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
	)	

REPLY COMMENTS OF VERIZON

Michael E. Glover
Of Counsel

Edward Shakin
William H. Johnson
VERIZON
1320 North Courthouse Road
Ninth Floor
Arlington, Virginia 22201

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Attorneys for Verizon

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I. INTRODUCTION AND SUMMARY

The record generated in response to the Commission's *Notice of Inquiry* in this proceeding demonstrates that competition in the video device marketplace has indeed already been "unleashed."[1] As a result, it is clear that ongoing marketplace developments are already serving the goals of Section 629 better than any technology mandate could. In order to compete with each other and with new "online" video providers, facilities-based multichannel video programming distributors ("MVPDs") must come up with new ways to offer video content from a variety of sources over a variety of devices. Driven by consumer demand, video providers and device manufacturers have made great progress toward expanding the availability of retail devices that can access MVPD services. Given these ongoing marketplace developments, the record demonstrates that there is no justification for technology mandates, particularly lowest common denominator mandates that would stifle MVPDs' ability to innovate. Instead, to further the goals of Section 629, the Commission should encourage these ongoing marketplace developments and work to facilitate ongoing industry-led, open standards-setting. In particular, as one consumer electronics manufacturer suggested, the Commission could host roundtables that bring together all stakeholders, including manufacturers, MVPDs, other video providers, public safety representatives, disabilities groups, and content providers, to discuss standards-setting issues.

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[1] *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, CS Docket No. 97-80, PP Docket No. 00-67, FCC 10-60 ¶ 1 (rel. Apr. 21, 2010) ("*NOI*").

Numerous commenters echo Verizon's caution in its opening comments that a one-size-fits-all technology mandate will lead to a host of technical and policy problems. Indeed, aside from broad consensus that the Commission's December 31, 2012 deadline is unrealistic, commenters agree on very little with respect to how an AllVid adapter would be implemented. Many commenters also recognize that, to the extent that the AllVid proposal would require MVPDs to unbundle video services, a number of additional problems would result. Lastly, the record confirms that Section 629 does not authorize the Commission to mandate content unbundling, and that any content unbundling mandate would raise First Amendment concerns.

In sum, the record confirms that the Commission should not adopt its AllVid adapter proposal or any other technology mandates. Instead, the Commission should encourage ongoing marketplace developments, which better serve consumers and the goals of Section 629.

II. THE RECORD CONFIRMS THAT ONGOING MARKETPLACE INNOVATION IS ALREADY SERVING THE PURPOSES OF SECTION 629 BETTER THAN ANY TECHNOLOGY MANDATE COULD.

The comments submitted in this proceeding drive home the fact that ongoing marketplace developments are serving the goals of Section 629 better than any technology mandate could. As video providers face extensive intermodal competition from a variety of traditional and new video providers, consumers benefit from new and innovative ways to view a range of video content over a variety of devices in addition to increasingly sophisticated video offerings. Given this, MVPD-centric technology mandates would restrict the ability of MVPDs to innovate and disrupt providers' ability to effectively offer their increasingly complex and interactive services to consumers. Rather than impose new technology mandates, the Commission should encourage

ongoing open, industry standards-setting work to further facilitate market-driven innovation.

A. The Record Confirms That Ongoing Marketplace Developments Are Already Leading to Greater Video Convergence.

As evidenced by a number of comments in the record, consumer-driven innovation in the video device marketplace is rapidly increasing access to video programming across a broad range of devices.[2] Video providers have responded to extensive competition from a range of both "traditional" providers using different types of networks and new "online" video content providers by offering new and improved services that allow consumers to access content on a variety of devices from a variety of sources. For example, like Verizon, other video providers have responded to consumers' desire to consume media in any location by making certain broadcast and subscription television content available online to their subscribers.[3] And like Verizon, a number of traditional providers are also in the process of working with consumer electronics manufacturers to allow consumers access to MVPD services over a range of retail devices, including gaming consoles, Blu-ray™ players, personal computers, and mobile

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[2] *See, e.g.*, Comments of Cablevision Systems Corporation at 4 ("the Commission's goal of promoting and improving access to video programming via a broad array of devices and across multiple content delivery platforms is already being achieved in the marketplace without a technological mandate.")("Cablevision Comments"); Comments of Time Warner Inc. at 4-5 ("Time Warner Inc. Comments").

