Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

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COMMENTS OF AT&T

AT&T Inc. ("AT&T") respectfully submits these comments in response to the Commission's April 21, 2010 Notice of Inquiry[1] in the above-referenced dockets.

INTRODUCTION AND SUMMARY

AT&T fully supports the objective of a retail market for consumer devices that are interoperable with all multichannel video programming distributor ("MVPD") services nationwide, and we believe that it is possible to devise an industry-standardized gateway device that can help achieve that goal. In fact, AT&T and others in the industry have been working hard for several years to do precisely that, and much progress has been made. AT&T and other IPTV providers have agreed to general development principles with the consumer electronics industry,

[1] Notice of Inquiry, *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*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, FCC No. 10-60 (Apr. 21, 2010) ("NOI").

and have worked with industry standard-setting bodies to develop standards for a gateway solution for IPTV providers and the industry generally. However, the stumbling block to date has been the fundamental need to ensure that when a consumer device receives an MVPD's service over the gateway, it can and will display the MVPD's user interface, so that subscribers can be assured that they will receive their MVPD service with the "look and feel" intended by their service provider, and so that MVPDs can ensure the integrity of their offerings. AT&T and other industry stakeholders have developed approaches that allow a consumer device to access all the features of an MVPD's service and still support other services and capabilities (including home networking) that consumer electronics ("CE") manufacturers want to offer. But many CE manufacturers have rejected this approach, insisting that any interoperability solution must support the right of CE manufacturers to completely replace the MVPD's user interface with their own. They contend that MVPDs should have to provide their services as individual, disintermediated components, which CE manufacturers should be free to slice, dice, and repackage.

AT&T believes that, if left to its own devices, the marketplace will continue to make progress towards the development of industry standards that facilitate the development of commercially available devices that can access all MVPD services. Over time, the collective interests of MVPDs and CE manufacturers should result in solutions that achieve that statutory goal while serving and respecting the interests of all parties, including consumers. The Commission's desire to reach a resolution more quickly is understandable, but seeking to achieve this through blunt regulatory force would be ill advised. Indeed, the mere prospect that the Commission might force a solution that grants CE manufacturers the ability to replace MVPDs' user interfaces with the manufacturers' has undermined several years of industry negotiation and

technological development by encouraging manufacturers to hold out for a regulatory solution rather than continue to negotiate in good faith a solution that protects the rights and interests of all parties. Worse yet, by focusing solely on CE manufacturers' demands to have fully disintermediated access to the individual components of MVPDs' services, the NOI's proposed AllVid "solution" fails to account for consumers' interest in receiving the MVPD service to which they subscribe, with all the features they expect from their provider, as well as MVPDs' legitimate desire to protect the integrity and interface of their own offerings.

AT&T recognizes that the Commission likely did not intend such a one-sided approach. Yet if the Commission fails to consider and appropriately balance the interests of all parties—CE manufacturers, MVPDs, and consumers—it will not achieve a solution around which the affected industries can rally; instead, it will only undermine the significant progress that has been made to date. MVPDs simply will not support a framework that allows CE manufacturers to interfere with the MVPD-subscriber relationship, to change the look and feel of the integrated service offering that MVPDs deliver, or to substitute a manufacturer's or its partners' offerings, content, or applications for those provided by the MVPD and expected by the MVPD's subscribers. Like any other video service provider, including the over-the-top ("OTT") providers that routinely place "user interface" and other restrictions on CE manufacturers, MVPDs have a right to protect the integrity of their own offerings and ensure that their subscribers receive what they want and pay for.

Devising an interoperability solution that is compatible with all MVPDs' systems also will be substantially more complex and time consuming than the Commission assumes. Indeed, it is entirely unrealistic to target December 2012—*see* NOI ¶¶ 37, 42—for completion of the very complex standard-setting effort that will be necessary to develop an AllVid device that is

acceptable to all MVPDs, content providers, and CE manufacturers. The Commission avoids focusing on the difficulties by simply dismissing a host of highly complex issues. For example, the Commission does not deal with the ways in which a static, regulatorily-mandated standard might deter or delay MVPDs' introduction of new services not accommodated by that standard. In an ecosystem marked by fast-paced technological change and service innovation, this is a serious concern. Indeed, had the Commission imposed technological standards when Section 629 first became law, the industry might still be struggling to develop a variety of options that consumers enjoy today, including digital cable service, 3D video services, IPTV, and offerings integrating video and other advanced services.

The Commission similarly does not grapple with the fact that the AllVid proposal could interfere with MVPDs' ability to control service quality, leaving consumers with degraded service for which they have no solution. The Commission also posits that the AllVid device will handle digital rights management ("DRM") using a link protection standard that will do nothing to assuage content providers' real fears about misappropriation of their high-quality digital content in a home networking environment. And the Commission does not even consider or weigh the significant costs its proposal would impose on MVPDs in terms of network reengineering, standards development, testing, and increased customer support and troubleshooting—costs that will divert funds from pursuit of innovation, deployment of broadband facilities and services, and other Commission objectives, and that could ultimately result in higher prices for consumers.

Finally, the Commission lacks authority to mandate the AllVid approach—at least as proposed in the NOI. Section 629 of the Act, 47 U.S.C. § 549, does not grant the Commission broad power to remake MVPD service, or to force MVPDs to support CE-manufacturer-

provided services. Instead, Congress carefully limited the Commission's authority to the minimum rules needed to establish a retail market for consumer devices that can receive and use *MVPDs'* services. And that objective can be satisfied by the more targeted efforts AT&T and other MVPDs are pursuing to allow consumers to use commercially available devices like personal computers ("PCs"), the Xbox 360, and others to access their services. The AllVid proposal also would not advance the Commission's broadband goals, since there is absolutely no basis for the assumption that the ability to access broadband services over a high-end video device integrated in some way with MVPD service will address the digital literacy, affordability, or relevance concerns that the Commission itself has identified as the chief obstacles to broadband adoption. Indeed, by requiring MVPDs to subsidize CE manufacturers and shoulder the expensive burden of remaking their services and systems, the AllVid proposal risks undermining the Administration's broadband policy objectives by diverting investment from broadband deployment and fundamentally altering MVPDs' business case.

The proposed requirement that MVPDs allow their services to be restructured by manufacturers also would violate MVPDs' copyright interests in the look and feel of their services, and the Commission has no jurisdiction to authorize CE manufacturers to make derivative offerings from MVPDs' services. And it would violate MVPDs' First and Fifth Amendment rights, by depriving them of the ability to control how their "message" is delivered and appears to subscribers, and by radically changing the nature of MVPDs' businesses in contravention of their reasonable, settled expectations without compensation.

In sum, while AT&T shares the Commission's objective of opening up a retail market for devices that can access MVPD services on a standardized, nationwide basis, the approach proposed in the NOI is not the way to achieve it, and it instead will undermine the great strides

industry stakeholders have made to resolve this same challenge on a commercial, voluntary basis.

DISCUSSION

I. THE PROPOSED ALLVID MANDATE IS UNNECESSARY TO ACHIEVE THE COMMISSION'S LEGITIMATE OBJECTIVES.

A. The AllVid Proposal Is Premature and Could Derail Genuine and Extensive Industry Efforts to Achieve a Voluntary Nationwide Gateway Standard.

Three years ago, AT&T presented to the Commission its vision for a robust IP-based video ecosystem in which consumers could leverage the inherent power and flexibility of IP-based technologies, devices, and services to access content across an array of interoperable devices.[2] As AT&T explained there, the company's goal—one it was already engaged in pursuing then and has pursued assiduously since—is to ensure that consumers can choose from among a variety of commercially available, innovative electronic devices that can attach seamlessly to IP-enabled multichannel video services, and use those devices to integrate their subscription video services with OTT video and other Internet content and services.

This vision would not only achieve the objectives of Section 629 and advance the interests of consumers and CE manufacturers. It also makes good business sense for AT&T. As AT&T has emphasized from the start, the company has never had, and does not now have, any interest in serving as the exclusive provider of equipment for its Internet protocol video distribution technology ("IPTV") service.[3] To the contrary: AT&T's goal is to maximize the spectacular flexibility of the IP platform to provide cutting-edge content and associated applications in new and innovative ways over a broad range of devices and across multiple

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[2] Letter from James K. Smith, AT&T, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, PP Docket No. 00-67 (Nov. 2, 2007).

[3] *Id.* at 2.

screens. Other IP-enabled service providers are similarly committed to achieving a framework for IPTV systems that would allow broad attachment of commercially available equipment and home networking solutions.[4] Indeed, as the Consumer Electronics Association (the "CEA") recently noted, IPTV providers have been especially proactive in exploring paths toward a flexible, system-agnostic retail solution.[5]

That said, achieving an interoperability solution has not proven to be simple or swift, though significant progress has been made over time. After IPTV providers committed to a general set of CE interoperability principles in 2006, the CEA initiated the IPTV Oversight and Coordination Committee ("IPTV OCC") to collaborate with standards bodies on the development of nationwide interoperability standards for IPTV. A wide range of companies participated in the process, including cable providers, satellite operators, IPTV providers, CE companies, and content providers. The Committee also established formal relationships with various standards bodies.

The OCC tested various models that would allow CE manufacturers to build interoperable devices. It concluded that the best and most flexible model—and the one that ultimately could be deployed on a nationwide basis—was an "MVPD Gateway" that could

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[4] *See* CEA, Press Release, *AT&T, BellSouth, Verizon and CEA Announce Principles on Device Attachment: Guidelines are Designed to Facilitate Retail Market for Devices Attaching to IP-Enabled Video Services*, Mar. 15, 2006, http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=10967.

[5] Comments of the Consumer Electronics Association on NBP Public Notice #27, *A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act, Inquiry Concerning the Deployment 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 of 1996, as amended by the Broadband Data Improvement Act, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, GN Docket No. 09-51, GN Docket No. 09-47, GN Docket No. 09-137, CS Docket No. 97-80, at 12 (Dec. 21, 2009).

convert an MVPD's unique network interface into a common local area network ("LAN") interface. With the support of 40 companies, the OCC in October 2006 began to focus exclusively on the development of this approach, which it called "Scenario 5 Home Network Compliant Model." This model envisioned a "carrier gateway device" that would sit between the provider's network and the home network and would interface with retail CE equipment—a notion generally similar to the Commission's proposal in the NOI.

At a general level, there was significant support for this approach. However—and of note for the current NOI—development of this model ultimately foundered as a result of an impasse around one key issue: the extent to which the gateway framework would ensure that the CE equipment faithfully rendered the MVPD's particular user interface and electronic programming guide. MVPDs stressed the importance of being able to directly offer their subscribers the services they expect and have ordered, including value-added services, and to otherwise shape their subscribers' user-experience. CE manufacturers resisted this, demanding access to MVPD services in "component parts" so that each manufacturer could remake those components into new, CE-controlled service packages. When this significant issue could not be resolved, the OCC effort was abandoned.

Industry-wide support for the ultimate goal did not wane, however. The work to define interoperability standards continued—and continues still—through the Digital Living Network Alliance ("DLNA"), an organization comprised of over 200 leading manufacturers of CE devices that facilitates the creation of compatible products. DLNA has developed Remote User Interface ("RUI") guidelines. The RUI mechanism would allow an MVPD to replicate its user interface on third-party consumer equipment. Under the RUI model, the MVPD's proprietary electronic programming guide and unique consumer interface could be generated in the gateway device and

sent to the set top box ("STB") or other CE device for rendering. Subscribers would see the programs and services provided by their chosen MVPD as an intact whole, with the MVPD's unique look and feel—but at the same time, they could use any additional options and content that their CE device might enable.

CE manufacturers have not broadly accepted this approach. Many continue to insist on a "component-part" or "disintermediated" delivery of MVPD services to the gateway device. Nevertheless, there is some support in the CE manufacturer community, and AT&T and other MVPDs, along with some CE manufacturer partners, have been working to further develop and test the gateway model using the RUI approach. Technological and cost issues with this approach remain; however, AT&T already has worked with Samsung and other CE manufacturers to build and demonstrate a proof of concept prototype to validate that the RUI approach can work across a gateway device, and AT&T has conducted tests of the RUI approach with Samsung devices in the AT&T Video Lab. Further, AT&T has engaged the vendor community to develop cost effective gateway products, and has tested early phases of various home networking solutions in its labs.[6]

In short, there is ample evidence that the marketplace generally (and AT&T in particular) supports the goals of a gateway device and a common interface—and that a solution should ultimately be achieved through voluntary industry efforts. Indeed, although there is significant work to be done on the technology and the cost model, AT&T is optimistic that, with time, these concerns could be resolved: the technological solution has been modeled, and all parties involved have significant commercial incentives to work this out. Yet the NOI threatens to

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[6] Other industry standards organizations (*e.g.*, ATIS IIF, DVB, ITU-T) have also been working towards specifications that would support delivery of IPTV services across a range of devices.

derail the process and undermine the productive efforts to date. As we discuss further below, the NOI seems to disregard one side of what has been a complex industry debate, proposing the "disintermediated" model as the sole approach for a gateway framework. This is perplexing, unnecessary, and, if adopted, would be extremely unfair.

