

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

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 14-16
Competition in)
the Market for the Delivery of Video)
Programming

**Comments of the
AllVid Tech Company Alliance
CCIA, Consumer Action, National
Consumers League and Public Knowledge**

March 21, 2013

TABLE OF CONTENTS

SUMMARY	i
I. Leasing Dominates the Market Because the Commission Has Allowed It To.....	3
II. Products Are Not Interoperable Because There Is No Nationally Standard Network Interface.....	4
III. Some Operators’ Support for Multi-Purpose Products on Some Systems Does Not Address These Shortcomings.	6
IV. The Prevalence of Leasing and the Lack of Interoperability Among Devices Have Consequences for Competition for Subscribers Among MVPDs.	7
V. The Vacatur In The <i>EchoStar</i> Case of Rules That Support Competition In This Market Needs To Be Addressed By the Commission.....	8
VI. Common Reliance And The “Integration Ban” Are Essential To Present And Future Competition.....	12
VII. A Standards-Based Common Network Interface Is Essential To Interoperability.....	15

SUMMARY

The leased model for device competition is an anachronism that hampers competition in the markets for both devices and programming. A national home network interface standard to allow both leased and retail devices to connect to MVPD services and content will allow a competitive market and innovative technologies to develop. Congress specifically recognized, in enacting Section 629 of the Communications Act, that device competition for MVPD programming and services would need to be based on common industry standards.

Unfortunately, the number of devices capable of *replacing* the MVPD-leased set-top box as a means of receiving MVPD programming and services remains as limited as it has ever been. Limited programming on limited proprietary platforms made available at the whim of an MVPD does not satisfy the mandate of Section 629. Making incidental “apps” available that only work for limited services and only with particular systems does not provide an adequate solution to the systemic problems noted in the NOI. The granting of sporadic favors by MVPDs to particular makers of devices with other primary purposes, through various “apps,” has not been and cannot be the equivalent of a common, standards-based network interface that would enable real competition.

The prevalence of leasing and lack of interoperability among devices has inhibited competition and has hurt consumers. Being tied to leased devices frustrates consumers who, as many or most do, periodically need to move, or who want to change their MVPD providers, or want to buy a new and different CE product. The innovation of the FCC’s “gateway” proposal in the National Broadband Plan, referred to as “AllVid” in its NOI, is that a common network interface would make it possible for a consumer’s device to work on any MVPD system, just as a PC, tablet, or phone can work on any accessible WiFi system. This would allow consumers – as

they do with their other devices – to choose their device based on their own preferences and its innovation and features, and *then* choose an MVPD system.

The undersigned entities support reinstatement of the Commission’s CableCARD technical Support Rules and its Encoding Rules as they pertain to cable operators. These provisions of the Second Report & Order implementing Section 629 of the Communications Act were neither implicated nor discussed on their merits in the court’s opinion in the EchoStar case. The references to industry standards that define CableCARD support are utterly noncontroversial and provide vital points of reference and stability for all who would enter or persist in this market. The Encoding Rules protect present and future competitive entrants from discrimination and leveraging in the capabilities of licensed products, under both existing and new technologies. The sudden absence of Encoding Rules, based on procedural concerns only applicable to satellite operators, again subjects commercial products as well as MVPD devices to arbitrary constraints on viewing and recording, through triggers that were agreed to by manufacturers only with the assurance that Encoding Rules would be in place.

From the initiation of the obligation to supply CableCARDs by July 1, 2000, through the FCC’s postponed implementation of the “integration ban” on July 1, 2007, an entire generation of CableCARD-reliant TV sets was introduced and disappeared as a direct, documented consequence of the poor support rendered by cable operators. Virtually every major television manufacturer introduced CableCARD-reliant TVs in the period between the Second R&O in 2003 and the onset of common reliance in July 2007. Each of these products failed due to cable industry indifference and undermining, before common reliance (the “integration ban”) came into force. The result was that manufacturers and retailers who had invested in this generation of products found themselves unable to recoup their investments because they could not, with any

confidence, either advertise the new features or recover their cost in a highly competitive TV market. When the integration ban finally took effect in July 2007, requiring a base level of more routine support, it was too late for these products. On the cusp of a transition to IP-based services, now would be a particularly unfortunate time for the Commission to invite a repetition of the experience with CableCARD-enabled televisions.

