

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

**COMMENTS OF ASIAN AMERICANS ADVANCING JUSTICE (AAJC), ASIAN  
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MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL**

The Multicultural Media, Telecom and Internet Council (“MMTC”), in partnership with nine leading national civil rights advocates (“The Coalition”), respectfully submits these comments in response to the Federal Communications Commission’s (“FCC” or “the Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced dockets.<sup>1</sup>

While the Coalition understands the Commission’s intention to consolidate content options for consumers in a single, universal device that can search across multiple platforms, we oppose the NPRM’s fundamental construct, which calls for the mandatory dismantling and repackaging of existing multichannel video service offerings from their negotiated channel placements, and enables third parties to profit from this radical shift. From a regulatory perspective, there is no statutory nexus between this concept and the plain language of Section 629 of the Communications Act, and adoption of the proposal would undermine critical means for actually advancing the Commission’s media diversity goals, both in this proceeding and elsewhere.<sup>2</sup>

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<sup>1</sup> *Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum, Opinion, and Order, FCC 16-18 (rel. Feb. 18, 2016) (“NPRM”).

<sup>2</sup> NPRM, 31 FCC Rcd at 1553 ¶ 17 (dismissing independent programmer concerns about the NPRM’s favored proposal with a factually unsupported “expectation” that “competition in interfaces, menus, search functions, and improved over-the-top integration will make it easier for consumers to find and watch minority and special interest

## I. INTRODUCTION AND SUMMARY

The Coalition takes no issue with the Commission’s general desire to update its rules implementing Section 629, which calls for the “competitive availability” of “navigation devices.”<sup>3</sup> While recent data indicates that 40 percent of U.S. pay-TV subscribers use “TV Everywhere” offerings,<sup>4</sup> the Commission must remain platform-neutral, refrain from picking winners and losers, and fulfill its statutory obligation to ensure diversity across all media platforms. What appears to be the NPRM’s favored proposal would do none of this. Instead, TV network programmers and the multichannel video programming distributors (“MVPDs”) with whom they partner would be required to relinquish their copyrights and contractual rights so that online video distributors (“OVDs”) and third-party device manufacturers may take, reorganize, and monetize programmer content without negotiation or compensation. Under this scenario, the

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programming”). The Commission also has linked this proceeding to its new inquiry concerning “the current state of programming diversity and the principal obstacles that independent programmers face in obtaining carriage on video distribution platforms.” *Id.* n.53 (citing *Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd 1610 (2016) (“Diverse Programming NOI”).

The dismantling/repackaging proposal’s impact will fall on broadcasters as well as on non-broadcast programmers, and it thereby threatens localism as well as diversity. Congress long ago established localism as a lodestar for the FCC’s media regulation. *See* 47 U.S.C. 307(b); *see also, e.g., FCC v. Allentown Corp.*, 349 U.S. 358, 362 (1955) (fairness to communities is furthered by localism-driven recognition of needs). In today’s media environment, local broadcasters heavily rely on MVPD channel placement to attract and retain viewers, which Congress also recognized. *See* 47 U.S.C. § 534(b)(6) (channel placement guarantee for must-carry stations). Losing their valuable, established place in the local lineup will have a detrimental effect on all local broadcasters who strive to serve the needs and interests of their local audiences, but it is reasonable to expect that this aspect of the proposal’s unintended consequences will fall especially heavy on the few minority TV broadcasters who remain in business. As MMTC has pointed out repeatedly, the current state of minority media ownership is dismal. *See 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835 (MB 2014) (reporting on October 2013 data that people of color, including Hispanics, held a majority voting interest in only 6.0 percent of full power commercial television stations). Risking the business models of these few stations by pursuing the dismantling/repacking proposal would be short-sighted and counter to the Commission’s statutory mandate to promote diversity. *See* 47 U.S.C. § 309(i)(3).

<sup>3</sup> 47 U.S.C. § 549 (emphasis added).

<sup>4</sup> Jeff Baumgartner, *TV Everywhere Usage Climbs: Study*, Multichannel News (Mar. 24, 2016), <http://www.multichannel.com/news/content/tv-everywhere-usage-climbs-study/403575>; *see also* Downloadable Security Technical Advisory Committee Report, 30 FCC Rcd 15293, 15334 (2015) (“DSTAC Report”) (attached to Media Bureau Seeks Comment on DSTAC Report, Public Notice, 30 FCC Rcd 15293 (2015)) (“There have been millions of downloads of MVPDs apps and millions of unique users.”).

FCC will pick “winners” in today’s rapidly changing video marketplace. The unintended consequences of the FCC’s choice would harm diverse programmers and content creators by violating their copyright and licensing agreements and existing distribution arrangements with MVPDs, the lifeblood of their very existence.<sup>5</sup>

While characterized by the Commission as merely allowing consumers to conveniently access content they have already paid for,<sup>6</sup> the proposal goes much further as written. In fact, it allows device manufacturers and potentially other OVDs<sup>7</sup> to pluck TV networks from MVPDs’ “information flows,” and reorganize and redistribute those networks as they see fit at *zero cost*. These beneficiaries would then be able to charge consumers for this repackaged “guide” or presentation. Freed of channel placement requirements, device manufacturers and app developers can also prioritize search results to favor the highest bidder, or their own video offerings. Under the current NPRM, these third-party device manufacturers that are unregulated by the FCC will set the terms of search discovery and predictive algorithms that will explicitly discriminate against other content creators or programming distributors.

Despite its “expectations” that the proposal will cultivate more opportunities for diverse and independent programmers, the Commission lacks any empirical support demonstrating that the concept would actually advance diversity and inclusion in media on *any* platform.<sup>8</sup> To the

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<sup>5</sup> See, e.g., Letter from Justin Nelson, Co-Founder & President, National Gay and Lesbian Chamber of Commerce et al. to Tom Wheeler, Chairman, FCC, et al., MB Docket No. 16-42 (filed Apr. 11, 2016); Letter from Dr. Juan Andrade, Jr., President, United States Hispanic Leadership Institute, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42 (filed Apr. 4, 2016).

<sup>6</sup> See, e.g., NPRM, 31 FCC Rcd at 1545 ¶ 1.

<sup>7</sup> Without the NPRM explicitly recognizing it, the dismantling/repackaging proposal effectively would transform device manufacturers into online video distributors, and so these comments employ the term “device manufacturer/OVD” to encompass third-party hardware manufacturers and app developers that would benefit from the FCC’s dismantling/repackaging proposal.

