

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Video Device Competition	)	MB Docket No. 10-91
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

**COMMENTS OF FREE PRESS**

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## **SUMMARY**

This proceeding opens the latest effort by the Commission to create a competitive market for video navigation devices, as directed by Congress well over a decade ago. Under the current framework, every day, millions of Americans are left without any real choice for their navigation devices because video distributors have a firm grip on the market. The result is an environment of unnecessarily high prices without competition or innovation. The Commission's proposed AllVid model is long overdue. The Commission must now carry its proposal through to conclusion, and must put the public interest first at every step of the process. Countless hurdles will arise along the way, but these hurdles can be overcome if the Commission learns from its past experiences.

The CableCARD and Tru2way histories offer crucial insight into the types of interference that can be wrought by incumbents. The Commission should learn from these histories as they strive to avoid similar obstacles in an AllVid model. From the design of the device to its ultimate deployment and installation, video distributors have the ability and incentive to produce undesirable outcomes for customers with third-party navigation devices. Video distributors have almost complete control over the market for navigation devices, employing the advantages of their video distribution business and a litany of other methods to impede competitors.

It is incumbent upon the Commission to ensure that competitors can enter the market for navigation devices on a level playing field. Constant vigilance and strict enforcement will be needed to ensure the design and ultimate implementation of the AllVid adapter solution occurs free from incumbent interference. We look forward to working with the Commission towards a successful outcome in this proceeding.

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**COMMENTS OF FREE PRESS**

**I. Introduction**

Free Press files these comments in response to the Notice of Inquiry (“NOI”) in the Commission proceeding to “unleash competition in the retail market for smart, set-top video devices.”<sup>1</sup> This NOI marks a new effort to bring about the Congressional vision embodied in Section 629.<sup>2</sup> Near universal agreement exists that, despite being nearly 15 years old, this vision has not been realized.<sup>3</sup> Consumers have yet to experience anything approaching a competitive

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<sup>1</sup> *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*, Notice of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, 25 FCC Rcd 4275 (rel. April 21, 2010) (“NOI”).

<sup>2</sup> 47 U.S.C. § 549.

<sup>3</sup> See e.g. Statement of Chairman Boucher, The National Broadband Plan: Competitive Availability of Navigation Devices, Before the Subcommittee on Communications, Technology, and the Internet, U.S. House Energy and Commerce Committee, April 29, 2010; In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 - Commercial Availability of Navigation Devices et al.*, CS Docket No. 97-80, GN Docket Nos. 09-47, 09-51, 09-137, Petition for Rulemaking of Public Knowledge, Free Press, Media Access Project, Consumers Union, CCTV Center for Media & Democracy, Open Technology Initiative of New America Foundation, p. 5 (Dec. 18, 2009) (“*Public Interest Petition*”); Letter from James W. Hedlund, Vice President, Regulatory Affairs, Consumer Electronics Association, to Marlene H. Dortch,

retail market for video devices. Instead, nearly all consumers continue to rely on the equipment leased to them by their multi-channel video programming distributor (MVPD). The proposed “AllVid” adapter solution will create a clear delineation point to put, for the first time, consumers in control of their video experience ‘downstream’ from the adapter. The Commission’s goal is to create an environment similar to “the approach to assuring device compatibility with broadband service.”<sup>4</sup> Through a renewed understanding of the political and economic factors at work in this area, and recognition of its past failures and the reasons behind them, the Commission can finally bring about the significant consumer and economic benefits associated with this laudable goal.

## **II. The Success of the Commission’s Proposed AllVid Adapter Will Depend on the Commission**

The lofty goals of this proceeding will bring about no benefit in and of themselves – the Commission must still implement them through effective rules, a step all too often not taken. Any Commission effort designed to benefit the public, but which is viewed by industry as harmful to its selfish business interests, typically results in considerable implementation difficulty.<sup>5</sup> Yet, the public relies on the Commission to establish good policy, and unnecessary accession to industry demands at the expense of the public interest betrays that stewardship.

