COVINGTON

BEIJING BRUSSELS LONDON NEW YORK
SAN DIEGO SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

October 17, 2016

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 16-42, In re Expanding Consumers' Video Navigation Choices; CS Docket No. 97-80, Commercial Availability of Navigation Devices

Dear Ms. Dortch:

On October 13, 2016, representatives of Microsoft Corporation spoke with Commission staff by telephone to discuss the above-referenced proceedings. Attendees for the Commission consisted of Jessica Almond, Legal Advisor to Chairman Wheeler; Gigi Sohn, Counselor to Chairman Wheeler; and Scott Jordan, the Commission's Chief Technologist. Attendees for Microsoft consisted of Cari Benn, Senior Attorney; Paula Boyd, Director, Government and Regulatory Affairs; Gunnar Halley, Senior Attorney; and the undersigned, outside counsel.

The discussion focused on Chairman Wheeler's proposal to require "that the privacy protections that exist today for consumers of pay-TV providers will be preserved no matter what device is used."[1] Microsoft explained that in seeking to require that device manufacturers certify that they will comply with the privacy rules applicable to multichannel video programming distributors ("MVPDs") in order to make MVPD programming available on their devices, the Commission should make clear that any such compliance obligation should apply only to data that is derived exclusively from the MVPD data stream. Overbroad application of the certification requirement would interfere with the collection and use of data to support other legitimate functions of multi-use devices, including operations to maintain the security of the device.

Microsoft also expressed its understanding that the author of the certification requirement would be the FCC, that the enforcer of adherence to the certification would be the Federal Trade Commission ("FTC"); and that the certification requirement would govern the collection and use of personally identifiable information ("PII"). Microsoft explained that without further

[1] "Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice & Innovation in the Video Marketplace," released September 8, 2016, DOC-341152A1, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0908/DOC-341152A1.pdf.

clarification, there is a risk that the FTC could enforce the certification requirement differently than the FCC intends because the FCC and the FTC may afford different meanings to the term "personally identifiable information." As a result, enforcement actions by the FTC could accrue to the collection and use of certain data, such as dynamic IP addresses, that the FCC (or a court interpreting its rules) considers to be outside the scope of the certification.[2] To avoid this outcome, the FCC's rule should specify that certifications made under its rules will certify to the treatment of PII only as that term has been interpreted to date under Sections 551 and 338 of the Communications Act.

Microsoft also explained that if device manufacturers are required to comply with the annual notice requirement set forth in MVPD privacy rules, they should be permitted to satisfy this obligation by articulating their privacy practices in a privacy notice or policy that is posted online and made easily accessible to consumers. Unlike MVPDs and similarly situated service providers, device manufacturers do not issue monthly bills to consumers. This limits the ability of device manufacturers to routinely reach consumers in the way that MVPDs have done to satisfy this component of the rules. Requiring the mailing of an annual privacy notice to device owners would require device manufacturers to collect and obtain *more* personal information about device owners – specifically, name and address – than they typically do, which would be inconsistent with overarching data minimization principles. Given that device manufacturers do not have a monthly billing relationship with consumers like MVPDs, Microsoft explained that device manufacturers should have the option of satisfying any annual privacy notice rule by incorporating the same information required for such a notice in their online privacy statements. Microsoft believes this will provide consumers with meaningful and persistent notice about device manufacturer privacy practices.

Pursuant to the Commission's rules, a copy of this letter is being filed in the above-referenced docket. Please contact me if you have any questions.

Respectfully submitted,

/s/

Yaron Dori
Counsel for Microsoft

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[2] *Pruitt v. Comcast Cable Holdings, LLC*, 100 F. App'x 713, 716 (10th Cir. 2004) (concluding that a cable box, without the name, address, or any information about the subscriber using it, did not contain PII); *Klimas v. Comcast Cable Commc'ns, Inc.*, No. 02-CV072054-DT, 2003 WL 23472182, at *5 (E.D. Mich. July 1, 2003) (holding that a dynamic IP address does not constitute PII).

cc: Jessica Almond
Gigi Sohn
Scott Jordan