<sup>8</sup> See, e.g., Letter from Greg Walden, Chairman, Subcommittee on Communications and Technology, and Yvette D. Clarke, Member, to Gene L Dodaro, Comptroller General, U.S. Government Accountability Office, at 1 (Apr. 1,

contrary, information and data before the Commission here, and in other proceedings to date, indicate that the reverse is true. Moreover, there is no data that this proposal will allow existing and emerging content creators to successfully monetize their content, while the “winners” make money at their expense.

The NPRM would also entrust the Silicon Valley companies or edge providers that are the *least* diverse to cultivate a more inclusive video marketplace over those companies, some of which are even minority-owned or -controlled, that are currently demonstrating their commitment to diversity. As the Commission has chosen not to re-charter its Federal Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Advisory Committee”) for the last two years, they too have no counsel or accountability if these proposed rules were to obliterate diversity in the video marketplace. Notably, the Diversity Committee is the *only* FCC advisory committee that has not been re-chartered.

If the Commission nonetheless is determined to pursue the NPRM’s proposal, the Coalition requests that the agency pause the rulemaking proceeding to gather sufficient evidence to support such a substantial government reordering of the multichannel business model. At the very least, the Commission should conduct three empirical studies to try to gather the factual support it needs: (1) an analysis of the proposal’s disparate impact on diverse TV networks and content creators, and their ability to monetize their content; (2) a determination of the proposal’s costs to consumers; and (3) a study of the proposal’s effect on consumer privacy protections. Only after the results of these studies are in hand – and after the Commission has afforded interested entities an opportunity to comment on them – should the agency resume consideration

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2016) (expressing concern that the FCC’s proposed rules “do not include a meaningful assessment of the effects [of the proposal] on independent and diverse networks” and requesting the GAO study the impact of the FCC proposal), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160401GAO.pdf>.

of the proposal. These empirical studies are absolutely necessary to provide evidence to support such a substantial government disruption and reordering of the multichannel TV business.

Alternatively, the FCC has a less disruptive option for updating its Section 629 rules, recommended by its own Downloadable Security Technology Advisory Committee (“DSTAC”): The DSTAC “apps model” has been recommended as a platform-neutral option that would better serve consumers and diverse content creators and programmers without dismantling network television as we know it.<sup>9</sup> This alternative merits more attention than it received in the NPRM.<sup>10</sup> The applications approach is a creative, technology-neutral, and consumer-friendly solution that is already transforming the marketplace by supporting many competitive “navigation devices” such as Roku, Amazon Fire TV, and Apple TV. Moreover, the marketplace’s efforts to accommodate cord-cutting have resulted in new product offerings in the form of apps, such as HBO Go, Time Warner Cable’s and Charter Communications’ online cable app, and Comcast’s new box-eliminating apps partnership with Samsung and Roku<sup>11</sup> – all without FCC intervention.

It is significant to note that what the FCC hopes to accomplish in the NPRM is *already happening in the marketplace*. The Commission therefore could update its Section 629 rules by simply endorsing that reality. The Commission should not disrupt the marketplace with an old technology fix, at an unknown cost. The collateral damage to diverse TV programmers on MVPD platforms is simply too high, and there is no evidence to support the wisdom of such a

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<sup>9</sup> DSTAC Report, 30 FCC Rcd at 15298-99; *see also* NPRM, 31 FCC Rcd at 1550 ¶ 10 (outlining the two propositions from the DSTAC, the “Proprietary Applications approach” and the “Competitive Navigation approach”).

<sup>10</sup> *Id.* ¶ 35 (effectively adopting the Competitive Navigation approach as the favored model); *id.* ¶¶ 42, 44, 47-49 (presenting the Proprietary Applications approach merely as a critique of the Competitive Navigation approach, to be addressed and mitigated).

<sup>11</sup> Press Release, *Comcast Launches Xfinity TV Partner Program; Samsung First TV Partner to Join*, Comcast (Apr. 20, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-launches-xfinity-tv-partner-program-samsung-first-tv-partner-to-join>.

move. And as demonstrated in these Comments, there is no evidentiary record to substantiate that the NPRM's proposal is the way to promote greater diversity on any platform.

## **II. THE COMMISSION SHOULD REMAIN PLATFORM-NEUTRAL, REFRAIN FROM PICKING WINNERS AND LOSERS, AND ENCOURAGE DIVERSITY ON ALL PLATFORMS**

In seeking to fulfill its statutory obligations in this proceeding,<sup>12</sup> the Commission must respond to Congress's charge that the agency support media diversity. That mandate appears in multiple sections of the Communications Act,<sup>13</sup> the most relevant one here may be the program carriage provision of the 1992 Cable Act, which directs the Commission to regulate carriage agreements and related practices between MVPDs and programmers so as "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market."<sup>14</sup> That fundamental policy goal – diversity across many multichannel video services – has not changed as technology has increased the number of available video platforms. In fact, video innovation and consumer choice have expanded tremendously, in large part because the Commission's past regulatory actions generally have sought to be both even-handed and light touch.

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<sup>12</sup> The Coalition is aware that other commenters in this proceeding will be addressing the statutory infirmities of the disaggregation aspects of the proposal and so will simply address the issue briefly here. The NPRM concedes, as it must, that the language of Section 629 refers only to "navigation devices" and "equipment," NPRM at ¶ 22, and cites to nothing in the statutory text or legislative history to support the extension of its authority to hardware-free apps, much less to justify the wholesale dismantling of MVPD programming packages and repackaging by device manufacturers/OVDs. The Commission has often paid attention to a stricter construction of its statutory authority to ensure its rules are later upheld in court, but inexplicably it has abandoned this approach in this proceeding. *See, e.g., Accessibility of User Interfaces and Video Programming Guides and Menus*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 13914, 13928 ¶ 25 (2015) (declining to adopt requirements that MVPDs include more detailed programming information for PEG channels due to a lack of statutory authority).

<sup>13</sup> *See, e.g.,* 47 U.S.C. § 309; *see also id.* §§ 310, 390, & 521.

<sup>14</sup> *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 628(a), 106 Stat. 1460, 1494 (1992); *see also* 47 U.S.C. § 536.

