

**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 TIME WARNER CABLE INC.**

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## SUMMARY

Time Warner Cable Inc. (“TWC”) supports the broad goals that animate the Notice of Inquiry (“NOI”) and shares the Commission’s interest in expanding consumer choice in connection with navigation devices. The NOI’s proposal to do so through the introduction of a universal gateway device, however, should be pursued with considerable caution. Indeed, prior attempts to stimulate consumer demand for retail devices illustrate the significant costs—and the uncertainty of success—inherent in any such initiative, and those burdens would likely be even greater in this context.

Instead of forcing multichannel video programming distributors (“MVPDs”) to divert considerable resources to developing a product that consumers may not even want, the Commission should allow the marketplace to continue driving the innovative solutions that are already expanding choices for consumers. If, after careful consideration, the Commission nonetheless determines that the costs of the NOI’s aspirational “AllVid concept” are justified by the benefits it can be reasonably expected to produce, it should only proceed in a manner that does not limit MVPDs’ flexibility to innovate in response to consumer needs and that avoids rigid implementation requirements that would make any chance of success even more remote. Specifically, the Commission should avoid mandating that MVPDs disaggregate their services—a requirement that it lacks authority to impose and that would harm consumers in any event—and reject the unrealistic timeline proposed in the NOI.

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**COMMENTS OF TIME WARNER CABLE INC.**

Time Warner Cable Inc. (“TWC”) respectfully submits these comments in response to the Commission’s Notice of Inquiry (“NOI”) in the above-captioned docket.<sup>1</sup> As a leader in a number of industry-led initiatives to promote a commercial market for retail navigation devices, TWC supports the broad goals that animate the NOI. In particular, TWC, like the cable industry more generally, shares the Commission’s interest in expanding consumer choice with respect to services and devices. The NOI’s proposal to do so through the introduction of a universal gateway device, however, should be pursued with considerable caution. Indeed, prior attempts to stimulate consumer demand for retail devices illustrate the significant costs—and the uncertainty of success—inherent in any such initiative, and those burdens would likely be even greater in this context. Instead of forcing multichannel video programming distributors (“MVPDs”) to divert considerable resources to developing a product that consumers may not

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<sup>1</sup> *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*, Notice of Inquiry, MB Docket No. 10-91 *et al.* (rel. Apr. 21, 2010) (“NOI”).

even want, the Commission should allow the marketplace to continue driving the innovative solutions that are already expanding choices for consumers. If, after careful consideration, the Commission nonetheless determines that the costs of the NOI's aspirational "AllVid concept" are justified by the benefits it can be reasonably expected to produce, it should only proceed in a manner that does not limit MVPD's flexibility to innovate in response to consumer needs and that avoids rigid implementation requirements that would make any chance of success even more remote.

## **INTRODUCTION AND BACKGROUND**

TWC appreciates the Commission's continued interest in exploring issues relating to navigation devices. The various marketplace initiatives already underway, which have produced a burgeoning supply of cross-platform content and over-the-top services, raise significant questions about how best to consolidate gains made for consumers and to stimulate further innovation. TWC has encouraged the Commission to examine such questions through a notice of inquiry and thus welcomes the opportunity to participate in this proceeding and to share its informed perspective on the issues presented.<sup>2</sup>

TWC supports the NOI's stated goal of fostering both innovation and consumer choice among video devices.<sup>3</sup> Indeed, these concepts are core parts of TWC's business strategy. TWC is the nation's second-largest cable operator, serving approximately 14.7 million customers—including more than 13 million video subscribers—in 28 different states. In order to differentiate and maximize the value of its services in the competitive marketplace, TWC must continually seek to ensure that its customers can access any content, anywhere, at any time—through *any*

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<sup>2</sup> Comments of Time Warner Cable Inc., *Comment Sought on Video Device Innovation*, GN Docket Nos. 09-47 *et al.*, at 2-3 (filed Dec. 21, 2009) ("TWC Device Innovation Comments").

<sup>3</sup> NOI ¶ 23.

device. More generally, the cable industry as a whole has expressed its collective commitment to fostering consumer choice.<sup>4</sup> In this respect, the interests of cable operators and the Commission are very much aligned in this proceeding.

