

**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 DIRECTV, INC.**

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## SUMMARY

Some supporters of the “AllVid proposal,” apparently dissatisfied with traditional cable set-top boxes and the limited success of the CableCARD regime, wrongly assume that there is no innovation in the video space. Such a view may have been defensible in the 1990s and early last decade, but it ignores major developments over just the past few years. Innovation has leapfrogged the government-mandated CableCARD and is flourishing today.

New technology providers from Apple to Xbox have introduced a veritable avalanche of innovative devices and services, with new ones appearing each day. Traditional MVPDs have responded with their own highly sophisticated offerings. And both groups have worked together to begin creating standards for yet more classes of devices and services—including at least one, the RVU Alliance, that promises to make the Chairman’s vision of a “video shopping mall” a reality. These new technologies build upon, inspire, and compete with one another—all to the benefit of consumers, who now have more options for accessing video than they could have dreamed possible even a few years ago. In the words of NCTA, “this is not a portrait of market failure.”

Despite this record evidence, AllVid supporters seek extraordinary intervention by the Commission, notwithstanding their claims to the contrary. For example, AllVid supporters would have the Commission replace the MVPD experience enjoyed by hundreds of millions of Americans today with one in which MVPDs would become standardized, lowest-common-denominator “dumb pipes.” Under such a regime, MVPDs would be permitted to deliver only a stream of dis-integrated digital components that third-party manufacturers would be free to delete, repackage, and overlay with material of their own choosing.

Numerous commenters raise concerns that this would, essentially, put MVPDs out of the innovation business. Indeed, MVPDs could not have introduced any number of features that consumers now enjoy (most recently, 3D television) had such a regime been in place. Other commenters question the wisdom of imposing an AllVid regime at this moment of great technological change—noting what is sometimes referred to as the “blind giant” problem, in which regulators lack adequate information to regulate wisely in circumstances when complex and emerging technologies are involved. We and others continue to question the wisdom of a regime that gives a huge advantage to cable operators (for whom video service is only one component of a “triple play” offering) and over-the-top video providers (who could both take advantage of MVPD innovations to date and continue to innovate themselves) at the expense of DBS operators such as DIRECTV who have driven so much innovation to date.

The comments also raise serious issues as to the Commission’s legal authority to implement an AllVid disaggregation mandate. The Commission is charged with assuring the commercial availability of third-party devices permitting consumers to “access” video and other services “offered” by MVPDs. This does not give the Commission the power to abrogate important legal rights held by content providers, nor the rights held by MVPDs as a result of their contracts negotiated with such providers. Indeed, the statute’s plain language limits the Commission’s authority to regulating the *devices* used to access video and services offered by the MVPD, but not the video and services themselves.

Even putting these legal and policy issues aside, many question whether the AllVid mandate can be implemented as proposed. For example, as DIRECTV pointed out, the mere selection of Internet Protocol as a common basis for communication does not ensure that devices can actually understand data delivered via that protocol. Similarly, although some supporters

suggest that Digital Living Network Alliance (“DLNA”) standards could be used to provide the full suite of capabilities necessary to support an AllVid regime, this is not the case. While DLNA has developed some highly promising standards for interoperability between digital devices, all of the elements necessary for AllVid implementation have yet to be standardized to work across the various MVPD network platforms.

Accordingly, DIRECTV submits that Commission intervention is neither necessary nor prudent at this stage in the evolution of video services.

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**REPLY COMMENTS OF DIRECTV, INC.**

The record in this proceeding demonstrates that the Commission’s proposal for an “AllVid” regime<sup>1</sup>—even assuming the technical issues could be overcome—would stifle ongoing industry innovation, violate contractual and intellectual property rights, disrupt customer service, and place satellite carriers at a disadvantage vis-à-vis their terrestrial competitors.<sup>2</sup> The majority of commenters raised these or similar concerns, while the small handful of AllVid supporters essentially ignore the technical and legal challenges such a proposal entails. On the basis of this record, the Commission should not proceed to a rulemaking.

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<sup>1</sup> See *Video Device Competition*, Notice of Inquiry, 25 FCC Rcd. 4275 (2010) (“*Notice*”).

<sup>2</sup> See, e.g., Comments of DIRECTV, Inc. (“*DIRECTV Comments*”). Unless indicated otherwise, all comments cited herein were filed in MB Docket No. 10-91, CS Docket No. 97-80, and PP Docket No. 00-67 on July 13, 2010.

## **I. THE RECORD LACKS ANY BASIS TO DISRUPT INNOVATION IN THE HIGHLY COMPETITIVE MARKET FOR VIDEO DEVICES**

The overwhelming majority of commenters in this proceeding urge the Commission to exercise caution before requiring MVPDs to disaggregate their service into components to be used by third parties to create their own services. Cable operators,<sup>3</sup> non-cable MVPDs,<sup>4</sup> consumer electronics companies,<sup>5</sup> standards-setting organizations,<sup>6</sup> trade groups<sup>7</sup> and intellectual property rights holders<sup>8</sup> all fear that an over-regulatory “AllVid” approach could “stifle [ongoing] innovation in the development of features and services that consumers want.”<sup>9</sup>

The relatively few commenters supporting an AllVid disaggregation mandate<sup>10</sup> appear to do so primarily out of dissatisfaction with traditional cable set-top boxes and the limited success

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<sup>3</sup> See, e.g., Comments of Time Warner Cable, Inc. (“Time Warner Cable Comments”); Comments of Charter Communications, Inc. (“Charter Comments”); Comments of Cablevision Systems Corporation (“Cablevision Comments”); Comments of Massillon Cable TV, Inc. (“Massillon Comments”).

<sup>4</sup> See, e.g., Comments of AT&T, Inc. (“AT&T Comments”); Comments of Verizon (“Verizon Comments”); see also Joint Comments of DISH Network L.L.C. and EchoStar Technologies L.L.C. at 2 (“DISH/EchoStar Comments”) (supporting the Commission’s “exploration” of AllVid, but urging the Commission to “be mindful not to undermine its own past achievement in spurring competition against cable operators in the MVPD market”).

<sup>5</sup> See, e.g., Comments of Panasonic Corporation of North America (“Panasonic Comments”); Comments of Cisco Systems, Inc. (“Cisco”); Comments of ARRIS Group, Inc. (“ARRIS Comments”); Comments of Motorola, Inc. (“Motorola Comments”).

<sup>6</sup> See, e.g., Comments of the HomePNA Alliance (“HomePNA Comments”).

<sup>7</sup> See, e.g., Comments of the National Cable and Telecommunications Association (“NCTA Comments”); Comments of the Alliance for Telecommunications Industry Solutions (“ATIS Comments”); Comments of the Telecommunications Industry Association (“TIA Comments”).

<sup>8</sup> See, e.g., Comments of the Motion Picture Association of America, Inc. (“MPAA Comments”); Comments of Time Warner, Inc. (“Time Warner Comments”); Comments of Rovi Corporation (“Rovi Comments”).

<sup>9</sup> Time Warner Cable Comments at 7.

<sup>10</sup> See, e.g., Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition on Notice of Inquiry (“CEA Comments”); Comments of Free Press (“Free Press Comments”); Comments of Google, Inc. (“Google Comments”); Comments of Media Access Project (“MAP Comments”) Comments of Intel Corporation to Notice of Inquiry on AllVid Gateway (“Intel Comments”); Comments of Public Knowledge and New America Foundation (“Public Knowledge Comments”); Comments of Sony Electronics Inc. (“Sony Comments”); TiVo, Inc. Comments on Notice of Inquiry (“TiVo Comments”). Notably, two members of CEA’s Video Board, DIRECTV and Panasonic, filed comments urging caution in this proceeding.

of the Commission’s CableCARD regime.<sup>11</sup> They argue that CableCARD-equipped devices are not as innovative as devices in other sectors of the industry,<sup>12</sup> and conclude that only government regulation can bring about “the dawn of TV 3.0” in which “the confluence of the Internet and traditional MVPD service will provide consumers with virtually unlimited choices.”<sup>13</sup>

That view might have been defensible during the battles over the CableCARD regime in the 1990s and early last decade, but it does not reflect current reality.<sup>14</sup> The record in this proceeding is replete with examples of the tremendous innovation that is taking place in the video space, among both traditional industry players and new entrants as well. This “avalanche of new video services and service providers”<sup>15</sup> has already bypassed whatever obstacles to innovation the CableCARD regime might have presented: “TV 3.0” is arriving without Commission intervention.

