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

REPLY COMMENTS OF THE MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL (MMTC), ASIAN AMERICANS ADVANCING JUSTICE (AAJC), LATINOS IN INFORMATION SCIENCES AND TECHNOLOGY ASSOCIATION (LISTA), NATIONAL ASSOCIATION OF MULTICULTURAL DIGITAL ENTREPRENEURS (NAMDE), NATIONAL ORGANIZATION OF BLACK COUNTY OFFICIALS (NOBCO), NATIONAL ORGANIZATION OF BLACK ELECTED LEGISLATIVE (NOBEL) WOMEN, NATIONAL POLICY ALLIANCE (NPA), OCA – ASIAN PACIFIC AMERICAN ADVOCATES, RAINBOW PUSH COALITION, NATIONAL PUERTO RICAN CHAMBER OF COMMERCE

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE RECORD STRONGLY VALIDATES THE COALITION'S CONCERNS THAT THE NPRM'S PROPOSAL WOULD JEOPARDIZE THE VIABILITY OF DIVERSE VOICES. 4

A. Communities of Color Have Explained Why the Proposal Will Undermine the Ability of Diverse and Independent Content Creators to Thrive Over Time. 4

B. Because the Record Fails to Support the Unproven Theory That the NPRM's Proposal Might Foster More Diverse Programming, the FCC Must Undertake Impact Studies Before Adopting Any New Rules. 10

III. DATA NOW BEFORE THE COMMISSION INDICATES THAT THE NPRM'S PROPOSAL WILL RAISE CONSUMER COSTS, NOT LOWER THEM. 11

IV. THE RECORD DEMONSTRATES THAT HOLDING THIRD-PARTY DEVICE MANUFACTURERS INDIRECTLY LIABLE FOR PRIVACY VIOLATIONS WOULD BE NEITHER WORKABLE NOR WISE. 14

V. CONCLUSION 15

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REPLY COMMENTS OF THE
MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, et al.

The Multicultural Media, Telecom and Internet Council ("MMTC"), in partnership with nine leading national civil rights organizations ("The Coalition"), respectfully submits this reply in response to the initial comments addressing the Federal Communications Commission's ("FCC" or "the Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced dockets.[1] MMTC and the Coalition firmly reassert our position that enacting the NPRM's proposal ultimately weakens diversity among media voices and harms consumers – assessments now well-justified in the record. The FCC therefore should reject the proposal or, at a minimum, pause its decision-making until it undertakes and completes the research studies necessary to demonstrate that its theories are factually sound – thereby avoiding any unintended consequences against the constituents that we serve.

I. INTRODUCTION AND SUMMARY

Communications Act directives require the Commission to advance diversity and inclusion in media, thus compelling the agency to take actions that promote a wide array of

[1] *Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum, Opinion, and Order, 31 FCC Rcd 1469 (2016) ("NPRM").

diverse voices on all electronic media platforms.[2] In fulfilling its statutory obligations to implement Section 629, the FCC must avoid favoring one platform over another.

Yet evidence in the record shows that the NPRM's proposal – which calls for dismantling MVPD offerings and allowing third parties to both repackage programming content and control the "navigation" search function needed to find said programming – would unfairly privilege online media at the expense of the current and future multichannel TV industry.[3] Included in the record are the voices of many creators of color and public interest organizations that have explained why the proposal will hurt diverse programmers already carried on traditional multichannel video programming distributor ("MVPD") platforms, as well as thwart other diverse programmers from gaining such carriage in the future.[4]

The record also makes clear that in today's tumultuous video content ecosystem, diverse programmers still seek traditional MVPD carriage to build economically viable and sustainable businesses. The more established models of multichannel video distribution, which combine carriage affiliate fees, advertising availabilities, and programming guides that facilitate discoverability in expected "neighborhoods," continue to be critical to attracting and holding audiences, and monetizing investments for diverse programmers. Each of these elements – distribution, advertising, and discoverability – are essential to the survival of diverse programming networks, and disruption of one or more of these elements causes immediate harm to the programming ecosystem.

As many commenters have pointed out, the NPRM's proposal would supplant these negotiated business arrangements with online search functionality controlled by third parties that

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[2] *See, e.g.*, 47 U.S.C. § 309; *see also id*. §§ 310, 390, & 521.

[3] *See, e.g.*, *infra* notes 11-15 and accompanying text.

