

**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 The
Consumer Electronics Association And
The Consumer Electronics Retailers Coalition On
Notice Of Inquiry**

August 12, 2010

TABLE OF CONTENTS

	Page
I. Introduction And Summary	2
II. MVPD Comments Demonstrate The Feasibility Of The Commission’s Goals As Set Forth In The NOI.....	3
A. The Comments Of Dish / Echostar In Support Of A Gateway Rulemaking Demonstrate That Private Sector Industry Standards Will Be Sufficient To Accomplish The Commission’s Objectives.....	3
B. The Concerns Of MVPDs About “Disaggregation” Of Services Are Based On Their Assumption That Their Own EPGs Will Not Be Transmitted To Client Devices.....	5
(1) Consumer choice of guide.....	6
(2) Guide data to other licensed devices	6
III. The Comments Of Standards And Licensing Consortia And Technology Vendors Demonstrate The Feasibility And Benefits Of The Gateway Approach	8
A. The DLNA Comments Demonstrate That Private Sector Standards, Already Developed Or Under Development, Can Satisfy The Commission’s Objectives.....	8
B. The RVU Comments Demonstrate That The Full MVPD EPG Can Be Made Available On Client Devices On A Fully Interactive Basis.....	10
C. The DTLA And Rovi Comments Demonstrate That Content And EPG Data Can Be Provided To Client Devices Without Compromise To Content Provider Or MVPD Interests	10
IV. The Commission Has The Authority To Complete And Implement A Rulemaking In Accordance With Its Goals As Stated In The NOI.....	11
A. Arguments That The Commission Would Be Assuming New Powers Are Based On A Misunderstanding Of How Programming Would Be Protected And Guide Data Conveyed.....	12
B. Arguments That The Commission Lacks Essential Authority Under Sections 624A and Section 629 Are Contrary To Law And Would Require The FCC To Reverse Its Settled Interpretations Of Those Provisions And Their Legislative History	12
Conclusion.....	15

**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 The
Consumer Electronics Association And
The Consumer Electronics Retailers Coalition On
Notice Of Inquiry**

The Consumer Electronics Association (“CEA”) and the Consumer Electronics Retailers Coalition (“CERC”) submit these joint Reply Comments in further support of the Commission’s Notice Of Inquiry,¹ the Commission’s National Broadband Plan,² and the Commission’s implementation of Sections 624A³ and 629⁴ of the Communications Act. CEA and CERC believe that the comments received in response to this NOI validate and support the Commission’s goal of completing a rulemaking, by the end of 2012, to establish a “gateway”-based implementation of its obligations under Section

¹ *In the Matter of 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 Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Notice of Inquiry (rel. Apr. 21, 2010) (“NOI”).

² National Broadband Plan Chapter 4.2.

³ 47 U.S.C. § 544a.

⁴ 47 U.S.C. § 549.

629. CEA and CERC urge the Commission to proceed expeditiously toward this objective.

I. Introduction And Summary

The comments received on this Notice Of Inquiry demonstrate the correctness and feasibility of the course outlined by the Commission in its National Broadband Plan. Stakeholders in every affected industry group have come forward to endorse the Commission's objectives and to offer tools for their accomplishment. One MVPD, Dish Networks, agrees with CEA and CERC that the Commission should proceed to a rulemaking and should issue regulations to accomplish its goals.⁵ The reluctance of some others seems based on an apparent misapprehension as to the range of choices that consumers will be offered. Several of these, nevertheless, see a role for the Commission in achieving its goals through focused, but less formal, means attendant to a rulemaking.⁶

The private sector technology, standards, and licensing communities have come forward with information and assurances more than sufficient to give the Commission confidence that its objectives can be achieved based on the elaboration of specifications, standards, and standards-based projects already in existence. Entities that support a rulemaking refer to projects that they already have initiated with members of other industries.⁷ The comments demonstrate that there are sufficient technical resources and support for the Commission to construct a regulatory framework based on private sector technical standards. There is more than sufficient basis for the Commission to proceed expeditiously to a Notice Of Proposed Rulemaking.

⁵ Echostar / Dish comments at 3.

⁶ See also Panasonic comments at 12-13. CEA and CERC would endorse constructive roundtable consultations led by the FCC, in the context of its rulemaking.

⁷ See, e.g., Echostar / Dish *id.*; Google comments at 2-7; Sony Electronics at 19-21, 28.

