AN ANALYSIS OF THE FCC CHAIRMAN'S NEW SET-TOP BOX PROPOSAL

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I. INTRODUCTION AND SUMMARY

In February 2016 the Commission adopted an NPRM that would have required MVPDs to grant manufacturers of navigation devices access to unbundled "information flows" from which the manufacturers could create their own unlicensed services, monetize private viewing data, and disregard a vast array of laws that protect copyright, competition, and consumers. The NPRM's proposal was roundly criticized by Democratic and Republican members of Congress, the creative community, privacy advocates, many of the participants in the video ecosystem, and even the United States Copyright Office, to name just a few. In the spirit of compromise, however, the MVPD industry came forward with an alternative based on the HTML5 standard that would provide consumers the choice of enjoying their MVPD's service on a wide variety of retail equipment using a widely-embraced global open standard, while still protecting intellectual property interests and consumer privacy.

On September 8, 2016, Chairman Wheeler publicly outlined a new proposal that turned the MVPDs' productive, consumer-friendly proposal on its head. Despite the ubiquitous presence of MVPD apps today—there are more than 460 million retail devices supporting MVPD apps—the Chairman now proposes a regime that would supplant the private, individually negotiated agreements for apps licensing that have worked phenomenally well with a government-created, centralized licensing entity, regulate copyright owners' licensing agreements, and sacrifice the very same consumer privacy rights as did the original unbundling proposal in the NPRM.

Based on the little that is known about the Chairman's new proposal, its unprecedented mandate will only succeed in destroying the existing, well-functioning private arrangements by which MVPD apps are provided to device makers, and it will do so without achieving any of the Chairman's purported goals. It would abrogate negotiated copyright licenses and app development agreements. It would raise costs to consumers by mandating that each MVPD build and maintain apps for an indeterminate number of retail platforms for an indefinite period of time, regardless of the nature of the device or platform. It would require MVPDs to release customers' personally identifiable information about their channel subscriptions, previous viewing patterns, and financial transactions to third-party device manufacturers that MVPDs have no ability to monitor and that are not subject to the statutory protections prescribed by Congress. It would regulate MVPD apps that are already established, including MVPDs' TV Everywhere apps that enable over-the-top, out-of-home viewing far beyond the aim of Section 629. It would create new barriers to innovation with mandatory standardization of highly-varied and dynamic networks, prior regulatory consents to innovation, and delays in launching any new set-top box feature unless it can be supported on an indeterminate number of retail apps. It would impose extraordinary prohibitions limiting how MVPDs (but *not* their competitors) may assemble and deliver their services and invite subscribers to explore their many viewing options. It would be unprecedented in scope and go far beyond the CableLabs' DFAST license for CableCARDs.

On top of all this, the Chairman's new proposal suffers from numerous legal flaws, each of which independently would render it invalid. The Commission has never provided notice or opportunity for comment on anything like this proposal. The three-page fact sheet that the Chairman rushed out is not action by the Commission, raises more questions than it answers, and makes promises—such as renewed assurances to protect the sanctity of copyright—that are, just as before, contradicted by the actual proposal.

The Chairman's new proposal also exceeds the Commission's statutory authority because it would empower the FCC to overturn a content provider's licensing decision to determine its distribution partners and methods, and effectively establish the Commission as a compulsory copyright-licensing authority. The Constitution, however, grants Congress the sole authority to engage in copyright policymaking, and neither Section 629 nor the Communications Act provides the Commission with the right to arrogate copyright licensing authority to itself. The proposal would also stretch Section 629 far beyond its express terms into a long arm controlling over-the-top, out-of-home TV Everywhere services, rather than focusing on the delivery of MVPD service to "converter boxes" and the other equipment to which Section 629 is directed.

The Chairman's new proposal also affirmatively violates at least four other provisions of the Communications Act. It regulates the "provision" and "content" of cable services without express statutory authority, in violation of Section 624(f). It jeopardizes the security of video programming and impedes MVPDs' theft-deterrence rights by requiring MVPDs to provide apps for all widely deployed platforms, apparently without regard to their security standards, in violation of Section 629(b). It relegates cable systems to *per se* common-carrier status in violation of Section 621(c). And it sacrifices consumer privacy rights by placing personal information in the hands of third parties that are not subject to the FCC's enforcement authority and by nullifying statutory consumer remedies in violation of Sections 631 and 338. The Chairman's new proposal also infringes on the rights of programmers and MVPDs to engage in and transmit speech under the protection of the First Amendment. Finally, the Chairman's new proposal is arbitrary and capricious, particularly, but not exclusively, for failing to be grounded in any cost-benefit analysis when Congress directed the Commission towards "*not unduly burdensome*" approaches when considering technologies under Section 629.

The Commission cannot avoid the serious flaws with the Chairman's new proposal simply by tweaking or removing only parts of it. For example, even if the licensing body requirements are retracted, as they certainly should be, unless the Commission also removes the entitlement data and parity mandates and the other flaws discussed herein, the new proposal cannot be sustained as a matter of law or sound public policy.

The Commission should reject the Chairman's new proposal. It is an unwise, ill-considered, and unlawful approach that will hurt consumers and accomplish none of Section 629's goals. The Commission should instead embrace the true apps approach advanced by the MVPD industry, an approach that fully satisfies the goals of Section 629 and will advance and preserve the golden age of television for the viewing public.

II. BACKGROUND

The Chairman's new proposal is being promoted as "apps-based." That choice of terminology is understandable, as programmers; economists; industry analysts; civil rights organizations; independent and diverse content creators; directors; writers; record labels; large and small MVPDs; members of Congress; legislators; and nationally-respected advocates of consumer privacy, disability access, diversity, energy efficiency, commerce, intellectual property, innovation, and labor have all urged the Commission to embrace today's apps-based video ecosystem.

But as details continue to surface, the Chairman's new proposal is something quite different than what it has been promoted to be.

- It would intrude directly on programmers' negotiated copyright licenses and programming agreements with their distributors, inserting the Commission as the arbiter of what terms may and may not apply to distribution of content on various platforms.

- It would abrogate negotiated app development and licensing agreements, and grant the Commission direct control over the terms of distribution of video over all apps on all platforms through a new centralized licensing authority.

- ➢ It would deprive programmers and MVPDs of the ability to directly and reliably enforce copyright, privacy, and other requirements, and put primary enforcement in the hands of an unauthorized licensing bureaucracy.

- ➢ It would regulate not just apps that serve as in-home set-top box replacements, but out-of-home TV Everywhere services distributed over the Internet.

- ➢ It would mandate that each MVPD build and maintain apps for an indefinite period of time and for an indeterminate number of retail platforms that have shipped a minimum number of units, regardless of the nature of the device or platform or whether they support open standards, thereby imposing a substantial and apparently perpetual burden on MVPDs with no mechanism to reimburse MVPDs even for cost, and thus inevitably leading to increased prices for all subscribers (not just those using apps).

- ➢ It would require MVPDs to provide an information flow of entitlement data to third-party device manufacturers, presenting the very same privacy issues and unbundling concerns that plagued the original proposal in the NPRM.

- ➢ It would create new barriers to innovation and defeat key attributes of apps by demanding that all MVPD networks conform their highly varied systems to new, to-be-invented open standards; by forbidding the introduction of new set-top box features unless they can be replicated on all apps platforms; and by requiring government pre-approval for any and every desired variation or amendment in licensing.

- ➢ It would impose extraordinary prohibitions limiting how MVPDs (but *not* their competitors) may assemble and deliver their services: effective bans on copyright licensing terms only if MVPDs request them; and requirements that MVPDs alone respond to subscriber searches in ways designed to discourage further exploration, that prohibit MVPDs from presenting their many clickable options for MVPD content offerings (e.g., startover, tune live, upgrade, look back, view on demand, electronic purchase, and more), and that effectively bypass the MVPD's user interface, thus undermining the MVPD's service as did the NPRM's original unbundling proposal.

Rather than striving for simplicity, the Chairman's new proposal would establish a complicated FCC regime to regulate copyright licensing arrangements, programming terms, and the distribution and use of apps that are already deployed and in wide market use. It would require MVPDs to seek waivers if they doubt the ability or intentions of any third-party consumer-electronics platform to support privacy, security, and the terms of programming agreements that are bilaterally negotiated between programmers and distributors. This is the polar opposite of the simple and effective apps-based solutions and straightforward app licensing processes that have emerged in the market and upon which the industry's HTML5 apps-based proposal, submitted months ago in this proceeding, is based. And, although we respond as best we can to the information of which we are aware (much of which has been conflicting and incomplete), at no time has the Commission provided sufficient notice for parties to learn many significant aspects of the Chairman's new proposal or address it adequately.

In short, the Chairman's proposed response to the widespread availability and popularity of MVPD apps is to interpose the Commission between business-to-business copyright licenses and app development agreements and, without any grant of authority from Congress, race to assume the role of national copyright licensing authority and innovation czar—all of which would harm consumers.

III. THE CHAIRMAN'S NEW PROPOSAL WOULD DEVASTATE THE VIDEO ECOSYSTEM AND DEFEAT KEY BENEFITS OF APPS.

A. The Chairman's New Proposal Will Not Accomplish Its Goals.

1. The Chairman's New Proposal Undermines the Current Copyright Licensing Regime Between Programmers and MVPDs.

The Chairman's new proposal would require MVPDs to deploy apps on "all widely deployed platforms"[1] but assures that "copyrights and licensing agreements will remain in place" and that "deals made between pay-TV providers and content providers are not affected by the proposal."[2] These are empty promises. Under the actual proposal (insofar as its terms are known), a new "non-discrimination" rule would empower the FCC to overturn any of the terms in licenses between programmers and MVPDs that may restrict consumers' access to and use of programming or MVPD services on such platforms. No longer would a content provider be able to determine its distribution partners and methods. The Chairman proposes to define some terms governing the availability of programming in the distribution licenses between programmers and MVPDs that would be reasonable "in most cases" and to deem other terms explicitly forbidden. The proposal would even revise the bilateral copyright license negotiation process, effectively prohibiting an MVPD from proposing any term to a programmer that might limit consumers' access to and use of MVPD services on a particular platform, regardless of whether the limit was essential to security, copyright, privacy, or any other interest. Nor is it clear how determinations as to whether these unnecessary regulatory requirements would be made or how they could be challenged in a way consistent with the fast-moving business environment in which programmers and MVPDs operate. The Chairman proposes to place authority to decide such issues in the hands of one of its Bureaus—an extraordinary grant of power for unelected staffers in an agency without copyright authority to change a copyright holder's constitutionally-protected rights. Simply put, under the Chairman's proposal, programming rights would be commoditized and ultimately controlled by the Commission, not by the copyright owner.

The Chairman's proposal disregards the realities of content licensing in the marketplace today. Programmers do not pool and offer uniform rights across all platforms and uses. They segment the market, license some rights to OVDs and other rights to MVPDs, and make refined judgments about how to distribute and authorize the use of their content. Through the ordinary operation of bilateral affiliate license negotiations, programmers and operators negotiate usage rights, security requirements, and renewal terms, giving both individual programmers and operators a means to address their particular concerns. There are hundreds of programmers, each with its own negotiated agreement with every MVPD. Those agreements differ in numerous and important respects. For example, the record explains that, in the context of the HTML5 app license, while there will likely be common licensing terms across MVPDs, there will also be some differences arising from content-specific requirements, among other reasons.[3] MVPD apps, and the licenses associated with particular device platforms, reflect these marketplace dynamics.

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1 *Fact Sheet: Chairman Wheeler's Proposal To Increase Consumer Choice & Innovation in the Video Marketplace* 2 (Sept. 8, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341152A1.pdf (hereinafter "Fact Sheet").

2 *Id.* at 2.

3 *See* Response to Questions About Open Standards HTML5 Apps-Based Approach, MB Docket No. 16-42, CS Docket No. 97-80, at 21 (July 22, 2016) ("NCTA and AT&T Response to Questions").

The Chairman's proposal would completely upend these settled licensing practices and arrogate to the Commission an entirely unauthorized role as national copyright licensor. This intervention is explicitly opposed jointly by the creative community and individually by many of the world's largest and most prominent networks and studios.[4]

2. A Standard License for Device-Maker Access to MVPD Apps Cannot Accommodate All Apps on All Platforms.

Under the standard licensing regime proposed by the Chairman, MVPDs would be compelled to write apps for any widely-deployed fixed or mobile consumer-electronics proprietary platform, with none of the protections built into the HTML5 platform, and without the private licensing process available to address such issues as copyright, security, privacy, and protection against device taxes and surcharges that has made such deployments possible. Instead, the Chairman's proposal would put the Commission at the center of future app licensing for "all widely deployed platforms."[5] The Commission would "recommend" that MVPDs create a licensing authority that includes programmer representatives to create a standard license for apps, and pair that "recommendation" with a threat: if the licensing authority fails to develop a standard license quickly for all MVPD apps and all device platforms, the Commission would mandate a licensing authority and standard license through rulemaking.

