presentation would need to be disclosed if it were “of substantial significance and clearly intended to affect the ultimate decision.”

The Obama Administration's recent contribution to the FCC's navigation device proceeding was appropriate and constructive and it does not alter the process the FCC will follow to develop and issue final rules. The APA and the Commission's rules require us to address the significant issues that commenters raise during the rulemaking and to clearly explain the rationale behind our decisions. The Commission and its staff are now fully engaged in examining the important policy issues that the stakeholders have brought to our attention in this proceeding. It is my hope that the rules we develop through this process will achieve the goal Congress set for us in section 629 of a navigation device market that promotes competition, innovation, and consumer choice.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", with a horizontal line drawn above it.

Tom Wheeler