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September 19, 2016

via electronic filing

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

RE: Notice of *Ex Parte* Meeting
Expanding Consumers' Video Navigation Choices
MB Docket No. 16-42
CS Docket No. 97-80

Dear Ms. Dortch:

On Monday, September 19, 2016, Laura Moy, Drew Simshaw, and clinical law student Thomas Koh of the Institute for Public Representation (IPR), Georgetown Law (Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc.), spoke with Gigi Sohn and Jessica Almond of the Chairman's Office regarding the above-referenced dockets.

Consistent with Consumer Groups' letter to Chairman Wheeler dated September 15, 2016,[1] participants urged the Commission to make clear in its order that all components of the pay-TV ecosystem, including the pay-TV apps and the devices on which they are viewed, must be directly and unquestionably subject to the Commission's accessibility rules. This includes making clear that the proposed pay-TV apps, like all MVPD-provided apps and devices, will be subject to the accessibility rules under the Twenty-First Century Communications and Video

[1] A copy of the letter is attached to this notice.

* Admitted to the bars of New York and New Jersey. Supervised by a member of the DC bar.

Accessibility Act of 2010 and the Commission's 2012 IP Closed Captioning Order.[2] It also means making clear that devices on which pay-TV apps will be used, such as those manufactured by Roku, Apple, Microsoft, and Google, are also subject to the CVAA[3] and therefore are required to be properly equipped and capable of displaying closed captioning.[4]

Participants reiterated that ensuring that all apps and devices are directly subject to the Commission's accessibility rules, regardless of whether apps are preinstalled or downloaded later, is essential to ensuring certainty and consistency in application and enforcement of the rules. The order must make clear that this complete coverage will exist independently of any license, pledge, or agreement between the entities, and that any Federal Trade Commission ("FTC") authority with regard to the enforcement of the FCC's accessibility rules will be merely supplementary, and not relied upon as a primary means of enforcement.

Respectfully submitted,

/s/
Drew Simshaw
Institute for Public Representation
Counsel to TDI

September 19, 2016

Cc (by email): Gigi Sohn
Jessica Almond

Enclosed: Consumer Groups' Letter to Chairman Wheeler re: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, CS Docket No. 97-80 (September 15, 2016)

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[2] *See* Twenty-First Century Communications and Video Accessibility Act of 2010 §202, Pub. L. No. 111-260, 124 Stat. 2751 (2010) ("CVAA"); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communication and Video Accessibility Act of 2010, Report and Order*, ("IP Closed Captioning Report and Order") Dkt. No. 11-154 (Jan 12, 2012).
[3] *See* CVAA § 203(a)(1) (defining covered "apparatus designed to receive or play back video programming transmitted simultaneously with sound"). *See also* 47 U.S.C. § 303(aa)(1).
[4] *See* 47 U.S.C. § 303(u)(1)(A).

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September 15, 2016

via electronic filing

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Expanding Consumers' Video Navigation Choices
MB Docket No. 16-42
CS Docket No. 97-80

Dear Chairman Wheeler:

The below-signed organizations (collectively, "Consumer Groups") appreciate the Commission's efforts to expand consumers' video navigation choices,[1] as many deaf and hard of hearing consumers have frustrating experiences with their current set-top boxes.[2] We also appreciate the Commission's intention to ensure that consumers maintain a comparable viewing experience if they choose to switch from their current set-top box to a newly-proposed "pay-TV

[1] *See Expanding Consumers' Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order* ("NPRM"), Dkt. No. 16-42 (Feb. 18, 2016).
[2] *See, e.g.,* Consumer Groups *ex parte*, Dkt. No.16-42, at 2 (Jun. 13, 2016) (describing one consumer's "experience of having to choose between keeping a box that is too old to customize caption settings, or having to pay to upgrade to a box that also includes unneeded features—effectively amounting to a surcharge for accessibility").

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app" to view their paid multichannel video programming.[3] For deaf and hard of hearing consumers to fully realize the benefits of this comparable experience, however, all components of the pay-TV ecosystem, including the pay-TV apps and the devices on which they are viewed, must be directly and unquestionably subject to the Commission's accessibility rules.[4] We urge the Commission to make clear the overwhelming extent to which these apps and devices are already covered under the Commission's existing accessibility rules, and to indicate how it intends to ensure that any gaps in coverage are addressed before the proposed rules go into effect.

First, the Commission should make clear that the proposed pay-TV apps, like all MVPD-provided apps and devices, will be subject to the Commission's accessibility rules.[5] Indeed, pay-TV providers agree, as Comcast and NBCUniversal explained in their comments, "[t]he Commission's accessibility rules apply to MVPD-supplied devices and apps. So, for example, Xfinity TV apps support closed captioning (including caption enhancements such as font, color, and the like), video description, and audible emergency information."[6] Consumer Groups agree. Any final order issued in this proceeding must leave no room for any alternate interpretation of the accessibility rules—the accessibility rules unquestionably apply to all MVPD-provided apps and devices.

