

**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
)	

REPLY COMMENTS OF AT&T INC.

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AT&T Inc. (“AT&T”) respectfully submits this reply to the comments filed in response to the Notice of Inquiry in the above-captioned proceeding (the “NOI”).¹

INTRODUCTION AND SUMMARY

The record in this proceeding reflects a broad consensus that the Commission should not adopt rules mandating the AllVid approach or any similar, mandatory separation between Multi-Channel Video Programming Distributors (“MVPDs”) and their subscribers. That position was embraced across a range of MVPDs, standard-setting organizations, consumer electronic (“CE”) manufacturers, and content providers and organizations, all of whom agreed that the AllVid

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). Unless otherwise indicated, all references below to the “Comments” of a party refer to comments filed in MB Docket No. 10-91 in July 2010.

proposal was premature, the timeline rushed, and the technological and equitable challenges far more complex than the Commission acknowledges.

Predictably, a few manufacturers and pro-regulation advocates nevertheless support AllVid, and seek to push its reach and requirements further still. Yet none offers evidence that the AllVid approach is necessary to achieve any legitimate aim. To the contrary, those advocates' comments in many cases illustrate that manufacturers are already producing devices that integrate MVPD and over-the-top ("OTT") video services, and that commercial efforts to achieve such results are ongoing. And no advocate bothers to demonstrate that the AllVid proposal is technologically achievable; how it would practically affect quality of service and customer support; how content owners would be protected and innovation supported under the new model; or myriad other details. Further, no AllVid advocate grapples with the strict statutory limitations on the Commission's authority to compel MVPDs to support specific CE manufacturer services, or to modify their services and technologies in order to do so.

Meanwhile, the Commission should find reassuring the extensive record evidence that MVPDs, standard-setting organizations such as the Digital Living Network Alliance ("DLNA"), the RVU Alliance and the Alliance for Telecommunications Industry Solutions ("ATIS"), and CE manufacturers are actively working on ways to ensure access to MVPD services by devices available at retail, including the development of standards for a gateway device usable with all MVPD services. But, in contrast to the NOI's proposed approach, industry-based solutions recognize the need for a model that would allow subscribers to use the electronic program guide ("EPG") and all other services provided by their MVPD, and permit MVPDs to introduce updated and innovative new services and applications. In the shorter term, MVPDs are working on solutions that will allow subscribers to access particular MVPD services over devices already

available at retail, such as an Xbox 360 or a personal computer. Those efforts fully satisfy Congress's objectives in Section 629, and the Commission need not, and indeed cannot, require more.

The record should also cause the Commission to reexamine its belief that an AllVid-type approach is necessary to support consumer access to OTT video, or to stimulate broadband adoption. As commenters (including even pro-regulation advocates) note, OTT video is accessible now on a host of display devices that are already available to consumers and can also be used to access MVPD service. Indeed, Google TV shows that manufacturers and MVPDs can even reach commercial agreement on *integration* of MVPD and OTT services. *Compelling* that model is neither a necessary nor useful way to promote consumer OTT use or broadband adoption, since lower-income consumers and the elderly—the population whose broadband adoption is among the lowest—are also the population least likely to want to shoulder the upfront cost of new and complex set top boxes (“STBs”) or video display equipment, and may not be willing or able to pay the cost of broadband just because some content is available on their television. The record thus confirms that rules mandating adoption of the AllVid or similar solution are not necessary to facilitate a commercial market for advanced video devices capable of accessing both OTT and MVPD services *or* to promote broadband deployment.

All that the AllVid proposal *would* advance is the ability of CE manufacturers to provide new services in direct competition with MVPDs. And while manufacturers' desire to provide such services may be legitimate, their insistence that they be able to do so on the backs of the MVPDs is not. Their proposals to take EPG data for free; compel MVPDs to provide them with disintermediated access to content and metadata; and preclude MVPDs from ensuring that MVPD subscribers receive the MVPD's full, integrated service and user experience, would

seriously interfere with the MVPD-subscriber relationship, consumers' rights, and MVPDs' business interests. Their suggestion that they have protected MVPDs' interests by ensuring that the AllVid gateway can address security is nothing short of facile. And as noted above, their "ask" exceeds any potential Commission authority, and it would violate MVPD contractual commitments to content owners and EPG vendors.

As AT&T noted and many commenters confirmed, the AllVid proposal would also raise a host of practical challenges. No standard could be developed that addresses the diverse interests and technologies at issue here in time to meet the Commission's proposed 2012 deadline. And any standard that is adopted will likely omit some services that some providers offer today—and will seriously encumber efforts to offer new services and enhancements tomorrow. AllVid proponents also fail to address the reduction in quality of service and delivery of advanced features that can be expected under a framework that severs the intensive coordination between the STB and the network in today's advanced MVPD systems. They do not deal with the costs, in terms of network reconfiguration, consumer equipment purchases, customer service, and reduced broadband investment, that will surely follow hasty imposition of a regulatorily mandated solution. And they brush away real digital rights management concerns that content owners themselves—key stakeholders in this process—have raised as substantial and fundamental issues of first principles.

Yet under any measure of reasoned decisionmaking, the Commission must seriously consider all of these issues and implications of its approach before proceeding further. And it must also consider the First and Fifth Amendment and copyright law concerns that preclude its proposed course of action, and which AllVid proponents ignore or brush off. In short, the

Commission should slow the precipitous rush forward here and instead focus on encouraging the ongoing industry efforts to develop a gateway solution and other interoperability standards.

DISCUSSION

I. THE RECORD AFFIRMS THAT COMMISSION INTERVENTION IS UNNECESSARY.

The NOI premises the proposed AllVid framework on two policy objectives: facilitating Section 629's STB competition and consumer choice goals, and meeting the National Broadband Plan's aims of increasing broadband adoption and use. But as the comments make clear, regulatory intervention is unnecessary to achieve either objective (and threatens to *undermine* service providers' incentives to deploy the broadband facilities that support advanced video and other services), because the marketplace itself is already meeting, and indeed often exceeding, those goals.

A. The Industry Already Is Working to Develop Gateway and Other Approaches That Promote Section 629's Device Competition Goals.

As AT&T explained in its opening comments, the industry has been actively pursuing various solutions that would permit manufacturers to offer universal STBs and other navigation devices at retail to consumers. In particular, AT&T, together with CE manufacturers, MVPDs, and others, is pursuing development of DLNA's solution. Like the AllVid approach, the DLNA solution envisions the use of a gateway device with a universal output, and it has the support and interest of a large cross section of the industry.² DLNA Guidelines also are designed to "add new features . . . based on market demand," allowing them to "evolve over time and ensure continued interoperability as new and old technologies" are combined.³ Thus, DLNA has published updated Guidelines twice since their original release in 2004, making them continually

² DLNA Comments at 1, 6.

³ *Id.* at 2, 10.

relevant and responsive to industry developments.⁴ These efforts are likely to produce a solution that advances and actually exceeds the goals of Section 629. But in stark contrast to the Commission’s vision of a CE-centric interface, DLNA’s approach includes Remote User Interface (“RUI”) Guidelines for use with its gateway. These RUI Guidelines are designed to enable MVPDs to offer their own unique user interface and EPG over the gateway on STBs and devices, so that MVPDs can ensure that their customers receive the services and experience the MVPDs intend to provide and their customers pay for and expect to receive.⁵

Thus, the DLNA solution can achieve the Commission’s objectives without the harms to MVPD services and subscribers’ interests that the AllVid proposal would create. And it has accordingly won support from a variety of industry stakeholders. In fact, AT&T already has been working with Samsung and other CE manufacturers to build a prototype and test various RUI solutions.⁶ While these efforts are still under development, and technological and pricing points still need to be explored, they reflect the enormous promise of marketplace-driven standardization.

In addition to these developments, commenters describe a variety of other ongoing efforts to create standards and devices that would support the interoperability of MVPD services and end-user CE devices. While much would need to be done to make any of these a standard that could be adopted and deployed across the marketplace, industry clearly has already begun this

⁴ *Id.* at 2-3.

⁵ DLNA provides an alternative under which the user interface is controlled by the CE device, *see* DLNA Comments at 11-12, and some MVPDs might find that approach acceptable. But DLNA’s recognition that a gateway can function with an RUI demonstrates that it is unnecessary for the Commission to mandate the wholesale change in MVPD service proposed in the NOI. And, as AT&T pointed out (AT&T Comments at 47), Section 624A(a)(4) of the Act, 47 USC § 544a(a)(4), requires that the FCC mandate the “minimum degree of common design.”

⁶ AT&T Comments at 9.

process and has substantial support.⁷ ATIS, for instance, has developed and published 33 IPTV interoperability standards,⁸ and is currently working to develop a standard for downloadable IPTV security solutions.⁹ The RVU Alliance has developed an industry standard utilizing RUI and many DLNA standards.¹⁰ And the traditional cable industry has developed the tru2way standard and also is exploring various other options.¹¹

In short, the record shows that MVPDs, and AT&T in particular, are already actively pursuing solutions of the type that the Commission proposes to *mandate*—but the industry initiatives reflect the technological and commercial input of a broad cross-section of marketplace stakeholders and are thus less likely to create the barriers to innovation and investment, and more likely to win support of critical stakeholders including MVPDs and content providers. And those efforts clearly demonstrate that the industry is long past the point where providers are seeking “to keep ‘foreign devices’ from their networks.”¹² To the contrary, as Verizon notes, MVPDs “have powerful and increasing incentives to ensure that video services are available in an

⁷ Indeed, while AT&T is participating in the ATIS process, AT&T believes ATIS’s suggestion (at 4-5) that the industry will be prepared to implement a downloadable security standard immediately upon ATIS’s publication at the end of 2010 is overly optimistic both in terms of the imminence of full agreement on a standard and timing of deployment.