[4] *Infra* notes 6-8 and accompanying text.

have not demonstrated an interest in diversity and inclusion, and are more experienced in selling top search results to their highest bidders. If the Commission were to adopt this new construct into the multichannel TV ecosystem, the agency would ironically favor precisely the type of "paid prioritization" that it decried in the Open Internet context. Contrary to the Commission's belief that the NPRM's proposal would generate more diversity, it would in actuality place creators of color at risk of fighting to survive in an ocean of un-curated content. In the end, consumers might ultimately lose access to those voices.

The NPRM's proposal would impose additional harms beyond depriving consumers of diverse, multicultural content. Commenters have shown that the proposal is likely to increase costs for many customers, particularly among those who are not as tech-savvy as the "digital elites" who stand to gain the most from it.[5] The record also contains broad agreement that the NPRM's concept for indirectly protecting consumer privacy is unworkable.[6]

In short, FCC adoption of the NPRM's proposal would be contrary to the overwhelming evidence in this proceeding. The Coalition believes that the better alternative already is before the agency: The "apps model" approach outlined by the Downloadable Security Technical Advisory Committee's ("DSTAC") Report would allow the Commission to rely on marketplace developments to advance Section 629's requirements, while also future-proofing the new rules to accommodate technological advances.[7] However, if the agency nevertheless is determined to proceed with the NPRM's proposal, it must take the time necessary to build a supportive record. Before the consideration or adoption of any rules, the Commission first must gather empirical

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[5] *See, e.g., infra* Section III.

[6] *Infra* notes 41-43 and accompanying text.

[7] Downloadable Security Technical Advisory Committee Report, 30 FCC Rcd 15293, 15298-99 (2015) ("DSTAC Report") (attached to *Media Bureau Seeks Comment on DSTAC Report*, Public Notice, 30 FCC Rcd 15293 (2015)).

support to meet its basic obligations under the Administrative Procedure Act. The record evidence to date justifies the Coalition's call for the FCC to conduct studies on the proposal's likely impact on diversity, consumer cost, and consumer privacy.

II. THE RECORD STRONGLY VALIDATES THE COALITION'S CONCERNS THAT THE NPRM'S PROPOSAL WOULD JEOPARDIZE THE VIABILITY OF DIVERSE VOICES.

A. COMMUNITIES OF COLOR HAVE EXPLAINED WHY THE PROPOSAL WILL UNDERMINE THE ABILITY OF DIVERSE AND INDEPENDENT CONTENT CREATORS TO THRIVE OVER TIME.

While some suggest that diverse creators and civil rights advocates are evenly split in their analysis of the NPRM's proposal, the record demonstrates that this is plainly incorrect. Rather, the record evinces overwhelming alarm[8] – especially among *actual producers* of diverse

[8] *See, e.g.*, Letter from Sonia Lopez, President and CEO, Cuban American National Council, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42 (filed Apr. 22, 2016) ("CNC Letter") (the NPRM's proposals "appear likely to significantly reduce the revenues of networks owned by and serving communities of color"; some networks "may not survive"; the net result "will be fewer and lower-quality options for diverse programming and less economic opportunity for minority content"); Letter from Harry C. Alford, President and CEO, National Black Chamber of Commerce, MB Docket No. 16-42 (filed Apr. 7, 2016) ("the Commission's NPRM would negatively impact the ability of African American content providers, programmers, and media companies to enter into or maintain a presence in media markets"); Letter from Dr. Juan Andrade, Jr., President, United States Hispanic Leadership Initiative, to Tom Wheeler, Chairman, FCC, MB Docket No 16-42 (filed Mar. 28, 2016) ("Our community is particularly concerned that this rule may make it harder for audiences to find niche or minority-focused programming options"); Comments of the United States Hispanic Chamber of Commerce *et al.*, MB Docket No. 16-42, at 1 (filed Apr. 11, 2016) ("Diverse Chambers of Commerce Comments") (arguments of the U.S. Hispanic Chamber of Commerce, National Gay and Lesbian Chamber of Commerce, U.S. Pan Asian American Chamber of Commerce, and the U.S. Black Chamber that "[f]ar from serving the best interests of minority communities, this rule creates an unfair advantage for large tech companies at the expense of minority content creators and entrepreneurs"); Letter from Carlos Gutierrez, Head of Legal and Policy Affairs, LGBT Technology Partnership & Institute, to Marlene H. Dortch, Sec'y, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 7, 2016); Letter from Priscilla Ouchida, Executive Director, Japanese American Citizens League, to Tom Wheeler, Chairman, FCC *et al.*, MB Docket No. 16-42 (filed Mar. 29, 2016) (eight different diversity organizations objecting to the NPRM's proposal); Letter from Amy Hinojosa, President and CEO, MANA – A National Latina Organization, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 1 (filed Apr. 4, 2016) (MANA Comments) ("this proposal will inevitably impose harm on Latino and other minority-focused networks and interfere with their ability to continue maintaining and investing in quality programming for our community"); Letter from Marc H. Morial, President and CEO, National Urban League *et al.*, to Tom Wheeler, Chairman, FCC, MB Docket Nos. 16-41, 16-42, CS Docket No. 97-80 (filed Mar. 21, 2016) (ten different national diversity organizations calling on the Commission to "hit the 'pause' button on this proceeding to conduct a disparity study"); Letter from TechFreedom *et al* to Tom Wheeler, Chairman, FCC, *et al*, MB Docket No. 16-42 (filed May 23, 2016) ("[The FCC's proposal] will unintentionally widen the Digital Divide, especially in rural America, and reduce video and broadband competition in many markets. The proposal would also harm minority, religious, and other niche programmers by arbitrarily and illegally disrupting their business models"); Comments of the Multicultural Media, Telecom and Internet Council *et al*., MB

