



July 27, 2011

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Video Device Competition, MB Docket No. 10-91; Commercial Availability of Navigation Devices, CS Docket No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket 07-269

Dear Mr. Chairman:

The undersigned private sector companies, public interest groups, and trade associations respectfully submit this joint letter in response to the July 7 letter to you from Michael Powell, President and CEO of the National Cable and Telecommunications Association. That letter (“NCTA letter”), which also was submitted as part of NCTA’s Video Competition NOI Reply Comments,¹ cited to a number of demonstrations and prototypes featured at the 2011 Cable Show, purportedly establishing that the goals of Section 629 of the Communications Act are being addressed by new techniques and

¹ Reply Comments of the National Cable & Telecommunications Association, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 (July 8, 2011).

developments in the cable industry. The examples cited in that letter, however, demonstrate no such progress. In fact, they confirm that after a decade and a half of product demonstrations and announcements, the mandate established by Congress in Section 629 remains unfulfilled.

The situation remains virtually unchanged from a year ago, when you noted how the Commission's prior effort behind CableCARD "hasn't worked. It hasn't generated competition in this space." You observed how true market competition in the Internet space generated hundreds of thousands of apps, but, "If you think about your living room, you can count the apps on one hand." You pointed to the AllVid proceeding, and predicted that the "move toward a universal gateway device that would address this issue of competition in set-top boxes...a gateway device that protects the pay model, that protects intellectual property but that unleashes innovation in the living room," would provide the Commission, and consumers, with an answer.² You recognized in your recommendation to Congress, in Section 4.2 of the National Broadband Plan,³ that new technologies and private sector standards can be deployed in the service of competition, innovation, and consumer benefit.

² See "The Regulatory Challenge," The Wall Street Journal Online, June 7, 2010, <http://professional.wsj.com/article/SB10001424052748704183204575288363378490860.html?mg=reno-wsj>. See also, Gary Arlen, *Genachowski Affirms Focus on Gateway Device, Spectrum Allocation, FCC Chairman Says Cable Card Has Not Worked, Apps Coming to TV Set*, Multichannel News (June 3, 2010). (The "drive toward a single universal gateway" is one that "ultimately will allow innovation in the living room.")

³ *Connecting America: The National Broadband Plan* (Mar. 16, 2010) ("National Broadband Plan"); cf., *In the Matter of Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Notice of Inquiry (rel. Apr. 21, 2010) ("NOI"); *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").

What the panel discussions and the demonstrations at the Cable Show showed most clearly is that the industry is moving toward IP-based program distribution. A failure by the Commission to move in parallel to a standards-based IP home-network interface would be a failure of potentially historic proportions.

The featured list of “innovative approaches” that begins on the first page of the NCTA letter includes not a single thing that would make MVPD programming or services available on competitive devices. Rather, “progress” is cited in these areas:

- Internet delivery of *some* “cable video”
- Extensions to a few specified portable devices
- IP-based interfaces that deliver only the MSOs’ own guides to their own leased set-top boxes
- Limited availability of standards-based home networking
- Reliance on “cloud” delivery

Citing these advances as a “march of progress,” however, merely continues NCTA’s tactic over the last 15 years of pointing to incremental achievements to sidestep or forestall proposals from the Commission and the consumer electronics, information technology, retailer, and public interest sectors that would achieve the goals of Section 629 in full. The reality is that greater progress in device interoperability and home networking has been achieved in other sectors, such as Internet-based video delivery, where competition exists.

While cable MSOs were demonstrating some of these techniques, their executives were assuring Cable Show audiences that Internet-based program delivery was *not* seriously competitive with MVPD programming and services – that, as one panelist put it, Netflix is essentially just another “app,” not a competing service.⁴ The same news report,

⁴ See, http://news.cnet.com/8301-30686_3-20071272-266/cable-operators-to-netflix-bring-it-on/#ixzz1SIZRjduR (“CNET report”).

cited favorably in NCTA's own post-Show publicity,⁵ quoted members of a panel of cable executives as dismissing the across-the-board competitive potential of the most prominent

“Over The Top” programming providers:

During a panel discussion here today at the National Cable & Telecommunications Association's Cable Show, Robert Marcus, COO of Time Warner Cable, and Michael Wilner, CEO of Insight Communications, a cable operator based in Kentucky, said that without live programming and sports Netflix and other over-the-top video providers will never be able to compete head to head with them.⁶

The market for devices, compared to the new technologies that are available, has shown even less innovation and competitive progress than the market for MVPD programming. Contrasting the technological progress demonstrated at the Cable Show with the state of affairs when Congress passed Section 629, the NCTA letter invites you to conclude that there is *more* competition today in the device market. But the opposite is the case. When Section 629 was passed, and for years after, at least half of all cable customers neither needed nor wanted a set-top box. Their retail-market TVs and VCRs were able to tune and receive all the channels that these consumers desired. In passing Section 629, the Congress was *looking ahead* – to an age in which digital transmission, conditional access, and the need to protect against redistribution would, unless *standards* were agreed to, curtail the interoperability of retail devices with MVPD systems. While digital transmission has come to pass, and the Internet has brought new options in program

⁵ See NCTA's link to CNET report at http://2011.thecableshow.com/EndofShow2011?utm_source=Eos2011&utm_medium=email&utm_content=banner&utm_campaign=mass.