The record in this proceeding also demonstrates that ill-considered Commission action—particularly at this critical time in the development of the market—would actually impede innovation. NCTA’s economists refer to this as the “blind giant” problem, in which regulators lack adequate information to regulate wisely in circumstances when complex and emerging

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<sup>11</sup> *See, e.g.*, MAP Comments at 2 (“Narrowly constructed and inconsistently applied rules have left the market for smart video devices dominated by the cable industry, with little hope for further competition.”); Free Press Comments at 4 (“The CableCARD regime was doomed to failure at the outset when the cable industry was not forced to support the technology within the industry’s own navigation devices”); TiVo Comments at 2 (“Inadequate MVPD support for the installation and use of competitive products has kept this market from fulfilling its potential thus far.”).

<sup>12</sup> *See, e.g.*, Public Knowledge Comments at 19 (arguing that “AllVid is necessary to allow MVPDs to match the frenetic progress that has marked other areas of communications technology for the past several years”).

<sup>13</sup> Sony Comments at 3; *see also id.* at 2 (“With widespread deployment of a universal all MVPD/gateway device, most Americans will finally be able to use their televisions to connect themselves and their families to a wider world of news, information, and entertainment.”).

<sup>14</sup> Time Warner Comments at 6 (“As evidenced by the numerous innovations detailed above, however, the world today is quite different than it was in 1996 when Section 629 was enacted.”).

<sup>15</sup> NCTA Comments at 3.

technologies are involved.<sup>16</sup> DIRECTV shares the fear of others that an AllVid disaggregation mandate would essentially force MVPDs out of the innovation business,<sup>17</sup> giving a huge advantage to cable operators (for whom video service is but one element of a “triple play” offering) and over-the-top providers (who could both take advantage of MVPD innovations to date and continue to innovate themselves). This proceeding should not be used to reorder the competitive video marketplace, and distorting competition in favor of cable surely would not serve the public interest.

**A. There is No Lack of Innovation in the Video Space.**

AllVid supporters, who appear locked in the mindset of ten years ago, baldly assert that there is insufficient innovation in the video space.<sup>18</sup> Yet the record in this proceeding contains substantial evidence to the contrary. New technology entrants, MVPDs, and combinations of the two have introduced or are introducing technologies that build upon, inspire, and compete with one another—all to the benefit of consumers, who now have many more options for accessing video than they could have dreamed possible even a few years ago.

*1. New technology providers.* Dozens of commenters describe the wealth of non-MVPD, “edge-of-the-network” retail devices with which consumers can access video content.

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<sup>16</sup> Michael G. Baumann and John M. Gale, “Economic Analysis of the Regulation of MVPD Navigation Devices,” at 1, attached to Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, Commission, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 19, 2010) (“NCTA Economic Analysis”).

<sup>17</sup> See, e.g., NCTA Comments at 29 (expressing concern that “a rigid prohibition on devices that are not compatible with an AllVid adapter would likely preclude new innovations that we cannot imagine today that might not be supported by other devices available at retail”); AT&T Comments at 28 (“[A]s others have pointed out to the Commission in the past, the mandatory standardization envisioned by the FCC would freeze today’s MVPD services in time, deterring or at least slowing future innovation, and depriving consumers of the benefits of the fast-paced change and development they enjoy today.”).

<sup>18</sup> See, e.g., Google Comments at 3 (stating that “parties from all corners of the videospace agree that the current device marketplace is wholly inadequate, creating what the FCC and others have called a “television set-top box innovation gap””) (citations omitted); MAP comments at 4 (stating that “barriers to entry for smart video device competitors remain high, competition is minimal, innovation is stifled, and consumers are harmed by high prices and lack of options in the device market”).

NCTA, for example, describes “new platforms offer[ing] access to multiple sources of video programming without the need for any cable set-top box, from Apple, Boxee, Blu-Ray, and DivX all the way through the alphabet to PlayStation, Roku, TiVo, Vudu, and Xbox,” not to mention “fifty Internet-enabled TV models from Samsung, Sony, Panasonic, Vizio and other top manufacturers . . . equipped with Ethernet ports that can plug into a home network or a networked PC.”<sup>19</sup> Indeed, just one of these offerings, the Xbox LIVE service, has more video subscribers than either satellite MVPD.<sup>20</sup> Time Warner references the “increasing number of online video portals that are expanding the amount and type of high quality television content accessible through the Internet,” including its own HBO GO service, which gives subscribers “instant access to hundreds of titles including HBO Original Series, blockbuster movies, sports and more for display on their computers.”<sup>21</sup> Time Warner Cable adds that “mobile devices such as smart phones, iPads and other portable media players, notebooks, and laptops give consumers portable access to online and subscription video content.”<sup>22</sup> Google, for its part, touts its “GoogleTV,” which works “through client software that enables seamless navigation of content distributed through both traditional and broadband channels.”<sup>23</sup> This service will debut on DISH

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<sup>19</sup> NCTA Comments at 9-10; *see also, e.g.*, Time Warner Comments at 3 (same).

<sup>20</sup> In May 2009, XboxLive already had 20 million subscribers. *See* Press Release, Xbox 360 Sees Record Growth in 2009 (May 28, 2009), *available at* <http://www.microsoft.com/presspass/press/2009/may09/05-28XboxGrowthPR.msp> .

<sup>21</sup> Time Warner Comments at 4 (internal quotations omitted).

<sup>22</sup> Time Warner Cable Comments at 4 (citations omitted).

<sup>23</sup> Google Comments at 5. Curiously, despite touting its involvement in such innovative video offerings, Google nonetheless asserts that the current market is not characterized by innovation.

Network in the fall without any government encouragement whatsoever.<sup>24</sup> Even Public Knowledge lists *twenty* devices that already “offer similar functionality” to an AllVid device.<sup>25</sup>

All of this innovation has occurred notwithstanding the challenges of CableCARD implementation. Apple, Boxee, Google, and the like have leapfrogged that regime as if it did not exist. In light of this, it is puzzling that AllVid proponents—many of whom are responsible for this innovation—would wish to reignite tired, CableCARD-like debates about MVPD navigation devices that belong in a totally different era.<sup>26</sup>

**2. MVPD-delivered technology.** While non-MVPDs have developed many new offerings in the video space, MVPDs have also provided some of the most exciting innovations. DIRECTV described in its initial comments its own set-top boxes, which it believes match or surpass in technical sophistication those of any new technology company.<sup>27</sup> These devices allow DIRECTV’s one-way network to provide services comparable to, and in many cases better than, those of its two-way competitors. Moreover, they are robust enough for DIRECTV to add new features constantly without requiring consumers to change equipment—indeed, DIRECTV has added 75 features in the 15 months since the Commission launched its National Broadband Plan alone. And the innovation goes on, as DIRECTV has just announced that its engineering team is

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<sup>24</sup> Press Release, “Google and DISH Network Collaborate to Develop Integrated Multichannel TV and Web Platform” (May 20, 2010), *available at* <http://www.dishnetwork.com/googletv/>.

<sup>25</sup> Public Knowledge Comments at 3-4. This, of course, appears inconsistent with Public Knowledge’s position that the Commission should mandate AllVid rules.

<sup>26</sup> *See, e.g.*, Michael G. Bauman & John M. Gale, “Economic Analysis of the Regulation of MVPD Navigation Devices” at 10, *attached to* letter from Neal M. Goldberg to Marlene Dortch (July 29, 2010) (“NCTA Economic Analysis”) (noting that the AllVid risks obsolescence in the same way as did CableCARDS); *id.* at 12 (suggesting that proposed AllVid standards may already be outdated).