and independent programming[9] – that the proposal would jeopardize their ability to establish and expand their businesses, or even to continue in business at all. *The FCC must not dismiss these arguments* as irrelevant or uninformed. They are raised by the very entities that the NPRM's proposal allegedly will help – active participants in the marketplace with a stronger basis for making "predictive judgments" in this matter than the Commission.[10]

Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) ("MMTC Comments") (signed by nine other diversity organizations).

[9] *See, e.g.*, Letter from Victor Cerda, Senior Vice President, VMe Media Inc. *et al.*, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 3 (filed Apr. 22, 2016) ("VMe Coalition Comments") (nine different diverse and independent programming creators objecting to the NPRM's proposal and saying it "will devastate the entire television creative ecosystem, with small and independent networks taking the hardest hit"; the NPRM's proposal "destroys the market for our work," makes "our content lest valuable to the existing TV distributors with whom we must regularly negotiate," and "gives tech companies the right to siphon away our advertising revenue"); Comments of Creators of Color, MB Docket No 16-42, at 1 (filed Apr. 22, 2016) ("Creators of Color Comments") (ten diverse actors, actresses, producers, agents, and CEOs expressing concern over the impact of the proposal on their businesses); Comments of TV One, MB Docket No. 16-42, CS Docket No. 97-80, at 7-18 (filed Apr. 22, 2016) ("TV One Comments") (arguing the proposed rules will (i) undermine TV One's ability to provide diverse programming by giving third parties the ability the dilute TV One's carefully developed brand, (ii) interfere with the value of TV One's negotiated contracts with MVPDs and put TV One at risk of losing viewers (in part through eliminating important carriage agreement terms such as channel position or neighborhood, advertising insertion, and on-demand restrictions), and (iii) that minority programmers are particularly at risk as a result of the proposal); Comments of Tower of Babel, LLC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) ("Crossings TV Comments") ("This mandate threatens to separate niche-programming networks from our audiences, sawing away one leg of the three-sided marketplace in which we operate. But another leg – the ad revenues we receive from advertisers would also be devastated by this proposal."); Comments of Mnet America, MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed Apr. 22, 2016) ("Mnet Comments") (the "largest independent cable television network serving Asian Americans" saying the NPRM's proposal "will drive down the intrinsic value of our content and erode the economic foundation of diverse, independent television networks."); Comments of REVOLT Media and TV, LLC, MB Docket Nos. 16-42, 15-62, CS Docket No. 97-80, at 2 (filed Apr. 22, 2016) ("REVOLT Comments") (while the NPRM's proposal "will hurt all TV artists, the first victims will be diverse and independent" programmers; "[i]ndependent and minority networks, who are already last in line, would simply get no resources, no opportunity, and no path to the audiences we serve").

