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

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

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these comments in response to the Federal Communications Commission's *Notice of Inquiry*[1] in the above-captioned dockets. The *Notice of Inquiry* seeks comment on specific steps the Commission can take to promote competition in the retail market for smart, set-top video devices ("smart video devices") that are compatible with all multichannel video programming distributor ("MVPD") services, as well as comments on a specific "set-back" or gateway device for allowing either a single smart video device or multiple consumer electronics devices in the home to access multichannel video programming services.[2]

In response to the *Notice of Inquiry*, MAP submits the following comments wholly supporting the Commission's proposed "AllVid" concept. MAP hereby encourages the Commission to develop appropriate standards and rules governing design, deployment, and

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[1] In the Matter of Video Device Competition, MB Docket No. 10-91, *Notice of Inquiry*, 24 FCC Rcd. 4275 (2010) ("*Notice of Inquiry*").
[2] *Id*. at ¶¶ 1-3.

support of such devices in multichannel video programming markets. MAP supports adoption of standards that will allow all smart video devices in the home to access multichannel video programming services, and specifically asks the Commission to implement its statutory mandate by adopting rules that apply broadly to all MVPDs, including DBS providers and telecommunications companies that provide cable service. Finally, MAP respectfully submits that, in its application of those rules, the Commission should avoid granting an abundance of waivers to MVPDs in order to avoid the problems that resulted from the Commission's grant of such waivers for its CableCARD rules.

INTRODUCTION

Reacting to market control and dominance by incumbent cable operators in the smart video device market, Congress directed the Commission beginning in 1996 to implement rules ensuring that devices for receiving and displaying multichannel video signals could be purchased at retail stores, so that customers would have alternatives to merely leasing the devices from their MVPD for a monthly fee.[3] In response to this directive, the Commission adopted its first round of rules, leading eventually to the development of CableCARD technology and, more recently, the cable industry's proprietary tru2way middleware.[4]

As the *Notice of Inquiry* points out, the Commission's current rules intended to promote competition among smart video devices have been unsuccessful.[5] Narrowly constructed and inconsistently applied rules have left the market for smart video devices dominated by the cable

[3] Public Knowledge *et al.* Petition for Rulemaking, CS Docket No. 97-80, GN Docket Nos. 08-47, 09-51, and 09-137, at 1-2 (filed Dec. 19, 2009) ("Petition for Rulemaking"); *see also Notice of Inquiry* ¶ 4.
[4] Petition for Rulemaking at 9.
[5] *Notice of Inquiry* ¶ 15.

industry, with little hope for further competition.[6] Drawing upon the suggestion of various groups, including MAP, Public Knowledge, Consumer's Union, the Center for Media and Democracy, and the New America Foundation, for a "universal video gateway,"[7] the Commission proposes a new solution which it terms "AllVid."[8]

These comments highlight the concerns that MAP believes to be particularly pressing in the development of the new generation of rules for promoting competition in the retail market for smart video devices. To that end, MAP agrees with the *Notice of Inquiry*'s suggestion that many of the problems with the original CableCARD initiative stemmed from the fact that only cable MVPDs fell under the rules' purview, and not alternative MVPD providers such as satellite, meaning that "as a general matter a retail navigation device purchased for use with one MVPD's services cannot be used with the services of a competing MVPD."[9] MAP also respectfully submits that while the grant of numerous waivers of the CableCARD rules may or may not have resulted in the benefits that the *Notice of Inquiry* supposes,[10] the sheer number of such waiver grants created disparities in application of the CableCARD technology and thwarted its widespread adoption.

Fixing these discrepancies to achieve more uniform and predictable application of the AllVid rules would foster the type of common reliance in smart video devices that the CableCARD rules never achieved. Such consistent application of the new standards and rules

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[6] *See id.* ¶ 10; Petition for Rulemaking at 3-5.
[7] Petition for Rulemaking at 30.
[8] *Notice of Inquiry* ¶¶ 17, 24. The Commission further acknowledges the Petition for Rulemaking's request for standards for (1) a physical connection, (2) a communication protocol, (3) authentication, (4) service discovery, and (5) content encoding. *Id.* ¶ 24. MAP continues to believe that technical standards are a critical component of rulemaking for smart video devices, but seeks in these initial comments to establish first the importance of establishing rules applicable to all MVPD platforms, and application of those rules to all providers.
[9] *Id.* ¶ 15.
[10] *Id.* ¶ 9.

would represent a critical first step towards promoting the commercial availability of innovative retail navigation devices that are able to provide the same functionality as leased devices and access the full range of MVPD services.