[3] *See, e.g.*, Time Warner Inc. Comments at 4; Comments of Panasonic Corporation of North America at 5 ("Panasonic Comments"); Cablevision Comments at 10; Comments of Cisco Systems, Inc. at 12 ("Cisco Comments"). And Dish Network Corp. recently announced that its subscribers will be able to watch live programming on their mobile devices, such as the iPad, iPhone, and Blackberry devices. *See* Deborah Yao, Dish to Stream Live TV on iPad, Other Devices, Associated Press (Aug. 4, 2010).

devices.[4] Consumers can already instantly stream or download video content from a growing variety of sources through a number of devices, including Internet-ready television sets manufactured by companies like Samsung, Panasonic and Sony, which are already available on retail shelves.[5] And new video delivery platforms are emerging to compete with facilities-based MVPDs.[6] As Cisco notes, "there has been an explosion in the number and use of over-the-top video devices and services over the past several years."[7] These devices and services, like Roku and Google TV, use various methods to integrate Internet content with traditional television content.[8]

The record also demonstrates that video providers and manufacturers have invested in other innovations that will continue to further video convergence. For instance, providers and manufacturers have invested in a number of technologies,

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[4] *See, e.g.*, Comments of AT&T Inc. at 11 ("AT&T is pursuing . . .arrangements that would permit consumers to access AT&T's MVPD service over . . . the X-Box 360, PCs running Windows 7, and some mobile devices . . . .")("AT&T Comments"); Comments of Beyond Broadband Technology LLC at 11 ("Beyond Broadband Technology Comments").

[5] *See* Comments of the National Cable & Telecommunications Association at 9-10 ("A variety of IP-based and new platforms also drive consumer choice for video access without a cable set-top box: Apple, Boxee, Blu-ray, DivX, PlayStation, Roku, TiVo, Vudu, Xbox, and Wii.") ("NCTA Comments"); AT&T Comments at12; Beyond Broadband Technology Comments at 11-12; Comments of the Telecommunications Industry Association at 3 ("The marketplace contains a growing number of smart video choices that allow consumers to access content from the Internet and non-MVPD sources.") ("TIA Comments"); Comments of Dish Network LLC at 3 ("Several retail manufacturers are already making available new devices that integrate MVPD offerings with broadband-enabled online video applications. . . .") ("Dish Comments").

[6] *See* Panasonic Comments at 6-7 (noting that new video delivery platforms, like over-the-top video devices and services, are emerging to challenge traditional MVPDs); *see also* Time Warner Inc. Comments at 4-5.

[7] Cisco Comments at 11.

[8] *See* Comments of Motorola, Inc. at 8 ("Motorola Comments"); Comments of Google, Inc. at 5 ("Google Comments").

including cloud-based capabilities and downloadable security solutions, which provide alternative technological solutions that will further facilitate both the type of video convergence and innovation that the Commission is seeking to encourage.[9] Motorola explains that its cloud-based solution leverages Web-based technologies to allow service providers to deliver the personalized media experience consumers desire to multiple screens on multiple devices over legacy networks.[10]

In addition, the record shows that video providers, spurred by competition, have continued to invest in and improve the capabilities of set-top boxes in order to provide their increasingly complex and interactive services in a consumer-friendly manner.[11] As a result, set-top boxes have become high-definition devices and digital video recorders, offering on-demand content, interactive program guides, voting, polling and other interactive and cross-platform services.[12] For example, Verizon has made substantial investments in its Interactive Media Guide, which allows customers to order new channels, movies, or premium services, troubleshoot any problems with set-top boxes, and program remote controls right from home through their set-top boxes.

B. There is No Justification for New Technology Mandates.

Given the ongoing marketplace developments, there is no justification for technology mandates, particularly mandates that would restrict video providers' ability to innovate. The record confirms that the Commission should not impose technology

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[9] *See, e.g.*, Cablevision Comments at 4; Motorola Comments at 10-13; Panasonic Comments at 9.