Based on the information now available, it is the Commission that would effectively set the terms of the device-maker license to use the MVPD app. It would define a set of baseline terms that must be included, and then have the Media Bureau review the draft license "recommended" by the licensing authority. The Media Bureau would then be empowered to put the recommended standard license out for public comment, change the license as it sees fit, and eliminate terms that it deems objectionable or contrary to the FCC's order. After the FCC adopts a standard license, the licensing authority would grant that FCC-approved standard license for all MVPD apps (HTML5, non-HTML5 and native) to any device platform that has shipped five million units in a year.

A "standard" license developed this way will not fit all MVPD apps on all platforms—today, or in the future.

One Standard License Does Not Assure Security. A standard license may be premised on certain security assumptions that will not necessarily be met by all well-selling devices. Even if a particular device included a supported digital rights management (DRM) system, the device's specific implementation of the DRM's tools may not meet the then-current security requirements of programmers and their distributors. Or a device may be designed to be "leaky" once content is decrypted. As the record demonstrates, a trustworthy apps platform must provide a "trusted application execution

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[4] Letter from Anne Lucey, CBS Corporation; Susan L. Fox, The Walt Disney Company; Kimberly Hulsey, Scripps Networks Interactive, Inc.; Kyle Dixon, Time Warner Inc.; Jared S. Sher, Twenty First Century Fox, Inc.; Keith R. Murphy, Viacom Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (September 15, 2016); Members of the Creative Community Reject the Revised FCC Set-top Box Proposal's Creativity, Innovation, and Job Chilling Intrusion into the Creative Economy (September 14, 2016) (joint statement on behalf of A2IM, American Federation of Musicians, the Copyright Alliance, CreativeFuture, Crossings TV, the Directors Guild of America (DGA), IATSE, Independent Film & Television Alliance, Motion Picture Association of America, Inc., National Music Publishers' Association, Recording Industry Association of America, SAG-AFTRA, Vme TV), available at https://copyrightalliance.org/2016/09/members_creative_community_reject_revised_fcc_set-top_box_proposals_creativity_innovation.

[5] Fact Sheet 2.

environment" in which service provider apps may run code and render service securely.[6] HTML5 is one such platform. It uses HTML5 playback to ensure that content is protected through HTML5 with premium media extensions. Other devices or platforms may not be so tightly integrated, and need different technical and licensing requirements to meet the same level of security. For example, it is our understanding that the Chairman proposes to define "platform" according to the operating system used by the device. But there is a wide variation in the operations and security of devices that happen to use Linux. By compelling the standardized licensing of apps to any device platform without accounting for these differences, the Chairman's proposal will inevitably lead to harmful mismatches between licenses and devices that reduce security and content protection.

One Standard License Does Not Assure Consumer Access to Content. As a second example, the Chairman's expectation that MVPD apps will be made available free of charge apparently is not limited to device manufacturers that, unlike Apple on its iOS platform today, agree not to demand a "tax," fee, or revenue share from the MVPD or the consumer. These fees make a difference. Indeed, Apple's fee structure has led a number of app developers for mobile iOS devices to avoid delivering transactional content that would incur a "tax," or to alternatively direct consumers to purchase content from another online location and then return to iOS for consumption (a route that Apple is now constraining). If the Chairman's proposal expects MVPDs to provide only programming for which there is no tax (such as basic linear programming in iOS), then it is creating a self-defeating situation: a consumer with an app that is supposed to work as a set-top box substitute either would not be able to purchase video-on-demand content (VOD) that would be available through the set-top box, or must do so on a different device entirely.

One Standard License Does Not Account for Hidden Royalties. As a third example, a standard license premised on certain intellectual property assumptions will not necessarily work with any well-selling platform using different patents. HTML5 is designed as a royalty-free open source platform, and the intellectual property provisions are crafted accordingly. But other platforms might have reserved intellectual property rights and then insist on collecting royalties for launching an app on its platform, even from an MVPD that provided its app on the platform only because it was forced to do so by Commission rule.[7]

One Standard License Does Not Account for the Variation in MVPD Apps Across Different Platforms. Other questions can be expected to arise frequently when preparing an MVPD app for a particular platform. Can the MVPD's app access device features unique to that platform to enable features unique to that MVPD's app? Is the app sufficiently mapped to the devices' remote control keys? Can the device assure sufficient display quality (e.g., a specified number of uninterrupted video frames per second) to deliver the MVPD's service?[8] Does the device support the secure payment path required by the service provider for purchasing its VOD? Does the device maintain a consumer-facing customer support department? What is the appropriate term for the agreement if the platform is new or the parties

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6 NCTA Comments, MB Docket No. 16-42, CS Docket No. 97-80 (April 22, 2016) at 68, 78 ("NCTA Comments"); NCTA Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80 (May 23, 2016) at 61; Sidney Skjei, A Technical Analysis of the FCC's Navigation Device Proposal, attached to NCTA Comments as Appendix B at 9-10 ("Technical White Paper").

7 CVCC has already asserted such rights. Letter from Angie Kronenberg, Consumer Video Choice Coalition (CVCC) to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 1, 2016) ("CVCC September 1, 2016 *Ex Parte*") ("For example, the app … cannot be offered under licensing terms … that compel relinquishment of a licensee's intellectual property rights").

8 If a retail device delivers poor quality, most consumers would seek help or redress from the MVPD rather than the device manufacturer, many of which do not provide ongoing support for their devices.

wish to experiment with advertising and cross-marketing? What obligations arise if the platform changes fundamentally and requires a material redesign of the app? Is the platform neutral, or should there be an express prohibition against steering search results to parties that pay a revenue share or other compensation to the platform owner, or to the device's affiliated sources, over an MVPD that offers the content to subscribers at no extra charge?

A license and licensing mechanisms that were specifically crafted for one platform, such as HTML5, cannot translate automatically to license terms for other platforms. HTML5 open standards were developed by international standards bodies and reflect the market's movement to IP streaming standards under HTML5. The MVPDs' HTML5 apps-based proposal was based on those market trends and on royalty-free open standards to provide a common denominator app to which all manufacturers could build. Non-HTML5 platforms, by contrast, typically involve different technologies and business models, so the licenses written for those platforms must be different from each other and from the licenses for the HTML5 platform.

The Chairman's proposal appears to contemplate that any such differences can be addressed through "technical appendices" that the licensing authority would develop and the Commission would approve, and that would then be added to the standard license to account for differences in platforms. But the technical appendices would not necessarily account for variations grounded in differences in an individual MVPD's app, or differences required by an individual programmer's agreement. Indeed, if they did, making the case for such a technical appendix would require the disclosure of particularly sensitive information. An MVPD would need to share marketing and other business terms, precise security and other technical information, product road maps, and requirements derived from the terms of MVPDs' agreements with programmers, with a licensing authority that may include its competitors and a Commission that has rights of final approval.

There also are substantial questions as to how this review and approval process would work in practice. Would a majority of the licensing body have to sign off on every technical appendix? What criteria would be used to decide whether particular provisions should be approved or rejected? What would be the appeal rights, particularly if the Commission delegates review and approval authority to the Media Bureau? The Commission has no experience establishing and overseeing a licensing regime of this magnitude, and, as explained below, has not sought any public comment or independent evaluation of the proposal. There is a substantial risk that establishing such a regime on the fly will create a regulatory morass that will only slow the deployment of apps and undermine the very goals of this rulemaking.

Beyond that, a one-size-fits-all FCC national license would lack the flexibility necessary to foster innovative business relationships in a fast-changing environment where change cannot await consensus by a central licensing authority and subsequent approval by the Commission. When new non-standard platforms seek apps, they work out business-to-business agreements, development arrangements, and licenses designed for the capabilities, security, privacy protections, and rights associated with that platform. Similarly, there is no uniform technical approach for implementing an integrated search across different device platforms. MVPDs and device manufacturers must work together to develop the best ways to build search capabilities and provide unique and competitive products for consumers. A uniform license for all MVPDs and all device platforms simply cannot accommodate these differences.

In sum, the Chairman's proposal would empower the Commission to write the terms of and issue a single license for all device platforms and all MVPDs. It would put the Commission in the middle of licensing issues over which it has no experience or expertise (much less authority, as described below), and force the government to take sides in everyday business negotiations. And it would disrupt the private licensing arrangements that undergird the thriving apps economy today, creating barriers to innovation and harming consumers. The Chairman's wager appears to be that the Commission can do a better job than the marketplace in driving the apps revolution forward, but the more likely outcome is that his proposal would stop that revolution dead in its tracks.

3. The Chairman's New Proposal Does Not Provide Effective Enforcement of Copyrights or License Rights.

The Chairman's new proposal apparently leaves license enforcement in jeopardy because the licensing authority, rather than MVPDs, issues the app license to device manufacturers. As we have explained previously, it is each individual MVPD that has assembled the service that contains programmers' content, created the app, licensed the app and its individual trademarks, and enabled integrated search. As a result, privity of contract between the device manufacturer and the MVPD service provider is essential to enforce those rights.[9] Yet it appears that such privity would be completely lost and replaced with a governmental license. There would be no business-to-business relationship between the MVPD and the device manufacturer or any certainty that copyrights or license requirements could be enforced. These were the very same concerns that many parties raised with the Commission's NPRM.[10] Even third-party beneficiary rights have questionable value if the Commission has effective control over the primary party—the licensing authority—and the interpretation or nullification of license terms. If MVPDs do not have the ability to enforce apps license conditions or to ensure the enforcement of their copyright interests, MVPDs and content providers will be effectively stripped of their rights, and all terms will be left to the vagaries of the politically-driven compulsory license process.

This model also raises serious questions about the mechanics of any enforcement process. For example, if a programmer has a specific term in its licensing agreement with a specific MVPD, how will it enforce its term through a licensing authority composed of myriad, possibly competing interests, and under the control of Commission regulation or influence? If the licensing body is responsible for enforcement, what are the risks associated with having one competitor sitting in judgment over whether another has violated a license, and how would those be addressed?[11] What injunctive relief is available immediately to a programmer or MVPD for hacking, theft of subscriber information, or other violations that demand prompt action? Could the device manufacturer continue with the infringing activity during the pendency of any enforcement activity? And if so, what would be the remedy for the period of infringing activity? What appellate remedies, if any, will exist to challenge a licensing body decision? By failing to provide a reliable and predictable process for making copyrights and license rights enforceable, the Chairman's proposal has further undermined the foundation for the video ecosystem.

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9 *See* Letter from Paul Glist, Davis Wright Tremaine LLP, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 17 (Aug. 19, 2016) ("NCTA August 19 Rebuttal *Ex Parte*").

10 *See, e.g.*, NCTA Comments , MB Docket No. 16-42, CS Docket No. 97-80, at 78 (April 22, 2016); NCTA Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 19-20 (May 23, 2016); AT&T Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 47-48, 84-85 (Apr. 22, 2016) ("AT&T Comments"); Comcast Corp. et al. Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 35-36 (May 23, 2016) ("Comcast Reply Comments").

11 As the D.C. Circuit has recently explained, "due process of law is violated when a self-interested entity is '[e]ntrusted with the power to regulate the business of a competitor.'" *Ass'n of Am. Rr. v. U.S. Dep't of Transp.*, 821 F.3d 19, 31 (2016) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (alteration omitted)).

4. The Chairman's New Proposal Would Entangle the Commission in Licensing Disputes.

The Chairman's new proposal also would inevitably draw the Commission into disputes over the license. As noted, when new platforms seek apps, they typically negotiate with MVPDs over licenses designed for the capabilities, security, privacy protections, and any other unique aspects of the platform. Under the Chairman's proposal, if a new platform wanted an MVPD to build an app for its platform, it would instead simply sign up for the standard license, which would then trigger the obligation for the MVPD to build the app. To the extent that the MVPD doubted the capability or intentions of a device platform—for example, if there were questions about whether the platform meets the security requirements under the MVPD's agreement with programmers—such a dispute would apparently be channeled into the Commission. Since the MVPD would be under a regulatory obligation to build the app, its only recourse would be to file a petition at the Commission to waive that obligation. Here again, it is unclear how such waivers would be handled and how quickly, and whether the MVPD would be forced to move forward with app development work during the pendency of its waiver request.

5. The Chairman's New Proposal is Anticompetitive.

One extraordinary consequence of this proposal is its displacement of the competitive forces that have impelled an incredible proliferation of apps and associated licensing and other business arrangements among programmers, MVPDs, online video distributors (OVDs), and device manufacturers. Consumers have already benefited enormously from this innovative and competitive market. The Chairman's proposal would recommend (and effectively compel) competing MVPDs and programmers jointly to develop standard licensing terms for all apps across all platforms that would displace the dynamics of today's video ecosystem. Homogenizing this diversity through a single license and a single licensing authority—designed and imposed by a central government planning authority no less—promises to frustrate competition and discourage further innovation.

