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September 23, 2016

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

**Re: Notice of *Ex Parte* Presentation: MB Docket No. 16-42; CS Docket No. 97-80. *Expanding Consumers' Video Navigation Choices; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices***

Dear Ms. Dortch:

This is to notify you that on September 21, 2016, on behalf of Cox Communications, Inc. ("Cox"), Barry Ohlson, Vice President, Regulatory Affairs, Cox Enterprises, Inc.; Jennifer Prime, Director, Regulatory Affairs, Cox Enterprises, Inc.; and the undersigned, of Wilkinson Barker Knauer, LLP, counsel to Cox, met with Gigi Sohn, Jessica Almond, Timothy Campbell, and Stephen Klein of the Office of Chairman Wheeler and John Williams of the Office of General Counsel. Chief Technology Officer Scott Jordan participated by phone.

The purpose of the meeting was to discuss the proposed approach under consideration by the Commission in the above-referenced proceeding.<sup>1</sup> Cox outlined several concerns with the current proposal, as reflected on the attached handout. Specifically, Cox explained that under the proposed approach the burden would fall inequitably on MVPDs to provide and support an unspecified number of native apps, while, in contrast, platform manufacturers or developers would not need to make any changes and effectively would be in a position to dictate the terms

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<sup>1</sup> *Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice and Innovation in the Video Marketplace*, FED. COMM'NS COMM'N MEDIA BUREAU (Sept. 8, 2016), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0908/DOC-341152A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0908/DOC-341152A1.pdf).

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of MVPD compliance. Cox does not object *per se* to devoting resources to native apps – indeed, absent any regulatory mandate, Cox currently offers native apps for three platforms (web, iOS, and Android) and continues to actively explore other platforms. Cox is concerned, however, that an unworkable number of separate, customized app configurations would be required under the proposed rules.<sup>2</sup> With each new app, customer service becomes far more complicated and costly, an expense for which the Fact Sheet does not indicate any sunset that would allow an MVPD to cease supporting a particular app.

It also is unclear under the current proposal what MVPDs must do with respect to app upgrades. It is in everyone's interest to ensure that MVPD app users on all platforms have access to the most updated functionalities. In addressing upgrades, however, the Commission should not require simultaneous rollout on leased set-top boxes and third-party apps. Mandating third-party app upgrades at the same time as set-top box upgrades has the potential to either freeze innovation (delaying rollout on all platforms, including the leased platform, until new functionalities can be deployed everywhere) or disappoint consumers (forcing premature rollout of untested new features on platforms outside an MVPD's control).

Finally, Cox noted the puzzling fact that the current proposal would force MVPDs *away* from the existing, open HTML5 standard that can cover a broad array of existing and new devices and *toward* a fragmented marketplace of proprietary apps.

Given these concerns, Cox urged the Commission to adopt a safe harbor approach based on the HTML5 standard. At the outset, Cox explained that it is not seeking a technical mandate, but rather a workable *option* for MVPDs to comply with the app requirement in a common way across platforms. Under the safe harbor, while MVPDs of a certain size would need to provide the software for their apps, MVPDs that implement HTML5 would be deemed in compliance with this requirement. The Commission has found in other circumstances that a safe harbor “minimize[s] the need for [companies] to author multiple standards,” “balance[s] goals of efficiency, certainty, and consumer access with needed flexibility to continue to innovate,” and “provide[s] certainty while enabling the industry to continue to innovate and permitting parties to agree to use an alternative standard.”<sup>3</sup>

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<sup>2</sup> In response to the question of why Cox should have any concerns at all about native apps, given consumers' general familiarity with the app model and the internet ecosystem, Cox explained that if Cox subscribers are using an app *instead* of a set-top box (as the NPRM contemplates, as opposed to the current complementary “second screen” usage often seen today), their expectations as far as quality of service and consistency of performance will more closely mirror what they expect to see from traditional MVPD delivery, rather than from an app. Thus, Cox believes it is important to deliver a high level of service on its apps to its subscribers and urges the Commission not to adopt rules that would hinder these efforts.

<sup>3</sup> *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012).

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In this case, a safe harbor would facilitate the Commission's ultimate goal of MVPD app deployment to as many platforms as possible on the fastest timeline. HTML5 apps cost less to develop and can be deployed much more quickly, since common code can be shared across platforms and features can be launched across all platforms almost simultaneously. In contrast, relying on native apps could slow innovation and force deployment on scattered timelines, as MVPDs code to individual platforms. Cox acknowledges that in select cases, native apps may offer some advantages for consumers using a particular platform, and it notes that nothing about a safe harbor would eliminate parties' ability to enter into business-to-business relationships where they agree a native app or other distinctive functionalities or features are worth pursuing. Indeed, adoption of a safe harbor is unlikely to affect existing native app deployment or support – where such arrangements are working to the benefit of both parties and consumers, Cox anticipates they will remain in effect without issue. In this regard, the Commission should make clear that existing and future business-to-business arrangements are permitted under the new rules to the benefit of both MVPDs and platform providers.