An open standard is a prerequisite for innovation and competition. The White House has emphasized the importance of interoperability standards to ensure that equipment or software from different vendors can work together or communicate and allow new, innovative creations to work with older, established services. In September 2011, the AllVid Alliance submitted a set of draft regulations that included references to existing and developing private sector standards that would comprise an IP-based interface common to all MVPDs. The undersigned entities urge the Commission to seek comment on this proposal and to issue a Notice of Proposed Rulemaking that will result in a national home network interface to MVPD programming and services.

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These Comments are submitted on behalf of the AllVid Tech Company Alliance, Computer & Communications Industry Association (CCIA), Consumer Action, Free Press Action Fund, the National Consumers League, and Public Knowledge, entities sharing the common goal that consumers have true choice with respect to how they access video programming and services offered by multichannel video programming distributors (MVPDs). While each of these entities may have additional and possibly different perspectives on the diverse questions asked in this NOI,¹ they share a common concern and view on the issue of why there is relatively little competition in the market for devices that afford access to MVPD programming and services, and what the FCC should do about this. These entities came together recently to express their views to a congressional committee that is considering taking what we believe would be a step in the wrong direction.²

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, FCC 14-8, Notice of Inquiry (rel. Jan. 31, 2014) (“NOI”).

² Letter from Public Knowledge, National Consumers League, Free Press Action Fund, Consumer Action, Writers Guild of America, West, and AllVid Tech Company Alliance to Hon. Greg Walden and Hon. Anna Eshoo, Chair and Ranking Member, House Energy & Commerce Subcommittee on Communications and Technology, March 7, 2014; CCIA, “*CCIA Supports STELA, But Not Anti-competitive Amendment On*

Specifically, we respond jointly to the questions posed by the Commission in paragraphs 65 – 67 of the NOI. The Commission asks, essentially, why the market for devices accessing MVPD and other video content is not more competitive. The Commission’s questions may be paraphrased and our answers summarized as follows:

- I. Why does leasing, rather than sale, uniquely dominate this market?
 - o Answer: *Because the Commission allows this to happen.*
- II. Why are products generally not interoperable from MVPD to MVPD?
 - o Answer: *Because there is no nationally standard network interface.*
- III. Will some operators’ support for multi-purpose products on some systems address these shortcomings?
 - o Answer: *No.*
- IV. Do the prevalence of leasing and the lack of interoperability among devices have consequences for competition for subscribers among MVPDs?
 - o Answer: *Yes – leasing and the lack of interoperability inhibit competition.*
- V. What is the consequence for this market of the decision of the D.C. Circuit in the *EchoStar* case, vacating rules that support competition in this market in general, and the provisioning of CableCARDS in particular?
 - o Answer: *The FCC should act affirmatively on TiVo’s Petition for Rulemaking to restore the rules adopted with the Second Report & Order. Otherwise, support for CableCARDS will continue to diminish and customary consumer freedoms will be at risk.*
- VI. What is the impact of the “integration ban” on device cost and availability?
 - o Answer: *History proves that in the absence of common reliance, competitive devices are poorly supported. Without effective competition, innovation and choice will suffer and the cost of leased devices will continue to increase.*
- VII. What is the potential impact of industry standards in facilitating interoperability?

TV Set Top Boxes,” March 12, 2014, <https://www.cciagnet.org/blog/2014/03/ccia-supports-stela-anti-competitive-amendment-tv-set-top-boxes/>.

- Answer: *Competition, innovation, and true consumer choice, as envisioned by Congress in 1996.*

The undersigned entities believe that these device markets can and should be more competitive, and have joined to provide responses to the Commission's questions.