- It is perplexing, because legitimate efforts and interests underlie the RUI model, and some CE manufacturers are ready to experiment with it—yet the Commission appears to reject it out of hand, without even acknowledging its existence.
- It is unnecessary, because the industry itself is genuinely working its way toward a solution and has already developed technically viable prototypes. The Commission should prefer that approach to any government-mandated model, given its past experience with the latter in the CableCARD context. If all stakeholders support a model, its success is far more likely than one imposed by government fiat. And any Commission-mandated solution could, and in the case of the one proposed in the NOI undoubtedly would, be the subject of litigation for years, whereas the industry is at least working towards a voluntary solution.
- Finally, it would be unfair if adopted, because the interests of MVPDs in the standard-developing process are no less legitimate than those of CE manufacturers, and yet the AllVid framework—as discussed further below—would address only the latter. It also would be unfair because it would deprive consumers of the services they expect and pay for, and it would leave them with a confusing array of providers and no one-stop-shop for troubleshooting and customer service.

Rather than proceed down a path that embroils the industry in protracted disputes, the Commission should stay focused on the most significant development to date: Today, MVPDs in general and AT&T in particular support a nationwide, standardized gateway model—so long as it respects MVPDs' interests in controlling the user interface and other aspects of their own service offerings, and ensures that subscribers can receive the integrated service they order and expect from their MVPD. To be sure, achieving a model that accounts for these and the many other concerns that are yet to be addressed will not be an instantaneous process. Indeed, there is no way *any* standardization process (much less a complex and disputed one) could be completed in the short time the Commission has allotted. *See* NOI ¶¶ 37, 42. Nor will the process be simple. But there is an opportunity for the Commission to work with rather than derail the

industry's efforts, and it should take that path rather than resorting immediately to a one-sided, heavily regulatory solution.

B. AT&T Has Other Efforts Underway to Facilitate Access to U-verse over Various Commercially Available CE Devices in Full Satisfaction of Section 629.

Quite apart from its efforts to help achieve a broad industry standard, AT&T is pursuing U-verse-specific arrangements that would permit consumers to access AT&T's MVPD service over various third-party CE devices, including the X-Box 360, PCs running Windows 7, and some mobile devices, all of which are of course already available at retail. Although not all these devices would replicate the full U-verse experience, they would replace the need for an AT&T-provided STB or "navigation" device. This approach would therefore satisfy Congress's explicit goal in Section 629: they would "assure the commercial availability . . . of . . . interactive communications equipment . . . used by consumers to access multichannel video programming . . . from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor." 47 U.S.C. § 549(a). Furthermore, since each of these devices also has the ability to access and display services from the Internet, AT&T's proposed arrangements would achieve the Commission's objective of allowing consumers to choose easily among a mix of services from their MVPD, from the Internet, or from other third parties who make their content available over these platforms.

Finally, there are a host of devices and applications on the market today that already allow consumers to view Internet and other content on the same devices they use to watch their MVPD service; a consumer today who truly wants just one "box" in the house (*e.g.*, a PC or a television but not both) already has several options on the market. Higher-end sets allow

connections to the customer's broadband service, a PC, or any other IP-enabled device.[7] A recent report shows that 85 digital television receivers now on the market can be connected to the Internet.[8] Consumers typically can also use these sets as home networking hubs, uploading photos and contacts and other information. Google TV would embed the Google browser directly into some advanced television sets, and make it easy for customers to search through their MVPD's and OTT providers' content for programs and other material of interest.[9] Apple TV downloads Internet content (including "SD and HD movies . . . and TV shows and music") to the Apple TV STB and a variety of audio/video interfaces to display that content onto a consumer's television set.[10]

In short, the marketplace already has developed far beyond the vision Congress had in 1996 when it adopted Section 629, to the great benefit of consumers. A great variety of options are available that enable or will enable consumers to use their commercially available CE devices to access MVPD services. And consumers also enjoy a robustly competitive CE equipment market—one that no longer includes only passive video display, but instead offers a host of alternatives and access to a wide array of content and capabilities.

C. The AllVid Proposal Is Neither a Necessary Nor Effective Means of Achieving the Commission's Stated Goals.

For the various reasons stated above, the AllVid proposal is unnecessary. As discussed, voluntary efforts are already underway to achieve interoperability solutions on a system-specific

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[7] *See, e.g.*, Javaughn Denness, *The New Internet Televisions*, July 24, 2009, http://www.techfuels.com/general-networking/18141-new-internet-televisions.html.

[8] iSuppli, Press Release, *Internet TV Sales to Rise Sixfold by 2013*, Sept. 15, 2009, http://www.isuppli.com/Semiconductor-Value-Chain/News/Pages/Internet-TV-Sales-to-Rise-Six-fold-by-2013.aspx.

[9] *See* Google TV, http://www.google.com/tv/.

[10] *See* Apple TV, Technical Specifications, http://www.apple.com/appletv/specs.html.

and an industry-wide basis, though nothing in Section 629 even requires adoption of one nationwide, all-system standard. Nor, as we discuss below, does Section 629 require (or permit) a key component of the AllVid concept: the mandatory disintermediation of MVPD services in support of *substitute* services provided by CE manufacturers. That goal is very far afield from Section 629's focus on equipment compatibility. In particular, Section 629 is not a mandate for the Commission to support a new range of independent CE manufacturer capabilities and services. It is solely a mandate to ensure that consumers have commercially available equipment over which they can receive their *MVPD* services. Thus, as we discuss in Section V below, AllVid would be a blunt and unlawfully overbroad means of achieving the modest goals Congress expressed in that provision.

In any event, the relevance of *online* (or OTT) video grows increasingly significant every day, soon to rival access to MVPD content. And CE manufacturers are briskly competing in offering access to and capabilities with respect to *those* content services, while remaining careful to maintain the look and feel of the online video provider's user interface. For example, devices like the TiVo do not simply take the underlying content supplied by YouTube or NetFlix and repackage it to create their own user experience. Rather, pursuant to license terms negotiated with the online video provider, they respect the integrity of the provider's service in its entirety, including its look and feel. Yet as we explain in Section II.B, below, they manage to do so without mandatory "disintermediation" and while respecting each OTT content provider's right to control the "look and feel" of its unique offering. That should be telling: It illustrates beyond question that the Commission could readily achieve a competitive marketplace for commercially available MVPD navigation devices, *without* imposing the AllVid framework's burdensome and

unfair disintermediation requirements. In other words, the direct and legitimate objectives of Section 629 can be achieved without the AllVid proposal.

AllVid would also be a decidedly ineffective means for the Commission to achieve the broadband goals it cites in support of that proposal: "wider broadband use and adoption." NOI ¶ 1. The NOI cites no evidence whatsoever to support the theory that consumers might be more likely to adopt broadband if they were spared the need to purchase a separate PC—notwithstanding the fact that many parties raised questions about any such assumption in response to the STB-related National Broadband Plan workshop ("NBP workshop"). As Verizon noted, for example, "Consumers may ultimately wish to access the Internet using set-top devices, or other video devices, but this is far from a certainty. It is not clear that a consumer would prefer to use a full featured video device . . . rather than the many other devices available to consumers today."[11] Indeed, as the National Cable and Telecommunications Association ("NCTA") pointed out, the same demographic groups who subscribe to digital MVPD service and have digital television displays also tend to own personal computers—and such consumers typically either do or readily *could* subscribe to broadband service.[12]

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[11] Verizon Comments – NBP Public Notice #27, *A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timey Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as amended by the Broadband Data Improvement Act, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, GN Docket No. 09-51, GN Docket No. 09-47, GN Docket No. 09-137, CS Docket No. 97-80, at 6 (Dec. 22, 2009).

[12] *See* Comments of the National Cable and Telecommunications Association on NBP Public Notice #27, *A National Broadband Plan for Our Future, International Comparison and Survey Requirements in the Broadband Data Improvement Act, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timey Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as amended by the Broadband Data Improvement Act,*

Further, only 10 percent of adults who have not adopted broadband have cited the cost of purchasing a computer as the main reason they do not use broadband at home.[13] Rather, as the Commission itself has concluded, the biggest problems underlying lower-than-optimal levels of broadband adoption in this country relate to *relevance* among certain user groups, and digital literacy. *See Broadband Plan* at 168-70. Promoting adoption among non-broadband adopters will require Internet skills training to point consumers to online job training or employment, government services, or educational opportunities—not the availability of high-end devices that can provide access to VoIP-caller-ID over the television set or other such offerings.[14]

Finally, as discussed above, consumers already have access to televisions that can access Internet content and capabilities. And many MVPDs—including AT&T—already provide their subscribers access to some broadband Internet content via widgets included in the MVPD service (like AT&T's U-bar). The Commission's reasoning therefore reduces to the notion that a few consumers might use broadband even more if they could access broadband over their

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Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, GN Docket No. 09-51, GN Docket No. 09-47, GN Docket No. 09-137, CS Docket No. 97-80, at 14-15 (Dec. 22, 2009) ("*NCTA NBP #27 Comments*") (explaining that 85 percent of U.S. households subscribe to MVPD services and 80 percent own computers). *See also* NCTA, Industry Data, http://www.ncta.com/Statistics.aspx (reporting that 43.5 million households subscribe to digital cable service and 42.8 million subscribe to high-speed Internet service).

[13] FCC, *Connecting America: The National Broadband Plan* at 168 (2010) ("*Broadband Plan*"), http://download.broadband.gov/plan/national-broadband-plan.pdf. And if cost is the concern, there is little reason to assume that these consumers would find the cost of a new set-top device and a digital display television any less prohibitive than a PC.

[14] Nor will the proposal increase broadband adoption among the many MVPD subscribers who still use analog television sets. The Commission posits no reason to believe that these consumers, who have resisted paying for higher-end digital televisions to date, will rush out and do so as a result of the AllVid framework. If they do not, they will enjoy *no* benefit whatsoever from that framework, because their sets cannot display digital Internet content. For these consumers, too, therefore, the AllVid approach cannot possibly be said to encourage broadband adoption.

televisions—or via their MVPD service—and do so in an integrated manner via their CE device in particular. But that presumption is nonsense—and in all events not a substantial enough public benefit to justify the significant cost that will be required to develop and deploy the AllVid framework.

Accordingly, the broadband-related premise on which the NOI is based—that integrating MVPD service and broadband on home video displays is important and effective for promotion of broadband adoption—is simply without any factual foundation. The AllVid proposal might increase broadband use by some small number of tech savvy consumers, but it is by no means a relevant or rational tool to use to promote the core adoption goals of the National Broadband Plan.

The AllVid proposal could actually *frustrate* the Commission's broadband objectives. It would impose substantial costs on MVPDs to remake their systems to support a standard and devices that are untested and for which there is no proven customer demand. In other words, the Commission proposes to have MVPDs shoulder the cost of a grand new experiment, which, as currently proposed, is designed primarily to boost CE manufacturer revenues. The funds MVPDs will have to deploy in pursuit of this dubious objective will have to be diverted from some other goal. For example, MVPDs might be forced to slow or abort the development and introduction of new services—services that might enhance MVPD competition and innovation—express goals mandated by Congress in Section 621 of the Act. *See* 47 U.S.C. § 521 (national cable policy includes fostering a diversity of information sources and services and robust competition). Further, as we discuss below, innovation will likely suffer regardless of economic concerns, due to the constraints of premature standardization. MVPDs might also have to divert funds from the $350 *billion* that will be needed to achieve this Administration's broadband

deployment objectives[15]—or from the effective, targeted broadband adoption initiatives that AT&T and so many MVPDs have been supporting. These concerns are especially valid to the extent the AllVid proposal also undermines MVPDs' business case by disrupting MVPDs' delivery of value-added services to their subscribers. Wireline MVPDs (like AT&T, Verizon, and a host of cable operators) have invested billions of dollars to extend fiber deeper into their networks to offer consumers a rich array of innovative, value-added, broadband and IP-enabled services, including multichannel video programming distribution services. As the Commission has recognized, the revenues these broadband providers earn from their MVPD services thus are essential to the economics of broadband deployment.[16] Yet the AllVid model, which builds on CE manufacturers' desire for disintermediation of MVPD service and full control of the "user experience," would permit CE manufacturers to discard the MVPD's user interface and any "unwanted" components of the MVPD's service offering, which would have a devastating impact on MVPD revenues from both consumer value-added services and advertising. The AllVid proposal (at least as proposed in the NOI) thus threatens to undermine the very broadband deployment objectives it purportedly is intended to advance. Simply put, the MVPDs/broadband service providers that are investing scarce investment capital to deploy the broadband networks and services on which the Commission has said it will rely to meet its ambitious broadband deployment agenda cannot justify that investment if they are denied the ability to offer the services on which that investment is based.

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[15] Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf.

[16] *See* note 89, *infra* (discussing Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, 5103 ¶ 3 & n.238 (2007) ("*Local Franchising Order*")).

In short, the AllVid model would be of little value, yet it would cause substantial harm. Instead of committing itself to advancing this regulatory proposal, the Commission should continue to encourage MVPDs' and CE manufacturers' current efforts to develop consumer devices that can access MVPD services, and to develop approaches such as RUI that will enable a broader retail market for nationally standardized navigation devices while preserving the quality and integrity of MVPD service.

II. IN ITS SINGULAR FOCUS ON CE DEVICE MANUFACTURERS' INTERESTS, THE ALLVID PROPOSAL FAILS TO ACCOUNT FOR MVPDS' LEGITIMATE INTERESTS IN CONTROLLING THE LOOK AND FEEL OF THEIR OWN OFFERINGS.

