

February 2, 2011

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *MB Docket No. 10-91, CS Docket No. 97-80, and PP Docket No. 00-67*

Dear Ms. Dortch:

As the *Notice of Inquiry* in this proceeding recognizes, Section 629 of the Communications Act “directs the Commission to adopt regulations to assure the commercial availability of navigation devices used by consumers to access services” from multichannel video programming distributors (“MVPDs”).¹ Based upon perceived shortcomings in the CableCARD regime, the Commission currently envisions an AllVid regime that would apply to all MVPDs and be based on a nationwide interoperability standard.² If it is to implement this ambitious goal, however, the Commission must first resolve a critical definitional issue: what type of entity qualifies as an MVPD whose services and equipment would be subject to the Commission’s requirements?

With the rapid development of over-the-top video options, this question is becoming more difficult to resolve. Many commenters have described the wealth of “edge-of-the-network” services and related retail technologies through which consumers can access video content,³ blurring the lines between traditional MVPDs and a rising class of online video distributors (“OVDs”). These technologies are highly relevant to a discussion on the choices that consumers have today to access video content, which we see as the core concept embodied in Section 629.⁴

¹ *Video Device Competition*, Notice of Inquiry, 25 FCC Rcd. 4275, ¶ 4 (2010).

² *Id.*, ¶ 17.

³ *See, e.g.*, Reply Comments of DIRECTV, Inc. at 4-5 (filed Aug. 12, 2010) (summarizing comments).

⁴ As stated in previous filings, DIRECTV does not believe that an AllVid mandate is necessary given recent developments in the marketplace, including the rise of OVDs.

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However, neither the Commission nor any commenter has addressed whether such entities might *be* MVPDs, and therefore subject to any rules ultimately adopted in this proceeding.

The issue of whether and under what circumstances an OVD qualifies as an MVPD for purposes of the Communications Act and the Commission's regulations has been raised in two proceedings currently pending before the Commission.⁵ Most recently, the Commission recognized the pendency of this issue in its order approving the proposed Comcast/NBCU transaction.⁶ Although it discussed OVDs and MVPDs extensively in that order, the Commission did not resolve the definitional issue. Accordingly, the universe of those who qualify as an "MVPD" remains unknown.

This is no mere semantic debate, as the outcome will have material consequences in this proceeding. The Commission has raised the possibility that all MVPDs would be required to comply with an AllVid regime under which, among other things, they could be required to disaggregate their content and provide their services only through a Commission-mandated gateway device using standardized technology. It would be unfair and legally problematic to impose such requirements on parties that did not even know they might fall within the ambit of the rules, and thus had no input into their formulation. Similarly, if there is to be a standardized technology underlying the AllVid regime, the Commission must consider the concerns and capabilities of all stakeholders in developing that unified approach. It is likely that the architecture of OVD systems will vary markedly from that of cable, DBS, and telco operators, rendering a technological approach developed by and for traditional MVPDs potentially unsuitable for OVDs should they ultimately be deemed covered.

To illustrate the significance of this issue, consider Roku, which recently announced that it had sold one million of its "set-top boxes" – its term, not ours – and delivered one billion streams of video programming from sources such as Netflix, Hulu Plus, and Amazon Video on Demand.⁷ If the Commission required MVPDs to make their content available to all AllVid devices on a disaggregated basis, would device manufacturers be given access to Roku's content from Netflix, Hulu, and Amazon to present any way those manufacturers saw fit? If the

⁵ See *VDC Corp. v. Turner Network Sales, Inc.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Communications LLC*, Program Access Complaint (Mar. 24, 2010).

⁶ See *Comcast Corp., General Electric Co., and NBC Universal, Inc.*, FCC 11-4, n. 131 (rel. Jan. 20, 2011). The Commission also noted (but did not resolve) this issue in its net neutrality order. See *Preserving the Open Internet*, FCC 10-201, n. 407 (rel. Dec. 23, 2010).

⁷ See Don Reisinger, "Roku hits 1 billion streams to televisions" (Jan. 5, 2011) (available at http://news.cnet.com/8301-13506_3-20027310-17.html).

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Commission formulated an AllVid technology standard, would Roku be required to design a compliant AllVid gateway device capable of passing content through to third-party devices?

As this example makes clear, the Commission must resolve the fundamental threshold question of who qualifies as an MVPD before it can consider the merits of a regime that could have a dramatic effect on the nature of MVPD services for years to come. Accordingly, DIRECTV urges the Commission to clearly define the category of entities whose operations would be affected by an AllVid mandate before proceeding further toward an AllVid mandate.

Respectfully submitted,

/s/

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