[10] *Compare* the twenty-one-some independent and/or diverse content creators that filed in opposition to the NPRM's proposal, *supra* note 5, *with* the handful of actual content creators, some of whom are no longer in the business, who spoke in favor of the Commission's efforts. Letter from Robert L. Townsend, The Townsend Group, to Marlene H. Dortch, Sec'y, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Letter from Dr. Donahue Tuitt, CEO, UNIFYme.tv, to Marlene H. Dortch, Sec'y, FCC, MB Docket Nos. 16-41, 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Letter from Eric Easter, CEO, BLQBOX, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) ("BLQBOX Comments"); Letter from Clifford Franklin, CEO, FUSE Advertising and GFNTV.com ("GFNTV.com Comments"), to Marlene H. Dortch, Sec'y, FCC, MB Docket Nos. 16-41, 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Letter from Stephen Davis, CEO, New England Broadband, to Marlene H. Dortch, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Letter from Peggy Dodson, CEO and President, UBCTV, to Marlene H. Dortch, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Comments of the Writers Guild of America, West, Inc., MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016); Letter from Broderick C. Byers, CEO, iSwop Networks, *et al.*, to Tom Wheeler, Chairman, FCC, MB Docket Nos. 16-41, 16-42, CS Docket No. 97-80 (filed March 24, 2016).

Veteran creators of diverse content have explained why MVPD carriage remains critical to their economic stability, notwithstanding the promise of online distribution which they are actively exploring. As TV One explains, creating "innovative, diverse content requires substantial resources" – and the company "depends on revenues from MVPD affiliate fees and from advertising to ensure that the network succeeds."[11] Thus, the fact that the "[p]roposal puts TV One at risk of losing the full value of both of these revenue streams" threatens to undermine the company's fundamental business model.[12] A group of nine different diverse content companies aptly observe that online streaming alone is not a sufficient substitute for carriage, since "simply existing on the Internet is no guarantee of meaningful (or any) revenue."[13] Rather, to again quote the same group of actual diverse content creators, it is "carriage-based business models that have allowed the emergence and growth of independent television networks" – and if these revenues are stripped away, "independent networks will have no choice but to cut back significantly on production costs," causing cutbacks whose effects "will ripple throughout the creative industry, limiting economic and creative opportunities for the hundreds of thousands of writers, producers, directors, actors, and crew members who work in the television industry today."[14]

A separate group of actual diverse content creators also explains that "while we celebrate and support artists and entrepreneurs creating web-based programming, these platforms simply lack the economic and cultural power of the full service video networks the FCC's proposed mandate would destroy," and "telling communities of color they don't need real networks of

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[11] TV One Comments at 10.

[12] *Id.*

[13] VMe Coalition Comments at 2.

[14] *Id.*

their own and should be happy with second-class solutions is the kind of old school patronizing exploitation that we have fought so long to overcome."[15]

The proposal's call for dismantling and repackaging multichannel program offerings through a search function controlled by third parties has drawn sharp opposition from diverse content creators and others representing communities of color,[16] as well as marketplace participants of all sizes.[17] Mnet America, "the largest independent cable television network serving Asian Americans and fans of Asian Entertainment" warned that the NPRM's proposal "will drive down the intrinsic value of [their] content and erode the economic foundation of diverse, independent television networks."[18] Further, the Independent Film & Television Alliance elaborated that the "Commission's proposal would negate existing relationships and obligations by bestowing 'new rights' on unaffiliated third parties to control distribution and search environments for content, allowing unaffiliated third parties to generate revenue for themselves without compensation to the producer/content owner"[19] – irreparably harming many independent film and television creators in the process. Noncommercial programmers share many of these concerns, along with additional fears concerning potential commercialization and possible misuse of their content.[20]

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[15] Creators of Color Comments at 2.

[16] *See, e.g.*, *supra* notes 8 and 9.

[17] *See, e.g.*, Comments of 21st Century Fox, Inc. *et al.*, MB Docket No. 16-42, CS Docket No. 98-80, at 6-11 (filed Apr. 22, 2016) ("Content Companies Comments") (major programmers explaining the nature of their carefully negotiated program license terms used to safeguard content against theft and protect critical branding elements, which the proposal would undermine)

[18] Mnet Comments at 1.

[19] Comments of the Independent Film & Television Alliance, MB Docket No. 16-42, CS Docket No. 97-80, at 3 (filed Apr. 22, 2016).