The FCC bases its AllVid proposal on a false premise: that MVPD services today consist simply of streams of raw programming and guides to that programming, and perhaps some Video on Demand ("VoD") programs. But MVPDs' offerings are far more complex than this. They provide a range of integrated services, content, and capabilities with carefully tailored user interfaces, and MVPDs compete primarily on the basis of these highly individualized, proprietary "user experiences" that have been tailored to reflect *consumers'* interests. In its rush to promote the interests of manufacturers and their entry into the video marketplace, the AllVid proposal fails to accord any value whatsoever to MVPDs' legitimate interests in providing their integrated product offerings and user experience to subscribers regardless of the device used to display the service.

A. The AllVid Proposal Fails to Acknowledge MVPDs' Interests in Providing Their Subscribers with Their Own, Highly Developed and Unitary Service Offerings.

The NOI reflects the outdated view that MVPDs offer (and MVPD subscribers pay for) no more than the delivery of linear programming, VoD, and a basic electronic programming guide ("EPG"). Indeed, in the worldview advanced by the NOI, so long as a gateway device can

receive and pass through the programming signals and guide information an MVPD has amassed, the MVPD's and its subscribers' interests are satisfied, and no more is necessary. This view of today's MVPD marketplace is deeply skewed. It ignores the fact that MVPDs provide (and MVPD subscribers *expect*), a vast and growing array of complex offerings, including non-programming content, a variety of applications, and various user capabilities—all of which add up to a user experience that ranges far beyond simple selection and viewing of programming.

Yet because the NOI fails even to acknowledge this, its proposal affords MVPDs no protection for their ability to provide those highly complex offerings without interference by CE manufacturers—and never accounts for the fact that subscribers might want and have a right to receive such offerings from their MVPD. Instead, the NOI proposes to require MVPDs to provide their services as a stream of dis-integrated *components* that a manufacturer can unpack, repackage, slice, and overlay with its own material. And the NOI never even suggests that manufacturers would have any obligation to *also* offer customers the ability to access the MVPD's service *as designed and transmitted by the MVPD*. Thus, the AllVid proposal almost guarantees that manufacturers will be able to and will interfere with MVPDs' continued ability to provide subscribers with the MVPD's own attractive, integrated, and tailored offerings—offerings that subscribers expect and pay for. Said another way, the AllVid framework, at least as currently conceived, threatens to close off tomorrow's video marketplace to MVPDs—in the name of opening it to CE manufacturers. And as discussed elsewhere in these comments, there is neither a public interest justification nor statutory authority for the Commission to remake the MVPD market in this way.

Today's sophisticated MVPD services include not only video programming, but a whole host of other content. This ranges from commercial-free music channels to the type of

sophisticated original non-video content that AT&T offers to its U-verse subscribers. For example, AT&T provided subscribers with information about athlete biographies, medal counts, schedules, and Olympic news in connection with the 2010 Winter Olympics[17] and again in connection with the World Cup—in five different languages.[18] U-verse also includes other "preloaded" content such as family games and other non-programming entertainment.[19] MVPD services like AT&T's also incorporate a variety of online applications and content. For example, the interactive U-verse TV U-bar application enables a customer to access information about weather, traffic, or sports scores, as well as the ability to track her investment portfolio—all while watching her favorite program.[20] MVPD services also offer access to Facebook and other social networking sites.[21] And today's MVPD services typically include applications that permit subscribers to share music and photos[22] and view Caller ID or voicemail notifications while watching television.[23]

Finally, AT&T (like many other MVPDs) offers a highly customized electronic programming guide that is not simply a compilation of information about times and channels, but

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[17] AT&T, Press Release, *AT&T Brings Fans Interactive NBC Universal Coverage from Vancouver with Olympic Games Multiview App on U-verse TV* (Feb. 10, 2010), http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30496.

[18] AT&T, U-verse, http://www.att.com/u-verse/explore/default.jsp#/initialScene=IPTV (select "Explore," "Television," "Features," and then "Seasonal Apps").

[19] *Id.* (select "Interactive Apps" under "Features" and then "AT&T Yahoo! Games").

[20] *Id.* (select "Interactive Apps" under "Features" and then "U-Bar").

[21] *See* Verizon, FiOS TV, http://www22.verizon.com/Residential/FiOSTV/Overview.htm#features (select "Features").

[22] AT&T, U-verse, http://www.att.com/u-verse/explore/default.jsp#/initialScene=IPTV (select "Explore," "Television," "Features," "Interactive Apps," and then "Photos and Music").

[23] *Id.* (select "U-verse Voice on TV" under "Features").

also offers programming video within the guide itself,[24] and reflects AT&T's decisions regarding appropriate channel assignment and "neighborhooding" of various types of content. MVPDs also offer search capabilities that facilitate sophisticated searches within linear and VoD programming by program type[25] or actor name.[26] MVPD services today also include various interactive user functionalities, such as the ability to change viewing angles on programming, watch multiple programming streams at once with picture-in-picture capabilities,[27] restart a program in progress, view video clips of favorite programs, and record programming, sometimes remotely.

As an integrated whole, these arrangements of content and applications, together with MVPDs' proprietary user interfaces and visual displays, give each MVPD service its own distinctive "look and feel." And the resulting user experience is a key competitive differentiator for MVPDs and an important part of how MVPDs market to and retain their subscribers. Indeed, MVPDs would not expend the time and effort to develop these various functionalities if they were not demanded and valued by consumers, and thus a key feature in how MVPDs attract and retain subscribers. In addition, because MVPDs design their services as a collective offering, their business case reflects expected revenues not just from the basic subscription fee, but from

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[24] AT&T, MediaKit: AT&T U-verse, http://www.att.com/gen/press-room?pid=5838 (go to "Video" on the side bar, select "AT&T U-verse Overview" under "U-verse TV," then select "U-browse" under U-verse Demo) (demonstrating picture-in-picture window show previews).

[25] Verizon, FiOS TV, http://www22.verizon.com/Residential/FiOSTV/Overview.htm#using (select "Using FiOS").

[26] AT&T, U-verse, http://www.att.com/u-verse/explore/default.jsp#/initialScene=IPTV (select "Explore," "Television," "Features," and then "Advanced Search").

[27] AT&T, for example, has just launched the ability for subscribers to create their own, customized "Multiview" or "mosaic" of channels they mark as their "favorites." *See* AT&T, U-Verse, http://www.att.com/u-verse/explore/feature-landing.jsp (select "Explore," "Television," and then "Feature Overview").

subscribers' use of various value-added services such as VoD or pay-per-view, and from advertising that may be provided in connection with various types of programming content, programming guides, and other applications and capabilities.

Yet, the NOI contains no discussion whatsoever of the importance of protecting MVPDs' ability to continue providing their integrated, unitary service offerings to subscribers, or of subscribers' interests in maintaining access to the full "user experience" of those offerings. Instead, as noted, the NOI conceives of MVPDs as passive conduits for programming delivery, and thus perceives no value in their offerings or legitimacy in their interests beyond mere transmission of their signals into the household. As a result, the Commission's proposed interoperability "solution" contains no assurance that manufacturers will ever pass through the unitary service the MVPD designs, packages, markets, and sells to its subscribers. It is focused solely on ensuring that *manufacturers* can get access to an MVPD's service "components" so that a manufacturer can remake that service according to its own design.

For example, the NOI proposes to require MVPDs to present their content in a manner that allows CE manufacturers to disassemble and reuse it in any way a manufacturer chooses, which presumably could include omitting some components altogether, altering others, or combining the MVPD's content with third party content of the manufacturer's choice. *See* NOI ¶¶ 17, 22, 30, 42. The NOI seems entirely unconcerned that one possible result of this requirement is that a subscriber might never get to see or experience the service as designed by that subscriber's MVPD. Likewise, the NOI suggests that MVPDs be required to "provide programming guide data . . . in a form that would allow competitive devices to display the data as they wish[,]" or to "manipulat[e] the channel guide" and "provid[e] new user interfaces." *Id.* ¶¶ 44, 17. Again, the Commission seems perfectly comfortable with the notion that a CE

manufacturer could offer its own programming guide *in place* of the MVPD's guide—notwithstanding that this would alter and could even degrade the MVPD's own service. And finally, the NOI can be read to suggest that a CE manufacturer would be free to separate out the MVPD's programming from the MVPD's additional offerings—such as special non-programming content, widgets or applications, or picture-in-picture capabilities—and suppress some or all of those in favor of the manufacturer's *own* offerings.

In short, the rules contemplated by the NOI would do precisely what some CE manufacturers have always hoped: They would turn MVPDs' complex, integrated offerings into the raw material for CE manufacturers' own service offerings. That immodest proposal is designed to ensure that CE manufacturers can offer a host of new, state-of-the-art video services, replete with integrated Internet content and applications and supported by a fully populated, up-to-date electronic programming guide. But MVPDs today provide the precise same services, in satisfaction of their own customers' demands. It is one thing for the Commission to empower CE manufacturers to join that market, to the extent that is within the bounds of its authority. But it is quite another for the Commission to tip the market entirely in favor of manufacturers by (1) forcing MVPDs to subsidize their service and then (2) permitting those same manufacturers to then block, distort, or degrade the MVPDs' services in favor of their own.

B. The AllVid Proposal Would Put MVPDs in a Worse Position Than Over-the-Top Programming Distributors in Terms of Controlling the Look and Feel of Their Own Offerings.

As noted above, CE manufacturers have been developing and deploying a range of new Internet-based televisions and other home video devices that can display a range of OTT video and other Internet content. And yet they have done so—and done so successfully—without any type of free-ranging prerogative to transform and recast the offerings their devices access from

these OTT content providers. For example, as NCTA explained in its NBP workshop comments, the manufacturers of TiVo, Xbox 360, and Blu-ray players (among others) offer customers the ability to accesses the content offerings of various online providers, such as NetFlix, Amazon, or Blockbuster. *NCTA NBP # 27 Comments* at 10-11. When they do so, they do not treat those providers' content offerings as individual components that can be sliced and diced and remade into the manufacturer's own offering—because those content providers impose contractual limitations on their ability to do so. *Id.* at 11-12, 21.

For example, the Netflix Developer guidelines ensure that a TiVo customer is not enabled to select or view a Netflix offering through the TiVo "interface."[28] Instead, as NCTA explains, "the consumer entering TiVo's Netflix-branded service will enter the Netflix library courtesy of a direct Netflix account . . . . At the highest level of navigation, the user is presented with a user interface dictated by TiVo, but once the user enters the Netflix content area . . . the Netflix user interface guidelines are implemented to govern access to the 'walled' Netflix VOD library, which is separated from TiVo's and other VOD libraries." *NCTA NBP # 27 Comments* at 11-12. Specifically, when a TiVo user selects the "Netflix" option from the TiVo menu, she is taken to her Netflix account's "Instant Queue," which presents the Netflix-generated display, user-interface, and branding.[29]

By the same token, absent specific contractual agreement, Netflix, Amazon, Blockbuster and others do not "turn their [content] catalogues into an aggregated TiVo VOD library," and

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[28] *See* Netflix, *Welcome to the Netflix Developer Network*, http://developer.netflix.com/page (explaining that non-Netflix branded applications "[m]ay not play Netflix movies inline, but may launch our stand-alone player when a member hits the Play button").

[29] *See* TiVo, *Instantly watch movies & TV episodes from Netflix on your TiVo® box*, http://www.tivo.com/mytivo/product-features/on-demand/watch-netflix/index.html.

their "titles do not show up in the TiVo grid guide." *NCTA NBP # 27 Comments* at 12, 21. And while advanced devices may offer the capability to search among different OTT content offerings, they reflect the different programming sources from which the programming may be accessed—and the actual content itself is provided through the source user interface, as explained above. In other words, CE manufacturers have managed to develop and offer successful, cutting edge devices notwithstanding that they are often contractually required to present each of their underlying OTT providers' offerings as a unified whole, and notwithstanding that these OTT providers do not necessarily turn over a catalogue listing of their content for inclusion in the manufacturer's guide or navigator.

Online video distributors today protect their user interfaces and the "look and feel" of their programming in other ways, as well. These OTT providers often restrict the manner in which MVPDs (or broadband providers) (and presumably CE manufacturers as well) distribute their content. For example, certain online video providers will allow a broadband provider to feature their content for use on a PC, but restrict the broadband provider's right to offer that same content over an MVPD service, for display over a television set; AT&T's own content agreements contain many such "platform" limitations. OTT distributors may seek to control the way their content is displayed on television sets and other non-PC display devices because they hope to offer more enhanced versions of their service for that medium; they may not want a broadband provider/MVPD to display a lower resolution or version with a different aspect ratio on a television set, as this may reflect badly on the OTT service. In the commercial marketplace, they can and do insist on the right to carefully control the way their service is displayed in order to control the user experience and their own branding and reputation.

Any solution that the Commission mandates for interoperable CE devices must similarly respect MVPDs' interest in controlling the quality, branding, and interface of their own services, and ensuring that their subscribers receive the user experience the MVPD has designed and the subscriber has a right to expect.[30] To be clear, the concern is not with CE manufacturers enabling *additional* services and content to be displayed alongside the MVPD's service over the same device. And as AT&T described above, there are home networking and interoperability models in development that can support those CE capabilities while still offering the MVPD's service as an integrated whole with its intended user interface. The Commission need not discard or disregard MVPD interests in their own unitary programming offerings—or subscribers' interest in receiving those offerings—in order to advance the capabilities and competitiveness of the CE marketplace. And it *cannot* do so if it is sincere in its desire to "allow MVPDs to continue unfettered innovation in video delivery" and "to develop and introduce innovative services[.]" NOI ¶¶ 17, 23.