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(footnote continued)

Secretary, FCC, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 - Commercial Availability of Navigation Devices*, CS Docket No. 97-80, MB Docket Nos. 03-15, 08-82, p. 2 (Sept. 15, 2009); Letter from Kyle McSlarrow, NCTA to Carlos Kirjner, Sr. Advisor to the Chairman on Broadband, FCC, and William Lake, Chief, Media Bureau, FCC, In the Matter of *Video Device Innovation, NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, p. 1 (Dec. 4, 2009).

<sup>4</sup> *NOI* at para 21.

<sup>5</sup> Perhaps the most prominent being the Commission’s efforts to implement the UNE-P regime mandated by Congress. *See e.g.* Steve Ulfelder, “The DLECs’ demise,” *Network World*, Jan. 7, 2002.

Given the history of past efforts to implement Section 629, it is imperative that the Commission recognize at the outset that this struggle is what they face with the proposed AllVid solution.

The Commission's AllVid solution gains its name due to its ability to "work for all MVPDs and lead to a nationwide interoperability standard."<sup>6</sup> The central benefit of the proposed approach is "allowing any electronics manufacturer to offer smart video devices at retail...without the need to coordinate or negotiate with MVPDs."<sup>7</sup> Although compelling in theory, similar efforts to implement Section 629 have a troubled history of broad goals that were followed up by ineffective rules, lax enforcement, and frequent waivers. Rules to implement the proposed AllVid solution must learn from the mistakes of CableCARD; the CableCARD regime's "failure...to create a strong retail market for navigation devices" should stand at the front of the Commission's mind as they seek to pursue a new course.<sup>8</sup>

The cable industry played a prominent role in impeding the potential success of CableCARD, a fact often brought to the Commission's attention. Constant obstruction from the cable industry through misleading marketing, obstructed installations, billing irregularities, and gatekeeper control over device design created a market where, as noted in the *NOI*, "most manufacturers have abandoned the technology."<sup>9</sup> The causes behind this failure highlight many of the landmines that must be avoided in order for the AllVid effort to succeed.

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<sup>6</sup> *NOI*. at para 17.

<sup>7</sup> *Ibid.* at para 1.

<sup>8</sup> *Ibid.* at para 8.

<sup>9</sup> *Ibid.* at para 10. For instance, barely a year after the inception of the CableCARD regime, two electronics manufacturers, Thomson and Mitsubishi, met with the Commission to detail the problems facing the market. Ex Parte of Thomson Inc., In the Matter of *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (Oct. 28, 2004) ("*Thomson/Mitsubishi Ex Parte*"). At present, neither company offers consumers a stand-alone set-top box. While Thomson has developed a set-top box based on the cable-centric "Tru2way" standard, it "has no plans to hawk that box directly to consumers. Instead, it hopes to gather traction by selling them directly to

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### A. True Common Reliance Will Always Be a Critical Component for Success

The CableCARD regime was doomed to failure at the outset when the cable industry was not forced to support the technology within the industry's own navigation devices.<sup>10</sup> This was a primary cause behind manufacturers ultimate abandonment of CableCARD efforts.<sup>11</sup> Because the cable industry was not forced to use CableCARD, support from the industry for independent device manufacturers was woefully lacking.<sup>12</sup> As the Consumer Electronics Association repeatedly noted, “[a] mandate to ‘support’ a competitive product is not sufficient without a matching marketplace incentive.”<sup>13</sup> Abandonment of CableCARD can be attributed in part to multiple delays of implementation of the integration ban, and no real Commission action to increase CableCARD support from the cable industry.<sup>14</sup> Independent device manufacturers persistently asked the Commission to retain the integration ban deadline, so that the industry

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(footnote continued)

cable operators.” See Jeff Baumgartner, “Thomson Tees Up Tru2way Box,” *Light Reading*, Jan. 9, 2009.

