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Mr. Carlos Kirjner
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Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. William Lake
Chief, Media Bureau
Federal Communications Commission
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Washington, D.C. 20554

**Re: GN Docket Nos. 09-47, 09-51, 09-137; CS Docket 97-80
(Comments – NBP Public Notice #27)**

Dear Mr. Kirjner and Mr. Lake:

At a recent meeting with staff from the Broadband Task Force and Media Bureau, we were asked our views on whether Section 629 of the Communications Act had fulfilled its goals and, if not, what we might recommend. As we have stated previously and as described more fully below, we agree that Section 629 has not met its stated goals since it was adopted in 1996. We therefore support the release yesterday of *Public Notice #27* seeking comment on how the Commission can facilitate further innovation in the market for video devices and we are particularly encouraged by the Commission's intent to look at solutions that will work across all video providers.¹ We urge the Commission to use this opportunity to initiate a broader Notice of Inquiry to examine whether and how we can achieve a robust retail marketplace for consumer video devices.

As an initial matter, we agree that a fully-competitive retail navigation device market has not yet developed – despite the persistent efforts of the Commission, the cable industry, and consumer electronics manufacturers and retailers. Perhaps more important, even if a retail market had developed, it would have been based on a video landscape that no longer resembles the highly-competitive marketplace of today – a world in which four of the ten largest

¹ See Public Notice, *Comment Sought on Video Device Innovation*, NBP Public Notice #27, DA 09-2519 (rel. Dec. 3, 2009) (“*Public Notice #27*”).

multichannel video programming distributors are Direct Broadcast Satellite providers and telephone companies who collectively serve more than 37 million customers. And, despite the fact that the Section 629 mandate applies to all multichannel video programming distributors (“MVPDs”), the burdens imposed by the FCC’s rules implementing Section 629 are currently not being imposed on DBS providers, AT&T, and other telco video providers. In this regard, NCTA has previously raised the possibility of an “all-MVPD” plug-and-play solution – that is, a solution that uses a standard network interface that is platform agnostic, allowing retail devices to work across diverse MVPD networks – and we are pleased to see that *Public Notice #27* reflects the views that such an approach can best serve consumers.²

Nevertheless, the cable industry has invested tremendous time and resources over the past decade to support the development of a retail marketplace. That includes a longstanding industry commitment to develop, deploy, and support CableCARD separate security solutions – from nationwide support for CableCARDs, to the national deployment of mutually-agreeable interactive Java-based solutions, to the deployment of interactive retail digital television sets based on that platform. In a little over two years, the cable industry has deployed over 17 million set-top boxes equipped with CableCARDs, supplied by a growing number of consumer electronics (“CE”) manufacturers, including Pace, Motorola, Cisco, Evolution Broadband, Samsung, Panasonic, and TiVo.

Notwithstanding these efforts and the substantial progress to date, it is worth exploring why the hoped-for retail market has not developed.³ It may be that consumers simply prefer the

² See *Public Notice #27* at 3. In the summer of 2007 and thereafter, the cable industry asked the Commission to encourage an all-provider solution, and actively sought support for the concept from AT&T, Verizon, and the DBS providers during the summer and fall of 2007, including numerous high-level contacts among the parties. See, e.g., Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed June 13, 2007); Letter from Kyle McSlarrow, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed August 12, 2008). Unfortunately, AT&T, Verizon, and the DBS providers all declined the cable industry’s invitation, and the cable industry proceeded with its plan to negotiate and conclude the tru2way Memorandum of Understanding (“MOU”) with major CE and IT companies. When NCTA announced the tru2way MOU in June 2008, we specifically renewed the cable industry’s invitation to collaborate on a voluntary all-MVPD solution. See Remarks by Kyle McSlarrow, National Press Club, Washington, D.C., June 9, 2008, at 4, available at <http://www.ncta.com/ReleaseType/MediaRelease/McSlarrow-Remarks-at-National-Press-Club.aspx>. Since then, Verizon, TiVo, the Consumer Electronics Association, and a number of public interest groups have endorsed an all-MVPD approach to retail availability. Verizon’s *ex parte* submission in CS Docket 97-80 (filed July 31, 2008) suggested an all-MVPD solution. CEA invited an all-MVPD solution in its Opposition in CSR-8200-Z, CS Docket 97-80, at 8 (filed Sept. 24, 2009), as did TiVo in Comments of TiVo, MB Docket 07-269 (filed July 29, 2009), and Public Knowledge, Consumer Federation of America, Consumers Union, EDUCAUSE, Electronic Frontier Foundation, Free Press, Media Access Project, New America Foundation, and U.S. Public Interest Research Group in joint comments requesting rules to “move forward to an all-MVPD solution” filed in CS Docket 97-80 on August 24, 2007.