⁸ ATIS Comments at 6.

⁹ *Id.* at 4-5; Verizon Comments at 25.

¹⁰ RVU Alliance Comments at 2; DIRECTV Comments at 7; Verizon Comments at 25. Notably, DIRECTV says it intends to offer consumers an STB based on the RVU standard—a real-world demonstration that the RUI approach is viable.

¹¹ NCTA Comments at 11; *see id.* at 11-17.

¹² Public Knowledge Comments at 6 (suggesting MVPDs presently seek to exclude third-party devices).

increasing number of ways and using a wide range of devices,”¹³ and stand to benefit if consumers can use their services more flexibly and for a broader range of purposes.

Indeed, for that very reason, AT&T and other MVPDs also are actively pursuing *individualized* arrangements to allow consumers to access their services over various retail devices. AT&T is in the midst of efforts to facilitate U-verse access over Xbox 360, personal computers running Windows 7, and some mobile devices.¹⁴ DISH has partnered with Google to allow consumers to access DISH services and OTT video over a Google TV product,¹⁵ and others are exploring service access via Blu-ray devices and game consoles.¹⁶

These efforts belie the NOI’s premise that MVPDs are seeking to maintain exclusive control over CE devices and that only Commission involvement will prompt industry movement toward the goals of Section 629. Whether or not that once was true, it is not today. Indeed, the individualized efforts described above directly and fully satisfy the actual command of Section 629: commercial availability of devices that can access and use an MVPD’s services.¹⁷ As we

¹³ Verizon Comments at 5; *see* Cablevision Systems Corporation (“Cablevision”) Comments at 17.

¹⁴ AT&T Comments at 11.

¹⁵ DISH Network L.L.C. and Echostar Technologies L.L.C. (“DISH”) Comments at 3.

¹⁶ *E.g.*, Verizon Comments at 10. *See also* Cisco Systems, Inc. (“Cisco”) Comments at 12-13. A recent report also indicates Verizon may be partnering with Motorola to offer its FiOS video service over a tablet device. *See* Kenneth Li & Paul Taylor, *Motorola and Verizon team up for TV tablet*, FT.com, Aug. 3, 2010, <http://www.ft.com/cms/s/2/9b5704d8-9f32-11df-8732-00144feabdc0.html>. *See also* Josh Wein, *Cable Operators See IP Video Services Coming to Other Home Devices*, Communications Daily, Aug. 6, 2010 (Cablevision and Time Warner Cable developing capability to use an iPad to control their services).

¹⁷ Section 629 is designed to “assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 U.S.C. § 549(a). *See also* AT&T

have previously explained, nothing in that statutory provision speaks to a universal solution that makes every device usable on every system; nor is there any evidence that this is necessary in order to promote a competitive retail market for CE video devices.¹⁸ Indeed, as the Google TV and Xbox efforts demonstrate, manufacturers clearly believe otherwise—regardless of what they assert for the purposes of this proceeding. Further, as we discuss below, there is nothing in the statute that would mandate or even permit the specific solution mapped out in the NOI, including in particular the proposed disintermediation requirements.

In short, the NOI’s proposals are unnecessary and at minimum premature. The affected industries are moving to satisfy the statute’s goals independently, creatively, and commercially—even “gateway” standards are under active development. All of this augers a better result than any type of regulatory solution.

B. The AllVid Approach Is Neither a Necessary Nor an Effective Means of Promoting Broadband Adoption and Usage.

There is no basis for the NOI’s suggestion that promotion of CE devices that can integrate MVPD services and OTT video would enhance broadband adoption and usage.¹⁹ That presumption is flawed for numerous reasons. As a preliminary matter, it is not plausible that broadband adoption or usage is being seriously stymied because MVPD customers cannot access full OTT video on all their video display equipment. There is, notably, *no record evidence* to that effect, not even from AllVid’s most ardent supporters. And as economists Michael Baumann and John Gaile observe in an analysis submitted on behalf of the National Cable and

Comments at 11-12; Time Warner Cable Inc. (“TWC”) Comments at 7-8; NCTA Comments at 6-11; Verizon Comments at 11; Cablevision Comments at 12.

¹⁸ Nor, for that matter, is it necessary or useful to promote deployment, adoption or usage of broadband, as we discuss below.

¹⁹ NOI ¶ 1.

Telecommunications Association (“NCTA”), they “have seen no evidence that it is a perceived inability to integrate web and MVPD sources that accounts for a consumer’s lack of interest in securing a broadband connection.”²⁰

Indeed, the Commission itself has already identified the real drivers of low broadband adoption: lack of digital literacy, particularly among the elderly and lower income households, and lack of relevance, among other things.²¹ The key to attracting this non-adopting population is surely not the ability to access YouTube videos or Hulu over a television, rather than a computer; that assumption is nothing short of absurd. In all events, the record demonstrates substantial overlap between subscribers to MVPD and broadband services, and suggests that those who do *not* subscribe to broadband at home also are not likely to own or purchase high-end televisions or video equipment.²² As Drs. Baumann and Gaile indicate, “a disproportionate share of households without internet access also has no set-top box.”²³

What is more, the AllVid proposal is not *necessary* to provide consumers with a means of accessing MVPD service and OTT video over a television or other display device. As the record plainly shows, there are *dozens* of such devices available on the market today—even leaving aside the development efforts described above—including Roku, Vudu, Boxee, TiVo, Google

²⁰ NCTA ex parte, Michael G. Baumann & John M. Gaile, *Economic Analysis of the Regulation of MVPD Navigation Devices*, at 36 (filed July 19, 2010) (“*Baumann & Gaile Economic Analysis*”).

²¹ See FCC, *Connecting America: The National Broadband Plan* at 168-70 (2010) (“*Broadband Plan*”), <http://download.broadband.gov/plan/national-broadband-plan.pdf>. See also *Baumann & Gaile Economic Analysis* at 36. Indeed, Drs. Baumann and Gaile suggest that “households without a computer [may] not yet value [broadband] service enough to incur the cost.” *Id.*

²² AT&T Comments at 14-15.

²³ *Baumann & Gaile Economic Analysis* at 36.

TV, Apple TV, Blu-ray, DivX, PlayStation, Sezmi, Xbox, and multiple others.²⁴ Indeed, Public Knowledge lists *twenty-one* examples of such devices,²⁵ even while insisting that the lack of an AllVid device is somehow impeding development and consumer enjoyment of OTT video.²⁶ And as Cisco and Panasonic note,²⁷ the assertion that OTT video cannot develop in the absence of a gateway model²⁸ would not bear weight in any event. As the record shows, OTT video is *already* burgeoning, without any regulatory boost. Today, “[o]ver one-third of the 18-24 year old adult households stream full-length OTT video on a regular basis.”²⁹ Over the last three years, the number of adults watching videos online has increased at a striking pace,³⁰ and the number of households that view OTT over their broadband connections is expected to more than double in the near future, making OTT video a “high-growth market with multi-billion dollar revenue streams” that will quadruple by 2014.³¹ In fact, 69 percent of Internet users—about half

²⁴ See, e.g., NCTA Comments at 9; TWC Comments at 3; DIRECTV Comments at 5-6; Google Comments at 5-6; Cablevision Comments at 11-12. See also AT&T Comments at 13-14.

²⁵ See Public Knowledge Comments at 3 & n.11.

²⁶ *Id.* at 20.

²⁷ See Cisco Comments at 12-13; Panasonic Corporation of North America (“Panasonic”) Comments at 6-7 (stating the Commission “has offered no evidence to suggest” it is true that “the lack of access to MVPD video services [is] a significant barrier to entry for OTT video devices and services”).

²⁸ *Broadband Plan* at 51.

²⁹ In-Stat, Press Release, *OTT Video Providers Jockeying For Position As Market Heats Up*, June 25, 2010, <http://www.instat.com/press.asp?ID=2803&sku=IN1004653CM> (“*In-Stat Press Release*”) (quoting In-Stat analyst Keith Nissen).

³⁰ Kristin Purcell, Pew Internet & American Life Project, *The State of Online Video*, at 2 (June 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-The-State-of-Online-Video.pdf> (“*Pew Online Video Study*”) (citing dramatic increases in adults viewing humorous, educational, political, and movie or tv show videos).