⁶ CNET report, *id.* These statements confirm the official positions taken by Comcast and the FCC. See, *In the Matter of Application of Comcast Corp., et al*, Memorandum Opinion and Order ¶¶ 76, 79.

distribution, Congress's prediction – that competitive, innovative retail devices would be mostly locked out of MVPD markets⁷ – has proven true.

As the Commission acknowledged in its Third Report and Order, until now it has had to rely on a limited standards-based toolkit. CableCARDs address only cable MSOs and conditional access. Faced with the challenge of MSOs moving to “switched digital” techniques, the Commission declined to adopt a forward-looking, IP-based solution because – as encouraged by the NCTA and others – it viewed CableCARDs as a limited, “interim” solution. Instead, the Commission looked to a future AllVid rulemaking to establish a more comprehensive interface for the IP era. Now the NCTA urges the Commission to retreat from this necessary task.

Any retreat by the Commission, now, would come just as the private sector delivers standards-based tools to implement Section 629. On May 17, the Digital Living Network Alliance (“DLNA”)⁸ filed with the FCC a prepublication version of its Commercial Video Profile⁹ interoperability guidelines and standards references. The progress represented was widely hailed, especially by cable MSOs.¹⁰ Yet these same MSOs are now urging the FCC not to do what Section 629 explicitly commands – to *consult* with standards organizations

⁷ See, Comments of Senator Leahy, 137 Cong. Rec. S18376-S18380 (1991); and references cited, *In the Matter of A National Broadband Plan for Our Future, et al.*, GN Docket Nos. 09-47, 09-51, 09-137, and CS Dkt. No. 97-80, Comments of the Consumer Electronics Retailers Coalition at 3-4 (Dec. 21, 2009).

⁸ Digital Living Network Alliance began in 2003 and is comprised of approximately 250 companies, including consumer electronics, computer and mobile device manufacturers, and many MVPDs. DLNA member companies seek to create new products that are compatible by using open standards and widely available industry specifications. For more on DLNA, see http://www.dlna.org/about_us/about/.

⁹ According to May 17 *ex parte* filings by DLNA in Docket 10-91, a confidential pre-publication version was delivered to the FCC on that date.

¹⁰ See, DLNA Advances Playback Of Commercial Video Across DLNA Certified Products, *Wall Street Journal Online*, May 23, 2011, <http://online.wsj.com/article/PR-CO-20110523-903685.html>.

to *assure* a commercial and competitive market in devices that render *MVPD programming and services* to MVPD subscribers.

Instead, the NCTA letter reviews a list of “app” integrations that are partial and limited in purpose, scope, and effect. History already is littered with cable MSO initiatives sold to the Commission on the basis of partial *potential* and never matched by national *fulfillment*. From a decade of nonexistent to poor CableCARD support¹¹ to the mythical, NDA-protected “downloadable security” (that bought an additional year of CableCARD waivers based on classifying CableCARDS as an “interim” solution), to the purported national rollout of OCAP, partial solutions have been partially or fully abandoned.

NCTA’s letter touts “innovative approaches” while omitting the fact that none will support the operation of a device on more than one MVPD’s services. Nor is there any assurance that the demonstrated products will operate on all, many, or most of the systems owned by the MSO for whose services they are specifically designed. A limited and proprietary approach does not satisfy the mandate of Section 629, which requires the Commission to foster a competitive national retail market for navigation devices used by consumers to access “the” programming and services offered by any MVPD. In accepting partial demonstrations as complete solutions, the Commission again would be hoping for the best only to receive the worst.

If the partial and limited “solutions” pointed to in the NCTA letter are all there is, the “default” fallback will remain a leased set-top box or DVR connected by a one-way, non-recordable HDMI cable to a TV. This merely perpetuates the last century’s problem. This century’s solution is what the Commission pointed to in Recommendation 4.12 of the

¹¹ See recent New York Times report of MSO resistance, despite the Third Report and Order: <http://gadgetwise.blogs.nytimes.com/2011/07/18/tivo-nice-service-if-you-can-get-it/?nl=technology&emc=techupdateemb1>.

National Broadband Plan – a whole-house IP-based interface, to match the trend to IP program delivery by MVPDs. With the publication and release from NDA of DLNA’s Commercial Video Profile, the path is now clear for the Commission to do just what Section 629 says: To make public reference, in its regulations, to the accomplishments of private sector industry standards bodies. The FCC should formulate these standards references, in an NPRM, to accomplish the goals it recommended in the Broadband Plan, and should invite public comment on this formulation. This is what sound policy and the law require.