<sup>10</sup> While the Commission ultimately required this of cable operators, the requirement came nearly four years after the “integration ban” took effect. *NOI* at para 7.

<sup>11</sup> Nonetheless, CableCARD currently represent consumers’ only means to utilize third party navigation devices on a cable system. Thus, we strongly support the Commission’s efforts to utilize the technology on interim basis until such time as a new solution has been able to be brought to market. See e.g. Comments of Free Press, 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 Electronic Equipment*, CS Docket No. 97-80, PP Docket No. 00-67 (June 14, 2010) (“*Free Press CableCARD Comments*”).

<sup>12</sup> See e.g. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report & Order, CS Docket No. 97-80, 18 FCC Rcd 20885, 20906 (rel. March 17, 2005) (“*Second Report and Order*”).

<sup>13</sup> Ex Parte Letter of Julie M. Kearney, Senior Director, Regulatory Affairs, Consumer Electronics Association to Marlene Dortch, Secretary, FCC, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, p. 2 (Nov. 23, 2004).

<sup>14</sup> The Commission’s *Second Report and Order* in 2005 aptly illustrates this. See *Second Report and Order* at 20886.

would provide better support out of its own self-interest.<sup>15</sup> Yet, the Commission instead delayed the deadline further, and only required the largest cable operators to file status reports on CableCARD support every 90 days.<sup>16</sup> Further proceedings brought further delays, until ultimately the Commission granted a series of integration ban waivers, removing even the threat of future enforcement.<sup>17</sup>

This history demonstrates that the Commission must ensure common reliance from the outset of its “AllVid” solution. The “AllVid” device must remain separate from every other MVPD offering to create structural incentives to support the device. Without this separation, MVPDs will have incentives to stymie effective implementation – as with CableCARD, and with the voluntary bidirectional support deadlines,<sup>18</sup> and other poorly enforced attempts at reform. Similarly, the Commission must require all advanced devices to rely on the AllVid adapter.<sup>19</sup> Common reliance means creating parity between an engrained incumbent and competitors who would otherwise be at an inherent disadvantage. It should be no easier to acquire a leased box from an MVPD than purchase one from a third party.<sup>20</sup>

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<sup>15</sup> See e.g. *Thompson/Mitsubishi Ex Parte* at 2 (“Thomson and Mitsubishi made clear that, in their view, retention of the July 1, 2006 “reliance date” is absolutely essential to ensuring that CableCARD problems such as these would be rectified promptly and would not multiply.”)

<sup>16</sup> *Second Report and Order* at 20906.

<sup>17</sup> *Public Interest Petition* at 28-29.

<sup>18</sup> See e.g. Jeff Baumgartner, “No Penalties for Missing Tru2way Date,” *Light Reading*, July 1, 2009; Nate Anderson, “Tru2way plug-and-play digital cable support still AWOL,” *Ars Technica*, Oct. 20, 2009.

<sup>19</sup> See *NOI* at para 39.

<sup>20</sup> The integration ban within the CableCARD regime suffered from a fundamental problem. Cable operator navigation devices are delivered to consumer’s home pre-installed. Undoubtedly, most of these consumers are unaware that a CableCARD is in use. Meanwhile, a consumer with a third party device is starkly aware; going through the litany of well-documented hurdles. Thankfully, by design, the AllVid adapter accounts for this discrepancy.



## **B. Potential Competitors Require Equivalent Treatment**

The CableCARD failure also demonstrated that common reliance means more than just relying on the same product as third-party device manufacturers. Electronics manufacturers face a range of obstacles in offering CableCARD devices because of practices of the incumbent cable industry related to marketing, installations, and billing. For example, TiVo, one of only two companies that continue to attempt to sell products under CableCARD,<sup>21</sup> recently noted that customer's issues with CableCARD are "the number one driver of customer service calls."<sup>22</sup> These problems cover nearly every aspect of a consumer's experience in which the cable industry can have an effect. The recent *Fourth Further Notice of Proposed Rulemaking* makes the scope of these problems clear, and proposes changes to address some of them.<sup>23</sup> For purposes of avoiding similar problems in the development of an AllVid solution, the Commission would be well served to study the structural features that give rise to them.