<sup>27</sup> DIRECTV Comments at 3-4.

working to improve the service's user interface to achieve (among other things) faster channel changing and personalized applications.<sup>28</sup>

While DIRECTV believes its innovative technology is second to none, the record demonstrates that DIRECTV is far from alone among MVPDs when it comes to technological innovation. AT&T, for example, describes a wide range of services it offers, including program-related content (*e.g.*, sports biographies, medal counts, and news) and a variety of online content (*e.g.*, weather, traffic, sports scores, investment portfolios, social networking sites, music and photo sharing, and voice telephony applications).<sup>29</sup> Cablevision, for its part, has chosen to innovate “from ‘the cloud’” because it believes that “applications can be developed more quickly due to less dependence on the internal hardware configuration of customer premises’ equipment and deployed to devices in a secure environment essential for high-value content.”<sup>30</sup> Cablevision has deployed “more than two dozen new interactive channels to its entire digital video customer base” using this technology, and recently announced a new “PC to TV Media Relay service which will enable subscribers to access on their televisions content sourced from their PCs.”<sup>31</sup> Verizon claims that its set-top boxes “are unique in that they combine traditional one-way cable technology with interactive IP capabilities, making them powerful platforms that enable Verizon to innovate and increase the choices available to our customers.”<sup>32</sup>

The record thus demonstrates that MVPDs have responded both to the desires of their customers and the new offerings by non-MVPD players. New MVPD offerings, in turn,

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<sup>28</sup> See Communications Daily, Aug. 6, 2010, at 13.

<sup>29</sup> AT&T Comments at 20.

<sup>30</sup> Cablevision Comments at 8.

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> Verizon Comments at 7.

encourage both other MVPDs and non-MVPDs to improve their own devices in response.

Innovation has thus become a virtuous cycle in the video space.

3. *Standardization efforts.* The record also reflects that MVPDs and non-MVPDs are increasingly working together to provide innovative products and services and to give consumers turnkey solutions. From DIRECTV's perspective, the most important of these are the Digital Living Network Alliance ("DLNA") and the RVU Alliance. DIRECTV's initial comments describe in detail how open-standard technology developed by the RVU Alliance enables DIRECTV or any other MVPD to offer its content through a single home gateway that distributes content to multiple televisions or other RVU-compliant devices, eliminating the need for additional set-top boxes in each room.<sup>33</sup> An RVU client device manufacturer would be free to display the remote user interface of rendered graphics and data from DIRECTV alongside content from other sources to create a "shopping mall" of services—but, just as with a physical mall, the makeup of each "store" will be up to the individual provider. So Netflix's "store" will look like Netflix, YouTube will look like YouTube, and Amazon will look like Amazon—just as they do on the Internet.<sup>34</sup> DLNA, driven by its members and market imperatives, continues to work on standards for the delivery of video that would complement the standards it has finalized in other areas.

Those who say there is no video device competition or innovation repeat words that may have been true in 1996 or perhaps even ten years later. Yet the record in this proceeding cannot support the view that the video space is lacking for innovation—much less that only entities on the edge of the network can introduce such innovation, or that government regulation is required

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<sup>33</sup> DIRECTV Comments at 8; *see also* RVU Alliance Comments at 2 (noting that RVU's "pixel accurate RUI technology can provide an identical user experience on all RVU- client CE devices that are connected via a digital home network to an RVU server").

<sup>34</sup> *See* RVU Alliance Comments at 3 (comparing use of RVU to use of DVD players and Netflix).

to bring it into being. In the words of one commenter, “[t]his is not a portrait of market failure.”<sup>35</sup> Whether in spite of or because of Commission action in implementing Section 629, the unavoidable conclusion is that in 2010 this market is an emerging success story of competition and innovation.<sup>36</sup>

## **B. Unwise Commission Action Would Likely Impede Innovation.**

Although AllVid supporters maintain otherwise,<sup>37</sup> the record reflects legitimate fears from important parts of the video distribution ecosystem about the potential scope of Commission regulation in this proceeding. At least as envisioned by supporters, the AllVid proposal would require every new subscriber to buy a Commission-mandated gateway<sup>38</sup> as well as one or more downstream devices to connect to it.<sup>39</sup> It would prohibit MVPDs from offering their core functionalities—such as displaying television pictures and guides—except through devices connected to the AllVid gateway.<sup>40</sup> It would prohibit MVPDs from introducing *any* new

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<sup>35</sup> NCTA Comments at 10.

<sup>36</sup> Indeed the only specific complaint about the state of the market from the consumer’s perspective appears to concern the alleged difficulties of manipulating multiple wires and remote controls and switching between different television inputs. *See* Sony Comments at 11 (“Consumers today must use too many remotes and connect too many wires to access the lawful content of their choice. . . . They must switch between display inputs to access content from each source, and must control each device through a different user interface.”); Public Knowledge Comments at 18 (complaining that “a user may have to switch the television into a different ‘mode’ or launch a different application to compare different sources of content”). Even if that is a problem deemed worthy of government attention, DIRECTV and others are finding ways to address these issues as well. *See* DIRECTV Comments at 7-8 (describing RVU technology that will greatly reduce wires in the home).

<sup>37</sup> *See, e.g.*, CEA Comments at 19 (claiming that the AllVid proposal does not require “disaggregation”).

<sup>38</sup> The Commission also refers to a set-back dongle. *Notice*, ¶ 25. Commenters almost uniformly refer to both form-factors as “gateways,” however.

<sup>39</sup> *E.g.*, Sony Comments at 10 (“Any successful implementation of the AllVid approach must require all navigation devices, including all operator-provided devices and not just those devices provided at retail by third parties, to access MVPD services through the common set of AllVid interface standards.”)

<sup>40</sup> *See, e.g.*, TiVo Comments at 8-12 (setting forth “minimum gateway functions,” “optional gateway functions,” and functions and features reserved for the supported clients and networks”) (internal capitalization omitted). The latter include “audiovisual performance output,” “display of and interaction with guides, external and internal network games and service,” and “client/home network storage.” *See also* Public Knowledge Comments at 17 (“MVPDs should make their content available over the home network, but they should not ‘present’ it.”).

features using proprietary innovative technology.<sup>41</sup> It would even ban MVPDs from subsidizing their own equipment<sup>42</sup>—a pro-competitive practice engaged in by nearly every provider of communications service as it lowers the cost to subscribers of switching to their service, thereby vastly improving consumers’ ability to migrate to the service they prefer.

AllVid supporters thus appear to be asking the Commission to replace the MVPD experience enjoyed by hundreds of millions of Americans today with one in which MVPDs would become standardized, lowest-common-denominator “dumb pipes.”<sup>43</sup> Under such a regime, MVPDs would be permitted to deliver only “a stream of dis-integrated *components* that a manufacturer can unpack, repackage, slice, and overlay with its own material.”<sup>44</sup> From the perspective of MVPD commenters, such a regime would “fail[] to accord any value whatsoever to MVPDs’ legitimate interests in providing their integrated product offerings and user experience to subscribers regardless of the devices used to display the service.”<sup>45</sup> It would essentially tell MVPDs that they can no longer be in the business they have chosen—providing a turnkey video service<sup>46</sup>—but must instead operate a very different sort of business chosen by the

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<sup>41</sup> See, e.g., Sony Comments at 4 (“A reasonable approach would be to allow MVPD service providers to add new features to their services so long as they do so using open and publicly available standards.”); *id.* at 29 (arguing that “the Commission could consider mandating standardization of conditional access technologies across providers, and require open, low-cost licensing of these technologies to third parties”).

<sup>42</sup> See, e.g., Public Knowledge Comments at 8 (arguing that the Commission must “strictly enforce rules preventing the cross-subsidization of device costs with MVPD subscription fees”).

<sup>43</sup> Sony argues that “[o]ne approach would be to require MVPDs to standardize delivery of their services on the same technologies, in much the same way that the Commission effectively has required over-the-air broadcast video services to standardize on a particular technology.” Sony Comments at 9. It concludes that adopting the AllVid proposal “as soon as practicable” would be a good “interim step.” *Id.*

<sup>44</sup> AT&T Comments at 19.

<sup>45</sup> AT&T Comments at 18.

