

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Video Device Competition)	MB Docket No. 10-91
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	
)	CS Docket No. 97-80
Commercial Availability of Navigation Devices)	
)	PP Docket No. 00-67
Compatibility Between Cable Systems and Consumer Electronics Equipment)	

REPLY COMMENTS OF SONY ELECTRONICS INC.

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EXECUTIVE SUMMARY

Sony Electronics Inc. (“SEL”) continues to support measures that will encourage the rapid and widespread deployment of “AllVid” gateway devices by all Multichannel Video Programming Distributors (“MVPDs”). An all-MVPD gateway device will at long last foster meaningful competition among service providers and device manufacturers. Such a solution will not only unlock innovation, but also will enable the competition in consumer navigation devices that Congress and the Commission have long desired.

Contrary to the arguments of some commenters, Commission action is necessary to ensure the implementation of Section 629 of the Communications Act of 1934 in a manner that benefits all stakeholders in the MVPD video ecosystem. Ongoing private initiatives, however well-intended and beneficial, will not by themselves turn Section 629’s promise of commercial availability of navigation devices into reality. The development of *navigation device* competition lies at the heart of the statute, and any development in the market for Internet-delivered video does not release the Commission from its duty to enable such competition. This competition will develop only when device manufacturers have the ability to differentiate their products in a meaningful way for consumers. Contrary to suggestions from some commenters, technology is not an obstacle to the Commission’s effort. The protocols and standards necessary to implement the AllVid proposal have existed for some time, are widely deployed, and are well-tested. Moreover, contrary the view of some commenters, no jurisdictional, constitutional, or other legal arguments stand in the way of the Commission moving forward consistent with its Congressional mandate.

As the Commission recognized in its National Broadband Plan and in this Notice of Inquiry, the country is now at the dawn of “TV 3.0.” The confluence of the Internet and traditional MVPD services will provide consumers with virtually unlimited choices—but only if the Commission can get this issue right. Facilitating the integration of Internet-delivered video with traditional MVPD services will leverage the massive power of the Internet, allowing consumers to tailor their television viewing in ways we can only imagine. It will bring consumers both better value and an almost infinite number of choices of news, information, and entertainment programming. It will permit viewers to interact with the programming they receive and with each other. Most importantly, it will give consumers the tools they need to manage their programming choices to get what they want, when they want it, and where they want to view it.

Yet, for millions of American consumers to step into the new age of TV 3.0 and fully enjoy its potential, they must have the capability of receiving the many different transmission signals in use by cable operators, satellite providers, phone companies, and other competitors. Nothing in the record submitted so far provides any basis for the Commission denying consumers access to the technology that will make TV 3.0 a reality. That is why SEL supports the Commission’s AllVid/gateway device proposal.

TABLE OF CONTENTS

- I. THE COMMISSION MUST ACT..... 2**
 - A. Competition Does Not Exist In The MVPD Navigation Device Market..... 2**
 - B. Private Initiatives, By Themselves, Are Not Leading To A Competitive Navigation Device Market..... 3**
 - C. Competition Will Never Exist In The Navigation Device Market If Manufacturers Cannot Differentiate Their Products..... 5**

- II. THERE ARE NO TECHNOLOGICAL BARRIERS TO IMPLEMENTATION OF THE COMMISSION’S ALLVID PROPOSAL 8**
 - A. The DLNA Guidelines Enable the Delivery of Multichannel Video Programming 8**
 - B. The Commission Should Allow MVPDs Discretion in the Delivery of “Other Services” Under the AllVid Model 10**
 - C. Any New Standards Development for the AllVid Proposal Is Limited and Achievable 11**
 - D. The Commission Should Acknowledge the Differences Between, and the Separate Benefits of, Digital Rights Management and Link Protection 12**

- III. THERE ARE NO LEGAL IMPEDIMENTS TO IMPLEMENTATION OF THE COMMISSION’S ALLVID PROPOSAL..... 14**
 - A. The Commission Has Broad Authority To Effectuate Section 629..... 14**
 - 1. The Commission has direct authority under Section 629 to adopt regulations to effectuate Congress’s intent..... 14
 - 2. The Commission may also rely on ancillary jurisdiction to implement the AllVid proposal. 15
 - 3. The AllVid proposal does not regulate MVPDs as common carriers 17
 - 4. The AllVid proposal would not “unbundle” MVPD services..... 19
 - 5. The D.C. Circuit holding in *American Library Association* does not limit the Commission’s authority to implement the AllVid proposal..... 20
 - 6. Section 629(b) Supplies the Commission with Clear and Direct Authority to Regulate the AllVid’s Outputs and the Associated Content Protection Technologies..... 21

B. Section 624A Does Not Limit the Commission’s Authority Under Section 629	22
C. The AllVid Proposal Would Not Contradict the Commission’s <i>Gemstar</i> Order	23
D. The Allvid Proposal Does Not Violate MVPD First Amendment Rights	24
E. The AllVid Proposal Does Not Constitute A Constitutional Taking	27
V. CONCLUSION	29

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REPLY COMMENTS OF SONY ELECTRONICS INC.

Sony Electronics Inc. (“SEL”)¹ herein reiterates its support for the AllVid proposal outlined by the Federal Communications Commission (“FCC” or “Commission”) in its Notice of Inquiry (“Notice”) in this proceeding.² Contrary to the arguments of some commenters, Commission action is necessary to ensure the implementation of Section 629 of the Communications Act of 1934, as amended, (the “Act”)³ in a manner that benefits all stakeholders in the Multichannel Video Programming Distributor (“MVPD”) video ecosystem. Ongoing private initiatives, however well-intended and beneficial, will not by themselves turn Section 629’s promise of navigation device competition into reality. This competition will develop only when device manufacturers have the ability to differentiate their products in a

¹ SEL manufactures and sells Internet-connected products, including televisions, personal computers, and other devices, for the U.S. market.

² *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*, Notice of Inquiry, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, 25 FCC Rcd. 4275 (2010) (“*NOI*”).

³ 47 U.S.C. § 549.

meaningful way for consumers. Technology is not an obstacle to the Commission’s effort, as the protocols and standards necessary to implement the AllVid proposal have existed for some time, are widely deployed, and are well-tested. Moreover, the jurisdictional, constitutional and other legal arguments made by some commenters against the AllVid proposal are without merit.

I. THE COMMISSION MUST ACT

Opponents of the Commission’s AllVid proposal primarily but wrongly contend that the Commission need not act to implement Section 629.⁴ They argue that action is unnecessary because consumers already have access to a choice of (primarily Internet-delivered) video services,⁵ and that private initiatives are already achieving the goals of the statute.⁶ These arguments ignore the plain language of Section 629, are inapposite, and should be rejected by the Commission.