TWC has long been a proponent of market-based solutions to ensure consumer choice in connection with navigation devices, and the utility of such an approach is steadily increasing as competition continues to drive innovation to new heights. Unlike when Section 629 was enacted, the video marketplace today features vastly increased competition.<sup>5</sup> Among MVPDs, DBS and telco providers have become serious competitors to cable—TWC faces two or more MVPD competitors in 99 percent of its footprint, and three or more in almost half of its footprint.<sup>6</sup> As the NOI notes, competition has similarly increased among device manufacturers, and as a result, “delivery platforms continue to evolve at a rapid pace.”<sup>7</sup> An increasing number of retail devices (including Roku, Vudu, Boxee, TiVo, Sony’s PlayStation 3, Microsoft’s Xbox 360, and Apple TV) give consumers access to a growing array of over-the-top content services

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<sup>4</sup> Letter to Julius Genachowski, Chairman, FCC, from Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association, GN Docket Nos. 09-47 *et al.*, at 1-2 (filed Mar. 12, 2010) (setting out “consumer principles to which cable operators are committed” in approaching video device innovation).

<sup>5</sup> *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 4-5 (2009) (“*13th MVPD Competition Report*”); *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (“Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.”).

<sup>6</sup> *See 13th MVPD Competition Report* ¶¶ 4-5; *see also id.* ¶¶ 132-33 (observing that, by 2006, DBS providers DIRECTV and DISH Network had become two of the top three MVPDs); NOI ¶ 12 (same); U.S. Department of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, at 6 (Nov. 2008) (stating that “[t]he most significant development in regard to [multichannel video programming distribution] in the past three years is entry by the principal local telephone companies,” and further noting that, “[w]here incumbent local exchange carriers (‘ILECs’) have entered, they have often achieved considerable success”), *available at* <http://www.usdoj.gov/atr/public/reports/239284.pdf>.

<sup>7</sup> NOI ¶ 13.

(from sources such as Netflix, YouTube, Hulu, Amazon, Walmart, and iTunes), and cable operators are working with these companies to provide various video offerings—both linear and interactive—alongside online content.<sup>8</sup> Meanwhile, mobile devices such as smart phones, iPads and other portable media players, notebooks, and laptops give consumers portable access to online and subscription video content. Finally, software companies are creating new platforms, such as Microsoft’s Mediaroom suite and Google’s Google TV initiative, that allow for integration of a variety of sources of video content.<sup>9</sup>

While the marketplace thus is making actual progress in enhancing consumer choice on its own, TWC and other cable operators have invested considerably in several initiatives to assist the Commission’s efforts to fulfill the goals established by Congress in Section 629.<sup>10</sup> As the Commission has repeatedly acknowledged, TWC and others have devoted substantial resources over several years to develop specifications, interfaces, and a separate-security element (*i.e.*, CableCARDs) for both unidirectional digital cable products (“UDCPs”) and tru2way devices.<sup>11</sup>

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<sup>8</sup> See, *e.g.*, *Connected Devices: Boon for Cable?*, BROADCASTING & CABLE, at 14, June 28, 2010 (describing initiatives to deliver cable VOD content to Roku, Boxee, and Vudu devices, among others, including Clearleap plan to introduce a branded cable VOD channel).

<sup>9</sup> See, *e.g.*, *Microsoft Mediaroom 2.0 Delivers the Future of TV*, Microsoft News Center, Jan. 6, 2010.

<sup>10</sup> See, *e.g.*, Comments of Time Warner Cable Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 4-6 (filed Aug. 24, 2007) (“TWC Plug and Play Comments”) (describing TWC’s leadership in other industry initiatives).

