Testimony of Harold Feld
Legal Director, Public Knowledge

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications, Technology, and the Internet

Hearing On:

"The National Broadband Plan: Competitive Availability Of Navigation Devices"

Washington, DC
April 29, 2010

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On behalf of
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Media Access Project
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Introduction

Mr. Chairman, Ranking Member Stearns, and members of the subcommittee, thank you for inviting me to speak today. My name is Harold Feld. I am the Legal Director of Public Knowledge, a nonprofit organization that seeks to promote consumer choice in broadband, video programming, and other communications services. I am also testifying on behalf of Media Access Project and Consumers Union. Media Access Project is a non-profit law firm and advocacy organization that works to advance freedom of expression, independent media, and universal access to communications platforms, and Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves.

We are here to discuss how the FCC should implement a law Congress passed nearly 15 years ago to promote competition in the market for set-top boxes.

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* I would like to thank Public Knowledge Staff Attorney John Bergmayer for his assistance in the preparation of this testimony.

Congress showed prescience and vision when it passed this law—codified at Section 629 of the Communications Act—as part of the 1996 Telecommunications Act.[1] Congress correctly predicted that the old analog cable box would grow into a sophisticated two-way "navigation device" allowing consumers on multiple platforms to chose among competing video services and new services emerging broadband communications would make possible. Section 629 therefore instructed the FCC in no uncertain terms to create rules that would make it possible for a consumer to purchase devices for these new services in a competitive consumer electronics market.

Unfortunately, despite many proceedings, rulemakings, and false starts, the FCC failed to create the competitive market in video devices Congress directed. Poorly constructed rules, undercut by numerous exceptions and waivers, left consumers with no easily implemented solution for video devices. As a result, the vast majority of subscribers to MVPDs continue to lease set-top boxes from their provider and cannot easily take advantage of competitive choices for such services as digital video recorders (DVRs). Often, consumers lease underwhelming set-top boxes for years on at rates that more than cover the cost of the equipment, and are charged a fee if they fail to return the devices when moving or changing providers—devices that, when returned, are thrown in a recycling bin. This poor consumer experience indicates a lack of a properly functioning market.

To its credit, the FCC recently recognized that despite Congress' express directive in Section 629 and the FCC's efforts, competition and innovation have

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 549 (Section 629 of the Communications Act).

failed to emerge in the set-top box market, and this has deprived consumers of the lower prices and superior service that comes with a genuinely competitive market.[2] In the National Broadband Plan, the FCC determined that promoting competition in video devices would spur the adoption and use of broadband by making it easy for innovators to break down the wall between television and the Internet. Fulfilling the mandate of Congress to promote competition in video devices will help America achieve the goal of universal broadband, which has become the general-purpose communications technology of our time.

As part of the National Broadband Plan proceeding, Public Knowledge asked the FCC to adopt a "video gateway" approach. Under this proposal, all subscription TV providers would provide their consumers with a simple device that allows competitive devices to use subscription TV services. This approach is the best way to implement the law and help fulfill the goals of the National Broadband Plan.

Choice in Video Devices Is Good for Consumers—and It's the Law

Choice in video devices is a long-standing Congressional policy. As cable television became more complex, subscribers increasingly needed specialized equipment, rented from the cable company, to access certain features. This not only required consumers to pay regular monthly fees they could avoid were equipment available for purchase, it also increasingly interfered with the market for VCRs and other consumer devices. In response to this, in 1992, Congress found that:

> if these problems are allowed to persist, consumers will be less likely to purchase, and electronics equipment manufacturers will be less likely to

[2] *National Broadband Plan* § 4.2.

> develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions….[3]

The 1992 law directed the FCC to start working on a standard to promote compatibility between cable systems and analog consumer electronics. The FCC quickly implemented a set of standards that proved remarkably successful. In less than two years after passage of the 1992 Act, consumers began to see the emergence of "cable ready" televisions and devices like VCRs. Manufacturers, able to use stable technical standards, began to create combined versions of devices. Consumers benefitted twice over. They saved themselves monthly rental fees and enjoyed the convenience of integrated televisions and devices. Related industries, such as the movie industry, likewise benefited from the broader availability of VCRs and DVD players.

Building on this success, Congress directed the FCC to create the same competitive market for the next generation of consumer devices. In a provision garnering bipartisan support, Congress ordered the FCC to:

> adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel 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….[4]

The shift from "cable" to "multichannel video programming distributors" (MVPDs) reflected another success of the 1992 Cable Act—the emergence of competitors to

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[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 544a (Section 624A of the Communications Act).

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 549 (Section 629 of the Communications Act).

cable such as Direct Broadcast Satellite (DBS). Congress therefore directed the FCC not only to adopt the technical standards needed to assure a robust video device ecosystem, but to follow through and make sure that the standards had the desired effect of promoting competition and choice in video devices and the future world of two-way digital services.