³¹ *In-Stat Press Release*, *supra* note 29.

of the entire U.S. adult population—have watched or downloaded video from the Internet.³² The trend extends to mobile broadband usage as well.³³

In other words, the facts provide no support for the notion that the success of OTT video (and its ability to stimulate broadband adoption) depends on the Commission’s mandating a new generation of CE devices. Those devices already exist, but even more important, it is almost certainly the case that the vast majority of OTT video users are not using them. And the NOI in all events never explains (nor does any commenter) why the worst aspects of the AllVid proposal—disintermediation of MVPD service and EPGs—are necessary to promote OTT video, broadband, or any other legitimate Commission goal. To the contrary, as AT&T, NCTA, and Verizon explain in their opening comments, the devices on the market that “integrate” MVPD

³² *Pew Online Video Study* at 2, *supra* note 30. Notably, in the context of the Comcast merger, groups like Public Knowledge have taken the position that OTT video is growing so successfully that it increasingly presents a significant threat to subscription MVPD service. *See* Petition to Deny of Public Knowledge, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, at 1 (June 21, 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020510361> (“OTT is uniquely positioned to bring true competition to the MVPD market.”). *See also* Statement of Susan P. Crawford, Professor, Cardozo Law School, *Applications for Consent to the Transfer of Control of Licenses, General Electric Company, Transferor to Comcast Corporation, Transferee*, MB Docket No. 10-56, at 6 (July 13, 2010), http://reboot.fcc.gov/c/document_library/get_file?uuid=3ef109ce-914f-4c77-80d0-0de257635bf1&groupId=19001. (“Comcast rightly perceives online video distribution to be a potential substitute for its cable television business. Cord-cutting is growing quickly, with 800,000 Americans having already abandoned their cable subscription. At least 1.6 million Americans will do so by 2011. In 2001, when asked to choose between giving up their Internet connection and giving up television, 72% of Americans said they would give up the Internet connection and just 26% said they would give up television. Now, just 48% say they would give up the Internet and 49% say they would give up television.”).

³³ *See, e.g.*, Marguerite Reardon, *Cisco predicts wireless-data explosion*, CNET News, Feb. 9, 2010, http://news.cnet.com/8301-30686_3-10449758-266.html (“Researchers estimate that mobile video traffic will represent 66 percent all mobile data traffic by 2014, increasing 66-fold from 2009 to 2014.”); Tim Conneally, *Report: Streaming video drove 72% global increase in mobile data consumption*, betanews.com, Feb. 8, 2010, <http://www.betanews.com/article/Report-Streaming-video-drove-72-global-increase-in-mobile-data-consumption/1265650049> (citing Allot Communications study).

and OTT content today flourish³⁴ *notwithstanding* the fact that the OTT providers often insist that the manufacturer preserve their “look and feel” and user interface and limit the manufacturer’s ability to search their content or include it in a generalized EPG³⁵—and notwithstanding that any integration that manufacturers *do* perform is (and must be) achieved today via commercial negotiations.³⁶ Indeed, as Google’s comments about Google TV unwittingly demonstrate (together with DISH’s), the integration benefits the Commission hopes to achieve can be and already are being achieved commercially, without the need to force all MVPD services into one model.

While the AllVid solution is thus unlikely to promote adoption and usage of broadband by consumers, it undoubtedly *will* frustrate the Commission’s broadband deployment objectives. As we explained in our comments, the AllVid solution 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, forcing them to divert funds needed to expand broadband to unserved or underserved areas.³⁷ Worse yet, the mandatory disintermediation of MVPDs’ services contemplated under the current AllVid proposal would disrupt MVPDs’ business models by permitting CE manufacturers to discard MVPDs’ user interfaces and any “unwanted” components of their service offerings, interfering with the quality of the services they provide to subscribers and depriving them of the revenues from both consumer value-added

³⁴ See *supra* note 24.

³⁵ AT&T Comments at 13-14; see NCTA Comments at iv, 16; Verizon Comments at 16.

³⁶ See, e.g., Google Comments at 5 (describing commercial arrangements to integrate video services). See also DISH Comments at 3.

³⁷ AT&T Comments at 17.

services and advertising. Broadband investment models that depend on those revenues will have to be reevaluated.³⁸

II. THE ALLVID PROPOSAL TO ADVANCE CE MANUFACTURER EXPANSION INTO NEW LINES OF BUSINESS AT THE EXPENSE OF MVPDS IS A GOAL WHOLLY UNAUTHORIZED BY THE ACT.

What AllVid proponents really seek has nothing to do with either Section 629 *or* the statute's authorized broadband goals, as should be evident from the absence of any real effort by any of those commenters to discuss the statutory language or build a record that might support the Commission's proposed theories. Their goal is the subsidization of CE manufacturer competition with MVPDs in the market for video *services*—not video *equipment*. To that end, they ask the Commission to (1) *limit* MVPDs' ability to control the look, feel, and user interface of their own services,³⁹ and (2) compel MVPDs to *provide* their services and EPGs in a disaggregated (and in some cases, even standardized) manner so that their CE manufacturer competitors may unpack and repackage the data into their own offering.⁴⁰

Public Knowledge, for example, makes no pretense about the fact that it sees this proceeding as an opportunity to transform MVPDs from providers of services to consumers into mere conduits for content to CE manufacturers. In its view, the AllVid framework presents an opportunity to eliminate MVPDs' right to "present" their own content and services—and to instead vest that right in CE manufacturers.⁴¹ MVPDs' sole function should be to "make their

³⁸ *Id.*

³⁹ *See, e.g.,* The Consumer Electronics Association and the Consumer Electronics Retailers Coalition ("CEA") Comments at 11-13; Free Press Comments at 12-13; Public Knowledge Comments at 17-19; TiVo Comments at 16.

⁴⁰ *See, e.g.,* CEA Comments at 9-10; Sony Comments at 31; Public Knowledge Comments at 13. *See also* Panasonic Comments at 11; Google Comments at 13 (seeking a standardized metadata stream); TiVo Comments at 13 (similar).

⁴¹ Public Knowledge Comments at 17.

content available over the home network” in the service of CE device manufacturers.⁴²

Astoundingly, Public Knowledge reasons this approach is justified because “one of the key ways that *electronics manufacturers* differentiate themselves from one another is through offering varied user experiences.” *Id.* (emphasis added).

Public Knowledge is joined by the other AllVid advocates who uniformly contend that the Commission should shift complete control over the look and feel of MVPD services to the CE device.⁴³ The gateway should not even be permitted to pass through a user interface, according to many,⁴⁴ and, as Sony bluntly puts it, inclusion of the MVPD’s user interface should at *best* be “optional” for manufacturers.⁴⁵

These commenters, like the NOI itself, rest on an unduly restrictive (and often self-serving) view of MVPD services,⁴⁶ view security as the limit of MVPDs’ legitimate interests in their services,⁴⁷ and ignore the tight integration between the network and the consumer device that permits the provision of advanced video and other services, an issue we discuss further below. As a result, their proposed approach would frustrate consumers, interfere with the MVPD-subscriber relationship, and deprive MVPDs of the benefits of offering their own, carefully designed interface and user experience, threatening to vastly change the nature of their services as received and perceived by consumers, and the value of their broadband investments. And beyond this, one thing is very clear: this is a far cry from what Congress meant when it

⁴² *Id.*

⁴³ *See* note 39, *supra*.

⁴⁴ *See, e.g.*, CEA Comments at 11-13; Public Knowledge Comments at 17-19.

⁴⁵ Sony Comments at 31.

⁴⁶ *See, e.g.*, CEA Comments at 12.

⁴⁷ *See, e.g.*, TiVo Comments at 8.

adopted Section 629 fourteen years ago, and it is not a legitimate exercise of Commission authority. Section 629 is concerned with one thing, and one thing only: supporting CE manufacturers' ability to offer devices that can access MVPD services. The Commission is authorized to develop a market for devices that can "access services provided by multichannel video programming distributors." 47 U.S.C. § 549(a). Section 629 is not concerned with supporting CE manufacturers' *services*, or their ability to compete with MVPDs for video customers. And it is certainly not concerned with permitting CE manufacturers to produce a device that can *eliminate* some parts of an MVPD's services and *preclude* an MVPD customer from obtaining the services and experience they expect and pay for. It would be unreasonable—and, indeed, an egregious contradiction of the statute's language and purpose—to transform Section 629 into an entitlement to make CE devices that foreclose consumers' access to parts of the MVPD service.⁴⁸

The same problems preclude compelling MVPDs to share EPG data with manufacturers.⁴⁹ Because device manufacturers want to produce their own EPGs that integrate MVPD and OTT content, they insist that the Commission force MVPDs to provide them the data to populate manufacturer EPGs.⁵⁰ In some cases, they go even further, and demand that MVPDs be required to amend their signals to provide EPG data in a to-be-developed

⁴⁸ See TWC Comments at 13.

⁴⁹ With remarkable lack of embarrassment, TiVo admits it now pays for EPG data, but asks the Commission to mandate that the cost of providing TiVo's service now be shifted to MVPDs who would be required to obtain that data and provide it to TiVo for free. See TiVo Comments at 13 & n.12.

⁵⁰ See, e.g., CEA Comments at 9-10; Sony Comments at 31; Public Knowledge Comments at 13. See also Panasonic Comments at 11.

standardized format for the benefit of manufacturers.⁵¹ And TiVo suggests that EPGs should be provided *only* by CE device manufacturers,⁵² excluding MVPD EPGs altogether.

According to the CE manufacturers, they must have these various EPG rights because their ability to offer EPGs would present a “great potential for innovation [and] product differentiation.”⁵³ That may very well be the case, but it does not make the proposal lawful. As a preliminary matter, and as the Commission itself has already recognized in the *Gemstar* case, ensuring that a manufacturer device has access to EPG data is not a legitimate exercise of the Commission’s Section 629 authority. “[N]either Section 629, nor the rules adopted by the Commission to implement Section 629, require” an MVPD to ensure that “proprietary EPG data” is made available to devices.⁵⁴ As the Commission found, “Section 629 is intended to assure the competitive availability of *equipment*, including ‘*converter boxes*, interactive communications *equipment*, and other *equipment* used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.’” *Id.* The Commission stressed that it has “*not* found that the right to attach consumer electronics equipment to a cable system can be expanded to include the obligation by cable operators to carry any service that is used by such equipment, nor is the legislative history supportive of such

⁵¹ See Google Comments at 13; TiVo Comments at 13. Sony also suggests that MVPDs eventually be required to transition to one network technology, and to a standardized conditional access technology to facilitate innovation in the device market. Sony Comments at 9, 29. However, it never explains why either requirement is necessary.

