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EX PARTE VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, DC 20554

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

Dear Ms. Dortch:

AT&T submits this response to the *ex parte* and attachment filed by the Computer & Communications Industry Association ("CCIA") on August 18, 2016.[1] According to CCIA's filing, CCIA has now figured out that "there are ways that the proposals in the NPRM and the app proposal can coexist."[2] Such coexistence supposedly can occur because CCIA's proposal "remedies" all of the many fundamental copyright, security, privacy, and other flaws that programmers, MVPDs, virtually the entire creative community, over 200 bipartisan members of Congress, unions, scholars and academics, public interest groups, industry experts, the Copyright Office, and myriad others have identified with the Commission's original proposal in this proceeding. In fact, CCIA's proposal does not magically enable the "coexistence" that it purports to provide. Instead, it is a thinly veiled repackaging of the NPRM's unlawful, unwise, and unworkable unbundling proposal, and it replicates all the flaws inherent in that scheme. The new filing thus perpetuates CCIA's original and outrageous demand that the FCC facilitate its members' ability to poach, reshape, and monetize valuable video programming – for free and unbound by the very contractual/licensing terms that catalyzed creation of the programming in the first place.

Most egregiously, CCIA explicitly concedes that its supposed "solution," just like the NPRM proposal, would not honor all terms of programmers' copyright licenses: "Because third parties are not parties to and lack access to programmers' private contracts, there should be no expectation that competitive navigation devices can or should have to follow those restrictions." CCIA *ex parte* Attach. at 6. The Copyright Office has expressly rejected such a result as incompatible with the basic legal protections Congress has provided for copyright owners. The Copyright Office explained that copyright owners have the exclusive right to license and profit from the commercial exploitation of

[1] CCIA *ex parte* (Aug. 18, 2016), attaching CCIA, *'Unlock the Box': How To Address Opposition and Boost Competition* (Aug. 18, 2016) ("CCIA *ex parte* Attach.").
[2] CCIA *ex parte* at 2.

their works and that disregarding these license terms conflicts with those exclusive rights. *See*, *e.g.*, Copyright Office Letter at 7-11 (Aug. 3, 2016) ("it appears inevitable that many negotiated conditions under which copyright owners license their works to MVPDs will not be honored"). Remarkably, CCIA never even acknowledges the existence of the Copyright Office's letter, and thus ignores entirely its devastating critique of the very result that CCIA continues to promote. Notably, in stark contrast, the HTML5 apps alternative that MVPDs have advocated is designed to honor programmers' copyright licenses. It thus ensures, as three major programmers recently emphasized, that "all of programmers' valuable content would remain inside of, and under the control of, apps developed exclusively by [MVPDs] with whom programmers have a direct contractual relationship." 21st Century Fox/Disney/Time Warner *ex parte* at 1 (Aug. 22, 2016).

Additionally, as with the NPRM proposal, by requiring MVPDs to provide programming "streams" to the third-party navigation device, CCIA's proposal would prevent MVPDs from using their preferred content protection system. Indeed, CCIA is explicit (CCIA *ex parte* Attach. at 6) that the MVPD would not be able to "provid[e] a complete [security] application of its own" — that is, an application that is acceptable both to the MVPD and to the copyright holders whose content the MVPD has contracted to show — but would instead be required to accept other security systems that are not even specifically designed "to protect content." *Id.* As the Copyright Office has explained, such a scheme is contrary to the Digital Millennium Copyright Act (DMCA), which protects content owners' ability to choose how best to protect their content. Thus, just like the NPRM proposal, CCIA's approach would "inhibit the ability of MVPDs and content programmers to develop, improve, and customize technological solutions to protect their content in the digital marketplace. It would do so in part by requiring MVPDs to give third-party actors access to copyrighted video content and associated data according to one or more security standards prescribed by outside organizations rather than . . . through their preferred (and potentially more secure) protocols negotiated between copyright owners and the MVPDs." Copyright Office Letter at 16 (footnotes omitted). *See*, *e.g.*, AT&T Comments at 81-82 (Apr. 22, 2016) (discussing DMCA protections). The proposal is thus unlawful and contrary to sound anti-piracy policy for this reason as well.

