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February 22, 2010

Ex Parte via Electronic Filing

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: NBP Public Notice #27, GN Docket No. 09-47, GN Docket
No. 09-51, GN Docket No. 09-137, CS Docket No. 97-80

Dear Ms: Dortch:

Google Inc. (Google) submits this letter in connection with the FCC's National Broadband Plan (NBP) Public Notice No. 27, and the related above-referenced proceedings focused on fostering greater innovation for video devices. As Google explained in its previous comments,¹ consumers should be able to acquire competitive and innovative video navigation devices that allow them to easily control and manage their video viewing experiences according to their personal preferences. Making available network-agnostic, portable video devices that permit people to enjoy their choice of video content, regardless of its source, will help drive broadband adoption, facilitate investment in innovative offerings, promote media diversity, reduce retail prices, and improve the consumer experience overall.² To help create this reality, the time is ripe for the FCC to institute a Notice of Proposed Rulemaking (NPRM) to consider adopting rules to implement this overarching goal.

There is no serious dispute that Congress' vision in the Communications Act³ of competitive and innovative retail video navigation devices has not emerged. Today, the amount and type of video content available to consumers is rapidly expanding, and

¹ See Comments of Google, NBP Public Notice #27, GN Docket No. 09-51 (rel. Dec. 22, 2009).

² As Sony puts it, "A user experience that integrates Internet-delivered video content with MVPD-delivered video content would increase the value of and demand for not just broadband Internet access, but also for the MVPD services, video content and end-user devices that together comprise the video service ecosystem." Comments of Sony Electronics Inc., GN Docket No. 09-51, at 3 (filed Dec. 22, 2009).

³ See 47 U.S.C. §§ 544(a), 549.

includes traditional MVPD programming on non-traditional devices (whether a PC, wireless handset or other device) and non-traditional video fare on television sets. Nonetheless, consumers often find themselves thwarted in their ability to view what they want on the device of their choice. As TiVo and others have noted, consumers are likely to encounter numerous obstacles that collectively interfere with their ability to use their devices across networks to watch and control their choice of programming.⁴ The FCC has identified these failures as a critical “gap” impeding the attainment of our national broadband goals.⁵ In a world where “content is king,” it is time to ensure that consumers are given maximum control of their video viewing experiences and the flexibility to switch easily among different distributors of video content.

There have been numerous calls asking the FCC to propose and adopt rules through an NPRM to attain this goal; these include video gateway proposals from Public Knowledge, the Consumer Electronics Association, and TiVo, and other proposals to meet statutory goals and create a user-driven video experience.⁶ In our view, a network gateway model appears to resolve some of the most significant challenges because it accounts for the technological variety in MVPD networks. We recognize that certain issues have been identified that warrant considered review, and we agree that how these matters are resolved will dictate the parameters of final FCC rules. That said, there is no salient reason that the FCC should wait to proceed. Broad industry inquiries allow the FCC to obtain a range of views on far-reaching issues and can serve an important role to gain a clearer picture on whether any agency role is desirable. Here, however, there is no debate that the FCC’s statutory mandate has not been fulfilled. There is no vibrant, viable market for retail devices, and consumers are unable to utilize advanced interfaces to select video content from a variety of sources. On these facts, even NCTA agrees, explaining to the FCC that Section 629 has not met its stated goals and a fully-competitive retail navigation market has not developed.⁷ For this reason, a Notice of Inquiry (NOI) would only frustrate Congressional intent and create unnecessary delays. Instead, in connection with unveiling the National Broadband Plan next month, the FCC

⁴ See Comments of TiVo Inc. at 16-19 (filed Dec. 22, 2009); Ex Parte Comments of TiVo Inc., GN Docket No. 09-51, at 4 (filed Feb. 17, 2010). See also, Reply Comments of Sage TV, GN Docket No. 09-51, at 5 (filed Feb. 16, 2010).

⁵ See, e.g., FCC News Release, “FCC Identifies Critical Gaps in Path to Future Universal Broadband,” Nov. 18, 2009.

⁶ See, e.g., Petition for Rulemaking of Public Knowledge, et al. at 4-5, CS Dkt. 97-80, GN Dkts. 09-41, 09-51, 09-137 (filed Dec. 18, 2009). See also Comments of Consumer Electronics Association, GN Docket No. 09-51, Dec. 22, 2009 at 3; Comments of TiVo, Inc., GN Docket No. 09-51, Dec. 22, 2009 at 16-19; Comments of 1394 Trade Association, GN Docket No. 09-5, Dec. 22, 2009 at 2; Comments of Consumer Electronics Retailers Coalition, GN Docket No. 09-51, Dec. 22, 2009 at 3; Comments of Sony Electronics Inc., GN Docket No. 09-51, Dec. 22, 2009 at 6.

⁷ See Letter from Kyle McSillarow, President and CEO, National Cable and Telecommunications Association, to Carlos Kirjner, Senior Advisor to the Chairman on Broadband and William Lake, Chief, Media Bureau, FCC, CS Dkt. 97-80, GN Dkts. 09-47, 09-51, 09-137 (Dec. 4, 2009).

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should institute an NPRM. Such a notice should include a proposed rule generally requiring that all content offered via an MVPD be made available through competitive navigation devices able to offer consumers innovative and advanced features.

Without question, there will be details regarding technical aspects and implementation that require additional input from a range of parties, including MVPDs, manufacturers, consumer groups, users, video content companies and others. To enact rules, however, all of the details need not be determined prior to the issuance of the NPRM.⁸ Rather, that is precisely the function of a rulemaking – to allow all interested stakeholders to share their views publicly, and allow the agency to examine specific claims and data and revise its proposed rules based upon the evidence in the record.⁹ As Verizon has urged, the FCC should seek network agnostic solutions that use “relevant technical standards that are open, fair and accommodate the concerns of all stakeholders, including consumers.”¹⁰ Far from creating a “new technological mandate,” the NPRM would implement the FCC’s current (and unfulfilled) statutory mandate through a public, collaborative process.¹¹ If nothing else, the Commission clearly should signal that this rulemaking consideration process must have a definitive endpoint -- such as March 17, 2011 -- when any final rules would be adopted and in place.

Video convergence offers the potential for unprecedented benefits, including increased broadband usage and demand and increased innovation and investment. The FCC should implement the vision of a competitive video device market by taking the next important step in the rulemaking process.

Respectfully submitted,



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⁸ 5 U.S.C. § 553(b) & (c).

⁹ See *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-1080 (D.C. Cir. 2009) (an agency's final rule need only be a ‘logical outgrowth’ of its notice). See also, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006); *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (same).

¹⁰ Comments of Verizon at 2 (filed Dec. 22, 2009).

¹¹ See Letter of Leora Hochstein, Executive Director, Federal Regulatory Affairs, Verizon, at 2, FCC GN Dkts. 09-47, 09-51, 09-137, CS Dkt. 97-80 (Feb. 18, 2010).