

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 07-269
Competition in)
the Market for the Delivery of Video)
Programming

**COMMENTS OF THE
CONSUMER ELECTRONICS ASSOCIATION AND
THE CONSUMER ELECTRONICS RETAILERS COALITION
ON FURTHER NOTICE OF INQUIRY**

June 8, 2011

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The Consumer Electronics Association (“CEA”) and the Consumer Electronics Retailers Coalition (“CERC”) respectfully submit these joint comments on the Commission’s Further Notice of Inquiry with respect to the status of competition in the market for the delivery of video programming.¹ For the first time, the Commission has included the category of “Consumer Premises Equipment” as one of the key factors in assessing the status of competition in the markets for MVPD, broadcast, and online-delivered programming. The Commission’s recognition that consumer electronics devices are (or should be) a vital element for competition in the market for MVPD programming (and vice versa) is long overdue.

CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing and distribution of

¹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Dkt. No. 07-269 Further Notice of Inquiry (rel. Apr. 21, 2011).

audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than \$186 billion in annual factory sales and employ tens of thousands of people. CERC's corporate members include Amazon, Best Buy, K-Mart, RadioShack, Sears, Target, and Walmart. CERC's association members are the National Retail Federation and the Retail Industry Leaders Association.

I. Introduction and Summary

This inquiry poses questions about the effects of MVPD practices on device competition, and then asks about the effects of device constraints back on the markets for MVPD and on-line video distribution ("OVD"). The answers point to the necessity – as recognized in Recommendation 4.12 of the National Broadband Plan² – for an "AllVid" gateway rulemaking.

In enacting Section 629 of the Communications Act,³ the Congress recognized that the markets for MVPD programming and for consumer electronics devices are, or should be, closely related. Specifically, the bipartisan sponsors of Section 304 of the 1996 Telecommunications Act realized that unless meaningful technical standards were adopted for the transition to digital transmission, each market would suffer from a lack of competition in the other.⁴ Unfortunately, due to MVPD resistance and the failure of the Commission to follow through on implementation, this is precisely what has happened.

² *Connecting America: The National Broadband Plan* (Mar. 16, 2010) ("National Broadband Plan" or "NBP"), Chapter 4.2 and Recommendation 4.12.

³ 47 U.S.C. § 549.

⁴ The first sentence of Section 549(a) explicitly references the utilization and reliance on *industry standard* techniques, and explicitly applies this requirement to *MVPD*

As the Commission has recently found,⁵ the market for MVPD programming and services remains a separate market from the markets for OVD and broadcast programming. Moreover, the barriers to entry in the market for navigation devices that the Commission has allowed to persist continue to insulate MVPDs from competition with each other. Consequently, while competition within the OVD and broadcast programming markets has provided incentives to develop and market new, more advanced consumer premises equipment, the same incentives have not been realized for MVPD services. The MVPD practices that have discouraged and precluded competitive entry into the navigation devices market include:

- CableLabs and MVPD standards, licensing, and certification requirements
- Customer service failures and impositions
- Price discrimination and bundling in favor of MVPDs' own leased products
- Tying content to leased devices, so as to discourage subscription mobility.

Even where competitive devices have gained a foothold, the Commission has allowed MVPDs to undermine them. In its Fourth Further Notice of Proposed

programming and services: “The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, 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.”

⁵ *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Dkt. No. 10-56, Memorandum Opinion and Order ¶¶ 76, 79 (rel. Jan. 20, 2011) (“Comcast Order”).

Rulemaking in CS Docket No. 97-80,⁶ the Commission noted that MVPD use of “switched digital” transmission practices will deny linear channels to consumer premises devices that now receive them. Yet at the urging of MVPDs who said the problem could be solved by AllVid, the Third Report and Order⁷ declined to require a feasible and readily available standards-based solution – further discouraging device entry and further insulating MVPD’s from intra-market competition. (Instead, the Commission, as urged by MVPDs, looked ahead to an AllVid rulemaking.)

More generally, potential entrants to the device market are constrained by a lack of standards, license impositions that prevent them from offering competitive Electronic Program Guides and two-way services, and by consumers’ continued inability to attach competitive equipment, due to a discriminatory pricing regime. Fully competitive consumer electronics navigation products would enhance the ability of consumers to choose and switch among MVPDs. This would enhance competition among MVPD providers, and between such providers and the providers of complementary programming. The Commission can reduce or eliminate the impact of these market failures by proceeding with a rulemaking to implement NBP Recommendation 4.12. This action is a necessity for the Commission to be in compliance with Section 629.