A. *CONSUMER CHOICE IS AT AN ALL-TIME HIGH – AND THE NPRM’S PROPOSAL THREATENS THAT SUCCESS STORY*

In attempting to help consumers access the wealth of video content available in the marketplace today, the FCC should remain platform-neutral, refrain from picking winners and losers, and avoid favoring one industry or business model over another.<sup>15</sup> The marketplace is already providing consumers more video programming options than ever before, such as OTT multichannel service (*e.g.*, Sling TV and Hulu) and programmer-specific choices (*e.g.*, HBO NOW) – and at various attractive price points.<sup>16</sup>

It is ironic, then, that the NPRM’s proposal would consider using government mandates that threaten to stymie this kind of innovation in the future by relying upon a universal technology framework that may lose relevance in a matter of years or even months.<sup>17</sup> From the regulatory perspective, the result goes against *both* the agency’s mandates to encourage diversity and to encourage competitive choice in navigation devices. The concept is arguably akin to forced “open sourcing” of valuable content, whereby content creators and funders would be forced by the federal government to allow MVPDs to give OVDs free access to content which OVDs can then use to build their own proprietary businesses.

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<sup>15</sup> The Commission’s development of the *NPRM* was an unnecessarily obscure, behind-closed-doors process. The FCC should have begun this proceeding with a Notice of Inquiry to examine key issues such as diversity and consumer protection, rather than leaping straight to an *NPRM* that leaves open hundreds of business, technology, and policy questions. As explained in Section III, *infra*, the *NPRM* is incomplete because it leaves many critical questions unasked.

<sup>16</sup> Non-cable offerings such Sling TV (\$20/month for access to premium channels including ESPN, TNT, and the Food Network without a cable subscription) and single-channel apps like HBO’s NOW program (\$14.99/month for unlimited access to HBO’s original programming) are just two prime examples of the marketplace forces disrupting the status quo without any regulatory intervention. *See* Sling Television, <https://www.sling.com/> (last visited Apr. 8, 2016); HBO Now, <https://order.hbonow.com/> (last visited Apr. 8, 2016).

<sup>17</sup> *See, e.g.*, Frank Louthan IV et al., *TMT: FCC Set Top Box Proposal Commentary: Not the BYOB Party the Commission Envisions*, Raymond James U.S. Research, at 4 (Apr. 11, 2016) (discussing trends in accessing video content) (attached to Letter from Frank Louthan et al., to Tom Wheeler et al., Chairman, FCC, MB Docket No. 16-42 & CS Docket No. 97-80 (Apr. 11, 2016)).

From the consumer perspective, intervention that favors one platform or business model over another is unwarranted and unwise. Neither the FCC nor anyone else can reliably predict the future of the video marketplace, but the degree to which OVDs and MVPDs may become more complementary or more competitive should be shaped by consumer choice and technology advances over time, not a mandate.

*B. THE NPRM'S PROPOSAL WOULD DIRECTLY HARM THE DIVERSE CREATORS ALREADY ON MVPD PLATFORMS*

Diversity has value on both broadcasting and MVPD platforms, but the NPRM's proposal would jeopardize that programming diversity by disrupting channel placement agreements and other business arrangements, moving niche programming networks away from their known "place on the dial" or electronic program guide where they are easily discovered by MVPD subscribers.<sup>18</sup>

Historically, civil rights groups have opposed similar unbundling mandates, such as *a la carte* requirements, because they make it harder for diverse programmers to monetize their content or be found in channel line-ups, impacting their long-term success.<sup>19</sup> We continue to

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<sup>18</sup> See Letter from Priscilla Ouchida, Executive Director, Japanese American Citizens League, to Tom Wheeler, Chairman, FCC, et al., MB Docket No. 16-42, at 1-2 (dated Mar. 29, 2016) (explaining that "[s]mall networks and those serving minority communities must negotiate for a prominent place on the dial where they can be found and sampled by potential viewers" and these networks "have no way to fight for placement or promotion with anonymous search engines and distant companies") ("JACL Letter"); Letter from Dr. Juan Andrade, Jr., President, United States Hispanic Leadership Institute, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 1 (dated Mar. 29, 2016) ("The proposal explicitly argues against any rules to prevent box makers from ignoring negotiated channel placement guarantees, re-arranging channels, or replacing traditional channel guides with Google-style search engine interfaces. These changes would benefit shows that are already popular, but greatly disadvantage up-and-coming minority networks that could find themselves buried at the bottom of the heap.").

<sup>19</sup> The docket opened in connection with the Commission's 2004 *A La Carte Report* contains numerous comments explaining these challenges. See, e.g., Letter from Lorraine Cortes-Vazquez, President, Hispanic Federation, to Michael Powell, Chairman, FCC, et al., MB Docket No. 04-207, at 1-2 (filed July 26, 2004) ("the Hispanic Federation opposes forcing the *a la carte* option on consumers ... as experts have publicly agreed, it is less likely that the average non-Latino viewer would select a network billed as 'programming for Latinos/Hispanics,' which would limit the number of viewers of these positive messages ... without guaranteed access to viewers' homes, upstart networks would find it difficult to raise sufficient capital from investors and advertisers to launch in the first place, eliminating, one by one, the number of voices on cable.); Letter from Hilary O. Shelton, Director, NAACP, et

express concerns about mandatory *a la carte* requirements, or rulemakings such as this NPRM, that would have the same effect.<sup>20</sup> Mandatory dismantling of TV networks threatens their business model, which is reliant on dual revenue streams from advertising and affiliate fees. Such a mandate continues to be particularly problematic for civil rights and social justice organizations because it ignores the Commission’s previous acknowledgement that a mandatory *a la carte* system’s resultant “loss of cost savings, combined with the loss in advertising revenue and the likely rise in license fees to compensate such losses, may cause many program networks to fail, thus adversely affecting diversity.”<sup>21</sup> Forcing these programmers into the uncurated ocean of online content exacerbates visibility challenges and upends the revenue models associated with local and national advertisements, which keep them viable.<sup>22</sup> The same consequence will also apply to new and diverse programmers and content creators who will be

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al., to Michael K. Powell, Chairman, FCC, MB Docket No. 04-207, at 1 (filed Aug. 13, 2004) (*a la carte* regulations “represent a wrecking ball for media diversity” and if they had been put in place, “most programming, targeted to African-American, Hispanic, and Asian audiences [...] would never have seen the light of day”); Letter from Reverend Willie Barrow, Rainbow Push Coalition, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 04-207, at 1 (filed July 15, 2004) (“On the surface, this idea sounds appealing, but a deeper look can only lead to the conclusion that a la carte packaging would have a chilling effect on programming diversity in America.”); Comments of Step Up Women’s Network, MB Docket No. 04-207, at 1 (filed July 22, 2004) (“Niche networks that cater to women and other targeted audiences already have a very difficult time getting distribution on cable. A la carte would only exacerbate this problem and make it more difficult for these channels to attract advertisers or subscribers. If a la carte is enacted, there would be less diversity and fewer channels devoted to women and minorities.”); Comments of The Women’s Alliance, MB Docket No. 04-207, at 1 (filed July 20, 2004) (“the proposal could have a significant negative impact on the so-called ‘niche’ networks that cater to particular interests or demographics such as women, minorities, gays and lesbians and non-English language speakers”); Comments of Woodhull Institute for Ethical Leadership, MB Docket No. 04-207, at 1 (filed July 20, 2004) (same).