⁵² See, e.g., TiVo Comments at 10-11.

⁵³ Panasonic Comments at 11.

⁵⁴ Memorandum Opinion and Order, *Gemstar Int’l Grp., Ltd.*, 16 FCC Rcd 21531, 21542 ¶ 31 (2001). While *Gemstar* speaks about an MVPD’s obligation to *carry* EPG data, there is no distinction between an obligation to carry it at all, and an obligation to “transmit” it to manufacturer devices or transmit it in a certain format. The end result in both cases would be the same, and would in both cases exceed the Commission’s authority under Section 629.

a requirement. Indeed, the scope of Section 629 apparently was ‘narrowed to include only equipment used to access services provided by multichannel video programming distributors.’” *Id.* (emphasis added) (quoting S. Conf. Rep. No 104-230 at 181 (1996)).

CE manufacturers are of course free to negotiate for the right to provide their own unique, integrated EPGs. But Congress did not authorize the Commission to dictate that MVPDs must enable manufacturers to offer that service. In fact, Congress directed the FCC *not* to interfere with “features, functions, protocols and other product and service options”⁵⁵ of consumer video devices, as many commenters point out.⁵⁶ And the Commission itself previously has recognized that Section 629 does *not* authorize it to “create a market for certain specific equipment,”⁵⁷ much less specific equipment with certain capabilities.

The Commission also has made clear that Section 629 does not authorize the Commission to force MVPDs to *reshape* their data or services for the benefit of manufacturers. As the Commission explained in *Gemstar*, there is no requirement that MVPDs engage in “carriage of services outside of those chosen by the MVPD in order to assure retail availability of navigation devices.”⁵⁸ Instead, the rule adopted by the Commission to implement Section 629 simply “is intended to prevent a cable operator from excluding competing equipment from subscriber’s homes.” *Id.* In other words, the Commission is authorized to ensure that CE devices can access those services *as provided*. It may not mandate provision of disaggregated

⁵⁵ 47 U.S.C. § 544a(c)(2)(D).

⁵⁶ See AT&T Comments at 47; TWC Comments at 11; NCTA Comments at 29 n.46.

⁵⁷ Report and Order, *Implementation of Section 304 of The Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14784-85 ¶ 26 (1998) (“*First Report & Order*”).

⁵⁸ *Gemstar Int’l Grp., Ltd.*, 16 FCC Rcd at 21542 ¶ 31.

EPG data or EPG data reformatted to meet a particular standard for the sole purpose of supporting CE manufacturer EPG capabilities.

Finally, Section 629 could not be interpreted to require disintermediation and sharing of EPG data (or MVPD services generally), because that clearly is unnecessary to promote a robust commercial marketplace for CE retail video devices. Currently, OTT video providers are not compelled to offer such support to CE manufacturers, and many in fact refuse to allow manufacturers to include their content in the manufacturer's EPG.⁵⁹ Yet CE manufacturers are nevertheless competing vigorously to offer devices that access these providers' services, as discussed above. The record thus provides compelling evidence that pursuit of Congress's objectives does *not* require the disintermediation and integration that AllVid proponents insist on, and could more appropriately be met by the shopping mall approach Chairman Genachowski has described,⁶⁰ in which each individual video "shop"—whether an MVPD's or an OTT provider's—offers the look and feel of its proprietor, even while the mall owner/CE manufacturer offers an overlay, unifying interface that is itself attractive to consumers.

The manufacturers' EPG demands are seriously flawed for other reasons as well. For one, MVPDs today provide EPGs pursuant to contractual arrangements with programming guide data vendors. As AT&T and others in this proceeding have explained, requiring MVPDs to reformat and/or redistribute programming guide data would in fact *violate* those vendor contracts and vendors' copyright interests.⁶¹ DIRECTV makes clear that it "pays to obtain" EPG data, and that its vendor agreement "does not permit DIRECTV to provide the data to third parties—

⁵⁹ NCTA Comments at iv, 16 (noting restrictions on TiVo's and Roku's ability to integrate OTT content into their programming guides and search; in many cases, the OTT service must be searched from within the specific service or site).

⁶⁰ See NOI, Statement of Chairman Genachowski at 20.

⁶¹ See AT&T Comments at 55 & n.78; NCTA Comments at 40-41; Rovi Comments at 3-6.

presumably, because [the vendor] would like to sell its data to them as well.”⁶² And as we discuss below, EPG licensors and MVPDs that use their data to create their own EPGs have a protected copyright interest in their compilations, one that the Commission may not simply ignore in shaping its rules.

Nor is there any merit to some commenters’ insistence that CE manufacturers must have access to MVPDs’ EPG metadata in order to protect consumers’ putative “right” to search all MVPD and OTT content on an integrated basis.⁶³ To begin with, the roots of this supposed “right” are never identified. It certainly does not prevail in other contexts: As NCTA notes, neither consumers nor search engine operators have a “right” to search all *websites* simultaneously; search engines enter into commercial negotiations with website operators, some of which withhold their consent.⁶⁴ Consumers thus must often resort to context-specific search engines to search for certain types of content: A Google search for a flight to New York will not turn up specific pricing and travel time options for certain airlines, but a search using the Kayak search engine will, since Kayak negotiates with the airlines for that data.⁶⁵ And as noted, OTT video providers do not always agree that manufacturers can include *their* programming in an integrated EPG.⁶⁶ It is unclear why consumers have a unique “right” to integrated search that includes full access to the *MVPD*’s content. The fact that something might be an attractive feature or offering does not convert that feature into a consumer “right” or an MVPD obligation.

⁶² DIRECTV Comments at 20.

⁶³ See CEA Comments at 17-18; TiVo Comments at 14; Sony Comments at 31.

⁶⁴ See NCTA Comments at 14-15.

⁶⁵ See Dylan Tweney, *Aggregating Data Makes Us Smarter: An Interview With Kayak Founder Paul English*, Wired.com, June 13, 2007, http://www.wired.com/epicenter/2007/06/aggregating_dat/ (explaining that airlines provide the data directly to Kayak on a voluntary basis).

⁶⁶ See *supra* note 59.

And of course, satisfaction of consumers' desire for an integrated EPG could be met by MVPDs themselves; it is unclear why manufacturers must have a unique opportunity to offer that option.

There is even less merit to the argument that *manufacturers* have a right to EPG data because *consumers* pay to receive that data.⁶⁷ Subscribers pay for their MVPD services as a whole, and, as Sony itself recognizes, EPG data “constitute[] an integral part of the MVPD service, which is highly beneficial for presentation of the MVPD service[.]”⁶⁸ A subscriber may choose not use the EPG that the MVPD offers, but that does not mean the subscriber has a right to have that EPG data transferred to another provider whose EPG interface she prefers—any more than the subscriber would have a right to force her MVPD to transfer program *content* to another company. And TiVo and the Consumer Electronics Association and the Consumer Electronics Retailers Coalition's (“CEA”) contention that it would be *discriminatory* to withhold EPG metadata from manufacturers after consumers pay for it⁶⁹ is especially absurd. There is no suggestion in the record that manufacturers would agree to take MVPDs' services and EPG data on terms equivalent to what subscribers pay; instead, they want access for *free*. Finally, the suggestion that the Commission could preclude MVPDs from charging subscribers for EPG data as part of the service⁷⁰ is directly contrary to Section 623 of the Act, 47 U.S.C. § 543, which strictly limits the Commission's ability to dictate MVPD rates, and in particular, bars *any* rate regulation for MVPDs like AT&T that compete with incumbent cable systems.

⁶⁷ See CEA Comments at 18; TiVo Comments at 14.

⁶⁸ Sony Comments at 31.

⁶⁹ TiVo Comments at 14; CEA Comments at 18.

⁷⁰ See NOI ¶ 44 (asking whether MVPDs should be required to “charge separately for guide data”).

III. THE ALLVID PROPOSAL RAISES SERIOUS OPERATIONAL, CUSTOMER SERVICE, AND CONTENT PROTECTION ISSUES.

AllVid proponents either ignore or dismiss the many functional concerns AT&T and others identify in connection with the rigid AllVid proposal.⁷¹ But reasoned decisionmaking compels the Commission to grapple with those issues before proceeding forward.⁷²

Unattainable Deadline. As a preliminary matter, the record makes clear that the December 31, 2012 deadline the NOI proposes is unrealistic. Industry standard-setting is protracted even where there is industry agreement on the goal, and without the added challenge of having to accommodate the variety of independently designed and highly distinct network technologies used by traditional cable companies, IPTV providers, and DBS operators. Indeed, the protracted design process for the CableCARD standard for just *one* group of network technologies took much longer than the timeline proposed here.⁷³ As Baumann and Gaile and others explain, “very few Commission-driven technology mandates have been developed and implemented in 30 months or less,” including the CMRS service provider number portability framework, E911 location accuracy requirements, and broadcast DTV standards.⁷⁴ Here, as

⁷¹ See AT&T Comments at 26-43.

