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FCC's Proposed "AllVid" Regulation Ill-Suited to Today's Dynamic Market

by

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Nearly a year after the FCC adopted changes to its CableCARD regulations, the agency announced on August 8 that its rule changes are now in effect. Or at least most of them. The FCC's new requirement that cable operators include a home networking output on HD set-top boxes won't be going into effect until December 1, 2012.

By administrative agency reckoning, the FCC's CableCARD rule changes might be following a standard timeline for implementing new rules. But the passing of time takes on crucial significance in today's dynamic video market, where device hardware design, software programming, and applications functionality are undergoing dramatic changes.

The length of time it’s taken to put CableCARD rule changes into effect serves as an important lesson about the inability of any regulatory agency to impose technical device design regulations on a dynamic market. This lesson is especially relevant when it comes to the FCC's ambitious but misguided "AllVid" proposal for adopting an ever more expansive regime for video navigation device regulation.

CableCARDs are inserted into cable set-top boxes or independently-manufactured devices that contain security functions and allow access to video programming. They were developed by cable operators in an attempt to comply with the FCC's implementation of Section 629 of the 1996 Telecom Act. Section 629 directs the FCC to

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assure the commercial availability of electronic equipment from independent manufacturers and retailers to access to multichannel video programming. Although not required by the statute, the FCC's CableCARD regulation includes an "integration ban," prohibiting cable operators from combining video navigation and security functions in their set-top boxes. Cable operators must instead rely on CableCARDs to provide security functions for the set-top boxes they lease to their customers.

The soon-to-be implemented changes to the CableCARD regime – which I discussed in an October *Perspectives* paper and which were again modified in part by an FCC order in late January – were first proposed in the FCC's National Broadband Plan. In particular, they were meant to prop up a failed interventionist regulatory policy. For despite the FCC's intentions, consumers have proven more interested in leasing set-top boxes from cable operators than making separate trips to the store to purchase boxes that run the risk of becoming obsolete after a few years' time. CableCARD rule changes were also proposed as an interim measure or prelude to a newer and more expansive regulatory apparatus for video navigation devices called "AllVid."

In a February *Perspectives* paper, I briefly described AllVid as follows:

> At the core of AllVid is a proposed requirement that all MVPDs use and make available to subscribers a special "adapter." The Allvid adapter must operate as a "set-back" device containing certain functionalities (such as access, provision, decoding, and reception) to connect to all video navigation devices (including those manufactured by companies unaffiliated with MVPDs). Alternatively, MVPDs must use an AllVid adapter as a "gateway" device for allowing all consumer electronic devices to access MVPD services.

Whereas CableCARD regulations apply only to cable operators, AllVid would extend to DBS providers as well as telcos that have more recently entered the video services market.

The National Broadband Plan's asserted goal for "AllVid" is "[t]o spur innovation and driving increased broadband adoption and utilization." Behind "AllVid" is the idea that a new set of video navigation design mandates will increase consumers' broadband access without the need for purchasing personal computers. This despite the fact that new PCs now run below $300, despite the fact that broadband-enabled TVs are already on the market (something I've also blogged about previously), and also despite the fact that a surging number of consumers are now choosing to access the Internet through wireless handsets. According to the FCC's latest Wireless Competition Report, Form 477 data indicates that at the end of 2009, "there were 55.8 million subscribers to mobile Internet access services at speeds exceeding 200 kbps in at least one direction – which is more than double the number at the end of 2008." That number is almost certainly higher today.

In its action items section, the National Broadband Plan laid out an ambitious timeframe for implementing AllVid:

> Propose rules in Q4 2010 providing an approach, to be implemented by the end of 2012, to enable consumers to buy smart video devices at retail that can be used with any MVPD and that can fully integrate pay television services, including two-way services, with video received over the Internet.

The FCC released its AllVid Notice of Inquiry last April. But it's easier to propose lofty ideas for standardizing myriad device designs and interfaces than it is to put such ideas into the form of concrete rules to bind myriad device makers and video network operators. So it shouldn't be surprising that more than halfway into 2011 the FCC has *not* released an AllVid proposed rulemaking. And there are plenty of reasons to be thankful that the FCC has restrained itself rather than recklessly forge ahead to impose new AllVid regulation.

As a general rule, Government Shouldn't Design Devices in Dynamic Markets. And if AllVid made little sense when it was adopted, the growth of broadband-enabled TVs as well as wireless tablet devices that can access video content, not to mention cloud-based video content and navigation experiments being undertaken by cable companies, make the AllVid concept appear increasingly outdated. The difficulty of setting technical mandates in a dynamic market means that any future FCC AllVid rules will run the risk of becoming obsolete by the time they are put into concrete proposed rules and eventually implemented. One begins to suspect that AllVid's stay on life support owes significantly to lobbying by competing electronics manufacturers hoping to gain from a regulated competition regime.

Chairman Genachowski praised the President's Executive Order of July 11 regarding Regulation and Independent Regulatory Agencies, issuing a statement that the FCC is "[d]irecting the FCC staff to prepare a plan to continue identifying outmoded or counterproductive rules." The FCC's rules adopted pursuant to Section 629 are certainly outmoded and counterproductive. And as recently reiterated during FSF's Capitol Hill Seminar on regulatory reform at the FCC, Section 629 is especially congenial to deregulatory action. Section 629, rather uniquely among enabling legislation, gives the FCC power to sunset set-top box regulation when the MVPD and set-top box markets are fully competitive and when elimination of regulations would promote the public interest.

As the FCC's recent public notice points out, it is the FCC's new CableCARD requirement that cable operators include a home networking output on HD set-top boxes that will finally be implemented at the end of 2012 – not new AllVid rules. But rather than continue tinkering with its CableCARD rules or mistakenly going through with its AllVid proposal to expand video device navigation regulation, the FCC should consider a deregulatory course correction.

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