### **1. Customer Solicitation and Marketing Must Not Impede Consumer Choice**

The Commission must keep a close eye on the marketing, sales, and support operations of MVPDs. Each of these systems offers an opportunity for video distributors to skew the navigation device market in their favor, either through deliberate misinformation or more subtle obscuring of the possibility or value of competing alternative devices. The CableCARD regime

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<sup>21</sup> *NOI* at para 10.

<sup>22</sup> Testimony of Matthew Zinn, Senior Vice President, General Counsel, Secretary and Chief Privacy Officer, Tivo Inc., Before the Subcommittee on Communications, Technology, and the Internet, U.S. House Energy and Commerce Committee, April 29, 2010, p. 8. *See also* Comments of TiVo Inc., 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, pp. 5-6 (July 29, 2009).

<sup>23</sup> *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Fourth Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (rel. April 21, 2010) ("*Fourth Further Notice of Proposed Rulemaking*").

has illustrated that such an occurrence is far from unlikely. For instance, cable operator representatives have told consumers that “[t]he only way to receive digital channels is to lease a set-top box.”<sup>24</sup> One device manufacturer has noted that “[c]able customer service reps routinely tell customers that our receivers ‘don’t work with CableCARDS’ and suggest that a leased STB is needed to solve ‘the problem.’”<sup>25</sup> Such misinformation can only be prevented through aggressive Commission enforcement of clear, binding rules.

The marketing, sales, and sign-up processes take on a renewed importance with the AllVid adapter. Consumers must be made aware from the outset that the gateway device being purchased or leased allows them to connect and use any compatible device, not just the MVPD leased devices they had likely been using in the past. As the Commission recognized, MVPDs will need to offer navigation devices “separate from the adapter and marketed separately.”<sup>26</sup> But the rules must go beyond mere separate offering and marketing: The separation must also include the phone and online ordering processes, and must be kept free of any misleading or incorrect information on third party compatibility.

Consumers should have the ability to view navigation boxes in a comparable light. For instance, beyond the monthly lease price, consumers should be made aware of the estimated average cumulative cost of such a device over the duration of a service contract or other time period. Currently, device leasing fees are dwarfed by the typical monthly bill for cable service,

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<sup>24</sup> Letter from Robert S. Schwartz to Marlene Dortch, Secretary, FCC, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Attachment, p. 9 (March 24, 2006) (“*Schwartz Ex Parte*”).

<sup>25</sup> Ex Parte Letter of Julie M. Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association to Marlene Dortch, Secretary, FCC, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Attachment 1, p. 9 (March 23, 2006) (“*Kearney Ex Parte*”).

<sup>26</sup> *NOI* at para. 22.

resulting in a lack of general awareness of the total amount spent over the course of 6, 12, or 24 months of service, which may far exceed the cost of purchasing a third party device.

Furthermore, consumers should be reminded that they will not own the device at the end of that period, and they should be made aware of what they will pay if the device is damaged, lost, or stolen. MVPDs typically charge excessive rates in these cases. For instance, Comcast charges customers \$225, if they are unable to return a DVR, regardless of how long they've been leasing the device.<sup>27</sup> In the case of Comcast's broadband Internet access service, subscribers can view a list of compatible cable modems during the ordering process.<sup>28</sup> Offering a similar list to MVPD subscribers would illustrate to consumers their options for third-party navigation devices, though such a list should be clearly labeled as a representative sample, not including all compatible products.

