

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	

**OPENING COMMENTS OF THE GREENLINING INSTITUTE ON THE SECOND  
FURTHER NOTICE OF PROPOSED RULEMAKING, ORDER ON  
RECONSIDERATION, SECOND REPORT AND ORDER, AND MEMORANDUM  
OPINION AND ORDER**

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## I. INTRODUCTION

The Greenlining Institute thanks the Commission for issuing the NPRM, and believes that expanding availability of third-party navigation devices would be an enormous boon to consumers. Additionally, greater competition in the set top box market would increase racial equity in content production and availability, because it would provide paths for creators of content by and for communities of color to reach much larger audiences. These comments will focus on the proposed rules' benefits to increasing the content created by and for communities of color.

## II. THE COMMISSION'S RULES REGARDING THIRD PARTY SET TOP BOXES SHOULD ENABLE CONSUMERS TO ACCESS PROGRAMMING BY AND FOR COMMUNITIES OF COLOR TO THE FULLEST EXTENT POSSIBLE.

### A. MVPDs' Gatekeeper Power Over Content Has Resulted In Extremely Limited Availability of Programming Made By And For People of Color, And Overall Content Does Not Reflect the Full Diversity of Viewers.

As the Commission noted in its NPRM, MVPDs overwhelmingly require customers to purchase proprietary navigation devices in order to watch the content offered by that provider.<sup>1</sup> This makes MVPDs the gatekeepers for an enormous amount of content. MVPDs do not include a significant amount of programming made by and/or for communities of color in their service offerings.<sup>2</sup> Accordingly, communities of color are underrepresented on television, and there are disproportionately low numbers of writers, actors, and producers of color in the television

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<sup>1</sup> NPRM at ¶ 13.

<sup>2</sup> See Comments of the National Hispanic Media Coalition, In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 1-57 (August 25, 2014).

industry.<sup>3</sup> It appears that MVPDs have little incentive to increase their offerings of programming made by and for communities of color. As a result, it is difficult for consumers who wish to view programming made by and for communities of color to find it using their providers' navigation devices, and it is even more difficult for creators of such programming to deliver that content to audiences.

B. The Commission's Proposed Rules Will Create Enormous Benefits for Communities of Color.

Third party navigation devices are a critical first step toward breaking the content delivery bottleneck and ensuring that diverse content creators can deliver their programming to audiences. Third party navigation devices allow consumers to purchase one device that provides access to the video service they've subscribed to **and** to third-party video content, such as streaming video created by and for communities of color. This allows them to work around the bottleneck of MVPDs who do not adequately serve communities of color. Additionally, third party navigation device manufacturers could offer services and technologies which enhance the content offered by MVPDs.

For example, As the Commission itself notes, some navigation devices provide "applications that include news headlines, weather information, sports scores, and social networking."<sup>4</sup> A third-party manufacturer could develop a device with those applications targeted towards particular demographics, and could implement targeted advertising for those corporate interests that want to be responsive to communities of color. Similarly, a manufacturer could develop a navigation device which permits subtitles or dubbing in languages that an

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<sup>3</sup> Ralph J. Bunche Center for African American Studies at UCLA, 2015 Hollywood Diversity Report: Flipping The Script (Feb. 2015), *available at* <http://www.bunchecenter.ucla.edu/wp-content/uploads/2015/02/2015-Hollywood-Diversity-Report-2-25-15.pdf>.

<sup>4</sup> NPRM at ¶ 40.

MVPD does not offer. Similarly, if an MVPD is unwilling to pay for a license for certain language rights for content, a third-party navigation device manufacturer could purchase that license, or a navigation device could permit a content creator to sell language rights directly to a customer.

This increased access to audiences carries an enormous second benefit—employment. Much of the non-English content offered by MVPDs consists of “repackaged” programs that are created in other countries.<sup>5</sup> As noted above, a navigation device manufacturer could offer a device that allows consumers to install apps for a particular program or channel that is not available from their MVPD. This could make available a much broader diversity of programming, which in turn will lead to increased demand for diverse programming. This in turn will drive growth in content production, and the jobs needed to make it happen.

### C. The Commission Must Adopt Rules That Remedy the Relative Scarcity of Programming Created by and for Communities of Color.

To remedy the relative scarcity of programming created by and for communities of color, it is not enough that that the Commission allow third-party set-top boxes. The Commission must do so in a manner that (1) prevents MVPDs from creating unnecessary barriers, (2) makes programming accessible to the widest possible audience, and (3) protects consumers.

### III. THE COMMISSION’S RULES MUST HELP PREVENT MVPDS FROM ERECTING ARTIFICIAL BARRIERS TO PARTICIPATION IN THE MARKET FOR NAVIGATION DEVICES.

Greenlining supports the Commission’s efforts to increase competition for navigation devices. As the Commission has noted, MVPDs make as much as \$19.5 billion annually through set-top box fees.<sup>6</sup> This creates a huge economic incentive for MVPDs to create artificial barriers

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<sup>5</sup> Dana Calvo, *Univision Adds Muscle to Its Original Lineup* (June 19, 2001), *available at* <http://articles.latimes.com/2001/jun/19/entertainment/ca-12000> (last accessed April 15, 2016).

<sup>6</sup> NPRM at ¶ 13.

to competition for navigation devices. Greenlining urges the Commission to create specific rules regarding open standards bodies and certification, and to take steps to increase consumer access to content created by and for communities of color.