To be sure, in some cases standard-setting activities can have pro-competitive benefits that outweigh the risks of harm to competition.[12] For example, the industry offer to build additional apps under open standards developed through W3C and to make direct licensing by MVPDs easy and frictionless would promote competition and consumer choice, lower barriers to entry, and reduce transaction costs. But it does not promote competition or consumer choice to compel *all* licenses for *all* apps on *all* platforms to be homogenized into common terms, including potentially the *economic* terms of licensing transactions between and among MVPDs, device manufacturers, and programmers and placed under a government-controlled licensing body. There is no reason that such terms should not be the subject of robust competition, with innovative offerings providing a competitive advantage, spurring yet further innovation. It is inexplicable that the Chairman's proposal would simultaneously propose such an anticompetitive mandate and go out of its way to warn that it is not providing any exemption from antitrust laws.

B. The Chairman's New Proposal Overlooks Its Harmful Effects on Consumers and Innovation.

1. The Chairman's New Proposal Would Increase Costs for Consumers.

MVPDs have already broadly deployed apps on a variety of platforms under marketplace terms in the absence of any government mandates, and are developing HTML5-based apps to work on additional platforms. There are more than 460 million retail devices supporting native MVPD apps, including iOS,

[12] *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008).

Android, Windows, and Roku platforms. Their development did not occur in a vacuum: native device platforms, such as iOS and Android, have set their own agreements and licensing structure, and other platforms negotiate terms for development, deployment, support, and the like.

Notwithstanding this phenomenal marketplace success, the Chairman's new proposal would mandate that each MVPD build and maintain an app for an indeterminate number of varying retail platforms that have shipped a minimum volume of units, regardless of the nature of the device or platform, imposing a substantial burden on MVPDs.[13] Beyond that, the Chairman apparently proposes to define "platform" as any device that includes a particular operating system. This tells the app developer nothing about how many apps need to be developed for that "platform." Many devices are built on Linux, for example, but nonetheless have wide variation in operations, APIs, security, memory processing, video capabilities, graphics capabilities, and more. How can one app serve them all? Are iOS phones, iOS tablets, tvOS on Apple TV, and watchOS on Apple Watch each different platforms that must meet the five million mark, or are they one? "Android" may sound like a platform, but applications written for smartphones, streaming media players, and smart watches are simply not the same. Must MVPDs create apps for each of the notoriously fragmented versions of Android? What happens when a device manufacturer fails to support the latest version of any particular operating system? Such thorny questions can be avoided entirely under the industry's HTML5 proposal, because a single app written to HTML5 could operate with the standard browser that is embedded in *all* these devices and that underlies the platforms of smart TVs.

Moreover, MVPDs would incur substantial costs to develop each customized app, integrate the apps with particular device platforms, and provide ongoing support for the apps, such as app updates and bug fixes, apparently without regard to the nature of the device or its own changes in platform architecture or popularity over time.[14] While MVPDs might be willing to absorb these substantial costs for some platforms, the Chairman's proposal would compel MVPDs to develop and maintain new apps on platforms that they would not otherwise support because market demand for the device, security risks, or other costly factors do not justify the investment. Consequently, MVPDs would be forced to divert investment, expert personnel, time, and other resources away from service and product initiatives that consumers value in order to meet this new app mandate.

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[13] The Chairman's Fact Sheet does not place a finite limit on the number of different device platforms for which MVPDs would have to build apps. And, given the rapid pace of change in the marketplace, the range of platforms that would have to be supported is likely to grow quickly over time. It is also unclear whether MVPDs' obligations to support "widely deployed platforms" would continue indefinitely if consumer interest in such platforms wanes over time.

[14] Because the Commission has not put its proposal out for public comment, it is impossible for stakeholders to know the details of the Chairman's proposal or the information or misinformation on which it is being based. Many parties have recently advanced demonstrably false claims intended to trivialize the burdens of various proposed conditions. CCIA's "White Paper," for example, has been refuted in the NCTA August 19, 2016 Rebuttal *Ex Parte* as well as the Letter from Alex Starr, Christopher M. Heimann, Gary L. Phillips, and David L. Lawson, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (August 25, 2016). But it also includes the fallacious claim that a third-party user interface can be easily accommodated in an HTML5 app by using HTML 5 "custom platform extras" "which MVPDs have utilized." There is no such specification, and it has not been utilized by MVPDs. If CCIA means to refer to Cross-Platform Extras for HTML, the author of that specification has advised that there are no current implementations at all. Even if there were, it is designed to support one studio title at a time, by the same studio that is delivering content. It does not support a guide, third-party UIs, browsing a full VOD or linear catalog, or the many other functions suggested. This is only one small example of the misinformation included in the CCIA "White Paper" and that is being fed into the record at the eleventh hour. Only proper APA public notice and comment procedures can remedy these errors.

The Chairman's proposal does not appear to include any mechanism to reimburse MVPDs even for the costs of these efforts. Rather, all of the development, integration, support, and other costs associated with the app mandate would be borne by the MVPDs. The Chairman's proposal would compel MVPDs to write apps even for products in a tailspin that would in the open market pay for app support. All of this would ultimately translate into higher rates for all subscribers, *regardless* of whether they even use the apps.

The Chairman's new proposal would also raise costs for consumers by requiring MVPDs to impose a separate line item charge for modems and navigation devices. MVPDs have recently been harshly criticized for such line-item fees.[15] The record already reflects a prominent example of a provider's simplified pricing for broadband access service with no extra charge for the modem, and the provider's "all in" price is comparable to or lower than charges by its peers before their modem fee is added as a line item.[16] The FCC itself has mandated or strongly encouraged MVPDs to provide such free equipment offerings.[17] What purpose would it serve to mandate line itemization for equipment, for example, when AT&T must install a primary set-top box for one-way satellite service to interface with its app on retail devices? There is simply no evidence in the record that rate regulation of MVPDs' equipment offerings is necessary to assure the commercial availability of retail navigation devices, but the record is replete with economic evidence to the contrary.[18] Mandating new charges would not only arbitrarily raise costs to consumers, it would contravene the Commission's recent decisions not to

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[15] U.S. Senate, Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, Minority Staff Report, *Inside the Box: Customer Service and Billing Practices in the Cable and Satellite Industry*, 114th Cong., 2nd Sess. (Jun. 23, 2016).

[16] *See* Letter from Samuel L. Feder, Charter Communications, Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 2, 2016); Letter from Leah J. Tulin, Jenner & Block LLP, Counsel for Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Aug. 18, 2016).

[17] *See* NCTA Comments at 169-70 (citing *BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC*, Memorandum Opinion and Order, CSR-6355-Z, 19 FCC Rcd 15607 ¶ 8 (M.B. 2004); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Report and Order and Order on Reconsideration, CS Docket No. 97-80; PP Docket No. 00-67, 25 FCC Rcd 14657 ¶ 14 (2010); FCC, CableCARD: Know Your Rights, https://www.fcc.gov/media/cablecard-know-your-rights (last updated Dec. 9, 2015) (telling consumers that among their "rights" is that "a second device called a 'tuning adapter' … is typically provided at no additional charge to CableCARD customers"); *Cablevision Systems Corporation's Request for Waiver of Section 76.630(a) of the Commission's Rules*, DA 10-34, Memorandum Opinion and Order, MB Docket No. 09-168, 25 FCC Rcd 134 (2010); *Basic Service Tier Encryption*, FCC 12-126, Report and Order, MB Docket No. 11-169, 27 FCC Rcd 12786 (2012); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, CS Docket No. 98-120, 27 FCC Rcd 6529 ¶ 14 (2012) (promoting free DTAs and capping any charges at $2 as part of a new interpretation of must carry rules)).

[18] *See* NCTA Comments at 171-172.

regulate the rates of cable services[19] and broadband services,[20] and its recognition of express Congressional intent not to regulate the rates of operators subject to effective competition.[21]

2. The Chairman's New Proposal Would Undermine Consumer Privacy and Undermine an MVPD's Service.

The Chairman's proposal would also require MVPDs to provide an information flow of entitlement data to any third-party device manufacturer that obtained a license, so that MVPD search results on the device platform would have to indicate whether the customer is subscribed to receive a particular asset or not.[22] This requirement is not only unnecessary and, as discussed below, unlawful; it is affirmatively harmful to consumers. It presents the same privacy flaws, and similar concerns regarding the unbundling of the MVPD's service, as the Commission's original proposal in the NPRM. Consequently, it would be insufficient for the Chairman simply to retract the licensing body aspects of his latest proposal; rather, this entitlement data mandate (as well as the "parity" mandate discussed in the next section) must also be eliminated.

Entitlements reveal a consumer's personally identifiable information, such as subscriptions to certain channels, previous viewing patterns, and financial transactions ("PII"). Requiring MVPDs to indicate to any device maker that obtained a license whether a customer is subscribed to a particular asset in the search results on the device platform is the equivalent of transmitting PII to third-party devices.

We understand that there will be some form of opt-in procedure to get consumers' consent to share PII, though there has been no notice as to any aspects of such a mechanism. Such a scheme raises fundamental questions. For instance, to whom would the customer opt in? What kind of notice regarding the consequences of opt-in would suffice? How would the device maker certify compliance with any limits on the opt-in? Is the device maker limited in its use of the data? What happens to the device maker's interface if only a portion of the MVPDs' subscribers opt in, or if some initially opt in but later decide they want to opt out? And, most fundamentally, under an opt-in regime, would subscribers have the same privacy remedies against the device maker as Congress required in the privacy provisions of the Communications Act, including a private right of action (which neither the Commission nor any other agency can lawfully provide)? In this regard, cable and satellite providers cannot reasonably be expected to release entitlement information—in violation of their obligations under Sections 631 and 338—to device manufacturers that are not subject to these provisions and with which they have no enforceable bilateral agreement.[23] Nor, as discussed in section IV.B. below, does the Commission have the statutory

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[19] *See* NCTA Comments at 172 n. 410; see also *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574, (2016).

[20] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, 30 FCC Rcd 5601, Statement of Chairman Wheeler (2015) ("Let me be clear, the FCC will not impose "utility style" regulation [on broadband services]. … That means no rate regulation ….").

[21] *See* NCTA Comments at 171 (Commission quoting Senator Burns during the floor debate regarding what became Section 629).

[22] As noted in NCTA/AT&T July 22, 2016 Response *Ex Parte* at 18, proponents of the HTML5 apps-based approach do not believe that integrated search is required by Section 629, but nonetheless offered a commitment that would be supportive of integrated search that includes MVPD content. The Chairman's proposal to vastly expand that proposal is not authorized by Section 629.

[23] *See* Letter from Rick Chessen, NCTA, and Stacy Fuller, AT&T/DIRECTV, to Marlene H. Dortch, MB Docket No. 16-42, CS Docket. No. 97-80, at 5-6 (Sept. 6, 2016).

authority under Section 629 or any other provision to require the forced sharing of such information with unregulated third parties.

The significant problems with the entitlement data mandate are not limited to reduced privacy protections for consumers. This requirement also raises many of the same concerns of the original unbundling proposal regarding the dismantling of MVPDs' service. Notably, the Chairman's proposal includes mandatory standardization that has been exhaustively critiqued in this record:[24] All MVPDs must conform to APIs established by an undefined open standards body to convey entitlement information to inform the third-party device of the subscription level of the MVPD's customer (one of the NPRM's original information flows); and navigation and discoverability information (the second of the NPRM's original information flows).

The Chairman's proposal even micromanages search in such a way that could gut the MVPD app-based experience and recreate the flow of unbundled content. It forbids an MVPD from taking subscribers from their third-party search result to a "landing page" that provides them with their many clickable options to reach content offered by the MVPD (e.g., startover, tune live, upgrade, look back, view on demand, electronic purchase, etc.). This essentially would re-introduce the NPRM's proposal for third-party guides linking directly into naked streams of live content—the third information flow that unbundled the entire MVPD service.

In short, the entitlement data mandate and associated restrictions on search constitute independent and substantial flaws with the Chairman's new proposal that cannot be sustained.

3. The Chairman's New Proposal Would Stifle Innovation and Consumer Choice.

The Chairman's new proposal would also trample the vibrant innovation and consumer choice that privately-licensed apps are currently driving in the marketplace. The proposal includes mandatory standardization of highly varied networks, prior regulatory consents to innovation, and delays in launching any new set-top box feature unless they can be supported on an indeterminate number of retail apps. It was only because the FCC's last technology mandate did *not* create such uniform dictates to govern all technology platforms that CableCARD's failure fortunately did not interfere with the development of the apps-based solutions that now support hundreds of millions of customer-owned devices.[25] Now, the Chairman's proposal would mandate one vision for all apps and put the brakes on innovations yet to come.