## **2. Installations Should Not Be An Issue With the AllVid Solution**

The CableCARD installation woes for consumers with third-party navigation devices are well documented. Commission proceedings and the Internet are replete with personal testimonials<sup>29</sup> and evidence from device manufacturers.<sup>30</sup> Chairman Boucher recently noted, “the installation of CableCARDs typically involves several multiple-hour visits by sometimes

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<sup>27</sup> Phone conversation with Comcast Customer Service Representative, July 13, 2010.

<sup>28</sup> The hyperlink to this list is offered at step 2, “Customize”, of the purchasing process. *See* <http://mydeviceinfo.comcast.net/>.

<sup>29</sup> *See e.g.* Comments of Jose Cerna, CS Docket No. 97-80 (May 11, 2010); Comments of Farley Padron, CS Docket No. 97-80 (May 3, 2010); Comments of Josh Quigley, CS Docket No. 97-80 (April 26, 2010); Meg Marco, “How Many Comcast Techs Does It Take To Hook Up A Tivo?” *Consumerist*, April 8, 2010; Don Reisenger, “Lessons learned: Switching to the TiVo HD,” *CNet News*, Sept. 21, 2009; Comment of Richard LaFalce, CS Docket No. 97-80 (March 11, 2008).

<sup>30</sup> *See e.g. Kearney Ex Parte; Schwartz Ex Parte.*

untrained technicians.”<sup>31</sup> Not only do these woes create headaches for consumers, they also offer operators an opportunity to sell customers, whether explicitly or implicitly, on the hassle-free experience of an internal navigation device.

True common reliance will do much to close off these potential interference avenues. With a standardized interface, in which MVPDs devices must rely, distributors will have an incentive to ensure the AllVid adapter is working properly. But the AllVid adapter should be designed in a way that ensures self-installation, of both the AllVid adapter and devices connecting to it. Self-installation has resulted in considerable cost savings for cable operators; the technical challenges are no greater in the AllVid environment, and stand to confer comparable benefits.<sup>32</sup> Self-installation will also confer public interest benefits, as few consumers enjoy the hassle of scheduling a visit during a long window from an MVPD technician. As a general rule, the Commission should strive to reduce AllVid-related interactions between MVPDs and consumers, leaving consumers free to make decisions without the possibility of improper MVPD influence.

### **3. Billing Problems Will Continue to Present Hurdles Without Corrective Action**

The Commission recently recognized the pricing and billing problems that exist with CableCARD.<sup>33</sup> Many of these problems, including disparate line-item charges, device subsidization, and a lack of transparency regarding device leasing fees, must be corrected in the AllVid context to realize fully the Commission’s goals in this proceeding.

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<sup>31</sup> Statement of Chairman Boucher, The National Broadband Plan – Competitive Availability of Navigation Devices, Before the Subcommittee on Communications, Technology, and the Internet, U.S. House Energy and Commerce Committee, April 29, 2010.

<sup>32</sup> See *Free Press CableCARD Comments* at 6.

<sup>33</sup> *Fourth Further Notice of Proposed Rulemaking* at para. 15.

The current disparate practices related to line-item charges for CableCARDs should not be extended to AllVid. Customers using third-party CableCARD devices receive a separate line item charge on their bill for their leased CableCARDs. Meanwhile, customers with leased devices see no such charge, despite having a CableCARD within their device. This creates an appearance that only third-party device users must pay for a CableCARD, which skews public understanding of CableCARD and their cable bills. To avoid similar confusion, cable operators should list a separate line item charge for any leased AllVid adapter, for the same amount, regardless of whether the customer uses a third-party device or a cable operator-provided device.