<sup>46</sup> This, among many other reasons, is why the AllVid proposal is nothing like *Carterfone*. *Contra* Public Knowledge Comments at 6, citing *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (1968). *Carterfone* involved devices connected to the then-monopoly *common carrier* network, in which a single, highly-regulated entity undertook to transmit “information of the user’s choosing without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43) (setting statutory definition of “telecommunications”); *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (setting forth traditional definition

government.<sup>47</sup>

Many commenters fear that such a regime would put MVPDs out of the innovation business. One AllVid proponent states that “[i]nnovation should not be limited to one portion of the video ecosystem.”<sup>48</sup> Yet by converting MVPDs into dumb pipes, a disaggregation mandate would do exactly that. A number of MVPDs echo DIRECTV’s contention that, had their services been no more than disaggregated data for others to compile and distribute, they could never have offered the wide range of innovative features they do today and could not justify the expense of adding new ones tomorrow.<sup>49</sup> As one commenter put it, an AllVid disaggregation mandate would “close off tomorrow’s video marketplace to MVPDs—in the name of opening it to CE manufacturers.”<sup>50</sup>

Other commenters question the wisdom of Commission action at a time of such rapid technological change. NCTA’s economists point out that “the time when regulators may be best able to influence the future of a technology (before a *de facto* or voluntary standard is in place) is

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of “common carrier”). In that context, it made sense to ensure that as many devices could connect with that single network as possible. The Commission has yet to determine whether a similar legal regime ought to be applied to the “telecommunications component” of broadband Internet service—which (regardless of the merits of that debate) also involves the provision of information “of the user’s choosing” and at user’s request. *Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. Jun 17, 2010). Here, by contrast, multiple facilities-based companies provide competing *services* with content of the *provider’s* choosing, each over their own networks, and each using proprietary technology both within and at the edges of the network. *See, e.g.*, NCTA Comments at 8 (“[V]ideo services and operator-provided navigation devices are anything but static and non-competitive like the black rotary phones and AT&T monopoly service to which some have tried to compare them.”) AllVid supporters may well believe that the Internet is a superior technology and business model. *See, e.g.*, Google Comments at 2. But this does not mean that the government can justifiably force non-Internet businesses to change their business model to become more “like the Internet.”

<sup>47</sup> *Cf. e.g.*, Public Knowledge Comments at 9 (proposing to allow an MVPD to remain in the “turnkey solution” business for “some of its customers” so long as it also operates in a business configuration more to Public Knowledge’s liking).

<sup>48</sup> Sony Comments at 9.

<sup>49</sup> *See, e.g.*, Verizon Comments at 15 (noting that a “uniform, lowest common denominator mandate” would “effectively prevent MVPDs from designing the kinds of electronic storefronts that make it easy for consumers to discover and purchase content through the MVPD’s system”).

<sup>50</sup> AT&T Comments at 19.

also when they have very little information to make a choice (the technology is still changing rapidly).”<sup>51</sup> This problem is described in the economics literature as that of the “blind giant.”<sup>52</sup> And the video space is one in which the Commission cannot help but be particularly “blind.” As described above, new technology entrants the Commission does not regulate, MVPDs themselves, and combinations of the two are each introducing a host of new products, services, and standards. Yet the market has not yet settled upon *de facto* standards (though DIRECTV hopes a combination of DLNA and RVU will emerge in that role at some point). In conditions such as these, “[t]he mere presence of the regulatory process may discourage market-based and voluntary attempts at improving services and technology.”<sup>53</sup>

Yet other commenters question the disparate treatment of MVPDs as compared to other actors in the video space. Technology companies like Netflix, Apple, and Amazon would all continue to be able to control the overall “look and feel” of the online services they offer their customers, and would retain control over the manner in which public and proprietary elements are combined to convey that “look and feel.” As one commenter points out, “[e]ach CE device may share some common features, such as a Linux operating system, but CE manufacturers do not build a common application platform.”<sup>54</sup> Accordingly, if DIRECTV wanted to integrate, for example, the iTunes store in its set-top boxes, it would have to negotiate with Apple for the rights to do so. In any such negotiations, Apple (assuming it were interested) would presumably insist that iTunes maintain its unique user interface, and the matter would be the subject of commercial negotiation. Yet, under the AllVid disaggregation proposal, if Apple wanted to

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<sup>51</sup> NCTA Economic Analysis at 15.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 16.

<sup>54</sup> NCTA Comments at 20; *see also id.* (“Because CE manufacturers have not built to any standard, Netflix has to custom build and support many different versions of their client software for every different device, and each client must be individually coded, tested, improved, and maintained.”).

integrate DIRECTV into its AppleTV offering, it could do so by government fiat, without DIRECTV's permission, and without keeping DIRECTV's unique user interface. In a world where MVPD and non-MVPD video offerings increasingly compete—and where the law is generally (and sensibly) moving toward parity of treatment<sup>55</sup>—AllVid supporters have provided no justification for treating one set of competitors so differently.

DIRECTV, for its part, continues to worry about disparate treatment even *among* MVPDs. In particular, forced disaggregation would penalize DIRECTV by comparison to its cable competitors in three ways. First, DIRECTV relies on storage and intelligence in the set-top box to perform many functions that cable operators perform on the network, ranging from VOD to our DVR Scheduler on computers and smart phones to DIRECTV TV Apps to Common Sense Media ratings in our programming guide to 3D television.<sup>56</sup> Unless AllVid devices were to allow such storage and intelligence, DIRECTV would lose all that functionality.<sup>57</sup> AllVid supporters appear to concede that satellite AllVid adapters require additional storage and intelligence, but argue that it must be used only for “network” functions.<sup>58</sup> While the precise meaning of that claim is unclear, it would likely stifle current innovative services offered by DIRECTV, or at the very least decrease the efficiency and increase the costs of offering particular features. For example, it appears to contemplate that storage for functionality such as

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<sup>55</sup> For example, the Twenty-First Century Communications and Video Accessibility Act, which updates the ADA-type accessibility requirements for the communications sector, treats non-MVPD video equipment comparably with MVPD equipment with respect to closed captioning and other functionality. *Compare* H.R. 3101, 111<sup>th</sup> Cong. § 204 (2010) (dealing with “digital apparatus”) *with id.* § 205 (dealing with navigation devices).

<sup>56</sup> DIRECTV Comments at 23.

<sup>57</sup> As DIRECTV explained in its initial comments, even assuming that all client devices have storage, there is no reason to expect a third party manufacturer to make any of that capacity available for DIRECTV's exclusive use. Moreover, in the unlikely event that a smart device *were* to offer storage capacity in that way, DIRECTV still could not lawfully send content to the device because it would lose control over the subscriber's ability to access that programming and would have no way to bill for the service—two requirements demanded of DIRECTV by copyright holders. DIRECTV Comments at 23.

<sup>58</sup> TiVo Comments at 10-11 (arguing that storage should be permitted “[t]o the extent necessary to accomplish this network function” but that “gateway-side” storage should be prohibited).

VOD could remain in the AllVid device while DVR functionality would reside only in downstream devices. But such an arrangement would preclude DIRECTV from allowing customers to use a single networked DVR throughout the house—even though cable operators could offer this functionality by putting it on the network.<sup>59</sup>

Second, even setting aside issues of storage and functionality, an AllVid proposal would advantage cable more generally. Cable operators and certain telephone companies offer a “triple play” of video, voice, and data services. DIRECTV offers only video service, so it competes by offering the best, most innovative, most feature-packed video service available. Were the Commission to homogenize DIRECTV’s unique video offerings into lowest-common-denominator components for others’ service offerings, it would take away DIRECTV’s ability to distinguish itself from its cable and telco competitors. That would make consumers more likely to choose the cable/telco triple play, exacerbating the already formidable market advantages enjoyed by those former monopoly service providers.

Third, DIRECTV prides itself on providing superior customer service. But an AllVid disaggregation proposal would complicate customer services issues by both requiring consumers to have an additional device not under DIRECTV’s control and eliminating DIRECTV’s ability to provide a consistent experience to all of its subscribers. These factors combined would certainly result in additional customer service issues and expense, as well as eliminating a competitive advantage (superior customer service experience) which DIRECTV now maintains.<sup>60</sup>

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<sup>59</sup> Cablevision Comments at 8-9.

<sup>60</sup> See DIRECTV Comments at 25-26; Reply Comments of DIRECTV, Inc., NBP Public Notice #30 at 14-15, GN Docket No. 09-47 *et al.* (filed Jan. 27, 2010) (“DIRECTV NBP Reply Comments”).