[20] *See, e.g.*, Letter from Bruce D. Collins, Corporate Vice President & General Counsel, C-SPAN, to Marlene H. Dortch, Sec'y, FCC, MB Docket No. 16-42, at 1-2 (filed Apr. 21, 2016) ("C-SPAN has particular concern that the

As the Coalition previously explained, the NPRM's proposal risks creating a new kind of "paid prioritization," as it would allow third parties to repackage content and then *sell top spots in their navigation menus and search results to the highest bidder* – a bidder likely to be a large, well-financed entity that can afford to pay for prominent positioning.[21] Smaller content providers – including but not limited to diverse producers and programmers and new entrants of all types – will be relegated to lower spots on the search list, where fewer TV viewers may find them. Moreover, the NPRM's proposal appears to invite third-party vendors to replace or overlay advertisements as part of the original program stream with commercials of the third party's own choosing.

The proposed platform of the NPRM's proposal would have several negative ramifications on programmers and consumers alike. Advertising entities such as the Association of National Advertisers explain that the proposed rules will "impact the advertising segment of our economy in a very significant and undesirable way" – effectively curtailing the $30.1 billion in "gross payments made by advertisers to cable programming networks" that currently "supports access by consumers to incredibly diverse and reasonably-priced content."[22] Programmers raise the same alarm, stating that the NPRM's proposal "will hurt all TV artists, [and] the first victims will be diverse and independent" programmers – indeed, "[i]ndependent and minority networks, who are already last in line, would simply get no resources, no

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proposed rule could undermine two of our fundamental operating characteristics: non-partisanship and non-commerciality").

[21] MMTC Comments at 12.

[22] Comments of the Association of National Advertisers, MB Docket No. 16-42, CS Docket No. 97-80, at 1, 9 (filed Apr. 22, 2016) ("ANA Comments").

opportunity, and no path to the audience" as a result.[23] Diversity groups such as MANA – A National Latina Organization similarly explain that under the proposal, third parties "will be able to ignore [existing] agreements and surround the programming they take from MVPDs with additional advertising without sharing the revenue from that advertising with content creators." As a result, "independent and diverse programmers will see their own advertising revenues and carriage fees diminished, drying up the funds necessary to invest in developing and maintaining the quality of their content."[24]

Many programmers also have detailed their concerns about the NPRM's potential to violate trademarks and harm the value of their brands. As one commenter correctly explains, by "allowing third parties to dilute [the company's] brand among its well-earned viewers and hamper [its] ability to engage advertisers hoping to market to African Americans, the Proposal threatens diversity in programming."[25]

Rather than helping subscribers access "the content they already paid for,"[26] the NPRM's proposal, if implemented, would help certain companies get access to – and monetize – content from diverse programmers *they did not pay for*. Numerous commenters have noted that the NPRM's primary beneficiary is likely to be Google, the dominant search engine and Internet advertising provider.[27] Such an outcome would be far from pro-competitive, as recent regulatory

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[23] *See* REVOLT Comments at 2; *see also* Greg Saphier, *Creative Industry Representatives Voice Concerns about how the FCC Set-Top Box Proposal Could Impact the Creative Economy*, Motion Picture Association of American (May 23, 2016), http://www.mpaa.org/creative-industry-representatives-voice-concerns-about-how-the-fcc-set-top-box-proposal-could-impact-the-creative-economy/#.V0OmOPnxo0N.

[24] MANA Comments at 1.

[25] TV One Comments at 4.

[26] NPRM, 31 FCC Rcd at 1545 ¶ 1.

[27] Comments of AT&T, MB Docket No. 16-42, CS Docket No. 97-80, at 40-43 (filed Apr. 22, 2013) (AT&T Comments) ("the NPRM would enable Google to use consumer data regarding viewing together with its vast trove of other data to create targeted advertising"); Creators of Color Comments at 2 (the NPRM's proposal is "An Unfair

developments elsewhere suggest.[28] Moreover, the record in this docket shows that other participants in the multichannel video marketplace likely will face harsh outcomes – none more than creators or color and diverse networks, who would be forced to absorb the harms of having fewer net resources at their disposal than larger media entities.[29]

B. BECAUSE THE RECORD FAILS TO SUPPORT THE UNPROVEN THEORY THAT THE NPRM'S PROPOSAL MIGHT FOSTER MORE DIVERSE PROGRAMMING, THE FCC MUST UNDERTAKE IMPACT STUDIES BEFORE ADOPTING ANY NEW RULES.