II. MVPD Comments Demonstrate The Feasibility Of The Commission's Goals As Set Forth In The NOI.

Comments by MVPDs, taken as a whole, demonstrate the feasibility of the Commission's objectives as set forth in its NOI. One MVPD explicitly recognizes the potential benefits of a rulemaking. Others voice business and legal concerns about a "disaggregation" that neither the FCC nor any party filing comments has proposed. The technical concerns and questions voiced by these MVPDs are answered by the filings of standards consortia and technology providers.

The comments in this proceeding, including those of all MVPDs, demonstrate that competition in services and devices is a matter of policy and business choice, not technology. To compete, a device manufacturer must be able to (1) create and promote its own user interface, and (2) through that interface, offer consumers all available programs and services. Fundamentally, this offer should not be constrained by denials of data, or by other constraints imposed by an MVPD from which the device receives some of its programming. Some MVPDs continue to defend such anticompetitive practices behind smokescreens of legal and technical obfuscation. Other comments, however, agree with CEA and CERC that the avoidance of service and device competition is neither necessary nor appropriate.

A. The Comments Of Dish / Echostar In Support Of A Gateway Rulemaking Demonstrate That Private Sector Industry Standards Will Be Sufficient To Accomplish The Commission's Objectives.

CEA and CERC agree with the observation of Dish Networks L.L.C. and Echostar Technologies L.L.C. that "it appears premature to characterize the state of the market for 'smart' navigation devices as a failure," and their comment that "an

appropriate AllVid approach may spur innovation and expand consumer choice.”⁸ CEA and CERC agree with Dish and Echostar that an AllVid rulemaking can and should be to the benefit of those MVPDs that are interested in service and device competition, and that such a rulemaking may be feasibly accomplished.

Electronic Program Guides. Dish and Echostar avoid the misunderstandings and misapprehensions apparent in the comments of other MVPDs. Rather than objecting to the idea or legality of forwarding EPG metadata to a client device, Dish and Echostar seek to *assure* that this data will be displayed on client devices, so long as it is fairly represented as *one of* a consumer’s choices. Presumably Dish obtains guide data from the same suppliers that serve other MVPDs. Dish and Echostar, however, do not claim that Dish would be legally impaired from passing on such data as is necessary to support such an equitable display on a client device.⁹ To the contrary, they argue that it would be an unacceptable policy outcome for such data *not* to be available to the client device.¹⁰ CEA and CERC agree.

Echostar and Dish join other commenters¹¹ in recommending standard methods for carrying metadata over a gateway-client interface so that, on a client-generated display, the representation of a menu choice will not be blocked, slowed, or degraded due to its source. Dish acknowledges that a consumer should have the choice of viewing either the client-generated guide or its own guide: “The consumer, and not the device manufacturer, should make the choice among competing sources.” This is consistent

⁸ Echostar / Dish comments at 2 and heading no. II (capitalization omitted).

⁹ This is a separate issue from whether the FCC can assure that manufacturers of client devices will be offered nondiscriminatory licenses that address the needs of their own products. Echostar and Dish address this issue at 14; CEA and CERC address it further below.

¹⁰ Echostar / Dish comments at 7-9.

¹¹ Google comments at 4, 13; Panasonic at 11; Sony at 14, 31; TiVo at 13-15.

with CEA's and CERC's comments that the MVPD's own guide should be available but it is the consumer who should choose which guide to view at any given time.

Adaptability of Existing Standards. Dish and Echostar, with significant hands-on experience in relevant standards proceedings, assure the Commission that existing standards for carrying EAS messages, closed captioning, and parental control “likely can be adapted to an AllVid solution.” Dish and Echostar point to DLNA Guidelines for interoperable function between AllVid gateways and client devices, “based on open standards and widely available industry specifications and ... designed to enable interoperation among video navigation devices over a home network,”¹² and “recommend that the Commission largely base the home networking aspects of any AllVid regime on the DLNA Guidelines and their constituent standards.”¹³

Other MVPDs have argued that existing standards are sufficient to accomplish Commission objectives without regulation¹⁴ but, if the FCC gets involved, they become insufficient.¹⁵ We believe the Commission should be encouraged by one MVPD's acknowledgment that although the task is complex, the Commission's “gateway” objectives are achievable through a rulemaking based on private sector standards that already exist or are already under development.

B. The Concerns Of MVPDs About “Disaggregation” Of Services Are Based On Their Assumption That Their Own EPGs Will Not Be Transmitted To Client Devices.

