TESTIMONY OF KYLE McSLARROW
PRESIDENT AND CEO
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

on
The National Broadband Plan: Competitive Availability of Navigation Devices

before the

Committee on Energy and Commerce
Subcommittee on Communications, Technology, and the Internet

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Good morning, Chairman Boucher, Ranking Member Stearns, and Members of the Subcommittee. My name is Kyle McSlarrow and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association. Thank you for inviting me today to testify on the competitive availability of navigation devices.

As you know, the Federal Communications Commission (FCC) last week opened two proceedings seeking comment on video device issues and how best to implement Section 629, the navigation device provisions of the Communications Act. First, the FCC adopted a Notice of Inquiry ("NOI") seeking comment on a "long-term" solution that will enable consumers to purchase "smart video" devices that will work with all multichannel video programming distributor's ("MVPD's") systems. Second, the Commission adopted a shorter term Notice of Proposed Rulemaking ("NPRM") seeking comment on proposals to improve the current cable-centric CableCARD regime while the longer term approach it proposed in the NOI is explored. The cable industry fully supports the Commission's examination of these issues and its efforts to make the goals of Section 629 a reality.

As the FCC recognizes in the "Smart Device" NOI, the video landscape has grown dramatically more competitive since the navigation device requirement was enacted as part of the Telecommunications Act of 1996. Four of the ten largest MVPDs now are either direct broadcast satellite (DBS) or telephone companies who collectively serve almost 40 million customers and whose share continues to grow. There is also now a flourishing and rapidly-growing market for Internet-enabled devices that offer consumers an ever-widening array of

choices for information, entertainment, and communications applications – a development that is itself a testament, in part, to the massive investment by our industry to innovate and bring high-speed broadband Internet to more than 90 percent of American households.

The cable industry is committed to providing video content to consumers where and when they want it, on all possible consumer devices, and for those devices to be innovative platforms for new applications. We want consumers to be able to buy video devices at retail and to know that cable content can be among their video sources. Indeed, NCTA and its members have been in the forefront of promoting innovation in consumer video devices for over two decades. The original analog set-top box, in use for decades, gave way to the first generation of digital boxes in the 1990s, which have rapidly yielded to advanced set-top boxes that today deliver HD television, caller ID on the TV, video-on-demand, and DVR capability. Our tru2way agreement with major consumer electronics (CE) manufacturers enables CE manufacturers to build retail digital cable ready devices that can access all of cable's video services, including video-on-demand and other interactive services – without the need for a set-top box. And cable operators themselves are deploying a new generation of cable set-top boxes that use tru2way middleware capable of running applications which provide the opportunity to unleash innovation by third party applications developers on a new national platform.

The cable industry stands ready to explore new cross-industry approaches to develop a fully competitive and innovative retail video device marketplace. Indeed, we have called for a broad FCC proceeding on this set of issues for the last three years in order to accomplish this goal. That's why we applaud the FCC's adoption of the NOI, particularly its overarching recognition that all video providers must be part of the solution. In order to aid the FCC's and this Subcommittee's consideration of these issues, we proposed earlier this year a series of

consumer principles governing video devices that we think can and should serve as the foundation for new, consumer-driven approaches to addressing the future of retail navigation devices. We are pleased that the Commission, in its NOI, references our consumer principles and concludes that they are "largely supportive of [the Commission's] objectives in launching this proceeding."

Promoting Competition and Choice in Video Devices

The consumer principles NCTA submitted to the FCC outlined a foundation for Commission and inter-industry efforts to support innovation and consumer access to video services, from any source:

1. Consumers should have the option to purchase video devices at retail that can access their multichannel provider's video services without a set-top box supplied by that provider.

2. Consumers should also have the option to purchase video devices at retail that can access any multichannel provider's video services through an interface solution offered by that provider.

3. Consumers should have the option to access video content from the Internet through their multichannel provider's video devices and retail video devices.

4. Consumers should have the option to purchase video devices at retail that can search for video content across multiple content sources, including content from their multichannel provider, the Internet, or other sources.

