September 22, 2016

The Honorable Thomas Wheeler
Chairman
The Federal Communications Commission (Commission)
445 12th Street, S.W.
Washington, D.C. 20054

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

Dear Chairman Wheeler:

On March 21, our Coalition of leaders representing historic national civil and social rights organizations wrote a letter voicing our concerns about your February 18th Notice of Proposed Rulemaking and Memorandum Opinion and Order *Expanding Consumers' Video Navigation Choices* aka the Proposal to "Unlock the Set Top Box."

Minority and independent programmers already face a plethora of challenges to remain both visible and relevant in a highly competitive, video marketplace. In the letter, our Coalition urged the Commission to "pause" this proceeding to conduct a study to ensure that the proposal will in fact, promote diversity and inclusion in the television and video programming ecosystem. We wanted to ensure that the Commission heard from our communities that the issues of diversity, inclusion and economic opportunity should be key considerations.

Today, we write to continue our support for increased diversity and inclusion on the nation's airwaves as it relates to your revised proposal released on September 8, 2016. Once again, we find it necessary to reiterate that "in the 21st Century diversity and inclusion is not only consistent with the promotion of the public interest; it is consistent with the promotion of the business interest and must be a top-priority."

Based on the limited information that has been publicly disclosed, we remain concerned that this revised proposal may still bring undue harm and stress to the business models of diverse and independent programmers.

In Chairman Wheeler's recent blog in the LA Times on this proceeding, he referred to "integrated search" – which would enable the ability for consumers to search for pay-TV content alongside other

sources of content, as one of the biggest benefits of your proposal.[1] While we agree that this type of search could streamline content discoverability for consumers, our organizations remain concerned about the effects of this and other actions on diverse and independent programmers, particularly if increased competition serves to devalue legacy media or degrade the revenue sources that support them, including advertising. He asserted that integrated search will lead to expanded access to programming created by diverse and independent networks.[2] However, without a comprehensive study on the impacts of the proposal on diverse and independent networks in the areas of costs, savings, and implementation, we find this to be mere speculation, rather than based on facts. *It remains our opinion that the Commission must still complete a disparity study, which at minimum would gather and document the principal challenges faced by diverse and independent networks when securing carriage on both television and online.*

We also have questions about the Commission's central licensing approach to copyright. In addition to being unprecedented and perhaps outside of the scope of the agency's jurisdiction, this approach may still violate copyright, even with an imposition of royalty-free, compulsory license agreements for MVPDs and programmers. Pirated content costs the nation upwards of billions of dollars in revenue that not only impacts content creators, but also consumers who are often negatively affected by the malware, which drives people to these illegal sites that steal their personal data. In our opinion, the Commission's central licensing approach is too broad and can further disadvantage diverse and independent networks, which do not have the bandwidth to legally guard against and remedy piracy infractions.

Indeed, the protection of online consumer privacy remains a major concern for our organizations. Under the new proposal, it appears that pay-TV providers would be required to hand off consumers' private subscription and transaction data to third party companies. The ensuing threats associated with the collection of "big data," from where one lives, eats, shops, and with whom one communicates, take priority within our organizations – especially as we represent the interests of historically disadvantaged populations. It is unclear in the proposal how consumer privacy would be protected under the new search requirements, particularly personally identifiable viewer information and financial data. *Thus, we caution against any proposal from the Commission that undermines consumer privacy protections and ignores the statutory obligation of MVPDs to do the same.*

While we appreciate this attempt to revise the Commission's initial proposal, the information provided about this revision still does not answer the substantive concerns that we, Congressional members and other stakeholders have had about this proceeding- especially the impact to independent minority programmers.

Too much remains unclear. As we have stated previously, it is because our groups uniquely understand the powerful role television, the media and Hollywood play in the democratic process, as well as in shaping perceptions about who we are as individuals, communities and as a nation, that we continue to oppose the fast-tracking of this proposal. Additionally, we are not alone with these concerns.