Most AllVid supporters ignore this issue entirely. The only one to address it argues merely that “[c]ustomer service issues occur throughout the video-service ecosystem today, and are often addressed by service providers and device manufacturers in tandem, not individually.”<sup>61</sup> As DIRECTV knows well from experience, this is no answer. During the period when DIRECTV did not control the set-top box and user experience specifications, resulting in hundreds of interfaces, it could not in many cases adequately resolve customer service issues. The AllVid regime would thus mark a significant step *backward* for DIRECTV and wipe out many of the customer service improvements it has implemented over the years.

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In today’s video space, new MVPD services and features compete with and build upon those offered by CE manufacturers and others. DIRECTV fears that an AllVid disaggregation mandate would disrupt this virtuous cycle with a set of rules that purports to help CE manufacturers but would certainly harm consumers by most severely handicapping the most innovative, most customer-focused MVPDs.

## **II. THE COMMISSION LACKS LEGAL AUTHORITY TO ADOPT AN ALLVID DISAGGREGATION PROPOSAL**

Even if—notwithstanding the record discussed above demonstrating impressive innovation in the video marketplace—the Commission might otherwise want to impose an AllVid disaggregation mandate, there remain serious questions about its legal authority to do so.

In pertinent part, Section 629(a) provides:

The Commission shall . . . adopt regulations to assure the commercial availability . . . to consumers . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other

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<sup>61</sup> Sony Comments at 30-31. Of course, addressing such issues in tandem results in increased costs to consumers as well as inefficiencies.

services offered over multichannel video programming systems, from . . . vendors not affiliated with any [MVPD].<sup>62</sup>

While Section 629 is concededly “not a model of clarity,”<sup>63</sup> it does not give the Commission the sweeping legal authority AllVid supporters claim. The statute provides no authority to undermine legal rights of MVPDs’ video programming suppliers by requiring MVPDs to distribute that programming in violation of contractual agreements with suppliers. Nor does it permit the Commission to upend MVPDs’ own intellectual property rights and undermine their First Amendment rights. Indeed, a careful reading of the statutory text reveals that Congress did not intend to confer on the Commission unfettered authority to regulate MVPD video streams at all.

The AllVid proposal would accordingly fail judicial review on both steps of the *Chevron* analysis. As the D.C. Circuit has explained, “*Chevron* analysis is focused on discerning the boundaries of Congress’ delegation of authority to the agency,” and “[i]t does not matter whether” those bounds are exceeded “because the disputed regulation defies the plain language of a statute or because the agency’s construction is utterly unreasonable and thus impermissible.”<sup>64</sup> Either way, a regulation “cannot survive judicial review if [it] . . . exceeds the agency’s authority”<sup>65</sup>—and the AllVid proposal fails on both fronts.

**A. Section 629 Provides No Authority for the Commission to Undermine Legal Rights of MVPD Suppliers.**

The entities that supply MVPDs with programming and other services hold intellectual property rights over the distribution of their content. MVPDs routinely agree to limit such

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<sup>62</sup> 47 U.S.C. § 549(a).

<sup>63</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

<sup>64</sup> *Aid Ass’n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (internal citation omitted).

<sup>65</sup> *Id.*

distribution as a condition of purchasing or licensing such content in the first place. An AllVid disaggregation regime would, by definition, require MVPDs to distribute their suppliers' content in violation of such agreements and thus in abrogation of those suppliers' legal rights. The only other alternative is that MVPDs would be required to become the uncompensated agents of device manufacturers and obtain the requisite redistribution rights. Section 629 cannot reasonably be read to provide authority for the Commission to either disrupt commercial arrangements or to allow device manufacturers to obtain indirectly, without compensation, the rights they have not been able (or have not attempted) to obtain directly.

Below, we discuss three specific instances described in the record in which an AllVid disaggregation mandate would undermine content suppliers' intellectual property rights and place MVPDs in legal jeopardy.

**1. *Digital Rights Management.*** In licensing their content to MVPDs, programmers often insist that MVPD set-top boxes and similar devices obey digital rights management ("DRM") compliance rules.<sup>66</sup> Such rules "dictate the authorized uses of digital content by recipients of that content *once it has arrived at the destination receive equipment.*"<sup>67</sup> A DRM rule might, for example, ensure that content stored on a device could honor commands such as "may be rented again for \$1.99" or "expires after August 12 at midnight."<sup>68</sup> Yet, as several commenters observed, the authentication protocol included in the AllVid proposal does not include these sorts of advanced DRM capabilities. Digital Transmission Content Protection Over Internet-Protocol ("DTCP-IP") provides "link protection," which "protects[s] content as it

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<sup>66</sup> AT&T Comments at 34.

<sup>67</sup> *Id.* (emphasis in original).

<sup>68</sup> See DIRECTV Comments at 17 (providing similar examples).

passes between two trusted devices.”<sup>69</sup> A requirement that MVPDs deliver content to third party devices using DTCP-IP would not allow MVPDs to ensure the types of sophisticated DRM capabilities demanded by programmers (now or in the future) for their highest value content. Nor would it allow MVPDs to ensure that downstream devices complied with ongoing security upgrades.<sup>70</sup>

Only one AllVid supporter addresses this issue at all. Public Knowledge argues that DRM technologies are bad<sup>71</sup> and the Commission has no jurisdiction to “implement copyright policy” by requiring the use of DRM.<sup>72</sup> This misconstrues the debate. Nobody has suggested that the Commission should *require* use of DRM. AllVid supporters, however, would effectively order MVPDs to transmit content without sufficient DRM protection, even if they are legally bound not to do so. Alternatively, the lack of advanced DRM capabilities could stymie MVPDs’ ability to gain access to content in earlier windows or under different business models.

Programming is plainly copyrighted content. Programmers that agree to license their content to MVPDs with certain restrictions can thus assert both copyright and contractual claims against an MVPD that distributes that content contrary to the terms of the licenses. Public Knowledge concedes that the Commission lacks jurisdiction over copyright.<sup>73</sup> Yet an AllVid disaggregation mandate would in many ways be akin to a “statutory copyright license” under which MVPDs would be required to deliver copyrighted works to others, who would copy and publicly perform them without obtaining their own license from the copyright holder.

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<sup>69</sup> See, e.g., NagraVision Comments at 8 (“While DTCP-IP is a good link protection technology, it is not DRM.”).

<sup>70</sup> The proposal does not address how MVPDs and CE manufacturers would address responsibility for payments for such upgrades.

<sup>71</sup> Public Knowledge Comments at 12 (suggesting that DRM technology does not work, prevents lawful fair uses, and limits device interoperability).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 22.

When Congress abrogates traditional copyright protections, such as through the creation of a statutory license, it does so specifically.<sup>74</sup> Yet Congress did not mention copyright when it promulgated the navigation device provisions of the Communications Act. Nor did it otherwise abrogate intellectual property rights by implication,<sup>75</sup> as some claim it has in the program access context.<sup>76</sup> Some AllVid supporters argue that abrogation of copyright is “ancillary” to the navigation device provisions to the Act.<sup>77</sup> Yet none explains how this could be so, especially in light of the D.C. Circuit’s admonition that there is no such authority for “regulations that significantly implicate program content.”<sup>78</sup>

Nor do AllVid supporters discuss at all how Section 629 permits the Commission to abrogate programmers’ entirely separate *contractual* rights with respect to the presentation of their programming. As discussed above, nearly every programming agreement contains detailed specifications as to an MVPD’s presentation of the programming. Although these are programmers’ contractual and not intellectual property rights (in the sense that a programmer would have a contract claim against an MVPD for breach of its agreements), Section 629 is

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<sup>74</sup> See, e.g., 17 U.S.C. § 111 (statutory license for cable operators to retransmit broadcast programming).

<sup>75</sup> AT&T Comments at 56.

