

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Video Device Competition)	MB Docket No. 10-91
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	PP Docket No. 00-67

**Comments Of The
Consumer Electronics Association And
The Consumer Electronics Retailers Coalition On
Notice Of Inquiry**

July 13, 2010

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The Consumer Electronics Association (“CEA”) and the Consumer Electronics Retailers Coalition (“CERC”) submit these Comments jointly in support of the Commission’s Notice Of Inquiry in furtherance of the Commission’s National Broadband Plan and its direction by the Congress, in Section 629 of the Communications Act, to assure the commercial availability of competitive devices for MVPD systems. CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s approximately 2,000 member companies include the world’s leading manufacturers of both broadband and home audiovisual products. CERC is a public policy organization that includes major specialist and general retailers of consumer electronics products. CERC’s corporate members include Amazon, Best Buy,

K-Mart, RadioShack, Sears, Target, and Walmart. CERC's association members are the National Retail Federation and the Retail Industry Leaders Association.

CEA and CERC in their NBP No. 27 Comments¹ each encouraged the Commission to move forward expeditiously with a rulemaking on MVPD-provided "Gateways" to enable a new and much broader category of competitive devices, and to better link the competitive aspects of the broadband and television markets. Subsequently, CEA and CERC jointly supported the Commission's choice to first strengthen and reform the existing CableCARD-reliant market.² CEA and CERC now endorse the Commission's objectives in this NOI, and believe it will provide a basis for sound and expeditious rulemaking.

I. Introduction And Summary

As the Commission observed in its NBP No. 27 Notice and concluded in its National Broadband Plan, IP-enabled home networks provide the best current example of support for a free and open market for devices, in which the necessary parameters for market entry are well known, and the technology that enables participation is freely

¹ *In the Matter of A National Broadband Plan for Our Future, et al.*, GN Docket Nos. 09-47, 09-51, 09-137, and CS Docket No. 97-80, Comments of the Consumer Electronics Association on NBP Public Notice # 27 at 2-3, 8-9, 20-23 (Dec. 21, 2009) ("CEA NBP PN #27 Comments"); Comments of the Consumer Electronics Retailers Coalition at 3, 13 (Dec. 21, 2009) ("CERC NBP PN #27 Comments"). CEA and CERC request that their NBP PN # 27 Comments be included by reference in the instant proceeding and dockets.

² *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition on the Fourth Further Notice of Proposed Rulemaking ("FNPRM") (June 14, 2010) ("CEA/CERC Fourth FNPRM June 14 Comments"); CEA/CERC Fourth FNPRM June 28 Reply Comments.

available, without MVPD license obligation or contractual constraint.³ In a prior era, free, over the air radio and television broadcasting were the best models. Their universality, basis in officially acknowledged industry standards, and lack of contractual restriction on device design led to rigorous competition in features and value, and the creation of ancillary markets for products and programming, such as the market for sequential motion picture release opened by the VCR. These free broadcast services, as updated by the transition to digital broadcast television and the FCC's adoption of standards for HD Radio, remain vital. The platform for ensuring universal and interoperable access to these and other services, however, has moved into the world of IP-based, interactive communication, rather than point-to-multipoint broadcasts.

An obstacle to bringing MVPD programming and services into the IP-enabled world has been the legitimate requirement of these services to set safe parameters for system security, and to maintain sufficiently flexible means to offer, transmit, and merchandize features on an interactive basis. The addition of out-of-band IP communications ability to CableCARD-enabled devices adds promising capabilities and consumer choices to such products, and makes it vital that FCC regulations be updated so as to allow consumers to take advantage of these choices.

CERC and CEA were among those who welcomed, supported, and documented the insight in NBP No. 27 that a more universal approach, modeled on the successful IP-enabled support of broadband home networks, would be more equitable in involving all MVPDs (not just cable operators) and potentially providing a true "level playing field"

³ *Comment Sought on Video Device Innovation*, NBP Public Notice # 27, GN Dkt. Nos. 09-47, 09-51, 09-137, CS Dkt. 97-80 at 1-2 (rel. Dec. 3, 2009); National Broadband Plan at 49-51.

for the operation of competitive products on networks. The National Broadband Plan, as approved by the Commission after public comment and transmitted to the Congress, signified the Commission's acceptance of these goals. This NOI should provide a firm basis for a rulemaking to accomplish this vital objective.