The main objection by MVPDs to a “gateway” rulemaking appears to be that once client devices have access to necessary EPG data, subscribers would not have the

¹² *Id.* at 9-10.

¹³ *Id.* at 10-11.

¹⁴ *See, e.g.*, NCTA comments at 26-27, 31-33; Verizon at 10-11; AT&T at 11-13.

¹⁵ *E.g.*, NCTA comments at 28-30, 33; Verizon at 14; AT&T at 16.

opportunity to view the MVPD's own Electronic Program Guide. CEA and CERC are not aware that either the Commission or any commenter has proposed this outcome.

MVPD discussions of EPGs, and EPG data, are devoted largely to knocking down two *straw men*:

(1) The assumption that a gateway's support of a client-generated guide means that the client cannot *also* offer the consumer the choice of relying on the MVPD's own guide as "remotely" conveyed; and

(2) The assumption that, to the extent guide data is protected by copyright, it would be unlawful for a gateway to provide guide data to a client that is licensed to use such data.

(1) **Consumer choice of guide.** There is no basis to assume that consumers will be deprived of the choice of viewing a client guide that fully integrates all choices, or the MVPD's own guide. The CEA and CERC comments urged the Commission to specify the transmission of the MVPD guide (as well as guide data) as a "mandatory" feature of gateways.¹⁶ DirecTV discusses in detail the capacity of standards relied upon by, *e.g.*, the RVU consortium to fulfill this objective.¹⁷ In focusing on the "disaggregation" straw man, MVPDs other than Dish fail to appreciate that their own guide can and should remain in-tact and available to clients, or are seeking to divert attention from a less defensible position – that consumers should *not* have the ability to compare MVPD and competitive offerings in a single user interface, offering all available services, devised by the maker of the host device.

(2) **Guide data to other licensed devices.** Similarly, MVPDs seem to assume that theirs are the only devices that are licensed to receive guide data, and that any device to which data would be transmitted by a gateway would not be licensed to

¹⁶ CEA/CERC comments at 9-10.

¹⁷ DirecTV comments at 6-9.

receive it. This straw man is deconstructed by the comments of Rovi, the leading licensor of such data. No stakeholder has a greater interest in asserting the protection of guide data,¹⁸ and none has a more proximate interest in defending contracts that are based on such protection. Yet it is Rovi that in its comments *advocates* the transmission to client devices of the very data that MVPDs claim would violate contracts with Rovi:

*We propose a system based on disseminating information describing which programming channel is on which virtual channel, from the AllVid adaptor to smart video devices. Smart video devices would then acquire program guide data (e.g., via the Internet) for those channels and create an electronic program guide. [n. 16: This facilitates user interface differences between different products by device manufacturers, such as described in the Notice.] Alternately, an AllVid adaptor that has appropriate licenses may compete with the smart video devices' guides by generating the MVPD's program guide and transmitting the guide display to smart video devices for display. [n.17: This facilitates both competition between MVPD-provided AllVid devices' guides and smart video devices' guides, as well as MVPD standardized user interfaces. *Id.*]*¹⁹

As some but apparently not all commenters recognize, it would be anticompetitive, against public policy, and contrary to Section 629 for necessary guide data to be available for licensing to MVPDs, for *their* devices, but not to competitive entrants, for theirs.²⁰

The Commission has repeatedly recognized its responsibility in implementing Section

¹⁸ See Rovi comments at 4-7.

¹⁹ Rovi comments at 7 and nn.16 & 17. (emphasis supplied.) Each note refers to NOI ¶ 43. For purposes of this discussion, the subject of which elements of data may or may not be protectable under *Feist Publications, Inc. v. Rural Telephone Svc. Co.*, 499 U.S. 340 (1991), as discussed in the comments of CEA and CERC and disputed by Rovi and others, is made moot where the basis data (in addition to the elements that Rovi proposes be supplied by the AllVid to the client) is provided to the client device over the Internet under a separate license. To obtain the necessary data under such licenses, the client device would have to authenticate itself to Rovi's server. Hence the FCC need not "mandate" anything that arguably would violate any license.

²⁰ CEA and CERC reiterate their positions as expressed in their July 13 comments that (1) providing the MVPD's own guide in useful form over the IP interface should be a mandatory function of gateways, and (2) client devices are, additionally, legally entitled to all MVPD guide data, to populate competitive guides as necessary, because the subscriber pays for this data. CEA and CERC comments at 18. If the parties or a court determine that this position is incorrect, appropriate licenses can be negotiated.

