

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Section 304 of the Telecommunications Act of 1996)))	CS Docket No. 97-80
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act))))	GN Docket No. 09-47
A National Broadband Plan for Our Future))	GN Docket No. 09-51
Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act)))))))	GN Docket No. 09-137

Comments of the
Consumer Electronics Retailers Coalition
On NBP Public Notice # 27

December 21, 2009

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The Consumer Electronics Retailers Coalition welcomes the Commission’s initiative in this Public Notice and looks forward to further Commission action to make competition in the market for audiovisual navigation devices as vigorous as it has been in the marketplace for Internet-connected devices. CERC and its members¹ played leading roles in asking the Congress to enact Section 629 of the Communications Act in 1996,² and in raising the “competitive availability” issue in earlier Congresses. CERC and its members were also aggressive in urging the Commission, as the law requires, to “assure”

¹ CERC’s corporate members include Amazon, Best Buy, K-Mart, RadioShack, Sears, Target, and Wal-Mart. CERC’s association members are the National Retail Federation and the Retail Industry Leaders Association.

² 47 U.S.C. § 549. Section 629 of the Communications Act of 1934 was adopted as Section 304 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56.

in its regulations the commercial retail availability of such consumer products, and in urging the Commission to be vigilant in interpreting and enforcing its own regulations.³

In 1996, convergence at the TV screen was only a vision. Today it should be reality. We have moved from a “500 channel universe” to a self-programmed universe of multi-media content. The TV is more than a box to receive whatever MVPDs choose to provide. Indeed, the TV is not even a box any more. It is a video and image display and audio enjoyment device and *can* be a platform for content from multiple sources, including gaming, digital photography, music, on-line searches, over the air broadcasts, and multiple MVPDs. High quality video over the internet is no longer hypothetical. Some video sources on-line have no comparable MVPD source. Open devices could allow consumers conveniently to mix and match content sources. Video is on the brink of becoming the final application that will drive widespread broadband adoption and availability.⁴

As the Commission notes, the disappointing process since the passage of Section 629 is the opposite of what has occurred for devices that connect to the Internet. It is also the opposite of what the lead sponsors of Section 629 intended. CERC urges the Commission to make the achievement of an open market in MVPD devices a priority, and to conduct a Notice of Proposed Rulemaking to achieve this goal. To achieve this goal expeditiously, CERC urges the Commission to give priority to two objectives:

³ See, e.g., *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report (Aug. 2, 2000); *id.*, Comments of the Consumer Electronics Retailers Coalition on Further Notice of Proposed Rulemaking (Nov. 15, 2000) (“CERC Year 2000 Review comments”).

⁴ The availability of competitive devices that empower the consumer to enjoy, store, shift, combine and use content from multiple sources also advances a vision of a greener future. Set-top boxes locked and controlled by cable providers prevent innovators from creating flexible devices to serve multiple needs.

- (1) The Commission needs to exercise vigorous oversight and enforcement of cable operators' obligations to provide and support CableCARDs, so that any subscriber can easily, quickly, and routinely receive and install a CableCARD at any time.
- (2) The Commission should conduct a rulemaking aimed at requiring all MVPDs to make readily available to each subscriber a home gateway server, as described by FCC staff in the Commission's December 16 Open Meeting. The sole function of the gateway should be to support the interactive operation of competitive devices on the MVPD's network, just as home devices are now supported on the Internet by modems and routers.

A. What technological and market-based limitations keep retail video devices from accessing all forms of video content that consumers want to watch?

On March 21, 1995, in introducing with Rep. Markey the bill that ultimately became Section 629, Chairman Bliley made clear the sponsors' intention that the retail and leased markets be on a level playing field. The lead sponsors also clearly anticipated the linkage that the Commission has now, in this Public Notice 14 years later, recognized – that a “National Information Infrastructure” must include MVPD services and devices, as well as the Internet:

Mr. BLILEY. Mr. Speaker, I am pleased to introduce the Competitive Consumer Electronics Availability Act of 1995. *** Pursuant to this legislation, Commission regulations *will assure* that converter boxes, interactive communications devices, and other customer premises equipment be available on a competitive basis from manufacturers, retailers, and other vendors who are not affiliated with the operators of telecommunications systems, as is the case in our telephone system today.

