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

Re: Notice of Ex Parte Presentation, MB Docket 15-64

Dear Ms. Dortch:

In its December 17 *ex parte* submission, TiVo makes four claims about its AllVid proposal.¹ It claims that AllVid is needed because it is “difficult if not impossible” to negotiate programming agreements. It claims that AllVid would help independent and minority programmers. It seeks to downplay the importance of the strong privacy and consumer protection rules applicable to multichannel service. And it claims that Section 629 has “always been about” extending the principles of *Carterfone* and replacing, rather than delivering, the services “offered” and “provided” by MVPDs. Each claim is baseless.

Negotiating programming rights

TiVo claims that it is “increasingly difficult if not impossible” to negotiate sufficient programming rights for a competitive offering. TiVo therefore proposes the AllVid approach, under which the FCC would grant certain tech companies the freedom to appropriate that content without negotiating or paying for it, to create an entire new competitive video *service*, and to ignore the carefully negotiated licensing agreements that content providers and distributors agree to for channel placement, advertising, and in-home use.² But the availability of program rights is

¹ The parties urging the Commission to mandate specific technical standards have changed their approach (and the names for their proposals) several times. We have used the term AllVid as a short-hand descriptor for all of these varied proposals, which share characteristics of the 2010 AllVid proposal that the Commission declined to pursue, such as compelling MVPDs to devote substantial economic and technical resources to build a new interface that would enable retail device manufacturers to obtain unbundled access to the piece parts of an MVPD’s service from which they could create their own service offering without regard for MVPD-content supplier agreements, copyright, licensing and other restrictions, and Title VI requirements.

² TiVo’s representative told DSTAC that “operators have made agreements where there’s not a disaggregation perhaps with the content owners, [but] that those should not necessarily apply to a third party device which should have the freedom to not be bound...” Transcript of March 24, 2015 DSTAC meeting at 96-97(emphasis added). Public Knowledge claims respect for copyright law, but it does not consider AllVid manufacturers to be a party to or bound by the copyright *licenses and distribution agreements* under which content providers lawfully segment the market. The Public Knowledge representative told DSTAC “an operator might have agreed to

evident to any consumer: Netflix, Hulu, Amazon, Sony, and others have negotiated those rights and offer video service. Many are producing and adding their own original content. For its part, TiVo successfully negotiated agreements to place Netflix apps, Amazon apps, and cable video-on-demand on its boxes. AllVid is not about choice. Consumers today already have unprecedented choices of different providers, different packages, and different devices. AllVid would only bestow a special favor on certain tech companies to let them take the copyrights, licenses, intellectual and other property of content creators and others who support this rich video ecosystem. There is no justification for such brazen misappropriation in a video market that is producing and presenting so much choice that it has been dubbed the new Golden Age of television.

Independent or minority programmers

TiVo next claims that AllVid would advance the cause of independent and minority programmers. But those programmers have already decried AllVid as destructive to their future. For example, TV One’s Alfred Liggins has explained that AllVid would undermine the content supplier-distributor partnership “as distributors will be forced to reconsider what they pay for programs that can be siphoned off, repackaged and resold, drying up the revenue needed to underwrite quality shows.” He further explained that “[t]elevision programmers depend on the integrity of licensing and distribution deals to produce their shows” and that “[t]hese arrangements — including critical terms such as channel placement, advertising, scheduling and more — are the lifeblood of the video marketplace today.” He concluded that a government mandate that enables “special interests to pick and choose which of these terms to follow would do severe damage to the programming ecosystem, and in particular, niche and minority-focused networks.”³ Others have made the same points.⁴

channel numbers and channel line ups *but ... a lot of those sorts of restrictions that operators have agreed to may not make any sense in a retail place.*” *Id.* at 38-39 (emphasis added). Another AllVid proponent dismissed video distribution agreements as irrelevant: “*Device manufacturers, of course, cannot violate contracts to which they are not a party.*” Comments of Computer & Communications Industry Association at 10 (emphasis added). Amazon’s representative dismissed a negotiated programming agreement enabling customers to view multiple screens of Olympic events simultaneously, saying “I’m perfectly happy as a DISH subscriber to have never viewed that. ... And if the device that I have is unable to do that, it’s no skin off my back at all. In fact, I want a refund because I don’t want to view that.” Transcript of July 7, 2015 DSTAC meeting at 177 (Matt Chaboud for Amazon). AllVid proponents assert that they would be “answerable to the marketplace, not to network operators or programmers.” Public Knowledge Comments at 15. According to AllVid proponents, *they would not be required to honor the conditions of “rights holders or intermediaries.”* Electronic Frontier Foundation Comments at 2 (emphasis added).

³ Alfred Liggins, *Protecting consumer choice, not special interests, in video market*, THE TAMPA TRIBUNE, (Oct. 24, 2015), available at <http://www.tbo.com/list/news-opinion-commentary/protecting-consumer-choice-not-special-interests-in-video-market-20151024/> (Op-Ed by Alfred C. Liggins III, Chairman of TV One).

