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April 22, 2016

VIA ELECTRONIC FILING

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

Re: Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices (MB Docket No. 16-42, CS Docket No. 97-80, FCC 16-18)

Dear Ms. Dortch:

The U.S. Chamber of Commerce ("Chamber"), the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, respectfully submits these comments to the Federal Communications Commission ("FCC" or "Commission") in response to its Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding—otherwise known as the proposed navigation device rule.

As explained below, the Chamber opposes the proposed FCC rule because it threatens sustainable competition by not explicitly protecting copyright and licensing agreements or the integrity of advertising and because of the significant privacy issues it raises. The current proposal is a regulatory overreach and the Chamber finds it even more troubling that the Administration has once again attempted to publicly put its thumb on the scales of an independent agency rulemaking in this matter.

Currently, the U.S. video viewing market is undergoing a renaissance, or what some have dubbed "The Golden Age of Television." Consumers are able to watch content provided by cable and satellite operators on smart televisions, tablets, and mobile phones. In addition to the boom in over-the-top streaming content as provided by companies like Netflix and Amazon, American consumers are able to integrate their Internet viewing experiences with televisions using plug-in devices such as Roku, TiVo, and Apple TV. Consumers today enjoy more options for viewing video content than at any other time all without heavy-handed government regulation.

The Commission points to the 1996 Telecommunications Act[1] as a source of authority requiring the Commission to engage in a rulemaking to assure the commercial availability of video navigation devices. In 2010, the Commission began a proceeding [2] examining a similar – if not identical – proposal to the one which is the subject of the current rulemaking. The FCC wisely decided not to pursue that proposal and the market for video devices has flourished since then. That market demonstrates that the current rulemaking is unnecessary.

The Chamber firmly supports policies that give consumers more choices and encourage robust competition. At the same time, federal regulators such as the Commission should not engage in rulemakings which stifle competition and investment through technology mandates that create regulatory imbalance and do not explicitly protect copyright, licensing terms, and the advertising agreements for which Multichannel Video Programming Distributors ("MVPDs") and content providers negotiated. For this reason, the Commission should abandon its current navigation device rulemaking and allow market-driven innovation to continue.

The Commission should examine the proposed rule in light of the FCC's failed attempt to spur competition in the local telephone marketplace by requiring incumbent local exchange carriers ("ILECs") to lease access to the networks they built to competitive local exchange carriers ("CLECs"). When legacy phone carriers were forced to provide network access to competitors, both new and incumbent providers had no incentive to build out new telecommunications infrastructure. An independent study commissioned by the Chamber found that during the Commission's CLEC experiment from 2000 to 2003, "[t]he loss of capital spending due to regulation is estimated to be more than $20 billion for incumbent operators and an additional $2 billion to $3.5 billion for competitive entrants."[3] When adequate protections are not in place when regulators seek to mandate competition, entire industries suffer from a lack of incentive to invest.

Much like the CLEC experiment, the proposed rule threatens expansion of telecommunications infrastructure by regulatory interference in the video device marketplace. In essence, with a lack of protection for copyright, licensing, and advertising, third-party navigation devices have the potential to be the CLECs of the video viewing industry. In order to comply with the newly mandated "open standards" proposed by the Commission, TV distributors may need to invest heavily to re-engineer their delivery networks and develop, manufacture and maintain new in-home adapter hardware.[4] With all of this reengineering, why would cable and television providers build out new network infrastructure if third-party navigation devices can free ride[5] and repackage their content?

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[1] *See* 47 U.S.C. § 549.
[2] 81 Fed. Reg. 14034 (Mar. 16, 2016).
[3] *See* Thomas Hazlett, Coleman Bazelon, John Rutledge, and Deborah Allan Hewitt, *Sending the Right Signals: Promoting Competition Through Telecommunications Reform* (Sept. 22, 2004) *available at* https://www.uschamber.com/sites/default/files/legacy/issues/technology/files/0410_telecommstudy.pdf.
[4] Michael Powell, President and CEO, NCTA, "No Good Market Goes Unregulated," re/code (Jan. 28, 2016) *available at* http://recode.net/2016/01/28/no-good-market-goes-unregulated/.
[5] Dissenting Statement of Commissioner Michael O'Rielly, *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (Feb. 16, 2016) *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A6.pdf ("Worst of all, [the proposed rule] would

I. The Proposed Rule Furthers a Regulatory Digital Divide

The proposed rule creates regulatory imbalance and furthers a regulatory digital divide in which third-party navigation devices will fall under the legal jurisdiction of the Federal Trade Commission ("FTC") while satellite and cable providers will continue to be subject to more stringent FCC enforcement. The same customer data about viewing histories will be regulated by two very different agencies. Although the NPRM states that third-party navigation device providers will have to self-certify compliance with federal privacy statutes directed toward cable and satellite operators[6], these third-party providers will only answer to the FTC for any future federal violations of consumer privacy rules.

Third-party STB providers would operate under FTC's jurisdiction to regulate "unfair and deceptive" trade practices under Section 5 of the Federal Trade Commission Act.[7] Under Section 5, in the case of unfair and deceptive trade practice violations, the FTC generally issues a cease and desist order that does not immediately impose penalties on alleged violators.[8] This practice gives companies notice and a chance to clean up their act.