³ Arguments that a retail market would develop if the Commission applied a *Carterfone*-like regime to cable do not withstand scrutiny. Indeed, the Commission has rejected the telephone analogy as inapt for cable, for good reasons. See *Commercial Availability of Navigation Devices*, First Report & Order, 13 FCC Rcd 14775, 14788 (1998) (“the telephone networks do not provide a proper analogy to the issues in this proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks”). First, the telephone network was originally built to a common standard nationwide by a single homogenous entity, AT&T. The Commission’s Part 68 rules applied to devices connected to a highly stable interface: a telephone loop with electrical characteristics that had remained essentially uniform and unchanged for a century, and used only for a well-defined “plain old telephone service” that needed no content protection. By contrast, cable technology,

option of leasing devices that are available at government regulated “cost-plus” rates (or whose rates are otherwise kept low in markets where effective competition exists) and which can be upgraded when the next model is released rather than purchasing a device at retail and assuming the risk of obsolescence.⁴ Leasing also makes it easier for customers to switch from cable to satellite to telco video services and back again, especially since today’s retail CableCARD devices are not supported by the DBS providers or many telephone-company MVPDs. It may be that the CableCARD, while well supported, is becoming outdated: AT&T’s U-verse and other IPTV services use DRM-based security methods.

It also bears emphasis that the lack of a vibrant retail market for video devices has not inhibited the growth of competition in the video marketplace or the resulting consumer benefits. Since the enactment of Section 629 over a decade ago, there has been a surge of video competition to cable operators by both DBS providers and other facilities-based providers; a dramatic expansion in the number of programming channels available to consumers; and the emergence of a wide variety of non-facilities-based Internet video providers.⁵ It is also worth noting that a market is developing for boxes that deliver web-based video such as devices from TiVo, Roku, Blu-Ray, and other providers. Meanwhile, even though Section 629 applies on its face to all MVPDs,⁶ DBS providers, AT&T, and other facilities-based competitors that have captured a large share of the market do not support CableCARD-enabled Series 3 TiVos, other CableCARD devices, or other similar retail alternatives.⁷

facilities, and services are widely varied and evolving rapidly, delivering multiple new broadband, two-way, digital services. Second, the Part 68 rules never imposed government constraints on the design of telephone networks and services. It merely required disclosure of the interface characteristics established unilaterally by the Bell System. The cable industry has already provided a consensus-driven tru2way interface for retail navigation devices. Third, the cable business is also quite different from the telephone business in the pre-*Carterfone* days. The Bell System sought to prevent competition from Carterfone to its wholly-owned Western Electric equipment division. By contrast, cable operators do not own any of its set-top box vendors. As noted above, a variety of vendors provide cable operators set-top boxes which are leased to consumers at regulated rates that essentially allow only the recovery of costs.

⁴ Consumer preference for equipment leasing is not unique to the cable industry. DBS providers have largely migrated from a sale to a lease model for their equipment, without any apparent impact on their ability to attract new customers. Likewise, most high-speed Internet customers elect to lease modems despite the widespread retail availability of modems.

⁵ See generally *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009); see also *Comcast Corp. v. FCC*, No. 08-1114, slip op. at 14 (D.C. Cir. Aug. 28, 2009) (“[T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992.”).

