

September 22, 2016

VIA ELECTRONIC FILING

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

Re: *Commercial Availability of Navigation Devices*, MB Docket No. 16-42,
CS Docket No. 97-80.

Dear Ms. Dortch:

On September 20, 2016, Rick Chessen of NCTA – The Internet & Television Association; Stacy Fuller and Raquel Noriega of AT&T/DIRECTV; Alex Hoehn-Saric of Charter; Jordan Goldstein of Comcast; and Paul Glist of Davis Wright Tremaine met with Matthew Berry, Chief of Staff to Commissioner Pai, regarding the above-referenced proceeding.

Stacy Fuller and Raquel Noriega of AT&T/DIRECTV; Alex Hoehn-Saric of Charter; Jordan Goldstein of Comcast; Barry Ohlson of Cox (collectively, the “MVPD Representatives”); Paul Glist of Davis Wright Tremaine; and the undersigned also met separately with Robin Colwell, Chief of Staff and Legal Advisor to Commissioner O’Rielly on September 22, 2016.

The participants discussed concerns with the concepts and approaches recently raised by Chairman Wheeler’s “Fact Sheet,” as detailed in the September 19, 2016 submission by NCTA and AT&T in this proceeding, a copy of which was provided to Mr. Berry and Ms. Colwell and is available at <https://www.fcc.gov/ecfs/filing/10919694706359>. We stated our concern that the Commission does not have the authority to dictate the terms by which an app is licensed, or to review the terms of the underlying agreements between programmers and distributors, nor can it avoid the myriad problems with the Chairman’s proposal merely by saying that the new rules are subject to the agreements between programmers and MVPDs.¹ The Chairman’s proposal (as we understand it), as well as new

¹ It is worth noting that it is not clear how such a determination could be made under the Chairman’s proposal without disclosing and evaluating the confidential terms of such agreements.

approaches offered by others, do not adequately address the consumer and competitive harms identified by the participants. In particular, we discussed the following points:

No Regulation of the Private Licensing Process. Rather than creating or overseeing an app licensing body and standard license framework, the Commission should rely on commercial app licenses that MVPDs will reach with device manufacturers on commercially reasonable terms. If such license agreements are not reached within an appropriate timeframe, the Commission can entertain complaints alleging a violation of the Commission's rules.

Full Respect for All Terms of Agreements between MVPDs and Programmers. The Commission should clarify that the terms of agreements between MVPDs and programmers are fully respected. The Commission should decline to adopt any proposed rule that intrudes into content providers' programming agreements with MVPDs or make any determinations as to the reasonableness of any terms of such agreements.

In the separate meeting with Ms. Colwell, the MVPD Representatives noted that agreements between programmers and MVPDs also address the financial, technical, and other terms for an MVPD to authenticate a programmer's TV Everywhere app on retail devices and also may set other terms, such as those relating to the sharing of aggregated consumer viewer data.² To the extent the Chairman's proposal seeks to regulate these areas, such rules would exceed the Commission's authority under Section 629; conflict with other provisions of the Communications Act;³ and raise serious copyright and constitutional issues.⁴

Business-to-Business Agreements. The Commission should expressly clarify that device manufacturers and MVPDs have the flexibility to enter into business-to-business agreements apart from any structure or rules set by the Commission. This approach would give parties more options for delivering apps, including to smaller platforms or on different terms.

No Restrictions on Search or Entitlement/Pricing Mandates. The Commission should not place restrictions on integrated search that interfere with commercially negotiated app licensing agreements, with the different search techniques developed together by MVPDs and device manufacturers for

² These agreements address such terms as technical coordination on both sides, available content, advertising, and MVPD payments of additional license fees. A blanket order to authenticate could negate such contract terms or trigger obligations for increased payments. If there are any concerns about discrimination, MVPDs have already committed in their HTML5 apps proposal that the MVPD app license is not intended to exclude programmer TV Everywhere apps. However, it bears emphasis that the specific terms governing the placement, promotion, search and handling of programmer TV Everywhere apps on retail devices are normally covered in agreements between programmers and the retail devices that host them.