<sup>20</sup> Letter from Ronald Blackburn-Moreno, President and CEO, ASPIRA Association, to Thomas Wheeler, Chairman, FCC, MB Docket No. 16-42 (dated Mar. 10, 2016); JA CL Letter at 1-2; Press Release, National Urban League Washington Bureau, *National Urban League and Civil Rights Organizations Call on FCC to Suspend “Unlock the Box” Proceeding to Conduct Disparity Study* (Mar. 21, 2016), <http://nulwb.iamempowered.com/newsroom/press-releases/national-urban-league-and-civil-rights-organizations-call-fcc-suspend->

<sup>21</sup> FCC, Media Bureau, *Report On the Packaging and Sale of Video Programming Services To the Public*, at 6 (Nov. 18, 2004), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-254432A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf).

<sup>22</sup> Letter from Marc H. Morial, President and CEO, National Urban League, et al., to Thomas Wheeler, Chairman, FCC, MB Docket No. 16-42, at 2-3 (filed Mar. 21, 2016) (“Civil Rights Groups Letter”).

disproportionately impacted by biased search algorithms and nominal Internet-generated revenue.

U.S. regulators should take a lesson on forced unbundling mandates from their Canadian counterparts, who recently mandated *a la carte* under the label “pick and pay,” forcing the cable and satellite companies to offer (i) 10-channel skinny bundles for a maximum price of \$25 starting in March 2016, and (ii) complete individual channel selection starting in December 2016.<sup>23</sup> Even before the full, more onerous regulation takes effect, Canadian commentators<sup>24</sup> and analysts<sup>25</sup> have criticized ill-conceived unbundling for its effect on diverse and niche programmers.

Proponents of the NPRM’s proposal argue that independent and minority programmers are just afraid to compete for viewers in today’s vibrant video marketplace. This is hardly the case, and the underlying implication that consumers of a given group are homogenous in their interests is highly troubling. Large, diverse program packages will continue to appeal to many consumers in the future, as they do now. Our objection is to the FCC putting its finger on the scale in a way that gives preference to online programming over more traditional TV broadcast

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<sup>23</sup> See Canadian Radio-television and Telecommunications Commission, *Affordable Basic TV Package, Small TV Packages and Pick and Pay TV Channels* (Mar. 1, 2016), <http://www.crtc.gc.ca/eng/television/program/alacarte.htm>.

<sup>24</sup> See, e.g., Kate Taylor, *Forcing Pick-and-Pay TV Was a Bad Move by the CRTC*, The Globe and Mail (Mar. 4, 2015, 3:18 PM), <http://www.theglobeandmail.com/arts/television/forcing-pick-and-pay-tv-was-a-bad-move-by-the-crtc/article29033504/> (criticizing CRTC for “removing a form of support for niche channels – which are providing diversity of choice in the system – without considering how independent producers of Canadian programs ... are going to operate in the future.”).

<sup>25</sup> See, e.g., Martin Kon, Kaijia Gu, & Philippe Beichou *TV Unbundling: An Economic and Consumer Experience Impact Assessment of the CRTC’s Proposed Approach*, Oliver Wyman at 1, 12 (2014), [http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2014/jul/2014\\_Oliver\\_Wyman\\_CMT\\_TV\\_Unbundling.pdf](http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2014/jul/2014_Oliver_Wyman_CMT_TV_Unbundling.pdf) (saying CRTC’s regulations will “decreas[e] overall programming diversity as well as funding for Canadian program production, especially independent production,” that the regulations will make consumers “suffer from less programming diversity, given the financial sustainability of many programming services would be at risk because of a loss of affiliate and/or advertising revenue coupled with increased marketing costs,” and that “diversity would be compromised, and approximately 26% of programming services could risk insolvency”).

and non-broadcast network programming.<sup>26</sup> The Commission entirely overlooks both the audience visibility and financial considerations linking the two platforms.<sup>27</sup> The Commission should not undermine minority programmers on TV in a misguided attempt to favor those on OTT.<sup>28</sup> This proposal ultimately does not move the needle forward for either side.

C. *THE NPRM'S PROPOSAL WOULD EFFECTIVELY REWARD SOME OF THE LEAST-DIVERSE COMPANIES AT THE COST OF THE MOST DIVERSE ACTORS*

There are other reasons for legitimate concern about the impact of the NPRM's proposal on media diversity. As designed, it would put control of video programming diversity in the hands of some of the nation's *least*-diverse companies.<sup>29</sup> A number of prominent edge providers have notoriously poor records on diversity and have demonstrated little intention to partner with diverse content providers.<sup>30</sup> Available data bears out this observation. According to a 2016

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<sup>26</sup> See Letter from Jose A. Marquez, National President, CEO and Founder, TechLatino: Latinos in Information Sciences and Technology Association, to Tom Wheeler, Chairman, FCC, MB Docket No. 16-42, at 2 (dated Mar. 28, 2016) (“[Under the proposal] third party tech companies ... could reorganize programming however they’d like – most likely rewarding popular mass-market shows while leaving niche programming vulnerable to being buried in the deepest depths of the program guide or back pages of search results.... [T]he text of the rule ... rejects the need for any safeguards in this area.”); JACL Letter at 1 (observing that Asian Americans “have made enormous gains in media representations on options in recent years,” that networks “like MNET and CrossingsTV have found a successful niche producing vibrant, quality content,” and that Chairman Wheeler’s proposal “would allow large tech companies to repackage licensed programming from TV providers into their own products and services,” making it hard for “small and foreign language networks” to “survive if their work is taken by companies”).

<sup>27</sup> See *infra* Section III(A).