For example, the entitlement data standardization mandate discussed above would impose significant constraints on innovation. As a technical matter, there is no uniform or fixed MVPD entitlement language that could communicate all search variations to any device. MVPDs today do not deliver entitlements in a standardized way. As comments have also explained, any mandate to create a standardized "entitlements" stream would require significant changes to MVPDs' networks—imposing even more costs—and introduce rigidity that retards innovation and restricts new consumer offerings.[26]

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[24] *See* NCTA Comments at 106-118; NCTA & AT&T Response to Questions at 26-28.

[25] DSTAC Final Report at 298 (DSTAC WG4 at 163) ("Had the FCC adopted the 'AllVid' rules, the distributor and programming industries could not have developed today's amazing market that provides MVPD programming to smartphones, tablets and other devices embraced by consumers.")

[26] *See* NCTA Comments at 109-111; Technical White Paper at 31; August 19 Rebuttal *Ex Parte* at 8 & n.35; Letter from Jordan B. Goldstein, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (May 11, 2016). More generally, as noted above, there is no uniform technical approach for implementing integrated search across different device platforms.

Fixed entitlements would, for example, forbid a studio from trialing a new kind of offer with an MVPD, bar an MVPD from selling video by buckets of viewing hours, or prevent other innovations not anticipated by the standard.[27] Requiring the Commission and/or the licensing body to review and approve proposed amendments to the standard license would also constrain the innovation that privately-licensed apps foster. For example, if an MVPD and programmer required changes to the license to launch a new innovative offering, such as 4K video or packages of electronic sell through, they would be required to go through the review and approval process at the licensing body and the Commission. Such a process would delay and even derail many such innovations. Moreover, any such arrangement between a particular programmer and particular MVPD may need to be made public and discussed in the licensing body months before it is rolled out, raising concerns over the release of confidential competitive information.

Similarly, if there is a security issue, such as a breach, and MVPDs need to make changes to the license to address those issues, such changes could likely take months to implement, including the time for the licensing body to act and for the Commission's public comment and approval process.

Innovation and consumer choice would be even further constrained under the Chairman's mandate that apps must provide retail devices "with an equivalent ability to access content via the Pay TV app as they have in the set-top box."[28] It appears that the item actually calls for far more than indicated in the Fact Sheet, by reinstating concepts of "parity" between features in MVPD-supplied set-top boxes and apps. The record has already demonstrated that such "parity" concepts are unworkable across device platforms and a barrier to innovation. For example, the record shows how such broad brush requirements would preclude an MVPD from launching a feature on one device unless it created an equivalent solution for all apps on all devices; how an MVPD could not migrate its network to ISO media formats, HEVC, and new DRM systems, until MVPD apps on retail devices can be made co-equal; how an MVPD could not sell video in new ways by bucket of viewing hours unless the standardized entitlement interface had anticipated that new way to market; how new codecs, formats resolution (like 4K and HDR), and other technical innovations would be put on hold or abandoned; and how MVPDs would have made public their proposed innovative offer, allowing others to steal the idea and beat them to market while the FCC-anointed standards (now licensing) body and the FCC consider it.[29] No party has contested any of these flaws.[30] This is not how innovative new features are rolled out in televisions, smart phones, consumer electronics, automobile technology, or MVPD services. Prohibiting the introduction of new features on any device until they can be replicated on all devices would, at the very least, delay, and in many cases deny, consumers from receiving the benefits of MVPD innovation that they consistently experience today in the current market-driven video ecosystem.

We understand that the Chairman's proposal would also require that MVPD apps support recording to a retail device's hard drive if the MVPD leases DVRs that permit local recording, a requirement that would undermine both copyright assurances and innovative recording technologies. A local recording requirement would completely violate the Chairman's assurance that "Pay-TV content

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Commission regulations threaten to stifle such innovation, to the detriment of consumers. Entitlements can also change frequently with promotions and changes to customers' subscriptions, and it is not possible to account for these changes and deliver this information correctly in advance. *See* NCTA August 19 Rebuttal *Ex Parte* at 8-9.

[27] NCTA August 19, 2016 Rebuttal *Ex Parte* at 22-26.

[28] Fact Sheet at 1.

[29] *See, e.g.*, NCTA Comments at 109-110, 141-142; Technical White Paper at 31, 34; NCTA Rebuttal Comments, MB Docket No. 16-42, CS Docket No. 97-80 (June 30, 2016) at 22-25 ("NCTA Rebuttal Comments").

[30] NCTA Rebuttal Comments at 23, n. 80.

will only be opened by the pay-TV app" and that "the pay-TV provider will control the content end-to-end."[31] End-to-end control by an MVPD's app is essential for content providers to place their trust in MVPD apps, but would be lost if the content was released to copying on any hard drive on any platform. Even if recordings on a local retail device could be managed inside an MVPD app, the app would need careful individualized integration with the retail device to account for its unique design. How much storage capacity is available? Is it dedicated and non-volatile? Where is it located in the device architecture? Why would the Commission direct MVPD resources towards such legacy local hard drive technologies that use more energy, are more prone to failure, and have fixed capacity, when MVPD apps are providing retail apps that record on an MVPD cloud DVR that is more energy efficient, more reliable and rapidly expandable?

In addition, the more that FCC rules weaken the copyright protections available to programmers, the more the Commission will undermine the "economic incentive" to invest in new, high-quality programming in the first place.[32] The golden age of television that consumers now know and enjoy would be strangled off by the proposed new regulatory process for apps.

The Chairman's new proposal to reorder the video ecosystem by demanding that all set-top features be available in all apps—without considering the realities of technology development, technical limitations, rights licensing, entitlements, experimentation, different platform life cycles, and the vagaries of the indeterminate platforms for which apps must be created—is an innovation killer. Comments have made clear that technology mandates in general and these rules in particular create ill effects that endure long after their adoption, derailing innovation in their wake.[33] Comments and the DSTAC Report itself noted the considerable economic and academic literature documenting the risks of government-induced market failure and the high costs to innovation when the government intervenes in such markets.[34] The Chairman's new proposal thus contravenes Congress's direction that the Commission "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[35]

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31 Fact Sheet at 2.

32 *Golan v. Holder*, 132 S. Ct. 873, 889 (2012); *see also, e.g.*, Copyright Alliance, Comment on *In the Matter of Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, MB Docket No. 16-42, at 4 (Aug. 23, 2016) ("[C]opyright law is predicated on the theory that creators are incentivized to create new works by the prospect of reaping the economic fruits of their creative labor, which in turn benefits the public by increasing the number of creative works available for their enjoyment.").

33 NCTA Comments at 116 ("The mandated inclusion of costly IEEE 1394 outputs on cable boxes continued for years even after HDMI won out in the marketplace. The Commission took two years to grant waivers from its integration ban and encoding rules for early-release theatrical content; well over a year to authorize the DTAs essential for cable's digital transition; and well over a year to deny a waiver that NCTA requested to provide a testbed for downloadable security. Later, the lengthy waiver process also delayed deployments of downloadable security under waivers that were finally granted to two operators. . . . Cable operators paid over $1 billion and wasted over 600 million kilowatt hours of energy ($60 million in residential electric bills) annually on the integration ban, and that technology mandate failed famously and expensively for nearly a decade before it was repealed by Congress.").

34 NCTA Comments at 106-108; DSTAC Final Report at 299 (DSTAC WG4 at 164).

35 H.R. Rep. No. 104-458, at 181 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 194. The Commission has previously acknowledged that imposing technology mandates "is perilous because regulations have the potential to stifle growth, innovation, and technical developments at a time when consumer demands, business plans, and technologies remain unknown, unformed or incomplete," and warned of the dangers of "fixing into law the current state of technology." *Navigation Device Order* ¶¶ 15-16.

In short, like the entitlement data mandate, the parity mandate is an independent and substantial flaw with the Chairman's new proposal that cannot be sustained.

4. The Chairman's New Proposal Appears to Eliminate Business-to-Business Deals.

The Chairman's new proposal appears to mandate that all app arrangements on all platforms be licensed and managed under the new FCC regime, with no mention in the Fact Sheet (or anywhere else) of the possibility for MVPDs and device makers to pursue differentiated business-to-business arrangements like those under which MVPDs have already made their apps available on at least 15 different platforms.[36] These platforms all have major technology differences,[37] and consequently have developed their own set of development agreements and licenses. The terms that Apple developed for iOS, that Google developed for Android, and that Roku uses for its devices are not the same. The HTML5 proposal made clear that, while the HTML5 app would provide device makers with a "common denominator" app option that could operate across many variations in device OS and hardware, [38] it would not supplant native apps in the marketplace. Nothing in the HTML5 apps proposal would have restricted MVPDs to HTML5 apps or restricted any devices to HTML5. The proposal explicitly contemplated the continued use of iOS, Android, Roku, and other native apps and welcomed other business-to-business arrangements.[39]

If the Chairman's new proposal were to explicitly or effectively preclude the continued use of such business-to-business deals, all of the flaws, costs, and problems with the Chairman's proposal would be substantially compounded, making the current proposal as bad in this respect as the original NPRM's unbundling proposal. A ban on such innovation-enhancing deals would portend an untenable future in which the Chairman's highly prescriptive regime would be superimposed on iOS, Android, and all of the development and licensing arrangements that operate successfully in the market today and that should be free to launch tomorrow. The FCC must clarify that nothing in any new rules it adopts precludes the alternative business-to-business arrangements that are essential to continued innovation.

C. The Chairman's New Proposal Is Unprecedented.

The Chairman claims that his new licensing mandate is comparable to CableLabs' DFAST license used for CableCARDs. This claim is baseless. It ignores the narrow scope of the original CableCARD regime, the narrow focus of the DFAST license, and the substantial intervening changes in the video marketplace, as well as other critical differences discussed below.

Unlike the Chairman's new proposal, CableCARD and DFAST does not require a broad and uniform compulsory copyright license for all apps on all devices, or require the provision of customer entitlement data to all retail devices.[40] Rather, all that is licensed was a patented decryption technology for use across the physical interface of a CableCARD plugged into a retail device with a dedicated CableCARD slot. CableCARD was designed solely for the in-home decryption of one-way linear cable

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36 *See* DSTAC Final Report at 208, 263 (DSTAC WG4 at Tables 8, 9).

37 *See* DSTAC Final Report at 39 (DSTAC WG2 at 12) ("each have their own unique development environment, interface, streaming platform and encryption technology").

38 NCTA & AT&T Response to Questions at 4.

39 NCTA & AT&T Response to Questions at 30-31.

40 As reported in DSTAC, "Under the applicable MOU, license and FCC rules, UDCPs only receive a virtual channel map and channel name, and only from cable operators." DSTAC WG4 Report at 160.

programming.[41] FCC rules designated CableCARD-enabled devices for cable systems only and required manufacturers to warn consumers that even on digital cable systems those devices did not deliver VOD, the cable operator's program guide, or any interactive services.[42]

The DFAST license addresses only the delivery of linear cable channels for in-home use. The entire technical and licensing regime was developed before a video-capable Internet, out-of-home viewing, "connected devices," over-the-top video, cloud delivery, data mining, and TiVo's insertion of Internet-delivered ads into the MVPD programming came into existence.[43]

The technological architecture of CableCARD is also quite limited. Cable systems interact with physical CableCARD modules located in the home, which operate as part of each operator's network and output decrypted linear channels across the CableCARD-Host interface into the retail device. The retail devices are required to meet specific technical requirements in order to receive those channels across that interface. Testing and certification is limited accordingly. With those constraints, only limited versions of CableCARDs needed to be built, for the handful of conditional access security technologies used to protect linear cable at the time CableCARD was developed.

The Chairman seeks to find justification for the proposed centralized licensing authority by analogy to DFAST, but the limited DFAST model is ill-suited for today's far more complex apps-based environment, for which it was not designed.

When MVPDs provide apps, there is no uniform patent or security being licensed as there was with the DFAST technology. Each individual MVPD assembles the service that contains programmers' content, creates the app, licenses the app, licenses its individual trademarks, and enables integrated search.

Moreover, MVPDs are no longer confining their services to one-way digital linear cable channels, in further contrast to the DFAST model. They offer access to VOD, interactive services, and new marketing offers like electronic sell through. They also offer integrated search capability. Some make content accessible to other home devices. A cable implementation already underway supports personal cloud recording. These offerings involve comprehensive underlying licenses that far exceed the narrow scope and limited purpose of the DFAST patent license.

An FCC mandate for each MVPD to build and maintain an app for an indeterminate number of varying retail platforms that have shipped some volume of units is the equivalent of asking each MVPD to build *and keep re-building* two-way customized CableCARD modules for every different retail device that has no obligation to conform to any interface standard, and to do so in software. When MVPDs provide such apps, they are not doing so within the narrow constraints of the few conditional access

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41 By agreement between the cable and consumer electronics industry, these CableCARD-enabled UDCP devices were intended to be transitional, with the eventual migration to apps-based solutions for interactive services. NCTA Comments at 61.