In the wake of the Broadband Plan, the NCTA, with great fanfare,¹² published “Seven Principles” in an attempt to demonstrate alignment with your objectives. If the Seven Principles are given a reasonable, objective interpretation, the NCTA should not now be advocating that the Commission sit idly under the flawed assumption that the cable industry has complied with Section 629. The first and most basic NCTA principle was that, “*Consumers should have the option to purchase video devices at retail that can access their multichannel provider’s video services without a set-top box supplied by that provider.*” This core principle was not qualified or limited as to “some” programming, “some” services, or “some” systems or devices. The remaining principles – pertaining to access through an “interface” solution, access to Internet content, search across multiple sources, movement of content in the home, the benefits of innovation, and acceptance by *all* video providers—should be read in light of the unfulfilled, basic principle. Moreover, the last two principles – consumer benefits from innovation, and acceptance by all

¹² See, e.g., http://www.multichannel.com/article/450192-NCTA_Outlines_Seven_Consumer_Principles_For_FCC.php.

providers –favor an approach that goes well beyond the progress shown at the Cable Show or cited thereafter.

What was missing from the Seven Principles, as well as from the NCTA letter, were acknowledgments that (1) an IP-based national interface is the key to allowing a single competitive retail device to empower consumers to *choose among* MVPDs, and (2) conversely, limiting a CE product to integrating “apps” for a *single* MVPD will constrain both product innovation and facilities-based competition between and among MVPDs. Hence – to be fair to the NCTA – the Seven Principles were never an endorsement of the Broadband Plan, and the NCTA letter is in only some respects a retreat from the Seven Principles.

The NCTA principles fall short of the law in a number of respects. The law requires that consumers be able to buy devices that access MVPD content “from manufacturers, retailers, and other vendors *not affiliated* with any multichannel video programming distributor.”¹³ Private deals between cable operators and select manufacturers and retailers do not meet this standard. Furthermore, requiring that third-party devices access video content only through “an interface solution offered by” the MVPD limits the ability of vendors to compete through user interface innovation, which in turn reduces the chances that a retail marketplace for video devices will develop.¹⁴

The products to which the NCTA letter points fall short of the core Principles and exemplify the limited objectives of the others. They give consumers access to *some*

¹³ 47 U.S.C. 549(a) (emphasis added).

¹⁴ In recent years, smartphones (whose design, unlike current video devices, is not dictated by network operators) have shown the importance of user interface differentiation. For instance, the competing iPhone and Android platforms both have to iterate rapidly to keep up with each other as well as ongoing competition from Windows Phone 7, WebOS, and Blackberry, each of which have a different interface paradigm. The ability of each vendor to experiment with different approaches to the user experience has led to the explosive growth of the smartphone market.

Internet video from *selected* partners, not “video content from the Internet” generally.

They might allow consumers to access video on multiple devices, but not necessarily the devices the consumer wants to use. A few MVPDs allow their customers to watch some video on an iPad app but not a laptop, or using one video game console but not another. A competitive, standards-based market would not suffer this fragmentation. More generally, Congress’s directive that the FCC promote a competitive retail market for video devices would go unmet even if some operators fulfilled plans for more advanced proprietary set-top boxes (even home networks of interconnected proprietary set-top boxes) or new proprietary cloud services. Innovation in this space cannot come from the MVPDs alone; and true competition requires standards, not isolated islands of proprietary technology.

Thus, the one observation in the NCTA letter with which we agree is that “the marketplace is at a critical juncture.” Today, consumers cannot simply walk into a retail store, choose from among a variety of differentiated video devices, and be assured that they each work with every MVPD. Following NCTA’s preferred approach, the marketplace for MVPD programming and devices will become further segmented, as MVPDs deploy and license system-specific devices to wall off their services from competition and frustrate device innovation.¹⁵ That may be NCTA’s vision of the future; but it does not satisfy the competition-based, consumer-focused mandate of Section 629.

¹⁵ See, Brian Stelter, “Hulu, Billed as Tomorrow’s TV, Looks Boxed In Today,” The New York Times, July 23, 2011 <http://www.nytimes.com/2011/07/24/business/media/hulu-billed-as-tomorrows-tv-looks-boxed-in-today.html?pagewanted=3>. (“What seems certain is that online TV will look more like a walled garden in the future, with cable and satellite customers receiving online access as an add-on to traditional TV subscriptions. This is the approach led by Time Warner, which coined the term ‘TV Everywhere’ two and a half years ago.”).

Respectfully submitted,

AllVid Tech Company Alliance

Consumer Electronics Association

Consumer Electronics Retailers Coalition

Media Access Project

New America Foundation

Public Knowledge

Of Counsel:

Robert S. Schwartz

Robert S. Schwartz
Constantine Cannon LLP
1301 K Street, N.W., 1050 East
Washington, D.C. 20005
202 204-3508

Jeffrey L. Turner
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
202 457-6434

Cc:

Hon. Michael J. Copps
Hon. Robert M. McDowell
Hon. Mignon Clyburn