5. Consumers should have the option to easily and securely move video content between and among devices in their homes.

6. Consumers should be assured the benefits of continuous innovation and variety in video products, devices, and services provided by multichannel providers and at retail.

7. To maximize consumer benefits and to ensure competitive neutrality in a highly dynamic marketplace, these principles should be embraced by all video providers, implemented flexibly to accommodate different network architectures and diverse

> equipment options, and, to the maximum extent possible, serve as the basis for private sector solutions, not government technology mandates.

We believe that these principles should be implemented in ways that facilitate the deployment of different video device options in response to dynamic and varying consumer demands, rather than requiring that all devices include the same features for all consumers. They should allow for the possibility of ever more innovative devices, such as set-back boxes, gateways, and network interface units, while preserving alternative possibilities such as innovation in the network or the cloud which may lead to fewer or simpler devices in the home. None of us can predict which is the better or more likely path to success and it is quite possible that multiple paths will emerge. The Commission's NOI explores these very issues. And, while asking a number of questions about one such device (which it calls "AllVid"), the NOI also seeks comment on "alternative proposals to the AllVid concept that could lead to the implementation of a competitive market solution for smart video devices." In particular, the NOI asks "whether the movement of functions away from navigation devices and into the cloud or network might represent a viable alternative." These are the right questions to ask.

It is clear that any new policy must apply to all MVPDs, across all technical platforms. We are very pleased that this principle was recognized not only by the FCC in its NOI, but also is a view shared by the consumer electronics (CE) industry, TiVo, and Public Knowledge, among others.

All MVPDs are covered by Section 629 and must play a part in a Section 629 solution, as traditional cable companies and Verizon have done with respect to the CableCARD regime. In a market where nearly 40% of pay television subscribers obtain services from DBS or the telephone companies, a cable-centric solution cannot succeed. Consumers are unlikely to pay a premium to own a retail navigation device that won't work with DBS providers and most telco

TV providers without a set-top box from the provider. If there is to be sufficient room for innovation and competition in networks and services, then there should be room for all MVPDs to innovate and compete.

Thus, if the government concludes that particular devices or particular rules are appropriate to promote competition or to serve other goals, then it only makes sense for those requirements to apply to all MVPDs – as the FCC's NOI proposes. For instance, the objective of enabling consumers to take their devices with them when they move from one community to another is valid regardless of which video provider the customer uses. Likewise, portability is incomplete if a consumer who is not moving, but simply wants to change video service providers, can't use his or her current video device on another provider's network.

Second, rigid technology mandates are most likely to be inappropriate for an industry as dynamic as the video distribution business. By way of example, the FCC's 2003 plug-and-play rules even specify the output connectors on the back of operator-supplied set-top boxes – including one port, the 1394 or "firewire" connection – which consumers use rarely, if ever. The FCC recognizes this issue in its just-released CableCARD NPRM, and proposes giving cable operators greater flexibility to choose appropriate outputs to include in their set-top boxes. Technology mandates run the very real risk of imposing solutions that are outdated the moment they go into effect and of undermining the very innovation we all seek to achieve. Even if technical mandates were imposed on all MVPDs, such an approach would also risk picking winners and losers in this marketplace since Xbox, Roku, Vudu, and other devices sold by non-MVPDs would presumably not be subject to any such regulations and thus would continue to be able to innovate and update their products without the need to seek government permission. In

this regard, as I noted above, we are pleased that the FCC has sought comment on alternative "market-driven" solutions and standards to achieve the goals of Section 629.

Third, one cannot "solve" this set of problems by visiting burdens and responsibilities on one part of the video ecosystem alone. This is why collaboration is so important. For example, it is clear that the creation of a robust market for new video devices requires some assurance that CE manufacturers will actually build and retailers will willingly stock such devices. That is more likely to be achieved through industry collaboration with appropriate government oversight rather than through government mandates. Otherwise, if there are to be government mandates imposed on MVPDs to help a retail market develop, complementary mandates on consumer electronics manufacturers and retailers would be necessary to assure that those devices are "commercially available."