<sup>76</sup> See Public Knowledge Comments at 21 (arguing that the Commission “has the authority to require MVPDs to share (undoubtedly copyrighted) programming channels with each other in its program access rules”). Of course, the program access rules do not require copyright holders to distribute their copyrighted works. Rather, Congress specifically forbade certain copyright holders from a limited number of “unfair and deceptive practices” with respect to such distribution. See 47 U.S.C. § 548(b). Here, again, Congress does nothing of the sort. Public Knowledge also mentions the retransmission consent/must carry rules, *see id.*, but this reference is inapposite. Retransmission consent allows broadcasters to *forbid* MVPDs from carrying programming without permission—a broadcaster right that complements, not abrogates, broadcast copyrights. See 47 U.S.C. § 325. Must carry allows broadcasters to *require* MVPDs to carry programming—but only upon request. This, too, is complementary to the rights of copyright holders. 47 U.S.C. §§ 534, 535, 338.

<sup>77</sup> See Public Knowledge Comments at 23 (suggesting that the Commission might have ancillary authority “to do what it must to carry out its primary statutory directives, such as Sections 629 and 624A” of the Communications Act). This claim is even more dubious because, as discussed above, Section 629 of the Act specifically limits the Commission’s authority in a number of respects.

<sup>78</sup> *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002).

silent about abrogating those rights and equally silent about requiring MVPDs to act on behalf of device manufacturers to obtain the necessary rights on their behalf.

“As the Supreme Court has reminded us, Congress ‘does not . . . hide elephants in mouseholes.’”<sup>79</sup> Thus, while Congress has authority to dramatically alter intellectual property and contractual rights held by MVPD suppliers were it to do so expressly, it would be unreasonable to construe the language of Section 629—which certainly is not designed on its face to wreak such changes—to unsettle those protections.

**2. Content Presentation.** Programmers care deeply about how their content is presented, as much as how it is distributed. As one rights-holder puts it:

[C]ontent creators and programmers invest considerable time and resources to create a uniform consumer experience nationwide, regardless of the specific equipment or software used by consumers to view the content. This is vital to maintaining the value of their brands and to avoiding consumer confusion.<sup>80</sup>

In licensing their content to MVPDs, programmers thus typically place a variety of restrictions on presentation. These restrictions include “requirements for channel positioning, ‘neighborhooding’ (*i.e.*, with other channels of a similar type), tier placement or exclusivity.”<sup>81</sup> Similarly, the Copyright and Communications Acts also place restrictions on content presentation.<sup>82</sup>

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<sup>79</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005) (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

<sup>80</sup> Time Warner Comments at 8.

<sup>81</sup> AT&T Comments at 50.

<sup>82</sup> *See, e.g.*, 17 U.S.C. § 122(e) (prohibiting satellite carriers from willfully altering local broadcast programming retransmitted under a statutory copyright license); 47 C.F.R. § 76.66(i) (restricting channel positioning for local stations delivered by satellite); *id.* § 76.66(j) (requiring satellite carriers to carry each local signal “in its entirety”).

Several commenters noted that an AllVid disaggregation mandate would allow third party devices to display MVPD content in violation of these restrictions.<sup>83</sup> DIRECTV itself listed numerous possibilities, such as a device manufacturer (such as AllVid supporter Sony Electronics) giving preferential treatment for affiliated content (such as that from Sony Pictures).<sup>84</sup> No commenter suggested that an AllVid disaggregation mandate would *not* allow device manufacturers to display content however they decide—indeed, that is one of their justifications for such a mandate in the first place.<sup>85</sup>

In the short term, this would place MVPDs in legal jeopardy. In the long run, programmers would react by either sending content to other, non-MVPD distribution platforms or by increasing the price as compensation for government-imposed, less favorable distribution terms.<sup>86</sup> In any event, no AllVid supporter explains how Section 629 permits the Commission to abrogate programmers’ copyright and contract rights with respect to program presentation.

**3. EPG Data.** MVPDs purchase programming guide data from sellers such as Tribune and Rovi.<sup>87</sup> Sellers of such data assert copyright in it.<sup>88</sup> Moreover, because the

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<sup>83</sup> See, e.g., Time Warner Comments at 9 (“For example, the user interfaces in the All-Vid retail equipment may not respect the intended presentation of multichannel video content and in the process may damage the brands that consumers trust. Such interfaces could enable the co-mingling of legitimate content with unauthorized content from illegitimate online sources, giving illegal websites a veneer of authenticity that may confuse consumers. They could also significantly impact how consumers locate and select content sources, such as by promoting one particular source over another. Moreover inappropriate content or commercials could be overlaid onto children’s programming or premium ad-free environments, leading to confusion and potential compliance issues with applicable law and/or contractual obligations.”).

<sup>84</sup> DIRECTV Comments at 21.

<sup>85</sup> See, e.g., TiVo comments at 16 (suggesting that it is important and desirable for devices to co-mingle content—authorized or not—from different sources). In theory, a disaggregation mandate could be used to “strip-out” commercials inserted by the original content provider and allow a new commercial to be inserted or overlaid through the third party device, thus dramatically changing the economics for the content provider and eliminating advertisers’ ability to utilize broadcast programming with any assurance of an audience.

<sup>86</sup> AT&T Comments at 50.

<sup>87</sup> NCTA Comments at 40 (“Cable operators do not own the electronic program guide metadata they use in their own guides. This metadata is the property of other companies such as Rovi and Tribune who charge service providers and device manufacturers alike for the data.”).

companies would like to sell their data to as many parties as possible,<sup>89</sup> their agreements with MVPDs often prohibit the MVPDs from delivering the data to others.<sup>90</sup> According to supporters, an AllVid disaggregation mandate should require MVPDs to deliver EPG data to downstream devices even over the sellers' objections.<sup>91</sup> Yet if EPG data is copyrightable, as sellers maintain, the Commission lacks authority to regulate it for the reasons discussed above.

Even if EPG data were *not* copyrightable,<sup>92</sup> moreover, sellers of this data could still presumably condition sale of such data as they see fit—including a contractual requirement that MVPD purchasers not give the data to other potential buyers.<sup>93</sup> AllVid proponents argue that such provisions in EPG contracts constitute “price discrimination . . . against competitive products” and that the Commission should invalidate them.<sup>94</sup> Yet there is no evidence in the record (as opposed to bald assertions) that companies selling EPG data have refused to sell it to new entrants, or have discriminated against them in the terms of such sale. Moreover, even if this assertion were true, a bald claim of “price discrimination” by parties not subject to Commission regulation would provide no basis on which the Commission might invalidate such contracts.

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<sup>88</sup> *Id.* (“Likewise, the structure of the guide itself is subject to complex intellectual property rights, with a record of patent litigation and large law suits. Gemstar’s claims extend to such basics as *pointing* to an entry in a grid guide and *clicking* to tune the channel. Cable operators themselves have had to pay more than \$400 million to clear the intellectual property rights to offer their own EPGs.”) (emphasis in original).

<sup>89</sup> Rovi Comments at 6 (asserting that “Rovi guide data *is available* to consumer electronics manufacturers, for a fee”) (emphasis in original).

<sup>90</sup> *Id.*

<sup>91</sup> *See, e.g.*, TiVo Comments at 14 (arguing that “[i]t would be discriminatory for [EPG data] not to be provided to downstream devices”).

<sup>92</sup> AllVid proponents argue that copyright law does not protect mere “data compilations.” CEA Comments at 18; Public Knowledge Comments at 22.

<sup>93</sup> *See* Public Knowledge Comments at 21 (arguing that “the only limitations regarding [EPG data’s] use would be contractual”).

<sup>94</sup> CEA Comments at 18.

An AllVid disaggregation mandate would undermine the rights of MVPDs' suppliers of programming and other services by forcing MVPDs to violate a significant percentage—perhaps the majority—of their supplier agreements. Section 629's limited mandate that the Commission must assure a market for third-party devices to access video programming and other services cannot reasonably be read to encompass authority to upend contractual relations between MVPDs and their suppliers.

**B. The AllVid Proposal Would Undermine Important MVPD Legal Rights.**

The Commission's AllVid proposal would affect not only the legal rights of MVPDs' suppliers, but those of MVPDs themselves. In particular, the proposal would undermine MVPDs' own intellectual property interests in their services, as well as their First Amendment rights. These additional real-world consequences further confirm that Congress could not have intended Section 629 to confer the sweeping regulatory authority suggested by the NOI.