629 to guard against the imposition of unnecessary restrictions on the furnishing of essential information to competitive devices, and to prevent the imposition of licensing terms that would frustrate the implementation of Section 629.²¹ Where the Commission cannot or need not tread, there exist ample tools in license and law to address controversies where essential data would be reserved to one group of competitors but denied to others.²²

III. The Comments Of Standards And Licensing Consortia And Technology Vendors Demonstrate The Feasibility And Benefits Of The Gateway Approach.

The comments of standards consortia and technology companies provide an ample record for the Commission to proceed to a rulemaking.

A. The DLNA Comments Demonstrate That Private Sector Standards, Already Developed Or Under Development, Can Satisfy The Commission's Objectives.

As several commenters note, due process industry standards as referenced by the DLNA consortium provide the necessary suite of tools for the gateway approach outlined

²¹ See, e.g., 47 C.F.R. §§ 76.1202 and 76.1204(c) (license terms); 47 C.F.R. § 76.1205 (information). See also, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 07-80, Further Notice of Proposed Rulemaking and Declaratory Ruling ¶ 29 (rel. Sept. 18, 2000); *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report And Order And Second Further Notice Of Proposed Rulemaking ¶¶ 75-79 (rel. Oct. 9, 2003) (“Oct 9, 2003 Order”).

²² As CEA and CERC note in their NOI comments at 23, n.33, if, finally, no remedy for anticompetitive practices is available in regulation or license, one will be available in law: “If the Commission changes its mind on this subject and concludes that it lacks sufficient authority in any respect, it should so indicate clearly and conclusively so that interested parties can assess other legal options. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009).”

in the National Broadband Plan and the NOI.²³ The comments of DLNA itself show that this confidence is well-founded:

- The DLNA “Interoperability Guidelines are very much in line with the Commission’s objectives outlined in both the Fourth Further Notice of Proposed Rulemaking and the Notice of Inquiry.”²⁴
- “DLNA Guidelines have been developed envisioning an approach similar to the broadband model, whereby an access device may supply entertainment content into the home network, focusing on interoperability between the devices, including simultaneous multi-device content recording and playback within a home. *** The standards and industry specifications believed to be necessary to develop an AllVid adaptor are similar to those included in the DLNA Guidelines.”²⁵
- “Existing standards for closed captioning, including CEA-608 and CEA-708 can likely be adapted to an AllVid solution. Existing standards for parental controls, including ATSC A/65 and CEA-766 can also likely be adapted to an AllVid solution. Existing standards for carrying EAS messages over the home network, can also likely be adapted to an AllVid solution.”²⁶
- “The Commission has identified two different approaches for consumer user interface construction: user interfaces controlled by the television display manufacturer and user interfaces controlled by the MVPD. The DLNA Guidelines describe technology that enables both approaches.”²⁷

The DLNA comments confirm that standards-based consortia such as DLNA have their own certification mechanisms, on which reliance can be made without the

²³ Dish comments at 9-11; Sony comments at 12-21; Rovi comments at 11-12; RVU comments at 4-6; NCTA comments at 13, 21-23; TIA comments at 3-5; AT&T comments at 6-12; DirecTV comments at 5-9.

²⁴ DLNA comments at 3 (footnotes omitted).

²⁵ *Id.* at 6 (footnote omitted).

²⁶ *Id.* at 9-10.

²⁷ *Id.* at 11.

certification of, or a product license from, an MVPD. This is a key goal identified in the National Broadband Plan.²⁸

B. The RVU Comments Demonstrate That The Full MVPD EPG Can Be Made Available On Client Devices On A Fully Interactive Basis.

The Comments of the RVU Alliance confirm that the private sector has been working on an approach that would communicate, “over open standards,” a Remote User Interface to assure MVPDs that their own guides may be a choice for consumers on gateway client devices. The RVU comments assert: “Not only is the RVU standard suitable for the AllVid concept, it includes capabilities such as a Remote User Interface that make it attractive to service providers, consumer electronics manufacturers and consumers.” RVU notes, as does DLNA, the inclusion of references to other technologies identified in the NOI, such as UPnP and DTCP-IP link protection.

C. The DTLA And Rovi Comments Demonstrate That Content And EPG Data Can Be Provided To Client Devices Without Compromise To Content Provider Or MVPD Interests.