Device subsidization across users of old and new set-top box devices poses a separate category of problems that could undermine the emergence of a market in set-top boxes. Under device subsidization, in areas that have been designated as having effective competition, cable operators use device leasing fees from legacy customers, who long ago recouped the cost of their leased devices, to subsidize the lease rates of new, more advanced devices. But a determination of effective competition should have no bearing on the status of competition for navigation equipment.<sup>34</sup> Allowing subsidization in any area, whether MVPD service itself is competitive or not, interferes with the emergence of a competitive market for third-party set-top boxes. To correct such an error and promote competition, the Commission must either ensure that third-party navigation devices also receive a subsidy, or prevent cross-subsidization from occurring.

The Commission should require cable operators to provide more information on the true costs to consumers of leased devices. Currently, consumers experience some amount of sticker shock comparing the monthly lease fee for an operator-provided device with the one-time

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<sup>34</sup> See e.g. Federal Communications Commission, “Connecting America: The National Broadband Plan,” p. 50 (“The top two cable set-top box manufacturers in North America, Motorola and Cisco, together captured a 95% share of unit shipments over the first three quarters of 2009. That’s up from 87% in 2006.”).

upfront cost of a third party device. This contrast disguises accumulating costs and the potential for additional fees, and thus may unfairly skew consumer choice. As the FCC has noted, “accurate information plays a vital role in maintaining a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services.”<sup>35</sup> To remedy this, consumers leasing devices from MVPD operators should be made aware of the amount they have paid over time, and should be reminded they will not own the device after any period, but instead will be subject to additional substantial fees if the device is not returned at the end of service.

**C. The Commission Must Avoid the Onerous Design Requirements of CableCARD and Tru2way**

Despite the CableCARD regime’s mutually agreed upon general principles, actual implementation of the solution permitted the cable industry to introduce numerous design hurdles that stymied the development of competitive devices, a problem that must not be perpetuated into the AllVid model. In the CableCARD model, third-party device manufacturers face numerous “artificial and discriminatory restrictions on the design and functionality of customer... devices.”<sup>36</sup> CableCARD-reliant device manufacturers must sign a license agreement with CableLabs, a group controlled and operated by the cable industry. This agreement forces device manufacturers to “adhere to strict requirements on the use and presentation of cable content.”<sup>37</sup> CableLabs maintains firm control over the device certification process, and has

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<sup>35</sup> See *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, Notice of Inquiry, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, 24 FCC Rcd 11380, 11383 (Rel. Aug. 28, 2009).

<sup>36</sup> Comments of TiVo Inc., In the Matter of *Video Device Innovation*, NBP Public Notice # 27, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, p. 3 (Dec. 22, 2009).

<sup>37</sup> *Ibid.*

virtually unilateral control over the ability of a device to be offered to consumers.<sup>38</sup> As one example of the harmful outcomes that flow from this one-sided process, CableCARD devices require additional equipment to access linear channels delivered using switched digital technology.<sup>39</sup> Even this uneven outcome followed Commission action<sup>40</sup> – initially, cable operators simply notified customers that they could no longer view certain channels as a CableCARD user, even though they would continue to pay for them.<sup>41</sup>

Beyond the challenges faced in the unidirectional CableCARD world, even greater hurdles exist for device manufacturers attempting to offer devices with bidirectional capability. In this instance, the Commission took an even less active role in the development of the compatibility model. Instead, the cable industry simply forced a ‘solution’ on device manufacturers. This cable centric approach, now known as Tru2way, includes numerous restrictions to ensure the cable industry retains full control over any device being used for navigation.<sup>42</sup> The result is a nightmare for innovation, competition, and consumer choice. As the Commission notes, Tru2way “limits a device’s ability to integrate video from multiple sources into a consistent viewing experience.”<sup>43</sup> Device manufacturers are required to use the navigation control method of the cable operator, and prohibited from competing over the interface, the primary consumer-

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<sup>38</sup> CABLECARD-Host Interface License Agreement (CHILA), para. 5, *available at* <http://www.cablelabs.com/opencable/downloads/CHILA.pdf>.

<sup>39</sup> *See e.g. Fourth Further Notice of Proposed Rulemaking* at para. 14.