I. Leasing Dominates the Market Because the Commission Has Allowed It To.

The Commission recognizes in paragraph 65 that while it is possible for consumers to purchase retail devices that afford access to MVPD content, most such devices still are leased by the entity that offers the programming. The leased model for device competition is an anachronism that hampers competition in the markets for both devices and programming.

With its landmark *Carterfone* decision in 1968 requiring AT&T to allow the Carterfone device and other devices to be connected directly to the AT&T network,³ the Commission remedied problems in a market analogous in many ways to the consumer navigation device market today. Prior to *Carterfone*, most telephones were rented from AT&T for prices substantially higher than consumers would have paid in a competitive market. Like set-top boxes available from MVPDs, the telephones AT&T made available for rental changed relatively little from year to year, decade to decade. The innovation enabled by *Carterfone* gave consumers freedom of choice to use customer-owned equipment. The *Carterfone* decision set the stage for the Internet by ultimately allowing computers to access the telephone network via modems. But more immediately, it allowed a competitive market in telephone equipment to develop, with telephones of all shapes and sizes available at every price point, and allowed previously rare devices like answering machines to become commonplace.

³ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968) (“Carterfone Decision”).

In its First Report & Order implementing Section 629, the Commission recognized that it was grounded in *Carterfone*:

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.⁴

The Commission elaborated:

The competitive market for consumer equipment in the telephone context provides the model of a market we have sought to emulate in this proceeding. Previously, consumers leased telephones from their service provider and no marketplace existed for those wishing to purchase their own phone As a result of *Carterfone* . . . the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.⁵

Similarly, unless the Commission takes action now, the very competition that brought consumers the smartphone will leave those same consumers continuing to pay MVPDs the same high prices each month for a limited set of dated proprietary devices to access multichannel programming.

II. Products Are Not Interoperable Because There Is No Nationally Standard Network Interface.

A national standard standard to allow both leased and retail devices access to MVPD services and content will allow a competitive market and innovative technologies to develop. Congress specifically recognized, in enacting Section 629 of the Communications Act, that device competition for MVPD programming and services would need to be based on common industry standards:

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

⁴ *Implementation of Section 304 of the Telecommunications Act of 1996*, Report & Order, ¶ 26 (rel. June 24, 1998) (“First Report & Order”). It was in this First Report & Order that Sections 76.1201, 76.1203, and 76.1205, clearly based on *Carterfone* principles, were added to Commission rules.

⁵ *Id.* at ¶ 11.

services offered over multi-channel 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.⁶

Despite attempts in the 18 years since Congress specifically instructed the Commission, in its regulations, to *act in consultation with appropriate industry standards-setting organizations*, to *assure* the commercial competitive availability of access devices from entities not affiliated with the service provider, this mandate remains unfulfilled:

- Cable operators have not given adequate support to the standards-based CableCARD interface, and the FCC has allowed reliance on this interface to be undermined through waivers.⁷
- New technologies and distribution entrants, such as “IPTV” operators, have introduced technologies incompatible with CableCARD and thus to retail entry. The FCC granted interim, now-expired waivers for these technologies with a view to future standards that have never emerged.⁸ Similarly, the FCC has granted waivers based on promises of “downloadable security” that have been reneged upon by the proponent.⁹
- The FCC anticipated that major cable operators would move to Internet Protocol (“IP”) distribution. The Commission proposed to account for this circumstance in

⁶ 47 U.S.C. § 549(a).

⁷ *Charter Communications v. FCC*, 440 F.3d 31, 40-44 & n.10 (D.C. Cir. 2006); *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 ¶ 39 & n.162 (rel. Mar. 17, 2005) (“Second Report and Order”). Cf. n. 29, *infra*. Cf. *In the Matter of Charter Communications, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-8740-Z, MB Dkt. No. 12-328, CS Dkt. No. 97-80, Application for Review (May 20, 2013).

⁸ See e.g., *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 11780 (rel. June 29, 2007). See *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, Petition for Rulemaking (July 16, 2013); *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 ¶ 9 (rel. Oct. 14, 2010) (“Third Report and Order”).