⁷² See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining an agency must face up to the logical consequences of its proposal before triggering them); *AEP Texas North Co. v. Surface Transp. Bd.*, No. 09-1202, 2010 WL 2431918, at *7, *11 (D.C. Cir. June 18, 2010) (vacating and remanding agency decision for failure to consider an important aspect of the problem). See also *Prof’l Pilots Fed. v. FAA*, 118 F.3d 758, 771 (D.C. Cir. 1997) (explaining that under the APA, an agency cannot “ignore[] contradictory evidence in the record” or “fail[] to justify seeming inconsistencies in its approach”).

⁷³ See TWC Comments at 16; DIRECTV Comments at 17-18; *Baumann & Gaile Economic Analysis* at 12-14.

⁷⁴ *Baumann & Gaile Economic Analysis* at 13 (citing Comments of Cisco Systems, 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 11 (June 14, 2010)).

Time Warner Cable points out, the “scope (and the attendant need to start from scratch) makes the instant task all the more challenging.”⁷⁵

While AllVid advocates blithely insist that the date should be readily achievable because the technology or standards for a gateway already exist,⁷⁶ simply reiterating this point does not make it so. As discussed above, there *are* a variety of technological and standards development processes underway, and there is reason to be optimistic that the industry could eventually adopt some of these solutions—especially if the Commission removes the specter of forced disintermediation of MVPD services and EPG data from the equation. But even advocates of particular gateway solutions (*e.g.*, DLNA) acknowledge there is still work to be done, and that a universally agreeable approach is unachievable within such an “aggressive”⁷⁷ and “wildly unrealistic”⁷⁸ timeline. And, of course, there is no agreement on the record, even among AllVid advocates, concerning basic fundamentals for adoption and implementation of an industry-wide standard: for example, which entity should develop the gateway standard, which party should be responsible for certification, or whether the Commission could or should mandate fair licensing

⁷⁵ TWC Comments at 16.

⁷⁶ *See, e.g.*, Sony Comments at 24. Notably, Sony’s insistence that a usable standard already exists is based on assertions that are contradicted by its own sister company, Sony Pictures. Thus, for example, while Sony points to DTCP-IP to argue that there already is a sufficient content protection standard, Sony Pictures disagrees, and more generally, Sony Pictures has made clear that “it will be necessary to resolve a range of issues before working on technical standards for an AllVid device,” and thus it will take significant time to develop a technological solution that protects all parties’ interests. 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*”).

⁷⁷ ATIS Comments at 6-7.

⁷⁸ Verizon Comments at 20.

terms for the technology included in the standard.⁷⁹ Thus, as Cisco notes, “December 31, 2012 is very optimistic [T]he standardization process alone could take between 24 and 36 months, with manufacturing adding at least an additional 18 to 24 months, depending on the number of AllVid device variants required.”⁸⁰

Operational Concerns. As noted above, the primary concern MVPDs have with the AllVid proposal is its failure to accommodate MVPDs’ and consumers’ interests in an MVPD subscriber being able to access and enjoy the full service experience offered by his MVPD, regardless of the video display device or STB he is using. Unless the AllVid proposal requires support for the MVPD’s user interface and its *full, un-disintermediated* service offering, subscribers will be frustrated with the performance of their service because MVPDs will not be able to ensure consistent and predictable offerings or user experiences. As DirecTV notes, “navigation devices of varying functionality” would be “unfair to and confusing for subscribers who, after all, pay MVPDs to receive *all* of their features.”⁸¹ Yet the AllVid proposal simply ignores this concern, despite the fact that there are several solutions under development that would support it.⁸²

⁷⁹ Commenters propose various approaches on each of these points. For instance, CEA proposes the Commission could rely on either the DLNA or the RVU Alliance for standards development and certification. *See* CEA Comments at 16-17. Public Knowledge (at 10), however, advocates self-certification, while TiVo simply asserts (at 12) that “it seems sufficient to assure the Commission . . . that the necessary standards exist” and neutral certification can be achieved. *See also* Google Comments at 10-11. While Sony appears to recognize (at 21) that the Commission lacks the authority to mandate licensing terms, TiVo contends (at 18) that the Commission *has* such authority.

⁸⁰ Cisco Comments at 34; *see* TWC Comments at 16; Panasonic Comments at 12 n.16; DIRECTV Comments at 18 n.55; Telecommunications Industry Association Comments at 8-9. *See also* NCTA Comments at 32; TiVo Comments at 4.

⁸¹ DIRECTV Comments at iv.

⁸² As NCTA notes (at 21-22), some approaches, like the RVU RUI solution, are not suitable for all MVPDs; the RVU approach is suitable for DBS in particular. But as discussed in

The AllVid framework raises other serious concerns that its proponents similarly fail to address. First, as Verizon points out (at 12), the mere exercise of forcing a variety of technologies into one standard (particularly on a compressed and artificial timeframe) creates a substantial risk of “reducing services to the lowest common denominator,” and depriving consumers of services and options that might otherwise be available.

Second, the many services that rely on coordination between the STB and the network today could be disrupted or degraded and might have to be reengineered to the detriment of consumers, who would ultimately bear those costs and poorer service. This is not a minor concern. In DIRECTV’s words, “set-top boxes operate in response to network data delivered . . . using proprietary—and in many cases secure—protocols that are processed by the various layers of software (*e.g.*, middleware, application layer) in the set-top box itself.”⁸³ The proposal to separate entirely the navigational capabilities from the service, and to have an entirely independent CE device interact with the network via the gateway, will give rise to a variety of performance and quality challenges.

As AT&T explained, that separation would disable MVPDs from resolving internal resource conflicts in a manner that preserves service quality. Today, for example, the MVPD-specific STB works with the U-verse network to limit a subscriber’s ability to display more than a certain number of channels in HD simultaneously. But an entirely independent STB would be able to ignore those optimal limits, and allow the customer to override HD channel limitations, with the result that a U-verse subscriber using that independent STB might receive significantly

AT&T’s opening comments and in DLNA’s comments, an all-MVPD solution that includes an RUI standard is under development. *See* AT&T Comments at 8-9; DLNA Comments at 11-12.

⁸³ DIRECTV Comments at 11.

degraded signal quality and thus a poorer customer experience, without understanding why.⁸⁴ TiVo shrugs off the possibility of such resource conflicts, declaring that CE manufacturers should be free to deal with those conflicts however they please⁸⁵—but that attitude simply highlights the cause for concern, since it emphasizes the degree to which the Commission’s proposal would permit manufacturers to insert themselves between the MVPD and the subscriber, even as to the MVPD’s own service.⁸⁶ And Sony’s response is equally untenable: It suggests (at 22) that each MVPD should decide for itself how to handle resource conflicts, but this fails to understand that the “wall” the Commission proposes between the MVPD and the consumer device makes that impossible.

In addition, the record shows that impeding STB-network interoperability will interfere with the delivery of many advanced functionalities that are highly dependent on intelligence in the STB. For example, the record shows that Cablevision’s delivery of two-way interactive channels is dependent on the STB setting up a link to an application server within the network and requires commands in a specific format “prescribed by the application . . . so that they can be sent and processed by the application server in the headend.”⁸⁷ Time Warner Cable likewise explains that its delivery of switched digital video depends on hardware and an application in the STB that “tells that hardware how to communicate with the headend to request and receive the

⁸⁴ AT&T Comments at 28-29.

⁸⁵ TiVo Comments at 16.

⁸⁶ Cablevision (at 23) also discusses various two-way applications it provides that require “‘squeezing back’ the video picture frame on the television to provide the subscriber with a series of options[,]” a process that depends on rapid coordination between the STB and the network—and one that could be disrupted by an independent STB.

⁸⁷ Cablevision Comments at 23.

appropriate channels.”⁸⁸ DIRECTV notes that its VOD service depends on the STB responding to proprietary data concerning conditional access, rental prices, and expiration dates.⁸⁹ And NCTA points out that programmers have launched various interactive applications that “rely upon the presence of a common interactive applications platform in the client device.”⁹⁰ At minimum, in Time Warner Cable’s words (at 17), “[i]nserting a gateway device between the hardware and headend would complicate that communication by requiring [the] dynamic information to be translated and relayed twice: once for delivery to the gateway, and again for delivery to the headend.” This adds a layer of complexity and could create unwanted latency—both of which could interfere with the consumer’s experience. And substantial re-engineering of MVPDs’ (and programmers’) services would be necessary in order to ensure operability in the new environment, a process that will take time and impose costs throughout the industry.

Relatedly, the AllVid approach could interfere with the performance of various functions with particular public interest implications. These include emergency alerts, parental controls, and closed captioning, among others. As AT&T has explained, where the MVPD no longer has a direct relationship with the STB, it cannot ensure that emergency alerts or closed captioning are actually displayed.⁹¹ And as both AT&T and DISH note, an MVPD’s unique parental controls are provided as part of the MVPD’s core user interface, and could be stripped away or not

⁸⁸ TWC Comments at 17.

⁸⁹ DIRECTV Comments at 12.

⁹⁰ NCTA Comments at 36. As NCTA further explains, the lack of STB-network interaction could also interfere with addressable advertising and dynamic ad insertion, because the STBs would not have a common platform and because MVPDs could not rely on unique device identifiers. *Id.* at 37.