I. THE COMMISSION HAS BEEN UNSUCCESSFUL IN ITS ATTEMPTS TO IMPLEMENT SECTION 629 THROUGH THE CABLECARD RULES.

Section 629 was designed "to ensure the commercial availability of navigation devices used by consumers to access services from MVPDs."[11] The absence of vibrant competition in the smart video device market has resulted in incumbent cable MVPD providers remaining the most common source of devices for consumers.[12] As a result, barriers to entry for smart video device competitors remain high, competition is minimal, innovation is stifled, and consumers are harmed by high prices and lack of options in the device market.

Section 629 explicitly directs the Commission to:

> adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment…from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[13]

Few, if any, would argue that the Commission's rules leading to the CableCARD regime have implemented successfully the directive set forth in Section 629 nearly fifteen years ago. Indeed, the *Notice of Inquiry* itself states that "the Commission's efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services,"[14] and that "[w]hile MVPD services have become far more robust in the intervening years, for the most part the consumer experience with respect to the equipment that is required to

[11] *Id.* ¶ 4.
[12] *Id.* ¶ 10.
[13] 47 U.S.C. § 549(a).
[14] *Notice of Inquiry* ¶ 10.

access those services has not."[15] Consumers, in large part, still rent their smart video devices from their MVPDs,[16] meaning that innovation and competition are still limited, and prices still remain artificially high for those devices.[17] Consumers stand to save significant amounts of money if they can purchase a device outright, rather than paying an ongoing monthly fee over the course of several years to lease a similar device from their MVPD.[18]

II. THE COMMISSION'S RULES FOR ALLVID SHOULD APPLY BROADLY TO ALL PROVIDERS OF MULTICHANNEL VIDEO PROGRAMMING.

In implementing AllVid rules, the Commission should apply them to all MVPDs. Specifically, it should extend the AllVid Rules, as it is statutorily mandated to do, to providers other than traditional cable operators, expanding them to include DBS providers and telecommunications companies such as Verizon, AT&T, and other such relatively recent entrants

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[15] *Id.* ¶ 15.

[16] Todd Spangler, *Top10 Cable Operators Have Deployed 16.7 Million CableCard Boxes: NCTA*, MULTICHANNEL NEWS, Sept. 29, 2009, *available at* http://www.multichannel.com/article/355815-Top_10_Operators_Have_Deployed_16_7M_CableCard_Boxes_NCTA.php.

[17] *See* Cecilia Kang, *FCC Takes on Cable, Satellite on Television Set-Top Boxes*, WASH. POST TECH BLOG, Nov. 18, 2009, *available at* http://voices.washingtonpost.com/posttech/2009/2009/11/fcc_takes_on_cable_satellite_o.html; *see also* Petition for Rulemaking at 2. As Harold Feld, Legal Director for Public Knowledge notes in his testimony before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Communications, Technology, and the Internet, the devices that customers lease from their MVPDs are "underwhelming," leased for a monthly fee that perpetuates as long as the consumer retains the MVPD video service, and are essentially thrown away once the customer is done with the service. *See* Testimony of Harold Feld, Legal Director, Public Knowledge, on behalf of Public Knowledge, Media Access Project, and Consumers Union, "The National Broadband Plan: Competitive Availability of Navigation Devices," at page 2 (April 29, 2010), *available at* http://www.publicknowledge.org/pdf/stb-testimony.pdf.

[18] *See* Comments of Public Knowledge, Media Access Project, and New America Foundation, CS Docket No. 97-80, PP Docket No. 00-67, at 10-11, n.9 (filed June 14, 2010). For example, a TiVo DVR costs a consumer approximately $300 and has a lifespan of about five years. In contrast, the cost of leasing a similar HD DVR from cable provider RCN for five years is nearly $900. *See id.* As competition for retail devices increases, the Commission could expect the cost of purchasing a device outright to decrease even further.

into the multichannel video market. In addition, the Commission should not grant waivers for providers as freely as it did for its CableCARD rules.

The *Notice of Inquiry* points out that, "although the CableCARD rules nominally apply to all MVPDs, the Commission exempted MVPDs that operate throughout the United States and offer devices for retail sale through unaffiliated vendors. In practice, this means that DBS operators are not subject to these rules."[19] This exclusion was based on the presumption that these DBS providers were "new entrants" and, as such, should be treated differently than "long established" MVPD providers.[20] The reality of the situation is that nearly fifteen years have passed since the Commission's first examination of the market relationship between MVPDs using a cable platform and those operating over satellite facilities. This market relationship between different types of MVPDs has changed; unfortunately, the poor status of competition in the smart video device market has not.[21] Additionally, the *Notice of Inquiry* contains a passing reference to lack of CableCARD adoption by AT&T and Verizon, but provides no further explanation for their lack of participation and compliance, nor any citation to waivers exempting such cable operators from the rules.[22]

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[19] *Notice of Inquiry* ¶ 9; s*ee* 47 C.F.R. § 76.1204(a)(2) ("The foregoing requirement shall not apply to a multichannel video programming distributor that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system.").

[20] Petition for Rulemaking at 22.