42 *See* former 47 C.F.R. §15.123(d) ("Manufacturers and importers shall provide in appropriate post-sale material that describes the features and functionality of the product, such as the owner's guide, the following language: 'This digital television is capable of receiving analog basic, digital basic and digital premium cable television programming by direct connection to a cable system providing such programming. A security card provided by your cable operator is required to view encrypted digital programming. Certain advanced and interactive digital cable services such as video-on-demand, a cable operator's enhanced program guide and data-enhanced television services may require the use of a set-top box. For more information call your local cable operator.'").

43 NCTA Comments at 61.

technologies in use across cable architectures of the 1990s. They are operating from cable, satellite, and telco networks using a wide and rapidly changing array of technologies. And in software-based apps solutions, there is no standardized in-home CableCARD "module" to which retail devices must conform in order to access MVPD service. By contrast, the HTML5 apps proposal would have utilized a software-based interface standard defined by the global W3C open standards body for commercial video and already widely embraced by TV standards bodies, manufacturers, and service providers.

The Chairman's proposal would also require MVPDs to provide entitlement data to device makers that the CableCARD model never provided. CableCARD provides the full channel map of available linear channels (which, in turn, is presented in retail guides as it is in cable guides). The specific subscriber entitlements are processed end-to-end within the cable operator's network and CableCARD, and only the decrypted programming passed across the interface. Subscriber entitlement data remains protected inside the cable network under the CableCARD model, thus avoiding the privacy problems and unbundling flaws that would be created by the Chairman's proposal.

The Chairman's new proposal would also take over legal and functional control of the development and operation of the license itself. By contrast, with DFAST and similar dockets, the FCC rightly avoided this role. The DFAST license was submitted to the Commission for informational purposes, and the Commission held itself out as a forum solely for resolving complaints under Rule 1.41,[44] but the Commission has never been required to intervene to resolve any DFAST licensing disputes.[45]

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[44] In the 2003 *Plug and Play* Order, the FCC chose not to adopt or administer DFAST, and not to agree to any specific enforcement role beyond its general complaint procedures and review of disputed output decisions. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80; PP Docket No. 00-67, 18 FCC Rcd 20885 (2003). Likewise, in the *Broadcast Flag Table A* order, the FCC certified a wide variety of security regimes and a variety of licensing agreements and specifically decided *not* to dictate license terms. The Commission took a similar approach in the *BST Encryption* order. *Basic Service Tier Encryption*, Report and Order, MB Docket No. 11-169, 27 FCC Rcd 12786 at ¶ 24 (2012) ("*BST Encryption"*); *Digital Output Protection Technology and Recording Method Certifications*, Order, MB Docket No. 04-55 *et al*, 19 FCC Rcd 15876 (2004) ("*Broadcast Flag Table A*").

[45] The Chairman's Office has recently waged a Twitter campaign claiming that the cable industry had no incentive to make licensing easy or easy to obtain. The Chairman has also claimed that when the cable industry "voluntarily" set up a licensing body for CableCARD, it prevented competitive devices from getting license. *Hearing on Oversight of the Federal Communications Commission Before the S. Comm. on Commerce, Science, & Technology*, 114th Cong., 2nd Sess. (Sep. 15, 2016) (testimony of Tom Wheeler, Chairman, FCC). To the contrary, 29 consumer-electronics manufacturers had over 600 models of televisions and other video devices certified or verified under DFAST for use with CableCARD and the cable industry has extensively supported CableCARDs. NCTA Comments at 90-91 and Appendix D, Timeline of Cable Industry Support for CableCARDs. The start-up problems in the manufacturers' early products and how cable operators received the service calls and worked with consumers on fixes to those *retail* device problems are documented in a 40+ page in-depth report on file at the Commission. NCTA Comments at 115 n. 271. Letter from Neal Goldberg, NCTA to Marlene H. Dortch, Secretary, FCC, CS Docket 97-80 (Jun. 29, 2006) (Retail device problems included defective power supplies, bad tuners, bad solder joints, projector lamps that interfered with the CableCARD interface, defective main boards, bad wave solder processes, component tolerance issues, bent pins, and software/firmware problems such as improperly designed software, corrupt software, and firmware that did not function properly. Manufacturers even sought to hide problems from the cable industry, from consumers, from the FCC and from each other.). Manufacturers of more advanced CableCARD-enabled TVs failed in the market as overpriced. *See* DSTAC Final Report at 46 (DSTAC WG2 at 19) (citing John Falcon, *First Panasonic Tru2way TVs Hit Stores in Chicago, Denver*, CNET (Oct. 16, 2008), http://www.cnet.com/news/first-panasonic-tru2way-tvs-hit-stores-in-chicago-denver/). And retail device

The Chairman's Fact Sheet makes no mention of any certification and testing process for devices subject to the standard license. DFAST testing was limited to cable platforms and only for very limited functions. For device testing and certification in a regime that covers all apps on all platforms in all devices, plus operations occurring outside of the control of the app, testing would need to be far more comprehensive. But no entity exists today to handle certification and testing across all MVPDs, all apps, and all devices. It's unclear how the Chairman envisions setting up such an unprecedented testing and certification regime from scratch, who would operate it and under what rules, and who would pay for it.

IV. THE CHAIRMAN'S NEW PROPOSAL SUFFERS FROM NUMEROUS FATAL LEGAL FLAWS

A. Any Final Rules Based on the Chairman's New Proposal Would Violate the APA's Notice-and-Comment Requirement

The Chairman's new proposal utterly fails to satisfy the notice requirements of the Administrative Procedure Act ("APA").[46] The Commission has an "obligation to make its views known to the public in a concrete and focused form,"[47] and must also "describe the range of alternatives being considered with reasonable specificity."[48] Though the precise formulation of final rules need not be the exact one proposed in the NPRM,[49] the rules must at minimum be a logical outgrowth of the rule proposed.[50]

The Chairman's new proposal, however, bears no logical connection to any of the proposed rules in the Commission's NPRM published in the Federal Register; it thus must be issued by the Commission as a new NPRM for further comment to comply with the APA. The focus of the NPRM was on how to implement the Commission's flawed "information flows" proposal.[51] While the NPRM did briefly seek comment on the apps-based approach raised in the DSTAC Report,[52] that approach—which the NPRM *rejected*—does not remotely resemble the new proposal put forth by the Chairman. In contrast to the approach in the DSTAC Report that the NPRM referenced, *which involved the private licensing of MVPD apps to device manufacturers* through market-driven initiatives, the Chairman's proposal would subject MVPD apps, copyright licenses, and app licenses to extensive regulation. The Commission would, among other things, control the drafting, issuance, and enforcement of a standard app license and a yet-to-be created licensing body; dictate app requirements for MVPDs; and mandate specific obligations for integrated search involving an MVPD app. Based on filings in the record, it appears that the Chairman's

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manufacturers have acknowledged improvements in operator support for CableCARD devices since the initial launch of CableCARD. For example, TiVo has applauded Comcast for "continued commitment to CableCARD provisioning and support" and for going well beyond any requirements from the vacated plug and play rules. NCTA August 19, 2016 Rebuttal *Ex Parte* at 24. And beyond this, MVPDs have been successfully and increasingly licensing their apps to numerous retail platforms, which the Chairman's Office neglects to mention.

46 *See* 5 U.S.C. § 553(b)(3).

47 *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) ("*Prometheus*") (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

48 *Prometheus*, 652 F.3d at 450 (quoting *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246 1248 (D.C. Cir. 1994) (noting that "[o]therwise interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making").

49 *See United States Telecom Ass'n v. FCC,* 825 F.3d 674 (D.C. Cir. 2016) ("*USTelecom*").

50 *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 160 (2007).

51 *See* NPRM at ¶¶ 1-2.

52 *See id.* at ¶¶ 23, 47, 49.

staff only started developing this approach in the weeks leading up to the non-public circulation of the draft order to other Commissioners on September 8th.[53] This is precisely the type of agency "surprise switcheroo on regulated entities" that the APA notice requirement prohibits.[54]

In this regard, courts have made clear that a final rule is a permissible logical outgrowth of a proposed rule only "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[55] However, "the logical outgrowth doctrine does not extend to a final rule that finds no roots in the agency's proposal because something is not a logical outgrowth of nothing." [56] Nor does it apply "where interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule."[57] This is undeniably the case here.

Licensing-related questions in the NPRM do not alter this conclusion. Although the NPRM posed a general question as to whether it should "develop a standardized license and certification regime similar to DFAST," this proposed "licensing alternative" was specifically limited to issues regarding compliance and robustness (*i.e*., adherence to copy control information and adequate content security), protection of MVPD networks from harm and theft, and consumer protection obligations, and the licensing alternative was raised in the context of the Commission's original unbundling proposal.[58] The NPRM gave no indication that a standard license could apply more broadly to address other unrelated issues or to apps at all.[59] And the fact that no parties even addressed the notion of a Commission-run

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53 *See* Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy NCTA, and Stacy Fuller, Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 6, 2016); Letter from Rick Kaplan, General Counsel and Executive Vice President Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 2, 2016). The Fact Sheet does not cure the APA notice deficiencies. In *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011), the court rejected any suggestion that a press release and op-ed article by an FCC chairman could serve as adequate APA notice for a change in policy that was not raised with specificity in the NPRM. There, as here, the modified proposal "was not published in the Federal Register, the views expressed were those of one person and not the Commission, and the Commission voted days after substantive responses were filed, allowing little opportunity for meaningful consideration of the responses before the final rule was adopted." *Id.*

54 *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("*Environmental Integrity Project*").

55 *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) ("*Agape Church*") (*quoting CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) ("*CSX*")).

56 *Environmental Integrity Project*, 425 F.3d at 998 (internal citations and quotations omitted).

57 *Agape Church*, 738 F.3d at 411; *see also Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (vacating two rules because "neither . . . was to be found among the proposed regulations" and "[i]nterested parties cannot be expected to divine the EPA's unspoken thoughts"); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 253 (3d Cir. 2010) (finding a provision of a rule that "was not mentioned in the [NPRM]" inadequate under the APA); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1252, 1260 (D.C. Cir. 2005) (vacating a rule setting a maximum air velocity for ventilation in coal mines because the NPRM proposed a minimum velocity and "did not indicate the possibility of a maximum cap"); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) ("*Time Warner Cable*") (vacating "standstill" rules for program carriage complaints where the FCC's proposal "did not specifically indicate that the FCC was considering adopting a standstill rule" and its requests for comment on related topics were "too general to provide adequate notice that a standstill rule was under consideration").

58 *See* NPRM at ¶ 79.

59 As such, although in the recent open Internet decision the D.C. Circuit found that the Commission may "satisf[y] the logical outgrowth test if it 'expressly ask[s] for comments on a particular issue or otherwise ma[kes]

licensing regime to administer MVPD apps in their comments provides further evidence that parties did not reasonably anticipate the Chairman's new rules and underscores the inadequacy of notice.[60]

Interested parties and the public now have only a short time before the sunshine period to attempt to comment on a completely new proposal that still has not been fully, much less properly, revealed. Such an unnecessary rush to decision, without the benefit of proper notice and comment, stands in significant contrast to the lengthy comprehensive review conducted by DSTAC and would defy the bedrock requirements of the APA, as well as common-sense notions of sound public policymaking.

B. The Chairman's New Proposal Far Exceeds the Commission's Statutory Authority.

1. Section 629 Provides No Support for the Elimination of Intellectual Property Rights or the Creation of a Compulsory Copyright.

The Chairman's proposal would dictate the terms on which MVPDs deliver their programming and thus, in some key respects, goes even further than the NPRM, as it grants to the Commission the authority to create, approve, and enforce a new, standard licensing regime. Nothing in Section 629 comes close to authorizing this FCC regulation, much less the conflict it creates with the Copyright Act. On the contrary, the Chairman's new proposal flouts the Commission's affirmative duty to "minimize[]" any potential conflicts with other statutory schemes.[61]

Significantly, the U.S. Copyright Office—which is "the expert agency created by Congress in 1897 to administer the Nation's copyright laws"[62]—prepared an authoritative letter cataloguing a number of significant copyright-related legal flaws and policy concerns raised by the NPRM. As the Office explained, one of the NPRM's major flaws was its encroachment upon copyright owners' exclusive right to license their works.[63] As the Office explained, the NPRM appeared to "create a new statutory license that requires the entirety of copyrighted programming offered by MVPDs to be delivered to third parties" in a manner that "could diminish the value of those works," without the individualized negotiations that are the "hallmark of the vibrant and dynamic MVPD marketplace."[64] The Office warned that the

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clear that the agency [is] contemplating a particular change,'" the NPRM plainly falls short of that standard. *See USTelecom*, 825 F.3d at 700 (*quoting CSX*, 584 F.3d at 1081).