CableCARD, the FCC's Attempt to Implement the Law, Has Fallen Short

Unfortunately, the FCC was not nearly as successful in implementing Section 629 as it had been implementing the rules for analog devices. Years of rulemaking produced only a temporary solution called "CableCARD," a small card that plugs in to any compatible television, DVR, or PC that allows these devices to access one-way cable services. The FCC did not settle on final rules for CableCARD until 2005, and did not require cable operators to include CableCARD with all new set-top boxes until 2007.[5] The FCC further undercut the value of CableCARD by exempting cable's primary competitor, DBS, from application of the rules.

Because CableCARD was only intended to be a temporary solution, it is incapable of sending signals upstream back to the cable company—the kind of signaling necessary to allow it to access video-on-demand, other two-way services, and increasing numbers of "switched digital" channels. The "solutions" that have been presented to allow CableCARD devices to access these abilities have been unsatisfactory. In particular, "solutions" that require a consumer installing a CableCARD-compliant device to continue to use a cable-supplied set-top box simply worsens the problem Congress intended Section 629 to solve.

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[5] *See Commercial Availability of Navigation Devices*, 20 F.C.C.R. 6794 (2005)

CableCARD Is Too Cable-centric To Succeed

Plans to replace CableCARD with a more modern solution that uses downloaded software, rather than a physical card, have gone nowhere—in part because the cable industry has dominated the process. The FCC permitted CableLabs, the standard setting body for the cable industry, to set standards without regard to the requirements of other technologies. Tru2way, the two-way system promoted by the cable industry and blessed by the FCC, has proven extremely difficult for providers using alternate technologies such as FiOS or IPTV. Worse, the licensing terms for tru2way require that a developer of compatible consumer electronic devices or services must abide by numerous restrictions set by incumbents to prevent the development of competing services and impose needless expense these developers must pass on to consumers.

With initiatives like tru2way, the cable industry gave up limited control of the hardware in a subscriber's living room, but maintained control of the software subscribers need to access the services they pay for. We have seen that mobile devices with operating systems and software controlled by companies like Apple, Palm, and Google offer a superior experience to locked-down handsets where all software and updates have to be carrier-approved. Similarly, innovative, feature-rich, easy-to-use video devices are far more likely to be supplied by outsiders than by cable companies, whose devices and interfaces are widely-used but little-loved.

CableCARD has not even lived up to the limited goal of promoting competition in devices that only access one-way services. Only CableLabs can certify a device as compatible with CableCARD, and the lack of competition for certification

has made the process time consuming and expensive. Consequently, few compatible devices are available at retail.

Rather than fix the problem by developing new standards and opening the standards process, the FCC attempted to bolster CableCARD by requiring that cable companies use it for their own equipment. The FCC then undermined this effort by granting frequent waivers. Manufacturers of compliant devices cannot achieve the economies of scale needed to make them competitive on price. Nor do they have a dependable platform on which to innovate, discouraging investment. Where developers have tried to develop devices that comply with the rules, the ability to obtain cheaper non-compliant devices by waiver has effectively destroyed the market for compliant devices.[6]

But even when a manufacturer makes it through the obstacle course, overcomes the cost, and brings a CableCARD compliant product to market, problems have not ended. CableCARD customers often cannot access the full range of services for which they pay for a variety of reasons. Customers have reported difficulty obtaining CableCARDs from their cable companies if they have boxes that came without CableCARD included. Even customers with CableCARDs included with the cable box must install the cards themselves, and those that do often find getting them to work difficult. The difficulties are not only logistical or technical. Anticompetitive price arrangements—such as charging all customers for rented set-

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[6] *See* Letter of Harold Feld, Legal Director, Public Knowledge, to Marlene Dortch, December 8, 2009, CSR-7902-Z; CS Docket No. 97-80, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020351973, and attached declaration of James D. Gee, Jr., Managing Member of IPCO, LLC, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020351975.

top boxes, whether or not they use them—are unfair to CableCARD users and discourage adoption. While cable operators have made efforts to address these complaints, problems persist; further thwarting Congress' intent to develop an independent consumer market in video devices to the detriment of consumers and the economy as a whole.

Finally, even if the current system worked well, it is limited because it only applies to cable systems. This, at least, is one area where Public Knowledge and the cable industry agree. Consumer fairness and regulatory parity both demand an all-MVPD solution. Today, satellite TV is more popular than ever, but is exempt from the CableCARD rules, and Verizon and AT&T offer subscription TV services that are incompatible with CableCARD. A system that only applies to cable does not meet the law's requirements, singles out cable on the basis of outdated market analyses, and does not make switching MVPDs much easier. Consumers should be able to use the same equipment with any MVPD—not just with any cable company—and should be able to easily switch from cable to satellite or another MVPD, and vice versa. From a consumer perspective, being locked into "cable" is the same as being locked into Comcast, Cox, or whatever the local cable company is.

These problems continue, five years after the FCC adopted the CableCARD rules, because the FCC has not been successful in its responsibility to implement the law as required by Congress. Too often in this process the FCC has viewed the cable industry as a "client" and "stakeholder" to be serviced, rather than putting the interests of consumers first. For the FCC to implement the law properly, and create

the innovative and competitive market Congress intended consumers to enjoy, the FCC must take a new approach focusing on the interests of MVPD subscribers.