[10] Motorola Comments at 12.

[11] *See, e.g.*, NCTA Comments at 7-8.

[12] *Id.*

mandates and that doing so would likely harm consumers by chilling innovation in a still-developing marketplace.[13] Commenters warn that the Commission should learn from its failed CableCARD experiment and IEEE 1394 interface requirement (which, although currently waived on an interim basis,[14] requires the inclusion of specific and costly hardware components despite lack of consumer demand).[15] So too here, a uniform technology mandate would require providers to "divert valuable capital and resources" away from more productive efforts, including broadband deployment,[16] in favor of a technology mandate that could quickly become outdated or fail to garner consumer

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[13] *See* Comments of the Alliance for Telecommunications Industry Solutions at 6 ("ATIS Comments") ("The imposition of regulatory mandates could have the affect [*sic*] of inhibiting the very technical innovation the Commission seeks to spur with this *NOI*."); Comments of Arris Group, Inc. at 5 ("Commission efforts to regulate the burgeoning market could limit the innovation, competition, and consumer choice that is already occurring within the industry.")("Arris Comments"); Panasonic Comments at 5-6 ("Given the dynamism of home networking technology, the Commission should not ossify this innovative environment by mandating a particular home networking technology in its rules."); Comments of Entropic Communications at 1 ("[I]t can be difficult to accurately forecast changes in home networking technology" and such mandates can derail innovation.) ("Entropic Comments"); Motorola Comments at 22-23 (stating that "the risk of the government 'getting it wrong' in choosing the best standard is extremely high, given that technology advances so rapidly in this area.").

[14] *See Intel Corporation, 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, CSR-8251-A, CSR-8252-Z, DA 10-1094 (rel. Jun. 18, 2010).

[15] *See* Cisco Comments at 2 ("Rather than repeating the mistakes of CableCARD by imposing a technology mandate, the Commission should reject the AllVid proposal in favor of policies that will truly foster innovation in provider networks, accommodate convergence in home networks, and unleash entire new markets of choice and competition in devices and services for the consumer."); Comments on AllVid from HomeGrid Forum at 5 ("Markets are efficient arbiters of technology solutions; the Commission should not make the grave mistake of mandating inclusion of any legacy or insecure technology . . . The Commission need merely look at the decision a decade ago to mandate the inclusion of IEEE 1394 . . . .").

[16] *See* Comments of the American Cable Association at 4.

interest. As Time Warner Cable noted, instead of requiring 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."[17]

A one-size-fits-all-technology mandate that would restrict MVPDs' ability to innovate and offer new services would be especially harmful to consumers and thus is particularly unjustified. The Commission's current approach of focusing its regulatory sights solely on MVPDs—while generally giving consumer electronic device manufacturers or "online" video providers a pass—in an effort to increase competition ignores the complexity of today's dynamic video marketplace and the range of players involved in the video device ecosystem. Imposing mandates on just MVPDs would distort competition and inhibit innovation, and thus, harm consumers.

Although imposing a lowest common denominator technology mandate on any video provider would be problematic, doing so solely on one segment of the video marketplace—facilities-based MVPDs—would effectively eliminate an MVPD's ability to differentiate services. This would undermine the MVPD's incentives and restrict its ability to improve users' experience through interactive guides, graphical user interfaces, and other innovative services that allow customers to navigate, discover and purchase an expanding selection of available content. Such a mandate would also diminish incentives to invest in the broadband networks over which these services are offered.

Rather than imposing technology mandates, many commenters agree with Verizon that the Commission should encourage ongoing industry standards-setting

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[17] Time Warner Cable Comments at 1-2

work.[18] As Panasonic suggested, the "Commission should serve as the initiator and guide of this collaboration" among all stakeholders "but should not be in a decision-making role."[19] The Commission should host stakeholder roundtables, including manufacturers, MVPDs, public safety representatives, disabilities groups, and content providers, to discuss standards-setting issues.[20] The record demonstrates that a wide range of industry participants have already made great progress in the creation of flexible and interoperable standards through the work of industry-led open and accredited standards-setting bodies. For example, the AISP.6-IDSI working group, representing a wide range of industry participants, is currently developing a downloadable security solution that is interoperable and network agnostic.[21] In addition, standards like the Digital Living Network Alliance ("DLNA") are already developed and incorporated into a number of devices, and work is well underway on standards like the RVU Alliance, an open home networking standard that allows video networks to interact with various devices such as televisions, digital video recorders, and personal computers based on Internet Protocol