³ See, e.g., 47 U.S.C. § 549(b) (prohibiting the Commission from imposing regulations that jeopardize content security); *id.* § 544(f) (prohibiting the Commission from regulating the "provision" and "content" of cable services).

⁴ More generally, the Chairman's new proposal has not been subject to notice and comment, as required under the Administrative Procedure Act.

different widely-available platforms today, and with the ability to innovate with new models. Rather, the Commission should continue to allow integrated search solutions to develop and be resolved in the marketplace across many different device platforms. Market-based technology developments will foster more choice and innovation.

MVPDs also should not be required to deliver entitlement data, third-party metadata, or pricing information to third parties, given that such information is not necessary to support integrated search and given the substantial technical, legal, and consumer privacy concerns with such an approach. Nor should MVPDs be required to standardize entitlements or other features. MVPDs today do not deliver entitlements in a standardized way, and any mandate to create a standardized “entitlements” stream would require significant changes to MVPDs’ networks – imposing even more costs – and introduce rigidity that threatens to stifle innovation and restrict new consumer offerings.⁵ Moreover, third-party metadata is subject to licensing restrictions that limit use or require additional fees. For search, the focus should be on providing information on content that is *available* for customers to obtain, as MVPDs do today and consistent with the information consumers will receive from other sources (e.g., Sling TV). Notably, no other video or audio services (e.g., Sling TV, Netflix, Hulu) provide such information today, and any mandate applied only to MVPDs would not create universal search, but rather competitive disparities.

Likewise, any restrictions on landing pages within the MVPD app would interfere with various provisions in MVPD/programmer agreements and with the presentation of the many clickable options available to consumers for various content offerings (e.g., startover, tune live, upgrade, look back, view on demand, electronic purchase, and more).

No Mandatory Apps with Revenue Share. There should be no mandate to provide an app if the device manufacturer demands a transactional fee, revenue share, tax, or alternative compensation for the app or for services available through the app, and no obligation to provide a “consumption only” app offering only non-transactional (e.g., linear) content. Such an app would not provide consumers with the MVPD’s premium and video-on-demand content (“VOD”) to which they are entitled and would cause customer confusion. Consumers would have to forgo the ability to buy VOD or other content that is part of their MVPD service and would lose the ability to subscribe to additional service offerings within the app. Such an approach also could require consumers to purchase VOD or other content through a different device entirely, pay more to cover the device tax, or not get access to new product offerings. With a “consumption-only” app mandate, device manufacturers would have little incentive to reach an agreement with MVPDs to deliver the full range of content to which consumers are entitled. Rather, device manufacturers would have the incentive and ability to raise the costs to consumers to receive pay-per-view and other MVPD offerings, since doing so would make the device

⁵ The proposed one-year timeframe for a standards body to develop a standardized API is even shorter than the two years proposed in the NPRM, notwithstanding the substantial record evidence that a two-year time period for standards setting is insufficient and entirely unrealistic.

manufacturer's own transactional offerings more valuable.⁶ Moreover, to the extent that the MVPD seeks to offer future services on the app that are competitive to the device manufacturer's offerings, the manufacturer would have the leverage and incentive to raise the cost of the new service or limit the MVPD to a "consumption only" app.

Costs. Under the HTML5 apps approach, MVPDs have committed that with no set-top box, there is no set-top box rental, and there is no app charge to the consumer for devices served by the HTML5 app beyond the standard fees for a consumer's MVPD service which would continue to apply. Moreover, MVPDs would license their HTML5 apps without charge to manufacturers of third-party navigation devices for their app stores, provided that the device manufacturers and stores do not impose any fee or surcharge on MVPDs or consumers for providing or using the app or for transactions enabled through the MVPD service. And no additional fees should be incurred from or imposed on programmers for the HTML5 app. Any Commission Order should follow this same approach.