A. Competition Does Not Exist In The MVPD Navigation Device Market

The threshold question for the Commission in this proceeding is whether it has met the requirements of Section 629 by:

adopt[ing] regulations to assure the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems . . . from manufacturers, retailers and other vendors not affiliated with any multichannel video programming distributor.⁷

⁴ See, e.g., Comments of AT&T Inc. at 6; Comments of the Telecommunications Industry Association at 2.

⁵ See, e.g., Comments of the National Cable and Telecommunications Association (“NCTA”) at 6; Comments of Time Warner Inc. (“Time Warner”) at 2-6.

⁶ See, e.g., Comments of Cablevision Systems Corp. at 7 (“Cablevision”); Comments of Cisco Systems, Inc. at 13.

⁷ 47 U.S.C. § 549(a).

Notably, not a single commenter claims that competition exists in the MVPD navigation device market and that, therefore, the Commission has met this statutory obligation.

Despite 14 years of efforts by the Commission and countless attempts at private collaboration by industry stakeholders, “converter boxes, interactive communications equipment, and other equipment” are not commercially available “from manufacturers, retailers and other vendors not affiliated with any multichannel video programming distributor.” Simply put, the facts tell the story; there are fewer than 500,000 CableCARDS⁸ deployed in retail devices to date out of a potential market of approximately 80 million digital MVPD subscribers. Moreover, no competitive devices exist, or can exist today, for direct-broadcast satellite (“DBS”) MVPD services. To its credit, the Commission has not ignored this reality, noting the absence of commercial availability in both the Notice of Inquiry in this proceeding⁹ and in the National Broadband Plan.¹⁰ Indeed, the National Broadband Plan explicitly concluded that “[d]espite Congressional and FCC intentions, CableCARDS have failed to stimulate a competitive retail market for set-top boxes.”¹¹

B. Private Initiatives, By Themselves, Are Not Leading To A Competitive Navigation Device Market

Notwithstanding the plain language of Section 629, several commenters cite the recent development of Internet-delivered video services and other technology initiatives as evidence of, in the words of one, a “highly competitive video marketplace.”¹² They allege that this competition, or perhaps the potential for future competition, eliminates any need for the

⁸ *NOI*, 25 FCC Rcd. at 4278, ¶ 10; Federal Communications Commission, Connecting America: The National Broadband Plan, at 53 (2010) (“*National Broadband Plan*”).

⁹ *NOI*, 25 FCC Rcd. at 4278, ¶ 10.

¹⁰ *National Broadband Plan* at 52.

¹¹ *Id.*

¹² *See, e.g.*, Comments of NCTA at 7.

Commission to intervene in the navigation device market.¹³ This argument: 1) confuses *video service* competition with *navigation device* competition; and 2) ignores the fact that ongoing voluntary initiatives to develop home networking and other interoperability technologies will not, by themselves, result in a competitive navigation device market.

First, the extent of video service competition is ultimately irrelevant to the implementation of Section 629. In Section 629, Congress acknowledges that the market for devices that access MVPD services exists separately from the market for MVPD services, or even video services generally.¹⁴ The legislative history of Section 629 describes “competition in network navigation devices and other customer premises equipment” as “an important national goal” in its own right, not as a subsidiary interest or byproduct of MVPD competition or video competition.¹⁵ Accordingly, the Commission should ignore any claim that the development of video service completion excuses or eliminates the independent statutory demand for navigation device competition. Moreover, it may be that the lack of navigation device competition has hindered online video from offering a more direct substitute for traditional MVPD services.

Finally, the Commission should view with skepticism the argument that voluntary, private efforts to develop and deploy home networking technologies can achieve a competitive navigation device market.¹⁶ As SEL noted in its initial comments in this proceeding, the vast majority of technologies necessary to implement the AllVid proposal exist today and, in fact, have existed for many years. There is no technological impediment keeping an MVPD from

¹³ See, e.g., Comments of NCTA at 9; Comments of Time Warner at 6.

¹⁴ See 47 U.S.C. § 549(e) (requiring the sunset of regulations under Section 629(a) when both the market for MVPD services *and* the navigation device market are “fully competitive”).

¹⁵ H.R. REP. NO. 104-204, pt. 1, at 112 (1995) (stating that “Competition in the manufacturing and distribution of consumer *devices* has always led to innovation, lower prices and higher quality.”) (emphasis added).

¹⁶ See, e.g., Comments of AT&T at 6; Comments of DIRECTV at 4-9; Comments of NCTA at 13; Comments of Verizon at 25.

supporting these standards in their current set-top boxes, and yet not a single MVPD does so, or has even indicated future plans to offer such support. Similarly, there is no technological reason why DBS providers could not support CableCARD today, over six years after the technology was introduced, and thereby expand the market for CableCARD-compatible host devices by nearly 50 percent. Even so, in the absence of a regulatory obligation, neither major DBS operator has elected to offer such support. If the Commission relies on the goodwill of MVPDs to implement home networking or other interoperability standards voluntarily, commercial availability will remain an unfulfilled dream for the indefinite future.

MVPD business interests, not technological limitations, represent the primary obstacles to achieving commercial availability of navigation devices under Section 629. MVPDs continue to demand exclusive, pixel-level control over the presentation of video services to end users, thereby denying manufacturers a critical mechanism for differentiating their products and creating a competitive market. They refuse to implement common, non-proprietary standards, and instead pursue divergent technological paths, or no path, at their whim, again to the detriment of competition. They do so at no cost to themselves, while denying their customers the benefits of innovation, lower prices, and improvements in quality found in every other consumer product market. The Commission should acknowledge that voluntary, private efforts to bring about the commercial availability of navigation devices have reached their limit without success.

C. Competition Will Never Exist In The Navigation Device Market If Manufacturers Cannot Differentiate Their Products

For this initiative to succeed, consumer devices must do more than serve as passive conduits for MVPD services as they do today. As long as a device manufacturer has no option but to create “dumb displays” for video services, it will have no opportunity to distinguish its products from those of its retail and non-retail competitors. Without the promise of market

differentiation, that manufacturer will have no incentive to innovate or to invest. Unfortunately, the initial comments from nearly every service provider in this proceeding demand precisely this outcome. The Commission should choose a different path.

The means by which an end user interacts with a device to access the content and services available on it remains both the most significant challenge and the greatest opportunity for device manufacturers. Although consumer electronics (“CE”) companies can differentiate their products today based on price, brand, and, in the case of television manufacturers, based on display technology, the user interface – a combination of remote control, device menu, electronic program guide, seamless integration of MVPD and online content and other functionality – offers vast, untapped potential for consumer benefit. Any effort by the Commission to bring competition to the navigation device market must therefore allow for some level of user-interface differentiation in order to succeed.