More generally, because CCIA's approach explicitly relies (at 4-5) on "digital certificates" that would be provided by an unnamed "certificate authority," it undermines the "chain of security" on which copyright holders rely and invites more content piracy. As MVPDs have explained, such certificate-based solutions are deficient because, unlike existing contractual regimes, they do not allow MVPDs and programmers to respond to piracy threats without, at best, extensive delays. *See*, *e.g.*, NCTA Comments at 79-80 (Apr. 22, 2016); AT&T Comments at 27; AT&T Reply Comments at 25-27 (May 23, 2016); *see also* NCTA *ex parte* at 17-18 (Aug. 19, 2016) (a "paper promise to comply with applicable copyright, regulatory, and other requirements. . . does not assure copyright compliance") (footnote omitted). Beyond that, such a regime is unnecessary, because, as discussed further below, MVPDs have committed to make licensing a simple process. And it is unworkable, because no centralized body exists and because licensing is not done through a centralized pool of rights, but through the terms of bilateral agreements with MVPDs that are then "baked into" individual apps. *See*, *e.g.*, NCTA *ex parte* at 17-18.

Nor do such certificate regimes guarantee user privacy. To be sure, CCIA claims (*ex parte* Attach. at 5) that the "digital certificates" could require third-party devices to comply with their published privacy policies and that any violations would be subject to the enforcement authority of the FTC or state regulators. But even if that were practicable (and CCIA has provided no basis to believe that it would be), as the MVPDs have explained, this system would be no substitute for the

comprehensive privacy protections — including private rights of action — that Congress enacted to protect consumers of multichannel video programming services. *See* 47 U.S.C. §§ 338(i), 551; *see also* AT&T Comments at 48-53, 82-86; NCTA *ex parte* at 17-18.

In addition to all these other flaws, CCIA's approach would enable competitive user interfaces to misappropriate *MVPDs*' copyright interests in their own services. MVPDs make creative choices when selecting, arranging, and coordinating programming content — *i.e.*, the total "look and feel" of their service — and the Copyright Office has acknowledged that such creative choices may result in protectable copyrights. *See* Copyright Office Letter at 14-15. CCIA nevertheless proposes to allow device makers to replace the MVPDs' look and feel with their own user interface. *See* CCIA *ex parte* Attach. at 3 ("there is no real reason for an MVPD app to restrict a device to only using the MVPD's proprietary [user interface]"). Thus, under CCIA's approach, MVPDs, unlike Netflix, Hulu, Amazon, and other video competitors, could not even control the presentation of content in their own apps. As AT&T and others have long explained, and the Copyright Office letter reiterates, there is no legal or policy basis for such a result. *See*, *e.g.*, AT&T Comments at 12-13, 78-81; NCTA Comments at 60.

Furthermore, there is no reason to believe – and every reason to doubt – that CCIA's scheme could be executed within anything like the two-year timeline the Commission has proposed (and the HTML5 app proposal would meet). CCIA's entire proposal (at 3-4) rests on a "shared environment" with a "standardize[d] . . . protocol to share the information needed by the device manufacturer." As with the NPRM proposal, CCIA thus proposes to rely on an as-yet-to-be-developed protocol between the device manufacturer and the MVPD controlling authentication, entitlement, and content delivery. CCIA provides no details on what this "protocol" would be. As the MVPDs have explained, attempting to develop new standardized protocols for the NPRM proposal — or the equivalent "shared environment" — would be time consuming, contentious, and wasteful. It would thus take many years beyond the timetable suggested in the NPRM. *See*, *e.g.*, NCTA Comments at 123-26; AT&T Comments at 19-28; AT&T Reply Comments at 13-19. In this regard, it is notable that DLNA, the entity that was purportedly best suited to implement the Commission's original proposal, has conceded that it would take two to four years just to develop the necessary standards and certification program to support such an approach, which would not even be sufficient by themselves to complete implementation. *See* DLNA Comments at 2 (Apr. 22, 2016); AT&T Reply Comments at 14.

Indeed, as AT&T and others have explained in detail in this docket (and CCIA does not address), there are numerous insuperable technical obstacles and limitations inherent in implementing unbundling proposals of the type that CCIA advocates. *See*, *e.g.*, AT&T Comments Attach. 1 (Technical Decl. of Stephen P. Dulac); Comcast Comments Attach. A (Decl. of Tony G. Werner) (Apr. 22, 2016). Among other things, such proposals limit consumer choice between diverse and competing MVPD networks and lock in existing technologies in a manner that stifles technological evolution and innovation. *See*, *e.g.*, Dulac Declaration ¶¶ 16, 34-41; NCTA Comments at 106-18; NCTA *ex parte* at 21; NCTA/AT&T *ex parte* at 26-28 (July 21, 2016). In sum, "bolting on" such an unbundling approach to the MVPDs' apps proposal in the way that CCIA suggests fundamentally alters that alternative approach and re-introduces the numerous and fundamental flaws with the NPRM's unbundling approach.