III. THE FCC'S ALLVID PROPOSAL WOULD ADVERSELY AFFECT THE PERFORMANCE OF TODAY'S MVPD SYSTEMS AND FAILS TO RECOGNIZE THE DIFFICULTIES CREATED BY THE NEED TO RESPECT PROGRAMMERS' RIGHTS.

The AllVid proposal is problematic from another perspective as well. The complete disintermediation it proposes could make it impossible for MVPDs to provide some services to consumers or interfere with the technical quality of those services. It also would interfere with MVPDs' ability to provide subscribers with the customer support they expect and need, and would leave consumers with a frustrating and uncertain path to resolve service and equipment

[30] The Commission has allowed content owners in some circumstances to require that MVPDs provide selectable output controls, recognizing the importance of allowing content owners the right to control distribution. *See* Memorandum Opinion and Order, *Motion Picture Ass'n of America*, DA 10-795, at ¶¶ 1-2, 7 (May 7, 2010). Yet its AllVid proposal would ignore MVPDs' similar interest in controlling distribution—and could even undermine MVPDs' ability to honor the content providers' output control requirements.

problems. Further, the proposed AllVid framework would raise serious DRM questions that are not readily resolved.

A. The AllVid Proposal Could Interfere With the Delivery of Advanced Services to Consumers.

The variety of innovative services offered to subscribers is continually changing and expanding. Today, that rich mix of services depends on close integration between the MVPD, the STB manufacturer, and the suppliers of software for the STB—particularly in the case of interactive, bi-directional services like AT&T's IPTV service.[31] Each STB must be populated with the intelligence to discover and display the programming options available to consumers and to ensure that programming is displayed promptly and correctly. In today's environment of advanced MVPD services, the STB also must be able to decode, support, and display special offerings, such as the program-specific additional content AT&T offers subscribers in connection with certain programming, or new applications or capabilities that are developed over time (like 3D programming). The STB also acts as a platform to run local MVPD applications such as digital video recorder ("DVR") functions, the EPG, local ads, program notifications and widgets for weather, sports, and games. In sum, a significant amount of the "user experience" relies on the software that runs on the STB.

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[31] As AT&T previously has explained, unlike legacy cable systems (which were designed to operate as one-way, passive distribution systems that broadcast their entire content stream to all subscribers over coaxial cable), AT&T's U-verse service employs an IP-based, interactive client-server architecture that requires constant communication between a subscriber's CPE and the network in order to transmit the specific programming or other content the subscriber selects (and only that content) at a particular time, together with encryption keys necessary to decrypt that content. Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, PP Docket No. 00-67, at 3 (filed Nov. 16, 2007). That architecture requires multiple, distributed server groups (including authentication servers, operational and business support servers, media acquisition servers, and media delivery servers) to work together with client devices at the subscriber's premises, linked through common software and middleware (which must regularly be updated) that resides both in the network and on client devices, to provide subscribers access to the content they want. *Id.*

Today, MVPDs are easily able to add new services, applications and widgets, and otherwise enrich the user experience over time, because they can download new information and applications from the network directly to the STB, which is loaded with the MVPD's proprietary software. Further, the MVPD can upgrade that software directly via the network connection to the extent necessary to support new innovations. But, by separating the STB from the gateway device, the AllVid proposal could seriously interfere with this process. Of necessity, the software in consumer devices will be designed based on static (or at least slow-moving) standards.[32] Some devices therefore may not be able to receive/decode new or updated services or capabilities. The *gateway* will receive and be able to decode these new applications or functionalities, but there may be no way for those functions to be passed across the AllVid interface.[33]

We discuss further below the risk that "freezing standards in time" could actually deter innovation altogether—a risk Sony Pictures and the Motion Picture Association of America ("MPAA") also stressed in a recent letter to the Commission.[34] But the risk we highlight here is that consumer equipment will simply be unable to support such innovation, thereby depriving AT&T (and other MVPD) subscribers of new developments and innovations—or forcing consumers to constantly upgrade their equipment with patches and other kluge-y solutions from

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[32] Even if the standard is updated regularly, consumer equipment will quickly become outdated because it generally has at least a multi-year lifecycle, whereas today, MVPDs may update their software to support new services, upgrades, or developments several times a year.

[33] Of course, even if there *is* a technical means for an MVPD to transmit new applications or services, there will no longer be any way that the MVPD can ensure that the STB *will* display these new functions.

[34] *See* Letter from Alicia W. Smith, Smith-Free Group, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, at 2 (filed July 1, 2010) ("*Sony Pictures Letter*").

their CE manufacturer—or new, expensive devices. Both results would interfere with today's more streamlined experience and harm consumer interests.[35]

Replacing the MVPD-managed STB with un-managed CE devices also could lead to significant and problematic resource conflicts, as the NOI acknowledges. *See* NOI ¶ 33. The way in which AT&T's U-verse service operates today provides an illustrative example of the potential problems. AT&T's U-verse Network Middleware integrates directly with U-verse STBs to limit the number of high definition, standard definition, and picture-in-picture signals used by the STB for the "local area network" (*i.e.*, in the consumer's home) at any given time, in order to maintain optimal overall service quality for the subscriber. To do this, U-verse service is designed so that the STB will reject a user command that would cause the service to exceed a certain number of high-definition ("HD") channels at any one time (or it will suggest an alternative less resource-intensive signal); this ensures that that the signal quality remains at an acceptable level for *all* channels.

Under the AllVid approach, however, AT&T could not prevent the STB or other consumer devices from demanding network resources in a manner that overrides these limitations and, in so doing, seriously degrades the quality of the service. For example, an AllVid-authorized consumer retail device could theoretically demand several HD channels at once. Without a network-STB handshake, there is (at least today) no way that the MVPD could mediate the different demands for service and reject or modify some, the way the U-verse STB does today (by sending the consumer a message that he or she had met their limit on

[35] Further, the MVPD may not even know that its subscriber is not receiving some of the service functionalities, since there will be no "handshake" between the STB and the network the way there is today.

simultaneous HD channels, for example). The result could be reductions in quality of all signals or even interruptions to programs, and seriously degraded service for the consumer.[36]

Other concerns such as these could arise as well. For example, today AT&T offers its subscribers the ability to impose parental controls on content and limit the use of certain applications—but this capability is controlled via the set top box. If a manufacturer provided different capabilities of its own in place of those AT&T offers, the consumer would not receive the benefit of AT&T's intended service—in a manner that could affect quality and the user experience. AT&T also relies on the handshake between the network and the STB to provide emergency alerts. These are generated in the network and displayed as an overlay by the STB. Without control over the STB, the MVPD can only ensure that the alert signal is transmitted; it can no longer ensure that the alert is *displayed* to the subscriber. Even if the common standard ensured that the consumer device could receive and decode the alert, the CE device could be configured to ignore those alerts or it could offer the customer the ability to override the display of alerts. A subscriber therefore might not receive an alert transmitted by its MVPD, without necessarily knowing or understanding why. A similar problem could arise with respect to the provision of closed captioning and video description, because AT&T's provision of these services requires interaction between the network and software resident on the STB.

Some of these concerns might be addressed, over time, through re-engineering of MVPDs' networks and services. But the cost would be significant and the process time-consuming. And these costs would be passed on to consumers in the form of increased service

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[36] The potential for signal degradation could also interfere with FCC rules and retransmission consent and other program carriage agreements barring degradation of certain signals by MVPDs. Under the AllVid proposal, the MVPD would have no ability to preclude such degradation if a retail device does not receive or transmit a signal properly or if resource conflicts interfere with service quality. Subscribers and content providers may be frustrated, yet the MVPD would be unable to resolve their complaints.

rates and/or less content and fewer innovative new services. Further, as noted above, other Commission priorities such as broadband deployment could suffer in pursuit of this one. In effect, then, the AllVid proposal asks both MVPDs and consumers to subsidize a new line of business for CE manufacturers—one that would not necessarily provide consumers with any improvement in the ultimate quality of their services, and might in fact degrade that service.

The proposal could also lead to serious customer service problems. If problems such as those described above arise, the subscriber will have no way of knowing whether those problems are caused by the MVPD, by the subscriber's equipment, or by the interface between them. The MVPD might not necessarily even know a problem with its service exists unless a subscriber complains, which means the MVPD cannot proactively fix the issue, as it often does today.[37] Worse, improving the subscriber's service may be entirely beyond the control of the MVPD. Issues may arise on the subscriber's CE equipment over which the MVPD has no control at all. On the other hand, CE-manufacturers typically have only a brief warranty-period relationship with their customers, and they do not have extensive ongoing customer support and customer service capabilities. They are unlikely to have the structures in place to help subscribers troubleshoot or reconfigure equipment to improve their service.

This is likely to be extremely frustrating to a subscriber. It is also likely to result in significantly increased customer service costs and burdens for MVPDs, who *do* have ongoing service relationships with their subscribers. MVPDs will almost certainly be the first point of contact for a confused or unhappy consumer whose service is not performing as expected, and to support their subscribers, MVPDs likely will strive to fill the AllVid support gap with whatever

[37] If the problem is that the manufacturer has blocked some element of the MVPD's offering, even the subscriber might not be aware that something is awry.

information they can develop and offer to consumers.[38] But even if they do, they never will be able to offer the same quality of service and support as they do today. The result for consumers is likely to be degraded service and support; it is likely to be burdensome and expensive for MVPDs (not to mention damaging to their brands), and that expense will ultimately lead to higher costs for consumers, as well.

Thus, the AllVid proposal would put at risk the quality of services that are the product of enormous MVPD investments, while raising consumers' costs; it would put the onus on consumers of ascertaining which equipment will actually allow them to receive the services to which they subscribe (or figuring out why their service is not as it should be); and it would leave consumers without effective recourse when they do discover a problem.

B. The NOI Does Not Adequately Address DRM Issues.

The AllVid framework would adversely affect the performance of AT&T's U-verse service and other MVPD services in another, even more fundamental, respect. The universal gateway and home networking concepts depend on the ability of the gateway to pass content to different, independently-manufactured devices. Content providers must be assured that their content will be protected regardless of the device to which it is transmitted and on which it is received. Today, content owners negotiate with an MVPD regarding the extent to which

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[38] Customers' frustration with the Google Nexus One provides an illustrative example. As the New York Times reported soon after the launch of the fully "disintermediated" Nexus One, "[t]he phone presents a puzzle for users . . . : Who do you call when you have a problem?" Customers had no way to know whether to call HTC, the phone's manufacturer, T-Mobile, the network provider underlying most Nexus One service, or Google itself—and when they called Google, there was initially no infrastructure for telephone support or customer care. A common refrain was that Google was "leaving troubleshooting up to the customer[.]" While T-Mobile sales representatives tried to "help customers with some questions" based on what they knew about "the family of Android-powered devices," they were not selling the device themselves and were not ultimately responsible. Jenna Wortham & Miguel Helft, *Hey Google, Anybody Home?*, N.Y. Times, Jan. 12, 2010, http://www.nytimes.com/2010/01/13/technology/companies/13google.html?pagewanted=all.

copying, redistribution, reformatting, or other manipulation of their content will be permitted, and on the DRM measures that will be used to effectuate the agreed-upon limitations.[39] An MVPD can commit to such controls for any link in the chain it "controls" directly or through contractual or licensing arrangements. Under the AllVid framework, however, that chain stops at the gateway device. The Commission's proposal thus raises a significant question concerning how content owners can be assured that their digital rights are adequately protected over independently managed links in a home networking chain.

In the NOI, the Commission suggests that digital transmission content protection over Internet protocol ("DTCP-IP") "would be a logical choice for content encryption and device authentication." NOI ¶ 28. This conclusion is premised on the fact that "both MPAA and CableLabs have approved [DTCP-IP] as an acceptable method of content encryption to prevent content theft, and it is the content protection scheme used in the Digital Living Network Alliance ('DLNA') standard." *Id.* But the former statement does not follow from the latter. DTCP-IP has been adopted by DLNA, solely for purposes of *link protection*—a concept that has no connection with ensuring DRM or even ensuring interoperability between DRM-enabled devices.

Link protection refers to methods used to protect content while it is in transit on a data transfer link between a source device and a display device.[40] The use of link protection prevents

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[39] H. Newton, ed., Newton's Telecom Dictionary, 25th Anniversary Ed., at 370 (2009). *See also* Wikipedia, Digital Rights Management, http://en.wikipedia.org/wiki/Digital_rights_management.