⁶ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80 and PP Dkt. 00-67, Fourth Further Notice of Proposed Rulemaking ¶ 14 (rel. Apr. 21, 2010) (“FNPRM”).

⁷ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Third Report and Order and Order on Reconsideration (Oct. 14, 2010) (“Third Report and Order”). Rather than a standards-based solution, the Commission settled for requiring MVPDs to furnish yet another set-top box.

II. Competition In The Market For Video Programming Delivery Is Constrained By The FCC's Incomplete Implementation of Section 629 of the Communications Act.

The Congress enacted Section 629 of the Communications Act just in time for the transition to digital television. The Commission, however, has not followed through on its responsibility to give competitive products based on new technical standards a chance to succeed. As a result, the competitive problems foreseen by the Congress, and the market failures, persist.

A. MVPDs Remain A Separate Product Market.

In conditioning its approval of the transfer of NBC-Universal licenses to Comcast, the Commission found that MVPD programming remains a separate market, and that OVD is a secondary, “complementary” or “supplementary” market.⁸ This comports with and is compelled by both technical and marketplace reality. There is no reason to expect that MVPDs will choose to amalgamate their proprietary and access-controlled bandwidth with the public Internet. Rather, given their investment in the programming delivery bandwidth that they exclusively control, they will do all they can to keep OVD markets secondary.⁹

It is precisely the fact that MVPD programming is sold on a subscriber basis and includes a package of broadcast and subscription channels that has made it the primary market for electronic distribution of programming, and has given MVPDs incentives to

⁸ Comcast Order, *supra* note 5.

⁹ See, e.g., Lindsay Powers, *Time Warner's Jeff Bewkes: Netflix Is No Threat to Media Companies*, Hollywood Reporter, Dec. 13, 2010, <http://www.hollywoodreporter.com/news/time-warners-jeff-bewkes-netflix-59204>; Kara Swisher, *What's playing – and Where* (interview with Reed Hastings), Wall St. J., June 6, 2011, <http://online.wsj.com/article/SB10001424052702303657404576363682334598062.html?KEYWORDS=%22Netflix%27s+Reed+Hastings%22>.

maintain exclusive and proprietary control over the navigation devices market. If the situation were reversed – if there were nationally standard access to the primary market for video programming, but exclusive and proprietary access to the secondary market – there would be an incentive for everyone to move to nationally portable standards immediately. (Indeed, this is what happened in the market for broadband access, where cable and telco service operators both started with zero market share, so supported relatively open modem standards.) The fact that dominant MVPDs are motivated to maintain control by being the only ones who can provide fully capable access devices has been, and remains, the key cause of market failure. The Commission was instructed by the Congress to avoid this result in the digital era, but has not done so.

B. Entry Into The Market For MVPD Programming And Services Is Constrained By The FCC’s Incomplete Implementation Of Section 629 And The National Broadband Plan.

It was to break this innovation death spiral, and to link the television and broadband environments, that the Commission sought public comment in NBP PN # 27¹⁰ and adopted Recommendation 4.12 of the National Broadband Plan. The Commission found that failure in the MVPD market also had ramifications for broadband usage:

Competition, often from companies that were not market leaders, has driven innovation and investment in devices in the past and must continue to do so in the future. When one examines the three main types of devices that connect to broadband service provider networks—mobile devices, computing devices and set-top boxes—one finds that there are many mobile and computing device manufacturers offering hundreds of devices with a dizzying assortment of brands, features and price levels. Whole new device classes, such as tablets, e-book readers and netbooks continue to emerge, shifting firms’ market positions and enabling entrants to capture market share. ***

¹⁰ *In the Matter of A National Broadband Plan for Our Future*, GN Dkt. Nos. 09-47, 09-51, 09-137, and CS Dkt. No. 97-80, NBP Public Notice # 27 (rel. Dec. 3, 2009) (“NBP PN # 27”).

The same is not true for set-top boxes, which are becoming increasingly important for broadband as video drives more broadband usage¹¹

The closed market for fully capable, multi-MVPD and multi-market navigation devices constrains innovation in the markets for programming and services, as well as in the market for devices. A consumer wishing to sample or switch to another provider, in surrendering her leased DVR, forfeits all of her saved programming. To the extent that leased DVRs also can save OVD content, that programming is also likely to be lost.¹² A national IP-based interface for connecting consumer navigation devices to MVPD gateways will allow consumers to choose devices and MVPDs on the basis of *merit and value*, rather than *imposition and inertia*.