60 *See Time Warner Cable*, 729 F.3d at 170 (noting that the fact that "[n]one of the commenters addressed such a rule during the official comment period . . . strongly suggests that the [NPRM] provided insufficient notice"); *Prometheus*, 652 F.3d at 452 (3d Cir. 2011) (stating that a lack of comments during official comment period showed that "interested parties were prejudiced" by inadequacy of notice).

61 *See LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974) ("[A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized."); *Storer Commc'ns, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985) (per curiam) ("The Commission has a duty to implement the Communications Act but also must attempt to do so in a manner as consistent as possible with [other laws].").

62 Letter from Maria A. Pallante, Register of Copyrights, U.S. Copyright Office, to Reps. Blackburn, Butterfield, Collins and Deutch, at 1 (Aug. 3, 2016) *available at* http://blackburn.house.gov/uploadedfiles/co_set-top_letter.pdf (hereinafter "Copyright Office Letter").

63 *See, e.g., id.* at 9 (explaining that the NPRM "appears to obligate MVPDs to deliver licensed works to third parties that could then unfairly exploit the works in ways that would be contrary to the essential conditions upon which the works were originally licensed").

64 *Id.* at 2, 11; *see id.* at 7-11. Under a "statutory" or "compulsory" license, a person wishing to use a copyrighted work "need not obtain the copyright owner's permission but must comply with statutory procedures,

Constitution expressly empowers *Congress* to establish copyright laws,[65] and "only Congress"—"not the FCC or any other agency"—has "the constitutional authority to create exceptions and limitations in copyright law."[66] In the few instances in which Congress has decided to "enac[t] compulsory licensing schemes," moreover, Congress has done so in "a carefully circumscribed manner" and with "a host of specific conditions," including the payment of royalties.[67] The Office "caution[ed] against government action that would interfere with, rather than respect, the flexible framework Congress has set forth."[68]

Despite this clear warning from the Copyright Office not to proceed in a manner that abridges copyright protections, the current proposal suffers from many of the same basic flaws previously identified in the NPRM, and then some. Any video-streaming app developed by an MVPD is itself protected by the Copyright Act.[69] Such apps are composed of the MVPD's proprietary technologies, content, and service. Yet the proposed rule would establish an FCC-mandated centralized licensing authority to govern the terms on which these apps can be licensed, effectively imposing upon MVPDs a compulsory app-licensing regime without congressional authority and, apparently, without royalty payments.

Moreover, the proposal subjects video content owners to an unlawful compulsory license. As the Register of Copyrights explained, "an MVPD must negotiate and obtain licenses directly from copyright owners in order to publicly perform, display, reproduce, or distribute copyrighted video programming."[70] The "first sale" doctrine, which allows consumers to resell certain copyright-protected works, is "limited to material items, like records, that the copyright owner put into the stream of commerce."[71] It does not

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including payment of statutorily or administratively set fees." 2 Patry on Copyright § 3:12. "The existence of a compulsory license negates exclusivity." *Id.*

[65] *See* Copyright Office Letter at 2; U.S. Const. art. I, § 8, cl. 8 (empowering Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[66] Copyright Office Letter 10 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 192-93 (2003)); *see also*, *e.g.*, Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.07 (2009) (explaining that Congress "may properly invoke … [n]onexclusivity under a compulsory license"); *Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (Statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (the authorization of compulsory licenses has "traditionally been the domain of Congress," which is the "proper forum to legislate compulsory licenses when they are found necessary").

[67] Copyright Office Letter 10-11; *see also, e.g.*, 4 Patry on Copyright § 14:59 (noting that Congress held "extensive" hearings and took into account "negotiations among the affected interests" in preparing the statutory license governing the transmission of broadcast programming by cable).

[68] Copyright Office Letter 10.

[69] *See* 17 U.S.C. §§ 101, 117 (defining the scope of copyright protections for computer programs); *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1354 (Fed. Cir. 2014) (noting that "computer programs . . . can be subject to copyright protection as 'literary works'"), *cert. denied*, 135 S. Ct. 2887 (2015); 2 Patry on Copyright § 3.76 (explaining that court decisions have "uniformly upheld copyright in computer programs as a class, regardless of their form," "purpose," or "fixation"); *see generally* Deborah F. Buckman, *Copyright Protection of Computer Programs*, 180 A.L.R. Fed. 1 (2002).

[70] Copyright Office Letter at 5.

[71] *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); *see also* Copyright Alliance, Comments on *Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, Docket No. 130927852-3852-01, at 17-18.

operate to extinguish copyright holders' rights in video programming.[72] Thus, the Commission cannot, consistent with existing intellectual property rights, compel copyright owners to grant rights they would otherwise withhold or require MVPDs to make programming more widely available in ways that go beyond the negotiated licensing agreements.[73]

Critically, nothing in the Communications Act purports to authorize the Commission to establish a compulsory licensing scheme, whether for MVPD apps or the underlying programming. The sum total of the Commission's authority under Section 629(a) is to "assure the commercial availability . . . of converter boxes . . . and other equipment . . . from manufacturers, retailers, and other vendors,"[74] and only using authority that it held prior to adoption of Section 629.[75] In other words, Congress charged the Commission with ensuring that third-party set-top boxes and other navigation devices are available for purchase in retail stores. That is a far cry from authorizing the Commission to mandate the creation of new apps for all device platforms, to specify the minimum features of the app, and to set the terms governing its licensing.[76] Notably, Congress knows how to establish a compulsory licensing regime when it wants to: it has established such a regime *in the specific context of broadcast television*.[77] This regime is codified in Title 17 of the U.S. Code, which pertains to copyrights, and expressly specifies that copyright experts—*not* the Commission—will handle the associated fee requests and otherwise administer the compulsory licensing scheme.[78] Particularly given that the Constitution specifically empowers *Congress* to make policy judgments on copyright issues, and that Congress in turn has entrusted the administration of compulsory licenses to copyright experts, the establishment of a sector-wide compulsory license regime for MVPDs and programmers is precisely the type of significant, far-reaching policy decision that courts would properly expect Congress—*not* the Commission—to make in the first instance.[79] Section 629 provides nothing remotely approaching authorization for that kind of regime.

Given that the Communications Act provides no authority for a compulsory licensing scheme at all, it certainly provides no authority to establish a *new centralized licensing body* to administer such a scheme. Such a proposal simply finds no support in law.

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[72] *See Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 153, 159-60 (3d Cir. 1984); 2 Nimmer § 8.12.

[73] Furthermore, to the extent that the rule's proponents expect that retail device manufacturers will be able to maintain their own central repository of video programming derived through MVPD apps to satisfy customers' request to watch broadcasts after their original airing, the Supreme Court has made clear that it would violate the copyright owners' exclusive right to publicly perform that content, even if specific programs are selected by the user at specific times. *Am. Broad. Co. v. Aereo*, 134 S. Ct. 2498, 2503 (2014).

[74] 47 U.S.C. § 549(a).

[75] *Id*. § 549(f). Section 629(f) expressly provides that nothing in Section 629 "shall be construed as expanding . . . any authority" of the Commission beyond pre-1996 limits.

[76] Copyright Office Letter at 10-11. *Oversight of the Federal Communications Commission*, hearing before the Senate Committee on Commerce, Science, and Transportation, 114th Cong, 2nd Sess. (Sept.15, 2016) (testimony of Hon. Jessica Rosenworcel, Commissioner, FCC) ("I'm going to be very candid with you that I have some problems with licensing and the FCC getting a little bit too involved in the licensing scheme here, because when I look at the Communications Act and Section 629, I just don't think we have the authority.")

[77] *Id.* at 4 & n.17, 10-11; *see* 17 U.S.C. §§ 111, 119, 122.

[78] *See* 17 U.S.C. § 111(d)(2)-(4); *see also* Copyright Office Letter at 11 (noting that royalties are paid "into funds administered by the Copyright office," and are distributed "through proceedings before the Copyright Royalty Judges").

[79] *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000).

Comparisons to DFAST cannot change this legal conclusion. As detailed above, DFAST licensed a patented decryption technology for use across the physical interface of a CableCARD plugged into a retail device. It did not mandate a copyright license for all MVPD apps and all underlying content on all third-party devices, the mandatory standardization and sharing of personal subscriber entitlement data with third parties not regulated by the Communications Act, or the many other elements that the Chairman's new proposal would subject to a compulsory license.[80]

The D.C. Circuit has warned the Commission against "unbridled" interpretations of Section 629.[81] Addressing rules far less extreme than the proposal at issue here, the court made clear that the Commission "cannot simply impose *any* regulation . . . as a means of promoting the commercial availability of navigation devices, no matter how tenuous its actual connection to [Section] 629's mandate."[82] The Commission would do well to heed that advice and abandon its attempt to displace Congress as the entity constitutionally charged with establishing copyright policy for multichannel video programming.[83]

2. The Chairman's New Proposal Stretches Section 629 Beyond Its Express Limitations.

Just as the Chairman's new proposal would have the Commission stretch Section 629 beyond its express terms into a compulsory copyright licensing vehicle, so too would the proposal convert Section 629 into a long arm controlling almost every app for every service—except the delivery of MVPD service to the "converter boxes" and other "equipment" to which Section 629 is actually directed.[84]

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[80] If the Chairman's proposal intends to also include a mandate to share proprietary navigation metadata, the infringement by the compulsory license would be even more extensive. MVPDs have only limited licenses to use the metadata they license from third-party programming metadata suppliers, not the right to provide such programming metadata to device manufacturers. *See* NCTA Comments at 53-54; NCTA Reply Comments at 39-40; Gracenote Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 13 (April 22, 2016) ("Gracenote licenses its metadata service to MVPDs, online video providers, digital media outlets, and third-party device manufacturers directly.")

[81] *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013).

[82] *Id.* (emphasis added); *see also id.* (stating that the Commission's Section 629 authority "is not as capacious as the agency suggests").

[83] For reasons analogous to the copyright problems discussed above, the proposal would also interfere with MVPDs' trademark rights. One of the most valuable rights that a trademark holder possesses is the right to control the quality of the goods or services offered under the trademark. *See, e.g.*, *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 62 (2d Cir. 1994) (quoting *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986)). The proposal threatens to strip this right away. For example, insofar as the proposed rules (or the license promulgated by the centralized licensing authority) would require MVPDs to use technologies they regard as inferior, or would override MVPDs' decisions relating to app design and features, they would undermine the MVPDs' trademarks by requiring MVPDs to associate their trademark with an inferior product. Similarly, to the extent that the proposal (or the standardized license) would allow subscribers to access content outside of the carefully negotiated confines of the agreement between the MVPD and the programmer, consumers could become confused as to whether the content is being provided by the MVPD, the retail device manufacturer, or another source. Trademark tarnishment is also possible insofar as the proposal (or the standardized license) would compel programmers or MVPDs to surrender the right to associate certain content (e.g., a children's show) only with other types of content (e.g., other children's shows, and not violent movies). These examples are just a few of the myriad ways that the proposal could undermine the rights of trademark holders.

[84] 47 U.S.C. § 549(a).

In this regard, the Chairman's new proposal is untethered from the very clear language and constraints in the statute. As the parties to this filing have previously argued, the availability of retail device alternatives for viewing MVPD service through MVPD apps raises questions about the Commission's general authority to regulate in this area under Section 629.[85] Even beyond that, as the comments already establish, Section 629 does not authorize the Commission to mandate access to an unbundled "flow" of "entitlement data," to halt all MVPD innovation on certain platforms unless and until such innovations are available on every app on every third-party platform,[86] and certainly not to lay the groundwork for recreating three unbundled flows that bypass MVPD service, but only authorizes the Commission to promote the commercial availability of competitive "equipment" necessary to "access" the existing MVPD service.[87] It does not authorize the Chairman's proposed distortion of a voluntary proposal to support integrated search in HTML5 that was explicitly offered as a compromise that went beyond the statute.

Because details of the Chairman's proposal have not been released under notice and comment procedures, it is impossible to know just how far the proposal seeks to take Commission control—whether to all MVPD apps already established; to MVPDs' TV Everywhere apps that enable over-the-top, out-of-home viewing; to all future MVPD apps;[88] or even to all video apps, all of which would be clearly beyond its authority under Section 629. Similarly, to the extent the Chairman's proposal continues to seek to enhance access to services other than the ones the MVPDs currently provide or treat entities with whom MVPDs have arm's length agreements as "affiliates," it remains unlawful in those respects as well.[89] Any assertion of authority in these various ways lack even the "tenuous . . . connection" to the statutory language and purpose that the D.C. Circuit has already held in *EchoStar* is insufficient to support FCC authority.

3. The Chairman's New Proposal Runs Afoul of Explicit Statutory Limitations on the FCC's Authority.

The Chairman's proposal not only is unsupported by statutory authority, but also affirmatively violates at least four separate provisions of the Communications Act. Thus, even if the Commission otherwise had authority to adopt the proposal—and it does not—the proposal still would be unlawful because the Commission "may not . . . utilize [its rulemaking authority] in a manner that contravenes" any of the "prohibition[s] contained in the Communications Act."[90]

First, the proposal violates Section 624(f)'s dual prohibitions against regulating the "provision" or "content" of cable services without *express* statutory authority specified in Title VI of the Act.[91] A

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85 *See, e.g.,* AT&T Comments at 2-17.