<sup>28</sup> See, e.g., Alex Byers, *Telecom, Media Firms See a Culprit for FCC Woes: Google*, Politico (Apr. 8, 2016, 10:27 AM), <http://www.politico.com/story/2016/04/telecom-media-firms-see-a-culprit-for-fcc-woes-google-221713>.

<sup>29</sup> See Letter from Brent Wilkes, National Executive Director, League of United Latin American Citizens, to Tom Wheeler, Chairman, FCC, MB Docket No. 15-64, at 4 (dated Feb. 17, 2016) (“LULAC notes that contrary to the Commission’s statements, over-the-top programming is not especially diverse, few if any minority channels have developed a sustaining revenue stream from over-the-top programming, and the edge providers themselves are some of the least diverse businesses operating in the United States.”); see also the diversity record of trendsetter Google, whose performance has been specifically poor in the areas of employment, ownership, supplier diversity, and incorporation of multicultural programming. See, e.g., Laszlo Block, *Getting to work on diversity at Google*, Google Official Blog (May 28, 2014), <https://googleblog.blogspot.com/2014/05/getting-to-work-on-diversity-at-google.html>; Tom Huddleston, Jr., *Google owns up to lack of diversity*, Fortune (May 29, 2014), <http://fortune.com/2014/05/29/google-owns-up-to-lack-of-diversity>; Kia Kokalitcheva, *Google’s workplace diversity still has a long way to go*, Fortune (June 1, 2015), <http://fortune.com/2015/06/01/google-diversity-demographics>; see also Civil Rights Groups Letter.

<sup>30</sup> See Larry Irving, *Netflix Amazon Programming as White as its Executive Suite*, Mercury News (July 10, 2015), [http://www.mercurynews.com/opinion/ci\\_28462023/larry-irving-netflix-amazon-programming-white-its-executive](http://www.mercurynews.com/opinion/ci_28462023/larry-irving-netflix-amazon-programming-white-its-executive);

report published by the University of Southern California, only two percent of OTT-produced content depicted proportional representation of diversity within the U.S. population, compared with 19 percent on broadcast and 13 percent on cable).<sup>31</sup> Similarly, only 11.4 percent of streaming shows featured a director from a racial or ethnic minority in their season premiere episodes.<sup>32</sup> Dismembering and plundering the traditional television platforms, is not the solution to encourage more diverse content from OTT providers and OVDs. Instead, the Commission should explore how to bolster its diversity mandate to serve *all* consumers on *all* platforms.<sup>33</sup>

Further, under the Commission’s proposed regime, OVDs could use their existing algorithm models, which are weighted by paid advertising,<sup>34</sup> in such a way that it is difficult to find diverse programming, thus devaluing the actual cost of the diverse content overall. This gives new meaning to the term “paid prioritization,” which the Commission sought to eliminate in its recent and highly controversial open Internet proceeding.<sup>35</sup>

### **III. THE COMMISSION SHOULD PRESS “PAUSE” ON THE SET-TOP BOX PROCEEDING IN ORDER TO CONDUCT SEVERAL CRUCIAL EVIDENTIARY STUDIES**

The Commission has good reason to abandon the NPRM’s proposal, but if the agency chooses to continue to explore the concept, at a minimum it must take time to gather empirical

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*see also* Netflix, *Diversity and Inclusiveness*, <https://jobs.netflix.com/diversity> (last visited Apr. 21, 2016) (reporting more than 65% of the company’s leadership as white, with only 10% of creative and corporate positions held by members of the African-American or Hispanic communities).

<sup>31</sup> Stacy L. Smith, PhD et al., *Inclusion or Invisibility? Comprehensive Annenberg Report on Diversity in Entertainment*, USC Annenberg, Media, Diversity, & Social Change Initiative, at 7 (Feb. 22, 2016), <http://annenberg.usc.edu/pages/~media/MDSCI/CARDReport%20FINAL%2022216.ashx>.

<sup>32</sup> This compares to 16.8 percent of cable shows that have employed diverse directors. *Id.* at 10.

<sup>33</sup> Further, the promise of carriage on alternative distribution platforms are also not the answer to increased visibility of diverse networks if the data trends persist. *See supra* note 2.

<sup>34</sup> *See* Google, *Ad Targeting – About the Ad Auction*, <https://support.google.com/adsense/answer/160525?hl=en> (last visited Apr. 21, 2016) (explaining Google’s weighted advertising practices).

<sup>35</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Red 5601 (2015) (“Open Internet Order”).

data to justify the public interest claims that are made in the NPRM. To forge ahead with adoption of the proposal despite the overwhelming evidence before the Commission that contradicts the NPRM's claims would be the height of arbitrary and capricious action.<sup>36</sup>

A. *THE NPRM'S PROPOSAL NOT ONLY LACKS EMPIRICAL SUPPORT TO SHOW IT WILL ACTUALLY ADVANCE MEDIA DIVERSITY, IT ALSO LACKS UNDERSTANDING OF THE REAL OBSTACLES CONFRONTING DIVERSE PROGRAMMERS TODAY*

The NPRM's claims for the pro-diversity impact of the dismantling/repackaging proposal reflect wishful thinking that is devoid of factual support. As the discussion in Section II, *supra*, makes plain, the available evidence cuts against the proposal.

But the suggestion that the NPRM's proposal will somehow make online video content more "accessible" implies barriers that do not exist – and indicates that the Commission lacks understanding of the root problem confronting independent and diverse programmers today. Existing online platforms already make a wealth of content accessible, and consumers plainly are accessing it.<sup>37</sup> The issue facing Internet-based multicultural content creators is not *access* to online distribution platforms – consumers are accessing online content at staggeringly high levels – but online content creators have difficulties *monetizing* this online viewership. On the contrary, content creators are forced to attempt to monetize this online fan base through endorsement deals<sup>38</sup> or by moving the content to traditional TV programming networks<sup>39</sup> – the

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<sup>36</sup> 5 U.S.C. § 706(2)(E).

<sup>37</sup> Netflix currently has more customers than any cable company (*compare* Tom Risen, *Comcast, Netflix and the Death of Cable: Cable providers leverage Internet access to slow the loss of customers*, U.S. News & World Report (July 16, 2015), <http://www.usnews.com/news/articles/2015/07/16/-comcast-netflix-and-the-death-of-cable> with Jon Brodtkin, *Comcast, Time Warner Cable get 71% of new Internet subscribers: AT&T and Verizon struggle to get new customers while cable soars*, Ars Technica (Nov. 23, 2015), <http://arstechnica.com/business/2015/11/comcast-time-warner-cable-get-71-of-new-internet-subscribers/>); Google's YouTube receives billions of views every day. YouTube, *Statistics*, <https://www.youtube.com/yt/press-statistics.html> (last visited Apr. 21, 2016).

