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The FCC's Continuing, Costly Video Navigation Device Regulation

by

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On October 14, the FCC issued yet another report and order adopting yet another revised set of rules governing cable set-top boxes.¹ The Commission made a handful of changes to its rules for CableCARDs. Some of those rule changes were prompted by prior failed attempts by the FCC to artificially create or prop up certain segments of the set-top box market. Overall, however, the Commission preserved its basic regulatory restrictions on set-top box functionalities. In short, the report continues the Commission's unnecessary and costly plan for expanded technocratic control of the video navigation device market.

CableCARDs are small devices inserted into cable set-top boxes or independently-manufactured navigation devices that contain security functions and allow access to cable programming. They were developed by cable operators in an attempt to comply with the FCC's implementation of Section 629 of the Telecommunications Act. Section 629 directs the FCC to assure the commercial availability of electronic equipment from independent manufacturers and retailers to access to multichannel video programming. Importantly, Section 629 contains a special sunset provision—according to which the FCC shall cease to apply regulations when it finds the multichannel video programming and video navigation device markets are fully competitive and the public interest favors eliminating such regulations. But despite

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the growth of new dynamic video delivery platforms—including DBS, telco video services, video gaming devices, broadband-enabled smartphones, and PCs with broadband Internet—the Commission continues to favor increasing cable set-top box regulation, as well as expanding regulation to other video navigation devices.

The Commission's latest order established some new CableCARD rules that include requiring cable operators to: provide CableCARDS enabled for switched digital video services on retail devices; allow self-installation of CableCARDS where device manufacturers offer installation instructions; provide multi-stream CableCARDS as a default offering; make CableCARD certification easier and simpler for device manufacturers; and reduce the price of cable service packages for customers who use retail devices by the cost of a leased set-top box.

But at the same time, the Commission's cutbacks on some of its technical requirements for CableCARDS reveal significant shortcomings to the FCC's regulatory approach to set-top boxes. For instance, the Commission finally eliminated its requirement that cable operators include a Firewire data connection interface in all HD set-top boxes they distribute to customers. (Firewire, also known as an IEEE-1394 interface, is an external data connection for audio and video transfers). First mandated by the Commission in 2005, the Firewire mandate was a bust. Industry claims some \$400 million in compliance costs for a data port that was never successfully adopted in the marketplace.² Most HD TV owners, for instance, use HDMI ports for audio and video transfers, not FCC-mandated Firewire ports.

Firewire should serve as a lesson for the Commission: "Government Shouldn't Design Devices in Dynamic Markets."³ There is no good reason to think the FCC should engineer electronic devices and interfaces based on its own views about what technologies and applications work best. Nor is there good reason to trust the FCC's predictions about what kinds of investments cable operators and device manufacturers should risk in research and marketing for devices and interfaces to meet future consumer demands.

The Commission also exempted from its integration ban new one-way navigation devices that include functionalities such as conditional access, security, and HD signal processing but which do not include recording functionalities. (The ban, put into effect by the FCC in 2007, prevents cable operators from integrating conditional access and security functionalities into its own set-top boxes.) In establishing the new exemption, the Commission conceded that "[t]he integration ban raises the cost of set-top boxes for cable operators, which discourages operators from transitioning their systems to all-digital."⁴

The costs of the integration ban — ultimately leading to more expensive devices for consumers — should have lead the Commission to jettison its ban. But the Commission instead tries to cabin its concession by insisting that the exemption can still work "without undermining the effectiveness of the integration ban."⁵ This despite the Commission's own admission that since the ban went into effect: "most

manufacturers have abandoned the [CableCARD] technology. Indeed, since July 1, 2007, cable operators have deployed more than 22.75 million leased devices pre-equipped with CableCARDS, compared to only 531,000 CableCARDS installed in retail devices connected to their networks."⁶ Consumers appear to prefer leasing set-top boxes from cable operators and trading those boxes in when more advanced devices become available over making separate trips to the store to pay the up-front costs of purchasing their own devices that risk turning obsolete in a few years' time. Regardless, in the face of its own assertion and numbers pointing to manufacturer abandonment of CableCARDS the Commission nonetheless still insists its integration ban provides better support and incentives for CableCARD adoption.

The Commission also insists it will keep the integration ban in place until it adopts a successor regulatory apparatus for video navigation devices. In fact, the "AllVid solution" that was initially proposed in the National Broadband Plan has been described in a Commission Notice of Inquiry as "a successor technology to CableCARD."⁷ AllVid, however, is much more expansive — it calls for all multichannel video programming distributors (MVPDs) to install a "gateway device or equivalent functionality" in homes using video navigation devices by year's end, 2012.⁸

Thus, the real significance of the Commission's CableCARD order is the extent to which it reveals the Commission's mindset for its forthcoming regulation of video navigation devices for all MVPDs. Unfortunately, a reading of the Commission's order suggests the Commission is continuing to disregard the variety of video delivery options available to consumers spanning multiple platforms — including DBS, telco video services, video gaming devices, broadband-enabled smartphones, and PCs with broadband Internet connections. The Commission's regulatory ambitions also appear undeterred by its unsuccessful attempts to regulate technical features of set-top boxes, including its integration band and Firewire mandate. And the Commission still refuses to take seriously Section 629's unique sunset provision, according to which the FCC shall cease to apply regulations when it finds the MVPD and navigation device markets are fully competitive.

The history of the Commission's severely shortsighted CableCARD regulation should temper the agency's ambitions for expanding such regulatory efforts to other video navigation devices. And Section 629's sunset provision — a rare instance when Congress itself explicitly recognized that a regulatory mandate might become counterproductive — should dispel any notion that the Commission is somehow compelled to regulate video navigation devices. But with its "AllVid" rulemaking scheduled for later this year, the Commission now appears more than willing to try building upon its lack of prior success in this ongoing effort of "design by bureaucracy."

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¹ See Third Report and Order on Reconsideration ("Order"), CS Docket No. 97-80, PP Docket No. 00-67 (October 14, 2010), available at:

http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1014/FCC-10-181A1.pdf.

² See Leslie Ellis, "Firewire: A \$400 Million Black Hole," *Multichannel News* (June 28, 2010), available at: http://www.multichannel.com/article/454241-Firewire_A_400_Million_Black_Hole.php.

³ See *id.*, FSF blog (September 23, 2010), available at:

<http://freestatefoundation.blogspot.com/2010/09/government-shouldnt-design-devices-in.html>.

⁴ Order, at 24, para. 45.

⁵ *Id.* at 25, para. 49.

⁶ *Id.* at 4, para. 4.

⁷ See National Broadband Plan ("Plan"), Chapter 4, Recommendation 4.12, at 51-52, available at:

<http://download.broadband.gov/plan/national-broadband-plan-chapter-4-broadband-competition-and-innovation-policy.pdf>; Notice of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (April 10, 2010), at 2, para. 3, available at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-60A1.pdf.

⁸ Plan, at 51.