In addressing the issue of content presentation in the NOI, the Commission notes what it believes to be an “inherent conflict between standardization and innovation,”¹⁷ but fails to acknowledge that MVPD consumers today encounter much of the former and very little of the latter. Although user interfaces obviously differ among service providers, most, if not all, customers of an MVPD, in some cases millions of households, must use the same, one-size-fits-all program guide. Consumers must accept a uniform, pre-defined set of features for channel selection and lineup, parental controls and accessibility, not to mention limitations on access to other content sources. Indeed, the ability to seamlessly integrate program information and online content into a user guide would result in significant innovation and product differentiation. MVPDs update these guides infrequently and grudgingly, if at all. One cable provider, for

¹⁷ *NOI*, 25 FCC Rcd. at 16.

example, recently released new guide software for its Cisco-supported systems a full *five years* after the same guide was available on its Motorola-supported systems.¹⁸

In this vein, the remote user interface (“RUI”) technologies promoted by a number of commenters¹⁹ offer little value to consumers if they represent the sole available option for accessing an MVPD service. These technologies do little more than replicate the MVPD user interface on the consumer display, in much the same way that an HDMI output delivers fully rendered video and graphics from a set-top box. SEL and its affiliates have supported RUI development efforts at the RVU Alliance, at DLNA, and in other fora. Assuming that service providers can agree on a single, nationwide RUI standard, SEL expects that most manufacturers would elect to support it. The Commission should understand, however, that these technologies offer no opportunity for product differentiation, and do not by themselves enable navigation device competition. Accordingly, the Commission must require MVPDs to provide the data necessary for a consumer device to generate its own, native user interface, including program a guide with access to online content and information. This requirement will help ensure the success of innovation through differentiation.

¹⁸ See Todd Spangler, *Comcast to Bring i- Guide to Cisco Boxes*, Multichannel News, available at <http://www.multichannel.com/article/452879-Comcast-To-Bring-i-Guide-To-Cisco-Boxes.php> (last visited Aug. 10, 2010); See also, Ben Drawbaugh, *Comcast Cisco/SA Markets Are Finally Getting the i-Guide*, endgadgetHD, available at <http://hd.engadget.com/2010/05/19/comcast-cisco-sa-markets-are-finally-getting-the-iguide/> (last visited Aug. 10, 2010) (“We’re not saying we’re fans of Comcast’s iGuide, but if you’ve been using the SARA guide for the past few years we don’t have to tell you that anything is an upgrade. This project has been in the works for five years and just goes to show how slow the cable set-top box upgrade process is.”).

¹⁹ See Comments of DIRECTV, Inc. at 4.

II. THERE ARE NO TECHNOLOGICAL BARRIERS TO IMPLEMENTATION OF THE COMMISSION'S ALLVID PROPOSAL

As SEL noted in its initial comments in this proceeding, the technologies necessary to implement the AllVid proposal have existed for some time and are in wide use today.²⁰ These technologies will allow the distribution of MVPD programming under the AllVid model, and the Commission should permit the development of technologies and other mechanisms to enable MVPDs to offer additional, non-programming services on retail devices. To the extent that the AllVid proposal requires additional standards and protocols, the development these tools is readily achievable and should not hinder AllVid deployment. Finally, the Commission should understand and acknowledge the differences between, as well as the benefits of, copy protection technologies and digital-rights management (“DRM”) technologies.

A. The DLNA Guidelines Enable the Delivery of Multichannel Video Programming

Section 629 contemplates the delivery of two broad but distinct classes of content and services to retail navigation devices: “multichannel video programming” and “other services.”²¹ This distinction is useful to the Commission’s inquiry because it suggests a workable approach for ensuring the development of a competitive navigation device market without constraining the ability of MVPDs to innovate and differentiate their services.

Commenters in this proceeding generally agree that the standards and protocols referenced in the DLNA Guidelines can be used to deliver video programming to retail devices under the AllVid model. In its own comments, DLNA notes that its Guidelines “define[] device control and content formats [which] assist in the reception and display of MVPD content

²⁰ See Comments of Sony Electronics Inc. at 16-18, 20.

²¹ 47 U.S.C. § 549(A).

services . . . on navigation devices from a wide variety of manufacturers and in a wide variety of product categories”²² Various MVPD commenters endorse the use of the DLNA Guidelines,²³ or note the value of the DLNA Guidelines as part of broader home networking initiatives.²⁴ Other consumer electronics manufacturers also offer support for the use of the DLNA Guidelines, or standards referenced by the DLNA Guidelines, as part of an AllVid interface.²⁵ Accordingly, SEL reiterates its support for use of the DLNA Guidelines for delivery of multichannel video programming from an AllVid gateway.

The Commission should, however, carefully consider and specifically define the meaning of “multichannel video programming.” It should do so with reference to the Communications Act, which defines “video programming” as programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”²⁶ Notably, this definition focuses on the nature of the programming, and encompasses not just traditional, linear programming, but any MVPD content that is comparable to content that could be found on over-the-air broadcast television. This definition makes no reference to the method by which this programming is delivered, and therefore must be read to include programming delivered on-demand, through switched-digital broadcast technologies, or any other so-called “two-way” or “interactive” delivery method. Indeed, when Congress drafted Section 629, it could have elected to exclude or require different treatment for “interactive on-demand services,” which are specifically defined in the Act.²⁷ That Congress made no such distinction among content

²² Comments of Digital Living Network Alliance (“DLNA”) at 4-5.

²³ *See, e.g.*, Joint Comments of Dish Network LLC and EchoStar Technologies LLC at 10-13 (“Dish/EchoStar”); Comments of AT&T at 8-9.

²⁴ *See e.g.*, Comments of DIRECTV at 7; Comments of Verizon at 5.

²⁵ *See e.g.*, Comments of Mitsubishi Digital Electronics America at 3; Comments of Panasonic Corporation of North America at 10.

²⁶ 47 U.S.C. § 522(20).

²⁷ 47 U.S.C. § 522 (19).

delivery methods in Section 629 strongly suggests that Commission must require uniform treatment for all programming.

B. The Commission Should Allow MVPDs Discretion in the Delivery of “Other Services” Under the AllVid Model

Both the Commission and several commenters raise the concern that the standardization inherent in the AllVid interface will inhibit innovation in MVPD services. These concerns, however, do not seem to relate to the delivery of multichannel video programming, as defined above, but rather the delivery of operator-specific service enhancements akin to the “other services” referenced in Section 629.²⁸ SEL agrees that consumers will benefit from receiving the entirety of the MVPD service to which they subscribe, and that these “other services” represent a valuable method for MVPDs to differentiate their services from those of their competitors.

Accordingly, SEL notes that the Commission’s AllVid proposal would allow MVPDs at least three mechanisms for delivering “other services” to consumers, thus preserving the benefits that these services offer. First, the Commission specifically notes that the AllVid proposal does not preclude MVPDs from offering competitive navigation devices of their own, which could support any number of additional features at the MVPDs’ discretion. This approach follows closely the current practices of MVPDs, whereby consumers must use and pay for new or different equipment to acquire additional services.²⁹ Second, SEL agrees with the Consumer Electronics Association (“CEA”) that MVPDs should have the option of offering support in the

²⁸ See, e.g., Comments of CableVision at 23 (referencing CableVision ActiveVideo); Comments of Charter Communications Inc. at 7 (referencing interactive video enhancements, interactive advertising, caller ID on TV, and audience measurement); Comments of Verizon at 7-8 (referencing FiOS TV widgets).

