October 17, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On October 6, 2011, counsel for the "AllVid Tech Company Alliance" submitted a letter regarding the September 28, 2011 panel discussions at the AllVid Workshop convened by the Media Bureau.[1] As participants in those discussions, AT&T, Comcast, DIRECTV, HBO, Time Warner Cable, The Walt Disney Company, and Verizon submit this letter to correct the record about what in fact occurred at the Workshop.

The Alliance letter asserts that there was "little controversy" about the points cited in the letter from Alliance counsel or that the letter reflects the consensus of panelists at the Workshop. That is incorrect. To be clear, our companies do *not* believe that the Alliance proposal of September 20 "comprises a clearly feasible, national, and nationally portable interface" solution that can or should form the basis of an FCC rulemaking. On the panels, our representatives were unequivocal that the marketplace is already providing diverse and multiplying solutions for consumers and that government regulation in this dynamic marketplace would only chill continued investment and innovation and should be avoided.

Furthermore, it is unclear whether the Alliance letter reflects the consensus of its own member companies about the Alliance proposal. Two of the three Alliance member companies who participated in the Workshop – Best Buy and TiVo – were at best ambivalent in their remarks about the need for AllVid regulations, and indicated that things are moving in the right direction from their perspectives. The other Alliance member participant, Nagravision, focused

[1] *See* Alliance Ex Parte, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 1 (Oct. 6, 2011) ("Alliance Oct. 6 Ex Parte").

its comments on conditional access issues, not AllVid.[2] The Alliance's outside consultant was the lone Alliance panelist who gave a full-throated defense of the Alliance's proposal.[3]

If there was any consensus at the workshop, it is that innovation *is* occurring in the device marketplace today in the absence of any government technology mandates. Panelists may have debated whether that innovation is adequate to satisfy the requirements of Section 629 – our companies plainly believe that it is – but all acknowledged that consumers have an increasing array of devices through which to access multichannel and other video. Against this backdrop, the Alliance letter, and previous filings by the Alliance which argue that there is *less* competition in the video marketplace today than was the case when Section 629 was enacted in 1996[4] and that Commission regulation is the *only* thing that can drive innovation,[5] simply do not reflect the facts on the ground.

Of course, many leaders in the CE and IT industries do not believe that government mandates are a panacea.

- In advising the Commission of its agreement with Comcast, TiVo urged the Commission "to carefully monitor the progress and implementation of these initiatives which have the potential to fulfill the Commission's goals for retail video devices," adding that it hoped that "other pay TV providers follow Comcast's lead and enter into voluntary initiatives to deliver greater device choices to consumers *without government intervention*, to the benefit of consumers."[6] TiVo's President explicitly supports a cable operator's ability to define the user interface and look-and-feel of the services and content it offers to subscribers, explaining that "[w]hat we think is critical is that the cable operator be in a position to frame that experience."[7]

- Intel told the Commission that CEA does not speak for Intel on AllVid issues,[8] and added in a subsequent filing that Intel "is a strong proponent of open ecosystems

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2 In fact, Nagravision has previously told the Commission that "[t]he Commission has a mandate in Section 629 to assure the commercial availability of *navigation devices*, not conditional access systems -- SimulCrypt doesn't affect the marketplace for receivers." Letter from Robin Wilson, Vice President, Nagravision USA, to Marlene H. Dortch, Secretary, FCC, CS Dkt. No. 97-80, at 1 (Sept. 30, 2009) (emphasis in original).

3 For this reason, the statement in the Media Bureau's letter describing the Workshop that "those representing consumer electronics manufacturers, retailers and consumer groups asserted that standards-based regulation *is necessary to realize a competitive market for such devices*" is not correct. Media Bureau Ex Parte, MB Dkt. No. 10-91, at 1 (Oct. 4, 2011) (emphasis added).

4 *See* Alliance Ex Parte, MB Dkt. Nos. 10-91 & 07-269, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 4 (July 27, 2011) ("Contrasting the technological progress demonstrated at the Cable Show with the state of affairs when Congress passed Section 629, the NCTA invites you to conclude that there is *more* competition today in the device market. But the opposite is the case." (emphasis in original)).