In separate NBP No. 27 comments, CERC, CEA, and others⁴ emphasized key points on why and how a "gateway" solution should work:

- Each gateway device should be specific to the service of the MVPD that provides it.
- As in the case of IP broadband modems and servers, the *sole* purpose of the device should be to support the operation of competitive devices on the MVPD's system.
- There should be a standard, IP-enabled interface facing and supporting the home network; thus there should be no MVPD-specific contractual obligations.
- Consumers who receive the MVPD programming and services should have the opportunity, through products supported by the gateway device, to compare and choose among all authorized offerings from the MVPD service and Internet and other services on a single menu generated in the client device.

These objectives were generally endorsed in the National Broadband Plan.⁵ In the NOI, the Commission covers much the same ground, but broadens its description of a potential serving device as possibly including an "AllVid," which could include an "adapter" version designed to support a single home device, or a network "gateway." It

⁴ CEA NBP PN #27 Comments at 16-20; CERC NBP PN #27 Comments at 10-12. Cf. Petition of Public Knowledge et al., In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Dkt. No. 97-80, GN Dkt. Nos. 09-47, 09-51, 09-137, Petition for Rulemaking of Public Knowledge, Free Press, Media Access Project, Consumers Union, CCTV Center for Media & Democracy, Open Technology Initiative of New America Foundation (Dec. 18, 2009).

⁵ National Broadband Plan Chapter 4.2.

also asks much more specific questions. In response to this NOI, CEA and CERC restate their answers as set forth above, and, provide these additional answers:

- Rather than attempt to classify two or more different categories of “AllVid” devices, the FCC should simply follow the successful NTIA/FCC approach to the broadcast digital transition by setting out *minimum, optional, and reserved* functions and capacities for any “gateway,” irrespective of form factor. Products that rely on the home network-side interface of the “gateway,” whether provided by the MVPD or acquired at retail, should be referred to as “client” products.
- Newly acquired MVPD-provided navigation devices should *also* rely on gateway home servers as client products.
- System security, including downloadable security, should remain an MVPD-network side function. Hence an MVPD’s system security should be integrated into that MVPD’s gateway device (*provided* that, as above, all new MVPD navigation devices rely on their own gateway for support of all their client services).
- Private sector standards and certification, as referenced in necessary Commission regulations, will be available and will provide solutions as sought by the Commission.
- The rendering and display of Guides, as well as of all programming, are client-side, rather than MVPD gateway, functions.
- Standards reliance of competitive client devices can and should be independently certified.
- There is a continued role for CableCARD-enabled products, independent of gateway-enabled products.
- The FCC has the authority, indeed the obligation, to adopt the necessary regulations.

II. The Successful Transition To Digital Television Provides A Model For The Transition To Gateway-Enabled MVPD Services.

In the transition to digital techniques, the NTIA was tasked with specifying, with the Commission's advice, a product to enable but not pre-empt or replace the operation of client devices in a new environment. While the objective was more limited in scope than is the Commission's vision for an "AllVid" device, the approach taken by the NTIA⁶ to defining and specifying a necessary, limited-purpose device provides a potential solution to the questions posed by the Commission, as to requirements, physical format, and terminology:

- Specify a *minimum* set of functions for any such device, to be included by the MVPD as specific to its own service and network.
- Define *optional* capacities that an MVPD may choose to include in some or all models, without changing its character or crossing over into functions or features reserved for the "client."
- As in the case of NTIA converters, with the core and optional functions defined, the physical format ("adapter" vs. "gateway") need not be described or specified. Nor should it be necessary to create separate "adapter" and "gateway" nomenclature or functions. They can all be called "gateways" (or all called "adapters").⁷

A. Gateways Should Be MVPD-Specific And Provided By The MVPD.

The comments on NBP No. 27, including those of CEA and CERC, seemed unanimous that each MVPD should be entitled to specify and provide its own gateway.