²⁹ See *Hey Cablevision, Where Did My Channels Go?*, ConsumerReports.org Money Blog, available at <http://blogs.consumerreports.org/money/2009/05/hey-cablevision-where-did-my-channels-go.html> (last visited Aug. 10, 2010); See also, <http://egv.illinois.gov/forms/comcast.pdf> (last visited Aug. 10, 2010).

AllVid interface for remote user-interface functionality,³⁰ thus allowing the consumer access to the full range of available services. Third, MVPDs would always have the option of developing new protocols and standards in the AllVid interface, which would enable access to new MVPD services, and which navigation devices could then support at the discretion of the manufacturer. Making these additional protocols and standards openly licensable, low-cost, and easily implementable through software or firmware upgrades will greatly increase the likelihood of device manufacturer support. Taken together, these three mechanisms for enabling the MVPD deployment of differentiated services should limit concerns that the AllVid proposal would stifle innovation.

C. Any New Standards Development for the AllVid Proposal Is Limited and Achievable

In its initial comments, SEL identified a handful of additional standards and protocols that would need to be included in the AllVid interface to ensure that consumers continue to receive access to the full range of MVPD service functionality.³¹ As other commenters note, several currently existing standards can likely be adapted for the AllVid interface to enable parental control, closed captioning, and emergency alert features.³² In addition, to the extent that MVPDs wish to deliver a fully rendered electronic program guide to retail devices, a number of technologies have been developed to support this capability.³³ SEL notes that further standards development will need to occur to create additional AllVid interface protocols for switched-

³⁰ Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition at 9-10 (stating that consumers “should have the choice of viewing the MVPD’s fully functional EPG, as provided to and rendered by the client . . .”)

³¹ Comments of Sony Electronics Inc. (“SEL”) at 14.

³² Comments of DLNA at 9-10; Comments of Dish/EchoStar at 9-10. The Commission should note that additional protocols will likely be necessary to support certain new accessibility requirements currently under consideration by Congress.

³³ See, e.g., Comments of the RVU Alliance; Comments of DIRECTV at 4-13 Comments of DLNA at 11-12.

digital channel release, on-demand ordering, and electronic program guide data delivery. These new standards efforts, however, are readily achievable, provided that all stakeholders work in good faith and under the guidance and direction of the Commission.

D. The Commission Should Acknowledge the Differences Between, and the Separate Benefits of, Digital Rights Management and Link Protection

Several commenters express concern about the absence of digital rights management (“DRM”) obligations in the AllVid proposal or the limitations of DTCP/IP as a copy protection technology.³⁴ As the Commission is likely aware, SEL and its sister companies have broad and deep experience as implementers, developers and licensors of content protection technologies, including DTCP/IP. SEL and Sony Pictures Entertainment are offering specific proposals on the subject of content protection in separate joint reply comments, concurrent with this submission. More generally, however, it is important that the Commission understand the strengths and weaknesses of its proposed use of DTCP/IP for encryption and authentication in the AllVid interface.

As the Commission recognizes,³⁵ DTCP/IP is a robust and widely accepted standard for preventing illegal copying and unauthorized retransmission of protected content. Subject to the Commission’s Encoding Rules,³⁶ it enables content providers and MVPDs to enforce these restrictions throughout the content delivery ecosystem. It does so by incorporating compliance and robustness obligations with the license for the underlying technology. The combination of these mechanisms ensures that programming receives the exact level of protection dictated by the content provider, regardless of the device receiving the programming, or the interface that the

³⁴ See, e.g., Comments of AT&T at 32-38; Comments of DIRECTV at 16-17; Comments of Time Warner Cable Inc. at 17.

³⁵ *NOI*, 25 FCC Rcd. At 4285, ¶ 28.

³⁶ 47 C.F.R. 76.1900 *et seq.*

programming crosses. Contrary to the claims of some commenters, DTCP/IP precludes, rather than enables, the delivery of protected content to non-secure devices. In addition, DTCP/IP can currently enable many business models beyond those envisioned by the baseline Encoding Rules including, but not limited to, those made possible by the Commission's recent selectable output control waiver order. Notably, forthcoming updates to the DTCP/IP specifications will allow for a wider variety of future business models.³⁷

DRM technologies, like Sony's Marlin, Windows Media DRM, Apple's Fairplay, DVB-CPCM, and others, also protect content from illegal copying and unauthorized retransmission. DRMs, however, may also enable content providers to offer programming to consumers, again subject to the Encoding Rules, under a greater diversity of current and future business models. For example, a DRM might allow a content provider to release certain on-demand programming at a lower price for viewing during a fixed period, or to enable the redistribution of certain programming throughout a household "domain."³⁸

In the context of the AllVid, therefore, DRMs can be seen as complementary to DTCP/IP. Indeed, many commonly used DRM technologies are approved for use in downstream devices as part of the DTCP/IP licensing regime.³⁹ DRM is therefore not *necessary*, per se, for the implementation of the AllVid model described by the Commission, given that DTCP/IP alone can prevent illegal copying and unauthorized redistribution of protected content and can enable a variety of current and future business models. DTCP/IP could serve as a baseline content protection standard for the AllVid gateway, with other DRMs perhaps supplementing DTCP/IP to enable a wider range of consumer-friendly business models.

³⁷ Comments of the Digital Transmission Licensing Administrator ("DTLA") at 9-10.

³⁸ *See, e.g.*, Comments of the Motion Picture Association of America at 5.

³⁹ For a list of currently approved DRM technologies, see <http://www.dtcp.com/approvedtechnologies.aspx> (last visited Aug. 11, 2010).

III. THERE ARE NO LEGAL IMPEDIMENTS TO IMPLEMENTATION OF THE COMMISSION'S ALLVID PROPOSAL

A. The Commission Has Broad Authority To Effectuate Section 629

The Commission has broad authority to issue regulations to establish a competitive retail market where consumers have access to navigation devices from sources other than MVPDs. Contrary to the arguments put forth by certain commenters in this proceeding, the Commission has both direct and ancillary jurisdiction to promulgate regulations that would effectuate a market in accordance with the AllVid proposal.

1. The Commission has direct authority under Section 629 to adopt regulations to effectuate Congress's intent.

The U.S. Court of Appeals for the District of Columbia has twice held that the Commission has broad authority to implement the requirements of Section 629.⁴⁰ In *General Instrument*, the court affirmed the Commission's "separable-security" requirement – a rule prohibiting cable operators from offering set-top converter boxes with both security and non-security functions.⁴¹ In *Charter*, the court reached largely the same conclusion in finding that the Commission did not exceed its authority by refusing to rescind this rule.⁴² In each case, the court upheld the Commission's decision to impose this requirement, despite the fact that NCTA and various cable operators opposed the rule and argued that the Commission had misconstrued the meaning of the statute.⁴³

Moreover, as noted by the D.C. Circuit in *Charter*, "this court is bound to defer to the FCC's predictive judgment," and that "this court's review has been 'particularly deferential' where the 'FCC must make judgments about the future market behavior with respect to a brand-

⁴⁰ *Charter Comm. Inc. v. FCC*, 460 F.3d 724 (D.C. Cir. 2006) ("*Charter*"); *General Instrument Corp. v. FCC*, 213 F.3d 742 (D.C. Cir. 2000) ("*General Instrument*").

