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Ms. Sherrese Smith
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Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: MB Docket No. 10-91
CS Docket No. 97-80
PP Docket 00-67
MB Docket 07-269**

Dear Ms. Smith:

On July 7, 2011, Michael Powell, NCTA’s President and CEO, sent a letter to Chairman Genachowski thanking him for the time he spent touring the floor at the 2011 Cable Show in Chicago and pointing out the efforts of the cable industry and others to enable a fully competitive and innovative retail video device marketplace. Mr. Powell’s letter described many of the innovative approaches the Chairman could see at the Cable Show as indicative of the changes in the video device marketplace since 1996 when the “commercial availability” provision – Section 629 – was added to the Communications Act.

In an apparent response to Mr. Powell’s letter, the Consumer Electronics Association (“CEA”) and others sent the Chairman a letter that presents an oddly anachronistic view of today’s vibrant video device market.¹ For the record, the following must be noted:

¹ Letter from the Consumer Electronics Association, *et al.* to Chairman Julius Genachowski, FCC, MB Docket Nos. 10-91 & 07-269, CS Docket No. 97-80, PP Docket No. 00-67 (July 27, 2011) (“CEA Letter”).

- The CEA Letter claims that multichannel video programming distributors (“MVPDs”) like cable operators want to “wall off their services.”² In fact, MVPDs have been racing to present their video services on all types of new platforms, screens, and devices with new developments seemingly being announced on a weekly basis.
- The CEA Letter claims that of today’s innovative approaches, “none will support the operation of a device on more than one MVPD’s services.”³ That is simply false. For example, DIRECTV, Verizon, and various cable operators’ tablet applications can all play on the same iPad, and cloud-based services from countless sources can all be received on the same PC and other devices.
- The CEA Letter says that “the NCTA letter invites you to conclude that there is *more* competition today in the device market [than there was when Congress enacted Section 629]. But the opposite is the case.”⁴ This remarkable conclusion willfully ignores every advance in the market and the explosion of new devices on which consumers can now watch video programming. Moreover, CEA has forgotten that the supposedly golden age of which it speaks, when television sets could simply tune channels, was also a time with far fewer multichannel sources, little on-demand or digital services, no television interactivity or applications, and not even the dream of services like “Start-Over” or network DVRs – all popular innovations in services, features, and technologies brought forth by MVPDs vigorously competing with one another. Today cable operators are partnering with CEA members like Pace, TiVo, and Samsung to create innovative set-top boxes, with Intel to develop the system on a chip, with Best Buy for retail sales, and with many others for cloud-based delivery and integration of applications with television. To say that little has changed since 1996 in this marketplace is to blink reality.
- The CEA Letter asserts that Mr. Powell’s letter “includes not a single thing that would make MVPD programming or services available on competitive devices.”⁵ Meanwhile, a few pages later, the CEA Letter acknowledges that such efforts are occurring but dismisses as

² *Id.* at 9.

³ *Id.* at 6.

⁴ *Id.* at 4 (emphasis in original).

⁵ *Id.* at 3.

“fragmentation”⁶ instances where cable operators have teamed with Sony and Samsung to integrate their offerings into those TV manufacturers’ DTVs and with others to provide cable video offerings on iPads and tablets. Far from “fragmentation,” these approaches demonstrate technological innovation and competition, driven by market imperatives, and characterized by rapid innovation and a variety of technological approaches. Cable operators are working across industry lines to help make DLNA into one of those approaches, but it is not the only one. Innovative approaches may also include negotiated marketplace arrangements. CEA disparages these arrangements as “private deals,”⁷ but many of CEA’s own members are not as dismissive of the marketplace at work and see the benefit to themselves and consumers of such arrangements.⁸

- The CEA Letter claims that the crucial missing ingredient in innovation is a single FCC-mandated standards-based approach under which all MVPDs would deliver their services, possibly in combination with all “video content from the Internet, generally.”⁹ Of course, this is exactly the opposite of the way in which consumer electronics manufacturers innovate. Sony brought Bravia Internet Video to market by offering its own proprietary BRAVIA Internet Video Link device that streamed only to compatible BRAVIA TVs. Its video-on-demand site Qriocity serves only Sony equipment, not Panasonic Viera Connect, Samsung Smart Hub, or LG Smart TV equipment. Each CE manufacturer is building its own ecosystem and seeking to distinguish itself with features and content that they individually select and license or curate from Internet sources. MVPDs require at least as much flexibility as CE manufacturers and others have in delivering their services to consumers given the dynamic marketplace in which MVPDs operate.

⁶ *Id.* at 9 (“A few MVPDs allow their customers to watch some video on an iPad app but not a laptop, or using [sic] one video game console but not another. A competitive, standards-based market would not suffer this fragmentation.”).

⁷ *Id.* at 8.

⁸ The CEA Letter claims that any contractual or licensing arrangement should be dismissed as not fulfilling the goal of permitting delivery of MVPD services from equipment and retailers not “affiliated” with an MVPD. *Id.* This is nonsense. If every contract or license made parties into affiliates, every major CE manufacturer and retailer would be “affiliated” today with MVPDs through licenses, program supply agreements from parents, OEM deals with MVPDs, and retail space agreements with MVPDs.

⁹ *Id.* at 9.

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The one approach which the FCC should avoid at all costs is mandating a single solution for all content and distribution. As Mr. Powell's letter observed, we are enjoying the most competitive and dynamic device, programming, and services market in our nation's history. Consumer choices continue to grow in creativity and variety. Those who invest in innovative technologies will continue to do so only if they have confidence that regulators will not displace their technologies or investments. Raising the specter of technology mandates would have exactly the opposite effect and would severely chill innovation. And while government regulation could provide "certainty," it is by no means certain that the government will make the right choice in this dynamic marketplace.¹⁰

Sincerely,

/s/ Neal M. Goldberg

Neal M. Goldberg

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Mignon Clyburn
Commissioner Robert M. McDowell
William Lake
Paul de Sa
Marlene Dortch

¹⁰ See Michael G. Baumann & John M. Gale, *Economic Analysis of the Regulation of MVPD Navigation Devices* 16 (2010), available at http://www.ei.com/downloadables/mgb_report.pdf ("The process of regulatory standard setting can also delay innovation and entry in addition to possibly locking in sub-optimal technology. The mere presence of the regulatory process may discourage market-based and voluntary attempts at improving services and technology."); T. Randolph Beard *et. al.*, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes* 36 (2010), available at <http://www.phoenix-center.org/pcpp/PCPP41Final.pdf> (concluding that the "fact that the video market is evolving at a rapid pace further supports a sober approach to Section 629. *Regulations designed and implemented today will be archaic in the very near term.*") (emphasis added; footnote omitted).