86 In fact, as noted above, Congress expressly directed the Commission *not* to impede innovation or technological developments in adopting its regulations under Section 629. *See* n. 35 *infra*.

87 *See, e.g., id.* at 60-67.

88 Programmers negotiate separately and offer distinct licensing rights for in home and out-of-home mobile uses, and apps designed for out-of-home viewing are provided over the Internet, not "over multichannel video programming systems" as defined in Section 629.

89 *See, e.g.,* AT&T Comments at 68-74.

90 *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014); *see also, e.g., Storer Commc'ns, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985) (per curiam) (holding that the Commission "has a duty to implement the Communications Act . . . in a manner as consistent as possible" with policies embodied in other statutory schemes).

91 47 U.S.C. § 544(f) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.").

primary purpose of the Chairman's proposal is to regulate the "provision" of cable services. Indeed, the first page of the Chairman's Fact Sheet confirms that the rules would require that MVPDs "must *provide*" apps on various platforms subject to various mandates on search, entitlement data sharing, and other restrictions on the provision of the MVPD's service, and that the app "must *provide* consumers with an equivalent ability to access content via the [MVPD] app as they have in the set-top box."[92] Each of these requirements would, by their plain terms, directly govern the "provision" of cable services. The proposal would also regulate the "content" of cable services by requiring that "*all* the programming" that subscribers pay for be accessible through the app.[93] Moreover, the rules would require MVPD "content" to be "searchable" alongside the "content" of other programmers, with no "promot[ion] [of] the [MVPD] app over other sources of programming in the search function."[94] These requirements apparently leave no discretion to an MVPD or programmer regarding which content to make available through an app or how to present the search results as consumer seek to explore the MVPD's offers. The Commission has pointed to no express grant of statutory authority to impose these service and content requirements on cable companies, so the proposal would violate Section 624(f).[95]

Second, the proposal "would jeopardize [the] security of multichannel video programming" and "impede the legal rights" of MVPDs to "prevent theft of such service," in violation of Section 629(b).[96] As noted, the proposal would prevent MVPDs from exercising any discretion over which platforms to support, requiring them instead to support "*all* widely deployed platforms,"[97] apparently without regard to potential security vulnerabilities or resource constraints. The existence of a multimember licensing body, moreover, would impede MVPDs' deployment of security updates because any update implicating the license terms presumably would be subject to time-consuming review and approval—and possible *rejection*—by the licensing body.

Third, the proposed standardized licensing regime would violate Section 621(c)'s prohibition against regulating a "cable system" as a "common carrier or other utility by reason of providing any cable service."[98] An entity is subjected to *per se* common-carrier obligations when it is "'forced to offer service indiscriminately and on general terms.'"[99] The proposal would accomplish precisely that result because it requires cable operators to develop and offer apps on "all widely deployed platforms" pursuant to a single, uniform, "standard license."[100] By design, the proposed rules would leave no "room for

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92 Fact Sheet at 1 (emphases added).

93 *Id.*

94 *Id.* at 1-2.

95 Indeed, any statute purporting to authorize the FCC to regulate programming content would "invariably raise First Amendment issues." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002). *See also* section IV.C. below for a more detailed discussion of the violations of MVPDs' and programmers' First Amendment rights that would be caused by the Chairman's proposal.

96 47 U.S.C. § 549(b). By compromising the operations and licensing of the app, the Chairman's new proposal would also thwart programmers' and MVPDs' choices of technological protection measures that the Copyright Office has explained are protected under the DMCA. Copyright Office August 3, 2016 Letter at 14-15 ("We also observe that the approach of the Proposed Rule appears to be in tension with Congress' judgment in enacting the Digital Millennium Copyright Act of 1988 ("DMCA") to allow copyright owners to select and implement technological measures to secure their content on digital delivery platforms.")

97 Fact Sheet at 2 (emphasis added).

98 47 U.S.C. § 541(c).

99 *Verizon*, 740 F.3d at 652 (quoting *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012)).

100 Fact Sheet at 2.

individualized bargaining and discrimination in terms,"[101] and instead would impose an across-the-board obligation on *all* cable operators and other MVPDs toward *all* covered device platforms. The proposal would also regulate certain terms proposed by MVPDs as presumptively "unreasonable" and require "non-discrimination" in terms, thus replicating traditional common carrier standards.[102] Section 621(c) precludes such regulations.

Fourth, the proposal does not adequately account for consumer privacy rights and remedies, running afoul of Sections 631 and 338.[103] Specifically, the proposal would place personal consumer data in the hands of third parties that are not subject to the same statutory constraints on use of personal information established by Congress and over whom the FCC has no enforcement authority. Cable and satellite providers are required to protect the privacy of subscribers' PII. For example, cable providers are generally prohibited from "disclos[ing]" personally identifiable information without the prior consent of the subscriber, even to government agencies.[104] Sections 631 and 338 further provide that cable and satellite providers "shall take such actions as are necessary to prevent unauthorized access" to personal information by third parties, and must destroy the information they do collect when it is no longer needed for a legitimate business purpose.[105] And Sections 631 and 338 provide subscribers with certain rights concerning their PII, including the right to bring private legal action to enforce the statutory provisions protecting their information from misuse and the right to have a court order issued before their personal data may be handed over to the government.[106] Cable and satellite operators have designed their interactive services and apps to ensure compliance with these privacy requirements so that customers receive the same privacy protections regardless of how they access their video programming.

But these provisions and obligations apply *only* to "cable systems" and "satellite carriers." The proposal, by contrast, would require MVPDs to share their customers' PII (e.g., subscriptions to certain channels, previous viewing patterns, and financial transactions) with third parties that MVPDs have no ability to monitor and over which the FCC has no enforcement authority. And, although the Chairman apparently intends to adopt some form of consumer "opt in" requirement, the proposal does not specify how violation of an opt-in could be enforced, identify what disclosures are adequate for obtaining subscriber consent, or clarify whether a device maker could share personal data with its affiliates or with unaffiliated third parties, among many other issues. In sum, the proposal undermines the protections Congress granted consumers in Sections 631 and 338.

Reliance on "pledges" by third parties to honor consumers' privacy rights and "enforcement by the Federal Trade Commission and State Attorneys General" is insufficient.[107] A self-certification scheme cannot provide parity of privacy protection for MVPD subscribers. MVPDs have no means of obtaining information in order to assess third-party compliance, and no means of enforcing compliance short of withdrawing the MVPD app itself (which, of course, would primarily harm the consumer).

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[101] *Verizon*, 740 F.3d at 652 (quoting *Cellco*, 700 F.3d at 548).

[102] *See* 47 U.S.C. §§ 201, 202.

[103] 47 U.S.C. § 551; *see also id.* § 338(i) (providing similar privacy protections for subscribers of satellite television service).

[104] 47 U.S.C. § 551(c), (h).

[105] *Id.* §§ 551(c), (e).

[106] *Id.* § 551(f).

[107] Fact Sheet at 3.

Nor is FTC enforcement a viable solution. As an initial matter, this approach would still deprive consumers of the rights they now enjoy against cable and satellite companies to bring a private legal action for misuse of personal information, as well as their right to have government agencies obtain a court order before an agency can obtain their viewing data. The Commission does not have legal authority to provide such protections. And the legal validity of the approach is doubly problematic. *First*, even assuming the FTC has authority under Section 5 of the FTC act to enforce a company's promise to abide by a voluntary code of conduct, it cannot collude with the FCC to create an enforcement scheme that circumvents congressional limits on the FCC's own authority. *Second*, even assuming the FCC itself could administer Sections 631 and 338 against MVPDs, it cannot subdelegate that responsibility to another federal agency without authorization from Congress.[108] Congress knows how to authorize inter-agency delegations,[109] and it did not do so here. Indeed, if an FTC-enforced compliance certification scheme can override limitations on the reach of statutory obligations imposed by Congress in the Communications Act, then there is effectively no meaningful check on the FCC's power to compel entities otherwise beyond its jurisdiction to comply with the Act.

Coordination with State Attorneys General under *state* laws would, at best, result in a patchwork of inconsistent privacy laws across the nation, as the FCC has no authority to commandeer state cooperation.[110] And in any event, the existence of supplemental state-law remedies does not fully replace the loss of a federal right of action. As NTIA has admonished, "the baseline privacy protection a subscriber receives should not hinge on where the consumer lives."[111]

C. The Chairman's Proposal Would Violate the First Amendment Rights of MVPDs and Programmers.

Both MVPDs and programmers "engage in and transmit speech," and thus "are entitled to the protection of the speech and press provisions of the First Amendment."[112] In addition to being statutorily unauthorized, the Chairman's proposal would violate the First Amendment rights of MVPDs and programmers in multiple ways.

First, the Chairman's proposal would interfere with both the constitutionally protected speech of MVPDs, as well as the constitutionally protected editorial judgment that MVPDs and programmers exercise in determining how, where, and when their content is presented.

The First Amendment's "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'"[113] It thus prevents the government both "from

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108 *See*, *e.g.*, *U.S. Telecom*, 359 F.3d at 565-66.

109 *See*, *e.g.*, 31 U.S.C. § 3726(g) ("The Administrator may delegate any authority conferred by this section to another agency or agencies if the Administrator determines that such a delegation would be cost-effective or otherwise in the public interest.").

110 *See* 47 U.S.C. § 551(g) (allowing enforcement of state laws consistent with Section 631); *New York v. United States*, 505 U.S. 144, 161 (1992) (States may not be commandeered into enforcing a federal regulatory program).

111 National Telecommunications and Information Administration Comments, MB Docket No. 16-42, CS Docket No. 97-80 (April 14, 2016) at 6, n.27.

112 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

113 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *see id.* (reiterating that the First Amendment protects the freedom "*not* to speak publicly," and that this right "serves the same ultimate end as freedom of speech in its affirmative aspect" (quotation marks omitted)).

prohibiting speech" and "from compelling individuals to express certain views."[114] The Chairman's proposal violates both limitations. The proposal *compels* speech by requiring MVPDs to transmit search results with entitlement data intended to create a visual signal (such as a lock icon) indicating that content is outside the user's *current* subscription. Absent this rule, most MVPDs would not display such negative imagery—which would affirmatively discourage subscribers from accessing content they are affirmatively seeking and interested in—and instead would encourage subscribers to explore options and offers for obtaining such content, including free trials or promotional discounts.[115]

The proposal also *prohibits* MVPD speech. It appears that the proposal will interfere with affiliation-agreement negotiations by effectively precluding MVPDs from proposing terms that limit content (deeming such terms presumptively unreasonable), while allowing the *other* contracting party to freely propose those same terms. The proposal apparently would also prohibit MVPDs (but *not* their competitors) from linking their search results to landing pages that offer subscribers clickable options for viewing, starting over, renting, purchasing, or recording the requested content, and other visual and expressive elements of the MVPD user interface and service—beneficial information about service features that subscribers may already be entitled to or could conveniently obtain, if they so desire. Instead, the proposal apparently will *require* MVPDs to avoid clickable options, bypassing the MVPD's own user interface and, for example, linking directly to the live stream of in-progress video content even when better options are available. In these respects, the proposal increasingly resembles the original NPRM, which would have unbundled MVPD programming and allowed third parties to repackage it with their own user experiences, thus violating the First Amendment by fundamentally altering MVPDs' messages to the viewing public.[116]

More broadly, the proposal interferes with the "editorial discretion" that MVPDs and programmers take "in selecting the programming they will make available to their subscribers"—decisions that "are entitled to the protection of the speech and press provisions of the First Amendment."[117] This right of editorial control extends to decisions regarding both the selection of programming and the manner in which the programming is organized and presented to customers, including which third-party outlets.

The Chairman's proposal overrules this editorial discretion by dictating which content must be made accessible ("all the programming," with any attempt to limit content being presumptively unreasonable) on which platforms ("all widely deployed platforms") and in what manner (in search results "alongside other video services accessible through the device").[118] It thus prevents programmers from choosing their distribution platforms based on, for example, the quality of user experience, security vulnerabilities, or other factors. This level of governmental interference with MVPDs' and programmers' protected expression is extraordinary. It would be unthinkable, for example, for the government to facilitate access to e-readers by mandating that newspapers publish all print content—including opinion pieces written by third parties—in one or more e-reader formats compatible with all widely deployed e-readers. Yet the type of interference with speech rights called for by the Chairman's proposal is even

[114] *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

[115] NCTA & AT&T Response to Questions at 19-20.

[116] *See* Theodore B. Olson, Helgi C. Walker, and Jack N. Goodman, The FCC's "Competitive Navigation" Mandate: A Legal Analysis of Statutory and Constitutional Limits on FCC Authority ("NCTA White Paper"), Attached to NCTA Comments as Appendix A, at 70-71.