Because most of the video programming that MVPDs provide is available across multiple platforms, MVPDs compete in substantial part on the basis of the “look and feel” of their services. DIRECTV, in particular, has had to devote years and billions of dollars of investment and innovation to designing the most compelling service available in order to compete with entrenched cable competitors who can offer a “triple play” of services not provided by DIRECTV. The “look and feel” of DIRECTV's service includes a unique user interface and visual display, extensive search capabilities, and distinctive features like the DIRECTV SportsMix and other channels that display multiple video feeds on a single screen. Of course, MVPDs also compete on the basis of their programming and other content, applying their critical and aesthetic judgment to assemble the most appealing “compilation” of content possible. Both the “look and feel” of an MVPD's service and its unique compilation of materials are entitled to

copyright protection,<sup>95</sup> and forced disaggregation of MVPDs' services as envisioned by the AllVid Proposal would undermine that protection. For the same reason Section 629 is best read as not abrogating suppliers' intellectual property rights, so too is it best read as not abrogating MVPDs' own such rights.

Finally, as a number of commenters pointed out, an AllVid disaggregation proposal raises serious First Amendment issues.<sup>96</sup> For many of the same reasons that “compiling” materials into a compelling service offering is entitled to copyright protection—*e.g.*, the “presentational” features of a service are clearly motivated by critical and aesthetic concerns<sup>97</sup>—the courts have also held that MVPDs are First Amendment speakers whose services represent protected speech.<sup>98</sup> Mandated disaggregation would interfere with the manner in which MVPDs prefer to speak, as device manufacturers would be able to delete or reorganize elements of MVPD expression at will. Under the First Amendment, however, a speaker has “the autonomy to choose the content of his own message,” and what to include or exclude as well as the order and manner of presentation all inhere in this right.<sup>99</sup> The AllVid Proposal would undermine this right. Section 629 should not be construed to permit such regulation unless no other construction is possible—which, as discussed below, is not the case.

**C. Section 629 Provides the Commission with No Authority to Regulate MVPD Services.**

Perhaps most fundamentally, a careful reading of the text reveals that it does not give the Commission authority to regulate MVPD *services* at all. Section 629 charges the Commission

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<sup>95</sup> See, *e.g.*, AT&T Comments at 52-54 (and cases cited).

<sup>96</sup> See, *e.g.*, Verizon Comments at 23-24; AT&T Comments at 57-64.

<sup>97</sup> Cf. *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1134 (N.D. Cal. 1986).

<sup>98</sup> See, *e.g.*, *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 636 (1994).

<sup>99</sup> See, *e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

with assuring the commercial availability of third-party devices permitting consumers to “access” video and other services “offered” by MVPDs. As discussed below, the statutory terms “access” and “offered” indicate that Congress intended to extend the Commission authority under Section 629 to regulate the market for *devices that receive* MVPD video and services, but not to regulate *the format of the offerings* themselves.

As a matter of ordinary English usage, the verb “to access” means “to get at” or “to gain access to” something.<sup>100</sup> On the basis of a statute allowing it to assure the availability of devices providing “access” to MVPD video and services, the AllVid proposal would impose fundamental changes on *how* the services themselves are communicated from MVPDs to subscribers. That is inconsistent with Congress’s use of the word “access” in Section 629. If, for example, Congress had charged the Commission with assuring the commercial availability of devices used to “access” the Internet, nobody would think that the Commission could prohibit websites from using Adobe’s Flash technology, even if some devices used to “access” those websites do not use that technology. In other words, the Commission could not—in order to foster a market in hypothetical “AllNet” Internet *access* devices—mandate a change in the way the Internet works. But this is exactly what the Commission seeks to do here.

The statutory term “offered” similarly indicates that Congress intended to extend authority to the Commission to regulate the market for devices but not the format or content of MVPD services themselves. “Offer” means “to present for acceptance or rejection” or “to make available.”<sup>101</sup> The past participle “offered” accordingly means “presented for acceptance or rejection” or “made available.” The statute thus authorizes the Commission to assure the availability of third-party devices for consumers to access video and services actually “presented

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<sup>100</sup> See Merriam-Webster’s Online Dictionary, *available at* <http://www.merriam-webster.com/dictionary/access>.

<sup>101</sup> See Merriam-Webster’s Online Dictionary, *available at* <http://www.merriam-webster.com/dictionary/offered>.

for acceptance or rejection” or “made available” by MVPDs. It does not authorize the Commission to require MVPDs to make *new*, disaggregated “quasi-services” available that are different from the services companies have chosen to “present for acceptance or rejection” in the competitive market. Again, the Commission plainly could not regulate the format or content of websites under a statute requiring the Commission to assure the availability of *devices* for obtaining “services offered over the Internet,” because requiring changes to the websites goes well beyond merely ensuring access to services “offered” over them. The same is true here with respect to MVPD services.

Moreover, as AT&T explained in its comments, “[t]he limitations on the Commission’s authority” set out in Section 629(a) “are reinforced by Section 629(f).”<sup>102</sup> Section 629(f) provides that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.”<sup>103</sup> Prior to enactment of the 1996 Act, the Commission already had authority over MVPD equipment granted by Section 624a, which provides authority to regulate “compatibility between televisions and video cassette recorders and cable systems.”<sup>104</sup> Section 624a(a)(4)—like Section 629, albeit even more expressly—confers authority on the Commission over the devices themselves, while mandating that the “functions, protocols, and other product and service options” must be left to “open competition in the market.”<sup>105</sup>

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<sup>102</sup> AT&T Comments at 47.

<sup>103</sup> 47 U.S.C. § 549(f).

<sup>104</sup> 47 U.S.C. § 544a(b)(14).

<sup>105</sup> 47 U.S.C. § 544a(a)(4).

In short, Section 629 reinforces the Commission’s authority over devices used to access MVPD services, but does not extend that authority to allow regulation of the format or content of the services themselves. As the Commission itself has previously (and correctly) concluded, Section 629 does *not* permit forcing MVPDs to “develop and deploy *new* products and services in tandem with consumer electronics manufacturers.”<sup>106</sup> The Commission should hew to that conclusion and decline to adopt the AllVid proposal.

### **III. ALLVID SUPPORTERS UNDERESTIMATE IMPLEMENTATION COMPLEXITY**

Even if an AllVid disaggregation mandate would promote innovation (which it would not), and even if it were consistent with the Commission’s statutory authority (which it is not), it is not as ready for implementation as its supporters claim. As numerous commenters observed, the delivery of a commercial-grade, multichannel video service is highly complex—far more complex than the data and voice services lauded by AllVid supporters. The AllVid proposal, as currently constituted, fails to account for this complexity.

DIRECTV places a great deal of functionality in its set-top boxes so that its one-way system can offer features comparable to (and, in many cases, superior to) those of two-way cable systems.<sup>107</sup> Any Commission navigation device mandate would thus create a particularly high risk of degrading DIRECTV’s particular offerings. Yet at least some two-way MVPDs also place significant functionality in their set-top boxes.<sup>108</sup> And in order for *any* set-top box to work, it must be able to understand commands delivered from the network. As AT&T put it, set-top boxes “must be able to decode, support, and display special offerings, such as the program-

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<sup>106</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Second Report & Order, 20 FCC Rcd. 6794, ¶ 30 (2005) (“*Second Report and Order*”) (emphasis added).

<sup>107</sup> DIRECTV Comments at 2-4; *see also* DISH/EchoStar Comments at 5-6.

<sup>108</sup> AT&T, for example, states that its “rich mix of services depends on close integration between the MVPD, the STB manufacturer, and the suppliers of software for the STB.” AT&T Comments at 27.

specific additional content AT&T offers subscribers in connection with certain programming, or new applications or capabilities that are developed over time (like 3D programming).”<sup>109</sup> All set-top boxes do so today through the use of highly sophisticated, and in most cases proprietary, protocols.<sup>110</sup>

Some AllVid supporters seem to believe that, just as set-top boxes understand network data today, future downstream devices will be able to understand disaggregated network data so long as AllVid devices deliver the network data using Internet Protocol (“IP”) as a communications protocol. AllVid, one supporter argues, “allows any device that ‘speaks IP’ to access [an MVPD’s] content without having to ask the MVPD for permission.”<sup>111</sup>

This is not true. As many commenters pointed out, the mere use of IP does not mean a downstream device can actually understand information delivered to it via that protocol.<sup>112</sup> Rather, a specialized protocol or standard would have to be created to enable such understanding.<sup>113</sup> Creating such a protocol or standard would take years, especially as it would necessarily involve negotiations among all MVPDs with a variety of different network architectures and proprietary protocols.<sup>114</sup> One commenter argued that “[t]he essence of the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Public Knowledge Comments at 5.