Conversely, cable and satellite operators are not entitled to a notice to correct mistakes and are subject to federal statutes governing their privacy practices.[9] Unlike the more lenient enforcement regime for third-party navigation device providers, any aggrieved party can sue a cable or satellite provider for alleged privacy violations in federal court with the ability to obtain punitive damages and attorneys' fees.[10] The Commission's proposal creates an environment in which third-party navigation device providers play under a different set of enforcement rules than cable and satellite operators.

II. The Rule Threatens Copyright and Licensing Agreements and Does Not Limit Piracy

Businesses have the right to select and engage in any lawful methods of marketing, manufacturing, distribution and sale of goods and services. Any company that wants to truly compete in the video marketplace is already free to negotiate for contract rights and launch its own "over-the-top" service to compete with incumbent television providers. The proposed rule gives third-party navigation device providers a regulatory shortcut to compete with current innovators who have already invested heavily in the nation's telecommunications infrastructure.

Programmers and content owners rely on negotiated licensing agreements to protect the value of their works. Content distributors must honor the terms of these contracts that govern

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certainly devalue the content produced be programmers large and small, by enabling anyone capable of writing a compliant app to turn on a free stream of video content painstakingly cobbled together by an MVPD at great expense—the ultimate free-rider problem.).

[6] 81 Fed. Reg. 14046 (Mar. 15, 2016).

[7] *See* 15 U.S.C. § 45

[8] *Id*. at § 45(b).

[9] *See* 47 U.S.C. §§ 338(i), 551.

[10] 47 U.S.C §§ 338(i)(7), 551(f).

where, how, and on what devices the programming can be shown. Using protected content for commercial gain in a way that contradicts these contracts threatens copyright protections. Not only does the NPRM fail to provide explicit protections for licensing agreements, it goes so far as to question whether it should ban contracts describing which devices have access to particular video content.[11]

The NPRM diminishes television providers' ability to protect content from piracy. Content distributors use complex security systems to ensure that their networks, navigation devices, and apps comply with content licenses and restrictions. Some Internet search engines show stolen content in their search terms. While programming streams will include data about authorized uses, the rule does not allow for any technical means for enforcing compliance. Moreover, the proposed rule fails to place restrictions on search results to prevent third-party device makers from showing pirated content alongside licensed content. The rule also limits the control cable and satellite providers have over digital rights management ("DRM") and content protection technologies.[12]

III. The Rule Threatens Negotiated Advertising and the Video Content Ecosystem

Content creators rely upon revenue generated by entering into advertising agreements. Unfortunately, as noted by Commissioner Ajit Pai, "nothing in this proposal would prevent a set-top box manufacturer from replacing the commercials in a television show with commercials sold by that manufacturer. And nothing in this proposal would prevent a set-top box manufacturer from adding commercials to a program."[13] It is important to note that the NPRM outright dismisses concerns about the replacement and insertion of new advertising due to a "lack of evidence."[14] To the contrary, however, as early as 2005, TiVo began tests on inserting its own pop-up advertising when viewers fast-forwarded through recorded content.[15] The fear of present and future technology replacing advertising is not unfounded.

If a third-party navigation device provider is able to replace commercials or insert its own pop-up ads into content, advertisers lose the incentive to enter into agreements with content providers. Television studios will suffer a reduction in advertising revenue; therefore, video production and content companies will be discouraged from producing innovative content which may be seen as financially riskier. Third-party navigation devices, without adequate regulatory safeguards to protect advertising agreements, would also have a disparate impact on television

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[11] 81 Fed. Reg. 14035.

[12] *Id.* at 14041 (We propose that MVDPs be required to support a content protection system that is licensable on reasonable and nondiscriminatory terms, and has a "Trust Authority" that is *not* substantially controlled by an MVPD or the MVPD industry.) (emphasis added).

[13] Dissenting Statement of Commissioner Ajit Pai, *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (Feb. 16, 2016) *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A5.pdf.

[14] 81 Fed. Reg. 14046 ("We do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation…replace or alter advertising, or improperly manipulate content).

[15] Ian Bell, "TiVo Tests Pop-Up Ads," Digital Trends (Mar. 29, 2005) *available at* http://www.digitaltrends.com/home-theater/tivo-tests-pop-up-ads/.

networks which cater to smaller niche audiences and other minority programming. As Chairman Pai noted[16], the FCC could simply have inserted explicit language to prevent the replacement of commercials but it did not, leaving the television ecosystem unnecessarily at risk.

IV. Conclusion

The FCC's proposed navigation device rule threatens sustainable competition because it does not explicitly protect copyright and licensing agreements or the integrity of advertising. The proposed rule also furthers the regulatory digital divide by creating an imbalance in the way privacy practices are enforced. Instead of merely "opening" the set-top box, the Commission's proposed rule threatens the television ecosystem and creates a regulatory Pandora's box in which government overreach threatens copyright, contract, and advertising agreements.

Thank you for the opportunity to participate in this proceeding. If you have any follow up questions, I may be reached at (202) 463-5457 or by e-mail at wkovacs@uschamber.com.

Sincerely,

William L. Kovacs

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[16] *See* supra note 13.