The notion that the NPRM's proposal "might" help creators of color and diverse programming networks remains unproven. The few commenters that suggest the proposal will enhance diversity have provided little more than wishful thinking, supported by scant evidence.[30] Other proposal proponents acknowledge the fundamental revenue problems that online-only content creators would face,[31] or even argue in favor of the NPRM on one hand, while actually championing a hybrid app-based model that more faithfully reflects the DSTAC Apps Model

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and Unnecessary Giveaway to Google" and is "simply a way to give the Silicon Valley giants a shortcut into the TV business"); REVOLT Comments at 2 (nothing the NPRM "would force existing TV companies to hand over the programs they create to companies like Google to use and monetize without negotiating with, or paying, creators anything for the rights to that programming"); *see generally* Comments of NetCompetition, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016).

[28] *See, e.g.*, Christopher Williams, Google Faces Record-Breaking Fine for Web Search Monopoly Abuse**,** The Tele**g**raph (May 14, 2016, 7:54 PM), http://www.telegraph.co.uk/business/2016/05/14/google-faces-record-breaking-fine-for-web-search-monopoly-abuse/ (reporting indications that the European Commission may be preparing to levy a €3 billion fine against Google for antitrust violations)

[29] STEVEN WILDMAN, THE SCARY ECONOMICS OF THE NPRM'S NAVIGATION DEVICE RULES 1–49 (2016), https://www.ncta.com/sites/prod/files/Scary%20Economics%20of%20Navigation%20Device%20NPRM%204-2016.pdf (last visited May 15, 2016).

[30] *See, e.g.*, Comments of the Consumer Federation of America, MB Docket No. 16-42, CS Docket No. 97-80, at 8, 12 (filed Apr. 22, 2016) (purporting a series of unsubstantiated and uncited statistics, including that "cable industry abuse of market power has already cost consumers over $100 billion in the past two decades" (no cite), and arguing that "minority programmers primarily reach consumers over the Internet" and should apparently as a result be content to remain there).

[31] *See, e.g.*, BLQBOX Comments at 2 (admitting that "the streaming world is no guarantee of success," since "as with early websites, most new channels will struggle to find a revenue model and fail before it gets figured out").

than the NPRM's proposal.[32] The proponents' assertions that the NPRM's technically complex (if not infeasible) proposal is needed to enable consumers "to install apps for a particular program or channel that is not available from their MVPD,"[33] are false. In reality, *current* technologies – plus the path charted by the DSTAC Apps Model – are what actually empowers consumers.[34]

Before the Commission attempts such a radical overhaul, it should undertake, at a minimum an empirical study on the NPRM's impact on diverse programmers. As the Coalition detailed in our initial comments, the analysis should compare the benefits and burdens of the proposal to those of the existing industry structure. The analysis also should include the proposal's impact on advertising revenue that feeds content creation and the prospects for over-the-top distribution to become a viable platform for sustainable production of high-quality diverse programming.

III. DATA NOW BEFORE THE COMMISSION INDICATES THAT THE NPRM'S PROPOSAL WILL RAISE CONSUMER COSTS, NOT LOWER THEM.

The record supports [the Coalition's call for studies on the NPRM proposal's effect on consumers' costs.[35] Numerous commenters have explained that the proposal is more likely to increase consumer costs than it is to reduce them. For example, the Hispanic Leadership Fund cautions that "customers [will pay] the price in the form of delayed innovation and higher

[32] *See* Comments of The Greenlining Institute, MB Docket No. 16-42, CS Docket No. 97-80, at 4-5 (filed Apr. 22, 2016) (lauding the integration of apps into navigation devices as a key perk, claiming a "third-party manufacturer could develop a device with [] applications targeted towards particular [diverse] demographics, and could implement targeted advertising for those corporate interests that want to be responsive to communities of color").

[33] *Id.* at 5.

[34] *See generally*, Comments of the National Cable & Telecommunications Association, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 25, 2016) ("NCTA Comments"); Comments of the Telecommunications Industry Association, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016).