It is fashionable to talk about telecommunications reform in terms of opening interfaces between networks or modes of communication. But the one area that ought to be a priority is the consumer interface-how our constituents will actually be connected to these new networks. So far we have two models-the telephone system, where there is a free and competitive market in making and selling network access devices to consumers; and cable television, where the consumer has enjoyed little choice or selection in devices. The Competitive Consumer Electronics Availability Act seeks to ensure that we follow the competitive market model rather than the monopoly model. *** *A consumer should be able to choose one the same way he or she chooses other products, by going to*

*the store, comparing the quality, features, and price, and buying or renting the best one.*⁵

When, the next year, the Telecommunications Act was passed by the Congress, the Bliley-Markey bill was included as Section 629 of the Communications Act. The Conference Report affirmed the sponsors' purpose:

The Conferees intend that the Commission avoid taking actions which could have the effect of freezing or chilling the development of new technologies and services. One purpose of this section is to help ensure that *Consumers are not forced to purchase or lease a specific, proprietary converter box or other equipment from the cable system or network operator.*⁶

As all in the public and private sectors now seem to acknowledge,⁷ the Commission has not succeeded in using the tools and direction provided in Section 629. It has allowed the objectives of this legislation to be frustrated in the following areas:

- (1) **Standards.** The objective set forth in Section 629's opening lines – that commercial availability be assured through standards-based interfaces – has not been achieved.
- (2) **Support.** Where standard interfaces have been achieved, they have not been adequately supported. CableCARD-reliant devices have been supported by cable MSOs poorly or not at all. The cable industry also has withdrawn support for “Plug & Play” devices by moving to “switched digital” techniques that prevent subscribers from accessing channels for which they pay.
- (3) **Subsidy and bundling.** Section 629 contains explicit language instructing the Commission to prevent the subsidizing of leased set-top boxes with service revenue, and requiring lease charges to be separately stated. CERC proposed eight years ago that so long as the Commission tolerates device subsidies they should be shared in equally by consumers who choose competitive devices. The NCTA opposed this, and no action was ever taken.

⁵ 141 Cong. Rec. E635-01 (daily ed. Mar. 21, 1995) (statement of Rep. Bliley) (emphasis supplied), 1995 WL 118602.

⁶ 42 H.R. Rep. No. 104-458 at 181 (emphasis supplied).

⁷ *In the Matter of Video Device Innovation, NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, CS Dkt. No. 97-80, letter from Kyle McSlarrow, NCTA to Carlos Kirjner, Sr. Advisor to the Chairman on Broadband, FCC, and William Lake, Chief, Media Bureau, FCC Re: GN Docket Nos. 09-47, 09-51, 08-137; CS Dkt. No. 97-80 (Comments – NBP Public Notice # 27) (Dec. 4, 2009) (“McSlarrow letter”).

Standards

When Congress passed Section 629, retailers were hoping that the transition from analog to digital services would allow them to enter the market for customer premises MVPD devices. But retail entry into the market for cable navigation devices was frustrated, even as MVPDs transitioned to digital technologies capable of resolving security and interoperability issues present in the analog environment. To the contrary, MVPDs have continued to leverage their control over video services capabilities in order to capture the market for new digital devices.

For example, DVR products became tied into MVPD proprietary systems, under licensing, technical, and subsidy circumstances that in combination choked off outside competition. Thus, the freely competitive market for analog VHS video cassette recorders (VCRs) was succeeded by a market dominated by leased, proprietary “DVRs.”