CEA and CERC’s confidence that appropriate and available technologies exist has been borne out by the comments of consortia and corporate technology providers. Fears, concerns, and misunderstandings about the secure provision of content in the home network and the appropriate population of EPGs have been responsible for untoward negative comments.

DTLA projects that DTCP will operate “on an AllVid adapter ...

... much in the same way as DTCP operates in MVPD set-top boxes and other products today. The owner or licensor of particular audiovisual content would require by contract the application of DTCP to particular transmitted programming. That contractual requirement would be perpetuated through to the MVPD, which would be responsible for

²⁸ National Broadband Plan at 50-51.

properly encoding DTCP in its program streams. Content control information in the program stream will signal whether and how DTCP is applied. DTCP would be applied to content in accordance with the Commission's (and DTLA's) Encoding Rules.”²⁹

These comments should put to rest the concerns expressed in some comments that a gateway solution will be any less secure than present techniques³⁰ or that, to avoid such an outcome, the FCC would have to specify new copyright protections.³¹ There is simply *no* reason to believe or expect that content provided by a gateway to a home network will be any less secure than it is under techniques that are in place by MVPD license today. Nor is there any reason to believe that the Commission will need to be any more or less involved in “copyright” than it is today.

Similarly, Rovi's comments explode MVPD concerns that too little or too much guide information will be provided from gateways to client devices:

The AllVid adaptor supplies a unique programming identifier (“UID”) and information sufficient for the smart video device to describe a tuning request to the AllVid adaptor (“tuning information”). If a smart video device has an appropriate license from an electronic program guide information supplier (such as Rovi), the device then uses the UID information to acquire program guide data from its supplier via the Internet. The format of the guide data supplied need not be specified, as it is unique to the guide data supplier and the electronic program guide software in the smart video adaptor.³²

IV. The Commission Has The Authority To Complete And Implement A Rulemaking In Accordance With Its Goals As Stated In The NOI.

As CEA and CERC demonstrate, many of the claims that the Commission lacks the authority to complete a gateway rulemaking are based on misunderstandings and misapprehensions as to what would be entailed. Moreover, for the Commission to accept

²⁹ DTLA comments at 6 (footnote omitted).

³⁰ *See, e.g.*, DirecTV comments at 16-17.

³¹ Public Knowledge comments at 12. Additional concerns expressed by some commenters presumably will be addressed by DTLA in reply comments.

³² Rovi comments at 8.

these objections now would require it to declare illegal, despite three Court of Appeals decisions confirming its jurisdiction and authority,³³ all that it has done since 1998 to implement Section 629.

A. Arguments That The Commission Would Be Assuming New Powers Are Based On A Misunderstanding Of How Programming Would Be Protected And Guide Data Conveyed.

As is discussed above, the concerns that the Commission, in a gateway rulemaking, would be requiring the misappropriation of guide data, or making substantive copyright law determinations, are exploded by the facts. Nothing would require, without recourse, the transmission of protected information to an unlicensed device.³⁴ Nor would any change be made to the way MVPDs now protect programming on home networks, in conformance with Subpart W of the Commission's rules. Any party contending otherwise would have the burden of proof to so demonstrate in the course of the Commission's rulemaking. No reason has been presented for the Commission to believe that such a demonstration could be made.

B. Arguments That The Commission Lacks Essential Authority Under Sections 624A and Section 629 Are Contrary To Law And Would Require The FCC To Reverse Its Settled Interpretations Of Those Provisions And Their Legislative History.

Apparently in the hope that this Commission does not read prior Reports and Orders, some commenters – in seeking to question authority that has been thrice upheld by the Court of Appeals – revive an argument that was rejected in both the First and

³³ *General Instrument Corporation v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communications v. FCC*, 440 F.3d 31 (D.C. Cir. 2006); *Comcast Corporation v. FCC*, 526 F.3d 763, 764 (D.C. Cir. 2008) (“Petitioners, for the third time, challenge the FCC’s policy regarding set-top converter boxes. We again deny their petition for review.”)

³⁴ The ancillary data referred to in the first sentence of the Rovi comment quoted at page 7, above, will not be useful without separately obtained guide data. As is noted above at n. 19, this data is made available over the Internet by the supplier on a conditional basis.