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[18] *See* ATIS Comments at 6 (stating that "technological innovation of video devices would best be promoted by the Commission's support and encouragement of the continued market-driven standardization of work through open, consensus-based standards organizations such as ATIS."); Comments of the RVU Alliance at 6-7 ("The FCC should not pick a winner between the standards and should regulate with a light touch to allow innovation in this area.") ("RVU Alliance Comments").

[19] Panasonic Comments at 12.

[20] *Id.*

[21] ATIS Comments at 1.

(IP) connectivity.[22] The Commission should encourage this progress and ensure that it continues.

III. THE RECORD CONFIRMS THAT A ONE-SIZE-FITS-ALL TECHNOLOGY MANDATE WILL LEAD TO A HOST OF TECHNICAL AND POLICY ISSUES.

As an initial matter, the record confirms that the proposed AllVid framework would, in fact, be very complex to implement and would lead to a vast array of technical concerns.

Today's MVPD services involve "sophisticated interplay between network, hardware, and software in order to present services on a television or other display device."[23] Unlike cable modems, which by comparison are much simpler, today's digital subscription services may require as many as one hundred different software interfaces to operate over a customer's navigation device and a provider's servers. As a result of these complications, a broad range of commenters agree that if the Commission goes forward with new rules—which it should not—the proposed deadline of December 31, 2012 would simply not be achievable.[24] As noted by commenters, the AllVid proposal would require a complicated standards-setting effort to address a number of issues that individually are each quite complex, such as encryption, interactive and transaction

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[22] *See, e.g.*, AT&T Comments at 8; Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition at 16-17; Comments of the Digital Living Network Alliance; DIRECTV Comments at 9,13& 33; Motorola Comments at 21; NCTA Comments at 27; RVU Alliance Comments at 6-7.

[23] NCTA Comments at 19.

[24] *See, e .g.,* ATIS Comments at 6-7 ("ATIS is unaware of any work being done to develop such equipment that would accommodate such an aggressive timeline"); AT&T Comments at 3-4; Beyond Broadband Technology Comments at 10 ("The Commission's estimate of having consumer 'AllVid' devices distributed by all MVPDs by the end of 2012 is simply not realistic."); TIA Comments at 8-11; Comments of Charter Communications at 7 ("Charter Comments").

services, emergency alert services, parental controls, and closed captioning.[25] For example, Charter Communications notes that it would be required to redesign and develop new standardized protocols for almost every aspect of its service including on-demand, switched digital, electronic programming guides, and interactive video enhancements.[26]

The record also confirms that matters are even further complicated by the fact that there is no consensus as to how an AllVid adapter should be implemented.[27] Commenters propose the addition of a vast array of different interfaces to the AllVid ranging from Simulcrypt interfaces to standardized networking adapter sockets.[28] Commenters also propose a variety of technologies to handle the various functions of the AllVid adapter.[29] And commenters disagree about the use of certain interfaces like

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[25] *See* AT&T Comments at 3-4 ("Indeed, it is entirely unrealistic to target December 2012…for completion of the very complex standard-setting effort that will be necessary to develop an AllVid device that is acceptable to all MVPDs, content providers, and CE manufacturers."); Beyond Broadband Technology Comments at 16-17 ("With the 'AllVid' approach, the Commission has to start from the beginning with a complex and time-consuming effort to find a consensus on a whole host of new standards which would then slowly move into the marketplace. In the best of circumstances this would take years."); Arris Comments at 4.

[26] Charter Comments at 7.

