



September 2, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Written Ex Parte Communication, MB Docket Nos. 16-42, 97-80

Dear Ms. Dortch:

Throughout the Commission's set-top box proceeding, the National Association of Broadcasters (NAB) has been constructively engaged in working with the Commission to achieve its stated goal of increasing competition in the set-top box marketplace while preserving broadcasters' rights of contract and copyright. The Commission has taken a number of positive steps since releasing its Notice of Proposed Rulemaking,¹ including shifting its focus to an applications-based approach. In pursuing an apps model, however, it is critical that neither the Commission nor any third party have the ability to rewrite any terms or conditions contained in programming contracts between broadcasters and multichannel video programming distributors (MVPDs). NAB cannot support any order where the Commission creates an ongoing ability to review or modify broadcaster contracts through the licensing process. Any such provision undermines the Commission's stated goals of protecting content, respecting copyright and avoiding third-party casualties in its quest to generate a competitive set-top box marketplace.

In its effort to promote a robust marketplace for navigation devices, the Commission is currently considering an applications-based approach that differs from what some large MVPDs have proposed.² Among other things, the approach would require the development of an app on a widely available platform that will enable consumer equipment manufacturers to build a device that runs the app.³ Device behavior and effectuation of contractual terms

¹ *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, CS Docket No. 97-80, FCC No. 16-18, (rel. Feb. 18, 2016) (*Notice*).

² Letter to Marlene H. Dortch, FCC Secretary, from Paul Glist of Davis Wright Tremaine LLP, counsel to the National Cable and Telecommunications Association (NCTA) *et al*, MB Docket No 16-42 (June 16, 2016).

³ NAB notes that some commenters have cited advantages to an apps-based approach that does not rely exclusively on HTML5. See, e.g., Letter to Marlene H. Dortch, FCC Secretary, from Trey Hanbury, Counsel to Roku, Inc., MB Docket No. 16-42 (Jul. 8, 2016) at 1 (requiring device manufacturers to develop products around the

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would be controlled by a licensing and certification regime that device manufacturers must meet in order to run the app. The licensing body overseeing this regime would be comprised of MVPDs and programmers.

Requiring an apps-based approach that does not rely exclusively on HTML5 may indeed be a reasonable step towards greater competition and innovation in navigating MVPD programming. However, as with its initial proposal, the Commission must ensure that the modified plan does not disrupt the protections programmers have in place through private agreements with MVPDs. While the Commission has asserted throughout this proceeding that it will protect content and preserve contracts,⁴ its updated proposal will unequivocally fail if there is a possibility of governmental or other third party intervention into the programming rights, obligations and restrictions negotiated by program suppliers, broadcasters and MVPDs.

The Commission must establish that neither it, nor any other party outside the licensing body, will have any role in the licensing or certification processes. The tasks of developing the terms and conditions of the license and determining whether an entity is compliant with the license must be at the exclusive discretion of the licensing body itself. Any other outcome would necessarily involve the Commission in the interpretation of contractual terms and determinations of which terms should or should not be honored by competing applications. This is unacceptable. Such involvement would needlessly “interfere with copyright owners’ rights to license their works as provided by copyright law” — the very concern cited by the United States Copyright Office with regard to the Commission’s initial plan.⁵ Any action that could “restrict [copyright owners’] ability to impose reasonable conditions on the use of [their] works through the private negotiations”⁶ represents an existential threat to our vibrant video programming marketplace. The only way for the Commission to resolve this issue is to unambiguously determine that neither it nor any entity other than MVPDs and programmers will be in a position to establish, interpret or modify agreement terms in any way during the licensing and certification process. Absent such an express determination, NAB cannot support the Commission’s proposal.

It is also critical that the Commission address the following matters in connection with its updated proposal:

- *Preserve Audience Measurement Tools.* As NAB discussed in our comments in this proceeding, it is essential that the Commission’s rules governing navigation devices

HTML5 standard would increase consumer prices and limit consumer choice; MVPDs should instead be required to “support all widely deployed and secure platforms”).

⁴ The Commission has emphasized since the outset of this proceeding its intent to safeguard the rights of programmers by preserving the contractual terms programmers negotiate with MVPDs, *Notice* at ¶ 17, by “honoring the sanctity of contract,” *FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation*, DOC-337449 (Jan. 27, 2016).