⁶ 47 C.F.R. § 301.5, Technical App. 1 ("Required Minimum Performance Specifications and Features"), Technical App. 2 ("Permitted and Disqualifying Features").

⁷ CEA and CERC have no objection to the "AllVid" name, but would be concerned that it could be misconstrued as implying that every MVPD would have to rely on the same server device. Hereinafter, for simplicity, "gateway" is used, as per the National Broadband Plan.

This seems essential to accomplishing all other objectives. There seems little or no argument on this point, and the Commission should proceed on this basis.

B. Rely On Private Sector Standards For Home Client / Home Network Support.

There are ample private sector resources devoted to developing home networking standards that will be capable of supporting the interactive operation of client devices on MVPD networks. The particulars of function and fulfillment are described below. The most challenging role for the Commission will be to decide when some choice or specification is necessary, and when the “market” can be relied upon to make these choices. It should not be necessary, in any case, for the FCC to undertake to invent, or cause to be invented, any enabling technology.

C. Minimum Functions Of Gateways—Security, Tuning, Secure Client And Network Support, Upstream Communication, Provide “Remote” EPG And Data.

If a “gateway” (“adapter”) satisfies minimum requirements, *and* if it is to support all new MVPD-provided clients as well as competitively-sourced clients, the physical format need not be specified.⁸ It is more important to be clear as to the purpose of the device, and its core functions.

1. Conditional Access Remains An MVPD Network Function.

Since the CableCARD was first devised in a CEA-cable joint engineering committee in the 1990s, it has been generally accepted that conditional access is an MVPD network function. The need to provide national portability of competitive devices

⁸ As has been seen in the Fourth FNPRM comments, a consumer-unfriendly physical format might be chosen by an MVPD when support of its *own* leased products is not required. TiVo Fourth FNPRM June 14 Comments at 8-11; TiVo Fourth FNPRM June 28 Reply Comments at 4-5, 14-15. There is no reason for such an encumbrance to be a concern if all new navigation devices of the MVPD are to be clients as well.

led to implementations that, on a CableCARD, would put the necessary circuitry on an MVPD-specific chip, to be mated with a client over a common interface. Proposals for “downloadable” security have followed the same model – with the additional complication that such systems, as proposed to date, all rely on an embedded hardware “chip” that is, unfortunately, specific to each purportedly “downloadable” (“DSC”) system, thus *defeating* the core objective of national portability.⁹ Hence, whether implemented via integrated security, CableCARD, or DSC, conditional access remains MVPD-network specific, so remains a core gateway function. As is discussed further below, CEA and CERC will have no objection to the MVPD, in a gateway device, handling conditional access in any way it chooses – integrated, via CableCARD, or via DSC – *provided* that the gateway device does not exceed its minimum and optional functions, *and* that new MVPD navigation devices must also be gateway clients.

2. Two Tuners For the MVPD Service Should Be The Minimum.

The NOI asks for comments on the appropriate number of MVPD-provided tuners for an “adapter” and for a “gateway” implementation. The FCC need not draw any such line or invent terminology on this basis; it need only specify a minimum. As the NOI suggests, the appropriate minimum would appear to be *two*. Since the invention of the VCR, consumers have been interested in watching one program while time-shifting another. As gateways should be MVPD-specific while clients need not be, it makes sense for the gateway to include a minimum of two of the tuners for the service of the MVPD that has furnished it.

⁹ See, NagraVision Fourth FNPRM June 28 Reply Comments.

3. Communication To Client / Home Network Over IP.

The sole function of a gateway device should be the provision of MVPD services and programming over an interactive IP-based, standard and secure home networking interface that can also be relied-upon by single, IP-enabled client devices. That this functionality would enable device competition while linking broadband techniques with TV penetration was the core insight of NBP No. 27 and Chapter 4.2 of the National Broadband Plan. As this interface will be *the* link between the gateway and any and all home client devices, it will need to support video display, digital audio transmission, and secure home network storage, including *moves* and other techniques as must remain available to client devices under the Commission’s Subpart W Encoding Rules.¹⁰ The interface should broadly support two-way communication with the MVPD’s network, from any appropriately enabled home network client (including a television).