[35] MMTC Comments at 18-19.

bills."[36] Similarly, MVPDs large and small warn they will have no choice but to pass through compliance costs and lost advertising revenue to consumers. AT&T explains that "the NPRM proposals would raise the costs of MVPD services to consumers … [because they] would allow third parties to insert their own advertising into the stream that consumers receive and impose no limit on how much advertising there may be. This increased supply in total advertising will not only harm programmers, especially independent and minority programmers, but … also reduce MVPD advertising revenues, which will put upward pressure on subscription fees."[37] In Frontier's words, the "effects of the proposal's complete disruption of underlying content agreements will fall hardest on consumers in the form of disrupted programming and higher costs."[38] This logic is expressed in actual content creators' concerns, as well. As the Motion Picture Association of America and SAG-AFTRA explain, a "major motion picture costs on average $100 million to make and television shows can cost millions per episode" – costs the NPRM's proposal would prevent the organization's members from recouping.[39] As the Director's Guild of America explains, "films and scripted TV dramas and comedies that the public want to watch, and are willing to pay to watch, require substantial high risk investments" – investments the NPRM's proposal would "undermine."[40]

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[36] Letter from Mario H. López, President, Hispanic Leadership Fund, to Tom Wheeler, Chairman, FCC *et al.*, MB Docket 16-42, at 2 (filed Apr. 22, 2016) (Hispanic Leadership Fund Comments).

[37] AT&T Comments at 55; *see also* Comments of the American Cable Association, MB Docket No. 16-42, CS Docket No. 97-80, at 55 (filed Apr. 22, 2016) ("[t]he costs of implementing the Commission's proposal would harm smaller MVPDs and their subscribers").

[38] Comments of Frontier Communications Corporation, MB Docket No. 16-42, CS Docket No. 97-80, at 12-13 (filed Apr. 22, 2016); *see also* Hispanic Leadership Fund Comments.

[39] Comments of the Motion Picture Association of America and SAG-AFTRA, MB Docket No. 16-42, CS Docket No. 97-80, at 2, 6-7 (filed Apr. 22, 2016).

[40] Comments of the Directors Guild of America and the International Alliance of Theatrical Stage Employees, MB Docket No. 16-42, CS Docket No. 97-80, at 4 (filed Apr. 22, 2016); *see also* VMe Coalition Comments at 5 (explaining the costs of programming production and the manner in which the NPRM proposal would damage independent and diverse creators' ability to recoup said costs).

The additional costs may arise in at least two ways. *First*, unlike the digital elites who can afford to adopt new technologies, many consumers lack such income, technical education, or both.[41] Low-income consumers and senior citizens, among others, are highly unlikely to purchase an extra, peripheral box with a large upfront outlay rather than simply renting a single set-top box.[42]

Second, consumers who wish to replicate the programming choices they currently enjoy may face the prospect of multiple subscriptions in the future. "[R]ather than allowing MVPD customers to access service directly on their display device via an MVPD app, [the proposal] would require customers to lease a new gateway device from the MVPD just to reach the display device or a retail device connected to the display" – effectively mandating *more* in-home set-top boxes, not fewer.[43] In addition, due to the network re-architecture that the proposal will trigger, the Commission's set-top box mandate "would require the deployment of additional in-home equipment – *i.e.*, a second, mandatory leased box" maintaining what the FCC already perceives as the status quo instead of encouraging a more innovative "boxless" future.[44]

Third, the NPRM's proposal rests on the flawed assumption that all consumers – regardless of age, finances, or digital literacy – will embrace a more technologically complex system for accessing video content. This is manifestly incorrect, as the FCC's own history in promoting new technology attests; the transition of TV broadcasting to digital mode took more than 13 years, several acts of Congress, and a massive (and last-minute) influx of federal funds to

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[41] *See, e.g.*, Cecilia Kang, *Unemployed Detroit Residents Are Trapped by a Digital Divide*, NEW YORK TIMES (May 22, 2016), http://nyti.ms/27N5qkR.

[42] Some commenters have called into question the claim that current set-top box rental charges are inflated, noting that "[f]or the past 20 years, the FCC has capped cable set top box rents *at cost*." NCTA Comments at 138.

[43] NCTA Comments at 130.

[44] Comments of Comcast Corporation and NBCUniversal Media, LLC, MB Docket No. 16-42, CS Docket No. 97-80, at 60 (filed Apr. 22, 2016); *see also* NCTA Comments at 80.

complete,[45] while the Commission's efforts to encourage greater broadband adoption remain ongoing after many years. Before FCC action in this proceeding ends with the imposition of new costs on consumers, the agency must conduct a study to estimate those costs and explain why they are warranted.

IV. THE RECORD DEMONSTRATES THAT HOLDING THIRD-PARTY DEVICE MANUFACTURERS INDIRECTLY LIABLE FOR PRIVACY VIOLATIONS WOULD BE NEITHER WORKABLE NOR WISE.