⁹ See, e.g., Second Report and Order ¶¶ 3-4. The technology on which this FCC action was based was formally abandoned in 2009.

its National Broadband Plan¹⁰ and conducted a Notice of Inquiry,¹¹ but has not followed through with a rulemaking.

Based on progress in private sector standards, a nationally standard IP-based interface can now be readily defined, discussed on the record, and implemented. The Commission has already conducted a Notice of Inquiry to receive public comment about a successor to the CableCARD regime based on the AllVid gateway concept of supporting competitive devices via such an IP interface that at the operator's discretion can be entirely "hardware free."¹² Such an approach would also allow cable operators who wish to continue to provide navigation devices to re-integrate their conventional conditional access technology, because it would move the competitive interface to the "IP" level.

III. Some Operators' Support for Multi-Purpose Products on Some Systems Does Not Address These Shortcomings.

Unfortunately, the number of devices capable of *replacing* the MVPD-leased set-top box as a means of receiving MVPD programming and services remains as limited as it has ever been. Limited programming on limited proprietary platforms made available at the whim of an MVPD does not satisfy the mandate of Section 629. Making available incidental "apps" that only work

¹⁰ FCC, *Connecting America: The National Broadband Plan*, Mar. 16, 2010, Section 4:12, available at <http://www.broadband.gov/plan/> ("National Broadband Plan").

¹¹ *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).

¹² Cable operators have stressed that the movement to IP distribution is inevitable and should be accompanied by an IP-based interface, but have not committed to a standards-based approach to support retail devices as required by Section 629. See, e.g., Fierce Cable, *Time Warner Cable moving to all-IP over 'some number of years,' CEO Britt says*, <http://www.fierceiptv.com/story/time-warner-cable-moving-all-ip-over-some-number-years-ceo-britt-says/2012-08-02> (Aug. 2, 2012); FierceCable, *Gateways obviate the boxed-in feeling for an entertained home*, <http://www.fierceiptv.com/story/gateways-obviate-boxed-feeling-entertained-home/2012-07-10> (July 10, 2012); FierceCable, *Humax could challenge Cisco, Motorola, Pace, Arris gateways with MMC Technology acquisition*, <http://www.fiercecable.com/story/humax-could-challenge-cisco-motorola-pace-arris-gateways-mmc-technology-acq/2012-07-09> (July 9, 2012); GIGAOM, *Did The Cloud Just Kill The Set-Top Box?*, <http://gigaom.com/video/cloud-set-top-box/> (June 16, 2011).

for limited services and only with particular systems does not provide an adequate solution to the systematic problems noted in the NOI. The granting of sporadic favors by MVPDs to particular makers of devices with other primary purposes, through various “apps,” has not been and cannot be the equivalent of a common, standards-based network interface that would enable real competition. Rather than enable long-term investment in standards-based competition, a fragmented and proprietary “app” approach serves to further entrench cable operators’ methods and devices as the only means by which consumers can access and experience the programming and services to which they subscribe.

If consumers remain stuck using only devices provided by MVPDs and their chosen suppliers, the FCC will not have fostered what Congress mandated, as reflected in the very title of Section 629: “*Competitive availability of navigation devices*,” and as reflected in the very title of Section 629(a): “*Commercial consumer availability of equipment used to access [MVPD] services*” (emphasis added). The FCC should take steps now to assure that consumers have the choice of accessing their cable programming through innovative user interfaces not dictated by cable operators.

IV. The Prevalence of Leasing and the Lack of Interoperability Among Devices Have Consequences for Competition for Subscribers Among MVPDs.

The prevalence of leasing and lack of interoperability among devices has inhibited competition and has hurt consumers. Even in instances in which effective, MVPD-device arrangements are limited in scope as to device, content, and geography, they force reliance on a single MVPD and single device, rather than support comparison shopping among MVPDs and devices. They frustrate consumers who, as many or most do, periodically need to move, or who want to change their MVPD providers, or want to buy a new and different CE product. They

produce a false investment in present devices, leased as well as purchased,¹³ rather than competition among devices or technologies.