⁹¹ *See* AT&T Comments at 30.

supported by independent STBs under the AllVid framework.⁹² Indeed, DISH’s parental controls include the ability to block certain programs from even appearing in the EPG, which could not be assured if the MVPD no longer could offer or control the EPG used with its service.⁹³

Finally, interfering with the MVPD’s ability to determine the quality of the audio-visual output provided to the consumer, as TiVo insists must be the rule,⁹⁴ is at odds with FCC rules and programming and retransmission consent agreements, which often *require* that programming be delivered to consumers in specific formats.⁹⁵ Fulfillment of these public and contractual requirements requires either that manufacturers support the MVPD’s user interface and allow the MVPD to control the “presentation” of its own service—or that the Commission revamp its rules to apply a host of obligations to CE manufacturers, who have notably not volunteered for that.

Innovation and Upgrades. As AT&T has explained⁹⁶ and many others note, freezing a gateway standard in place will necessarily compromise upgrades to existing services or the introduction of new innovations. No standard can be “future proofed,” as Time Warner Cable notes; nor can devices reliant on that standard be assured to be permanently capable of supporting a service as dynamic as today’s evolving MVPD services.⁹⁷ Today, MVPDs

⁹² See *id.*; DISH Comments at 8.

⁹³ See DISH Comments at 8.

⁹⁴ TiVo Comments at 10; see CEA Comments at 11-13.

⁹⁵ See AT&T Comments at 30 n.36.

⁹⁶ *Id.* at 38-43.

⁹⁷ TWC Comments at 8; see Motion Picture Association of America (“MPAA”) Comments at 4; Cisco Comments at 33; Panasonic Comments at 4, 6. In fact, as many commenters note, the Commission recently was forced to grapple with the challenges it faces in setting a standard that is supposed to capture future innovation: the IEEE 1394 interface requirement that the Commission thought would provide for any communications needs between devices and digital displays has been essentially abandoned, and the Commission has already waived and is

dynamically upgrade the software on STBs connected to their systems, so that the STB can interpret, access, and make use of upgraded and new applications and services.⁹⁸ Severing the relationship between the STB and the MVPD makes that difficult, unless the STB is required to support the MVPD’s RUI or client software.

But if the STB or other CE device is *not* required to be open to automatic upgrades under the AllVid framework, there is a risk that the AllVid rules could “preclude new innovations . . . that might not be supported by [the standard-based] devices available at retail.”⁹⁹ In Motorola’s words, the standardization that is at the heart of the AllVid approach “would make it difficult for the AllVid adapter to respond to changes in the marketplace” because new services “might require changes in the codec, transport, performance, or signaling mechanisms” to the STB or display device.¹⁰⁰ The mandated standard would either deter introduction of these new services by forcing the MVPD to figure out how to introduce new services by “transcod[ing]” them back to the existing standard for “backward compatibility,” or it could simply stall such innovation altogether, at least until “a standards-setting body [could] . . . update the existing standard”—which could take years.¹⁰¹ Services that are just emerging or on the horizon, such as

considering abandoning the requirement that devices support that interface going forward. *See* TWC Comments at 8; Cisco Comments at 5 n.11; Verizon Comments at 13; Motorola Comments at 4. *See also* 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, FCC 10-61 ¶ 20 (Apr. 21, 2010).

⁹⁸ AT&T Comments at 28; *see* DIRECTV Comments at 10-12.

⁹⁹ NCTA Comments at 29.

¹⁰⁰ Motorola Comments at 24.

¹⁰¹ *Id.* at 24-25. Even if an updated standard were periodically adopted, an MVPD would never know whether particular STBs have in fact been updated, so different subscribers might receive different services depending on their equipment. CE manufacturers would have no

Cablevision's cloud-based services,¹⁰² could be seriously stymied, as could innovations like 3D and others not yet imagined. As NCTA notes, this would directly contravene Congress's instruction that the Commission should "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."¹⁰³

Customer Service. The AllVid proposal presents serious customer service issues, as many commenters emphasize, since disintermediation and repackaging of MVPD services means customers will have no way of knowing whom to contact when an issue arises with their video service.¹⁰⁴ As NCTA explains, there is a significant risk of "consumer confusion over who is responsible for problems with access to content or for basic device operation, who is the supplier of interactive applications and advertisements, parental controls, and other services, and who is responsible for answering such customer complaints."¹⁰⁵ And while MVPDs would have no *control* over manufacturer-provided equipment, the record reflects a common expectation that they would likely receive the bulk of complaints, because subscribers are used to turning to their service provider for such support, and because MVPDs typically have a more developed customer support infrastructure and a longer ongoing relationship with customers than CE manufacturers.¹⁰⁶

obligation, and perhaps no means, to update all of their equipment in customer hands. *See* Panasonic Comments at 11.

¹⁰² Cablevision Comments at 20-21.

¹⁰³ *See* NCTA Comments at 29 (quoting H.R. Rep. No. 104-458, at 191 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 184).

¹⁰⁴ AT&T Comments at 31-32; *see* NCTA Comments at 46; Verizon Comments at 18; Cablevision Comments at 27 n.57; *Baumann & Gaile Economic Analysis* at 6-7.

¹⁰⁵ NCTA Comments at 46.

¹⁰⁶ *See* AT&T Comments at 31; NCTA Comments at 46; *Baumann & Gaile Economic Analysis* at 7.

MVPDs would also receive these complaints because many subscribers would likely find themselves unable (or at least unsure how) to receive the services they have paid for (and that their friends receive) if they unwittingly use an STB or video display device that blocks, chops, or degrades some aspects of their MVPD's service. As Drs. Baumann and Gaile indicate, "if a consumer's equipment purchased at retail does not support all of the services offered by the consumer's MVPD, the consumer could easily blame the service provider rather than the device manufacturer."¹⁰⁷ MVPDs will almost certainly be forced to incur greater costs to handle the increased customer inquiry flow, and to train representatives to troubleshoot to the best of their ability. Yet ultimately, they will be unable to solve many issues that involve entirely independent devices.¹⁰⁸

Oddly, the advocacy groups that purport to represent consumers' interests in this docket do not even address this very real concern, which will inconvenience and frustrate consumers who have paid a steep price for a high end video display device. And the manufacturing community provides only one response which is not much better than silence. Sony simply contends, without any analysis, that "[t]heoretical customer service concerns" are "overblown."¹⁰⁹ That bald statement should not satisfy consumers, their advocates, or this Commission.

Cost Concerns. The Commission must weigh the considerable costs that the AllVid approach would impose on consumers and MVPDs.¹¹⁰ Under the proposed approach, consumers

¹⁰⁷ *Baumann & Gaile Economic Analysis* at 7.

¹⁰⁸ *See* AT&T Comments at 31-32.

¹⁰⁹ Sony Comments at 30.

¹¹⁰ *See* DISH Comments at 13 (noting that the Commission must perform a serious study of the costs). The principles of "reasoned decisionmaking" require the government to "face[] up to the meaning of its choice" and at minimum offer the public "reasonable candor" about the

would have to lease the AllVid gateway *and* purchase new STB equipment.¹¹¹ And they will have to do so *whether or not they have any interest in the integration and home networking capabilities of new high-end display devices*, if the Commission prohibits MVPDs from using any non-gateway based equipment and swiftly forces “common reliance,” as several AllVid advocates insist.¹¹² Under that approach, the price for MVPD service access will skyrocket, which is unfair to consumers who want access only to basic video service.¹¹³ And it could impose real hardships on lower income consumers who are presumably the focus of the broadband adoption concern that supposedly animates the Commission’s proposal.

Consumers also will have to bear the cost of replacing or upgrading their STBs as MVPD services are upgraded or expanded—a cost *some* consumers may be perfectly willing to bear, but one that the Commission should not impose by regulatory fiat. Ironically, consumers often prefer to *lease* STBs today precisely to avoid having to upgrade or replace those devices.¹¹⁴ And as AT&T and Verizon have explained, consumers ultimately will bear at least some of the other costs imposed by the AllVid framework, including network reconfiguration, new customer support, and more.¹¹⁵

implications of its decisions. *Competitive Enterprise Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992). *See also ITT World Commc’ns, Inc. v. FCC*, 725 F.2d 732, 751 (D.C. Cir. 1984) (“In making public interest determinations which will affect an entire industry, the FCC is responsible for weighing the potential benefits against the detriments of a proposed policy.”).

¹¹¹ *See* NCTA Comments at 29; Panasonic Comments at i, 9-10. *See also Baumann & Gaile Economic Analysis* at 5.

¹¹² *See* Free Press Comments at 5; Sony Comments at 10; CEA Comments at 14-15. *See also* TiVo Comments at 11; Media Access Project Comments at 3.

¹¹³ *Baumann & Gaile Economic Analysis* at 35 (pointing to “the millions of consumers who have paid for UHF tuners and 1394 connectors and never used them”).

¹¹⁴ NCTA Comments at 24 & n.37; *Baumann & Gaile Economic Analysis* at 4-6.