<sup>38</sup> Michael Thomson, *PewDiePie Doesn't Make Anywhere Close to What He Should Be Making*, Forbes (Jul. 11, 2015, 1:32 PM), <http://www.forbes.com/sites/michaelthomson/2015/07/11/pewdiepie-doesnt-make-anywhere-close-to-what-he-should-be-making/#57a190b34a26>.

very networks that the FCC is undermining in the NPRM. Moreover, those inside the industry understand the significance of the role of traditional TV distribution in supporting viable business models online, even if the Commission does not.<sup>40</sup> In other words, we do not need government intervention to reach this result.

Many multicultural TV programming networks and content creators already have weighed in on the NPRM's proposal, and asserting that it is harmful to their businesses. The multicultural content creative community has stated that the proposal could do more harm than good in ensuring the visibility of diverse faces on screen.<sup>41</sup> While anyone can post a video on the Internet, creating quality content is expensive, and the business ecosystem for creating quality multicultural content is even more challenging. The CEO of TV One recently explained that “[i]t costs millions and millions of dollars to create quality content. [...] If an advertiser can get our audience for a lot less money with a lot more data ... then that devalues our business and devalues our content and puts us in a really precarious situation.”<sup>42</sup>

By allowing device manufacturers/OVDs to keep all proceeds – and, perhaps more significantly, consumer data – from the commercial distribution of such content for themselves, the proposal would deprive program creators of revenue and these assets. Such deprivation can only serve to break the cycle in which revenue from successful and diverse programming is re-invested in the creation of more high-quality multicultural content.

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<sup>39</sup> Elizabeth Wagneister, *HBO Greenlights Comedy Series 'Insecure' from YouTube Star Issa Rae*, Variety (Oct. 15, 2015, 4:30 PM), <http://variety.com/2015/tv/news/insecure-hbo-issa-rae-series-order-comedy-1201619196/>.

<sup>40</sup> See, e.g., Comments of Fuse Media, Inc., MB Docket No. 15-64 (filed Jan. 21, 2016).

<sup>41</sup> See, e.g., *supra* note 11.

<sup>42</sup> Jim Puzanghera, *Black TV executives split on FCC's proposed set-top box disruption*, Los Angeles Times (Mar. 4, 2016), <http://www.latimes.com/business/la-fi-set-top-box-minority-programming-20160303-story.html>; see also Laura Martin and Dan Medina, *Valuing Consumers' TV Choices*, Martin's Meditations, Needham Insights, at 1 (Dec. 1, 2013) (estimating that it costs an average of \$280 million annually to run an entertainment cable channel), [http://www.capknowledge.com/research\\_reports/media\\_theme\\_research\\_reports/old\\_reports/2013\\_12\\_01\\_Valuing\\_Consumers\\_TV\\_Choices\\_final.pdf](http://www.capknowledge.com/research_reports/media_theme_research_reports/old_reports/2013_12_01_Valuing_Consumers_TV_Choices_final.pdf).

Moreover, there is no reasonable explanation for how a new ecosystem with both regulated and unregulated participants will fairly protect consumers.<sup>43</sup> It is unlikely that such a regime will pass judicial muster unless all of the participants are regulated in the same manner.

The uncertainty surrounding the potential impact of the NPRM's proposal on ad revenue has not been helped by conflicting statements in the NPRM and by the Commission as to whether the concept would allow for the alteration, addition, or removal of advertisements.<sup>44</sup> Confusion by the proposal's own proponents on something so fundamental to programmer business models is likely to chill investment in new video programming, if not undercut it entirely.

While the Commission has stated that it understands the impact of these issues on diverse and independent programmers, the agency provides neither evidence nor a road map for preventing the collateral damage that will be caused by the NPRM's potentially negative impact on diversity. As stated, the Commission has failed to re-charter its own Diversity Advisory Committee, which could have offered feedback on the impact of these types of issues on diversity. Previous iterations of the committee have brought together content creators, video distributors, and advertising professionals who could have offered useful insights on the

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<sup>43</sup> While the White House recently weighed in in favor of the NPRM, it is not clear from the Administration's blog post that it has taken full account of the proposal and the current marketplace. Additionally, even the National Telecommunications & Information Administration, the President's "principal adviser on telecommunications and information policy," has recognized that the NPRM's proposal contains serious data protection and consumer privacy issues. See Jason Furman and Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, White House Blog (Apr. 15, 2016, 6:00 AM), <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>; 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 (Apr. 14, 2016) ("NTIA Letter").

<sup>44</sup> Jon Brodtkin, *FCC's Cable Box Rules Won't Prohibit Extra Ads Around TV Channels; Ban Unneeded As Companies Like TiVo "Are Not Disrupting Advertising," FCC Says*, ArsTechnica (Mar. 22, 2016, 12:17 PM), <http://arstechnica.com/business/2016/03/fccs-cable-box-rules-wont-prohibit-extra-ads-around-tv-channels>.

proposal. In the absence of an advisory body that understands the media diversity landscape, it is incumbent upon the FCC to do its homework.

At a minimum, the FCC should undertake three evidentiary studies specifically designed to test the viability of the proposal's dismantling/repackaging concept generally and its impact on media diversity in particular.

*B. THE COMMISSION SHOULD CONDUCT AN EMPIRICAL STUDY EXPLORING THE PROPOSAL'S IMPACT ON DIVERSE CONTENT, DIVERSE OWNERSHIP, AND THE VISIBILITY OF DIVERSE FACES ON-SCREEN*

Contrary to the statements in the record, the FCC's Diverse Programming Notice of Inquiry ("NOI") and set top NPRM are not related. The FCC's Diverse Programming NOI, which purports to assist diverse and independent programmers in overcoming carriage and distribution challenges, is in direct contradiction to the FCC's set top NPRM, which serves to destroy the entire TV network business model as we know it. So while the data from the Diverse Programming NOI may have marginal relevance, it is more appropriate for the FCC to conduct a media diversity impact study before attempting to impose a rule that so drastically impacts TV programming diversity. Congresswoman Yvette Clarke has already called for an "impact study" that assesses the unintended consequences of the FCC's proposal on diverse and independent programmers and their content.<sup>45</sup> Questions for the proposed media diversity impact study should include:

- Will disaggregating MVPD programming channels serve the goal of increasing media, content, and ownership diversity compared to the current system?