<sup>11</sup> See, *e.g.*, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Fourth Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67, at ¶ 12 (rel. Apr. 21, 2010) (“CableCARD NPRM”) (observing that the “cable and consumer electronics industries have invested heavily in [CableCARD] technology as both a unidirectional and bidirectional solution”); *id.* ¶ 10 (noting the cable and consumer electronics industries’ agreement for bidirectional compatibility, which “continues to rely and build on CableCARDs”); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of*

They did so despite the very real prospect that the entire effort would be rendered moot if manufacturers, retailers, and consumers were not sufficiently interested. Similarly, TWC and other cable operators voluntarily developed the tuning adapter—again at significant expense—to benefit consumers with CableCARD-equipped UDCPs by enabling them to view switched digital video (“SDV”) programming in addition to the traditional one-way services those devices were designed to receive.<sup>12</sup> TWC remains interested in collaborating with manufacturers in private-sector-driven efforts to introduce devices that satisfy consumer demand, including those that employ broadband connectivity.

It is critical, however, that this history of efforts to shepherd device innovation inform—and temper—the Commission’s consideration of new regulatory mandates such as that reflected by the AllVid concept. The NOI embraces one important take-away from the previous dozen years’ experience with Section 629: No such requirement will work unless it applies to all MVPDs.<sup>13</sup> TWC commends the Commission for recognizing this critical principle. But the threshold question remains whether such mandates, regardless of their scope, are even advisable. Indeed, experience thus far demonstrates the wisdom of a flexible approach that takes account of what consumers actually want and what precisely would be required to meet those needs. Despite the merit of its underlying purpose, the NOI does not adequately reflect these fundamental lessons.

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*Navigation Devices*, Second Report and Order, 20 FCC Rcd 6794 ¶ 36 (2005) (referencing “the significant efforts by the cable and consumer electronics industries since 1998” to promote commercial availability).

<sup>12</sup> See Comments of Time Warner Cable Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 7-9 (filed June 14, 2010) (“TWC CableCARD Comments”).

<sup>13</sup> NOI ¶ 15; see also Federal Communications Commission, *Connecting America: A National Broadband Plan for Our Future* at 51 (rel. Mar. 26, 2010) (“NBP”) (same).

## DISCUSSION

The NOI proceeds from the presumption that consumers would be better off if a universal gateway device were available. But as TWC has consistently explained, the Commission cannot consider the potential benefits of any regulatory initiative related to navigation devices in a vacuum. Rather, it must weigh them against the costs that would be required to make the initiative a reality. And in this respect, the NOI pays little heed to the significant burdens that MVPDs would have to incur in order to develop and implement a universal gateway device. Given those immense challenges and the highly speculative benefits of facing them, the AllVid concept, at least as it is described in the NOI, does not seem likely to advance the Commission's goals of promoting consumer choice and innovation. The market-based initiatives already underway are more likely to deliver on those objectives, without the risks associated with a government-mandated "solution." TWC elaborates on several concerns associated with the NOI below.

### **I. THE COMMISSION SHOULD BE MINDFUL OF THE LIMITS ON ITS ABILITY TO CREATE A RETAIL MARKET FOR NAVIGATION DEVICES**

As it considers whether to require all MVPDs to make the significant investments that would be required to develop a gateway device, the Commission should carefully assess whether consumers would in fact have sufficient interest in the endeavor to make it worthwhile. The NOI seems to presume that consumers would want the proposed gateway device—and, in turn, the ability to purchase retail devices that can utilize it. But the Commission must test such assumptions against both the realities of today's marketplace and the lessons learned from previous efforts in this space. Indeed, given the widely recognized failure of the UDCP model and the uncertain future facing retail tru2way products, there is abundant reason to expect that

the gateway would become the electronic equivalent of the human appendix: present, but devoid of purpose.

There are compelling reasons to doubt that a gateway device would create a new market for retail navigation devices.<sup>14</sup> Fundamentally, the ability to purchase a navigation device at retail has proven to be far less appealing to consumers than Congress originally assumed.<sup>15</sup> Experience has shown that the lease model provides important benefits to consumers relative to purchasing retail devices. Consumers can lease devices at regulated rates without paying hefty up-front prices that include a substantial markup charged by the retailer. The lease arrangement also places the risk of ownership on the MVPD. The NOI itself acknowledges that consumers may prefer leasing devices for precisely this reason, noting that it is “impractical” for consumers to upgrade or replace their devices as platforms evolve and that they can avoid the risk of obsolescence or damage by leasing a device from their cable operator.<sup>16</sup> In light of this established consumer behavior, all MVPDs have gravitated toward the lease model—including those that initially favored a retail option.<sup>17</sup> And they have done so despite the fact that the leasing model places significant costs on MVPDs.<sup>18</sup>

Notably, this trend in consumer behavior has developed simultaneously with the other Commission-inspired initiatives noted above and the Commission’s rules implementing Section

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<sup>14</sup> NOI ¶ 39 (seeking comment on consumers’ interest in retail navigation devices).