#### A. Open Standards Bodies

Greenlining generally supports the Commission's proposed rules regarding Open Standards Bodies. However, as the courts have noted, while industry-wide standards provide some benefits, there is a risk that members of standard-setting organizations can use the standard-setting process to impede or prevent competition.<sup>7</sup> Greenlining believes that there is a substantial risk that members of the proposed Open Standards Body would abuse the standard-setting process, especially given that the Open Standards Body would include consumer electronics, MVPD, and content companies<sup>8</sup> that would have a financial incentive to restrict customers' ability to use navigation devices. Accordingly, The Commission should include additional rules to prevent abuse of the standard-setting process.

First, there is a risk that members of the Open Standards Body would promulgate standards that include a member's own, proprietary technology as part of the standard.<sup>9</sup> Including that proprietary technology could allow a member or members to refuse to license the technology to third party manufacturers, or license that technology at a price that dissuaded market entry. To prevent such abuses, the Commission should require the following:

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<sup>7</sup> Dept. of Just. and Fed. Trade Comm'n, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: Promoting Innovation and Competition (April 2007), available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf> (last accessed April 15, 2016) (hereafter, 2007 IP Report).

<sup>8</sup> NPRM at ¶ 41.

<sup>9</sup> 2007 IP Report at 42.

- Members of an Open Standards Body must disclose the existence of any IP or pending patent applications that may relate to a standard under consideration.<sup>10</sup>
- If any members of the Open Standards Body own IP that may relate to a standard under consideration, the Open Standards Body should develop standards that do not include that IP.<sup>11</sup>
- Alternatively, if any members of the Open Standards Body own IP that may relate to a standard under consideration, those members must agree that they will not enforce intellectual property rights against users of the standard.<sup>12</sup>

Second, there is a risk that members of the Open Standards Body could use the Open Standards Body as a vehicle for collusion or the exchange of competitively sensitive information.<sup>13</sup> To reduce this risk, the Commission should include rules including:

- A requirement that the Open Standards Body conduct open meetings, and maintain a detailed agenda and minutes of all meetings.
- Prohibitions on discussions of:
  - Prices, pricing policies or output decisions,
  - Specific research, development, sales or marketing plans,
  - Confidential product, product development or production strategies,
  - Whether or how certain customers or suppliers will be served;
  - Prices paid for inputs, such as raw materials; or

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 47-48.

<sup>13</sup> *Id.* at 51.

- Complaints about individual firms or other actions that might tend to hinder competitors in any market.<sup>14</sup>

#### B. Certification.

As a related issue, the Commission should take care that MVPDs do not unnecessarily delay verification of a third-party device through the certification process.<sup>15</sup> MVPDs do have a history of such unnecessary delays: for example, Comcast refused to allow its customers to use the HBOGo service using a Roku device, claiming that it needed time to “work through technical integration and customer service” issues.<sup>16</sup> Comcast only relented when Roku complained to the FCC.<sup>17</sup> Additionally, Comcast does not currently permit its customers to use the HBOGo app on the Playstation 4, with no explanation other than claims about the need for review and certification.<sup>18</sup> The Commission’s rules should include safeguards that permit third-party device manufacturers to challenge unreasonable delays in a verification by MVPDs.

#### IV. THE COMMISSION’S RULES SHOULD PROMOTE THE AVAILABILITY AND ACCESSIBILITY OF CONTENT CREATED BY AND FOR COMMUNITIES OF COLOR.

The NPRM asks whether Service Discovery Data should include “whether the program has accessibility features such as closed captions and video description,”<sup>19</sup> and whether Content Delivery Data should include “[d]ata that contains navigable service and any information

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<sup>14</sup> Jennifer Grey, Antitrust Guidelines for Participating in Standard Setting Efforts at 8, available at <http://apps.americanbar.org/antitrust/at-committees/at-ta/pdf/articles/standardsetting.pdf> (last accessed April 15, 2016).

<sup>15</sup> NPRM at ¶ 73.

<sup>16</sup> Techdirt, Comcast Blocks HBO Go From Working On Playstation 4, Won't Coherently Explain Why (March 5, 2015), available at <https://www.techdirt.com/blog/netneutrality/articles/20150303/12433530200/comcast-blocks-hbo-go-working-playstation-4-wont-coherently-explain-why.shtml> (last accessed April 15, 2016).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> NPRM at ¶ 38.

necessary to make the Navigable Service accessible to persons with disabilities.”<sup>20</sup> The Commission’s rules should absolutely require the inclusion of that data, because that data would allow third-party manufacturers to make devices that served the needs of persons with disabilities.

Similarly, in order to increase the availability and accessibility of content to communities of color, providers’ Information Flows should include Content Delivery Data that would facilitate the translation of programming into languages other than English. For example, the Commission should require that Content Delivery Data include information about the existence of any secondary audio programming.

#### V. CONCLUSION

Greenlining supports the Commission’s goal of assuring “a competitive market for equipment, including software, that can access multichannel video programming.”<sup>21</sup> Greater competition in the set top box market would provide paths for creators of content by and for communities of color to reach much larger audiences, and would help reduce racial inequities in content production and availability.

Respectfully submitted,

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<sup>20</sup> NPRM at ¶ 40.

<sup>21</sup> NPRM at ¶ 11.