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**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: In re Accessibility of User Interfaces, and Video Programming Guides and Menus, MB Docket No. 12-108**

Dear Ms. Dortch:

We write to urge the Commission to exclude MVPD-provided applications (“apps”) that are downloaded on third party devices, such as tablets, “smart phones” and other devices, from its rules implementing Section 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). Legal and practical reasons strongly counsel against stretching the meaning of Section 205 to reach beyond menus and program guides provided by navigation devices in order to broadly sweep in stand-alone software such as apps.

Section 205 applies only to “on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 [of the Commission’s rules]) for the display or selection of multichannel video programming.”<sup>1</sup> By its terms, then, Section 205 applies only to navigation devices that include native on-screen text menus and guides since, in such cases, the devices “provide” the on-screen text menus and guides. In contrast, on-screen text menus and guides that a consumer independently chooses to download to a device are not in any sense something that the navigation device “provides” within the meaning of Section 205. NCTA’s comments have set forth in detail why stand-alone cable operator-developed “apps” downloaded independently by the consumer to third-party retail devices are therefore *not* “navigation devices” subject to the CVAA.<sup>2</sup> Likewise, a third-party device that does not “provide” an on-

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<sup>1</sup> See 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)) (emphasis supplied).

<sup>2</sup> See NCTA Comments at 8-10.

screen text menu or guide (or require the download of such a guide) for the display or selection of multichannel video programming is not covered by Section 205.<sup>3</sup>

As a result, many of the devices the Commission suggests could be covered under Section 205 are not “navigation devices” for purposes of this provision.<sup>4</sup> Interpreting “navigation device” so broadly as to cover equipment that does not perform the functions of a traditional set-top box but simply contains an Internet connection (by which any mobile device or any other equipment theoretically could access cable broadband service) would stray beyond Congress’ intent in the CVAA.

Moreover, the Commission has specifically rejected the claim that a software-based menu and guide downloaded to a device is itself a “navigation device” under Section 629 or the Commission’s rules. In the Gemstar case, Gemstar argued that *Guide Plus+* qualified as a navigation device because it could assist in navigation once downloaded to a device.<sup>5</sup> The Commission rejected the claim. It reviewed the text and legislative history of Section 629 and concluded “Section 629 is intended to assure the competitive availability of *equipment*, including ‘*converter boxes*, interactive communications *equipment*, and other *equipment* used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.”<sup>6</sup>

The legislative history accompanying Section 629 clearly demonstrates that, in drafting the Telecommunications Act of 1996, Congress intended to limit the scope of Section 629 to devices used to access Title VI video services delivered by an MVPD, rather than *any* “voice, video, or data services” delivered by the MVPD.<sup>7</sup> Since then, the Commission has consistently

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<sup>3</sup> See 47 U.S.C. § 303 (bb)(1) (as amended by CVAA § 205(a)). NCTA previously has explained that 47 U.S.C. § 303(bb)(3) does not expand the scope of this statutory requirement to otherwise authorize regulation of third-party software or “apps” downloaded to devices, but instead was intended to address hardware and software native to a navigation device. Indeed, the Commission has consistently interpreted other provisions of the CVAA to exclude apps in these circumstances, treating software that is downloaded or otherwise added independently by the consumer after the sale of the device differently than software integrated into the physical device. See NCTA Comments at 9, n.32.

<sup>4</sup> See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506 ¶ 16 & n.41 (2013).

<sup>5</sup> See *Gemstar International Group, Ltd.*, Memorandum Opinion & Order, 16 FCC Rcd 21531(2001).

<sup>6</sup> *Id.* ¶ 31 (emphasis in the original).

<sup>7</sup> See H.R. Rep. No. 104-458, at 181 (1996) (Conf. Rep.); H.R. Rep. No. 104-204, pt. 1, at 37 (1995). The original House version of the navigation device provision covered devices used to access “telecommunications subscription service,” which was defined to mean “the provision directly to subscribers of *video, voice, or data* services for which a subscriber charge is made.” H.R. Rep. No. 104-204, pt. 1, at 37 (1995) (emphasis added). The House report further directed that: “The Commission shall adopt regulations to assure competitive availability, to *consumers of telecommunications subscription services*, of converter boxes, interactive communications devices, and other customer premises equipment from manufacturers, retailers and other vendors not affiliated with any telecommunications system operator.” *Id.* (emphasis added). The House Report explained that “these devices will connect consumers to the network of communications and entertainment services that will be provided by telecommunications providers.” *Id.* at 112. However, the House-Senate

and repeatedly applied the definition of “navigation device” to equipment, such as cable set-top boxes, used to access Title VI cable services that are made available by a cable operator.<sup>8</sup> These cable services include “multichannel video programming services,” such as linear cable channels, as well as “other services,” such as an operator’s program guide and interactive TV services.

Numerous practical and operational issues provide further bases to interpret Section 205 to exclude apps. A requirement that MVPD-provided apps contain “talking guide” functionality could delay, or in some cases prevent, bringing an accessible app to the marketplace. For one thing, the app itself would become more technically complicated if it were required to include a “self-voicing” feature. Including this feature could make the app too large from a memory standpoint to be supported on certain devices.

Moreover, developing an audible app that works with third party devices is operationally impractical where those devices themselves do not contain accessibility features that can be relied upon. In contrast to the situation where cable operators and other MVPDs largely control the design of navigation devices provided to customers, cable operators typically have no similar ability to control the design of third-party devices running their apps. In fact, the device manufacturer may have little incentive to help meet the needs of MVPD-provided accessible apps since those apps may only be incidental to the many other features/uses of the device. Not every device platform supports assistive technology or provides the necessary Application Programming Interfaces (“APIs”) to develop an accessible app.

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conferees “narrowed [the scope of the regulations] to include only equipment used to access services provided by multichannel video programming distributors.” H.R. Rep. No. 104-458, at 181. Accordingly, instead of applying to equipment used by consumers of “telecommunications subscription service,” Section 629 was revised only to apply to equipment used by consumers of MVPD services. *Id.*

<sup>8</sup> See, e.g., *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report & Order, 13 FCC Rcd 14775 (1998); *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596 (1999); *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd 18199 (2000); *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report & Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003); *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report & Order, 20 FCC Rcd 6794 (2005); *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Third Report & Order and Order on Reconsideration, 25 FCC Rcd 14657 (2010).

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For all these reasons, the Commission should monitor developments in this area and refrain from taking action at this point that would likely result in unintended consequences in a highly dynamic marketplace.

Respectfully submitted,

**/s/ Rick Chessen**

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