<sup>40</sup> *See Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc. et al*, 24 FCC Rcd 8716, 8718 (Rel. June 26, 2009).

<sup>41</sup> *Kearney Ex Parte* at Attachment 3.

<sup>42</sup> Consumer Electronics Appendix to Joint Status Reports to FCC, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket 97-80, pp. 8-12 (Nov. 30, 2005).

<sup>43</sup> *NOI* at para. 12.

facing aspect of the device.<sup>44</sup> Furthermore, as with CableCARD, CableLabs, an arm of the cable industry, has final say on any device seeking approval.<sup>45</sup> All opportunities for innovation or competition are curtailed by these obstacles.

The Commission must ensure the design of the AllVid approach opens up the consumer environment and experience to true innovation and competition. In contrast, the restrictions of CableCARD and Tru2way have a single purpose: to fulfill the cable industry's desire "to be in control of the consumer's experience."<sup>46</sup> The Commission has recognized the problems with this approach – for example, the *NOI* acknowledged the flaws of Tru2way, and was "not convinced that the tru2way solution w[ould] assure the development of a commercial retail market."<sup>47</sup> A better solution for AllVid is to utilize existing and preferably widely used standards.<sup>48</sup> The use of non-cable-controlled standards would limit the influence MVPDs can exert during the creation of a new model, and would benefit from existing economies of scale in the manufacturing of compatible equipment. We support the Commission's general belief that this effort could find value in the model for "assuring device compatibility with broadband services."<sup>49</sup> In this vein, the Commission should be sure the ultimate design of the AllVid adapter results in true

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<sup>44</sup> Ex Parte Letter of Joel Wiginton, Vice President & Senior Counsel, Sony Electronics Inc. and Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation to Monica Desai, Chief, Media Bureau, FCC, 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 Docket No. 97-80, PP Docket No. 00-67, Attachment, p. 2 (June 10, 2008).

<sup>45</sup> *Ibid.* at 2.

<sup>46</sup> Michael Harris, "Comcast to Control its TV Platform with Liberate Deal," *Light Reading*, Jan. 13, 2005.

<sup>47</sup> *NOI* at para 12.

<sup>48</sup> *See Public Interest Petition* at 35. *See also NOI* at 24.

<sup>49</sup> *NOI* at para 21.



standards-based plug and play capability for consumers, rather than a proprietary, top-down, inflexible solution that leaves complete control in the hands of MVPDs.<sup>50</sup>

#### **D. The Commission Must Commit to Ongoing Enforcement**

This filing and many others have demonstrated the litany of ways in which video distributors can prevent third-party devices from competing on a level playing field. By its design, if carried through to completion as proposed, the AllVid solution will reduce the threat of some of these. As the Commission notes, the AllVid solution will “provide the necessary flexibility for consumer electronics manufacturers to develop new technologies, including combining MVPD content with over-the-top video services... manipulating the channel guide, providing more advanced parental controls, providing new user interfaces, and integrating with mobile devices.”<sup>51</sup> This flexibility is what will allow device manufacturers to differentiate and create a compelling product.

But even if AllVid is carried through to a successful, full specification for device compatibility, opportunities for obstruction will remain. The Commission must take an active role in ensuring that manufacturer flexibility is preserved, and historic or new opportunities for interference are not employed. As the Consumer Electronics Association stated, “guarding against discrimination in terms of device specification, connection, function, and cost, will be vital.”<sup>52</sup> This will require two actions by the Commission: vigilant monitoring, including the active solicitation of complaints by device manufacturers and consumers, and strict enforcement.

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<sup>50</sup> *Ibid.* at para 30.

<sup>51</sup> *Ibid.* at para. 17.

<sup>52</sup> Comments of the Consumer Electronics Association, In the Matter of *Video Device Innovation*, NBP Public Notice # 27, GN Docket Nos. 09-47, 09-51, 09- 137, CS Docket No. 97-80, p. 19 (Dec. 21, 2009).