We strongly support technology innovation around the video distribution platform, including potentially using the television as a means of accessing the Internet and content available on the Internet. Indeed, there is no shortage of devices that can put Internet content on the TV today. Internet-enabled DTVs, laptops, Blu-Ray players, Xbox, PlayStation, Roku, Apple, TiVo, Boxee, Slingbox, and Vudu devices are just the tip of the iceberg. We have always invited retail devices to include not only the ability to access cable content, but also the ability to access the Internet. Along these lines, the consumer principles we propose suggest extending the capability to access the Internet to our own leased set-top boxes, giving consumers the option to access Internet video content through our set-top boxes as well as through video devices purchased at retail.

We also are very interested in exploring the concepts advanced by the Commission in its NOI with respect to making cable content more readily available to consumers who use retail

devices. FCC Chairman Genachowski described one such concept that I believe captures the goal very well: "Just as a shopping mall presents customers with numerous retail outlets, smart video devices would offer viewers a single window into pay TV content and Internet content – as well as content that a viewer has already bought or archived." In this regard, we could envision a retail video device having access not only to a Netflix, Amazon.com or other video providers' "store" in the video content shopping mall, but also to the local cable operator's store, each of which could be included in a mall-like directory that would help customers navigate the different stores for video content. Customers could access each video "store" via icons, or through a similar process, in the retail device's display. So, for example, if a customer clicked on the icon for content provided by the local cable operator, the cable content would be presented just as if the customer had accessed it using a set-top box supplied by the customer's local cable operator.

We believe that industry and government collaboration in this area is necessary and we fully intend to work with the FCC and other stakeholders to shape technology solutions that benefit consumers. As Commissioner Copps said in his statement accompanying the NOI, in order for the Commission's goals to be met, "the Commission and the private sector are going to need to roll up their sleeves, work together and reach consensus on what will spur innovation and competition and what will improve the consumer experience." We believe the marketplace changes of just the last few years afford all stakeholders an opportunity to collaborate in new and innovative ways. But, in an era of such rapid technological change, the FCC's consideration of video device issues should be governed by the principle of regulatory humility. We respectfully urge the FCC and Congress to consider the consumer principles we've proposed, which we believe offer an appropriate framework for policymakers as well as inter-industry efforts.

"Fixing" the CableCARD Regime

The FCC's CableCARD NPRM correctly recognizes that the cable-centric CableCARD regime has not fulfilled the goals of section 629, despite the best efforts of the Commission, the CE industry and the cable industry, and that it may well be outdated. The NPRM identifies several issues with the CableCARD regime for which it proposes short-term "fixes" "until the successor solution [applicable to all MVPDs] becomes effective." We think the NPRM's targeted examination of certain CableCARD issues asks the right questions and we remain willing to continue working with our colleagues in the CE industry to resolve any lingering CableCARD implementation issues. We understand that we have an obligation to continue to work hard to refine and improve the consumer experience with the use of CableCARDs.

However, we firmly believe that imposing any additional significant or burdensome CableCARD-related requirements would be misdirected and would simply repeat the mistakes of the past at a time when we have an opportunity to shape a more innovative and collaborative future. The most useful path, as the NOI recognizes, is to focus our efforts on new solutions while correcting past mistakes as needed. Thus, we are particularly pleased that, as part of the CableCARD NPRM, the Commission proposes to increase our industry's ability to deploy low-cost high-definition Digital Terminal Adapters ("DTAs") by providing an exemption to the costly "integration ban" for such devices. Low-cost DTAs are a vital tool for all cable systems to recapture bandwidth that can be used to provide consumers with faster broadband speeds, more HD channels, and other digital services.

The reasons for the limited success of the CableCARD regime are easily identified. First, it was a requirement imposed only on cable operators, in an era when an increasing proportion of consumers bought their multichannel video services from a provider

other than a cable operator. Nonetheless, unlike our DBS competitors and most of our telco competitors, cable companies alone have worked to meet the challenges of Section 629 (including the CableCARD regime) throughout a period of tumultuous technological and market change. Cable operators and major CE manufacturers negotiated the landmark "plug and play" agreement for "unidirectional" devices (UDCPs), which was largely incorporated into the FCC's rules. Then – without regulatory compulsion – the cable and CE industries created informal mechanisms to effectively handle the field issues that inevitably arose with the rollout of new and complex technology. The cable industry also developed MultiStream CableCARDs ("M-CARDs") for use in retail products, enabling consumers to watch and record different channels simultaneously using the same CableCARD.