The innovation of the FCC’s “gateway” proposal in the National Broadband Plan, referred to as “AllVid” in its NOI, is that a common network interface would make it possible for a consumer’s device to work on any MVPD system, just as a PC, tablet, or phone can work on any accessible WiFi system. This would allow consumers – as they do with their other devices – to choose their device based on their own preferences and its innovation and features, and *then* choose an MVPD system. Consumers would also gain by being relieve of their monthly device leasing fees, which seldom support their own choice or preference.

V. The Vacatur In The *EchoStar* Case of Rules That Support Competition In This Market Needs To Be Addressed By the Commission.

The undersigned entities support reinstatement of the Commission’s CableCARD technical Support Rules and its Encoding Rules as they pertain to cable operators. The CableCARD Support Rules and the Encoding Rules have been stable, successful, and pro-consumer elements of an otherwise difficult implementation of Section 629. To assure the continued viability of CableCARD-reliant products and to provide for a successor technology the Commission should reinstate these regulations as they pertain to cable operators.

These provisions of the Second Report & Order (“Second R&O”) implementing Section 629 of the Communications Act were neither implicated nor discussed on their merits in the court’s opinion in the *EchoStar* case.¹⁴ The references to industry standards that define CableCARD support are utterly noncontroversial and provide vital points of reference and

¹³ MVPD-leased devices generally will not transfer digital video to another device. The Subpart W FCC Encoding Rules, which preclude coding to block such transfers, are not presently in force. Buying a more innovative device at retail or switching MVPDs usually means losing all of one’s stored video and frustrates competition among MVPDs, as well as discouraging competitive device entry.

¹⁴ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

stability for all who would enter or persist in this market. The Encoding Rules protect present and future competitive entrants from discrimination and leveraging in the capabilities of licensed products, under both existing and new technologies. Both sets of rules were vacated on grounds unrelated either to their merits or to the Commission’s authority to enact and implement them.

These Support Rules and Encoding Rules have been in place and effective for a decade without controversy as to their purpose, necessity, or operation. As MVPD and particularly cable transmission technology move to successor IP-based technologies, Commission regulations will continue to require technical references to private sector standards; Section 629 explicitly requires such consultation. Achieving workable private sector licenses based on such private sector technologies will require that these Encoding Rules remain in place.

Section 629 directs the FCC to assure in its regulations the commercial competitive availability of navigation devices “*in consultation with appropriate industry standard-setting organizations.*”¹⁵ In the 1997-1998 period the cable industry came forward with a CableCARD solution and the FCC accepted this offer.¹⁶ The initial offer and the FCC’s implementation, however, did not include specific references to underlying technical standards, as a “safe harbor” or otherwise. The ensuing five years devolved into controversy and finger-pointing *until* the cable and consumer electronics industries, under specific pressure from the Congress and the Commission, ironed out a set of standard references. Competitive entry simply was not possible without an underlying set of standards references – and even so has proved difficult for competitive entrants who have not had a “level playing field” in other respects. Now, almost

¹⁵ 47 USC § 549(a) (emphasis supplied).

¹⁶ See First Report & Order ¶¶ 76 – 78 & n.182.

immediately in the wake of the *EchoStar* decision, a cable operator¹⁷ and the Media Bureau¹⁸ have expressed uncertainty about whether in the absence of an official reference to underlying technical standards CableCARD remains a sufficiently stable and reliable technology. This reaction, whether or not sustained by the Commission,¹⁹ underscores the urgency of reinstating these noncontroversial references. It points, as well, to the need for references to standards as the Commission addresses successor technologies.²⁰ Whether invited through stakeholder offer or negotiation or cited by the FCC as a safe harbor,²¹ such references are explicitly required by the Congress in Section 629 and have proved essential to commercial-scale entry.