Cox also explained in the meeting that HTML5 would make it easier to provide a similar customer experience across platforms. In addition, the customer care concerns that Cox and other MVPDs have expressed would be greatly reduced with an HTML5 safe harbor. Each MVPD would have one HTML5 app (plus any native apps agreed to in business-to-business arrangements), rather than a potentially expansive number of different apps. Customer service representatives can be more easily trained, and technical support would be easier to maintain than for multiple configurations. A safe harbor also would reduce concerns regarding continued, unlimited support of legacy platforms. Under the approach proposed in the draft order, an MVPD might be required to continue to support an app even if a version of a platform becomes obsolete, or other changes occur. In the current voluntary app regime, MVPDs are subject to the app terms given by the larger platforms, but an MVPD has flexibility to replace or upgrade existing apps at a pace that responds to both customer needs and platform upgrade cycles, as well as to remove an app if continued participation is not feasible. An HTML5 safe harbor would balance these competing interests by ensuring that MVPDs continue to support apps on third-party devices while not unfairly straining MVPD resources.<sup>4</sup>

The Chairman's office staff asked Cox how many platforms currently support HTML5, and Cox recognizes that the safe harbor approach is only desirable if it works as a practical matter for numerous consumer-friendly and innovative platforms – which it does. HTML5 has the benefit of (i) working for multiple platforms today and (ii) being easily adaptable for a wide range of device manufacturers and software developers to implement quickly.<sup>5</sup> In addition to

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<sup>4</sup> Regardless of whether the Commission adopts a safe harbor, it should clarify that the timeframe for supporting a third-party app is not unlimited, and a device in decline should no longer be subject to the rules. MVPDs and platforms can work together, as they do today, to determine an appropriate level of support based on customer needs.

<sup>5</sup> See Letter from Paul Glist, Counsel to NCTA, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Aug. 19, 2016).

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platforms that could run HTML5 MVPD apps today, a number of platforms currently support portions of HTML5 and could be configured quickly, easily, and at little expense to include all of the HTML5 requirements necessary to support MVPD apps. Platforms that fall into one of these two categories include:<sup>6</sup>

- All major browsers (Apple Safari, Google Chrome, Microsoft Edge, Mozilla Firefox, Opera)
- Many new smart TVs (Samsung, LG, Sharp, Sony, Panasonic)
- TV standards groups, including ATSC 3.0 and DLNA VidiPath, also have adopted HTML5
- Samsung (working with Comcast on an Xfinity HTML5 app)
- TiVo as well as numerous smart TVs provide access to the Opera TV app store, which supports HTML5
- Select tablets, PCs and smartphones

In the event the FCC does not adopt the HTML5 safe harbor, Cox expressed deep concern regarding the definition of “widely deployed” platforms, which Cox understands to be a platform that has shipped five million devices in the last 12 months. Cox argued that the Commission must carefully consider the significant burdens imposed on Cox and other MVPDs in the event they are required to support multiple native apps on a potentially ever expanding class of “widely-deployed” platforms. Cox also explained that as a smaller MVPD, Cox would be disproportionately burdened as it could be forced to develop a native app for a relatively small number of its customers. One solution is that the FCC could limit the native app requirement so that MVPDs subject to the FCC’s rules would only be required to provide and maintain a native app to a “widely-deployed” platform if at least 500,000 of the MVPD’s subscribers actually use that platform (i.e., more than 10% of the widely-deployed platform base of customers).<sup>7</sup>

Finally, the participants in the meeting discussed concerns regarding revenue sharing between third-party platforms and MVPDs who place their apps on such platforms. Platforms often demand a share of revenue or alternate compensation for placement of apps in their app stores.<sup>8</sup> MVPDs should not have to pay twice – once to develop the apps and a second time for

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<sup>6</sup> See NCTA Response to Questions About Open Standards HTML5 Apps-Based Approach, MB Docket No. 16-42, CS Docket No. 97-80 (filed July 21, 2016).

<sup>7</sup> Indeed, Tivo and Amazon have supported a one million subscriber threshold (from 400,000 subscribers) for defining a “large MVPD” for many of the same reasons that would justify adopting a less burdensome threshold for required native app development, particularly for smaller operators. See Comments of Tivo, Inc., MB Docket No. 16-42, CS Docket No. 97-80, at 33-34 (filed Apr. 22, 2016); Letter from Gerard J. Waldron, Counsel to Amazon, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2, n.2 (filed Sep. 21, 2016).

<sup>8</sup> See, e.g., Roku, Inc., Application Distribution Agreement, <https://docs.roku.com/doc/developerdistribution/en-us> (describing “revenue share” from “pay-to-install applications” and “transactional applications,” as “Roku will pay you [the developer] 80% of the revenue ... and Roku will retain 20%). Amazon, Apple, and Google/Android retain even more – up to 30% of app revenue. See Google Inc., Developer Console Help, Transaction Fees,

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placing the apps or operating their service via the apps they are required to provide under the rules.<sup>9</sup> The Commission should be clear that it is not mandating revenue-sharing, and entities that seek such fees should not be permitted to take advantage of the FCC's framework to obtain an MVPD's app.<sup>10</sup>

This letter is filed pursuant to Section 1.1206 of the rules of the Federal Communications Commission.<sup>11</sup> Please direct any questions to the undersigned.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

By:           /s/ Natalie G. Roisman          

Natalie G. Roisman

*Counsel to Cox Communications, Inc.*

Enclosure

cc: Gigi Sohn  
Jessica Almond  
Scott Jordan  
John Williams  
Timothy Campbell  
Stephen Klein

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<https://support.google.com/googleplay/android-developer/answer/112622?hl=en>; Lauren Goode, "App Store 2.0," THEVERGE.COM (Jun. 8, 2016), <http://www.theverge.com/2016/6/8/11880730/apple-app-store-subscription-update-phil-schiller-interview>; Amazon Digital Services LLC, App Distribution and Services Agreement, <https://developer.amazon.com/appsandservices/support/legal/da>.

<sup>9</sup> See Letter from Jonathan Friedman, Counsel to NCTA, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Sept. 22, 2016).

<sup>10</sup> See Letter from Leora Hochstein, Verizon, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Sept. 21, 2016).

<sup>11</sup> Although the "sunshine" period has commenced, this notice is not subject to the Commission's sunshine prohibition, 47 C.F.R. § 1.1203(a)-(b), because it is being filed within two business days after the presentation, as required by 47 C.F.R. § 1.1206(b)(2)(iii).