There were also the usual start-up issues that accompany the introduction of new technology, exacerbated in this instance because the cable and CE industries were *both* introducing products with new technologies that had to be married in the consumer's home – the operator-provided card and the retail plug-and-play device.

Nonetheless, there are now almost 20 million operator-provided, CableCARD-equipped set-top boxes, which are supplied by a growing number of competitive consumer electronics manufacturers, including Pace, Motorola, Cisco, Evolution Broadband, Samsung, Panasonic, and TiVo. However, fewer than 490,000 CableCARDs have been deployed for use in retail CableCARD-enabled devices, despite the expenditure by cable operators of over a billion dollars in additional costs outfitting their own set-top boxes with CableCARDs. This amounts to more than $30 of cable operator "common reliance" insurance for every $1 of CableCARDs in retail devices – a cost no other MVPD (other than Verizon) was forced to bear under the FCC's "integration ban." These costs have been an unnecessary tax on cable consumers.

The fact that consumers have shown little interest in buying these retail devices may simply reflect the reality that the option of leasing devices is preferable to them. That's not surprising, since leased devices are available at government regulated "cost-plus" rates (or rates which are otherwise kept low in markets where effective competition exists) and can be upgraded when the next model is released rather than having to purchase a device at retail and assuming the risk of obsolescence.

Customers may also choose to lease their box rather than buy it because leasing makes it easier for consumers to switch from cable to satellite to telco video services and back again, especially since today's retail CableCARD devices are not supported by the DBS providers or many telephone-company MVPDs. A CableCARD-enabled digital cable ready DTV will work without an operator-supplied set-top box across all cable operators' footprints, but the consumer would need a different and unique set-top box to enable that DTV to work at all with DISH, DirecTV, or AT&T.

No less a source than *Consumer Reports* has recommended that consumers should lease rather than buy their DVR set-top boxes and the Commission itself seeks comment in its NOI on "whether consumers prefer to lease at government-regulated 'cost-plus' rates, whether consumers wish to avoid the risk [of] obsolescence of navigation devices, and whether the inability to 'port' a retail navigation device when he or she changes MVPDs limits the attractiveness of the retail option."

Finally, the FCC also correctly recognizes another reason why a retail market has not developed: "one-way" retail devices were brought to market just as consumer interest was growing in on-demand and other interactive cable services, which those devices did not provide. With respect to that issue, Mr. Chairman, with your personal encouragement, and that of other

policymakers, cable worked with major CE manufacturers and digital television makers to develop the Java-based tru2way solution as the national digital cable-ready "plug-and-play" standard. With this approach, consumers could go into a retail store, buy a flat screen tru2way high-definition television, take it home and access any cable service – including interactive services yet to be created – without having to use a set- top box and with just one remote control. Major cable operators reached agreement on this approach with consumer electronics manufacturers including Sony, Panasonic, Samsung, LG Electronics, Funai (known in the United States under the brand names Philips, Magnavox, Sylvania, and Emerson); set-top makers ADB and Digeo, and chip manufacturer Intel. Numerous other CE and IT companies have signed agreements to develop and produce tru2way devices and applications even though they are not parties to the tru2way MOU. In addition, CableLabs has held a number of productive tru2way Developers' Conferences which provide a forum where cable operators, consumer electronics equipment manufacturers, content providers, application developers, and other stakeholders can learn about and exchange information on the tru2way initiative.

While tru2way will address consumer concerns about service limitations of "one-way" CableCARD-enabled devices, the only real "fix" to the CableCARD regime is to explore how best to ensure that consumers can be provided the option of purchasing devices at retail that access and work with all multichannel video platforms. That is the subject of the FCC's NOI, and it has our strong support.

Thank you again for the opportunity to appear. We look forward to working with you on these challenging issues. I would be pleased to answer any questions you may have.