No "Parity" Rule; Leave the App Feature Set to Device Negotiation. Requiring simultaneous "parity" between all apps and any video features on a set-top box is not only well beyond the Commission's statutory authority and legally infirm for myriad other reasons, it also is a recipe for a freeze on technology and innovation. Apps will provide a similar consumer experience, but there will undoubtedly be differences across various devices with respect to program rights, platform technology, needs for special output controls, and factors that affect the consumer experience, including differences based on screen sizes that do not automatically support all features. Mandatory simultaneous parity would force MVPDs to delay or limit rollout of new functionalities until parity solutions could be developed for all apps in the market, thus effectively restricting consumers to the least common denominator supported by any app on any device, and would prevent consumers from getting new features. Even if an app can sustain a new feature across all applicable devices on which it is carried, there would still need to be a period of time for app development implementing the new feature across the various devices. New features do not roll out simultaneously on all models of televisions, smart phones, consumer electronics, automobile technology, and MVPDs' own set-top boxes all at once, and the Commission should not expect – and certainly not require – them to do so with apps. And the MVPD should not be required to provide new features for apps if the device manufacturer is not willing to support such features, as an MVPD's ability to develop a feature for a third-party device is largely dependent on the device's own capabilities and design, over which an MVPD has no control.

No Local Recording Mandates. MVPDs that offer cloud DVR or a local DVR gateway (such as AT&T may offer) should support cloud DVR or their own local DVR via their apps. However, there should be no requirement to support local recording *on* the third-party device, nor should there be

⁶ Amazon's proposal in support of a consumption-only app, *see* Letter from Gerard J. Waldron, Covington & Burling LLP, Counsel to Amazon.com Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 21, 2016), raises the same concerns.

any requirement that cloud DVR or other apps-based recording functionality be controllable through the device user interface, rather than the MVPD app. Programmers have made clear that any recordings must remain within the control of the app.

Support for Native Apps on Large Platforms. While the Commission should adopt HTML5 as a safe harbor solution, if the Commission mandates native apps for large device platforms, it needs to put limits around such a mandate in order to ensure that MVPDs are not unduly burdened with producing apps for untold numbers of native platforms. A large device platform is a set of devices that can run a single implementation of an app. The Commission cannot expect MVPDs to write multiple different apps for all the devices that run different flavors of an operating system like Linux. The device must be widely-deployed, actively shipping in volume, and actively supported by the manufacturer. If the device is in decline, it should no longer be subject to mandatory development and maintenance of an MVPD app; instead, the mandate for that device should sunset, and support for the MVPD app should be left to the ordinary market dynamics of how manufacturers and app providers support legacy devices. Any timeframe for app development must provide sufficient time to work with device manufacturers and to develop the app. It is unrealistic to expect all such work on a large number of platforms to be completed within two years after a license agreement has been signed. Moreover, consumers should be protected from manufacturers taking away an MVPD app without sufficient notice and time to transition.

No Regulation of TV Everywhere Apps. The Commission should not impose any regulations on MVPDs' TV Everywhere apps, which are already widely deployed today. These apps enable over-the-top, out-of-home viewing of TV Everywhere services, and are far beyond the Commission's Section 629 authority, which is focused on providing an alternate means of accessing MVPDs' offerings for in-home viewing.

Line Itemization. There should not be a mandate for separate line itemization for navigation devices. The record already reflects a prominent example of simplified "all in" pricing for broadband access service with no extra charge for the modem, and the provider's price is comparable to or lower than charges by its peers even before their modem fee is added as a line item. Moreover, certain MVPDs are offering broadband adoption programs for low-income consumers that do not charge equipment fees. Nor would it serve any purpose to mandate line itemization for equipment that must be provided by the MVPD, such as a gateway set-top box for one-way satellite service to interface with an app on retail devices.

No Infrastructure or Technology Specific Mandates. MVPDs should have flexibility in how they are going to implement the rules consistent with their technology. They should not be subject to mandatory standardization of highly varied networks or to prior regulatory consents to innovation.

Small Operator Exemption. Operators with fewer than one million subscribers should have a full exemption, as TiVo has repeatedly supported. Simply providing more time would not permit small operators to devote their limited resources to other pressing needs, and their exemption would have no adverse impact on development of a retail market for navigation devices.

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Respectfully submitted,

/s/ Jonathan Friedman
Jonathan Friedman

cc: Jessica Almond
Matthew Berry
Robin Colwell
David Grossman
Marc Paul
Howard Symons