⁴ Catherine Pugh, *Television’s Trojan horse*, THE HILL (Dec. 10, 2015), available at <http://thehill.com/blogs/congress-blog/technology/262734-televisions-trojan-horse> (Op Ed by Catherine Pugh, president of the National Black Caucus of State Legislators.); Mario Solis-Marich, *Protect TV programming diversity*, EL PASO TIMES (Guest Column by Mario Solis-Marich, Vice President of programming for BabyFirst Americas), available at <http://www.elpasotimes.com/story/opinion/columnists/2015/12/14/column-turn-back-clock-tv-programming-diversity/77261168/>.

As for TiVo's fallback claim that AllVid would help independent or minority programmers get more visibility than they have online, nothing in AllVid is needed for any retail equipment manufacturer to locate, promote, pay for and feature independent or minority programmers on their retail boxes.

Privacy and consumer protection

TiVo tacitly concedes that the tech companies proposing AllVid do not consider themselves bound by the strong privacy and consumer protections of Title VI. In DSTAC, when MVPDs asked that tech companies follow the same consumer protection rules when delivering MVPD services, TiVo responded that "Some members [referring to itself] hold the position that a provider's obligations do not apply to retail devices."⁵ Now TiVo vaguely claims that it is subject to "a variety" of other regulatory responsibilities and adds that "any concerns" about ignoring Title VI may be addressed in an FCC rulemaking.

But just last month, the FCC refused to adopt privacy rules for the edge, explaining that "The Commission has been unequivocal in declaring that it has no intent to regulate edge providers."⁶ The fact is that AllVid would enable tech companies to mine television viewing data without regard to the strong privacy protections of Title VI.

Section 629

TiVo claims that "Section 629 has always been about" the "competitive user interface," by which it means the ability to pick and choose piece parts of MVPD service using the content and intellectual property of others to create an entire new video service. But the FCC has already ruled that that Section 629 authorizes the Commission only to assure a market for retail *devices* that receive services "*offered*" and "*provided*" by MVPDs, not to receive some selected parts or derivative *service* that a CE manufacturer may wish its product to provide.⁷ Congress considered doing more, but instead narrowed Section 629 and added a proviso that the statute shall not be construed as expanding FCC authority. By contrast, Congress did include limited unbundling of incumbent local exchange carrier networks, but even then, the federal courts invalidated the FCC's unbundling rules as overreaching three times. Congress did not simultaneously and quietly slip in new, *unlimited* unbundling and disaggregating authority for the FCC over video equipment and services in Section 629.⁸

⁵ WG2 Report at 10.

⁶ Consumer Watchdog Petition, DA 15-1266 (November 6, 2015).

⁷ *Gemstar Int'l Group, Ltd.*, 16 FCC Rcd 21531, 21542, ¶ 31 (2001) ("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.' The Commission has not found that the right to attach consumer electronics equipment to a cable system can be expanded to include the obligation by cable operators to carry any service that is used by such equipment, nor is the legislative history supportive of such a requirement. Indeed, the scope of Section 629 apparently was 'narrowed to include only equipment used to access services provided by multichannel video programming distributors.'" (*citing* S. Conf. Rep. No 104-230 at 181 (1996), footnotes omitted; emphasis in original).

⁸ See NCTA Comments at 39-40.

When vacating the “plug and play” rules for CableCARD devices, the D.C. Circuit specifically warned the Commission that the FCC’s authority under Section 629 is neither “unbridled” nor “as capacious as the agency suggests;” that it does not encompass measures with only a “tenuous . . . connection to § 629’s mandate;” and that it does not “empower the FCC to take any action it deems useful in its quest to make navigation devices commercially available.”⁹

Finally, TiVo invokes *Carterfone* to support its reading of AllVid into Section 629, but the Commission has already found that *Carterfone* and the telephone network are not analogous to the video device marketplace.¹⁰ Cable operators do not own their set-top box vendors. As detailed in the record,¹¹ cable operators pay billions to buy and maintain set-top boxes from multiple consumer electronics manufacturers so that customers may receive their subscription service as advertised. In today’s competitive market, MVPDs are not trying to protect leased set-top boxes: they have explained to their investors their financial incentives to expand the reach of their service to more devices while reducing the capex cost of CPE; and are investing significant resources in “apps” to deliver service without a set-top box. Apps today make cable programming available to more retail devices like tablets, smart phones, and streaming boxes like Roku than there are set-top boxes. There is no need for an FCC tech mandate to enable consumers to enjoy multichannel service on retail devices.

If you have any further questions, please contact me.

Respectfully submitted,

/s/ **Neal M. Goldberg**

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⁹ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 997-98, 1000 (D.C. Cir. 2013).

¹⁰ From the beginning of its work implementing Section 629 in 1998, the Commission said that “the telephone networks do not provide a proper analogy to the issues in this [video device] proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.” *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, First Report and Order, 13 FCC Rcd 14775 ¶ 39 (1998). It reiterated that conclusion in 2010. *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 25 FCC Rcd 4275 ¶¶ 19, 21 (2010).

¹¹ See NCTA Reply Comments at 21-24; NCTA Comments at 38-40.

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