Similarly, major consumer electronics manufacturers lost ground to the two major incumbent suppliers of MVPD customer premises equipment. Competitive manufacturers have not been able to offer consumers the advantages that competition has brought to other markets because they have not been offered licenses that enable them to compete by means of a cross-platform device. The one area in which competitive entrants initially were licensed to make competitive products – DBS receivers and recorders – became closed and proprietary instead. As a result, the consumer choice, price competition and innovation that was experienced in the VCR market has not been achieved in the market for DVRs and similar MVPD customer premises equipment.

The advent of digital techniques has eliminated “security” as an excuse for failing to choose standards that support competitive devices. The Internet is an example of

secure support for devices as well as for transactions that (*e.g.*, with banks and securities firms) are much more financially consequential than the secure payment of MVPD program and service obligations.

To the extent MVPD technology does not support competition, this has been a matter of operator choice, not technology. For example, CERC and its members posed some of the earliest challenges to the licensing impositions of the cable industry's technical consortium, CableLabs, as contrary to the requirements of 47 C.F.R. §§ 1201-1203 and 1205, which limit MVPD licensing and subscriber impositions to those necessary to protect the network from harm and theft of service. Some of CERC members' objections to the initial "PHILA" license were addressed in the 2003 "DFAST" license that was a part of the "Plug And Play" package submitted to and approved by the Commission. However, the DFAST license does not allow devices to communicate "upstream" with the cable headend. The CableLabs licenses (the "CHILA" and "O-ILA" license suite) that allow such communication do *not* allow the licensed device to receive guide data, or to display programming and services from other sources on the same user interface on which cable programming and services are found.

Support

Even where one MVPD, the cable industry, has committed to supporting some level of operation of competitive devices, the results in terms of resource commitment and priority have been disappointing.

CableCARDS. CERC has been among those who have documented the persistent, inadequate supply, support, and installation of CableCARDS since

CableCARDS first became available.⁸ It should shock and rouse the Commission that fully eight years after MSOs were first obliged to provide CableCARDS, the installation and support by cable operators of CableCARD-reliant competitive devices has in no sense become efficient or routine.⁹

That newly fielded leased set-top boxes have also relied on CableCARDS since July 1, 2007 has been an important step forward but not a cure-all. Cable MSOs do provide CableCARDS in their new leased set-tops, but they are essentially bolted into the set-top box and neither evident to nor accessible by consumers. The consumer needing a CableCARD to support a competitive DVR must, unlike his neighbor, make a separate call requesting one, often from a service representative who is not well briefed or who will immediately propose an alternative.

Switched Digital. Another area in which promises to consumers have not been kept is in the availability to “Plug and Play” subscribers of the programming for which they pay. Some cable operators now provide certain channels only when they have been locally requested by a subscriber with upstream communications ability (*i.e.*, one with a leased set-top box). All CableCARDS, and all products made under the DFAST “Plug

⁸ The FCC noted this failure in *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report and Order ¶ 4 (Mar. 17, 2005) (“2005 Deferral Order”). The D.C. Circuit noted this failure in finding FCC’s denial insistence on common reliance to be justified in *Charter Communications v. FCC*, 440 F.3d 31, 40 – 44, n.10 (D.C. Cir. 2006). See also private sector comments, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Comments of the CEA on NCTA Downloadable Security Report (Jan. 20, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Notice of Ex Parte Presentation (Mar. 23, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Robert S. Schwartz, Constantine Cannon LLP, Counsel to CEA to Marlene H. Dortch, Sec., FCC Re: Notice of Ex Parte Presentation (Mar. 24, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Ex Parte Presentation (Aug. 7, 2006).

⁹ http://news.cnet.com/8301-13506_3-10357724-17.html.

and Play” license, have inherent upstream communications ability. Cable operators and CableLabs, however, for purely business purposes, have chosen not to license these products for upstream communication. CableLabs has maintained this policy *even though* its member owners have begun moving channels to “switched digital,” thus making them unavailable to “Plug and Play” devices.