<sup>15</sup> *Id.* ¶ 10 (“Most cable subscribers continue to use the traditional set-top boxes leased from their cable operator.”); CableCARD NPRM ¶ 12; TWC Device Innovation Comments at 5; TWC CableCARD Comments at 4-5.

<sup>16</sup> NOI ¶ 13.

<sup>17</sup> *See* TWC Plug and Play Comments at 13-14 (describing DBS operators’ adoption of the leasing model). Thus, it is not merely cable operators that rely on the lease model, as the NOI suggests. NOI ¶ 39.

<sup>18</sup> TWC Device Innovation Comments at 5.

629. Developments such as the introduction of the CableCARD and the Commission’s integration ban may have changed how cable navigation devices are manufactured, but they did not change how consumers behave—underscoring the limits on the Commission’s ability to stimulate demand where it does not otherwise exist.

The NOI posits that interoperability and obsolescence problems have dampened demand for retail devices thus far and that a gateway device would eliminate (or at least mitigate) these impediments. But that assumed result is unlikely. Although the NOI demonstrates an intent to ensure some sort of “future-proofing” of consumer-purchased downstream devices,<sup>19</sup> achieving this goal is inherently tricky. Indeed, no one can predict precisely how technology and the marketplace are likely to evolve, a point that is vividly illustrated by the failure of the IEEE 1394 interface requirement that the Commission has waived on an interim basis and that it now wisely is considering abandoning in favor of a more flexible approach.<sup>20</sup> Notwithstanding the proposed use of an Ethernet connection consistent with current industry practices,<sup>21</sup> the Commission cannot assume or necessarily expect that advancements in the delivery or presentation of video service in the future will be compatible with the equipment designed and manufactured to work with the gateway, particularly if the Commission were to take a heavy hand in requiring particular interfaces. And the type of digital output employed is only one of many technical mandates being considered.

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<sup>19</sup> See, e.g., NOI ¶ 20.

<sup>20</sup> CableCARD NPRM ¶ 20; *Intel Corp., Motorola, Inc., TiVo, Inc. Requests for Waiver of Section 76.640(b)(4)(ii) of the Commission’s Rules*, Memorandum Opinion and Order, CSR-8229-Z *et al.*, at ¶ 13 (Med. Bur. rel. June 18, 2010); see also TWC CableCARD Comments at 17-18 (explaining that such flexibility to choose IP or other interfaces would allow the industry to coalesce around the most effective option, which in turn could lead to the emergence of a single standard that is optimal for all interested parties).

<sup>21</sup> NOI ¶ 20.

Even if the gateway device were assured to function with all not-yet-imagined technologies, that fact would not necessarily generate demand for retail navigation devices, as other constraining factors would remain. For example, consumers would still have to consider spending hundreds of dollars for their first navigation device, and then several hundred more for any subsequent model (even if the upgrade also functions with the gateway device). Further, the consumer would continue to bear the risk associated with any damage to or repair of the device. Finally, the NOI risks making the retail option even less appealing to the extent it contemplates the disaggregation of MVPD services—which, as discussed below, would harm consumer interests.<sup>22</sup>

This is not to say that the NOI's goals themselves are unachievable. The above points of caution are meant only to underscore that consumer preferences limit the Commission's ability to create through regulatory fiat a marketplace for any particular type of device. As discussed above, the marketplace today is responding to those existing preferences and increasingly providing consumers with the sorts of choices that the NOI hopes to foster with the gateway device. Accordingly, the marketplace should continue to prove more reliable than any mandated solution as a means of gauging and meeting consumer demands.