CCIA's proposal not only fails to solve the problems identified with the NPRM's proposal, but it also badly mischaracterizes the HTML5 apps proposal. For example, CCIA suggests that the HTML5 apps approach would permit MVPDs to impose "contractual obligations" on third-party devices and "act against competitors' interests during any negotiations concerning the apps." CCIA *ex parte*

Attach. at 2 n.2. But each large MVPD has committed to develop a standard license that it will offer to each third-party navigation device manufacturer, and MVPDs could make these licenses available to manufacturers within the two-year window before launch. *See*, *e.g.*, NCTA *ex parte* at 17 (explaining that this commitment to develop a standard license means that "there will be no need for individual negotiations").

Exacerbating its mischaracterization, CCIA falsely asserts that the HTML5 apps proposal "only can be implemented in MVPD-controlled navigation devices." CCIA *ex parte* Attach. at 6. The truth is that, just as Roku and others have done, competitive device manufacturers would be free to develop and offer their own top-level user interface, their own integrated search, and even their own program guides if they wish. *See*, *e.g.*, NCTA *ex parte* at 22.

In a related vein, CCIA also suggests incorrectly that the HTML5 apps proposal will give MVPDs impermissibly "strict control on playback of content" and that the MVPDs' HTML5 apps may provide "limited channel lists." CCIA *ex parte* Attach. at 2, 4. But MVPDs have committed to provide consumers with all of the linear and VOD programming they have the right to distribute via apps and will endeavor to make the HTML5 app a set-top box substitute to the fullest extent allowed by agreements with content owners. *See* NCTA *ex parte* at 12 ("When we say in our proposal that we will provide content to the extent we have the rights to do so from programmers, that reflects MVPD[s'] respect for the content licensing process, and is not a hedge to shortchange the HTML5 app. In fact, MVPDs have every incentive to provide their fullest and best service to all devices, rights permitting, to compete with other video services on those platforms.").

Moreover, CCIA asserts that the HTML5 apps proposal's "support for content search from a third-party UI also is highly restrictive and ambiguous," CCIA *ex parte* Attach. at 2-3, but it ignores the crucial fact that MVPDs have firmly committed to support integrated search of MVPD content (linear and VOD). *See* NCTA *ex parte* at 6 ("The HTML5 apps proposal enables device manufacturers to use their search algorithms to retrieve search results from MVPDs. Device manufacturers could design search, for example, by title, actor, genre and more, limited only by the imagination of the device manufacturer, its willingness to license commercially-available metadata, and its investment in its own search algorithms.").

Finally, CCIA repeats the canard that the HTML5 apps proposal is intended as a "replacement for a 'native' application." CCIA *ex parte* Attach. at 3. To the contrary, MVPDs will continue to support and negotiate business-to-business agreements with third-party device manufacturers for the provision of native apps to access MVPD content. The HTML5 apps proposal augments, rather than supersedes, those existing efforts. In other words, the HTML5 apps approach ensures that third-party navigation devices have at least one guaranteed means of access to MVPD content through choosing to employ HTML5 apps. *See* NCTA *ex parte* at 10 ("The launch of HTML5 apps does nothing to eliminate native apps."). Incredibly, CCIA (CCIA *ex parte* Attach. at 3) belittles the worth of HTML5 apps, but CCIA's unsupported criticism pales in comparison to the mountain of record evidence that HTML5 apps are a widespread, effective, and increasingly popular means for streaming media. *See*, *e.g.*, NCTA *ex parte* at 4-6; NCTA/AT&T *ex parte* at 2-18.

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CCIA's filing does nothing more than slap a fresh coat of paint on the NPRM proposal and thus does nothing to solve the countless fatal flaws inherent in that proposal. Perhaps most shockingly, it deliberately ignores the lawful copyright rights of programmers and MVPDs as authoritatively

recognized by the Copyright Office. It also would weaken existing protections against piracy, in violation of both the DMCA and the best practices that MVPDs and programmers have already adopted to prevent such theft. In all events, CCIA's "shared environment" proposal, just like the NPRM's "specifications set by 'Open Standards Bodies,'" NPRM ¶ 41, does not yet exist, will likely take many years to develop, and will undermine innovation and consumer choice between diverse MVPDs. Beyond that, CCIA's proposal would deprive consumers of the specific privacy protections (including private rights of action) that Congress has granted them in this context.

At the end of the day, nothing in CCIA's filing changes the bottom line as to the appropriate result in this proceeding: the Commission should either stand aside and let the market continue its spectacular success in meeting consumer demand for competitive navigation devices; alternatively, if the Commission must regulate, MVPDs stand ready to continue working constructively with the Commission and all interested parties to fashion an HTML5-based apps approach that will promptly and efficiently accomplish our common goal of promoting navigation device competition.

Sincerely,

AT&T Services, Inc.

/s/ Alex Starr

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