[40] Digital Rights Management and Content Protection – DLNA, http://www.dlna.org/industry/why_dlna/key_components /drm/ (noting that the DLNA Content Protection Committee completed its link protection guideline work in March 2006, and only now is working on developing DLNA DRM interoperability guidelines).

an unauthorized party from "tapping into" or copying a signal during that transmission.[41] In contrast, DRM measures involve protection via access control technologies that can dictate the authorized uses of digital content by recipients of that content *once it has arrived at the destination receiver equipment*. In other words, link management may protect content from being stolen during transmission over an IP-enabled link, but it is not sufficient to ensure that the content is protected thereafter. Thus, the fact that DLNA has adopted DTCP-IP as a standard for link protection is irrelevant for DRM purposes; indeed, the DLNA Guidelines do not even purport to provide a DRM solution. They provide specifically that a DLNA device must support DTCP-IP, and may support WMDRM-ND, *for link protection*.[42]

One of the key problems with the AllVid concept arises precisely *because* DTCP-IP is only a link protection standard and not a DRM interoperability mechanism. Today, content owners and manufacturers use a variety of different DRM technologies and mechanisms to

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[41] *See, e.g.*, Kevin Aruda, *Link Protection in DLNA*, at 2 (2008), http://www.lampreynetworks.com/assets/documents/Link-Protection-In-DLNA.pdf; Digital Rights Management and Content Protection – DLNA, *supra* note 40. Source devices include such things as a digital media controller ("DMC"), a digital media server ("DMS"), and a digital media player ("DMP"). A DMC is a DLNA device class that is used to find content exposed by a DMS and match it to the rendering capacities of a DMR (or digital media renderer) and set up connections between the DMS and DMR. A DMS is a DLNA device class used to expose and distribute content throughout the home. A DMP is a DLNA device class used to find content exposed by a DMS and to render the content locally. Display devices include such things as a DMR, which is a DLNA device class used to render content it receives after being setup by another network entity. *See* Digital Rights Management and Content Protection – DLNA, *supra* note 40; DLNA Interoperability Guidelines – Architecture and Protocols Volume, at 3.1 Definition of Acronyms, http://www.dlna.org/industry/certification/guidelines/DLNA_Glossary_of_Acronyms_and_Terms.pdf.

[42] *See* Digital Rights Management and Content Protection – DLNA, *supra* note 40. WMDRM-ND is "Windows Media DRM for Network Devices." DLNA Interoperability Guidelines – Architecture and Protocols Volume, at 3.1 Definition of Acronyms, http://www.dlna.org/industry/certification/guidelines/DLNA_Glossary_of_Acronyms_and_Terms.pdf.

secure their content.[43] Within a closed environment, the content owner can ensure that all devices use the same DRM. But a content owner that allows its content to be transmitted to an independent, third party device has no assurance that the new device will be compatible with the DRM chosen by the content provider. If it is not, the content may lose its protections once it is transferred to that device.

To address DRM today, AT&T's content agreements require that all protected content must be DRM protected when stored in the DVR. With only DTCP-IP in the AllVid model, AT&T would be required to set the server DTCP-IP copy protection to "*copy never*,"[44] since the DVR function (in the third-party CE device) would be out of AT&T's control. As a consequence, the CE device downstream from the envisioned AllVid gateway would be *unable* to record any protected content: The AllVid device would pass the content to that consumer device using a DTCP-IP protected link (the NOI proposes to use an Ethernet connection, NOI ¶ 26), with protected content marked "copy never," and that coding would disable any type of DVR function, and might even prevent further distribution within a subscriber's home.

In other words, incorporating DLNA's DTCP-IP standard into the AllVid framework may ensure that content is protected during transmission—but it will undermine consumers' ability to record and playback content on their set top boxes or other consumer devices. It could hinder rather than advance home networking. And rather than give independent manufacturers a

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[43] Digital Rights Management and Content Protection – DLNA, *supra* note 40; DLNA for HD Video Streaming in Home Networking Environments, at 1-3, http://www.dlna.org/about_us/roadmap/DLNA_Whitepaper.pdf ("*DLNA for HD Video Streaming in Home Networking Environments White Paper*").

[44] *See DLNA for HD Video Streaming in Home Networking Environments White Paper* at 5 (noting that, because DLNA has only implemented guidelines on link protection, and has not reached agreement on DRM interoperability, "consumers are currently not able to copy protected content").

leg up, it could end up promoting the devices of the MVPDs who deal directly with the content owners, since content owners are most likely to get the reassurances they need through direct dealings that permit agreement on acceptable technological measures. Indeed, there might be no solution other than moving the recording functionality to the gateway device.

A successful home networking solution will ultimately depend upon development of a common DRM technique—or, given the proliferation of DRM techniques in use today,[45] a DRM *interoperability* standard designed to facilitate the flow of content from a source to a variety of independent destination devices without loss of protection.[46] In other words, a mechanism is required to ensure that content protected using the source DRM can be transformed into content protected using the destination DRM and still respecting all usage rights and limitations established by the content owner.[47]

As Sony Pictures and the MPAA recently told Commission staff, this type of assurance will be critical to the development of a "rich experience" that includes "delivery of and remote access to digital content from a variety of platforms to a variety of devices." *Sony Pictures Letter* at 2. They explained that "HD content is [now] readily available to the consumer, *because the distribution platforms adequately protect content against copying and redistribution*." *Id.* (emphasis added). But as they noted, in the DRM/home networking context, achieving those same assurances "is very complex." *Id.* Indeed, to date, DLNA has not completed work on a DRM interoperability mechanism, because content owners have not collectively agreed on an approach for achieving interoperability, and because developing and implementing any such

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[45] Digital Rights Management and Content Protection – DLNA, *supra* note 40; *DLNA for HD Video Streaming in Home Networking Environments White Paper* at 5.

[46] Digital Rights Management and Content Protection – DLNA, *supra* note 40; *DLNA for HD Video Streaming in Home Networking Environments White Paper* at 5.

[47] Digital Rights Management and Content Protection – DLNA, *supra* note 40.

solution is an extremely complex process.[48] In Sony Picture's words, "[I]t will be necessary to resolve a range of issues before working on technological standards for an AllVid device[,]" including both content protection and the flexibility to allow for future innovation without "locking the marketplace out of new options." *Sony Pictures Letter* at 2.[49]

As much as it may wish to do so, the Commission cannot solve this complex technological challenge with a regulatory mandate. For one thing, as discussed above, and as Sony Pictures and MPAA explain in their letter, industry efforts to resolve DRM and home networking concerns already are underway. The Commission's involvement in these efforts might help move the process forward, but it cannot simply wave aside genuine technological challenges and DRM concerns to achieve an artificial December 2012 deadline. *See* NOI ¶ 37. Further, as we discuss below, the D.C. Circuit made clear in *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), that the Commission lacks authority to dictate standards for DRM in video equipment. And finally, no Commission-dictated standard will be of any use unless it satisfies content owners—the essential DRM stakeholders. Any solution that does not involve the participation and consent of content owners risks reducing the flow of content to the detriment of *all* stakeholders, and consumers in particular. And premature deployment of an AllVid framework that does *not* solve these problems will strip consumer equipment of

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[48] Digital Rights Management and Content Protection – DLNA, *supra* note 40; *DLNA for HD Video Streaming in Home Networking Environments White Paper*.

[49] Indeed, the industry has been evolving toward a highly nuanced approach to content protection that would rely on specifications that distinguish the levels of trust based on factors such as the identity of the recipient (*e.g.* the Levels of Identity Assurance concepts from the OIX) and/or the security of the execution environment through which the content is presented. *See, e.g.*, IPTV Security Solutions Committee, Alliance for Telecommunication Industry Solutions IPTV Interoperability Forum, *ATIS-0800024, Security Robustness Rules Interoperability Specification* (Mar. 17, 2009). The single, undifferentiated approach that would presumably be required as part of the AllVid standard would not accommodate these developments, to the detriment of content owners and, in turn, consumers.

important capabilities such as recording and time-shifting and ultimately undermine rather than advance the goal of a rich home networking environment.

IV. MANDATING THE ALLVID APPROACH COULD HINDER INNOVATION RATHER THAN ADVANCE IT.

The Commission posits that the AllVid proposal would "spur investment and innovation, increase consumer choice, [and] allow unfettered innovation in MVPD delivery platforms." NOI ¶ 1. But a requirement that the AllVid gateway device conform to a fixed standard would have precisely the opposite effect. As discussed above, and as others have pointed out to the Commission in the past, the mandatory standardization envisioned by the FCC would freeze today's MVPD services in time, deterring or at least slowing future innovation, and depriving consumers of the benefits of the fast-paced change and development they enjoy today.[50]

The NOI points to the Commission's experience with the public switched telephone network ("PSTN") as a basis for its prediction that establishing a standardized interface for consumer devices to interconnect with MVPD networks through the gateway device will result in the creation of innovative products. NOI ¶¶ 18-19. The analogy is inapt. To begin with, legacy PSTN service did not change dramatically over the years. And consumer video equipment has evolved more in the past few years *without* a standardized interface than customer premises equipment ("CPE") did in the legacy PSTN world. Even in the broadband world—the Commission's alternative analogy, *id.* ¶¶ 18, 20, 22—innovation has been as robust as it is

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[50] *See, e.g.*, *NCTA NBP # 27 Comments* at iii-v, 21-22; Comments of the National Cable & Telecommunications Association, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, at 39-46 (Aug. 24, 2007); Comments of Time Warner Cable Inc., *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, at 30-34 (Aug. 24, 2007).

because the networks use a common protocol that facilitates the development of *applications* as much as devices.

But in any event, MVPD networks are not like the PSTN or the Internet, both of which developed from the start as common networks (the PSTN because it was commonly owned, the Internet because it was developed precisely to be a system that could communicate with disparate networks and computers using a common language). MVPD systems developed from the start as proprietary networks, and they do not use (and were never required to use) a common protocol or any other standard "language" or technology. Even where the basic technology is the same—for example, two IPTV systems or two standard cable systems—there may be significant differences, which simply reflect the independent way in which the systems were developed. And those differences go beyond the use of different codes for the same functions; different MVPDs deploy services from different places on their networks, for example, and use different tools to allocate network resources. Imposing standardization after the fact in order to develop a common interconnection interface is a far more daunting and costly task than requiring the PSTN, already-standardized network, to publish interconnection standards. The Commission should already understand this based on the difficulties it has faced in developing a common and separate security function just for all coaxial cable systems that could be used without restricting service offerings or capabilities.

The problems in relying on standardization where networks have developed independently are evident in the commercial mobile radio service ("CMRS") context, as AT&T has already explained in its comments on the Commission's net neutrality proposal.[51] A global

[51] Reply Comments of AT&T Inc., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 86-92 (Apr. 26, 2010) (explaining

system for mobile communications ("GSM") provider, for example, may be able to support any unlocked GSM-compliant device—but unless that device has been integrated with the particular provider's network, many of the proprietary capabilities of that network will not be supportable on the device. This is because the GSM standard does not account for many of the more advanced aspects of today's wireless networks—and accordingly, proposals for comprehensive standardization would force a "dumbing down" of networks and undermine the incredible innovation that characterizes the CMRS space. *See id.*

The same system-specific, non-standardized innovation characterizes the MVPD marketplace today. As little as a decade ago, there was little or no digital MVPD service, little or no HD programming, no DVR capability either at the set-top or on the network, little or no integration of MVPD and broadband service, no ability to control a subscriber's system remotely, no integration of television and telephone service, and no 3D video. Yet today, such features are either commonplace or are poised to begin spreading across two-way digital MVPD systems. Other new services, such as the targeted additional content U-verse provides to supplement some programming, are constantly being developed and provided to MVPD subscribers.

The AllVid proposal to institute a standardized gateway device risks slowing (if not freezing) such innovation. For one thing, MVPDs today can introduce new services easily because they can test them on a system-wide basis, all the way to the end-user, and confirm that the "look and feel" and performance of the service operates in a satisfactory manner. Where the MVPD has no direct relationships that extend past the gateway, it will be more difficult to evaluate the performance of a new capability—and more difficult to confirm that subscribers will

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that, given disparate existing networks and technologies, standardization across all devices cannot succeed and would hamper functionality).

appreciate the improvement enough to merit the MVPD's investment. Indeed, as noted above, under the Commission's proposed approach, MVPDs will not even have any assurance that the CE manufacturer will choose to support the new application or capability at *all*—which could itself hinder MVPD investment in new services.[52]

The proposal could slow innovation for the reason discussed above: the AllVid interface mandate will reflect MVPD offerings at a fixed point in time.[53] MVPDs will only be able to introduce *new* services if they can squeeze them into a format that allows their delivery across the standardized interface.[54] As the Commission has observed, adopting rules to govern the interconnection of devices to MVPD networks "is perilous because regulations have the potential to stifle growth, innovation, and technical developments when consumer demands, business

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[52] NCTA points out similar concerns in the CableCard context, noting that the absence of mandatory standards on the consumer equipment side leaves MVPDs with the risk that manufacturers will not respond to (*i.e.* pass through) all inputs from an MVPD even if those inputs are carefully crafted to conform to the interface standard—imposing significant cost on MVPDs for no reason, and also further depriving MVPDs of the ability to provide their customers with the service to which they have subscribed. *See* Reply Comments of the National Cable & Telecommunications Association on Fourth Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, at 18-23 (June 28, 2010).

[53] Given the large range of MVPD technologies, it will be difficult to define a common standard that successfully encompasses *all* MVPD capabilities today. And even as the standard is being developed, MVPD services will continue to evolve—so that any standard will be out-of-date by the time it is in place. *See id.* at 18 ("[I]t is impossible to create a list of specific interfaces that will not be already out of date by the time it is published in the Federal Register."). Indeed, this is always a risk when the Commission seeks to involve itself in standard-setting, because the Commission simply cannot react as quickly and as flexibly as the industry itself, and it will never have access to the full universe of information available to the industry stakeholders that are immersed in fast-paced technological development and ongoing research into new innovations.