## **II. THE COMMISSION SHOULD AVOID ANY FORCIBLE DISAGGREGATION OF MVPD VIDEO SERVICES**

If the Commission nonetheless determines that pursuing a universal gateway device is worthwhile, it should avoid over-reaching by requiring the unbundling of MVPD services. The goals identified in the NOI can—and by statute must—be achieved without fundamentally altering a consumer's experience or an MVPD's chosen method of content presentation. But the NOI contemplates allowing the disaggregation of MVPD services, such that device

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<sup>22</sup> See *infra* Section II.

manufacturers could pick and choose among the service elements that would be delivered to consumers.<sup>23</sup> As TWC has previously explained, such an approach would be unlawful and unwise.<sup>24</sup>

**A. The Commission Lacks the Legal Authority to Mandate Disaggregation.**

The Commission has no authority to require that MVPDs disaggregate their video services—such as their electronic programming guides (“EPGs”)—and allow others to “repackage” their content.<sup>25</sup> Rather, its statutorily mandated role is limited to facilitating a retail market for devices that receive an *MVPD*’s service. Specifically, Section 629 authorizes the Commission to promote a retail market for the “equipment used to access . . . services offered over multichannel video programming systems . . . .”<sup>26</sup> Were disaggregation allowed, however, devices—and consumers—no longer would access such services. Instead, those devices would provide another party’s version (the manufacturer’s, or perhaps another service provider’s) of the MVPD’s service. For instance, the service currently offered by an EPG includes the visual display of the information and any interactive functions keyed to the guide that are offered by the MVPD, such as DVR programming. If an MVPD were required to disaggregate its EPG and provide the underlying metadata to third-party equipment manufacturers, then consumers would not experience the unified package of visual elements, content, and applications that constitutes the *service* that the MVPD has chosen to assemble and offer in the competitive marketplace. This outcome cannot be squared with the plain language of the statute.

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<sup>23</sup> See, e.g., NOI ¶¶ 12, 43.

<sup>24</sup> TWC Device Innovation Comments at 7; TWC Plug and Play Comments at 37-40.

<sup>25</sup> NOI ¶ 45.

<sup>26</sup> 47 U.S.C. § 549(a).

Congressional intent confirms that the statute does not authorize a mandate for disaggregation of video services. As the Commission has acknowledged, Congress “inten[ded] that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”<sup>27</sup> The parallel context of Section 624A is instructive as to Congress’s view that any regulation must preserve an MVPD’s flexibility to innovate. There, in reaction to the Commission’s attempt to impose a particular standard, Congress expressly limited the Commission’s authority to regulate the compatibility of televisions and video cassette recorders with cable systems to bar it from adopting regulations that would “affect features, functions, protocols and other product and service options.”<sup>28</sup> The disaggregation of MVPD-provided service similarly would frustrate the incentive to innovate by directly altering the functions and services offered to the consumer.

Moreover, Section 629(b) bars regulations that would “jeopardize security” of MVPDs’ services or “impede the legal rights of a provider of such services to prevent theft of service.”<sup>29</sup> An unbundling requirement would threaten to violate these prohibitions. While the NOI suggests that the gateway device itself would perform all security functions,<sup>30</sup> its statements in that regard do not reflect a sufficient appreciation for the interactive components of security, such as billing and digital rights management, that would be performed downstream by the navigation device and that are also necessary to secure the content provided by an MVPD.<sup>31</sup> The

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<sup>27</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596 ¶ 16 (1998) (quoting Telecommunications Act of 1996, Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess., at 181 (1996)).

<sup>28</sup> 47 U.S.C. § 544a(c)(2)(D).

<sup>29</sup> *Id.* § 549(b).

<sup>30</sup> NOI ¶ 22.

<sup>31</sup> *Id.* ¶ 29.