<sup>112</sup> Time Warner Cable Comments at 17 (“For instance, because the gateway would be inserted into the content delivery mechanism, it could require agreement on and programming of new middleware for both the gateway and for set-top boxes. Advanced functionalities, such as [switched digital video] or [VOD] make this a daunting task.”).

<sup>113</sup> Sony argues that “the AllVid device must support standards for a) advertising the available channels on the MVPD service to connected devices; b) providing program-related metadata to connected devices; c) transmitting remote-code or user-generated inputs from connected devices to the AllVid gateway to enable channel changes, content ordering for on-demand services and, perhaps ‘trick-play’ (*i.e.*, pause, rewind, and fast-forward) functionality for streamed content; d) remote user-interface functionality; and e) transmitting parental-control and emergency-alert data.” Sony Comments at 14. This seems to concede that more is needed than simply choosing “IP” as a communications protocol.

<sup>114</sup> Time Warner Cable Comments at 17 (“Including DBS and telco providers in the negotiations, while necessary from a policy perspective, will increase the level of difficulty by introducing additional complications.”).

[AllVid] proposal is to start what has been a 14 year process all over again, replacing downloadable security with downloadable navigation,”<sup>115</sup> concluding that “[c]haracterizing the ‘AllVid’ concept as a ‘massive undertaking’ is not hyperbole.”<sup>116</sup>

Some AllVid supporters ignore the issue altogether. Others limit their discussions to the features and functionalities they think should be permitted to MVPDs and those that should be “reserved” to downstream devices, without explaining how exactly this would work.<sup>117</sup> Yet others seem to concede that further standards and protocols would need to be developed but argue that the Commission can simply import already existing standards rather than create new ones. Some in this latter category believe that the Commission can incorporate for this purpose the suite of standards promulgated by the DLNA.<sup>118</sup>

Although DLNA has propounded some extraordinarily useful standards, those standards cannot be incorporated wholesale into an AllVid mandate. Figure 1, below, depicts the general functions that are performed today by an MVPD set-top box.<sup>119</sup> (Some of the technologies themselves are DBS specific, although the “layers” are more generally applicable to MVPDs.)

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<sup>115</sup> Comments of Beyond Broadband Technology, LLC at 5.

<sup>116</sup> *Id.* at 10; *see also* TIA Comments at 10-11 (“Establishing the standards required to meet the FCC’s AllVid goals will take much longer than the 30 months between the filing of these Comments and December 31, 2012.”).

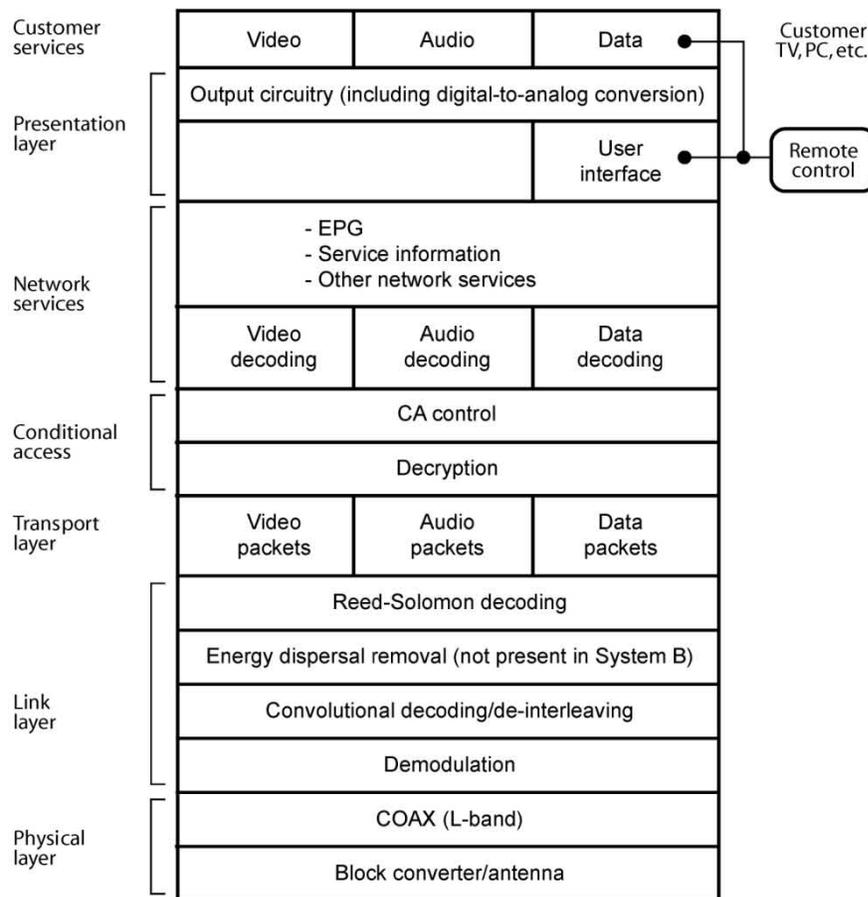
<sup>117</sup> Public Knowledge Comments at 16-18. Both CEA and Google make vague references to adopting “flexible” “industry standards,” CEA Comments at 16-17; Google Comments at 10-12, but neither acknowledges the concern raised by DIRECTV and others, much less provides a solution.

<sup>118</sup> Sony, for example, argues that “[r]ather than identifying an *ad hoc* collection of standards to describe the AllVid interface, [Sony] recommends that the Commission simply require the AllVid gateway to support the portions of the 2006 Digital Living Network Alliance (“DLNA”) Interoperability Guidelines, version 1.0, for the digital media server (“DMS”) device class, and which relate to the delivery of audio/visual (“AV”) content.” Sony Comments at 15-16 (listing specific standards). *See also* Intel Comments at 3 (arguing that AllVid content would be “output using the [DLNA] guidelines”). TiVo makes no reference to DLNA, but instead states that it “is confident that progress by multi-industry organizations and consortia, already in existence, can produce the necessary standards for reference in FCC regulations” and that “at the NOI state it seems sufficient to assure the Commission . . . that the necessary standards exist, and that there is a sufficient track record of neutral, non-discriminatory licensing and certification.” TiVo Comments at 12.

<sup>119</sup> This figure is from Stephen P. Dulac and John P. Godwin, *Satellite Direct to Home*, 94 PROC. IEEE 1, 166 (Jan. 2006) (reprinted with the permission of the ITU).

At a conceptual level, DLNA (and RVU, and even AllVid) each involve splitting the layers on the bottom and top halves of the diagram into two pieces of equipment, one on the “network” side, and another on the “client” side, and developing a common interface so that the devices can communicate with each other.

**Figure 1: Set-Top Box Architecture**



DLNA standards exist for some of the basic elements of the required common interface, including physical layer interface, the network layer protocol, link protection, service discovery, and media encoding formats. These are in many respects the easiest functions to standardize. The only DLNA standards that could be used for AllVid for the functions in the top half of the

figure, however, are those for media decoding. DLNA has yet to address other functions in the network services layer, the presentation layer, and customer services.

This is not to say that DLNA has ignored these “higher level” functions. Rather, DLNA is working on standards for the presentation of a remote user interface, in which the network services and presentation layers remain on the “network side” of the divide discussed above.<sup>120</sup> In AllVid’s “disaggregation” model, however, those layers are intended for the “client side” of the divide. Neither DLNA nor (to DIRECTV’s knowledge) anyone else has attempted to develop network, presentation, and customer services layer standards for use in a “client side” device such as contemplated by the AllVid proposal.

## **CONCLUSION**

For the reasons set forth above, as well as those elaborated in DIRECTV’s initial comments, DIRECTV urges the Commission not to proceed with the proposed “AllVid” mandate.

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<sup>120</sup> As DIRECTV described in its initial comments, RVU has completed such an interface, which may ultimately become part of the DLNA family of standards. *See* DIRECTV Comments at 4-9.