[54] *See* Comments of the Digital Living Network Alliance, *Video Device Innovation NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, MB Docket No. 97-80, ¶ D.2 (Dec. 21, 2009) (noting that all new services would have to be translated into a format that the consumer device understands and can display).

plans, and technologies remain unknown, unformed or incomplete."[55] Sony Pictures and MPAA stress this precise concern in their recent letter.[56] Innovative services from MVPDs will be, at best, delayed while they are adapted to the single standard (or delayed even further while MVPDs and CE manufacturers consider amendments to the standard). The bigger risk is that the AllVid framework will simply bar innovations that cannot be made to work with the common standard. This is not a far-fetched concern. As NCTA pointed out in its NBP workshop comments, CE manufacturers—and the FCC Enforcement Bureau—at one point took the position that cable companies should be prohibited from deploying switched digital channels because these could not be received on the one-way receivers that some CE manufacturers already had deployed.[57] While the Commission subsequently reversed course,[58] the episode illustrates the risk that the AllVid framework could impede innovation in order to protect CE manufacturers—all at consumers' expense.

This problem might be addressed if AllVid consumer devices were designed to run MVPD-supplied software and to accept upgrades to that software as necessary.[59] Historically,

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[55] Report and Order, *Implementation of Section 304 of The Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC No. 98-116, 13 FCC Rcd 14775, 14781-82 ¶¶ 15-16 (1998) ("*First Report & Order*").

[56] *Sony Pictures Letter* at 2 (underscoring that "any standards would need to leave ample room and flexibility for innovation to address changing consumer interests").

[57] *NCTA NBP # 27 Comments* at 32 (citing *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14981 (2008), *et al.*).

[58] *Id.* (citing *Oceanic Time Warner Cable, a Subsidiary of Time Warner Cable, Inc.*, FCC 09-52, 48 CR 161 (June 26, 2009) and Second Report and Order, *Implementation of Section 304 of The Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6809 ¶ 30 (2005) ("*Second Report & Order*")).

[59] The tru2way standard functions in this way and allows cable MSOs to download and run their own software applications on the user's device. To receive tru2way certification, CE manufacturers must include an approved software execution environment in all devices. AT&T

however, CE manufacturers have resisted any requirement to configure their devices to enable upgrades or software updates, which could create an ongoing service relationship between the manufacturer and the consumer. The commercial negotiations to date are the best means of exploring and resolving this impasse, but it will require that the Commission make clear that it is not intending to guarantee manufacturers' interests at the expense of consumers and MVPDs' legitimate concerns.

If the Commission instead imposes a static regulatory mandate and blocks any innovation that is not readily accommodated by that regulation, it will dumb down and freeze MVPD networks. Had the Commission adopted that approach when Section 629 first became law, there would be no digital cable service, no 3D services, no IPTV services, no integration of broadband service and video, none of the new applications that MVPDs typically offer today. Instead, MVPD services would resemble forever what they were in 1996. And consumers will be no better off if the Commission freezes MVPD services in their 2010 mode than if those services had been frozen in 1996.

V. THE ALLVID PROPOSAL IS ALSO BEYOND THE COMMISSION'S AUTHORITY.

In paragraph 45 of the NOI, the Commission quite properly asks whether it has the authority to adopt its AllVid proposal and, in particular, to require MVPDs to disaggregate their program services. The short answer is that it does not.

A. The Commission Has No Statutory Authority to Adopt the AllVid Proposal.

As noted above, the D.C. Circuit has decisively rejected the notion that the Commission has any general authority to regulate CE devices. As the court held in *American Library Association*, 406 F.3d at 700, the Commission's "general jurisdictional grant does not encompass

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has explored this type of solution; the RUI approach offers a slightly different means of achieving a similar end.

the regulation of consumer electronics products that can be used for receipt of wire or radio communications when those devices are not engaged in the process of radio or wire transmission." Accordingly, the Commission cannot regulate such equipment *absent a grant of specific authority from Congress*. And while Section 629 of the Act grants the Commission some authority over set top boxes, the AllVid rule goes far beyond the bounds of that authority—and in so doing, fails for the same fundamental lack of jurisdiction the court found in *American Library*.

Like the broadcast flag rule addressed in *American Library*, the AllVid rule would not govern how programming is transmitted on MVPD systems; indeed, the Commission explicitly recognizes that these would remain subject to each MVPD's particular standards. NOI ¶ 17. Instead, the rule would govern how equipment provided by the MVPD must interact with and support third party devices in the home, *after* the MVPD's signal has been sent and received in the household. The Commission may only regulate such post-transmission CE equipment if it does so pursuant to specific statutory authority. But Section 629, the sole statutory authority on which the NOI rests, does not provide the Commission with the authority to mandate the variety of standards it proposes for the gateway device or that would have to be incorporated into compatible home networking equipment for this solution to work (*e.g.*, DRM standards).

Section 629, in relevant part, provides that the FCC shall "adopt regulations to ensure the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming." 47 U.S.C. § 549(a). On its face, and as the Commission previously has concluded, that provision supports rules that ensure that manufacturers can supply consumer equipment at retail for use in accessing a customer's video subscription service. But nothing about that language authorizes rules that

require MVPDs to provide a device that would ensure that *all* consumer equipment available at retail be able to access *all* services and programming from *every* MVPD. The plain language clearly suggests that the statute is satisfied (and the Commission's authority exhausted) if the equipment needed to access a particular MVPD's system can be manufactured and sold at retail.

To be sure, the Commission is due some deference in interpreting Section 629. But such deference is bounded by *American Library*'s reminder that the Communications Act does not provide the Commission with the same expansive authority over *equipment* as it does over *transmission services*. Thus, the Commission must cleave closely to the statute's language and its intent. To support the AllVid proposal under Section 629, the Commission would have to show that the *only* way it could ensure commercially available retail CE equipment would be to mandate that *every* MVPD service support every device. But that conclusion could not bear scrutiny even if the Commission had tried to support it—which it has not. There are millions of IPTV subscribers, and manufacturers clearly could justify production and marketing an IPTV-specific device; the same is true to an even greater degree with respect to direct broadcast satellite ("DBS") and traditional cable services. And while the Commission might believe that more interoperability is better than less, Section 629 is not a free roving mandate; once satisfied, the authority it grants is exhausted.

Nor is it plausible that consumer video devices could not be made "commercially available" unless every device has the ability to support home networking involving all MVPD content, provide independent electronic programming guides supported by the MVPD's own guide, integrate Internet content with MVPD programming, and offer a variety of other features. The Commission points to no empirical evidence suggesting that manufacturers cannot sell *video receivers* unless those devices *also* support this particular array of capabilities. The inclusion of

certain advanced capabilities may very well be part of the next generation of some consumer video equipment, but that is for the market to decide, not the Commission—a point emphasized by the fact that Congress dictated that the Commission sunset the Section 629 rules once the device market is competitive. *See* 47 U.S.C. § 549(e). Indeed, as the Commission has made clear in the past, Section 629 is designed "to make navigation devices commercially available, rather than to create a market for certain specific equipment."[60]

Even more important, nothing in Section 629 suggests that Congress intended to authorize the Commission to facilitate manufacturers' ability to compete with the services offered by MVPDs—programming guides, the inclusion of various video streams, the ability to answer the telephone or see caller ID over the television, and the like. Instead, the provision is designed to allow manufacturers to create retail devices that can access an *MVPD's* service. *Id.* § 549(a). Yet the Commission appears bent on enabling manufacturers to enter into the core *service* markets of the MVPDs themselves, becoming alternative sources of video and other services by cannibalizing parts of the MVPD's service and then adding their own. Again—that vision may in fact come to pass—and may already be coming to pass. But achieving it (and requiring MVPDs to support it) is well outside the discrete goals and authority of Section 629. In fact, the Commission already has concluded that it is not an appropriate exercise of its Section 629 authority to "force cable operators to develop and deploy new products and services in tandem with consumer electronics manufacturers" because that provision is not designed to ensure that "electronics manufacturers are positioned to deploy substantially similar products and services" as those MVPDs or other providers offer.[61] In short, Section 629 does not authorize

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60 *First Report & Order*, 13 FCC Rcd at 14784-85 ¶ 26.

61 *Second Report & Order*, 20 FCC Rcd at 6809 ¶ 30.

the Commission to require that MVPDs support device features that are designed to enable the *manufacturers'* services, rather than the MVPDs' service.[62]

The limitations on the Commission's authority are reinforced by Section 629(f), which provides that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before [the date of enactment of the Telecommunications Act of 1996]." 47 U.S.C. § 549(f). The only other statutory authority over MVPD equipment available to the Commission prior to and apart from Section 629 was Section 624A of the Act, 47 U.S.C. § 544a, a provision authorizing the Commission to oversee "compatibility between televisions and video cassette recorders and cable systems." In that provision, Congress made clear that its objectives "can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market." 47 U.S.C. § 544a(a)(4).[63]

Congress could not have been clearer: the mandate to ensure compatibility between the cable system and particular equipment was *not* to be interpreted by the Commission as an invitation to dictate support for particular features, functions, product and service options offered

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[62] Section 629 also does not authorize the Commission to dictate to manufacturers what DRM methodologies they must use in their consumer equipment (or, for that matter, what DRM methodologies MVPDs and content owners must use to protect content), which is even further removed from the transmission concerns that are within the Commission's jurisdiction. Yet, as explained above, without an agreed-upon common standard, the AllVid proposal cannot meaningfully succeed.

[63] In Section 624A(c), Congress stressed that the only functions it wanted the Commission to consider in adopting rules were the ability to watch one channel while recording a program on another, the ability to record two consecutive programs appearing on different channels, and the ability "to use advanced television picture generation and display features." 47 U.S.C. § 544a(c)(1)(B)(iii). The NOI's proposed restructuring of MVPD service and the support it mandates for various consumer equipment features goes far beyond these functions.

by manufacturers of televisions and video recorders. Likewise, under Section 629, especially as limited by Section 629(f), the dictate to ensure that manufacturers may independently produce equipment for use with MVPD service cannot be interpreted by the Commission as a mandate to require support for various features that go beyond receipt of the MVPD service and instead advance the Commission's vision for the next-generation consumer equipment market. This is precisely what Congress told the Commission *not* to do. And those limits are further confirmed by the so-called Eshoo Amendment—a provision Congress adopted at the same time that it enacted Section 629. *See* 47 U.S.C. § 544a(c)(2)(D). The Eshoo Amendment provides that, in adopting regulations, the Commission will ensure that those rules "do not affect features, functions, protocols, and other product options, other than those specified in paragraph (1)(B)."[64]

The legislative history of Section 629 also illustrates Congress's intent to limit that provision to ensuring that devices available at retail could access MVPD video streams. The Senate bill that led to the 1996 Act would have provided the Commission no authority concerning navigation equipment. The House bill, on the other hand, gave the Commission broad authority to "assure competitive availability, to consumers of telecommunications subscription services, of converter boxes, interactive communications devices, and other customer premises equipment." 141 Cong. Rec. H9954-05 (daily ed. Oct. 12, 1995). It applied to equipment to be used in connection with "video, voice, or data services for which a subscriber charge is made." *Id.* The conference committee rejected that approach and the "scope of the regulations [were] narrowed to include *only equipment used to access services provided by multichannel video programming distributors.*"[65] In 1996, of course, this included only video

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[64] Paragraph (1)(B) deals with television receivers and video cassette recorders.

[65] H. Rep. No. 458, 104th Cong., 2d Sess. 181 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 160 (emphasis added).

programming. But more to the point, the provision makes clear that the focus of the statute is (and was) to allow the Commission to ensure that independent devices can receive the services provided by the MVPD—not to ensure that manufacturers can offer services and capabilities of their own.

Finally, leaving aside the limitations on Section 629 as a basis for regulation of consumer *equipment*, that provision certainly does not authorize the Commission to impose requirements on MVPD *service*, other than the basic requirement that conditional access be separated out from navigation functions. Yet the AllVid proposal would require MVPDs to make far more expensive and fundamental changes to the service itself. The NOI asks, for example, whether the Commission should adopt "rules governing *the way in which MVPD content is presented*;" NOI ¶ 43 (emphasis added); the NOI also suggests that MVPDs would have to make program guide information available "in a form that would allow competitive devices to display the data as they wish," and queries whether the FCC should even oversee the ways in which MVPDs *charge end users* for such data. *See id.* ¶ 44 (asking whether MVPDs should be required to "charge separately for guide data").[66] The mandate to establish the conditions needed for a retail market for MVPD navigation devices cannot be read to empower the FCC to force MVPDs to remake their services.

B. The AllVid Proposal Would Force MVPDs to Violate the Terms of Programming Agreements and Regulatory Requirements.

While MVPDs may own and even create some of the programming or other content they supply to subscribers, they obtain the majority of the programming they offer through contracts negotiated with programming networks and other content owners. These agreements typically

[66] The Commission lacks *any* authority to regulate charges for MVPD services, other than the rates certain incumbent cable operators charge for basic tier services. *See* 47 U.S.C. § 543.

include restrictions on how and in what medium MVPDs may distribute the content, and also often set out the content owners' requirements for channel positioning, "neighborhooding" (*i.e.*, with other channels of a similar type), tier placement, or exclusivity. MVPDs reach similar agreements with companies that provide electronic programming guide information for their linear programming; those contracts typically limit or prohibit redistribution of the guide data.

The AllVid proposal would undermine many aspects of these agreements, and could thus force a fundamental revision of the relationship between MVPDs and content owners (including EPG-data owners), with uncertain consequences for the video marketplace. For example, under the AllVid proposal, a manufacturer might take a particular program from the MVPD's service and list it in a guide format that does not account for the "neighborhooding" agreement between the MVPD and the content owner, isolating the program from other programming of the same type the manufacturer hopes to promote. Similarly, the manufacturer could undermine and devalue the MVPD's basic tier agreements by giving lower priority to the MVPD's basic tier programming.