[27] *See* Comments of CTB Group, Inc. (discussing its technology that allows a digital television broadcast station to provide both television and broadband services simultaneously over a single 6 MHz TV channel."); Comments of the 1394 Trade Association (arguing that MVPDs should be required to enable program-guide-initiated recording and playback over the existing 1394 interface via a firmware update); Comments of the Digital Transmission Licensing Administrator LLC at 8 ("DTLA Comments"); Comments of the HomePlug Power Alliance at 3; Comments of Nagravision at 5.

[28] Comments of Nagravision at 5; Comments of the HomePlug Power Alliance at 3.

[29] *See e.g.,* DTLA Comments at 8(arguing that Digital Transmission Content Protection can perform a necessary role in an AllVid adapter to promote secure transmission and interoperability across the home and personal network of MVPD-

Ethernet.[30] While many commenters seek to downplay the technical complexity of implementing the AllVid proposal, the common thread in each of these comments is a claim that the Commission should dictate the inclusion of commenter's preferred technology. The breadth and variety of these "pick me" proposals show that in order to implement AllVid, the FCC will either have to be ruthless in selecting the winning and losing technical standards, which will freeze innovation and undercut a variety of technological improvements, or be so inclusive as to render the resulting device complex, bloated and impossible to implement. Indeed, some commenters expressly advocate the kitchen sink approach by providing long lists of interfaces that should be included,[31] and calling into question how the AllVid adapter could ever be a "small, low-cost" device.[32]

No matter how wisely the FCC chooses the standards to include or how many different interfaces it layers into the device, history shows that, ultimately, obsolescence is inevitable. It is simply impossible in 2010 to predict with any accuracy the successor technologies to the various standards and interfaces available today; even those standards

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delivered conditional access content . . . ."); Comments of Rovi Corporation at 7 (proposing applications to address electronic programming guides in an AllVid adapter).

[30] *See* Entropic Comments (arguing that the use of the 100BASETX Ethernet interface as the physical layer connector may not be an easy solution and that Multimedia over Coax may be better"); Time Warner Inc. Comments at 10 (arguing that Ethernet is a low-level protocol that cannot handle many current and future functions); *but see* Comments of IPCO LLC at 5 (arguing that an Ethernet physical interface should be included).

[31] *See* Sony Electronics Inc. at 18 (noting that the AllVid should incorporate a DLNA interface as well as Gigabit Ethernet and MPEG-4 Part 10 (AVC) media codecs and MVPDs should also be free to use additional standards, like WiFi or MoCA.); Comments of IPCO LLC (noting a number of interfaces that the AllVid device should include, including an "MVPD port (*e.g.* RF coaxial in front of the insert device), an Ethernet port and blends of either, or, or both USB and IEEE1394 ports.").

[32] *NOI* ¶ 16.

that appear to be the best suited for a particular task may rapidly be overtaken by technological events. No further illustration of this point is needed than the FCC's failed IEEE 1394 mandate. IEEE 1394, at the time of the mandate's adoption, was seen as the only physical interface capable of delivering the type of capacity necessary for video. IEEE 1394 was eclipsed by all manner of faster, cheaper technologies before it ever became widely utilized for these purposes, yet the mandate stayed in place, forcing manufacturers and consumers to spend money on computer chips that they would never use. Indeed, despite an interim waiver, the IEEE 1394 mandate remains part of the Commission's rules to this day.

Moreover, as commenters note, once the AllVid adapter is deployed, other opportunities for innovation in areas like new transcoding technology, advanced acoustics, and smart device accommodation of new services may be foreclosed or seriously hampered.[33] TiVo's recommendation that Commission adopt MPEG2 and MPEG4 as required codecs for audiovisual clients in the AllVid[34] illustrates this point—under such a mandate, the need to support these legacy codecs might prevent MVPDs from upgrading to successor standards, including other encoding approaches with improved performance. Characterizing such mandates as "minimums" misses the broader point that even minimum standards have costs, either in terms of hardware architecture or software choices. For example, a follow-on technology that requires a

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[33] *See* Motorola Comments at 24-25 ("The crux of the problem is that once the AllVid adapter is deployed the opportunities for cloud-based innovation immediately dim because the adapter only has the capacity to translate commands, intelligence and functionality that are based upon the toolbox of network capabilities embodied within its design."); DIRECTV Comments at 14.