Finally, the record supports MMTC's position that further study of the NPRM's impact on consumer privacy is necessary. Many commenters have addressed the flaws in the NPRM's proposal for holding third-party device manufacturers indirectly liable for privacy violations.[46] Privacy watchdog the Electronic Privacy Information Center assessed the proposal as follows:

> The FCC's proposal to require retail navigation device manufacturers to self-certify compliance with privacy rules fails to meaningfully protect consumers. The proposal fails to provide for effective oversight and enforcement, and instead appears to deputize cable companies…. Significantly, the proposal lacks clarity on whether the FCC could bring an enforcement action against device manufacturers…. Suggestions that the FTC would enforce privacy self-certifications provide little reassurance to consumers….[47]

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[45] *See, e.g.*, Telecommunications Act of 1996, § 201 (setting original DTV transition date); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. 123 Stat. 115 tit. II.

[46] *See, e.g.*, Comments of Communications Workers of America, MB Docket No. 16-42, CS Docket No. 97-80, at 4-5 (filed Apr. 22, 2016) (observing that the Title VI protections apply to MVPDs but "tech companies or navigation devices suppliers" and that the proposal to "plug this serious hole" raises several questions"); AT&T Comments at 48-51 (The proposal "would undermine the privacy and personal-information protections that Congress has put in place to protect consumers" by enabling "third-party providers to combine information on individuals' viewing habits with data from other sources to create detailed profiles, all without the statutory privacy safeguards applicable to MVPD services" – a loophole that certification, a 'half-baked proposal', would not resolve."); Frontier Comments at 15 (The FCC would "be able to provide limited deterrence and no redress for blatant violations of customer privacy" under the proposed regime.); Comcast Comments at 25 ("*no* fixes for the contractual and privacy issues … or for the host of other issues" in the NPRM's privacy proposal, "all of which are of the Commission's own making and will do irreparable harm to the video marketplace and consumers.").

[47] Comments of the Electronic Privacy Information Center, MB Docket No. 16-42, CS Docket No. 97-80, at 4-5 (filed Apr. 22, 2016) (footnotes omitted).

Simply put, the NPRM proposes to "put at risk consumers who have come to rely on [the FCC's rules] for the protection of their private data."[48]

Even the Executive Branch recognizes that the NPRM's approach still "leaves important questions to be addressed – most importantly, who will ensure compliance with a [consumer privacy] certification and through what legal authority."[49] Before the agency embarks on what appears to be an unworkable legal construct, the FCC should initiate a survey to determine whether any other federal or state authority has employed a similarly indirect method to safeguard consumer privacy – and, if so, analyze the degree to which it actually served consumers' interests.

V. CONCLUSION

The evidence now before the Commission weighs heavily against adoption of the NPRM. Fast tracking the proposal to formal rulemaking would not simply be arbitrary and capricious as a legal matter – it would also generate a negative, real-world impact on diverse communities for years to come. Consumers ultimately would suffer in several respects: (1) by potentially losing access to diverse programming now and in the future, (2) by having to pay more to replicate the multichannel choices they have today, and (3) by being deprived of effective privacy protection. Diverse programmers would be at risk of losing ground on already established multichannel video platforms, while being lost within the sea of a crowded video marketplace. The FCC's best course now is to set aside the NPRM and seriously consider the alternative apps model for implementing Section 629. The only other defensible alternative would be to suspend decision-

[48] Letter from Carlos Gutierrez, Head of Legal and Policy Affairs, LGBT Technology Partnership & Institute, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 1 (dated Apr. 7, 2016) (*attached to* Letter from Carlos Gutierrez, Head of Legal and Policy Affairs, LGBT Technology Partnership & Institute, to Marlene H. Dortch, Sec'y, FCC, MB Docket No. 16-42 (filed Apr. 7, 2016)).

[49] Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, Department of Commerce, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 1, 5 (Apr. 14, 2016).

making on the NPRM until the Commission completes empirical studies to test its own hypotheses.

Respectfully submitted,

Multicultural Media, Telecom and Internet Council (MMTC)
Asian Americans Advancing Justice (AAJC)
Latinos in Information Sciences and Technology Association (LISTA)
National Association of Multicultural Digital Entrepreneurs (NAMDE)
National Organization of Black County Officials (NOBCO)
National Organization of Black Elected Legislative (NOBEL) Women
National Policy Alliance (NPA)
OCA – Asian Pacific American Advocates
Rainbow PUSH Coalition
National Puerto Rican Chamber of Commerce

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