The Commission should encourage device manufacturers to report any problems they encounter during the entire process, from product design all the way to installation, use, and support within a consumer's home. Device manufacturers should have ready access to Commission staff to raise issues as they occur. Consumers should be offered a similar, low-cost and easy opportunity, such as a 1-800 number or a general email address specifically devoted to AllVid problems. Opportunities for Commission communications should be widely published to consumers, perhaps through inclusion in the documentation that accompanies the AllVid solution. Consumers and device manufacturers are the Commission's ears and eyes on the ground monitoring for practical hindrances, and the information they provide will be vital to ensuring the AllVid adapter's success.

When the Commission determines that a video distributor is interfering with customers' ability to use third-party navigation devices, enforcement should be swift and strict. We believe the Commission should leave all available enforcement tools on the table and be prepared to use them as necessary. At this point, no MVPD has exhibited any considerable willingness to implement the AllVid solution.<sup>53</sup> This is likely to continue beyond AllVid design and into application and enforcement, as the Commission has proposed to open up an incumbent-dominated, highly profitable industry to competition. Indeed, IMS Research Senior Analyst Stephen Froehlich warned that cable operators "who are obligated to increase shareholder value, will have little choice other than to fight the FCC on every step of implementation and to

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<sup>53</sup> See e.g. Kyle McSlarrow, "Comments on the Video Device Recommendations in the National Broadband Plan," *CableTechTalk*, March 16, 2010; Comments of DirecTV, Inc, In the Matter of *Video Device Innovation*, *NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, p. 6 (Dec. 22, 2009); Joint Comments of Dish Network, LLC and Echostar Satellite Services, LLC, In the Matter of *Video Device Innovation*, *NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, p. 2 (Dec. 21, 2009); Comments of Verizon, In the Matter of *Video Device Innovation*, *NBP Public Notice # 27*, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, p. 11 (Dec. 22, 2009).

constantly seek exemptions from the new rule."<sup>54</sup> But despite opposition, the Commission must stand firm, even when MVPDs produce an "onslaught of lobbying."<sup>55</sup> The Commission can certainly explore incentives to increase the voluntary cooperation of MVPDs, and we would support such efforts. However, efforts for voluntary cooperation cannot come at the expense of a successful implementation of a model that can finally implement a long overdue Congressional directive. Nor can the Commission rely on industry negotiations to work out the details. MVPDs and the electronics industry are competing industry segments whose success in the market for set-top boxes ultimately depends on the other's failure. Negotiated policymaking in such a context is a recipe for a slow, contentious process, one likely to be won by video distributors and therefore resulting in continued failure, as the bi-directional negotiations leading to Tru2way made crystal clear.<sup>56</sup> The Commission must drive the AllVid effort, over any opposition that may arise, if it is to succeed where past efforts have failed.

### **III. Conclusion**

Through these comments, we do not seek intentionally to criticize the Commission's previous efforts at Section 629 implementation. In fact, the Commission is the most critical component to success of the AllVid solution. Our hope is that past experiences will guide the Commission towards a more successful solution. Every day more than 100 million American MVPD subscribers are denied the benefits of competition, innovation, and consumer choice in

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<sup>54</sup> David Lieberman, "The FCC begins to think outside cable's set top box," *USA Today*, Technology Live, April 2, 2010.

<sup>55</sup> Letter from Matthew Zinn, Vice President, General Counsel and Chief Privacy Officer, Tivo Inc. to Jonathan Cody, Legal Advisor, Office of Chairman Michael Powell, In the Matter of *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, p. 3 (Jan. 18, 2005).

<sup>56</sup> *NOI* at para. 12.

their video experience. The Commission has the opportunity to dramatically improve this. We look forward to supporting the Commission in turning this opportunity into a reality.

Respectfully Submitted,

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