[34] Comments of TiVo, Inc. at 15 ("TiVo Comments").

wholly different approach might be ignored if support for a legacy standard is mandated. Alternatively, consumers might be forced (as with the IEEE 1394 mandate) to bear the complexity and expense of a retaining a separate, vestigial "minimum" standard on the device, even while device manufacturers and carrier implement a newer approach.

Commenters also agree that the proposal could lead to quality of service ("QOS") problems, which in turn could create further customer service problems as customers would "have no way of knowing whether those problems are caused by the MVPD, by the subscriber's equipment, or by the interface between them."[35]

In addition to these broader technical issues, the record raises a number of other specific problems that likely would result from the proposal. For example, an AllVid adapter could interfere with some control mechanisms such as limitations on simultaneous HD channel usage, emergency alerts, and parental controls.[36] Charter Communications notes that the AllVid device would create problems in implementing its switched digital video service.[37] And AllVid could prohibit MVPDs' ability to measure program viewership and as a result interfere with its ability to improve services and tailor programming to a particular audience.[38]

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[35] *See* AT&T Comments at 31; Time Warner Inc. Comments at 10 ("Having devices use multiple encoding formats can also affect the video and audio quality of MVPD programming."); DIRECTV Comments at 26 ("An AllVid mandate would risk reintroducing the customer service problems. . . because no one would ultimately be responsible for problems with third-party devices."); Motorola Comments at n.22 ("The Notice raises customer service issues. For example, how is QOS assured since all the home networking and retail devices are outside the MVPD's domain—*e.g.*, who does the consumer call when there is a problem?")

[36] *See* AT&T Comments at 29-30

[37] *See* Charter Comments at 5-6.

[38] *Id.* at 6.

IV. THE FCC LACKS AUTHORITY TO UNBUNDLE VIDEO SERVICES, AND DOING SO WOULD BE BAD POLICY.

The record demonstrates that any content unbundling requirement would undermine existing services to consumers and would stifle further innovation. Even apart from these negative consequences, the record also shows that Section 629 simply does not authorize the Commission to require MVPDs to unbundle video services.

To the extent that the AllVid proposal would require MVPDs to strip out video content and offer it on a stand-alone, unbundled basis—essentially transforming MVPDs into content wholesalers—the record confirms that this would raise a number of further policy concerns. *First*, because customers would not have consistent access to all services provided by an MVPD, MVPDs would be unable to provide high-value interactive features and a consistent look and feel for their services. Such a result would undermine MVPDs' ability to innovate and compete effectively while directly harming consumers as MVPDs would be hindered from offering increasingly complex and interactive services, including the convenience of ordering video content and services from home, in a consumer-friendly and cost-effective manner.[39] Limiting the ability of MVPDs to differentiate a product's presentation would be particularly perverse given that many of the online competitors for MVPDs (including, for example, YouTube and Hulu) would be allowed to control the look and feel of *their* products. *Second*, an unbundling mandate would disrupt the intended presentation of video content, which may damage the brands that consumers trust, and could upset existing contracts between MVPDs and

[39] *See* Time Warner Cable Comments at 13.

content programmers, which set out specifics for the presentation of content.[40] And *third*, an unbundling mandate would undoubtedly raise questions about intellectual property rights.[41] In addition to the rights that MVPDs may have in branding,[42] any intellectual property rights held in the underlying technologies that MVPDs use may not be adequately protected.[43] And the proposal to unbundle MVPD services and content would upend the agreements between MVPDs and content providers concerning downstream security controls because not all video systems are compatible with the same content encryption and device authentication standards.[44] Indeed, while many commenters seem to envision a painless insertion of an AllVid adapter into existing consumer arrangements, there is no guarantee whatsoever that content providers would be willing to provide their content to MVPDs in the first instance if MVPDs could not ensure that the content would be adequately protected or provide assurances as to how the content would be presented.

Many commenters also agree that the plain language of Section 629 neither authorizes nor contemplates the disaggregation or unbundling of video services.[45]

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[40] *See* Time Warner Cable Comments at 9; NCTA Comments at 37, 43-44; DIRECTV Comments at19-20 (noting that its agreement with Tribune Media to obtain data for the programming guide does not allow distribution to third parties).