Given the two-way nature and interactivity of IP-based interfaces, it should not matter whether the “gateway” serves a single client product or supports a home network that contains additional clients.

4. The MVPD’s EPG Should Be Provided To The Client Along With EPG Data.

In order for a consumer using a client product to choose MVPD programming and services, the client needs access to the MVPD’s Electronic Program Guide (“EPG” or “Guide”). In order for the consumer to compare MVPD offerings with available alternatives, the interface must also provide sufficient data, from that comprising the EPG, to allow the MVPD offers to be represented on a menu as generated or provided by the client. The consumer should have the choice of viewing the MVPD’s fully functional

¹⁰ 47 C.F.R. §§ 1901-1909.

EPG, as provided to and rendered by the client, *or* viewing a broader menu that includes the MVPD's offerings of programming and services.

D. Optional Functions Of Gateways – Multiple MVPD Tuners, Transcoding, Cache Storage.

As was the case with DTV Converters, a gateway design should be flexible enough to perform additional MVPD-specific functions *on the MVPD network side of the interface*, but only to the extent they are not redundant or pre-emptive of client-side functions.

1. MVPD May Offer Gateways With Additional Tuners.

The number of home network clients that a gateway may be required to support with a separate tuner should determine whether a basic or a step-up gateway is provided to the home. Usage modeling based on experience can help MVPDs to determine the range of models to have available. As consumer needs evolve, MVPDs will have gateway models available to support client devices over the standard client interface. These should be readily available to consumers through simple exchange rather than a truck roll.¹¹

2. Client And Network Codecs Should Be Specified, Transcoding Should Be Optional.

To the extent needs can be anticipated, transcoding should be a client-side function; inclusion of this capacity in a gateway would appear to be redundant. However, in the event that the present stability in formats should be revised beyond those anticipated in standards applicable to client devices (see discussion below), this capacity

¹¹ Whether MVPDs should charge for providing gateways, and if so how, should be addressed in the Commission's rulemaking subsequent to this NOI. It does not appear necessary or advisable to decide this question before the FCC has received comments and is prepared to issue a rulemaking proposal.

should be optional in gateways. Again, experience and usage modeling should allow MVPDs to determine and assess the need for gateways with this capacity.

3. Cache Storage And Bit Rendering Should Be Optional Only To The Extent Necessary For Gateway Provision Of Interactive Services To Clients Over The Home IP Interface.

An MVPD should have the option of including cache storage in a gateway, and bit rendering over the client IP interface, to the extent each function is not redundant to, or displaces, functions reserved for client products. In the NOI, this issue is presented in two anticipated contexts:

- **Bit rendering.** Whereas audiovisual rendering for the purpose of program and EPG display is a core client function, the NOI asks whether gateways should be able to render video bits for the purpose of VOD ordering. This should be permissible but *only* to the extent of providing such video information over the IP interface for use, in and by client devices, in facilitating the ordering of programming and services through the MVPD's EPG and through the EPG of the client device.
- **Cache storage.** It is asserted that, in order for a DBS-based MVPD to maintain response times and flexibility in the offering of MVPD interactive programs and services comparable to that of wired competitors, some degree of gateway device storage capacity is required. So long as this capacity is in aid of *offering* the MVPD service and interacting with the consumer, CEA and CERC do not believe they would object to this in the context of a rulemaking. This capacity, however, should not replace client-side, home network program and data storage.

E. Functions Reserved For Client Or Network: Display Interface, Network Storage, ATSC Tuner, Source Integration, Default And Resource Demand Resolution Choices.

The display and storage of audiovisual programming have been *the* core functions of TV-based client devices. To the extent that direct support for these functions has been built into network navigation devices, this has been of MVPD necessity rather than consumer choice. Fundamentally, the products supporting the display and home storage

of video programs should be chosen by the consumer. Conversely, it would destroy the definition and nature of gateway devices to allow gateways also to serve as clients, competing with the products and choices that they are there to support.