Unlike many legislative and regulatory actions today, this is not a partisan issue. From the moment the Commission released the NPRM in February, there has been widespread agreement across both sides of

[1] *See* Tom Wheeler, "FCC Chairman: Here are the New Proposed Rules for Set Top Boxes." (September 8, 2016) L.A. Times, available at http://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html (last accessed Sept. 22, 2016).
[2] Ibid.

the aisle that this proceeding threatens minority programming and vital consumer protections. More than 150 bipartisan Members of the House of Representatives weighed in on the Commission's February 18th Proposal expressing concern not only about minority content, but also copyright, consumer privacy, piracy, advertising, and security. Much of these concerns have followed this revised proposal, especially in light of the dearth of substantive information regarding this new approach.

Just last week, members from both sides of the aisle and Commissioner Rosenworcel voiced concerns, including questions of the Commission's legal authority, over the new proposal at the Senate Commerce Committee hearing. Additionally, 16 Democratic members of Congress wrote a letter urging you to reconsider your intent to force a vote on the revised proposal on September 29, 2016. Instead, these members proposed publishing a full version of the revised proposal as a supplemental notice of proposed rulemaking, thus providing an opportunity for stakeholder review, comments and a final rule that respects the Copyright Office's expert interpretation.

We could not agree more. **Therefore, we request once again that the Commission hit the "pause" button on your revised proposal so that the Commission can do its statutory duty to evaluate its impact.**

By setting this plan for a public vote on September 29th—after a very short three weeks—the Commission is embracing a process that essentially shuns public discourse and limiting our ability as interested stakeholders and advocacy groups to fully evaluate and provide necessary input.

This is a highly complex and far-reaching decision that will transform the future of television and video. Diversity and inclusion must both be priorities in our increasingly diverse economy and across our robust video marketplace. As this Commission proceeds with this proposal, the record still lacks substantive evidence of its impact on diverse and independent programmers, and viewers of color. *The proposal's unknowns must not make diverse and independent programmers the collateral damage on this issue*. Moreover, the proposal cannot lead to less diversity and fewer successful minority programmers simply because the consequences were not addressed.

The onus to assess and address the merits of this proposal and the burden of accessing its impact on minority ownership and participation in this ecosystem statutorily falls on the Commission. In our March letter, our organizations put forth a non-exhaustive list of questions that the Commission should have endeavored to answer prior to moving forward.

Those questions included:[3]

- Will unlocking the set top box serve the goal of increasing media, content and ownership diversity compared to the current system?
- Could unlocking the box result in less diversity and fewer successful minority programmers and content producers? If so, what is the projected data on the extent/size of the disparity that would result? If not, what is the projected data on the extent/size of diversity gains?

[3] The Multicultural Media, Telecom and Internet Council ("MMTC") also added to the list of questions: "What is the economic model for how minority programmers and content producers will derive revenue under the Commission's revised proposal?" for the Chairman's consideration.

- What type of new opportunities and/or harms will unlocking the set top box create for minority programmers and content producers?
- What are the costs and/or savings associated for minority programmers and content producers?

We never received a response from the Commission, nor has the agency reached out to our groups or communities to discuss these possible issues. Instead, with this revised proposal, the Commission continues to arbitrarily ignore its statutory duty to protect diversity and inclusion. This is quite clear, as independent minority programmers worry that this proposal may lack mechanisms that they need to effectively access the market —such as necessary standardization of technology.

We strongly urge the Commission to pause this proceeding in order to build a record with the necessary data that will address these numerous concerns and allow for a diverse and inclusive market place. We hope that the Commission will consider our request and perspectives to ensure that the proposal proves valuable for all stakeholders in the end.

Sincerely,

Marc H. Morial
President and Chief Executive Officer
National Urban League

Mee Moua
President & Executive Director
Asian American Justice Center

Kim Keenan
President
Multicultural Media, Telecom and Internet Council

Hilary O. Shelton
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NAACP

Melanie Campbell
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National Coalition on Black Civic Participation

Rev. Al Sharpton
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National Action Network

Leslie Moe-Kaiser
National President
OCA – Asian Pacific American Advocates

Rev. Jesse L. Jackson, Sr.
Founder & President
Rainbow PUSH Coalition

cc:
The Honorable Mignon Clyburn, Commissioner
The Honorable Jessica Rosenworcel, Commissioner
The Honorable Ajit Pai, Commissioner
The Honorable Michael O'Rielly, Commissioner
Members, Congressional Tri-Caucus