Consumers' hands are also tied by MVPD pricing practices. Until last year the Commission allowed MVPDs, notwithstanding the clear language and intention of Section 629, to discriminate economically against competitive products, through preferential discounts and offers of "bundles" only for leased, but not for competitive, devices. The Commission finally adopted regulations to redress such unfair practices in the Third Report & Order in Docket No. 97-80.¹³ This rule, however, applies only to the market for "one-way," CableCARD-reliant products. There is no conceivable reason why these requirements should not apply to all MVPDs and all MVPD services – other than the fact that at present there has been little experience with such discrimination in

¹¹ National Broadband Plan Chapter 4.2, at 49-50.

¹² The same also would be true for remote DVRs, inasmuch as each MVPD service creates its own "cloud."

¹³ Third Report and Order, App. B. This rule has not yet been fully implemented through Federal Register publication.

these other contexts because Commission policies have not enabled such competitive entry at all.¹⁴

Even the limited steps taken by the Commission to facilitate navigation device entry and portability have fallen short of implementing available standards solutions. The Commission has allowed cable operators to move linear channels to a “switched digital” mode of transmission, which requires upstream navigation device signaling (invisible to the consumer) in order for the channel to be received. In its FNPRM in Docket 97-80, the Commission considered requiring cable MSOs to make a standards-based accommodation in their systems so that CableCARD-reliant consumer navigation devices could continue to receive these channels. However, at the urging of MVPDs who said this unarguably feasible¹⁵ step would be a *waste of resources with AllVid on the horizon*,¹⁶ the Commission settled for requiring MSOs to offer a set-top box “tuning

¹⁴ The Commission has never implemented Section 629 with respect to non-cable MVPDs. In its 1998 First Report and Order, the FCC granted forbearance to DBS providers. Despite the urging of the cable industry that continued forbearance was “arbitrary and capricious,” it has been maintained. *See, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Report and Order ¶¶ 64 – 66 (rel. June 24, 1998) (“First Report and Order”); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of the NCTA on FNPRM at 52 (June 14, 2010) (“NCTA FNPRM June 14 Comments”); *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 42-43 (D.C. Cir. 2006) (“Charter”).

¹⁵ *See, In the Matter of: Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80 and PP Dkt. 00-67, Reply Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition on the FNPRM at 6-10 (June 28, 2010) (“CEA/CERC FNPRM June 28 Reply Comments”).

¹⁶ *See, e.g., NCTA June 14 Comments at 42-47; In the Matter of: Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics*

adapter” instead. Thus, any consumer electronics manufacturer contemplating the launch of a new CableCARD-reliant product must anticipate that consumers will be told that their continued ability to receive linear channels may depend on their installing yet another set-top box, *and* on that box being reliably supported by MVPDs who have always discriminated, technically and economically, in favor of their own leased products.

III. Consumer Premises Equipment Is A Key Industry Input That Requires A More Open Market.

For the first time in these inquiries the Commission recognizes “consumer premises equipment” as a separate and key industry input in the market for video programming, and indicates (par. 66) that it intends to “discuss the devices – current and forthcoming – that facilitate the delivery of video programming and examine how these inputs affect competition in the delivery of video programming.”

The Commission and the Court of Appeals for the D.C. Circuit have found that cable MVPDs have constrained entry into the device market.¹⁷ This constraint has led to market failures with respect to programming as well. The appropriate contexts in which the Commission should consider and act on these failures are (1) Section 629, and (2) the National Broadband Plan.

A. Consumers Cannot Compare Prices Or Evaluate Purchase Or Lease Options, Or Find Competitive Devices For MVPD Services.

As the Commission notes, it has conducted a Notice of Inquiry with respect to the need and practicality of a “gateway” solution as recommended in the National Broadband

Equipment, CS Dkt. No. 97-80 and PP Dkt. 00-67, Reply Comments of the NCTA on FNPRM at 23-27 (June 28, 2010).

¹⁷ *See Charter* at 40-41.

Plan. The Comments of CEA and CERC, and of others, have established that such a rulemaking is both practical and necessary. The CEA and CERC comments in the AllVid NOI and the CableCARD FNPRM demonstrated how entry has been harmed by economic and service discrimination by MVPDs against consumer premises equipment, thus establishing the need for antidiscrimination provisions in Commission navigation device rules.¹⁸ As we note above, the Commission issued such rules *only* for “one way” CableCARD-reliant devices. For consumers to be in a position to compare prices for devices and for services, the same rules need to apply to all MVPD programming and services, and to all devices.

