Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF FREE PRESS

Free Press
501 Third Street, NW
Suite 875
Washington, DC 20001
202-265-1490

June 14, 2010

Free Press files these comments in response to the Fourth Further Notice of Proposed Rulemaking ("FNPRM") in the Commission proceeding on the commercial availability of navigation devices.[1] From its beginnings in 1997, this proceeding has been driven by an industry that does not welcome competitors freely, an industry that has been allowed to self-regulate in this space and create the rules by which companies could enter the market for set-top boxes. The resulting rules have stifled innovation and competition, impeding a direct statutory objective. The proposed minor rule changes are necessary to bring about some minimum level of competition under the current framework, but greater, more comprehensive reform is needed, as the Commission has acknowledged in opening its parallel proceeding.[2]

I. Industry Control Doomed CableCARD.

The FNPRM's most poignant moment lies in its first sentence: "the Commission has not been fully successful in implementing the command of Section 629 to ensure the commercial availability of navigation devices used by consumers to access the services of multichannel video programming distributors ("MVPDs")."[3] In simple, direct terms, the CableCARD regime has failed. Most consumers remain unaware that third party choices for set-top boxes even exist. Implementation of the current framework of rules was largely driven by the regulated industry

[1] *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) ("*FNPRM*").

[2] *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 (rel. April 21, 2010), para. 3 ("*NOI*").

[3] *FNPRM* at para. 1.

itself. Under this framework, CableCARD never became a prevalent technological solution.[4] Numerous factors contributed to this result, factors that must be addressed to have any hope of enacting the Congressional vision embodied in Section 629.

First and foremost, the CableCARD rules, including subsequent efforts to incorporate bidirectional capability, failed because the process for their implementation relied too heavily on industry participants. Year after year, the Commission avoided direct involvement, remaining "hopeful [private negotiations] w[ould] produce results in the near term."[5] In retrospect, as the Commission has noted, these hopes were not well-founded.

Policy should not be developed according to industry "compromise." The cable industry and the electronics industry are competing industry segments whose success in the market for set-top boxes ultimately depends on the other's failure; this is a recipe for slow, contentious negotiations. Too often in Commission policymaking and elsewhere have we seen the consequences of allowing industries to "self-regulate," particularly when the competitive balance in a market is already skewed. Dominant players will not act against their own self-interest to facilitate competitors. And here, after being provided with a loose leash, the dominant cable industry has been successful in ensuring they maintain their firm grip over nearly every aspect of a customer's viewing experience including the video equipment used to receive cable service.

The cable industry's dominance and control was no more evident than in the devising of the bidirectional "standard" now known as Tru2way. The cable industry and certain electronics manufacturers agreed to adopt Tru2way, appearing to fulfill the Commission's hopes of

---

[4] *Ibid.* at para. 8.

[5] *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availiability of Navigation Devices*, Order and Further Notice of Proposed Rulemaking, CS Docket No. 97-80, para 2 (Rel. April 25, 2003).

policymaking by industry compromise; however, the substance and the consequences of this "compromise" reveal harmful effects on its ostensible policy outcome. The agreement states that CableLabs, an arm of the cable industry, has final say on any device seeking approval.[6] Device manufacturers are required to use the navigation control method of the cable operator, and prohibited from competing over the interface, the primary consumer-facing aspect of the devices.[7] The Commission has recognized the negative impact of these restrictions.[8] Electronics manufacturers received little in exchange for these concessions: the ability to overlay a screen on top of the cable interface that allows consumers to move to another content source, and a promise that bidirectional capability would be deployed by July 1, 2009.[9] The overlay capacity has minimal value, and the supposed deadline has come and gone with a universal yawn of indifference.[10]

The deployment of a two-way standard remains long overdue, and promises by industry have fallen short on numerous occasions. For instance, just before the Commission released the Second Report and Order in 2005, providing the industries with further time to make "progress in bidirectional negotiations,"[11] senior executives of Microsoft, Comcast, and Time Warner

---

[6] Ex Parte of Comcast, 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 at 2 (June 10, 2008) ("*MOU*").

[7] *Ibid.* at 2.

[8] *NOI* at para. 12.

[9] *MOU* at 1-2.

[10] *See e.g.* Jeff Baumgartner, "No Penalties for Missing Tru2way Date," *Light Reading*, July 1, 2009.

[11] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report & Order (rel. March 17, 2005), para. 3 ("*2nd R&O*").

committed to "ensure the availability of two-way cable products during calendar year 2006."[12] Unless the Commission can identify ways in which handing away control will be in an MVPD's best interest,[13] they should expect more such voluntary industry promises, with similar results.

II. The Proposed Changes are Essential to Preserve Any Value in the Current Framework.

The Commission has proposed a number of long overdue improvements to limit the interference of the cable industry with CableCARD processes, largely in line with the recommendations set forth in the National Broadband Plan.[14] These changes are a bare minimum of reform needed in order to achieve any semblance of common reliance. If enacted, they will also establish that the Commission is prepared to do more than just "direct the six largest cable operators to file…status reports on CableCARD deployment and support."[15] In enacting these changes, though, the Commission must perpetually keep a close and skeptical eye on every cable industry practice related to CableCARDs; the current industry-centered framework creates considerable opportunities to introduce roadblocks to effective competition.