[117] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (brackets and quotation marks omitted).

[118] Fact Sheet at 1, 2.

more intrusive. Indeed, the proposal's compelled-speech problems are only exacerbated by its requirement that MVPDs develop and maintain the apps at issue themselves, which could lead to confusion as to the source of the editorial discretion.[119]

The Chairman's proposed restrictions on MVPDs' and programmers' speech rights are both speaker-based and content-based, and thus subject to heightened scrutiny.[120] They are speaker-based because they apply only to MVPDs and not to other video-service providers. Indeed, the proposal expressly contemplates that certain programmers will benefit from the proposal "because their content will be easily searchable on the same device as [MVPD] content."[121] "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns" and are subject to "strict scrutiny."[122] In fact, the First Amendment specifically precludes the government from "'abridg[ing] the speech of some elements of our society in order to enhance the relative voice of others.'"[123]

Further, by "[m]andating speech that [MVPDs] would not otherwise make," the proposal "necessarily alters the content of the speech" and is thus subject to strict scrutiny as a "content-based regulation of speech" as well.[124] Insofar as the proposal affects purely commercial speech, moreover, the Commission still "must affirmatively prove that (1) its asserted interest is substantial, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored."[125]

The Chairman's proposal cannot withstand any level of scrutiny. The interest in providing competitive alternatives to leased set-top boxes could easily be accomplished by the effective—and far less burdensome—HTML5 apps alternative proposed by industry. Moreover, some aspects of the proposal, such as the requirement that convey negative imagery next to search-result content that is outside of the consumer's MVPD subscription, appear to be based on nothing more than the Chairman's own intuitions about consumers' preferences, which is plainly an insufficient interest to justify speech regulation. And it is difficult to imagine what legitimate interest the government could possibly have in *blocking* subscribers from hearing about existing service features or the ability to purchase content in which they have expressed an interest.

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119 By contrast, the Supreme Court narrowly upheld the must-carry provision in the Cable Television Consumer Protection and Competition Act, which expressly authorized the FCC to require cable operators to carry local broadcast television programming, based on "the considerable evidence before Congress and adduced on remand" of a competition-based need for the mandate. *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 212 (1997). Here, by contrast, Section 629 does not provide (much less clearly so) for any speech mandate, and there are no underlying legislative findings to support such a mandate.

120 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *see also R.J. Reynolds Tobacco Co. v. FDA,* 696 F.3d 1205, 1216 (D.C. Cir. 2012).

121 Fact Sheet at 2 (emphasis added).

122 *Turner Broad. Sys.*, 512 U.S. at 659; *see also Citizens United v. FEC,* 558 U.S. 310, 340 (2010) (noting that the First Amendment prohibits government-imposed "restrictions distinguishing among different speakers, allowing speech by some but not others").

123 *Turner Broad. Sys.*, 512 U.S. at 657-58 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)).

124 *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015) (explaining that "a paradigmatic example of content-based discrimination" is a rule that "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter").

125 *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1212 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980)). "While this test is not quite as demanding as strict scrutiny, it is significantly more stringent" than "rational-basis review." *Id.*

Second, the Chairman's proposal would violate MVPDs' and programmers' right of association. "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[126] This right of association extends to any group that "engage[s] in some form of expression, whether it be public or private," and is not "reserved for advocacy groups."[127] And the freedom to associate "'plainly presupposes a freedom not to associate.'"[128] Thus, a government regulation forcing a group to associate with particular persons or entities violates the First Amendment if it significantly affects a group's ability to express its views, unless the regulation serves "'compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'"[129]

The Chairman's proposal runs afoul of these principles as well. Under current law, MVPDs and programmers are free to engage in voluntary business-to-business deals and licensing schemes with only those businesses they want to partner with in communicating their messages. The Chairman's proposal, however, would force MVPDs and programmers to associate their messages with *every* "widely deployed" platform that licenses an app through the proposal, regardless of its technical specifications and requirements (e.g., open standards- or proprietary standards-based), reputation, consumer-protection track record, potential security risks, business practices, and innumerable other factors that inform licensing decisions. This compelled association undermines an "indispensable means" of protecting MVPDs' and programmers' ability to engage in protected expression.[130] And the Chairman can identify no "compelling" interest that would support overriding MVPDs' and programmers associational rights in this way, particularly given the overwhelming evidence of widespread availability of retail devices and apps. Even if such an interest existed, moreover, the industry's HTML5 apps proposal would be a significantly less burdensome alternative means of accomplishing that interest, rendering the proposal constitutionally invalid.[131]

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126 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also id.* at 618 (noting that the "right to associate for the purpose of engaging in those activities protected by the First Amendment," including "speech," is an "indispensable means of preserving other individual liberties").

127 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

128 *Id.* (quoting *Roberts*, 468 U.S. at 623).

129 *Id.* (quoting *Roberts*, 468 U.S. at 623).

130 *Roberts*, 468 U.S. at 618.

131 The Chairman's proposal also raises constitutional problems under the non-delegation doctrine. Even if the Commission had statutory authority to adopt the Chairman's proposal to establish uniform API standards and a centralized body to license MVPD apps—which it does not—this proposal *still* could violate the Constitution by unlawfully delegating significant regulatory authority to a private entity. Like any other agency the FCC "may not subdelegate to outside entities—private or sovereign—*absent affirmative evidence of the authority to do so.*" *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (emphasis added); *see* NCTA White Paper at 66-69.

Likewise, the Chairman's proposal raises significant concerns under the Takings Clause. Insofar as any final rule purports to require MVPD apps to make content available online that would not otherwise be available under the relevant licensing agreement, forces MVPDs to offer free apps they would not otherwise offer, or otherwise deprives MVPDs or programmers of property without just compensation, significant Takings Clause issues could arise.

D. **Any Final Rules Based on the Chairman's New Proposal Would Be Arbitrary and Capricious.**

In addition to all its other legal flaws, the Chairman's proposal is arbitrary and capricious.[132] Even if the Commission had the statutory authority to require MVPDs to create customized apps for all devices and to regulate the terms of licenses for those apps, the Chairman's proposal is an unnecessarily complex and invasive means of attempting to assure the availability of retail navigation devices. As discussed above, consumers already use millions of devices other than MVPD-provided set-top boxes to access MVPDs' services. The economic evidence—as well as everyday experience—demonstrates that the video marketplace is competitive and that MVPDs are not engaging in foreclosure strategies with respect to retail devices.[133] Indeed, Chairman Wheeler himself noted that video consumers "have more options than ever," creating enormous "competition for eyeballs."[134] Because of that competition, MVPDs are vigorously competing with each other to provide apps on the devices of their customers' choosing.[135] And this marketplace progress with apps was further enhanced recently with the final adoption by W3C of the HTML5 open standard, which MVPDs and many consumer electronics manufacturers have fully embraced as an efficient and robust way to extend the apps revolution to smart TVs and other TV-connected devices.

Nonetheless, the Chairman claims that mandating the creation of apps with a standard license is necessary so that an indeterminate set of widely deployed third-party devices can compete with MVPD-supplied set-top boxes. Manufacturers of such devices are some of the largest companies in the United States. They are perfectly capable of negotiating licenses to carry MVPD apps and have repeatedly done so without the regulatory intrusion mandated by the Chairman's proposal. Consumers would be harmed by this unnecessary and costly regulation, which provides no corresponding benefit. And the compromise HTML5 proposal that MVPDs made would ensure device-maker access to apps without the needless complexity and unlawful compulsory copyright concerns discussed above.

The Chairman's proposal is all the more arbitrary in that it imposes burdens only on MVPDs and not on the OVDs with which they compete, thereby skewing the marketplace in favor of certain competitors. The Chairman's proposal does not justify the requirement that MVPDs license their apps through a standard license established and enforced through an as-yet created licensing authority, while arbitrarily allowing OVDs to negotiate their own individual licenses with device manufacturers.[136]

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132 *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (a rule is "arbitrary and capricious" when the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency").

133 *See* Declaration of Michael Katz ¶¶ 47-51 & § II.C.2 (Attachment 2 to the Comments of AT&T); *see also* Ralitza A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 Minn. J. L. Sci. & Tech. 279, 305 (2011); T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 CommLaw Conspectus 1, 4 (2012).

134 Stephen Battaglio, *FCC chief Tom Wheeler Wants To Give Consumers the Option of Cable Service Without a Set-Top Box*, L.A. Times (Sept. 8, 2016), *available at* http://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html.

135 *See* Katz Decl. at ¶¶ 16-29 (attached to AT&T Comments).

136 *See Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("A fundamental norm of administrative procedure requires an agency to treat like cases alike.").

The Chairman's proposal is also arbitrary in that it fails to resolve important issues that are essential to implement his proposal.[137] For instance, the Chairman's proposal would require MVPDs to share entitlement data with device makers as long as subscribers "opt in" to such a disclosure. But, as discussed above, there is no explanation (and certainly no legally adequate notice) regarding key aspects of such a proposal. The Chairman's proposal also fails to address the many issues specific to direct broadcast satellite that it necessarily raises.[138] This "not-ready-for-primetime" regime would fall far short of basic standards of reasoned decision-making.

Finally, the failure of the Chairman's proposal to be grounded in a cost-benefit analysis is also arbitrary and capricious.[139] The Chairman has stated that it is the Commission's policy "to act consistently with the cost-benefit analysis principles . . . in its rulemaking proceedings," including "consideration of quantifiable, monetized costs and benefits associated with a proposed regulatory approach, as well as careful consideration of those costs and benefits that are not as easily quantifiable or monetized."[140] And, for Section 629 in particular, Congress has directed the Commission to consider the costs of any regulation.[141] Yet the Chairman's proposal appears not even to question the costs of developing a standard apps license; of requiring MVPDs to develop, deploy, and maintain an indeterminate number of multiple apps in perpetuity; of restricting terms of MVPD-programmer licenses; of mandating the standardization and disclosure of PII to unregulated third parties; or of so-called "parity" requirements that would delay and deter innovation.

Although the lack of detail and last-minute timing of the Chairman's new proposal make it impossible for MVPDs to quantify precisely how costly it would be, there can be no doubt that the proposal would be exceptionally expensive and burdensome, given the sheer enormity of the duties imposed on MVPDs, as described above. Because the Chairman's proposal fails to even consider such "an important aspect of the problem," any rules based on the proposal would be arbitrary and capricious and contrary to Congress's direction to account for the costs of any regulation of navigation devices.[142]

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137 *See Specialty Equipment Market Ass'n v. Ruckelshaus*, 720 F.2d 124, 138 (D.C. Cir. 1983) (promulgation of a warranty reimbursement scheme "was arbitrary and capricious" where "the scheme set forth in the regulations [was found] to be unworkable in several respects"); *id.* ("Although EPA may adopt a reimbursement scheme to serve the purposes of the Act, we cannot endorse its failure to develop the details of such a scheme.").

138 *See* Letter from Jennifer Manner, EchoStar Technologies L.L.C., and Alison A. Minea, DISH Network, L.L.C. to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 8, 2016).

139 *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* disadvantages of agency decisions.").

140 Letter from Chairman Tom Wheeler, FCC, to Rep. Marsha Blackburn (May 19, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327470A1.pdf; *cf.* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (requiring executive agencies to make "a reasoned determination that [a regulation's] benefits justify its costs").

141 *See* STELAR § 106(d)(1), 128 Stat. 2063 (creating a working group "to identify . . . performance objectives, technical capabilities, and technical standards of a *not unduly burdensome*, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices in furtherance of section 629") (emphasis added).

142 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see Michigan v. EPA*, 135 S. Ct. at 2712 (vacating rule for failure to consider costs as required by statute).

V. **CONCLUSION**

While the Chairman's new proposal correctly identifies apps as the future of television, the proposal's components, to the extent they are known, are as problematic as the original NPRM unbundling proposal and, in important ways, simply recreate that proposal under the guise of an apps-based approach. The proposal's one-size-fits-all regime is likely to stifle innovation in MVPD apps, impose enormous costs on MVPDs and consumers, exceed the Commission's statutory authority, and violate the rights of copyright holders, the privacy rights of consumers, and the terms of the Communications Act and the Constitution, all without any real corresponding benefit to consumers that is not already readily achievable with the MVPDs' HTML5 proposal. The Commission cannot rectify or eliminate the serious flaws with the Chairman's new proposal simply by tweaking or removing only parts of it. For example, even if the licensing body requirements are retracted, as they certainly should be, unless the Commission also removes the entitlement data and parity mandates, the onerous restrictions on search, and the other flaws discussed herein, the new proposal cannot be sustained.

The Commission should decline to walk down this complicated and unlawful path and instead promote innovation and growth in MVPD apps by adopting the truly consumer-friendly and lawful HTML5 proposal.