For consumers to actually be in a position to *use* their consumer premises device on more than one MVPD system, the Commission needs to proceed with the AllVid rulemaking as recommended in the National Broadband Plan and outlined in the AllVid NOI. While “connected TVs” offer value to the consumer, the Commission has long and

¹⁸ See, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition on the FNPRM (June 14, 2010) (“CEA/CERC FNPRM June 14 Comments”) at 4-6; CEA/CERC FNPRM June 28 Reply Comments at 10-12. Cf., *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Comments of the CEA on NCTA Downloadable Security Report (Jan. 20, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Notice of Ex Parte Presentation (Mar. 23, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Robert S. Schwartz, Constantine Cannon LLP, Counsel to CEA to Marlene H. Dortch, Sec., FCC Re: Notice of Ex Parte Presentation (Mar. 24, 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Ex Parte Presentation (Aug. 7, 2006).

properly held that a product designed to receive services from *only a single MVPD* does not satisfy Section 629 or achieve its purpose.¹⁹ Moreover, products configured as navigation devices for a single MVPD have the effect of *locking in* the consumer to that MVPD, and *discourage rather than promote* intra-MVPD competition. Hence, initiatives to “expose” an MVPD’s service to consumer devices do nothing to facilitate intra-MVPD competition, or the innovation in devices that would spur it. Rather, they discourage such innovation and competition.

What remains lacking in the marketplace is *any* consumer navigation device that can present an electronic program guide that (1) informs the consumer of all MVPD, OVD, and home-stored programming to which the consumer has rights, (2) allows the consumer to access and to purchase such content, and (3) is portable nationally and will work on more than one MVPD’s system. Such a product would be the only product that would facilitate, rather than chill, intra-MVPD competition. Such a product would also promote competition between MVPD programming and services and OVD programming and services. Such products, and the innovation and retail market competition they would unleash, are what Section 629 requires. Such products are foreseeable *only* if the Commission proceeds with Recommendation 4.12 of the National Broadband Plan.

¹⁹ In the First Report and Order in Docket 97-80, the Commission said at par. 26: “The purpose of this proceeding is to make navigation devices commercially available, rather than to create a market for certain specific equipment. Just as the *Carterfone* decision resulted in the availability to the consumer of an expanding series of features and functions related to the use of the telephone, we believe that Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer. The expansive nature of the language of Section 629 is a recognition that the future convergence of various types of equipment and services may result in technical innovations not foreseeable at this time.” (footnote omitted).

B. The Failure To Fully Implement Section 629 And The National Broadband Plan Has Constrained Investment And Innovation.

In paragraphs 68 and 69, the Commission asks under what circumstances the emergence of new OVD markets, services, and devices can or will provide competition to MVPD programming and services. The Commission has taken a necessary step in finding that competition and innovation in consumer premises devices is essential if competition in program delivery is to be enhanced rather than rolled back. The next and vital step is for the Commission to implement the National Broadband Plan, comply with Section 629, and finally, as explicitly required by Section 629, *assure* in its regulations that consumer premises devices can offer MVPD programming and services along with OVD programming and services.

Half measures have not worked. Having failed to persuade the FCC in 1996 that second-sourcing of STBs would satisfy Section 629, the NCTA returned in 2001 with yet another palliative – a letter to Chairman Powell offering to encourage cable industry vendors to make their system-specific proprietary devices available at retail.²⁰ Further solutions tied to MVPD-specific technologies have produced only partial and generally unsatisfactory results. CableCARD products, as documented by the Commission and the Court of Appeals, have not been adequately supported by MVPDs.²¹ Cable industry middleware-based solutions, locked to the MVPD’s own electronic program guide,

²⁰ Letter from Robert Sachs, President & CEO of NCTA, to FCC Chairman Michael Powell, CS Dkt. 97-80, October 10, 2001, stating operators will “encourage” their vendors “to make available their digital set-top boxes ... at retail starting as soon as possible.”

²¹ *Charter* at 40-41. *Cf.*, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of TiVo Inc. on FNPRM at 7-9 & n.24; CEA/CERC FNPRM June 14 Comments at 3 & nn. 5-7.

produced a few additional leased set-top boxes, but no new television products. By grudgingly supporting such compromise measures, the MVPDs have bought themselves more time, but have denied competitors and consumers the benefits of any real progress.

As Congress recognized in Section 629 by pointing to the involvement of standards-setting organizations, and as the Commission recognized in the National Broadband Plan, the key to competition is innovation. Solutions that lock out features, functions, and choices, and that lock in consumers to particular MVPDs and program guides, will support rather than erode barriers to entry, for programming as well as for devices.

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