First, the terms on which cable operators lease devices need more stringent rules. As an initial matter, cross-subsidization must be prohibited to enable the emergence of an independent

[12] *Id.* at para. 13.

[13] MSO's spend the largest portion of their capital expenditures on customer premise equipment. Thus, exiting this business would result in a large increase in free cash flow, by one estimate 30 percent. *See* Bernstein Research, *Web Video: Friend or Foe…And to Whom?,* p. 14 (October 2009). This development could therefore be attractive to investors. However, some evidence suggests that MSO's earn a considerable return on their set-top boxes (not to mention the perceived threats this loss of control could effectuate). See *e.g.* Reply Comments of Free Press, 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. 6-7 (Aug. 28, 2009).

[14] Federal Communications Commission, "Connecting America: The National Broadband Plan," p. 52.

[15] *2nd R&O* at para. 4.

market for devices. The Commission should also require cable operators to list on each monthly bill the total amount a customer has paid towards a device. Currently, device leasing fees are dwarfed by the typical monthly bill for cable service, resulting in a lack of general awareness of the total amount spent over the course of 6, 12, or 24 months of service. This lack of awareness, coupled with a nearly non-existent market for competing devices, has enabled operators to get away with continuous equipment price increases.[16] These increases should have the effect of incentivizing competition – yet, as the Commission has recognized, the opposite has occurred.[17]

Commission reform should also be directed to improving the CableCARD installation process, and in particular to requiring cable companies to institute policies permitting self-installation of CableCARDs. Unlike installation of operator-provided equipment, for which helpful kits are often mailed to users, self-installation of CableCARD devices is generally prohibited. The additional time, hassle, and expense of professional installation creates a substantial deterrent to choosing third-party devices, particularly when the installation requires *multiple visits* due to technical difficulties arising from poor training, or sheer mistake as to the number or type of CableCARDs required.[18] Many have filed with the Commission to raise these concerns. One wrote, "[c]able companies need to be friendlier about cable cards and make it possible to self-install. There is no reason to pay $55 for an untrained technician to come to my

---

[16] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, pp. 28-30 (2009); Reply Comments of Free Press, 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. 6-7 (Aug. 28, 2009).

[17] *FNPRM* at para. 8.

[18] *Ibid* at para. 9. *See also e.g.* Stephen H. Wildstrom, "TiVo, Minus the Tangle," *BusinessWeek*, July 26, 2007; Rob Pegoraro, "Getting CableCarded," *Washington Post Blog*, Aug. 15, 2007.

house to pop the card in and read numbers from the screen to a phone rep."[19] Another stated, "I can say I have wasted 10's of hours of my life that I will never get back because CableCARD installs have no self-install option. This certainly must change."[20]

In fact, self-installs appear to be better for the cable company, at least with respect to its cable service. In discussing the success of their digital conversion, Comcast stated, "the key success factor so far has been the high rate of self-installation. Currently over three-quarters of our customers elect to self-install."[21] Furthermore, Comcast's conversion is coming in under budget "due to less truck rolls than forecast thanks to a high rate of self-install."[22] Thus, the primary impact of prohibitions on self-installation appears to be an anti-competitive disincentive towards adoption of third-party devices.

Customer service support is also in need of improvement, as the lack of substantial uptake of third party devices creates little incentive for cable companies to train support representatives to provide adequate CableCARD support. For instance, Brian Charbonneau of Chandler, AZ wrote the Commission recently stating the Cox "tech support continues to tell me cablecards don't exists, won't work, are out of stock, etc, etc. I have to request a supervisor (or two) EVERY time I call for support."[23] The frustration of third party device users is well documented.[24] Commission reform should ensure that cable companies provide adequate training to customer service representatives to support CableCARD users.

---

[19] Comments of Jose Cerna, CS Docket No. 97-80 (May 11, 2010). *See also* Comments of Josh Quigley, CS Docket No. 97-80 (April 26, 2010).

[20] Comments of Farley Padron, CS Docket No. 97-80 (May 3, 2010).

[21] Thomson Financial, Transcript of Q1 2009 Comcast Corporation Earnings Conference Call, April 30, 2009.

[22] *Ibid.*

[23] Comments of Brian Charbonneau, CS Docket No. 97-80 (May 3, 2010).

[24] *See e.g. FNPRM* at paras. 9, 16; *2nd R&O* at para. 4.

III. Conclusion

In this proceeding, the Commission has an opportunity to begin shaping a competitive future for navigation devices. The Commission can take steps to affirmatively salvage whatever is left of a possibility for the emergence of a competitive market for CableCARD devices, by fixing pricing policies for all navigation devices and improving the processes of installation and customer service for CableCARD users. More importantly, as the Commission begins its parallel proceeding on future navigation devices, rapid and public-interest driven resolution of this proceeding can set the right tone. The Commission must fulfill the Congressional intent behind Section 629, by wresting control of navigation devices away from MVPDs and placing it in the hands of consumers and a true competitive market.

Respectfully Submitted,

______/s/_____________

Adam Lynn
Chris Riley
Free Press
501 Third Street, NW
Suite 875
Washington, DC 2001
202-265-1490

June 14, 2010