If the AllVid proposal makes it uncertain whether MVPDs can ensure that programs are delivered as content owners desire, MVPDs' access to valuable program services will decrease.[67] Alternatively, the cost of programming may go up if MVPDs cannot offer non-monetary consideration such as channel placement in programming negotiations. The Commission simply fails to consider that its myopic focus on buttressing the services of manufacturers at the expense

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[67] *See* Report and Order and Further Notice of Proposed Rulemaking, *Digital Broadcast Content Protection*, 18 FCC Rcd 23550, 23552-53 ¶¶ 4, 6 (2003), *vacated in part and rev'd in part by American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (finding that content owners will be deterred from making content available to broadcasters if it is left unprotected); Comments of the ABC Television Affiliates Ass'n, CBS Television Affiliates Ass'n, and FBC Television Affiliates Ass'n, *Applications of Comcast Corp., GE Co., and NBCU Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56, at 3 (filed June 21, 2010) ("*ABC, CBS, and FBC Television Affiliates Ass'ns Comments*").

of all other stakeholders could have seriously adverse consequences for the video marketplace and for MVPD subscribers.

The AllVid proposal also could encumber MVPDs' compliance with FCC regulatory requirements. As discussed above, the AllVid proposal fails to require that manufacturers—no matter what else they might add of their own—pass through the MVPD's entire service, unencumbered, on a unitary basis. It is thus not clear that a consumer device would have to pass through all the program services the MVPD distributes, or that it would use the format chosen by the MVPD when the content is displayed. Thus, a CE company could decide effectively to block or "drop" a signal that the MVPD is compelled to carry under the must-carry regime or place the signal on a channel position other than one permitted under the must-carry rules,[68] or it could choose to downgrade signals to lower quality or resolution, inconsistent with regulatory (and contractual) requirements that MVPDs provide certain signals in HD or other formats.[69]

C. The AllVid Proposal Would Unlawfully Authorize Violation of MVPDs' Protected Copyright Interests.

By allowing manufacturers to remake MVPD services into a service offering of their own, the AllVid proposal would effectively authorize manufacturers to infringe on MVPDs' protected copyright interest in their own service offerings, and would compel MVPDs to acquiesce in such infringement (without compensation). From a policy perspective, this is a terrible idea, since there is no greater disincentive to innovation than the eradication of

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[68] *See* 47 C.F.R. § 76.57.

[69] Content owners have expressed concerns that STBs could be "force tuned" to favored programming. *See, e.g., ABC, CBS, and FBC Television Affiliates Ass'ns Comments* at 3. Under the AllVid proposal, CE manufacturers could "force tune" their devices to their own preferred channels, thus featuring the content or home page of a contractual partner whenever the STB is first turned on or even after a program ends.

intellectual property rights. It is also unlawful, because the Commission has no authority to authorize such infringement or mandate waiver of an MVPD's copyright interests.

1. MVPDs Have a Protected Copyright Interest in Many Aspects of Their Service Offerings, Independent of the Interest of Programmers and Underlying Content Owners.

MVPDs have a protected copyright interest in the unique presentation they develop for their service offerings. That presentation is the result of creative judgment and significant original work, all of which merits full copyright protection.[70] In the case of AT&T, for example, careful work goes into the selection of programming for the U-verse channel line-up and VoD library. AT&T exercises significant judgment concerning the separation and shaping of its programming into service tiers and the "grouping" or "neighborhooding" of channels of like kind in a way that will be most compelling to subscribers and attractive to programmers. U-verse also includes AT&T's proprietary user interface, which was designed to be particularly user-friendly and enable easy navigation through the various U-verse service offerings. The visual displays included in U-verse are also the product of sophisticated design choices. And the service also includes various select applications, such as games, news, and weather, chosen to appeal to AT&T's target audience, and content that AT&T commissions to complement its programming.

All of this is protected collectively and individually under the copyright laws on various grounds. As a preliminary matter, U-verse is quite obviously a compilation of programming and other content, which the Copyright Act explicitly protects.[71] And that compilation is the product

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[70] *See* 17 U.S.C. § 102 ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."); *Feist Pub'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("To qualify for copyright protection, a work must be original to the author . . . . mean[ing] only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.").

[71] 17 U.S.C. § 103 ("The subject matter of copyright . . . includes compilations . . . ."). The Copyright Act defines a compilation as "a work formed by the collection and assembling of

of significant critical judgment and expertise—far more than the "minimal degree of creativity" that the courts have found sufficient to transform a collection of content into a protected "compilation."[72] In *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 377 n.13 (D.C. Cir. 1982), the D.C. Circuit specifically found a copyright interest in the selection of the "optimum mix and arrangement of [a station's] programming," since it reflects an aesthetic judgment "based on audience demographics, competing broadcasts, seasonal changes, and 'audience flow' from one program to the next." U-verse, which combines that line-up with a significant amount of additional, carefully selected material, most certainly qualifies as a compilation in which AT&T has a protected interest.

AT&T also has a protected interest in the overall "look and feel" of the U-verse service. This includes the user interface, the program guide, the visual display, search functionality, and various included applications and features. The inclusion or exclusion of each of these features has a profound effect on the overall work and the user's experience of the offering. The courts have held that such "look and feel" features are fully protected, pointing, for example, to the "user interface" and "visual display" design of computer programs.[73] By the same token, the courts have extended protection to nonliteral aspects of computer and network software, which

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preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101.

[72] *Feist*, 499 U.S. at 345; *see also id.* at 362 (noting that a compilation is copyright protected so long as its components are collected in a way which is not "so mechanical or routine as to require no creativity whatsoever").

[73] *See, e.g.*, *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 55 (D. Mass. 1990). *See also Mistretta v. Curole*, 1992 WL 28118, 22 U.S.P.Q.2d 1707 (E.D. La. 1992) (finding copyright protection for the "look and feel" of a work of art).

include the structure, sequence, and organization of the program content or substance.[74] A program or service's screen displays, for example, have been protected under this analysis,[75] and U-verse's well-designed and unique visual display would qualify as well.

2. The AllVid Proposal Would Allow Manufacturers to Create Unauthorized Derivative Works.

AT&T's copyrighted interests in the U-verse service include the *exclusive* right to create and control derivative works based on that copyrighted material.[76] This includes the right to recast, transform, or adapt an original work.[77] Yet the AllVid proposal would require AT&T to permit—and indeed to support—infringement of that right: It would authorize manufacturers to create their own derivative works based on AT&T's services and content, integrated with third-party content and applications imported by the manufacturer. It also would authorize

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[74] *See, e.g.*, *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986) (articulating the structure, sequence, and organization test for copyright infringement of nonliteral aspects of computer programs).

[75] *See Broderbund Software, Inc. v. Unison World*, 648 F. Supp. 1127 (N.D. Cal. 1986) (protecting the overall structure, sequencing, and arrangement of screens). *See also Goldman v. Healthcare Mgmt. Sys., Inc.*, 628 F. Supp. 2d 748 (W.D. Mich. 2008) (explaining that screen displays, main menu, submenu command tree structure, parameter lists, macros, and general flow charts are copyright protected). The deciding factor is whether these "presentational" features of the program or service were motivated by aesthetic concerns, *Broderbund Software, Inc.*, 648 F. Supp. at 1134—whether, in other words, the presentation represents just one choice among many possible ways the information might have been presented, *Harbor Software, Inc. v. Applied Sys. Inc.*, 925 F. Supp. 1042, 1049 (S.D.N.Y. 1996). This precludes a finding of "merger," where the idea and the expression merge and therefore the expression cannot be copyright protected. *Id.* The menus, search capabilities, program guide, and visual displays incorporated into U-verse readily meet that test.

[76] 17 U.S.C. § 106(2) ("[T]he owner of copyright under this title has the exclusive rights to . . . prepare derivative works based upon the copyrighted work . . . .").

[77] Under 17 U.S.C. § 101, a "derivative work" is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modification which, as a whole, represent an original work of authorship, is a 'derivative work.'"

manufacturers to create new, independent electronic programming guides using the MVPD's own licensed guide. The manufacturer's new, derivative guide would violate not only AT&T's rights but those of the underlying programming guide vendor.[78]

The proposal also appears to authorize manufacturers to radically change the "look and feel" of an MVPD's offering. Manufacturers would apparently be permitted to replace AT&T's user interface with their own, substitute their own menuing functionality for AT&T's, and include new or different options in those menus; they could provide their own graphical display; and they could deemphasize or even omit AT&T's search functionality or its applications and supplementary content while featuring capabilities and content added by the manufacturer or its partners.

There may be various alternative ways that U-verse could be offered and organized and combined with other material, but AT&T has the sole right to either make or authorize these derivative alternatives. As the courts have found, breaking up and recasting original material, or reorganizing a unique compilation, creates an infringing, derivative work.[79] For instance, in *National Geographic Society v. Classified Geographic*, the court found that simply unbinding

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[78] Indeed, this requirement would compel AT&T to infringe on those vendors' copyrights and breach its contracts with those vendors, since programming guide content is often licensed to MVPDs like AT&T on very restrictive terms that do *not* permit redistribution. And if the Commission instead makes clear that manufacturers cannot use that data unless they separately obtain a license from the underlying EPG supplier, there would be no possible justification for imposing on *MVPDs* the costs of reformatting *their* licensed EPGs in order to transmit them in a manner that allows "scraping" of the data by the manufacturer.

[79] *See Greenwich Workshop, Inc. v. Timber Creations, Inc.*, 932 F. Supp. 1210 (C.D. Cal. 1996) (finding creation of infringing derivative work where bookplates were removed from a copyrighted book and framed); *National Geographic Soc'y v. Classified Geographic*, 27 F. Supp. 655 (D. Mass. 1939) (finding infringement based on reorganization of a unique compilation); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321 (D.N.H. 2002), *aff'd*, 342 F.3d 191 (3d Cir. 2003) (finding infringement where copyrighted portions of motion pictures were rearranged into trailers for display on the Internet without the consent of the copyright holder).

and reorganizing the pages of National Geographic magazines infringed National Geographic's exclusive copyright interests. 27 F. Supp. at 660. Courts also have found infringement based on unauthorized additions to copyrighted materials, such as the insertion of advertisements into the text of a book. *See National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980).

3. The Commission Has No Statutory Authority to Modify Copyright Interests or to Require That Copyright Owners Authorize Derivative Works or Other Uses of Their Copyrighted Material.

The Commission has no jurisdiction over MVPDs' copyright interests; nothing in Section 151 of the Act provides it with subject matter jurisdiction over the commercialization of rights held by content owners. As the court found in *Motion Picture Association of America v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002), there is no Title I authority for "regulations that significantly implicate program content." *See also American Library Ass'n*, 406 F.3d at 692 (Title I does not confer subject matter jurisdiction over equipment or activities that do not involve transmissions).

Indeed, in those few instances where Congress has permitted the Commission to affect private copyright interests, it has authorized such action explicitly. For example, under the Copyright Act of 1976, Congress specifically left open the FCC's right to modify the must-carry and broadcast program carriage rules in a manner that would indirectly affect the compulsory copyright license established in that Act.[80] Subsequent legislation, such as the various laws governing DBS service, have also expressly subjected broadcasters' and satellite providers'

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[80] *See* 17 U.S.C. § 111(c)(1) (explaining that secondary transmissions are subject to compulsory statutory licensing where the signal carriage is permissible under FCC rules or regulations).

copyright interests to the Commission's adoption or modification of carriage rules.[81] But there is *no* indication in Section 629 or its legislative history that Congress intended to empower the Commission to endow manufacturers with what amounts to a free compulsory copyright license to use and create derivative works from an MVPD's service.[82] Nor, as indicated above, can the Commission find any such authority in Title I.

D. The Proposed Disaggregation Rule Would Violate the First Amendment.

1. The Commission's AllVid Proposal Would Interfere with MVPDs' First Amendment Rights.

The courts are in broad agreement that AT&T and other MVPDs are First Amendment speakers whose selection and organization of programming services is protected speech.[83] As a protected speaker, AT&T has a right to control its own message, keep that message distinct from others' speech, and promote its speech under its own unique service and brand. Because the AllVid approach would interfere with AT&T's (and other MVPDs') ability to do all of these things, it triggers *at least* intermediate First Amendment scrutiny.[84] Indeed, as the D.C. Circuit

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[81] *See, e.g.*, 17 USC § 119(a)(13) (explaining that secondary transmissions are subject to statutory licensing only if satellite carriers are in compliance with FCC broadcast signal carriage rules and regulations).

[82] Indeed, as noted above, Section 629(f) makes clear that the provision is not intended to expand the Commission's authority beyond what is provided by other sections of the Act—none of which empower the Commission to adopt this new copyright mandate.

[83] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). *See also BellSouth Corp. v. FCC*, 144 F.3d 58, 67-68 (D.C. Cir. 1998); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001).

[84] *See Turner*, 512 U.S. at 636, 653-662 (applying intermediate scrutiny to must-carry statutory provisions and noting that the provision of "original programming" or the exercise of "editorial discretion" triggers First Amendment protection); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (invalidating state statute requiring newspaper to afford political candidates a right to reply, free of cost, to editorials attacking their official records or personal character, and noting that "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."); *Time Warner*, 240 F.3d at

has made clear, essentially *any* regulation that affects the offering of MVPD service is subject to at least intermediate scrutiny.[85] And as we show below, the AllVid proposal could not survive such scrutiny.