⁶ See *Commercial Availability of Navigation Devices*, Report & Order, 13 FCC Rcd. 14775, 14783 ¶ 22 (1998) (“We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems. Our reading of the law is that consumer choice in navigation devices for all multichannel video programming systems was mandated by Congress when it enacted Section 629.”).

⁷ See, e.g., National Cable & Telecommunications Association, Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7056 (filed Aug. 16, 2006) at 24-33.

These are complex issues worthy of thoughtful exploration. Therefore, a Notice of Inquiry working to develop fresh approaches – especially approaches that cross multiple industry lines – should be pursued in concert with Commission policies that promote competition, innovation, and other pro-consumer benefits. The cable industry is undergoing its own digital transition – reclaiming analog bandwidth in order to provide consumers with more high-definition and niche programming, faster (DOCSIS 3.0) broadband, and other services. Cable competitors such as the DBS providers and telephone companies are all-digital; in order to compete, cable must become all-digital as well.

The Commission should take steps to make cable’s digital transition as seamless as possible for consumers which in some instances will require – as the over-the-air DTV transition did – the widespread availability of low-cost digital-to-analog converter boxes (DTAs) with integrated security and other operator-supplied devices for which waivers may be required. It is therefore critical that, while the Commission develops and considers the record in a new Notice of Inquiry, it continue to evaluate requests for waiver of the current navigation device requirements, such as the requirements to include a CableCARD slot on each operator-supplied set-top box,⁸ to generally limit waivers to boxes without HD capability, or to include a costly but largely unused 1394 connector on operator-supplied HD boxes.

These waiver requests do not undermine Section 629: they are an integral part of the statute, were expressly contemplated by Congress in the statute and by the Commission in its navigation devices rulemaking, and would be compelled by the courts had the Commission not already wisely incorporated them into the fabric of its regulation.⁹ And the consumer benefits that result from cable’s digital migration should not be put on hold while the Commission considers possible ways to jumpstart the video devices marketplace. It will take time to explore whether and how a retail market for video devices should develop, adopt any necessary technical and regulatory requirements, and bring products to market. But the cable industry’s need to compete and reclaim its analog bandwidth is immediate. The Commission should continue to encourage, not hinder, cable’s consumer-friendly transition to all-digital service. There may be reasons that a robust retail marketplace has not developed, but granting waivers for inexpensive,

⁸ The Commission has approved several DTA waivers thus far and consumers have been the beneficiaries since the price tag for simple, one-way DTAs would be dramatically increased – and cable’s digital transition dramatically slowed – if operators were required to include a CableCARD slot on each DTA to meet the Commission’s separate security mandate. See *Evolution Broadband, LLC’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Memorandum Opinion & Order, 24 FCC Rcd. 7890 ¶¶ 11-12 (2009), citing *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, Second Report & Order, 20 FCC Rcd 6794 ¶ 37 (2005).

⁹ See 47 U.S.C. §549(c) (requiring the Commission to waive a Section 629 regulation upon certain showings); *Commercial Availability of Navigation Devices*, Report & Order, 13 FCC Rcd. 14775 ¶ 22 (1998) (in explaining its decision to apply Section 629 rules to all MVPDs, noting that “we believe the waiver process can sufficiently address the concerns of developing MVPDs”); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the “logic of applying [the rule] collapses,” and it was arbitrary to apply the rule); *WAIT Radio*, 418 F.2d at 1157 (“agency[] discretion to proceed in difficult areas through general rules is intimately linked to the ... safety valve procedure for consideration of an application for exemption based on special circumstances”).

one-way DTAs to permit consumers to continue to watch television on their existing sets, or similar waivers with clear public interest benefits, is not one of them.

We therefore encourage the Commission, as it gathers data and comment in response to *Public Notice #27*, to take the next step and launch a Notice of Inquiry into fresh approaches to facilitate the commercial availability of video devices in the retail marketplace, while continuing to accommodate today's MVPD operations and innovation through appropriate waivers.

Sincerely,

/s/ Kyle McSlarrow

Kyle McSlarrow

cc: Marlene Dortch (via ECFS)