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<sup>45</sup> See, e.g., Letter from Greg Walden, Chairman, Subcommittee on Communications and Technology, and Yvette D. Clarke, Member, to Gene L. Dodaro, Comptroller General, U.S. Government Accountability Office, at 1 (Apr. 1, 2016) (expressing concern that the FCC's proposed rules "do not include a meaningful assessment of the effects [of the proposal] on independent and diverse networks" and requesting the GAO study the impact of the FCC proposal), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160401GAO.pdf>.

- Could disaggregating MVPD programming channels result in less diversity and fewer successful diverse programmers and content producers? If so, what is the projected data on the extent/size of the disparity that would result? If not, what is the projected data on the extent/size of diversity gains?
- What type of new opportunities and/or harms would disaggregating MVPD programming channels create for diverse programmers and content producers?
- What are the costs and/or savings associated for diverse programmers and content producers?<sup>46</sup>
- What supports are needed to enable diverse OTT providers to be fiscally sustainable?<sup>47</sup>
- How will the proposal's impact on advertising affect the ad-based business models on which both national and local media depend?
- The business models for social media and search engines rely largely on targeted advertising that draws on data concerning an online consumer's interests and habits. Given that programmers typically do not collect that sort of data, how will their prospects for online ad revenues be affected?

The Commission must also explore the costs of search engine optimization on diverse programmers' efforts to have their content discovered in the vast ocean of the Internet. While diverse TV networks negotiate for distribution fees from MVPDs in exchange for the right to distribute their networks, we have yet to understand from the FCC exactly how the NPRM would operate in a search-and-discover environment. However, this much seems clear: The NPRM's proposal likely would facilitate a "prioritization for profit" regime, enabling search engines to act as gatekeepers, either by extracting payments from programmers before allowing viewers to easily find their content or by simply favoring their own content over that of others. Such action could amount to *de facto* discrimination in search results against programmers unable to afford

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<sup>46</sup> Civil Rights Groups Letter at 2-3.

<sup>47</sup> This question obviously is relevant to the Independent Programming NOI as well.

the favorable placement – a group almost certain to include new entrants and many multicultural programmers and content creators.

C. *THE COMMISSION SHOULD ANALYZE THE LIKELY INCREASED COSTS TO CONSUMERS UNDER THE PROPOSAL*

Similar to the transition from analog to digital television, the Commission must give adequate consideration to the economic consequences of the NPRM for consumers and other stakeholders.<sup>48</sup> Too many questions on this point remain unanswered – indeed, the FCC seems to believe that the question does not need to be asked.

Experts at the FCC’s recent State of the Video Marketplace Workshop explained that any type of dismantling/repackaging proposal could potentially increase overall costs to consumers in the long run.<sup>49</sup> According to calculations by Marci Ryvicker, head media analyst at Wells Fargo Securities, when typical services such as DVR recording and video on demand are included in the cost, OTT offerings are likely to be more expensive for consumers than the MVPD bundle.<sup>50</sup> Individually rebuilding the must-have elements of the bundle actually would cost the average consumer more than his or her current annual cable bill.<sup>51</sup> The stated purpose of this proceeding was to create competition to lower “box bills,” yet we are not on course for cheaper equipment.

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<sup>48</sup> See, e.g., *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 30 FCC Rcd 14927, 14948-49 ¶¶ 45-46 (2015) (acknowledging the need to ameliorate post-digital television transition consumer harms, even as far into the process as 2015).

<sup>49</sup> See FCC, Media Bureau, *Media Bureau Workshop on the State of the Video Marketplace* (Mar. 21, 2016), <https://www.fcc.gov/news-events/events/2016/03/media-bureau-workshop-state-video-marketplace#acc2>.

<sup>50</sup> Marci L. Ryvicker, Wells Fargo, *State of the Video Marketplace*, at 18-19 (Mar. 2016), [http://www.fcc.gov/-bureaus/mb/policy/video\\_marketplace/presentation\\_Ryvicker\\_2016.pptx](http://www.fcc.gov/-bureaus/mb/policy/video_marketplace/presentation_Ryvicker_2016.pptx) (calculating a cost of \$138.25 for the “synthetic” OTT replication of the bundle’s must-have offerings, and \$134.38 for the actual bundle).

<sup>51</sup> See Eric Ravenscraft, *À La Carte Streaming Is Here, and It’s Just as Expensive as Cable*, Lifehacker (Apr. 6, 2016), <http://lifehacker.com/a-la-carte-streaming-is-here-and-it-s-just-as-expensiv-1769410396>.

D. *THE COMMISSION ALSO SHOULD ASSESS THE PROPOSAL'S IMPACT ON CONSUMER PRIVACY PROTECTIONS*

Congress has fashioned very specific privacy rights for cable and satellite subscribers. Data concerning their viewing habits are protected by Section 631 of the Communications Act.<sup>52</sup> The provision prevents MVPDs from unilaterally selling or disclosing customers' personal data, and to help enforce these protections, customers have been empowered with a private right of action to pursue statutory and/or punitive damages in federal court. Third-party device manufacturers and app developers, however, are not covered by Title VI – or any other provision of the Communications Act – a legal gap the FCC lacks the authority to bridge.<sup>53</sup> The Commission already has determined that its 2015 reclassification of broadband Internet access service providers as Title II common carriers – requiring compliance with their own set of privacy obligations – does not extend to edge providers or any other entity in the Internet ecosystem.<sup>54</sup>

With no statutory protections to draw on, the NPRM offers only a hollow promise of privacy protection for customers of unregulated device manufacturers/OVDs.<sup>55</sup> The Commission's solution to this problem does not withstand even minimal scrutiny.<sup>56</sup> The proposed workaround would require TV providers to police device and app makers. This is

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<sup>52</sup> 47 U.S.C. § 551.

<sup>53</sup> See NTIA Letter.

<sup>54</sup> Open Internet Order, 30 FCC Rcd at 5820 ¶ 462; *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, FCC 16-39 ¶ 13 (rel. Apr. 1, 2016) (“Privacy Protection NPRM”).