⁴¹ See *General Instrument*, 213 F.3d 724, 735.

⁴² See *Charter*, 460 F.3d at 45.

⁴³ See *General Instrument*, 213 F.3d at 729-730; see also *Charter*, 460 F.3d at 35-36.

new technology.’”⁴⁴ In light of these observations, the *Charter* court rejected no less than four arguments that the Commission’s separable-security requirement was arbitrary and capricious.⁴⁵ Taken together, *General Instrument* and *Charter* stand for the proposition that Section 629 gives the Commission broad discretion to choose mechanisms for enabling a competitive navigation device market.

The Commission’s AllVid proposal, like the separable-security requirement at issue in *General Instrument* and *Charter*, would enable the development of a competitive navigation device market by allowing CE manufacturers to offer devices comparable to those offered by MVPDs today. The Commission predicts that, if implemented, the AllVid proposal would:

foster a competitive retail market in smart video devices to spur investment and innovation, increase consumer choice, [and] allow unfettered innovation in MVPD delivery platforms...[thus]...greatly enhance[ing] the incentives for manufacturers to enter the retail market.⁴⁶

This analysis reflects the same “predictive judgment” that the D.C. Circuit referenced, and afforded substantial deference to, in *Charter*. As in *General Instrument* and *Charter*, the Commission with the AllVid proposal has done nothing more than identify a mechanism for resolving the market failure identified in Section 629.

2. The Commission may also rely on ancillary jurisdiction to implement the AllVid proposal.

Notwithstanding its direct authority to implement the AllVid proposal under Section 629, the Commission may also do so by relying on its ancillary authority. The Supreme Court has observed that the Act gives the Commission flexibility in implementing its provisions because Congress recognized the dynamic nature of the communications industry and wanted to provide

⁴⁴ See *Charter*, 460 F.3d at 41 (quoting *Melcher v. FCC*, 134 F.3d 1143, 1151-52 (D.C. Cir. 1998)).

⁴⁵ *Id.* at 41-45.

⁴⁶ *NOI*, 25 FCC Rcd. at 4275.

the Commission with the flexible authority to regulate this sector.⁴⁷ Thus, in *United States v. Southwestern Cable Company*,⁴⁸ the Supreme Court held that the Commission has broad ancillary authority to regulate the cable industry.⁴⁹ Under the test articulated in *Southwestern Cable*, in order to act pursuant to its ancillary authority, the Commission must first demonstrate that it is regulating “interstate and foreign communication by wire or radio.”⁵⁰ Second, the Commission must ensure that any regulations promulgated in accordance with its broad authority are “reasonably ancillary to the effective performance of [its] various responsibilities”⁵¹ The Court in *United States v. Midwest Video Corporation* further explained this requirement in finding that the Commission’s ancillary jurisdiction “extends also to requiring [cable operators] affirmatively to further statutory policies.”⁵²

Consistent with the holdings in *Southwestern Cable* and *Midwest Video*, the Commission may rely on its ancillary authority in promulgating regulations effectuating the AllVid proposal. Such regulations would satisfy the initial prong of the *Southwestern Cable* test, in that they would directly regulate the nature and form of wired and radio communications from the MVPD source, through the AllVid gateway, and to the retail navigation device. Indeed, the fundamental goal of the AllVid proposal is to expand the means by which consumers may access jurisdictionally interstate MVPD services.⁵³

⁴⁷ See *Federal Communications Comm. v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (“The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses the desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.”).

⁴⁸ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (“*Southwestern Cable*”); see also *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (“*Midwest Video*”).

⁴⁹ *Southwestern Cable*, 392 U.S. at 178.

⁵⁰ *Id.* (citing 47 U.S.C. §152(a)).

⁵¹ *Id.*

⁵² *Midwest Video*, 406 U.S. at 664.

⁵³ *NOI*, 25 FCC Rcd. at 4275-76, 4281.

Second, the Commission’s AllVid proposal would be reasonably ancillary to the effective performance of the Commission’s responsibilities under Section 629. The Commission has reasonably concluded that the AllVid proposal would further the statutory policies outlined in Section 629, stating that it seeks to “unleash competition in the retail market for smart, set-top video devices that are compatible with all MVPDs [and therefore] to better effectuate the intent of Congress as set forth in Section 629.”⁵⁴ Accordingly, even if Section 629 is somehow construed not to confer direct jurisdiction on the Commission to implement the AllVid proposal, the Commission may also rely on its ancillary jurisdiction to reach the same goal.

3. The AllVid proposal does not regulate MVPDs as common carriers

Contrary to the assertion of the NCTA,⁵⁵ the AllVid proposal does not treat MVPDs as “common carriers” in violation of Section 3(h) of the Communications Act.⁵⁶ In the second *Midwest Video* case,⁵⁷ the Supreme Court found that a Commission rule requiring certain cable operators to make channels available for access by third parties, and to furnish equipment and facilities for access purposes, violated the prohibition in Section 3(h) on the treatment of persons engaged in broadcasting as common carriers.⁵⁸ The Court defined a common carrier service as a service that “makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.”⁵⁹ Moreover, said the Court, “a common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal.”⁶⁰ It concluded that the Commission’s access rules “transferred control of the content of access cable channels

⁵⁴ *NOI*, 25 FCC Rcd. at 4275.

⁵⁵ Comments of NCTA at 48-49.

⁵⁶ 47 U.S.C. § 153(h).

⁵⁷ *Federal Communications Comm. v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”)

⁵⁸ *Id.* at 705.

⁵⁹ *Id.* at 701 (citations and internal quotation marks omitted).

⁶⁰ *Id.* (citations and internal quotation marks omitted).

from cable operators to members of the public who wish to communicate by the cable medium.”⁶¹ These rules thus violated the common carrier prohibition in Section 3(h).