1. Support For Displays And Storage By Users Are Client Device And Home Network Functions.

Central to the role of the gateway, whether minimally or optionally configured, is the support of client devices. Most interested parties, including the NCTA,¹² say they would prefer that, if all else were equal, devices should be provided to consumers by the competitive marketplace rather than by service providers. It was only happenstance – the necessity to secure the network and to receive payment – that caused gateway functions to be built into MVPD client devices and thus, over time, substantially to remove MVPD tuning and video rendering and storage functions from the competitive marketplace. Because MVPD-tuning remains network-specific, this function must remain in gateways. Other core functions can and should be returned to the competitive marketplace. This rulemaking is the time to do so and, finally, to remove the bias against competitive products that inheres from building home client features, preemptively and redundantly, into leased products.

The core insight of the National Broadband Plan about device competition is that it flourishes in IP-enabled home networks and languishes when fully integrated boxes are

¹²See Statement of NCTA President & CEO Kyle McSlarrow Regarding New FCC Proceedings on Video Devices and CableCARDs (Apr. 21, 2010), <http://www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-Regarding-New-FCC-Proceedings-on-Video-Devices-and-CableCARDs.aspx>. See also, e.g., Time Warner Fourth FNPRM June 14 Comments at 4.

leased by service providers.¹³ The rulemaking that will follow this NOI will be the Commission's last, best opportunity to restore competition.¹⁴

2. Default Settings And Resource Call Resolution Are Consumer Choices.

When consumers bring home and activate a retail product, they should first see the product's capacities and choices as offered at retail, rather than as presented or dictated by a service to which the product was given access. Similarly, it should be up to the consumer which of her home network products or resources is to have priority in calls on resources provided by the gateway or that reside elsewhere on the home network. The increasing capacities of consumer electronics devices to meld television with Internet access has required resource management techniques to be refined and built in.

3. Consumers Should Be Able To Compare And Choose Among Program and Service Options Available For Purchase.

Fundamentally, the choice of where to go to obtain programming and services, and how to compare offerings and prices, is a consumer choice based on best available information. The available choices should be assembled and rendered by the consumer's own device, rather than filtered in the gateway device furnished by one of the contestants. While one function of the client device is to display the MVPD's Guide, this function should *add to, not detract from*, the product's other functions as chosen by consumers. Hence, the integration of choices from the MVPD Guide into a larger menu must also be

¹³ National Broadband Plan at 50, Box 4-1.

¹⁴ Client-side integration is also more efficient for consumers. CEA and CERC's Fourth FNPRM June 14 Comments at 4-5 set out the ways in which competitive device integration provides more competition and higher quality products at more affordable prices.

a function reserved for the client-side device as chosen, from among competitive offerings, by the consumer.

4. ATSC Tuning Is A Client-Side Function.

With the successful completion of the broadcast DTV Transition, ATSC tuning has been restored as a client function, built-in or facilitated in all products on which broadcast TV is viewed. Therefore it is no longer necessary (as it was in the 2003 Plug & Play regulations) and would be redundant to require ATSC tuning functionality in gateways. (FCC regulations already address the provision of ATSC tuning in television receiver products.)

III. All New “Navigation Devices” Should Rely On Gateways.

The NCTA and cable operators have complained, with growing justification, that the regulations to implement Section 629 have been applied only to cable operators.¹⁵ Moreover, “common reliance” on CableCARDS has addressed only the “attachment” element of national portability – not the need for a common platform for offering features.¹⁶

The rulemaking that will follow this NOI offers the Commission a chance to finally and fully level the playing field. CEA and CERC believe that as the ensuing rulemaking proceeds it will become evident that it is possible to do so *without* constricting the choices that MVPDs can offer to consumers. The key will be to enable competition in *both* device and programming markets. MVPDs’ new client-side devices for their own systems should be gateway-reliant, *and* MVPDs should be free to offer

¹⁵ NCTA Fourth FNPRM June 14 Comments at 3.

¹⁶ MVPD leveraging of this unique capacity, and the discouragement of competitive entry, are recognized in Chapter 4.2 of the National Broadband Plan and the resources cited at 67, notes 114 and 115.

client-side devices for use, through the standard home IP interface, on any *other* MVPD system.