The Video Gateway Is the Fresh Approach That Is Needed to Promote Competition and Implement the Law

The FCC should take quick action to fix the CableCARD system, which many consumers and competitive devices still rely on. At the same time, a fresh approach that applies to all MVPDs, as the law requires, is needed. That's why Public Knowledge, Media Access Project, Consumers Union and others submitted a petition to the FCC last December asking it to adopt a "video gateway" model, which will finally open up all subscription TV networks. You can use a Mac or a PC on your broadband connection without having to ask your ISP for permission, and you don't have to buy a different computer depending on whether you have cable, DSL, or fiber broadband. This is exactly the model that should be replicated with subscription TV: you should be able to buy devices at retail that "just work," whatever kind of service you have.

Under the gateway proposal, the FCC would require that all MVPDs provide consumers with a simple device that communicates with the MVPD network and makes MVPD services available in a standard way to third-party devices—bridging the gap between closed and proprietary MVPD networks and the open and competitive home media ecosystem.

The gateway approach will provide a single, nationwide, technology-neutral standard that allows competitive devices to work with any MVPD. Without this, the market will continue to be segmented into different technology islands, and new entrants will find it difficult to achieve economies of scale and market their

products. A standard needs to be a standard. There can be no exceptions or waivers, and proposals that call for a "gateway functionality" to be built into set-top boxes create an opportunity for the same kind of discriminatory pricing that has suppressed the competitive marketplace in video devices for many years. All of the services an MVPD offers need to be available through the gateway. Consumers should not have to care about how their video gets to them, and services they pay for shouldn't only be available to people who buy equipment from preferred suppliers.

As the history of Section 629 shows, technology alone will not promote competition. Our petition asks the FCC to rethink its non-technical regulations as well. For years, cable companies have mixed equipment and service charges in a way that makes it hard for outsiders to compete. The FCC must not allow this practice to continue, as a competitive market can only exist where consumers have the information they need to make informed choices and where MVPDs cannot take unfair advantage of their position in the consumer's home. In addition, the FCC must commit itself to developing a speedy complaint process and swift enforcement of the rules it adopts. Without these additional rule changes and institutional changes, the proposed gateway will simply become the next CableCARD, undermined by second-class service and third-class support.

The video gateway is the best and lowest cost way to achieve standardization. It only requires that there be a single standard for accessing services on the different kinds of MVPD networks—the networks themselves will not require significant upgrades to support it. Satellite, wireless, DSL, cable, and

fiber-to-the-home broadband networks are as different as can be. Different broadband providers can deploy different technologies and differentiate themselves through pricing, speed, bandwidth, and reliability. But because home broadband networking technologies are standardized, people can walk into Best Buy and purchase compatible equipment without having to know the technical details of their equipment, and when they move they do not have to throw it all away.

Implications For The Broader Digital Future

Competition in Internet-delivered, or over-the-top, video is a model for what could happen with MVPD video if the barriers to entry are broken down. Dozens of companies offer services and create devices that work over broadband, offering innovative video products with easy-to-use interfaces. But relative to MVPDs, over-the-top video is still a niche product that is not a full substitute for MVPD programming. There are substantial differences between facilities-based MVPDs, which run wires into the home or have access to exclusive spectrum, and over-the-top services that compete on a level playing field with other over-the-top services. The existence of over-the-top video does not mean that the gateway is not needed, and over-the-top services should not need to support the gateway. At the same time, by allowing devices to mix over-the-top and MVPD services, the video gateway may help over-the-top services gain even more popularity, and this in turn might help some consumers who don't need, or don't want to pay for, the full lineup of MVPD programming to "cut the cord" and get all their video from the Internet.

There is a historical analogy, too. In 1968, the FCC issued its *Carterfone* ruling,[7] making it clear that consumers have the right to use any non-harmful device on the telephone network. It followed this up with rules that established a standard interface that competitive devices could use to communicate with the telephone network. If it weren't for the FCC's *Carterfone* decision, it would have been impossible for consumers to use their telephone lines with modems to connect to the Internet without asking for special permission, and the digital revolution might have been delayed.

Some people have said that the market is moving in this direction already. Respectfully, it is not. There are a lot of market initiatives going on right now, but there is no reason to think that any of them will give us what the video gateway will: A nationwide, all-MVPD solution that allows third-party device competition to thrive. That's the kind of solution that's needed to satisfy the law. No one is saying that MVPDs have to become "dumb pipes." In a video gateway system, they will continue to differentiate themselves with various pricing plans, bundles of channels, and video-on-demand and other enhanced services, just as they do today.

Conclusion

The gateway is the best way to allow competition to bring the same innovation to video devices that we've seen in other areas. It is the best way to bring the benefits of broadband to the living room, which will help close the digital divide. Though I welcome debate on how the FCC can best make sure that consumers benefit from video device innovation, I reject the suggestion that years of

[7] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

incumbent opposition and false starts mean that the FCC should disregard the law, forget competition, and hope that things will just work out in the end. I ask that all members of this subcommittee support the FCC as it takes necessary steps to promote consumer choice.

Thank you.