Second, devices on which pay-TV apps will be used, such as those manufactured by Roku, Apple, Microsoft, and Google, are also subject to the CVAA[7] and therefore are required to be properly equipped and capable of displaying closed captioning.[8] In cases where pay-TV apps are preinstalled, the devices and the preinstalled applications are both subject to the Commission's accessible user interface requirements,[9] independently of any license, pledge, or

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[3] *See Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice & Innovation in the Video Marketplace* at 1 (Sep. 8, 2016), available at https://www.fcc.gov/document/chairman-wheelers-plan-increase-choice-and-innovation-video ("Pay-TV providers must provide consumers with an equivalent ability to access content via the pay-TV app as they have in the set-top box.").

[4] Consumer Groups have stressed the importance of this point throughout this proceeding. *See, e.g.*, Comments of Consumer Groups, Dkt. No.16-42 at 2-3 (Apr. 22, 2016) ("Any action taken by the Commission in this proceeding must ensure the accessibility of the video programming that is made available through all of these competitive navigation devices, no matter how those devices are defined.").

[5] *See* Twenty-First Century Communications and Video Accessibility Act of 2010 §202, Pub. L. No. 111-260, 124 Stat. 2751 (2010) ("CVAA"); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communication and Video Accessibility Act of 2010, Report and Order*, ("IP Closed Captioning Report and Order") Dkt. No. 11-154 (Jan 12, 2012).

[6] Comments of Comcast Corp. and NBCUniversal Media, LLC, Dkt. No. 16-42 at 100 (April 22, 2016).

[7] *See* CVAA § 203(a)(1) (defining covered "apparatus designed to receive or play back video programming transmitted simultaneously with sound"). *See also* 47 U.S.C. § 303(aa)(1).

[8] *See* 47 U.S.C. § 303(u)(1)(A).

[9] *See* 47 U.S.C. § 303(aa).

agreement between the entities that might also be subject to separate or additional enforcement by the Federal Trade Commission ("FTC"). Again, the proposed order must make this application of the rules in this context explicit.

In the event that any small corners of the proposed pay-TV app ecosystem might not be covered by the Commission's existing accessibility rules, the Commission must make clear that it intends to make good on its prior commitments to close these gaps, before the set-top box proposal goes into effect, using its substantial, specific statutory mandates under the CVAA, the Telecommunications Act of 1996, and the Television Decoder Circuitry Act of 1992 to implement clear, bright-line rules that are directly enforced by the Commission itself. Indeed, the Commission has expressly declared that it would extend its rules under Section 203 of the CVAA to ensure that apparatus manufacturers enable developers of third-party video software installed by consumers after manufacture to meet the developers' own obligations under the CVAA to make that software accessible.[10] The Commission has also vowed to "continue to monitor the development of accessible technology in this area," and that it would "reevaluate" its user interface rules to ensure that non-preinstalled pay-TV applications are accessible if necessary.[11]

Ensuring that all apps and devices are directly subject to the Commission's accessibility rules, regardless of whether apps are preinstalled or downloaded later, is essential to ensuring certainty and consistency in application and enforcement of the rules. Doing so is critical to ensure that deaf and hard of hearing consumers' rights to access video programming on equal terms are not only vindicated, but easily enforced by the Commission through a straightforward complaint process when problems arise.

We recognize that with other consumer protection rights, such as privacy, dual enforcement of the Commission's rules might be a useful tool, but it is not a substitute for FCC enforcement. Deaf and hard of hearing consumers have a long history of, and experience with, directing their complaints regarding accessibility issues to the agency that has the knowledge and direct authority to enforce these requirements—the FCC.

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[10] *See IP Closed Captioning Report and Order* at ¶94. "Given our interpretation of the statute to cover integrated software, as well as our decision under Section 202 . . . that VPDs must ensure that any video player they provide to the consumer is capable of rendering or passing through closed captions, we believe that the rules we adopt will cover the majority of situations in which consumers view video, and therefore do not believe that it is necessary to hold manufacturers responsible for such third-party software' or to regulate software companies directly." *Id.* "To the extent, in the future, there is evidence to suggest that our rule no longer ensures that the goals of the statute are met . . . we may revisit the issue." *Id.* at n. 372.

[11] *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Report & Order & FNPRM, Dkt. 12-108 (2013) at n. 190 ("We will continue to monitor the development of accessible technology in this area and will reevaluate whether we should require the accessibility of consumer-installed MVPD applications at a later date if it appears necessary to ensure access to MVPD programming by people who are blind or visually impaired.").

Consumers who encounter problems accessing pay-TV services on equal terms must not be required to finely parse the Commission's rules, develop a technical understanding of the relationship between the provider of their pay-TV service and the manufacturers of their video devices in the development of a pay-TV application, or hire a lawyer to discover whether their problems are suddenly—and without reasonable notice in this rulemaking—among a narrow subset under the jurisdiction of an entirely different agency. The Commission should make clear that FTC enforcement of promises to abide by rules that have always been exclusively enforced by the FCC, is not an appropriate long-term solution to fulfilling the Commission's statutory obligations to ensure that new forms of technology are accessible on equal terms. Accordingly, any order issued in the above-captioned proceeding should ensure that the FCC's accessibility enforcement authority is airtight, or should at the very least include a clear plan to close any temporary gaps in the accessibility rules arising out of the changing ecosystem.

Respectfully submitted,

/s/
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