Any technologies offered for license will include “compliance” and “robustness” rules. These are required by content owners in the chains of licenses that pertain to products that receive their content. Accordingly, device manufacturers must equip their devices to respond to content stream “triggers” that can entirely prevent display, recording, or transmission over a home network. These trigger responses must be designed into products before they come to market. Without encoding rules, content owners or distributors can arbitrarily impose constraints on consumer-purchased devices after consumers have invested in them, or could impose constraints not imposed on leased devices. Device manufacturers could not expose customers to

¹⁷ *In the Matter of Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-8740-Z, MB Dkt. No. 12-238, Ltr. from Paul Glist to Marlene H. Dortch, Sec., FCC, at 3 (Feb. 6, 2013).

¹⁸ *In the Matter of Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-8740-Z, MB Dkt. No. 12-238, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 9 (rel. Apr. 18, 2013).

¹⁹ The Consumer Electronics Association has applied for review and TiVo has applied for reconsideration.

²⁰ The Commission has acknowledged its obligation under Section 629 to address successor technologies. *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Report and Order, ¶ 35 n.162 (rel. Oct. 12, 2012) (“Basic Tier Report and Order”).

²¹ *See, e.g., In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Dkt. No. 11-154, Report and Order, ¶ 124 (rel. Jan. 13, 2012).

such risks, and argued that Sections 76.1201, 1203 and 1205 of the Commission's rules prohibited MVPDs from imposing such constraints on licensed products.

The FCC acknowledged the issue and its responsibility to resolve it. In its Notice of Further Proposed Rulemaking and Declaratory Order of September 18, 2000,²² the Commission said it would resolve these issues when brought by petition. Rather than bring their disputes to the Commission piecemeal and after the fact, the cable and consumer electronics parties jointly proposed these Encoding Rules as a reasonable outcome on which both consumers and MVPDs could rely when making investments in new devices.²³ This regime has now functioned, for a decade, exactly as proposed by the parties and adopted by the Commission. With only one waiver adjustment for new media,²⁴ the Encoding Rules have worked as envisioned – fairly, predictably, and to the benefit of consumers and stakeholders alike.

The sudden absence of Encoding Rules, based on procedural concerns only applicable to satellite operators, again subjects commercial products as well as MVPD devices to arbitrary constraints on viewing and recording, through triggers that were agreed to by manufacturers only with the assurance that Encoding Rules would be in place. This is manifestly unfair to manufacturers, potential entrants, and consumers. The capabilities of MVPD devices are now a potential bargaining chip in any dealings with content owners. The capabilities of consumer-owned retail navigation devices are now subject to potential constraints imposed by *both* content

²² *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Further Notice of Proposed Rule Making and Declaratory Ruling, ¶ 29 (rel. Sept. 18, 2000).

²³ *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, Ltr. to Hon. Michael K. Powell, Chairman, FCC from 14 digital television manufacturers and eight cable multisystem operators, re: Consensus Cable MSO-Consumer Electronics Industry Agreement on “Plug & Play” Cable Compatibility and Related Issues, and attachments (Dec. 19, 2002).

²⁴ *Motion Picture Association of America Petition for Expedited Special Relief; Petition for Waiver of the Commission's Prohibition on the Use of Selectable Output Control (47 C.F. R. § 76.1903)*, Memorandum Opinion and Order, MB Dkt. No. 08-82, CSR-7947-Z, DA 10-795, ¶¶ 12-18 (rel. May 7, 2010).

owners and content distributors – *whether or not* such constraints are agreed upon for leased devices.

These Encoding Rules apply and are relevant to successor technologies as well as to existing ones. Having acknowledged that a successor technology must be referenced in Commission policy and regulations implementing Section 629,²⁵ the Commission should not dismantle the foundation for achieving entry through private sector licensing. The record is clear that these Encoding Rules are key to achieving commercial entry based on private sector license rather than on government mandate. In practice these rules, including their provision for waiver, have worked exactly as contemplated.