IV. Standards Reliance And Certification Can And Should Be Independently Determined.

Evident from the history of regulations and practices implementing Section 629 is that the certification of devices competitive to their own by cable operators' owned and operated consortium, CableLabs, has run counter to the objectives of Section 629. Technical and licensing impositions and obstacles imposed by CableLabs have been complained of by retailers,¹⁷ manufacturers,¹⁸ and new entrants¹⁹ ever since the FCC issued its first regulation to implement Section 629. This problem was specifically recognized in the Fourth FNPRM.²⁰ Moreover, the gateway / client and home networking interface is one to be utilized by all MVPDs, not just cable operators. To put, *e.g.*, CableLabs in charge of the interface to be used by gateways of other MVPDs would be just as unsatisfactory as it has been to put CableLabs in charge of certifying devices to compete with those of its cable industry owners.

¹⁷ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Response of Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report (Aug. 2, 2000); Circuit City *ex parte* filings of July 30, 1999 and February 2, 2000 in CS Docket 97-80; Opposition of Circuit City Stores, Inc. in CSR 5558-Z (Application of Insight Communications Requesting Relief from 47 C.F.R. 76.1204(a)(1)).

¹⁸ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Consumer Electronics Association Comments on Third Further Notice of Proposed Rulemaking at 11-13 (Aug. 24, 2007).

¹⁹ *See, e.g.*, IPCO, LLC Fourth FNPRM June 14 Comments at 2, 7-8.

²⁰ Fourth FNPRM at ¶ 18.

The movement to IP-based home networking standards provides the Commission with a sound basis for making product certification both neutral and competitively rational.²¹ It allows the movement of client-side standards certification to the private sector entities that have devised these standards, and that have an interest in their uniform success. This will be consistent with – in fact, required by – the approach of identifying “client” functions that are reserved to the competitive marketplace, rather than to MVPD control.

A. DLNA Can Be Expected To Provide A Core Set Of Standards And A Certification Process For Compliance With Those Standards.

This NOI and the ensuing rulemaking are occurring at a time when the private sector has produced an unprecedented, multi-industry standards concentration on the support of home networks, and on linking these networks to service and program providers on an *interactive* basis. Rather than – as some might suggest – making full implementation of Section 629 unnecessary, this makes it *possible*.

For example, IP-based progress in DLNA – The Digital Living Network Alliance – has been such that a growing suite of standardized tools is, and will be, available. DLNA provides its own certification process, appropriate to client-side products.²²

²¹ This movement, as the FCC indicates in its June 18, 2010 waiver determination (*In the Matter of Intel Corporation, Motorola, Inc., TiVo, Inc. Requests for Waiver of Section 76.640(b)(4)(ii) of the Commission’s Rules*, CSR-8229-Z, CSR-8251-Z, CSR-8252-Z, Memorandum Opinion and Order (rel. June 18, 2010)), is already being addressed by the Commission in its Fourth FNPRM. A Commission determination, in the Fourth FNPRM, to choose an IP-based network can and should be a building block relied upon as the Commission chooses standards references for the client side of gateway devices.

²² DLNA, http://www.dlna.org/news/pr/view?item_key=53bf9cece92c6d454d0572c5375b0d87d5f2a958.

B. Industry Standards Should Be Referenced For Copy Protection, Remote UI, And Other Necessary Network Support.

CEA and CERC have long accepted that secure copy protection technology, within recognized outcome parameters as represented by Subpart W Encoding Rules, is an essential element when MVPD-originated content is introduced into home networks. Standard technologies that provide such protection on an interactive basis, over IP networks, are well-developed and already are referenced within DLNA.²³

A gateway / client approach also requires that the MVPD's own EPG be provided to network devices on a "remote" basis. Standards work, such as, for example, by the RVU²⁴ consortium, is also making tools available for this and potentially other purposes. As in other cases, there is no reason to relegate certification, instead, to a single MVPD consortium such as CableLabs.

V. Client And Network Navigation Devices Should Have Access To EPG Data.

Consumers should be able to choose among content offers from diverse sources, *without resorting to pencils and notepaper* as they switch back and forth among proprietary menus. There is no technical or legal obstacle to prevent competitive (or leased) devices from offering this facility.