Subsidies

Section 629(a) provides (emphasis added):

... Such regulations shall not prohibit any multichannel video programming distributor from also offering 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, to consumers, if the system operator’s charges to consumers for such devices and equipment are separately stated ***and not subsidized by charges for any such service.***

Unfortunately for competitive entry, the Commission has subordinated Section 629 to 47 U.S.C. § 543(a)(7)(A), which was passed as part of the same legislation.¹⁰ If the FCC is to achieve the same incentives for competitive entry that exist for Internet devices, it must allow a comparably free market by eliminating discrimination against retail purchasers of navigation devices.

CERC has long urged that a cable company be prohibited from subsidizing the cost of digital set top boxes with service revenues unless that company faces effective competition in *both* the service and equipment markets.¹¹ While there may be some support for the notion that the current effective competition test may be appropriate with

¹⁰ Section 543(a)(7)(A) provides that, “The Commission shall allow cable operators . . . to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category.” Yet, When Congress granted the cable industry additional latitude in the use of equipment averaging in 1996, it indicated that equipment averaging is just one way of accomplishing the deployment of digital technology. H.R. Rep. No. 104-204 at 108 (1995).

¹¹ CERC Year 2000 Review comments at 32-36.

respect to service price regulation (though many have challenged that), the test was never designed to measure competition in the market for MVPD-compatible equipment and there is no evidence to support that the presence of satellite or telco competition leads to equipment competition. The Commission's decision to nonetheless apply the prohibition only to cable franchises not facing effective competition in the *service market* has been a substantial barrier to investment in competitive entry, and needs to be reconsidered. Otherwise, cable operators will continue to be able to react to new devices and innovations by withholding licenses to deny compatible use with MVPD services (as they have with DVRs), and using unregulated service revenues to subsidize the integration of such functionality into MVPD-controlled digital set-top boxes instead.

CERC believes that the FCC, in reviewing its regulations pertaining to Section 629, should address those that pertain to the ability of MVPDs to set arbitrary lease rates for devices and otherwise impede a level commercial playing field for devices sold at retail. CERC reiterates, as it did at the beginning of this decade, that retailers are *not* seeking to share in any such subsidies or MSO revenues.¹² Rather, as is the case in the Internet modem and router markets, *subscribers* who choose to purchase rather than to lease navigation devices should not be discriminated against. No such discrimination occurs with respect to Internet-enabling devices.

¹² In 2001, CERC and its members proposed that the Commission amend the provisions on equipment averaging to ensure that the subsidies created are equitably available to all cable subscribers, regardless of whether they lease a box from the cable company or obtain a product with navigation features at retail. *See, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Leonard H. Roberts, Chairman and CEO of RadioShack and W. Alan McCollough, President and CEO of Circuit City, et al. to Chairman Powell, FCC Re: Commercial Availability of Navigation Devices (Apr. 16, 2001); *id.*, Consumer Electronics Retailers Coalition Reply to the NCTA Letter as to "Retail Set-Top Initiative" and the NCTA Response to CERC Status Report "J2K Plus 1" (Nov. 6, 2001).

B. Would a retail market for network agnostic video devices spur broadband use and adoption and achieve Section 629's goal of a competitive navigation device market for all MVPD's?

CERC endorses the FCC's contemplation of a network interface gateway server as an expeditious means of leveling the playing field by providing for an entire household's connection to an MVPD network via a standardized, bidirectional, home network interface. In its December 16, 2009 update on the National Broadband Plan, the Commission identified this objective as one of two options¹³ for spurring set-top box innovation to drive broadband adoption and utilization:

- Requiring video services providers to supply a small, low-cost, network-interface device whose only function is to bridge proprietary network elements with retail navigation devices

The consumer and retail experience with the current interface for connection to the Internet has been extremely positive. By fielding interface devices *whose only function* is to provide a means of connecting multiple devices of the consumer's choosing, ISPs have both encouraged and enabled a highly competitive market for devices, as well as for services. This market for Internet-enabled devices survived the transition from dial-up to DSL and cable modems, and has thrived as the amount of bandwidth available to these devices has increased. Allowing the much greater bandwidth of the MVPD world to be accessible to competitive devices ought to provide a similar *quantum leap* in both broadband availability and device competition.