NOI's proposals may also affect security functions that are inherent to particular MVPD systems.<sup>32</sup>

In connection with the request for comment on the Commission's authority, the NOI notes the "particularly deferential" judicial review to which the Commission is entitled in instances where it "must make judgments about future market behavior with respect to a brand-new technology."<sup>33</sup> That statement was made in the context of APA review of an order relating to cross-ownership rules that were premised on the Commission's factual predictions.<sup>34</sup> Here, however, the core legal concerns are not necessarily about the predictive accuracy of the Commission's judgment but its legal authority to make that judgment in the first place. As Congress has "directly spoken" to the issue, no deference would be afforded by a reviewing court.<sup>35</sup>

In short, disaggregation would violate the law by reducing MVPDs to mere providers of inputs for their competitors' business models, eviscerating the MVPD's right to provide a comprehensive service of its own. Such an outcome is well outside of the Commission's authority in this context.

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<sup>32</sup> See, e.g., Reply Comments of DirecTV, Inc., GN Docket Nos. 09-47 *et al.*, at 8-9 (filed Jan. 27, 2010) (describing DirecTV's reliance on the navigation device for its video-on-demand function and its incompatibility with certain gateway proposals).

<sup>33</sup> NOI ¶ 45 (quoting *Melcher v. FCC*, 134 F.3d 1143, 1152-53 (D.C. Cir. 1998)).

<sup>34</sup> *Melcher*, 134 F.3d at 1151-52. The question in that case was whether an order regulating the ability of ILECs to hold licenses for Local Multipoint Distribution Service was arbitrary and capricious. The ILECs challenging the order argued, among other things, that the Commission's prediction about the use of the technology by future licensees was too uncertain to serve as the basis for a regulation. The court rejected the argument, explaining that predictive factual judgments such as those warrant deference.

<sup>35</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

**B. A Disaggregation Requirement Would Harm Consumers.**

In any event, such an unbundling mandate would harm the interests of consumers.<sup>36</sup>

Video services are tightly integrated with the navigation user interface. Disaggregation would undo the intended design of services and frustrate consumer expectations. For reasons discussed above, disaggregation could also erode confidence in the ability of MVPDs to securely store and offer high-value content to consumers.

These consequences, in turn, would undermine MVPDs' incentives and ability to develop or offer new services.<sup>37</sup> Because consumers would not have consistent access to the service as intended and would not, even if they did have such access, associate it with their MVPD, the MVPD's interest in investing in the service would quickly wane. Further, content owners, deterred by a weakened and less transparent security function, could restrict MVPD access to the high-value content that consumers demand.<sup>38</sup> In other words, while the AllVid concept ostensibly is intended to *promote* consumer choice, it would in fact threaten to *reduce* such choice by curtailing the supply of high-value programming and enabling manufacturers to block MVPD content. The Commission may not pursue its policy objectives by depriving MVPDs of their right and ability to innovate, contrary to the NOI's description of its goals.<sup>39</sup>

In addition to chilling innovation by MVPDs, disaggregation would run afoul of other proposed and existing legal restrictions. Most notably, any rule that would allow manufacturers to block access to MVPD content and services by disaggregating them from an MVPD's

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<sup>36</sup> NOI ¶ 43

<sup>37</sup> See TWC Plug and Play Comments at 30-34.

<sup>38</sup> See *id.* at 35-36.

<sup>39</sup> See, e.g., NOI ¶ 17 (claiming that the "AllVid solution would be designed to accommodate any delivery technology that an MVPD chooses to use and allow MVPDs to continue unfettered innovation in video delivery").

intended offering would conflict with the Commission’s interest elsewhere in adopting rules codifying consumers’ entitlement to access content, services, and applications of their choosing.<sup>40</sup> The Commission’s open Internet proceeding is premised largely on its concern that so-called “gatekeepers,” in furtherance of their economic self-interest, could favor their own offerings by preventing consumers from obtaining unaffiliated content, services, and applications. Here, however, the Commission is considering empowering an entire category of such gatekeepers (retail consumer electronics manufacturers) by giving them a purported right to engage in the sort of blocking and related conduct the Commission is proposing to prohibit if done by broadband Internet access providers. Such conflicting approaches would be arbitrary and capricious.<sup>41</sup> And even if the Commission could reconcile such disparate treatment (and defend a disaggregation mandate as a jurisdictional matter), it would risk encouraging conduct that could run afoul of other legal protections, such as applicable intellectual property laws that protect rights owners from third-party interference with their chosen presentation of protected content.<sup>42</sup> The Commission could not immunize parties against such liability pursuant to Section 629.