The AllVid rules would interfere with MVPDs' First Amendment rights in multiple ways. First, as discussed, the proposal would force MVPDs to present their programming and their electronic programming guide content in a particular manner, interfering with the *way* in which the MVPD prefers to speak. *See* NOI ¶¶ 43-44. Second, under the proposal, AT&T and other MVPDs would be compelled to permit device manufacturers to disaggregate MVPD programming and programming guide content, and to reassemble and display such content in formats and orders different from what the MVPD intended. *See id.*; *see also id.* ¶¶ 2, 17. That disaggregation is specifically contemplated to include *integration* of MVPD content with additional content provided by the device manufacturer or third parties—for example, the

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1129 (applying intermediate scrutiny to ownership restrictions and recognizing that cable operators "exercise[] editorial discretion in selecting the programming [they] will make available to [their] subscribers, and are entitled to the protection of the speech and press provisions of the First Amendment") (internal quotation marks and citations omitted); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (infringements on commercial speech are subject to a four-part test that is materially indistinguishable from intermediate scrutiny).

Indeed, because the disaggregation requirement will force AT&T to associate its content and brand identity with the content of other providers, this proposal, even if content-neutral, should be subject to *strict scrutiny*. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (applying strict scrutiny when an expressive entity is forced to associate with another speaker who "affects in a significant way" its "ability to advocate private or public viewpoints"); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (finding a content-neutral antidiscrimination law to be an "[i]nfringement on expressive association" and thus "subject to strict scrutiny"); *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989) (holding that an associational claim by a commercial entity "trigger[ed] a higher standard of scrutiny than employed in cases involving only regulation of commercial speech"), *abrogated on other grounds by Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004).

[85] *See, e.g.*, *Cablevision Sys., Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010); *Time Warner*, 240 F.3d at 1137 (applying intermediate scrutiny to ownership restrictions on cable operators).

insertion into the AT&T programming guide of Internet video content obtained from a third party. And nothing in the AllVid proposal precludes manufacturers from *excluding* speech that AT&T and other MVPDs currently provide to their customers—indeed, this is a likely result under the disaggregated, slice-and-dice framework the FCC seeks to impose. Deleted features could include widgets, applications, advertising, or even entire channels of programming that compete with the third-party content that the manufacturer seeks to supply. And even if content is not deleted, the manufacturer could rearrange the programming information transmitted by an MVPD in order to deemphasize certain MVPD-provided content and emphasize other content. In short, the AllVid mandate, as currently envisioned, would disable AT&T and other MVPDs from controlling the message "spoken" to customers of their services, and put that control into the hands of independent manufacturers.

Under the First Amendment, a speaker has "the autonomy to choose the content of his own message," and the choice of voices to *include or exclude* is part of this right. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The Supreme Court has allowed interference with this right only in the rare circumstance where the audience would be unlikely to confuse one speaker with another. In *Turner*, for example, the Court concluded that cable operators could be compelled to carry broadcast stations because cable's "long history of serving as a conduit for broadcast signals" left "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner*, 512 U.S. at 655. There is no similar "long history" here. Today, the vast majority of Americans receive their channel line-ups, programming guides, menus, and applications from their MVPD. There is accordingly every reason to fear that the average consumer who subscribes to an MVPD's service will assume that the line-ups,

guides, menus, and applications she sees on her television in connection with her use of that MVPD service are provided by the MVPD. That will almost certainly be true, unless the MVPD's service continues to be a unitary offering, provided "as is" from the MVPD with the MVPD's user interface, guide and other features, separate and apart from anything *additional* offered by the manufacturer—in other words, the situation that prevails today when CE devices display the content of OTT video distributors. The confusion will be even more extreme if the manufacturer is permitted to disaggregate the MVPD's offerings (for example, the MVPD's VoD library), combine it with third-party content, and offer a library of combined content over the device. The consumer could quite reasonably believe that this entire library is provided by her MVPD—including content that the MVPD itself might have specifically rejected for taste or other reasons. Alternatively, if the manufacturer offers a library that includes only *some* of the MVPD's content, or provides a search functionality that deemphasizes some MVPD offerings, the consumer may never understand that the MVPD offers a host of other content that the manufacturer has either stripped out or deemphasized in favor of content from its business partners.

Such confusion has serious consequences for an MVPD's ability to control its "expressive message" to its subscribers. If the device manufacturer can affect what AT&T content subscribers can actually see by dropping some programs or even just making them harder to find, AT&T's chosen unitary programming offering will be undermined; subscribers will not get the "message" that AT&T seeks to offer. Similarly, if AT&T's VoD offerings are combined with objectionable content from third parties with no differentiation, subscribers may never

experience the more tasteful programming or menu that AT&T has assembled.[86] And if a manufacturer is permitted to replace AT&T's guide and applications with its own, AT&T may be unable to share with its subscribers its suggestions for similar programs; its special interactive content offered in connection with certain programming; family-friendly games; or other content. In other words, AT&T's "speech" will be distorted, and consumers will have every reason to attribute the distorted speech to AT&T itself. Under *Hurley* and its progeny, this directly implicates the First Amendment.

The AllVid proposal would infringe First Amendment rights in another way as well. AT&T's selection and arrangement of programs, its organization of menus, and its choice of particular applications, features, and services are designed to maximize the quality of its U-verse service and are aimed at retaining customers and attracting new subscribers. In addition, AT&T includes a variety of advertising within its menus and applications. Accordingly, AT&T's service includes commercial speech protected by the First Amendment. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009). And regulation of (and interference with) such speech is also subject to heightened scrutiny. *See Central Hudson*, 447 U.S. at 566.

It is not at all unusual that MVPDs would seek to preserve control over the presentation and content of their programming service. As discussed above, OTT providers do precisely this in their dealings with CE manufacturers, and they have similarly resisted efforts by MVPDs to import their content into the MVPD's service offering. In the commercial marketplace, parties can negotiate these concerns and assure themselves of certain protections. In contrast, the AllVid proposal would simply strip MVPDs of *any* right to control the presentation of *their*

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[86] *See, e.g.*, *Sony Pictures Letter* at 2 (expressing concern that " legitimate content should not be presented side by side with illegally sourced content").

messaging and content—and leave device manufacturers *more* free to manipulate MVPD content than they are to manipulate the content of third-party providers like Netflix.

2. The AllVid Proposal Cannot Survive Heightened Scrutiny.

Whether judged under the intermediate scrutiny standard or the commercial speech standard, the proposed AllVid regulation would fail.[87] The Commission must show both that its rules "further[] an important or substantial government interest" and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The AllVid proposal satisfies neither element.

First, the Commission asserts that a goal of the AllVid proposal is to "unleash competition in the retail market for smart-set-top boxes ('smart video devices') that are compatible with all multichannel video programming distributor ('MVPD') services." NOI ¶ 1. But as just discussed, the Commission's stated goal is far broader than the one articulated by Congress in Section 629. *See* Section V.A, *supra*. That provision does not suggest that MVPDs may be required to disaggregate their offerings so that device manufacturers can offer competing *video* services, programming guides, and applications; rather, Congress sought to promote competition in set-top-boxes that could be used to navigate the services offered *by MVPDs*. The Commission can satisfy *that* goal in a way that burdens protected First Amendment interests far less than the Commission's AllVid proposal. For one, the Commission could require device manufacturers to support access to MVPD services in their *original* form, while at the same time permitting them *also* to provide additional content, menus, applications, and functionalities through the same STB. Indeed, as discussed above, that reality prevails today in higher-end

[87] And it would certainly fail under the strict scrutiny approach discussed above in note 84, *supra*.

televisions and devices that offer customers access to OTT video content. And as AT&T has explained, the commercial marketplace is working toward more sophisticated and comprehensive solutions that would allow various devices to be used with two-way MVPD systems and offer a host of other services, including robust home-networking capabilities, while preserving the MVPD's user interface and ensuring appropriate protection for content owners. *See* Section I, *supra.*

Further, as explained above, the AllVid proposal is not a legitimate or effective means of achieving the Commission's second stated objective—advancement of broadband use and adoption. *See* Section I.C *supra.* Indeed, the Commission has provided *no* convincing reason to believe that consumers who do not use broadband today are likely purchasers of new, high-end digital display equipment, or that the absence of broadband capabilities on some consumer television equipment is in any way related to broadband adoption concerns. The Commission must do more than rely on pure speculation when seeking to defend a regulation that will seriously interfere with protected speech. As the courts have held, "[w]here first amendment rights are at stake, 'the Government must present more than anecdote and supposition'" as a justification for burdening speech.[88]

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[88] *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 959 (8th Cir. 2003) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000)); *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (the burden to show that the state interest is advanced by the regulation on speech "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Turner*, 512 U.S. at 664 (when the FCC "defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way") (internal citation omitted).

In any event, the Commission has not explained why promotion of broadband is dependent on (or served by) allowing a device manufacturer to *replace* MVPD programming guides with a guide of its own—or to disaggregate MVPD content and mix it with Internet content. A device that preserved an MVPD's content, menus, and applications, but *also* provided access to Internet content would provide consumers with the same broad range of Internet connectivity and applications, and thus promote broadband quite effectively, *without* impinging on the MVPD's speech. Further, as discussed above, the AllVid proposal would do absolutely nothing to address the primary barriers to adoption identified by the National Broadband Plan: cost, digital literacy, and relevance. *Broadband Plan* at 168. In fact, the AllVid proposal will likely *retard* broadband deployment and adoption by undermining the business case for deployment of high-speed broadband by MVPDs.

In sum, there are a number of ways that the Commission could promote its competition and broadband objectives without infringing the First Amendment. These alternatives would foster innovation and competition in consumer equipment, ensure access to broadband services over consumer video devices, and enable consumers to receive multiple services, all without forcing AT&T and other MVPDs to alter their speech. Accordingly, the Commission's AllVid proposal would fail intermediate scrutiny.

E. The Proposed Rule Would Effect an Unconstitutional Taking of MVPDs' Services.

The AllVid proposal would also effect an unauthorized, uncompensated taking of private property in violation of the Fifth Amendment's mandate that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V.

Although the AllVid proposal would not effect a traditional "physical" taking of MVPDs' property, it would effect a regulatory taking, by seriously interfering with MVPDs' business

operations and investment-backed, economic expectations. The Commission's proposal would convert AT&T and other MVPDs from providers of an integrated service that includes video programming, interactive IP applications, innovative programming guides, games, and powerful search functionalities and menus into mere conduits for programming and other components that manufacturers could then remake for their own service offerings. Indeed, the NOI suggests not only that MVPDs should have to populate manufacturers' own electronic programming guides—for free—but also that they might then be prohibited from recovering the costs of their guide data *even from their own subscribers*. *See* NOI ¶ 43. This would fundamentally transform the way in which MVPDs have historically used their property and earned a return in the marketplace, and that unforeseen regulatory change would deprive MVPDs of the revenue that they reasonably expect to earn as providers of their traditionally integrated service offerings.[89] Viewed another way, the proposal forces MVPDs into a new business—supporting and populating manufacturers' own integrated service offerings—without *any* compensation. This goes further than anything the Commission (or Congress) envisioned even under the heavily regulatory unbundled network element ("UNE") regime, in which incumbent operators were at least provided with some modicum of compensation by their competitors for their facilities and their operations support systems ("OSS") and other services.

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[89] MVPDs could also expect to lose revenues from other services that they typically provide as a package with their linear programming offerings, such as VOD, VoIP, and various applications—especially if manufacturers are permitted to omit or deemphasize the MVPD's offerings in favor of the manufacturer's own offerings. And the loss of these revenues, in total, could affect broadband investment generally. As the Commission has recognized, barriers to successful competitive entry by wireline MVPDs like AT&T "discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services" by reducing "the promise of revenues from video services to offset the costs of such deployment." *Local Franchising Order*, 22 FCC Rcd at 5103 ¶ 3 & n.238.

Regulatory changes that interfere with an entity's legitimate investment-backed expectations and significantly reduce the value of the entity's business enterprise constitute a taking that is unlawful unless appropriately compensated. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Since the AllVid proposal is not in accord with the historic use of MVPD systems or within the scope of historic regulation of such systems, and because no compensation would be paid under any proposal that has been advanced, the significant financial harm caused by adoption of the AllVid proposal would constitute a taking in violation of the Fifth Amendment. *Id.*

At the very least, the Commission's proposal runs afoul of the doctrine of constitutional avoidance. As the D.C. Circuit has explained, the Commission may not adopt policies that expose the public fisc to the risk of just-compensation liability unless Congress has explicitly authorized it to adopt those policies.[90] And as we have discussed, Congress has not remotely authorized the Commission to adopt the policies at issue here.

CONCLUSION

For the reasons set forth above, the Commission should focus on encouraging the industry's efforts to reach a voluntary interoperability solution in place of its regulatory, AllVid mandate, and it should at minimum reconsider and amend its proposed framework based on the serious concerns outlined above.

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[90] *See Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994) (explaining that the constitutional avoidance doctrine, and not *Chevron* deference, should be applied in reviewing the FCC's decision to require physical collocation, and holding: "Applying the strict test of statutory authority made necessary by the constitutional implications of the Commission's action, we hold that the Act does not expressly authorize an order of physical co-location, and thus the Commission may not impose it."). The doctrine of constitutional avoidance limits the Commission's ability to adopt rules that would raise takings issues in an "identifiable class of cases," as the proposed rules would. *Id.* at 1145 ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.").

Respectfully submitted,

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