A. Most Client Data Is Available From Other Sources, But Providing Consumers With A Choice And Means Of Comparison Requires Access To Data From The MVPD's EPG.

EPG data is available to clients, over independent broadband channels, from a number of sources. Hence, in order to provide a comprehensive Guide that allows consumers to compare all available choices, it is not necessary for client devices to have

²³ Digital Transmission Licensing Administrator LLC ("DTLA") Fourth FNPRM June 14 Comments; DTLA Fourth FNPRM June 28 Reply Comments.

²⁴ RVU Alliance, <http://www.rvualliance.org/>.

access to all that comprises an MVPD's EPG.²⁵ It is, however, necessary to have access to sufficient data as to allow a fair representation of each offering. There is no technical obstacle to populating a single guide with data from diverse sources. There are products on the market that do this today, and that could, if allowed to by license, integrate MVPD content as well.

B. There Is No Legal Obstacle To Access To Data As Necessary.

As has been discussed in NBP No. 27 comments, data compilations are not protectable as intellectual property.²⁶ Hence, any contractual or license provision that would restrict a client product from using the necessary data as derived from an MVPD's EPG, or would restrict the MVPD from allowing the data to be furnished to a client device, would not be based on the assertion of any intellectual property right. Such a restriction would be, simply, an anticompetitive business choice that regulation can and should address.

Moreover, consumers already pay for this data in their subscriptions. Withholding this data from the Guide of a competitive product would be yet another instance of price discrimination, based entirely on discretionary business judgment, against competitive products.²⁷ Allowing such discrimination to persist would run counter to the Commission's instruction from the Congress under Section 629 *and* would diminish the utility of broadband information to MVPD subscribers, counter to the objectives of the National Broadband Plan.

²⁵ TiVo *ex parte* letter of Feb. 17, 2010, Exh. C at 10 to TiVo Fourth FNPRM June 14 Comments.

²⁶ *Feist Publications, Inc. v. Rural Telephone Svc. Co.*, 499 U.S. 340 (1991). *See* discussion, TiVo *ex parte*, *id.* at 9-15. *Cf.*, CEA NBP PN # 27 Comments at 10.

²⁷ *See* discussions in CEA/CERC Fourth FNPRM June 14 Comments at 10-12.

C. Access To Data For Purposes Of Consumer Comparison And Choice Is Not “Disaggregation.”

MVPDs have tarred as “disaggregation” any proposal that would allow consumers to compare their offerings with competitive offers of programs and services. Yet they have also emphasized that they reserve the right to continually change and adapt their own offers to consumers. They have resisted implementation of Section 629 on the basis of increased competition from other MVPDs and from the Internet, yet have also resisted attempts to allow consumers to make fair and timely comparisons of competitive offers.

MVPDs are locally franchised to aggregate content and to provide it to homes and businesses securely and for payment, but they have no natural, regulatory, or intellectual property-based monopoly on the “aggregation” of content for consumer choice. Under law and Commission regulation they are “distributors.” Nothing in law or regulation has prevented MVPDs from “aggregating” their offers of content into program guides, and nothing as proposed by CEA or CERC would prevent any MVPD gateway from transmitting its Guide to a client device for display by consumers. In terms of what the MVPD has the right to “aggregate,” nothing is being “disaggregated,” any more than an MVPD would be “disaggregating” its own Guide when it *adds* choices that are available over the Internet. Consumers, when using a competitive device, should have the same right to compare.

VI. There Is A Continued Role For CableCARDS And The “CableCARD” Regulations.

Essentially, this proceeding is about the aggregation of consumer choices. Just as WiFi-based home and business networks support devices ranging from appliances to phones to computers, the marriage of television and broadband can support a range of approaches.

A. The Purpose Of The NOI And Subsequent Rulemaking Should Be To Enhance Rather Than Limit Consumer Choice.

CERC and CEA, in their comments and reply comments in the Fourth FNPRM, asserted that the competitive potential of CableCARD-enabled products, if properly installed and supported and enhanced by interactive broadband capabilities, has yet to be tested in the marketplace.²⁸ In requesting public comments as to gateways via NOI, rather than by an immediate rulemaking, the Commission is in the mode of gathering data rather than excluding choices.