[41] *See* Arris Comments at 4; DIRECTV Comments at 31.

[42] *See* NCTA Comments at 51-52.

[43] *See* Comments of Rovi Corporation at 4-6; NCTA Comments 40-42 (noting that "the AllVid NOI proposal does not adequately protect intellectual property, most of which is not owned by the cable operators.").

[44] *See* Time Warner Cable Comments at 17.

[45] *See* AT&T Comments at 45 ("The plain language of Section 629 clearly suggests that the statute is satisfied (and the Commission's authority is exhausted) if the equipment needed to access a particular MVPD's service can be manufactured and sold at retail."); Cablevision Comments at 25 ("That provision only authorizes the FCC to

Indeed, as NCTA notes, "[w]hen Congress directs unbundling, it spells out highly detailed plans, as it did with for limited portions of the telephone networks of defined incumbent local exchange carriers. There is no hint of such legislative intent for MVPD systems."[46] In contrast, the commenters who claim that the FCC does have authority to adopt the AllVid proposal do so based on nothing more than a superficial citation to Section 629, without any analysis of the flaws in that theory.

The record also confirms that the prospect of an AllVid mandate that would require unbundling raises a number of constitutional concerns. As Verizon noted in its initial comments, and commenters agree, a content unbundling mandate would deprive MVPDs of their First Amendment right to edit and control their content and how it appears to subscribers.[47] As such, although MVPDs do indeed license copyrighted guide data for electronic interactive guides,[48] whether or not certain aspects of electronic interactive guides may be copyrighted is irrelevant. Further, the First Amendment concerns of a content unbundling mandate could not be ameliorated by allowing MVPDs to retain the look and feel of the "ordering step" of its video on-demand services as TiVo suggests.[49]

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promote a retail marketplace for cable system navigation devices. . . ."); NCTA Comments at 48; Time Warner Cable Comments at 10.

[46] NCTA Comments at 48.

[47] *See* Time Warner Inc. Comments at 9; AT&T Comments at 57-63; NCTA Comments at 48-51;

[48] Despite comments on the record that indicate otherwise, *see, e.g.*, Comments of Public Knowledge & The New America Foundation at 22, the data that populate electronic interactive guides contain copyrighted materials that are licensed at cost for specific uses. For example, the description of a television show is copyrighted intellectual property. MVPDs make significant investments in this and other data to differentiate and improve their program guides and other features.

[49] *See* TiVo Comments at 14-15.

Commenters also raised concerns that the AllVid framework, as currently proposed, could effect an unconstitutional taking of MVPDs' property interests in violation of the Fifth Amendment.[50] By converting MVPDs from providers of an integrated service that includes video programming, interactive IP applications, innovative programming guides, games and powerful search functionalities into "dumb pipes," a content unbundling mandate would amount to a regulatory taking by seriously interfering with MVPDs' business operations and investment-backed, economic expectations.[51] Indeed, the NOI suggests not only that MVPDs might be required to populate retail device manufacturers' programming guides, at no cost, but they might then be prohibited from recovering the costs of their guide data from their own subscribers.[52] Under such a framework, MVPDs would be forced into the business of supporting and populating retail device manufacturers' own offerings without compensation.

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[50] AT&T Comments at 64-66; Cablevision Comments at 29; NCTA Comments at 52 (arguing that requiring video providers to give up trademark protection of their guides and programming services constitutes a government taking of a valuable property right).

[51] AT&T Comments at 64-65.

[52] *Id.* at 65 (citing *NOI* ¶ 43).

V. CONCLUSION

For the foregoing reasons the Commission should not adopt technology mandates, particularly its AllVid adapter proposal. Instead, the Commission should encourage ongoing marketplace developments, which better serve consumers and the goals of Section 629.

Respectfully submitted,

By: *Edward Shakin*

Michael E. Glover
Of Counsel

Edward Shakin
William H. Johnson
VERIZON
1320 North Courthouse Road
Ninth Floor
Arlington, Virginia 22201

August 12, 2010

Attorneys for Verizon