Broadband interface devices support extremely competitive markets for PCs, printers, cameras, and other devices that operate through home broadband connections *as*

¹³ CERC also vigorously supports the other option – making CableCARD support routine and effective – and discusses it further below.

if they had “direct” access to the Internet. By contrast, retailer experience has been less positive where the MVPD device and the retail device are in direct competition, and the MVPD has an incentive to favor the use of its own device. This incentive will be minimized if the MVPD, in addition to whatever other devices it offers, must provide a home server that does not compete with the devices it is supposed to support.

C. Can the home broadband service model be adapted to allow video networks to connect and interact with home video network devices such as televisions, DVRs, and Home Theater PCs via a multimedia home networking standard?

Based on retailers’ experience with selling products that are used on the Internet through standard and secure interfaces, CERC believes that the home broadband service model can and should be adopted as a model for the interconnection of home audiovisual devices to MVPD services. These audiovisual devices are already being connected to the Internet – a limited bandwidth medium for which they were not originally designed. Facilitating their connection, through home servers, to MVPD programming networks – the higher bandwidth media for which they *were* designed – seems a goal that is both obvious and worthy.

The routine connection of TVs and audiovisual recorders to the Internet as well as to MVPD programming will lead to progress in connection and competition that is mutually reinforcing. As consumers become aware that broadband connectivity is an avenue to receiving entertainment content that can be displayed in their living rooms, they will seek to be connected. As they become aware that they can display and record *both* MVPD content and Internet content in the same central viewing locations, they will seek competitive devices that provide this flexibility. This win-win solution can best be

achieved if home devices communicate with both MVPD gateways and Internet modems through Internet protocols.

D. What obstacles stand in the way of video convergence?

At the December 16 Open Meeting the Commission staff properly identified CableCARD support and MVPD furnishing of standards-based, sole-purpose gateway devices as priority goals to overcome obstacles to convergence.

CableCARD support. CableCARD ordering, installation and operation, 11 years after the 1998 NPRM, should be routine and predictable. There is no design or technology issue to be overcome – only execution. CableCARD installation can and should be so *routine* that CableCARDS can be mailed to consumers by MSOs or provided to consumers at retail, and self-installed by a consumer simply reading numbers from a screen and providing those numbers to their MSO (or other MVPD) in a single telephone call. This is how CableCARDS were designed to work; the truck-roll implementation was supposed to be for a transitional period only. To the extent MVPDs actually *support* CableCARD use, they will recognize that it is in their interest to save on the “truck roll” expense still involved in CableCARD installation.

Making CableCARDS routine will build sufficient consumer confidence that retailers can with confidence market MVPD access as a *feature* rather than be concerned that consumers will view it as a deadweight expense. In order for competitive entrant devices to achieve the same level of routine operation on MVPD networks as they do on Internet networks, both the industry attitude and the priority given to FCC oversight must change.

Sole purpose MVPD gateways. The absence of a gateway server for each MVPD service that would, like an Internet modem, serve *only* to support other home devices has been a prime impediment to Internet-style competition. Absent such a gateway, there is no viable and proximate means for the development and distribution of competing CE devices designed to function with MVPD services. Standards-based servers for both MVPD and Internet content will spur broadband adoption, development of MVPD-capable devices, and convergence of the media associated with each. The Commission should issue a Notice of Proposed Rulemaking to achieve this result.

Conclusion

As an original proponent of Section 629, CERC believes that this law’s objectives can and should be accomplished in full by the Commission. Entire product categories, such as home DVRs, can and should be re-opened to full competition and innovation. The steps identified by the FCC staff in the December 16th National Broadband Policy presentation are achievable based on “off the shelf” technologies. Once achieved they will be of vast benefit to consumers.

Respectfully submitted,

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