⁵ See Letter to Marlene H. Dortch, FCC Secretary, from Keith Kupferschmid, The Copyright Alliance, MB Docket No. 16-42 (Aug. 23, 2016), at attachment, Letter to United States Representatives Blackburn, Butterfield, Collins and Deutch from Maria A. Pallante, The Register of Copyrights of the United States of America (Aug. 3, 2016) (“Copyright Office Letter”).

⁶ *Id.*

and apps do not impede broadcasters' ability to measure their viewing audiences.⁷ The proposal currently being contemplated by the Commission differs substantially from what was originally proposed, and certainly none of the changes governing the navigation device marketplace being evaluated today could have been contemplated by broadcasters negotiating retransmission consent agreements currently in effect. In an environment driven by apps, merely passing through Nielsen watermarks and other encoding embedded in a program's audio feed *will be insufficient* to permit broadcasters to capture relevant audience information, and other Measurement Technology⁸ will have to be deployed by MVPDs. Accordingly, NAB urges the FCC to require MVPDs to incorporate Measurement Technology in all applications or other interfaces through which subscribers access on a device (e.g., computer, handheld, mobile or portable, connected device), multichannel video programming or on-demand content containing advertising, such that all transmissions of multichannel video programming accessed through such application or other interface are measurable by such Measurement Technology.

- *Prohibit Discrimination.* NAB understands that the Commission's current proposal contemplates that broadcasters'/programmers' own apps can be used in the context of its new regime, and that MVPDs must not discriminate against them. Such discrimination would include charging broadcasters and other programmers for inclusion of their apps. NAB agrees with this proposal and requests that the FCC state that MVPDs may not require any form of consideration in exchange for inclusion of broadcaster apps.
- *Ensure Broadcaster Presence on Licensing Body.* NAB urges the Commission to require that the "programmer" presence on the licensing body will include television broadcast licensees, given that broadcast station owners may have interests and concerns that are distinct from those of pure content companies that supply programming to MVPDs.
- *Exempt Only Analog Cable Systems.* The Commission has tentatively concluded that its modified rules will not apply to cable operators that continue to offer only analog service.⁹ The American Cable Association (ACA) has requested that any modified rules also exempt all operators that serve fewer than 1 million subscribers.¹⁰ ACA's request should be denied. ACA grossly overestimates the potential costs of implementing

⁷ NAB Comments, MB Docket No. 16-42 (April 22, 2016) at 17.

⁸ "Measurement Technology" means those measurement systems then-generally accepted within the advertising industry for the measurement of viewership of multichannel video programming or on-demand content containing advertising, including all commercially-released updates thereto. As of the effective date of these rules, Nielsen (e.g., DVR, DCR and DAR) and comScore (e.g., vCE) are Measurement Technologies. The Commission should specify that requests for changes to the list of Measurement Technologies may be made by any programmer and cannot be unreasonably denied.

⁹ Notice at ¶ 81.

¹⁰ See, e.g., Letter to Marlene H. Dortch, FCC Secretary, from Thomas Cohen of Kelley Drye & Warren LLP, counsel to ACA, MB Docket Nos. 16-42 and 97-80 (Aug. 25, 2016) (ACA Ex Parte).

either the Commission's original proposal or an apps-based approach.¹¹ The Commission should instead adopt its tentative conclusion to exempt only analog cable systems from its modified rules.

Please do not hesitate to contact me to discuss the modifications proposed above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

cc: Jessica Almond, Louisa Terrell, Gigi Sohn, Eric Feigenbaum, Scott Jordan, John Williams, Bill Lake, Michelle Carey, Mary Beth Murphy, Brendan Murray, Ikenna Ofobike

¹¹ For example, ACA claims that it will cost approximately \$2.1 million at each headend to transcode and encrypt national linear feeds in multiple formats. ACA Ex Parte at 8. There is no reason to believe that, if one does not already exist, a national service to perform this function will not arise, which would greatly reduce these costs. ACA also contends that systems will need to increase bandwidth on cable plants, split nodes, and transition to all-digital to support the increased demand for Internet Protocol (IP) capacity. *Id.* at 5-13. Taking all of these steps is likely unnecessary and definitely redundant. Moreover, the costs associated with such steps would be incurred only if the all-IP video product is widely popular, and thus should be considered costs of doing business.