[21] The *Notice of Inquiry* recognizes this point, noting that although DBS providers are now the second and third largest MVPDs, *see Notice of Inquiry* ¶ 12, and enjoy a large market share of MVPD subscribers, they are not subject to the integration ban in Section 629. As a result, the Commission indicated correctly that this disparate treatment of competitive MVPDs when it comes to the navigation device rules "may be impeding the development of a vibrant retail market by artificially limiting the market for competitive retail devices." *Id.*

[22] *Id*. ¶ 9 (noting that "[m]ore recent entrant AT&T does not provide CableCARD devices, and Verizon supports CableCARDs to a limited extent, but not for its advanced IP services").

As MAP and others have noted in previous filings, in the absence of comprehensive implementation of Section 629 for all MVPDs, significant barriers will continue to exist for the development of smart video devices that will work across all platforms because of the switching costs that consumers must overcome to switch from one provider to another.[23] These switching costs mean that consumers who purchase rather than lease a smart video device, and who enjoy the innovation and savings that come from such purchased devices, are locked into the MVPD platform on which their purchased devices work and cannot take their devices with them if they choose to switch among different platforms.[24] In addition, many current boxes only work with one provider, meaning that customers cannot switch even from one cable operator to another with a CableCARD device.[25]

In other words, when Commission rules treat competitive MVPDs and MVPD platforms differently, such regulatory choices reduce the benefits of competition in the smart video device market and in the MVPD market itself. The already high switching costs involved in changing providers are further exacerbated by the fact that a major piece of technology involved in receiving a customer's MVPD programming cannot be ported to an alternate platform, meaning that such customers do not reap the benefits of cheaper and more innovative smart video devices, nor do they have the same degree of freedom to switch providers.[26]

For the same reasons that disparate application of the rules among MVPD platforms is harmful, so has been the Commission's relatively lenient policy of granting waivers to MVPD

[23] Petition for rulemaking at 21-22.
[24] *Id*.
[25] *Notice of Inquiry* ¶ 13.
[26] Petition for Rulemaking at 21-22 ("These switching costs limit competition because consumers are not able to experiment with different MVPDs after becoming locked in to one platform. Additionally, consumers should not have to become experts on which video devices work with various MVPDs' systems….").

providers who would otherwise be subject to the CableCARD rules. Granting too many waivers undermines the policy goals of promoting competition and encouraging innovation in the device market. Further, by granting frequent waivers to MVPDs, the Commission has failed to fulfill its obligations under Section 629, and it will similarly continue to fail to meet those obligations should the practice continue. The *Notice of Inquiry* asks how the Commission can prevent an overabundance of waiver requests.[27] One simple answer might be to establish a precedent that waivers will be infrequently granted for the rules the Commission intends to adopt for AllVid,. The grant of too many waivers creates an atmosphere of regulatory uncertainty, and limits innovation and investment by removing incentives for competitors to develop devices that could compete with those leased by cable operators. Competitors who would otherwise develop smart video devices lose the incentive to do so, knowing that those devices may be foreclosed from the market by proprietary devices developed by MVPD providers who could be exempt from the rules.[28]

Finally, the Commission should establish technical standards for AllVid devices based on comments and technical input from participants outside of the cable industry. Although those standards can and should be developed by the Commission in the next phase of this rulemaking proceeding, care must be taken to ensure that all relevant stakeholders are involved in the process. Tru2way, a proposed middleware solution developed by the cable industry to provide bi-directional devices within the parameters of the CableCARD rules, has proven unworkable for DBS and other non-cable providers.[29] Future standards must not only ***apply*** to all MVPDs,

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[27] *Notice of Inquiry* ¶ 37.
[28] *See id.* ¶ 10.
[29] *Id.* ¶ 12. The *Notice of Inquiry* recognizes that even cable providers that use alternative delivery methods (such as Verizon with its use of Internet Protocol for certain video delivery functions) have not been able to utilize the cable-centric tru2way technology.

regardless of delivery platform, they must also be developed so that all MVPDs can and will utilize the technology.

CONCLUSION

The Commission's responsibilities under Section 629 are clear. The policy goals behind Section 629 are clear. Competition is needed in the device market, and it is now time for the Commission to begin fulfilling its responsibilities. To do so effectively, the Commission must extend its smart video device rules beyond cable MVPDs and must apply those rules consistently, without granting frequent waivers that undermine any success that such rules might achieve. Finally, to ensure that technical standards are workable beyond the cable market, they must be developed with the insight of a wide range of participants to avoid the previous pitfalls of the tru2way technology.

For the foregoing reasons, MAP respectfully submits that, in developing a new generation of AllVid rules to ensure competition in the smart video device market, the Commission should develop rules that apply to all MVPD providers and should discontinue its practice of granting frequent waivers to those rules.

Respectfully submitted,

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