The Commission’s AllVid proposal and its alleged “disaggregation” of MVPD services do nothing of the sort. In *Midwest Video II*, the Court concluded that the regulations at issue would have denied cable operators control over the use of their networks and the content that was transmitted them.⁶² By contrast, the AllVid proposal does not require that MVPDs cede control over their networks to third parties or to the public at large, or deprive MVPDs of any editorial discretion over content on their networks. To the contrary, MVPDs would retain exclusive control over their services.⁶³ The AllVid proposal in no way allows CE manufacturers or any other party to dictate the content that an MVPD must carry.⁶⁴

Contrary to *Midwest Video II*, the AllVid proposal would not require MVPDs to provide “studio facilities and technical assistance” to third-parties in order to enable those third parties to deliver content of their own choosing across the MVPD network.⁶⁵ Under an AllVid regime, MVPDs would be required to provide *their customers* a terminal device – the AllVid gateway – that would enable the reception, delivery and display of the MVPD service.⁶⁶ MVPDs would not provide those customers common-carrier access to the network. This obligation would simply mirror the MVPDs’ current, ubiquitous and decades-old business model of leasing set-top boxes to their customers.⁶⁷

⁶¹ *Id.* at 700.

⁶² *Id.* at 689.

⁶³ *See e.g., NOI*, 25 FCC Rcd., at 4281-83 (“The AllVid solution would be designed to accommodate any delivery technology that an MVPD chooses to use and allow MVPDs to continue unfettered innovation in video delivery.”)

⁶⁴ *NOI*, 25 FCC Rcd., at 4281-83.

⁶⁵ *Midwest Video II*, 440 U.S. at 702.

⁶⁶ *NOI*, 25 FCC Rcd., at 4287-88.

⁶⁷ *Id.*

4. The AllVid proposal would not “unbundle” MVPD services

Contrary to the claims of some commenters,⁶⁸ the AllVid proposal does not mandate the “unbundling” of MVPD services. Various MVPDs, in fact, illustrate this point in their own arguments. As Verizon notes in its Comments, “Congress made clear that telecommunications carriers had a duty to provide “*nondiscriminatory access to network elements* on an unbundled basis.”⁶⁹ And NCTA supports its unbundling claim by noting that the AllVid proposal “calls for turning MVPD systems into common carrier pipes for the transport of disaggregated ‘elements,’ such as wholesale video, or piece-parts of programming guides.”⁷⁰ As defined by the Commission, the AllVid proposal fits neither description.

First, as detailed above, the AllVid does not grant *anyone, any* access to *any* MVPD network facility.⁷¹ Rather, the AllVid would only empower consumers to control the presentation of MVPD content *after* it has left the purview of the MVPD and *after* it has entered the home network or personal domain.⁷² As noted by the Commission, the AllVid would merely “enabl[e] consumers to select and access content through navigation devices of their choosing.”⁷³ In addition, MVPDs could still offer consumers the option of their proprietary “service,” because “MVPDs would, of course, be free to participate in the retail market by offering navigation devices for sale or lease.”⁷⁴

⁶⁸ See Comments of Verizon at 22.

⁶⁹ *Id.* at 15 (citing 47 U.S.C. § 251(c)(3) (emphasis added)).

⁷⁰ Comments of NCTA at 48.

⁷¹ *NOI*, 25 FCC Rcd. at 4283.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Second, the AllVid does not in any way require MVPDs to carry any programming or programming data solely for the benefit of CE manufacturers.⁷⁵ MVPDs would still have complete control over what programs flow over their networks and what, if any, metadata would accompany such programs. They would only be obligated to pass such programming and data they chose to carry over the applicable home communications protocol.⁷⁶ In short, it might be politically expedient for the Service Providers to employ the currently unpopular term “unbundling,” but it is clear that its use in the context of the AllVid is wholly misplaced.

Finally, contrary to NCTA’s claims, the AllVid proposal imposes no wholesale requirement. NCTA mischaracterizes the definition of “wholesaling” under the Communications Act (“1996 Act”).⁷⁷ Under the 1996 Act, carriers must allow their services to be resold by others at a wholesale price, which is a discount off of the retail prices.⁷⁸ Here, consumers receive no discount; they must continue to pay the full retail price for the services they receive.

5. The D.C. Circuit holding in *American Library Association* does not limit the Commission’s authority to implement the AllVid proposal

The D.C. Circuit decision in *American Library v. Federal Communication Commission*,⁷⁹ in which the court struck down Commission regulations based exclusively on ancillary jurisdiction, is irrelevant to the Commission’s authority to implement the AllVid proposal. As outlined above, the Commission’s authority to promulgate the AllVid regulations is premised under its direct jurisdiction as provided by Section 629,⁸⁰ and the U.S. Court of Appeals for the District of Columbia has twice held that the Commission has broad, direct jurisdiction under

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Comments of NCTA at 43-44.

⁷⁸ See 47 U.S.C. § 251(c)(4)(A).

⁷⁹ 406 F. 3d. 680 (D.C. Cir 2005) (“*American Library*”).

⁸⁰ *NOI*, 25 FCC Rcd. at 4275; see also *supra* at 14-15.

Section 629 to enable Congress' vision of a competitive, retail market for navigation devices.⁸¹ In contrast, in enacting the so-called "broadcast flag" rules, "the FCC cited no specific statutory provision" and "relied exclusively on its ancillary jurisdiction."⁸² Stated plainly, *American Library* applies only in situations where the Commission relies exclusively on its ancillary jurisdiction for authority to effectuate rules.⁸³ That is clearly not the case with regard to the AllVid proposal.

Moreover, unlike the regulations at issue in *American Library*, the AllVid proposal does not involve the regulation of downstream, retail consumer electronics equipment. Rather, the Commission would be regulating the same "converter boxes" under the same direct authority that that the D.C. Circuit found it to have in *General Instrument* and *Charter*. In contrast to the rules struck down in *American Library*, there is no part of the AllVid proposal that would regulate stand-alone CE devices or consumer home networks after the MVPD's signal has been sent and received in the household.⁸⁴

6. Section 629(b) Supplies the Commission with Clear and Direct Authority to Regulate the AllVid's Outputs and the Associated Content Protection Technologies

Section 629(b) unequivocally directs the Commission to ensure the security of the MVPD's service and content, therefore, supplying the FCC with clear and direct authority to regulate the AllVid's outputs and associated content protection technologies. It provides that "[t]he Commission shall not prescribe regulations under subsection (a) of this section which would jeopardize security of multichannel video programming and other services offered over

⁸¹ *See id.*; *see also supra* at 15-16 (detailing how the Commission could also rely on its ancillary jurisdiction to enact the AllVid proposal).

⁸² *American Library*, 406 F. 3d at 691.