VI. Common Reliance And The “Integration Ban” Are Essential To Present And Future Competition.

From the initiation of the obligation to supply CableCARDS by July 1, 2000, through the FCC’s postponed implementation of the “integration ban” on *July 1, 2007*, an entire generation of CableCARD-reliant TV sets was introduced and disappeared as a direct, documented consequence of the poor support rendered by cable operators. As recently as 2010 it was necessary for the FCC to conduct a rulemaking devoted almost exclusively to fixing the *ad hoc* support system implemented by the cable industry seven years earlier, in *2003*. In response to this Fourth Further Notice of Proposed Rulemaking,²⁶ consumer electronics retailers and manufacturers cited to an overwhelming record, compiled by the Commission, the D.C. Circuit, and stakeholders, of neglect. In response to this documentation of absent, indifferent, and inadequate support, the FCC required that cable operators finally take steps, such as providing CableCARDS by mail upon request, that would

²⁵ See note 20, *supra*.

²⁶ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Fourth Further Notice of Proposed Rulemaking (rel. Apr. 21, 2010).

require their systems finally to automate their support for retail CableCARD-reliant devices. Based on the extensive record, the FCC took the additional step of requiring specifically that *cable field technicians on service calls be equipped with adequate numbers of multistream cards.*²⁷

Manufacturers and retailers observed in their Comments on the Fourth FNPRM:²⁸

“The failure of most cable operators to support CableCARD-reliant devices has been documented thoroughly, in filings of CEA, CERC, and their members;²⁹ by the U.S. Court of Appeals for the D.C. Circuit;³⁰ in a Commission Report & Order;³¹ and in the Commission’s National Broadband Plan.^{32,}”

Virtually every major television manufacturer introduced CableCARD-reliant TVs in the period between the Second R&O in 2003 and the onset of common reliance in July 2007. Each of these products failed due to cable industry indifference and undermining, before common reliance (the “integration ban”) came into force. CableLabs was not prepared with stable CableCARDS for the initial product certification wave, thus requiring each TV manufacturer to

²⁷ Third Report and Order, ¶ 27.

²⁸ The following quotation and supporting footnotes are from the joint comments of CEA and the Consumer Electronics Retailers Coalition (CERC) on the Fourth Further Notice of Proposed Rulemaking.

²⁹ *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, Ltr. 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, Ltr. 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, Ltr. from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Ex Parte Presentation (Aug. 7, 2006); *In the Matter of A National Broadband Plan*, GN Dkt. No. 09-47, 09-51, 09-137, and CS Dkt. No. 97-80, Ltr. from Todd G. Hartman, Vice President, Associate General Counsel and Chief Compliance Officer, Best Buy Co., Inc. to Marlene H. Dortch, Sec., FCC Re: Ex Parte Presentation (Jan. 27, 2010).

³⁰ *Charter Communications v. FCC*, 440 F.3d 31, 40-44 & n.10 (D.C. Cir. 2006).

³¹ Second Report and Order ¶ 39 & n.162.

³² “[C]onsumers who buy retail set-top boxes can encounter more installation and support costs and hassles than those who lease set-top boxes from their cable operators.” National Broadband Plan § 4.2 at 52.

chase a technical “moving target.” Once the CableCARD-reliant TVs were introduced, cable operators prepared neither their systems nor their personnel to regard or treat their support as routine or systematic. Unlike the support given leased boxes, arrangements were *ad hoc* and incomplete, requiring field technicians to take initiatives for which they were untrained or poorly trained. Neither the operators’ systems nor their field personnel made any pretense toward quality control. No effort was made to track either the provenance or the failure history of particular cards that had failed in previous installation attempts or to remove such cards from the pool of cards available for new installations. Thus cards that had failed in one installation were dumped back into a pool and tried in others without any record or tracking. Routinely, however, field technicians would tell consumers that *their new TV* was at fault.

Field technicians often would offer consumers a leased box at a discount, and would emphasize that, as opposed to the “one way” operation of CableCARD-reliant devices, leased boxes could receive more services. They would also disparage particular brands of TVs in which, in their own (untracked) personal installation calls, they had failed to achieve success with a CableCARD. The result was that manufacturers and retailers who had invested in this generation of products found themselves unable to recoup their investments because they could not, with any confidence, either advertise the new features or recover their cost in a highly competitive TV market. When the integration ban finally took effect in 2007, thus requiring a base level of more routine support, it was too late for these products.