5 *See* Alliance Oct. 6 Ex Parte at 2 ("In the absence of [an AllVid] rulemaking, there is no way forward for compliance with Section 629…").

6 TiVo Ex Parte, CS Dkt. No. 97-80, at 3 (May 9, 2011) (emphasis added).

7 *Suddenlink Turns to TiVo*, MULTICHANNEL NEWS (July 8, 2010), *available at* http://www.multichannelnews.com/article/454554-Suddenlink_Turns_To_TiVo.php.

8 *See* Intel Ex Parte, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67 (Apr. 7, 2011).

enabled by industry-agreed standards, *which Intel prefers over regulatory mandates*."[9]

- Google's Executive Chairman Eric Schmidt recently told the *Washington Post* that "one of the consequences of regulation is regulation prohibits real innovation, because the regulation essentially defines a path to follow.… And so what you want to do is you want to *make sure that the government does not get in the way and slow things down*."[10]

- CEA President Gary Shapiro said it best last November in response to another proposed tech mandate in an editorial titled "Say No to Buggy-Whip Mandates" when he said "the free market – not government mandates – holds the best hope for ensuring that our industries continue to innovate and thrive."[11]

In short, among the companies that build solutions in the marketplace, the consensus view is that government should defer to market-driven innovation, not the other way around. Below, we provide a more detailed rebuttal to the Alliance counsel's recent letter.

<u>The AllVid Approach is Neither Complete nor Sufficient</u>

Contrary to assertions in the Alliance letter, the "new" Alliance approach, which is not a significant improvement over the old Alliance "Adapter" approach, is far from being a "complete," "sufficient," and "feasible" approach for distributing multichannel video programming distributor ("MVPD") programming and services. Program rights holders pursue innovative business solutions with distributors in ways that address security measures, advertising opportunities, and other considerations and also ensure that the presentation of their programming services is consistent with their carefully cultivated brands and intellectual property rights. MVPDs produce a multimedia experience for consumers that includes channel lineups, VOD, enhanced applications, self-help provisioning, trouble-shooting and customer services capabilities and more to meet the needs of their customers and differentiate themselves from their competitors. This has spurred new devices, more programming, better service, and more consumer choice. The Alliance AllVid proposal dismantles all of this, regardless of rights or legality. Under the proposal, the CE device can change channel lineups, replace ads, place legitimate programs next to pirated content, and reassemble an MVPD's service on any device on the other side of the interface, whether authorized or not. Such an approach is *not* a feasible or sound basis for multichannel video distribution.

The AllVid approach is also technically naïve. It fails to support two-way MVPD services, any interactive multimedia services offered, or transport of anything other than stored programming. It would prevent the ongoing work by MVPDs and CE manufacturers in DLNA

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[9] Intel Ex Parte, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 1 (July 29, 2011) (emphasis added).

[10] Lillian Cunningham, *Google's Eric Schmidt Expounds on his Senate Testimony*, Wash. Post, Oct. 1, 2011 (emphasis added).

[11] Gary Shapiro, *Say No to Buggy-Whip Technology Mandates,* TV Technology (Nov. 16, 2010), *available at* http://www.tvtechnology.com/article/109248.

to make the full MVPD experience available on different retail devices over the home network using an HTML5- or RVU-based remote user interface. It fails to support rapid innovation or the many other different methods of video distribution used and emerging today.

<u>The AllVid Approach is Destructive to Innovation</u>

Competitive choices are already available for receiving MVPD services on consumers' smart video devices. MVPDs and programmers are racing to bring their services and programming to tablets and gaming consoles. "Smart" TVs, TiVos with VOD support, Xboxes with U-Verse, Verizon, and Comcast content, and "AnyPlay" delivery without set-top boxes are only the most recent announcements of more retail devices on the way.[12] There is no one-size-fits-all way to deliver content to different devices today because Apple differs from Android, Sony, Xbox, and Samsung, none of which are affiliated with any MVPD.[13] MVPDs and programmers are writing applications that work with these popular devices and still deliver the service experience expected by their subscribers. All of this innovation is occurring in response to actual consumer demand, not to hypothetical AllVid Alliance constructs, and is being done in ways that respect the complex rights involved in video distribution.