⁸³ *See id.*

⁸⁴ *See* Comments of AT&T at 37, 43-44 (arguing that *American Library* curtails the Commission's jurisdiction to implement the AllVid proposal).

multichannel video programming systems.”⁸⁵ Indeed, the cable industry took great pains in *General Instrument* to highlight the significance of Section 629(b) and the paramount importance of MVPDs’ security concerns.⁸⁶ Given that the Commission must ensure the security of the MVPD’s service, it must also have the authority to ensure that such services are only distributed via secure outputs and that such services are sufficiently protected with robust content protection technologies.⁸⁷

B. Section 624A Does Not Limit the Commission’s Authority Under Section 629

Contrary to the arguments advanced by certain commenters,⁸⁸ Congress did not intend to limit the authority of the Commission with regard to Section 629, through limits found in Section 624A of the Act.⁸⁹ The court in *General Instrument* concluded that Sections 624A and 629 provide the Commission with independent sources of authority.⁹⁰ Indeed, petitioners in *General Instrument* made precisely the same argument as the present commenters, which the court soundly rejected:

The Eshoo Amendment applies only to regulations promulgated under Section 624A’s equipment compatibility provisions; its limitations simply do not extend to the Commission’s actions in this proceeding which were pursuant to Section 629’s independent grant of regulatory authority.⁹¹

In addition, Representative Eshoo, in the legislative history of Section 629, stated that the amendment to Section 624A “does not affect Section 203 of H.R. 1555, which ensures that ‘set-

⁸⁵ 47 U.S.C. §529(b).

⁸⁶ *General Instrument*, 213 F. 3d at 730-31 (rejecting the cable industry’s Section 629(b)-based statutory claim against the Commission’s separable security regulations).

⁸⁷ See AT&T Comments at 37 (arguing that *American Library* limits the ability of Commission to dictate standards for so-called “DRM”).

⁸⁸ See AT&T Comments at 48.

⁸⁹ 47 U.S.C. § 544a.

⁹⁰ *General Instrument*, 213 F.3d at 733.

⁹¹ *Id.*

top' boxes will be made available to consumers through retail stores.”⁹² Furthermore, Representative Eshoo stated that she “support[s] the effort by the Committee to allow retailers to sell set-top boxes, and [the] amendment does not conflict with the directive that the FCC assure the retail commercial availability of cable converters.”⁹³ Therefore, although Congress may have intended to curtail the Commission’s Section 624A authority, it clearly did not intend to limit its authority in all sections of the Act, and in particular not in Section 629.

C. The AllVid Proposal Would Not Contradict the Commission’s *Gemstar* Order

Contrary to the assertions of the NCTA, the Commission did not conclude in the *Gemstar*⁹⁴ case that it lacks the authority to promulgate regulations under Section 629 that address both services and devices.⁹⁵ In *Gemstar*, the Commission ruled that Time Warner was not required to carry another party’s electronic programming guide data for the benefit of third parties, if Time Warner would not otherwise carry such content. In explaining this decision, the Commission noted that it “has not found that the right to attach consumer electronics equipment to a cable system can be expanded to include the obligation by cable operators to carry any service that is used by such equipment.”⁹⁶

The Commission also concluded, however, that “Section 76.1202 does not require carriage of services *outside of those chosen* by the MVPD in order to assure retail availability of

⁹² See H.R. Rep. 104-204, 104th Cong., 1st Sess. at 215 (1995). Section 203 of H.R. 1555, with slight modifications, became Section 629 in the process of reconciling H.R. 1555 with S.652, the Senate version of the Telecommunications Act of 1996. See S. Conf. Rep. 104-230, 104th Cong. 2^d Sess. at 180-81 (1996).

⁹³ *Id.*

⁹⁴ *Gemstar Internat’l Group, Ltd. and Gemstar Dev. Corp., Petition for Special Relief; Time Warner Cable, Petition for Declaratory Ruling*, Memorandum Opinion and Order, 16 FCC Rcd 21531, ¶ 31 (2001) (“*Gemstar*”).

⁹⁵ NCTA Comments at 47-48.

⁹⁶ *Id.* NCTA Comments, *supra* note 95.

navigation devices.”⁹⁷ That is, the Commission held that Section 629 does not require a regulatory regime in which MVPDs are mandated to carry particular services solely for the benefit of competitive navigation devices, a requirement that the AllVid proposal would plainly not impose. The *Gemstar* decision also reaffirmed the notion that if an MVPD *does choose* to carry a service, it must also make such service available to retail navigation devices.⁹⁸ In short, *Gemstar* stands for the proposition that the Commission cannot compel an MVPD to carry a particular service. A retail market for navigation devices would be illusory if competitive devices were not allowed equitable access to “the services . . . chosen by the MVPD.”⁹⁹

D. The Allvid Proposal Does Not Violate MVPD First Amendment Rights

Implementing the AllVid proposal would not violate the MVPDs’ First Amendment rights. AllVid does not involve a government action here that somehow silences the voices of MVPDs, limits their editorial discretion, or coerces them to make unwanted communications, nor does the AllVid proposal afford any third party the ability engage in communications using the MVPDs’ networks. To the contrary, the AllVid proposal explicitly notes that “MVPDs would, of course, be free to participate in the retail market by offering for sale or lease navigation devices,” devices that would allow the MVPDs to continue to dictate, without restriction, the nature and substance of any communication made via their services.¹⁰⁰

Accepting for purposes of argument only that the AllVid proposal somehow limits MVPD free speech rights, judicial review of the constitutionality of such regulations would apply the three-part test articulated by the Supreme Court in *United States v. O’Brien* for

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

content-neutral limitations,¹⁰¹ a test that the AllVid proposal would easily pass. The Supreme Court in *O'Brien* and the U.S. Court of Appeals for the D.C. Circuit in *Time Warner Entertainment Co., v. United States*, relying on *O'Brien*, held that not every regulation that limits speech necessarily violates First Amendment rights, and that a content-neutral regulation must satisfy heightened intermediate scrutiny.¹⁰² This test allows a regulation to pass constitutional muster if: 1) it furthers a substantial interest; 2) it is not related to the restraint of free speech; and 3) any suppression of the First Amendment freedom is no more than is necessary to advance the government interest.¹⁰³

In accordance with *O'Brien* and *Time Warner*, any regulation promulgated by the Commission that would effectuate the AllVid proposal would withstand this three-step test. In *Time Warner* the D.C. Circuit upheld two sections of the 1992 Cable Act: 1) a provision limiting the number of subscribers a cable operator could reach; and 2) a provision limiting the number of channels on a cable system that could be devoted to video programming in which a cable operator had a financial interest.¹⁰⁴ In doing so, the court found that both provisions advanced the legitimate government interest of: 1) limiting the ability of cable operators “to “impose their own biases upon the information they disseminate;” and 2) preventing “a few dominate cable operators from preclude[ing] new programming services from attaining the critical mass audience necessary to survive.”¹⁰⁵ The regulations necessary to effectuate the AllVid proposal –

¹⁰¹ See Comments of AT&T at 57.

¹⁰² See *United States v. O'Brien*, 391 U.S. 367, ___ (1968); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 635 (1994); see also *Time Warner Entmt. Co., v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000) (holding that “[a] law that singles out speech based upon the ideas or views expressed is content-based, whereas a law that ‘confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed’ is most likely content-neutral.”).

¹⁰³ See *O'Brien*, 391 U.S. at 376-387; see also *Time Warner*, 211 F.3d at 1316; see also *Turner Broadcasting*, 512 U.S. at 662.

¹⁰⁴ *Time Warner*, 211 F.3d at 1320-23.