<sup>55</sup> As former U.S. Representative Henry Waxman (D-CA) wrote recently, the NPRM's “suggestion that device maker ‘self-certification’ can substitute for the rigorous statutory safeguard that protect personal viewing data is simply wrong.” See Henry Waxman, *FCC Cable Box Proposal Affects More Than Just Cable Boxes*, The Hill (Mar. 21, 2016, 8:00AM) <http://thehill.com/blogs/congress-blog/technology/273590-fcc-cable-box-proposal-affects-more-than-just-cable-boxes> (“Waxman Blog”).

<sup>56</sup> NPRM, 31 FCC Rcd at 1579-82 ¶¶ 73-78; NTIA Letter at 1, 5 (NTIA, the “President's principal [privacy] adviser on telecommunications and information policy,” stating the FCC's approach still “leaves important questions to be addressed – most importantly, who will ensure compliance with a certification and through what legal authority”).

technically infeasible, in part because the rule prevents device competitors from accessing one another’s video interfaces.<sup>57</sup> The Federal Trade Commission and State Attorneys General are no substitute, either; their jurisdictions, priorities, and resources are fundamentally different from that of the FCC. Consumers’ privacy protections should not vary based on the regulatory category into which a service provider falls; and the Commission certainly “should not help turn set-top boxes into a platform for more intrusive, less regulated advertising opportunities.”<sup>58</sup> A non-regulated competitor should not be allowed to “pinky swear” about its adherence to online privacy protection, regardless of how much favor they have garnered with a particular regulatory authority.<sup>59</sup>

As written, the NPRM would dramatically differentiate privacy rights based on distinctions that will make no sense to any consumer – and that will effectively discriminate against the least financially fortunate ones. The Commission therefore should more closely

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<sup>57</sup> NPRM, 31 FCC Rcd at 1558-60 ¶¶ 25-27 (calling for competitive interfaces for accessing “Navigable Services” including MVPD linear and on-demand programming and the Emergency Alert system). In contrast to wishful technical thinking in the NPRM, the FCC rejected important aspects of the MMTC-backed “Katrina Petition” to reform the Emergency Alert System that the Commission claimed would raise technical feasibility concerns. *Review of the Emergency Alert System*, Order, FCC 16-32 ¶ 2 (rel. Mar. 30, 2016) (holding that implementing a technical alteration of the EAS system to promote multilingual distribution, “even in modified form, would be difficult if not impossible to do within the existing EAS architecture”).

<sup>58</sup> Waxman Blog; *see also* 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) (underscoring the importance of strong privacy for members of the LGBT community and noting that merely allowing third-parties to “self-certify” compliance with privacy rules “would put at risk consumers who have come to rely on [the FCC’s rules] for the protection of their private data”) (*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)). *See also* Patrick Maines, *Netflix, Self-Interest and Net Neutrality*, The Hill (Apr. 5, 2016), <http://thehill.com/blogs/pundits-blog/technology/275155-netflix-self-interest-and-net-neutrality> (a paradigmatic example of customer confusion created when edge providers and ISPs are subject to asymmetrical regulations – and customers blame the more heavily regulated ISP for the edge provider’s misconduct).

<sup>59</sup> *See* Privacy Protection NPRM, FCC 16-39 (imposing a multi-layered set of privacy protections onto broadband Internet access service providers – including transparency obligations, a three-tier consent framework for the use and disclosure of customer proprietary information, and data security and breach notification requirements - while leaving other actors untouched).

study the impact of its proposals on consumers and stakeholders before attempting implementation.

**IV. RATHER THAN PURSUE THE NPRM'S COSTLY AND LIKELY COUNTERPRODUCTIVE PROPOSAL, THE COMMISSION SHOULD EMBRACE CREATIVE, CONSUMER-FRIENDLY SOLUTIONS ALREADY AVAILABLE IN THE MARKETPLACE, SUCH AS APPS**

As the discussion above indicates, the NPRM has many complexities that require further analysis before the Commission should consider adopting its proposal. Notably, the proposal allows online businesses to take advantage of programming investments made by others; it harms content creators, including diverse programmers and their MVPD partners, by allowing device manufacturers to repackage and redistribute their content without compensation. Perhaps most importantly, technology is likely to replace this concept within a few years as consumers gravitate toward the “next big thing” in technology. In fact, this shift is occurring in the marketplace already.<sup>60</sup>

Although the Commission should have sought input on the DSTAC's two proposals<sup>61</sup> in an evenhanded and straightforward manner from the beginning, it is not too late to remedy that disparity: It could readily issue a *Further NPRM* to explore that alternative now. With the many innovations emerging in the video marketplace, and particularly as MVPDs adopt apps for their programming bundles, the Commission should put more emphasis on reviewing options that will serve consumers better in the long run while promoting the business models that foster investment in high-quality multicultural content.

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<sup>60</sup> Press Release, *Comcast Launches Xfinity TV Partner Program; Samsung First TV Partner to Join*, Comcast (Apr. 20, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-launches-xfinity-tv-partner-program-samsung-first-tv-partner-to-join>.

<sup>61</sup> NPRM, 31 FCC Rcd at 1550 ¶ 10.

Given the many pitfalls surrounding the NPRM, the Commission should consider refocusing the considerable agency resources that studying and implementing the proposal would require toward other pressing policy needs, such as ensuring that our nation's most vulnerable communities have broadband connectivity and increasing diverse ownership of our nation's communications services.<sup>62</sup>

## V. CONCLUSION

The proposed NPRM is broken on many levels, but most tellingly, as it relates to diversity and inclusion. The Communications Act requires the Commission to expand diverse programming, not to undermine its very existence. Before the agency disrupts the entire video marketplace as we know it, the Commission must conduct empirical studies concerning the NPRM's probable effect on media diversity, consumer costs, and consumer privacy. The Commission also should give serious consideration to the alternative means for implementing Section 629, the apps model, which already is emerging in the marketplace and would not require a broad reconfiguration of multichannel video services that threatens the creation of, and investment in, new and diverse programming content.

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<sup>62</sup> See, e.g., Press Release, FCC, *FCC Modernizes Lifeline Program for the Digital Age: New Rules Will Help Make Broadband More Affordable for Low-Income Americans* (Mar. 31, 2016), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0404/DOC-338676A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0404/DOC-338676A1.pdf); see also Open Internet Order, 30 FCC Rcd at 5627 ¶ 77 (in part justifying the Commission's open Internet rules based on the need for closing the digital divide and "facilitating the development of diverse content"); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17687 ¶ 66 n.81 (2011) (explicitly tying the importance of ubiquitous broadband deployment to all Americans to the policies and purposes of the Communications Act "favoring a diversity of media voices").

Respectfully submitted,  
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