Mandating disaggregation through a gateway mandate also would have disproportionate effects on MVPDs compared to their web-based competitors. While MVPDs would lose control

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<sup>40</sup> See *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52 (rel. Oct. 22, 2009).

<sup>41</sup> See, e.g., *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”) (internal citations omitted).

<sup>42</sup> Cf. *Live Nation Motor Sports, Inc., v. Davis*, 2006 WL 3616983, Civil Action No. 3:06-CV-276-L (N.D. Tex. Dec. 12, 2006) (ruling that practice of “deep linking” did not constitute fair use).

over their content and presentation, competing over-the-top providers, such as Netflix or Hulu, could continue to control the look and feel of their services, providing the user with a more enjoyable and integrated experience.<sup>43</sup> Further, the comparative ability of these providers to retain end-to-end control over content could give owners of high-value content greater confidence in their security, triggering a migration of such content away from MVPDs. These differences could substantially advantage “over the top” content providers and, in turn, alter the market for video content in a way that neither Congress nor the Commission intended. As the NOI recognizes and the CableCARD experience shows, a mandate cannot work without being neutral among all video providers.

Against these risks, disaggregation would present little consumer benefit. Existing online interfaces are menu driven, and different service options use menus that have their own unique look. In fact, existing devices can use their own guide software to display more than one menu—for example, Netflix accessed on a TiVo provides the consumer with the Netflix menu. Because consumers now can choose which menu they want—the sole upside to disaggregation identified in the NOI<sup>44</sup>—there is nothing in terms of consumer experience or competition to be gained by disaggregating MVPD services further.

All told, the likely effects of disaggregation threaten to disrupt settled business models by separating content from its intended delivery and security mechanisms. The Commission should not undertake such a risk without fully understanding the potential far-reaching consequences on the consumers of the content these business models are designed to deliver.

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<sup>43</sup> Indeed, this is the very reason the NOI suggests that content presentation might be important: “[D]evice manufacturers distinguish their products from one another by providing better user experiences.” NOI ¶ 41. This recognition underscores the importance of permitting MVPDs to retain the same control over their own content and presentation.

<sup>44</sup> *Id.* ¶ 43 & n.76.

### **III. THE COMMISSION SHOULD TAKE INTO ACCOUNT THE SIGNIFICANT IMPLEMENTATION CHALLENGES PRESENTED BY THE GATEWAY PROPOSAL**

TWC has already explained that the development of a universal gateway device presents tremendous challenges.<sup>45</sup> The NOI glosses over these substantial difficulties. It also endorses the aggressive implementation timeframe recommended by the National Broadband Plan and raises the prospect of enforcement penalties if MVPDs are unable to comply.<sup>46</sup> These aspects of the NOI suggest a rigid approach to the development and implementation of a gateway device that is not realistic, and that instead is based on a wildly optimistic projection of the time and effort this task will require that has no basis.

The Commission should acknowledge the realities relating to the development of a gateway device. First, the Commission should not adopt an unworkable timeline for the development of a gateway device; the December 2012 deadline suggested in the NOI simply is not viable. Again, past experience is instructive. Developing technical standards and protocols for cable plug-and-play devices required enormous effort over many years.<sup>47</sup> There is no reason not to expect at least the same degree of struggle in connection with a universal gateway device.

In fact, the NOI's proposal likely poses far greater—yet still quite predictable—implementation obstacles. While the Commission is correct to now pursue approaches that encompass all MVPDs, that scope (and the attendant need to start from scratch) makes the instant task all the more challenging, as the standard interface for the gateway device will have to meet the needs of all MVPDs, manufacturers, software developers, programming providers, and

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<sup>45</sup> TWC Device Innovation Comments at 9-10.

<sup>46</sup> NOI ¶ 37; *see also* NBP at 52.