Second Report & Orders implementing Section 629. In its first rulemaking, the Commission disposed of the claim that its power to implement the industry standards on which CableCARDS are based was constrained by language added to Section 624A, in the same bill that contained Section 629, that in developing any standards to implement Section 624A, the Commission should ensure that the adoption of standards does not adversely affect features and protocols. The Commission, in its First Report & Order, reviewed Sections 624A and Section 629 and their legislative histories,³⁵ and concluded:

The amended language of Section 624A by its terms applies only to rules prescribed by the Commission under Section 624A. These amendments to Section 624A were intended to restrict the Commission's standard setting authority and to respond directly to issues associated with the [analog] 'decoder interface standard' [that was the subject of Docket No. 93-7].
*** The text of the 1996 Amendments to Section 624A would appear, if applicable to Section 629, to direct the Commission to set only minimal standards in implementing Section 629 in both the analog and digital environments. However, the House Report states that the amendments to Section 624A were 'not intended to restrict the Commission's authority to promote the competitive availability of converter boxes, interactive communications devices, and other customer premises equipment as required by [Section 629]'.³⁶

The Commission concluded at par. 72 that it had the authority to proceed, and again recited that the House Report "specifically indicates" that the amendment to Section 624A was "*not intended to restrict the Commission's authority to promote the competitive availability of converter boxes, interactive communications devices, and other customer premises equipment as required by [Section 629].*" (emphasis supplied)

³⁵ Both provisions originated in the House Commerce Committee. H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 111 (1995).

³⁶ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, First Report and Order ¶¶ 53-54 (rel. June 24, 1998) (quoting House Commerce Report, *id.*) The Committee Report's discussion of Section 624A contains a similar notation that this language is not intended to circumscribe the implementation of Section 629.

Indeed the House Report, in citing “interactive communications devices” as devices within the Commission’s authority under Section 629, appears forward-looking in its *protection* of the Commission’s authority to pursue an *interactive* gateway solution.

In accepting a CableCARD regime based explicitly on industry standards, the First Report & Order made specific reference to those standards³⁷ and to a timeline³⁸ for their implementation. Five years later, in its Second (“Plug & Play”) Report & Order And Second Further Notice Of Proposed Rulemaking, the Commission, in its regulations, specifically incorporated industry standards by reference and specifically required that they be adhered to.³⁹ The Commission confirmed that it has not only the authority, but the *obligation* to implement Section 629 through regulations that pertain to copyrighted media and that invoke industry standards:

45. The Commission has authority to adopt the proposed encoding rules under the explicit authority granted in Section 629 of the Communications Act as well as our ancillary jurisdiction thereunder. We also conclude that our ancillary jurisdiction would extend the scope of Section 624A of the Communications Act to encompass non-cable MVPDs.

46. The mandate of Section 629 is broad. As discussed above, it requires the Commission to assure the commercial availability of navigation devices – *meaning that the Commission must persist in its efforts until commercial availability is achieved.*⁴⁰

There is no new basis for concluding, now, that the Commission lacks authority to proceed, and commenters have cited none.

³⁷ See ¶¶ 71, 73-75.

³⁸ See ¶ 77.

³⁹ See 47 C.F.R. § 15.38 (standards incorporated by reference), § 15.123 (standards required if label used), § 76.602 (standards incorporated by reference), § 76.640 (standards required). Cf. §§ 76.1901-1908 (encoding rules).

⁴⁰ Oct. 9, 2003 Order (Rel. Oct. 9, 2003) (emphasis supplied).

Conclusion

This inquiry, the ensuing rulemaking, and the National Broadband Plan provide the last best chance for the Commission to comply with Congress's directive in Section 629 of the Communications Act and finally to provide manufacturers with the ability to build truly competitive retail devices that can (1) offer their own user interface, and (2) through that interface, offer consumers all available programs and services to which they subscribe. The Commission should proceed forthwith.

Respectfully submitted,

Christopher McLean

Christopher A. McLean
Executive Director
Consumer Electronics Retailers Coalition
317 Massachusetts Avenue, NE, Suite 200
Washington, D.C. 20002
(202) 292-4600

Julie M. Kearney

Julie M. Kearney
Vice President, Regulatory Affairs
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202
(703) 907-7644

Of Counsel:

Robert S. Schwartz
Seth D. Greenstein
Mitchell L. Stoltz
Constantine Cannon LLP
1301 K Street, N.W., Suite 1050 East
Washington, D.C. 20005

(202) 204-3508

Dated: August 12, 2010