¹¹⁵ AT&T Comments at 31-32, 39-40; Verizon Comments at 19-20. All of these costs to meet the AllVid standard may prove worthless unless CE manufacturers actually build, and

Again, so-called consumer advocates simply ignore these concerns.¹¹⁶ And Sony again simply avers that the costs are minimal.¹¹⁷ But this back of the hand approach cannot satisfy the Commission's obligations to engage in reasoned decisionmaking that truly considers how to best serve the public interest. And that analysis must consider not only the immediate cost impact on consumers, but the broader impact on MVPD innovation and broadband deployment. Costs that are *not* passed on to consumers will have to be absorbed by MVPDs, as will the decreased revenues that could result from the disintermediation proposal. That could affect MVPDs' ability to invest in next generation services and networks—a result deeply at odds with the Commission's recent reaffirmation that more must be done to get broadband to all Americans.¹¹⁸

DRM and Other Content Problems. The comments confirm that the AllVid proposal fails to adequately address digital rights management (“DRM”) concerns. As AT&T has explained, DTCP-IP does not provide a DRM solution at destination devices, so its adoption as an AllVid standard would *either* provide content owners with no confidence that their use and

customers actually opt to buy, corresponding devices. Yet the CE manufacturers' comments express no real commitment to build such devices. As the CableCARD and DTV standards processes illustrate, adoption of a standard is no guarantee that standard-compliant devices will be developed or adopted. And if the Commission imposes the AllVid standard and few retail devices emerge, then consumers will be stuck acquiring two devices, not one, from their MVPD, and both consumers and MVPDs will have incurred greater costs to no public benefit.

¹¹⁶ Free Press (at 8, 10-11) takes the opportunity to focus on the costs of leasing, but it is illogical to consider those costs in isolation without comparing the costs of repairing and upgrading devices that will typically be *far* more “high end” than the devices the majority of Americans use today.

¹¹⁷ Sony Comments at 27-28. *See also* Public Knowledge Comments at 3-4.

¹¹⁸ *See* Sixth Broadband Deployment Report, *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, A National Broadband Plan for Our Future*, GN Docket No. 09-137, GN Docket No. 09-51, FCC 10-129 ¶¶ 1-3 (July 20, 2010).

copying restrictions would be respected once transmitted from the AllVid gateway, *or* would require that all content be passed out of the gateway with a “copy never” restriction, which would then preclude DVR functions in CE devices.¹¹⁹

DTCP-IP is solely a link protection standard that protects content while in transit *between* devices.¹²⁰ While Sony asserts that DTCP-IP *is* sufficient to provide adequate content protection,¹²¹ the content creators whose protections are at issue (including Sony Pictures) flatly disagree. Because DTCP-IP does not have the ability to “protect communication of control information” or to “carry content usage information beyond that for copy and move, redistribution, and image constraints,” DTCP-IP “would not be appropriate” for DRM in the AllVid solution, as MPAA explains.¹²²

In its comments, the Digital Transmission Licensing Administrator, LLC (“DTLA”) observes that “[c]ontent protected with DTCP can be re-protected with other content protection systems,” because it can enable a hand-off of “content control information incorporating usage and encoding rules associated with the source content.”¹²³ While DTLA is correct that DTCP-IP *could*, in the future, be used as part of a DRM interoperability solution (“DIS”) to facilitate the transmission of content and usage rules between two devices, that solution will work *only* if the DRM mechanism in the source device and that in the destination device are compatible, *and* if DTCP-IP can correctly map the content and usage rules between those mechanisms. In effect,

¹¹⁹ AT&T Comments at 33-36.

¹²⁰ Digital Transmission Licensing Administrator, LLC (“DTLA”) Comments at 3; DIRECTV Comments at 17; Panasonic Comments at 3 n.5; *see* DLNA Comments at 8; RVU Alliance Comments at 5.

¹²¹ *See* Sony Comments at 19-20.

¹²² MPAA Comments at 4-6.

¹²³ DTLA Comments at 4.

then, DTCP-IP would not itself be performing any DRM function; instead, it would merely be providing transport and transcription of the content and usage rules protected by the source DRM to that of the destination DRM. But the standards and rules necessary to provide compatibility (and thus interoperability) among different DRM mechanisms have yet to be developed, approved, and released by DLNA,¹²⁴ and thus, today, DTCP-IP would *not* ensure end-to-end protection against unauthorized copying and redistribution of protected content once that content left an AllVid gateway.

In a recent *ex parte* submission, DTLA again suggests that DTCP would be able to ensure protection “on all display and storage devices on the home network.”¹²⁵ To the extent that DTCP *ultimately* may be able to work with DRM implemented on display and storage devices, that statement is accurate. Until an interoperable DRM solution is developed and adopted, however, AT&T and other MVPDs are obligated by the terms of their agreements with content providers to ensure that content remains protected on consumer devices. If DTLA is suggesting that the existing DTCP standard could enable that protection in the absence of a compatible DRM on storage or display devices, that protection could only take the form of a “copy never” instruction, disabling any type of downstream DVR function and possibly preventing further distribution within a home network.¹²⁶

Public Knowledge brushes off this concern by noting that DRM often “stand[s] in the way of lawful fair use[]”¹²⁷—but that attitude could seriously compromise the availability of

¹²⁴ AT&T Comments at 36-37.

¹²⁵ Letter from Seth D. Greenstein, Constantine Cannon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, at 1 (filed Aug. 5, 2010).

¹²⁶ AT&T Comments at 35.

¹²⁷ Public Knowledge Comments at 11-12.

programming on MVPD networks, to no party's benefit.¹²⁸ To succeed, any gateway approach *must* include an acceptable end-to-end DRM specification.¹²⁹ And that requires collaboration, on a *voluntary* basis, by industry stakeholders, since, as Public Knowledge itself observes, the Commission lacks authority to mandate any such post-transmission standard under *American Library*.¹³⁰

Additional content protection concerns are raised by both content owners and by EPG licensors. Content owners, for one, strongly object to the programming and EPG disaggregation proposals on the grounds that this could interfere with their contractual rights to insist that MVPDs abide by certain terms such as “placement of channel in the [EPG], tier placement of the channel, content description in the EPG, and advertising conditions associated with the content” that “ensure a uniform nationwide presentation, and provide consumers with a consistent experience that they value.”¹³¹ They also express concern that disaggregation could degrade or devalue their content in a variety of ways: for example, MPAA suggests that nothing would stop a manufacturer from presenting legal content next to illegal content in the manufacturer-offered EPG, or placing family-friendly content next to adult or mature content.¹³² As Time Warner explains, the resulting “comingling of legitimate content with unauthorized content” could give

¹²⁸ See AT&T Comments at 50 n.67; TWC Comments at 13.

¹²⁹ In fact, Time Warner (at 10) suggests that the best approach would be to permit support for several *different* DRM standards, because this would afford more protection than a single standard susceptible to deconstruction over time by malicious players.

¹³⁰ *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); see Public Knowledge Comments at 12 (“[A]s explained by the broadcast flag case, post-transmission restrictions on content are not forms of ‘communication by wire or radio’ and thus fall outside of the Commission’s subject matter jurisdiction.”).

¹³¹ MPAA Comments at 8-9; see Time Warner Comments at 9; AT&T Comments at 49-50; DIRECTV Comments at 21. See also TWC Comments at 13-15.

¹³² MPAA Comments at 9-10; DIRECTV Comments at 21. See also *Sony Pictures Letter* at 2.

“illegal websites a veneer of authenticity that may confuse consumers,” and “inappropriate content or commercials . . . overlaid onto children’s programming” could similarly lead to “confusion and potential compliance issues with applicable law and/or contractual obligations.”¹³³

EPG licensors similarly protest the forced (and free) access to their data by manufacturers. As Rovi explains, it carefully circumscribes the use of its EPG data through licensing restrictions imposed on MVPDs.¹³⁴ DIRECTV similarly notes that its contracts with EPG vendors typically prevent it from selling EPG data and may limit it to displaying that data on *its* devices.¹³⁵ And as DISH points out, contracts from vendors for ratings and other information may prevent MVPDs from passing that information through to a third-party CE device.¹³⁶ Leaving aside questions about the Commission’s authority in this area, which we discuss below, the Commission has not even begun to consider the ways in which invalidating these contractual limitations might affect EPG vendors’ business incentives or the availability of useful and informative EPG data.

IV. THE COMMISSION LACKS AUTHORITY TO ADOPT THE ALLVID PROPOSAL.

As we explain above in Sections I and II, Section 629 simply does not authorize the Commission to mandate the AllVid approach. That provision is designed to enable manufacturers to produce and market navigation device equipment that can *access* MVPD-

¹³³ Time Warner Comments at 9.

¹³⁴ Rovi Comments at 3-6; *see* Section II, *supra*. *See also* MPAA Comments at 7-9 (explaining that, as “just one part of an interrelated chain of how content is accessed by consumers,” content providers and MVPDs enter into agreements to distribute content and ensure consistency in the programming experience).

¹³⁵ DIRECTV Comments at 20.

¹³⁶ DISH Comments at 10.

provided services. It does not authorize devices that “receive some selected parts” of that service but not others,¹³⁷ or that “provide another party’s version (the manufacturer’s, or perhaps another service provider’s) of the MVPD’s services.”¹³⁸ By the same token, Section 629 does not authorize the Commission to mandate MVPD support for specific CE device capabilities, like an integrated EPG; in fact, Congress directed the Commission *not* to involve itself in dictating specific device functionalities.¹³⁹ And Section 629 similarly does not allow the Commission to force MVPDs to disaggregate or reengineer their services, as the NOI and the AllVid proponents’ comments would have it. Notably, none of the comments filed in support of the NOI undertake a serious analysis of the limits on the Commission’s authority. Yet as the D.C. Circuit emphasized in *American Library*, the Commission has no authority over equipment except as specifically authorized by Congress.¹⁴⁰

Even leaving aside these statutory barriers, the AllVid proposal would run afoul of the law. For one thing, as Time Warner Cable notes, it is arbitrary and capricious, since it would impose obligations on MVPDs that do not apply to their OTT video competitors, despite the stated interest in facilitating “integrated” EPGs and devices.¹⁴¹ By the same token, it would

¹³⁷ NCTA Comments at 48.