¹⁰⁵ *Id.* at 1310.

regulations that would be *substantially* less intrusive than the provisions of the Cable Act at issue in *Time Warner* – would further the legitimate Congressional goal of creating a market where consumers would enjoy the benefits of competition in the market for retail navigation devices.¹⁰⁶

Second, the AllVid proposal simply involves the selection of a technical specification and has no direct impact on MVPDs’ speech. As noted above, the specification to which the MVPDs object would only be applied to a *portion* of navigation devices; the MVPDs would still have the ability to participate in the navigation device market and, thus, would still have the ability to completely control the look and feel of their service.¹⁰⁷

Finally, to the extent that the AllVid proposal would result in any limitation of MPVDs speech, it is certainly no more than is necessary to effectuate Congress’s intent as articulated in Section 629. Once the technical specifications for the AllVid device are determined, the MPVDs would be free to display and distribute whatever content they wish through their own leased and sold navigation devices.¹⁰⁸ And even when a consumer accesses an MVPD’s service via an AllVid device, the Commission would have no existing or continuing control over what type of content the MPVD chooses to carry or not carry.¹⁰⁹

Citations to *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*,¹¹⁰ in support of First Amendment arguments against AllVid are strained at best.¹¹¹ In *Hurley*, the Court held that the defendants’ First Amendment rights were violated when they were compelled

¹⁰⁶ 47 U.S.C. § 549.; *NOI*, 25 FCC Rcd. at 4275-76 (The AllVid proposal would “foster a competitive retail market in smart video devices to spur investment and innovation, increase consumer choice, [and] allow unfettered innovation in MVPD delivery platforms...[thus]...greatly enhanc[ing] the incentives for manufacturers to enter the retail market.”); *see also Turner*, 512 U.S. at 665 (“We agree that the courts must accord substantial deference to the predictive judgments of Congress.”) (internal citations omitted).

¹⁰⁷ *NOI*, 25 FCC Rcd. at 4283.

¹⁰⁸ *See id.* at 4283.

¹⁰⁹ *Id.* at 4275-76.

¹¹⁰ 515 U.S. 557 (1995) (“*Hurley*”).

¹¹¹ *See* AT&T Comments at 59-61; NCTA Comments at 49.

to include outsiders in their St. Patrick’s Day parade, noting that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”¹¹² As described in detail above, however, the AllVid proposal does not compel MVPDs to express or not to express any particular message.

Reliance on *Miami Herald Publishing Co. v. Tornillo*¹¹³ also appears misplaced.¹¹⁴ As noted by the *Time Warner* court:

[A] cable operator is unlike a newspaper publisher, however, in the one respect crucial to the Congress's reason for enacting the channel occupancy provision: A newspaper publisher does not have the ability to exclude competing publications from its subscribers' homes. The cable operator's bottleneck monopoly is a physical and economic barrier to such intra-medium competition. The channel occupancy provision responds in kind, without regard to the content of either the cable operator's speech or that of the unaffiliated programmer for which it secures an outlet.

The court’s logic would, of course, apply equally to all MPVDs and to the attempts by Congress and the Commission to open up the navigation device market to competition.

E. The AllVid Proposal Does Not Constitute A Constitutional Taking

Finally, nothing about AllVid proposal constitutes a regulatory taking.¹¹⁵ In *Penn Central Transportation Co. v. City of New York*,¹¹⁶ the Supreme Court articulated a three-part test for evaluating the constitutionality of an alleged regulatory taking. The test considers: 1) “the economic impact of the regulation on the claimant;” 2) “the extent to which the regulation has interfered with “distinct investment-backed expectations;” and 3) the “character of the government action’ – for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of

¹¹² *Hurley*, 515 U.S. at 567.

¹¹³ 418 U.S. 241 (1974).

¹¹⁴ See AT&T Comments at 57, N. 84.

¹¹⁵ See AT&T Comments at 64-65.

¹¹⁶ 438 U.S. 104, 124-38 (1978) (“*Penn Central*”).

economic life to promote a common good.”¹¹⁷ It is clear, based application of this test, that allowing a consumer to access an MVPD content in the manner of his or her choosing after it has been legally received in no way equates to a regulatory taking.

The Supreme Court in *Penn Central* held that a regulation that did not allow an owner of a building to expand upon the existing structure that had been distinguished as an historical site was not a regulatory taking, because it did not forbid the owner of the building to realize an economic return from the existing structure or any other means that was currently available to it.¹¹⁸ In addition, the owner of the building was able to realize the rate of return on other investments or projects that would meet the limitations imposed by the regulations. The Court further held that regulations limiting the ability of the owner to build upon the existing structure promoted the common good of preserving an historic site.¹¹⁹

Similarly, the AllVid proposal would withstand application of this test. First, the requirement that an MVPD pass along the same programming and metadata to consumers via an AllVid device as it already provides to consumers via its propriety devices would cause MVPDs a negligible economic impact, if any. Whether the programming and metadata are being passed to a consumer via an AllVid device or a traditional MPVD-leased device, the consumer is paying – as part of her service contract – the same amount for the same content and metadata. In short, the MVPD would be equally compensated by consumers for the use of the programming and metadata regardless of whether that programming and metadata are used to display the MVPD’s user interface or an alternative user-interface of the consumer’s choosing. In addition, the AllVid proposal would only require that the MVPDs provide the same programming and

¹¹⁷ *Id.* (internal citations omitted).

¹¹⁸ *See Penn Central*, 438 U.S. at 124-38.

¹¹⁹ *Penn Central*, 438 U.S. at 130-38.

metadata via an AllVid device; thus, such a requirement would place no additional bandwidth or procurement obligations on MVPDs.¹²⁰

Second, the provision of the same programming and metadata via an AllVid device would not interfere with the MVPDs' economic expectations. Indeed, as noted above, MVPDs are already being compensated by consumers for this programming and metadata, and they would not be required to carry any more or any different information than they otherwise would.¹²¹

Finally, any regulation promulgated by the Commission based on the AllVid proposal would fall far short of any sort of physical invasion into the MVPDs' property.¹²² Indeed, if any ancillary "intrusion" into the MVPDs' property interest would occur at all, it would be to promote a common good, where it would allow all consumers to benefit from competition and the ability to access their lawfully obtained MVPD-content in a manner of their choosing.

V. CONCLUSION

For the reasons set forth above, SEL submits that, contrary to the arguments of some commenters in this proceeding, the Commission must act on its AllVid proposal to ensure the implementation of Section 629, and the Commission's AllVid proposal would not be vulnerable to either technological or legal challenges.

¹²⁰ See *Gemstar Order*, ¶ 31 (unlike the case at issue in *Gemstar*, cable operators would not in any way be carrying the metadata solely for the benefit of a third party).

¹²¹ See *id.*

¹²² See AT&T Comments at 64 (acknowledging that "the AllVid proposal would not effect a traditional 'physical' taking of the MVPDs' property").

Respectfully submitted,

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