By contrast, the AllVid proposal puts the brakes on innovation by pretending it has discovered the universal solution for the future and locking a single approach in place through regulation. But the folly of that approach is illustrated by the fact that AllVid proponents supported the AllVid Adapter approach just last year, and if that new hardware adapter had been adopted as proposed in the AllVid NOI, it would have made it illegal for cable services to be sent directly to tablets or to web browsers as has been done as part of the TV Everywhere approach. The history of technology mandates – and particularly the Commission's history with CableCARD and 1394 mandates – demonstrates that such mandates serve as a constraint on, not a facilitator for, innovation and investment.

<u>The Path Forward is Through the Marketplace, not an NPRM</u>

The Alliance letter claims that there is "no way forward" without a rulemaking. In fact, even opening an NPRM would impede the dynamic developments now taking place in the video device marketplace. For example, CEA sought to use the recent CableCARD rulemaking to hinder cable's deployment of switched digital video, which is a tool critical to delivering more

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12 *See, e.g.*, Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, CS Docket No. 97-80 (Oct. 5, 2011) (describing availability of Xfinity On Demand content on Microsoft's Xbox 360 and additional examples of recent innovation); Letter from Leora Hochstein, Executive Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (Oct. 5, 2011) (discussing newly announced FiOS TV application on Microsoft's Xbox 360).

13 Although the Alliance's consultant on several occasions during the Workshop insinuated that cooperation or a contractual relationship between an MVPD and a CE manufacturer would result in an "affiliation," the Commission has consistently declined to find such a cognizable interest in the absence of a minimum level of ownership. In fact, the Commission's navigation device rules expressly define "Affiliate" in terms of ownership or control. *See* 47 C.F.R. § 76.1200(d) (defining "Affiliate" to mean "A person or entity that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person, as defined in the notes accompanying §76.501.").

HD, more MVPD services, and better broadband. In 2006, AT&T and other MVPDs negotiated with CEA a framework to guide the attachment of retail devices to IPTV services intended to facilitate the development of a retail market. However, implementation of those principles reached an impasse largely due to the insistence of CE interests to disaggregate MVPD services. And CE interests have attempted to gain more favorable terms (including disaggregation mandates) through Commission rulemakings on navigation device issues.

There is simply no need in today's dynamic and evolving device marketplace for rulemaking comments or a single guiding regulatory prescription. The heavy lifting on innovative service delivery, interoperability, and home networking is being done admirably behind the scenes in a variety of bilateral negotiations, applications development work, and standards development organizations. Today's marketplace is inviting participants to make major bets and even more major investments in technology to meet rapidly developing consumer demand with rapidly changing technological tools. The environment that invites the greatest risk taking needed for this kind of innovation is one with the certainty that regulators will not step in – or be seen as waiting in the wings to step in – to displace new technologies or new investments.

The Administration's regulatory reform initiative seeks to assure that regulations always consider costs and reduce burdens for American businesses and consumers. The Commission has committed to act in accordance with that reform agenda, including elimination of rules that are no longer needed, and revision of rules to reflect changes in technology. As Chairman Genachowski said, "Our extensive efforts to eliminate outdated regulations are rooted in our commitment to ensure that FCC rules and policies promote a healthy climate for private investment and job creation."[14] There is already so much competitive choice in the market that a strong case can be made that Section 629 is ready for sunset.[15] By contrast, an NPRM would signal that yet another regulatory "solution" may be imposed on what is the most competitive device, programming, and services marketplace this nation has ever enjoyed. Risk taking, investment, and innovation flourish most fully when freed from regulatory technology mandates, and participants in the marketplace are able to craft thoughtful solutions that optimize value to consumers. We respectfully request that the Commission allow such entrepreneurial activity to continue without the specter that it will ultimately be undermined by yet another ill-fated, government-imposed technology mandate.

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[14] FCC News Release, *FCC Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules* (Aug. 22, 2011); *see also* FCC News Release, *Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies* (July 11, 2011).

[15] *See* George S. Ford & Lawrence J. Spiwak, *Outliving its Usefulness: A Law and Economics Argument for Sunset of Section 629*, Phoenix Center Policy Bulletin No. 29 (June 2011).

Respectfully submitted,

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