¹³⁸ TWC Comments at 10; *see* Verizon Comments at 22 (“Nowhere does the text [of Section 629] indicate that the Commission is authorized to require MVPDs to unbundle those services, or that the Commission’s regulations can permit third parties to pick and choose among the constituent elements of the services offered by MVPDs in order to design their own distinct services.”).

¹³⁹ *See* 47 U.S.C. § 544a(c)(2)(D) (directing the Commission not to interfere with “features, functions, protocols and other product and service options”); AT&T Comments at 47; TWC Comments at 11; NCTA Comments at 29 n.46.

¹⁴⁰ *American Library Ass’n*, 406 F.3d at 700.

¹⁴¹ TWC Comments at 14 (quoting *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

boost the ability of CE manufacturers to compete directly with MVPDs, without giving MVPDs *any* comparable rights.

The AllVid proposal also presents a serious First Amendment problem. It would deprive MVPDs of control over their speech and force them to speak in ways they do not want—by requiring them to share metadata, standardize their EPG and other signals, and allow their programming selections to be displayed alongside other content not of their choosing.¹⁴² If some advocates had their way, the AllVid rules would go further and *preclude* MVPDs from offering their own EPGs or presentations, thus *barring* them from speaking.¹⁴³ And, as explained above, MVPDs’ are not the only speech rights that would be affected. Content owners’ rights to control the presentation of their speech also are at issue. As MPAA and Time Warner indicate, content owners negotiate to control the display of their programs, their placement in a programming tier, and their presentation in an MVPD’s EPG, and the AllVid rule would allow those choices to be overridden by CE manufacturers and their partners.¹⁴⁴

These restrictions on MVPDs’ (and content providers’) speech fail intermediate scrutiny, because they do not advance any “important government interest,” and they burden First Amendment rights far more “than is essential to the furtherance of that interest.”¹⁴⁵ As discussed above, the Commission can point to no provision of Section 629 (or the Act’s broadband

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.”)).

¹⁴² See AT&T Comments at 57-62; Verizon Comments at 23-24; NCTA Comments at 48-49.

¹⁴³ See TiVo Comments at 10-11 (explaining that the rule must specify that gateway devices must “conform to their ‘sole function[,]’” which would not include “the actual display of the EPG, and the consumer’s action with it, [which] are client-side functions”).

¹⁴⁴ MPAA Comments at 8-9; Time Warner Comments at 7-9.

¹⁴⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)); see AT&T Comments at 62.

provisions) that would legitimize forcing MVPDs to support and subsidize a new generation of CE devices. As noted, Congress specifically foreclosed the Commission from requiring specific CE video device capabilities, and the Commission itself has disclaimed that goal as a legitimate exercise of its authority.¹⁴⁶ And in any event, the Supreme Court has made clear that the government cannot justify the impingement on one party's (i.e., MVPDs') speech based on the desire to promote the speech of another.¹⁴⁷

Further, as we have explained, *see supra* Section I, there are less restrictive and more effective ways to achieve both the Commission's device competition and broadband adoption and usage goals.¹⁴⁸ There are already market-based solutions in play that include an RUI approach and thus ensure that the MVPD can transmit its "speech" to its subscribers, and there are various provider-specific commercial developments that already permit access to MVPD services over retail devices like the Xbox and others. There also are many devices on the market that can access and integrate MVPD and OTT video content. And the fact that CE manufacturers have been able to develop and market such devices, notwithstanding that they have no right to disintermediated OTT content or program guide data, demonstrates that there are

¹⁴⁶ See note 57, *supra* and accompanying text, explaining that the Commission itself previously has recognized that Section 629 does not authorize it to "create a market for certain specific equipment." *First Report & Order*, 13 FCC Rcd at 14784-85 ¶ 26 (1998). See also AT&T Comments at 46; Cablevision Comments at 25.

¹⁴⁷ See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (same); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 241 (1974). See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) ("[C]ontrol[ing] the volume of expression" by some speakers "in order to 'enhance the relative voices' of" others "contradicts basic tenets of First Amendment jurisprudence").

¹⁴⁸ See AT&T Comments at 62-64.

far less onerous mechanisms that would still fully promote a commercial navigation device market.

The AllVid proposal also improperly interferes with protected copyright interests.¹⁴⁹ In particular, AT&T has a copyright-protected interest in its unique user interface and the presentation of its service offerings, the creative compilation and arrangement of its programming and other content, and the overall “look and feel” of its service.¹⁵⁰ Similarly, as discussed in Section II, EPG vendors have copyright interests in their carefully researched and crafted programming guides.¹⁵¹

Public Knowledge asserts that “[EPG] data are not subject to copyright” and “may be freely shared” because—it says—they are merely compilations of facts.¹⁵² But as even Public Knowledge acknowledges, the seminal case in this area, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), makes clear that compilations *are* copyrightable so long as they reflect “some minimal degree of creativity.” EPGs easily meet this standard.¹⁵³ As EPG vendor Rovi explains, it uses “creativity and subjective analysis” to “sort, select, describe, and group programming . . . to produce high quality, user-friendly data that is clearly distinguishable from a generic compilation.”¹⁵⁴ To produce its guide, Rovi manually aggregates information from networks about their scheduled programming and then through

¹⁴⁹ See *id.* at 51-57; NCTA Comments at 49-50; Rovi Comments at 4-6; Cablevision Comments at 29.

¹⁵⁰ AT&T Comments at 52-54; see Cablevision Comments at 29.

¹⁵¹ See Rovi Comments at 4-6.

¹⁵² See Public Knowledge Comments at 21.

¹⁵³ See AT&T Comments at 52-54. And as EPG vendor Rovi points out, if its guide data were simply an “obvious,” non-protectable compilation, it “would be hard pressed to find customers willing to pay for a license to such data.” Rovi Comments at 5.

¹⁵⁴ Rovi Comments at 5.

research, enhancement, and modification, generates the metadata about each show.¹⁵⁵ The resulting compilation is most clearly a creative work that is properly copyrightable under applicable law, no matter that Public Knowledge would have it otherwise.

Copyright owners have the exclusive right to make and authorize others to make derivative products from their copyrighted material, including products that recast, transform, or adapt that material.¹⁵⁶ The Commission, by contrast, has *no* jurisdiction over such copyright interests and *no* authority, explicit or implicit, under Section 629, Title I, or any other statutory provision, to authorize manufacturers to make derivative works based on EPG data, program content, or any other component of MVPDs' services.¹⁵⁷ Indeed, as Public Knowledge concedes, nothing in the Communications Act "could be read to give the Commission authority to implement copyright policy."¹⁵⁸

Finally, the AllVid proposal would effect an unconstitutional, uncompensated taking of MVPDs' services in violation of the Fifth Amendment.¹⁵⁹ As AT&T has explained, because the proposal would prevent AT&T and other MVPDs from providing their proprietary integrated services, and would instead require MVPDs to provide the components of *manufacturers'* own service offerings, the proposal would seriously interfere with MVPDs' business and investment-

¹⁵⁵ *Id.* at 5-6. *See also* NCTA Comments at 40-41.

¹⁵⁶ AT&T Comments at 54-56.

¹⁵⁷ *Id.* at 56-57.

¹⁵⁸ Public Knowledge at 12. Public Knowledge suggests that the Commission could nevertheless compel access to MVPDs' data and service components based on an analogy to program access requirements imposed by the Commission. *See id.* at 21-22. But that comparison is inapposite. Those requirements were *mandated* by Congress. And they in any event involve payment for content, and involve access to the content in its original form, not the right to slice and dice that content to make a new derivative work.

¹⁵⁹ *See* AT&T Comments at 64-66; NCTA Comments at 50-51; Cablevision Comments at 29.

backed, economic expectations.¹⁶⁰ Proposals to restrict MVPDs from *charging* for their own EPGs only exacerbate this. And as NCTA explains, “to the extent that a valid [intellectual] property right . . . recognized by state or federal law” exists in an MVPD’s services as designed—and it does, as explained in our opening comments¹⁶¹ and above—“the taking of that property on the basis of a federal mandate is constrained by the Fifth Amendment,” as the Supreme Court has made clear in *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984).¹⁶² And even if the Commission were authorized by Congress to commit private MVPD services to “public” use by forcing them to support competing services—which it is not—the proposal makes *no* provision for compensating MVPDs for their loss. That result is untenable, and it is unconstitutional.¹⁶³

¹⁶⁰ AT&T Comments at 64-65.

¹⁶¹ *See id.* at 51-57.

¹⁶² NCTA Comments at 50-51. As the *Ruckelshaus* Court made clear, an agency mandate forcing disclosure of a private party’s data protected by intellectual property rights interferes with its investment-backed expectations, since “the economic value of that property right lies in the competitive advantage over others that [the private party] enjoys by virtue of its exclusive access to the data.” *Ruckelshaus*, 467 U.S. at 1012. Indeed, that is precisely the Commission’s improper aim here: It seeks to breach MVPDs’—and EPG licensors’—rights to data in order to promote *manufacturer* success in the video services market.

¹⁶³ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission reconsider its proposed AllVid framework and instead encourage the promising voluntary industry efforts already underway to achieve an interoperability solution.

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