In FNPRM reply comments, CEA and CERC said that those who would seek to cut back support of CableCARDS and CableCARD-enabled products should be required to produce *real and hard cost information* so as to allow actual implementation costs to be compared with integrated security (and downloadable) alternatives.²⁹ This is essential because, as CEA has noted in a host of waiver proceedings, the price to cable operators of CableCARD deployment has been determined by the strategic business decisions of cable industry vendors as to which products to enable with CableCARDS, rather than by the actual cost of the cards or the interface.³⁰ In proceeding via NOI, the Commission should

²⁸ See also TiVo Fourth FNPRM June 14 Comments at 2-8, 16-19; TiVo Fourth FNPRM June 28 Reply Comments at 16-24.

²⁹ CEA-CERC Fourth FNPRM June 19 Reply Comments at 14-15, 18-19.

³⁰ *Id.*, at 14 & n.27.

put a priority on acquiring and evaluating such data, rather than rubber-stamping self-interested business decisions and accepting them as fact.

In marrying broadband to television in the National Broadband Plan, the Commission has focused on inviting the interest of TV watchers in broadband-delivered content. The only competitive products that can or would do this on a basis integrated with MVPD programming – whether “Plug & Play” or tru2way – rely on CableCARDs. This foothold should be strengthened, not abandoned.

B. Necessary Regulations As To MVPD Support and Price Discrimination Will Remain Relevant.

As CEA and CERC note in Fourth FNPRM comments and reply comments, irrespective of how long the physical CableCARD format persists, the issues of equitable MVPD installation, technical support, and pricing, as recognized in notes 114 and 115 to the National Broadband Plan, will persist so long as Section 629 remains the law and the implementing FCC regulations have not been sunset. The issues as to technical support and pricing that were raised for comment in the Fourth FNPRM remain relevant for additional iterations of competitive devices as well.³¹ In the ensuing “gateway” rulemaking, these support issues should also be addressed, and their continued relevance to CableCARD-enabled products as well as to future gateway-reliant devices should be affirmed.

³¹ These were also discussed in Chapter 4.2 of the National Broadband Plan. CEA and CERC request that their Fourth FNPRM comments and reply comments be incorporated in this proceeding, and in docket 10-91, by reference.

C. To The Extent DSC Does Not Impair Network Security It Should Be An Option For MVPDs But Seems Redundant For Client Devices.

As is discussed above, the security of programming as transmitted by an MVPD to the home is an MVPD-side issue. In the context of CableCARDs, security became a client-side issue as well only because there was no standard client interface for access to *features and services* – so the client device that would receive programming needed a security interface. The gateway scenario, by contrast, draws the MVPD / client demarcation at the feature-service level, *after* security considerations have been addressed in the gateway. Hence, so long as this separation is maintained, *and* so long as new MVPD-furnished clients rely on the same gateway device, whether to deploy a CableCARD in a gateway, or whether to move to DSC in a gateway, should be purely an MVPD issue in which the client device has no interest. Adding this facility to a gateway-enabled client device would be redundant.

VII. The FCC Has Both The Obligation And The Authority To Proceed With A Rulemaking.

The issues of FCC authority under Section 629 were addressed comprehensively by several commenters, including CEA and CERC, when the 2003 “Plug & Play” regulations were published for comment.³² CEA and CERC remain confident in the FCC’s conclusions that, based on its obligations as to MVPD services, and more specifically, Section 624A and Congress’s explicit direction in Section 629, the

³² See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Consumer Electronics Industry Comments 4 – 12 (Mar. 28, 2003). CEA and CERC request that these comments and this discussion be included in the record in Docket No. 10-91.

Commission has the authority to proceed and to implement a rulemaking as outlined in this NOI.³³

Conclusion

This inquiry, the ensuing rulemaking, and the National Broadband Plan provide the last best chance for the Commission to comply with Congress's directive in Section 629 of the Telecommunications Act of 1996. The Commission should proceed forthwith.

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³³ If the Commission changes its mind on this subject and concludes that it lacks sufficient authority in any respect, it should so indicate clearly and conclusively so that interested parties can assess other legal options. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009).