<sup>47</sup> *See* TWC Innovation Device Comments at 9 (recounting difficulties in the plug and play negotiations).

consumers.<sup>48</sup> For instance, because the gateway would be inserted into the content delivery mechanism, it could require agreement on and programming of new middleware for both the gateway and for set-top boxes. Advanced functionalities, such as SDV or video-on-demand (“VOD”), make this a daunting task. TWC’s delivery of SDV programming relies on a hardware component (the set-top box) and an application that tells that hardware how to communicate with the headend to request and receive the appropriate channels. Inserting a gateway device between the hardware and headend would complicate that communication by requiring this dynamic information to be translated and relayed twice: once for delivery to the gateway, and again for delivery to the headend.

Digital rights management and system security similarly present difficult and sensitive issues. Both the gateway device and compatible navigation devices must secure the delivered content. In light of the resulting security concerns discussed above, the proposal to unbundle MVPD services and content would require further agreement concerning downstream security controls. Worse, not all video systems (such as IPTV) are compatible with the DTCP-IP standard that the NOI deems to be a “logical choice” for content encryption and device authentication.<sup>49</sup>

Including DBS and telco providers in the negotiations, while necessary from a policy perspective, will increase the level of difficulty by introducing additional complications. DBS providers generally lack two-way technologies and their attendant consumer benefits; meanwhile, some telco security functions are not supported by the NOI’s proposed content encryption standard. Yet the ultimate solution will have to accommodate all parties. Resolving

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<sup>48</sup> Comments of DirecTV, Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 11 (Aug. 24, 2007) (noting that because “all parties would have to start from scratch,” the industry would have to reproduce “the decade-long cable negotiations”).

<sup>49</sup> NOI ¶ 28.

such issues will require a cross-industry group to agree upon the proper standards, followed by significant investments to accommodate them. These various challenges would take years to resolve and would impose significant costs on MVPDs.

Further, the Commission should not allow the specter of enforcement action to hang over MVPDs' heads if they are unable to meet its specific expectations. There are a number of factors—some of which, such as consumer electronics manufacturers' sensitivity to security concerns,<sup>50</sup> are beyond MVPDs' control—that could impact the success or pace of this initiative. The threat of an enforcement action needlessly raises the stakes of what is sure to be a difficult process.

Finally, TWC agrees with the National Broadband Plan's statement that any new standards must be determined by industry standard-setting bodies, rather than by regulatory fiat.<sup>51</sup> The Commission must avoid picking technology winners and losers, as it is impossible and counterproductive to try to predict which solutions might gain acceptance in the marketplace. The requirement to include IEEE 1394 connectors in high-definition devices, which as noted above the Commission has waived on an interim basis and is considering abandoning altogether, illustrates the risks attendant in imposing a particular standard.<sup>52</sup> Indeed, that particular mandate cost the industry and consumers millions of dollars for an interface that the marketplace never embraced.<sup>53</sup> Further, as noted above, Congress has instructed the

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<sup>50</sup> See, e.g., Letter from Neal M. Goldberg, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47 *et al.*, at 2 (filed Feb. 26, 2010) (discussing security shortcomings of a consumer electronics manufacturer's proposed gateway device).

<sup>51</sup> NBP at 51 n.119.

<sup>52</sup> See *supra* at 8.

<sup>53</sup> See, e.g., Leslie Ellis, *FireWire: A \$400 Million Black Hole*, MULTICHANNEL NEWS, June 30, 2010.

Commission to avoid stifling innovation and to refrain from imposing technology-forcing standards.

### CONCLUSION

TWC appreciates and shares the Commission's interest in providing consumers with maximum choice among video content and delivery platforms. But there is much reason to be skeptical about the NOI's proposed gateway device as a means of achieving that goal. Before proceeding further, the Commission should carefully analyze whether consumers would truly want and utilize a gateway device and whether any such interest among consumers would justify the imposition of significant burdens on all MVPDs. While TWC believes that any conceivable benefit of the AllVid concept would be far outweighed by the costs on all parties, it urges the Commission to adopt a flexible framework for implementation in the event it decides to move forward with this substantial endeavor.

Respectfully submitted,

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