On the cusp of a transition to IP-based services, now would be a particularly unfortunate time for the Commission to invite a repetition of the experience with CableCARD-enabled televisions. In 2012 the Commission, in citing technical change as a reason to allow cable operators to encrypt basic tier programming, appeared to agree that a successor to CableCARD is

required.³³ Private sector industry standards as referenced by the Digital Living Network Alliance (DLNA) will be the predominant IP-based means of distributing MVPD programming and services to and through home networks. Accordingly, now is the time for the Commission to act on this observation.

VII. A Standards-Based Common Network Interface Is Essential To Interoperability.

An open standard is a prerequisite for innovation and competition. The White House has emphasized the importance of interoperability standards to ensure that “equipment or software from different vendors [can] work together or communicate” and allow “new, innovative creations to work with older, established services.”³⁴ While the White House discussed the importance of standards in the smart grid context, the issues are parallel in the multichannel video programming context. In fact, the White House noted that the federal government has promoted the development of standards in a “wide array of fields” including public health, national security and the environment.³⁵ Indeed, the White House emphasized that developing interoperability standards would “enable innovation, improve consumer choice, and yield economies of scale.”³⁶ The rationale underscored in the White House report is equally applicable in the multichannel video programming context:

(1) “Standards help to ensure that today’s investments will still be valuable in the future.” The report noted that standards provide assurance that “investments made today will be compatible

³³ Basic Tier Report and Order, at ¶ 35 n.162.

³⁴ Exec. Office of the President, Nat’l Sci. & Tech. Council, A Policy Framework for the 21st Century Grid: Enabling Our Secure Energy Future 26 (June 2011) (“White House Policy Framework”) (citing PCAST 2010).

³⁵ *Id.*

³⁶ *Id.*

with advancing technology,” and that “devices installed today are installed with proper consideration of the security required to enable and protect” future systems and networks.³⁷

(2) “Standards help catalyze innovation.” The White House report noted that standards “reduce investment uncertainty by lowering transaction costs and increasing compatibility. Standards demonstrate to entrepreneurs that a significant market will exist for their work. Standards also help consumers trust and adopt new technologies in their homes and businesses.”³⁸

(3) “Standards support consumer choice.” The report emphasized that without interoperability standards, “companies may attempt to ‘lock-in’ consumers by using proprietary technologies that make their products (and, therefore, their consumers’ assets) incompatible with other suppliers’ products or services.”³⁹

(4) “Standards help keep prices lower.” The report notes that standards “can reduce fragmentation and help create economies of scale, providing consumers greater choice and lower costs.” The report points to the adoption of the USB standard by computer manufacturers, and how that has enabled significant and affordable innovations in connectivity for a broad range of consumer devices.⁴⁰

In September 2011, the AllVid Alliance submitted a set of draft regulations that included references to existing and developing private sector standards that would comprise an IP-based interface common to all MVPDs. The suite of DLNA-referenced and other technical standards identified in the draft regulation proposed by the AllVid Alliance comprises a clearly feasible, national, and nationally portable interface for any MVPD to support the operation of consumer devices, directly or through the provision of a “gateway” device that provides an interface as

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 27.

⁴⁰ White House Policy Framework.

described by these standards.⁴¹ The undersigned entities urge the Commission to seek comment on this proposal and issue a Notice of Proposed Rulemaking that will result in a national standard.

Respectfully submitted,

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⁴¹ See *In the Matter of Video Device Competition*, MB Dkt. 10-91, *et al.*, ltr. from Robert S. Schwartz, Counsel, AllVid Tech Company Alliance to Marlene H. Dortch, Secretary, FCC, Notice of Ex Parte (Sept. 20, 2011). In a stakeholder roundtable convened by the Media Bureau later that month, the technical viability of an interface based on these private sector standards was not seriously questioned.