

Statement of
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Before the
Subcommittee on Telecommunications and the Internet
House Energy and Commerce Committee

Status of the Digital Television Transition Part III

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Chairman Markey and Ranking Member Upton, thank you for inviting me to appear again before your Subcommittee on behalf of Best Buy and the Consumer Electronics Retailers Coalition (CERC).¹ I was privileged to participate in the first part of this oversight hearing, on March 28 of this year. Looking back over the past seven months, I want to share with you our view of the progress that has been made, and of the challenges and determinations that lie ahead.

Where We Were Then

Back in March, our DTV Transition Coalition, which CERC founded along with APTS, CEA, and NAB, was not yet two months old. Best Buy is one of its 170 members. You will be hearing today of all that we have accomplished by working together on common messaging and consumer outreach, and our joint view of what else needs to be done. We are very proud of the role that CERC has played in working cohesively with the other members of the private and public-interest sectors in consumer

¹ Other members of CERC include specialist retailers Circuit City and RadioShack, and general retailers Amazon.com, Sears, Target and Wal-Mart, as well as the three major retail associations – the North American Retail Dealers Association (NARDA), the National Retail Federation (NRF), and the Retail Industry Leaders Association (RILA).

education and in helping to coordinate a cohesive message on the impact that the DTV transition will have, and the choices consumers will have to insure that every household is able to receive a TV broadcast signal on February 18, 2009.

In March, we had commented on and endorsed the NTIA's CECB program regulations, and we were working constructively with the NTIA staff about what would attract the greatest possible number of retailers, of all sizes, to participate in the program. At that time we were still more than four months away from NTIA's selection of a Program Contractor. CERC and its members had extensive discussions with any and all potential contractors to help them shape plans that would be inviting to retailers.

Best Buy participated actively and with determination in many of these meetings and briefings. But we could have no idea which team would be selected, or what systems or technologies they would ask us to implement. The proposals to the NTIA were creative but varied widely in concept, form, and implementation. Some of the proposals may have made the program technically infeasible for us, which is why I was unable to comment more specifically about our intentions on March 28th.

Where We Are Now

To give you a snapshot of where we are now, I was able to be more specific about our plans in a filing, that I signed, that we made with the FCC, in its DTV Consumer Education Docket, two weeks ago:

Best Buy hereby advises the Commission of the following public education and NTIA undertakings, some of which are already in process:

- As of October 1, 2007, Best Buy stopped selling analog-tuner video equipment.
- Best Buy will participate in the NTIA CECB program.

- Best Buy will educate the public in many ways including as follows:
 - Best Buy will include educational items about the DTV Transition and the end of analog broadcasting in its in-store “video loops” that are shown on the TVs displayed for sale.
 - Best Buy will deploy retail signs about the Transition and the end of analog broadcasts.
- Best Buy will conduct additional and more specific training for its sales associates about the DTV Transition and the NTIA CECB program, including appropriately addressing the expressed needs of customers for CECB products in aid of their existing TVs, if this will suit their needs better than would the purchase of a new TV.
- Best Buy will include DTV Transition information in a variety of advertisements.
- Best Buy will make available to its customers its own pamphlet material as to the DTV transition in our stores, plus that of the FCC, NTIA, CERC, and DTV Transition Coalition [via BestBuy.com].
- Best Buy will continue to use its web site to educate consumers about the DTV Transition and the NTIA CECB program as more specific information becomes available.

I have submitted the full text of this filing, and similar filings made by our fellow CERC Board Members Circuit City, RadioShack, and Target, for the record as an Appendix to this statement, along with the English and Spanish versions of the CERC Consumer DTV Guide.

Where The Government Is Now

The FCC. We share your interest, Chairman Markey, and that of Chairman Dingell, in the FCC’s pending rulemaking on DTV Consumer Education. In CERC’s Comments filed on September 17 in that rulemaking, we agreed that FCC leadership is vitally important to a successful Transition, and we pledged to work with Chairman Martin and the Commission to these ends. CERC said (emphasis in original):

As the critical time periods for the DTV Transition approach, CERC and its members believe it is more important than ever that there be a *unified* government and private industry message to the public, and a carefully coordinated means of reaching the public and answering citizens' questions. CERC agrees with House Energy and Commerce Chairman Dingell and Subcommittee Chairman Markey that the Commission should play a leadership role in these respects. We pledge the cooperation of CERC and its members to continue to assist the Commission in this role.

Over the last month most CERC members have consulted with the Commission, via the Chairman, the Chairman's office, bureau staff, and/or Commissioners' legal advisors, and in this process have advised of their specific plans to inform and assist their customers as key Transition dates approach. Undertakings discussed with the Commission, some of which are already in process, cumulatively² are expected to include:

- Additional and more specific training for sales associates
- Retail floor signage about the Transition and the end of analog broadcasts
- Pamphlets with retailers' own advisories, distribution of FCC, NTIA, CERC, and DTV Transition Coalition printed material; links / frames to CERC and official sites
- Inclusion of DTV Transition advisory information in advertising supplements
- Participation in the NTIA CECB program
- Specialized web site about Transition as part of web store
- Inclusion of Transition / end of analog information in in-store "video loops" (specialist retailers)
- Continued implementation of Commission-required labels until stocks of covered products are exhausted

Given the variety in the sources and, potentially, the content of published material and Internet advisories pertaining to the Transition, CERC, as a member and founder of the Steering Committee of the DTV Transition Coalition, has urged that early attention be paid to coordination in and rationalization of messaging and consumer contact points. For example, the public and private

² As CERC includes specialist as well as general retailers, and store-front as well as web-based retailers, not every undertaking may be feasible for execution by every CERC member.

sectors need to pay careful attention to the number of “1-800” numbers that are offered to the public. They need carefully to coordinate the subject matter of each, the message communicated, and the resources available for answering questions. In this respect, the leadership role to be played by the Commission is as obvious as it is necessary. ***CERC and its members specifically commit to working with the Commission, via the DTV Transition Coalition and otherwise, to assist the Commission, pursuant to the requests of Members of Congress and the Commission’s own responsibilities, in achieving a unified message that is strongly in the public interest at this critical time.*** We will also be responsive to additional needs as identified by the Commission.

The NTIA. As Best Buy’s own October 16 letter to Chairman Martin and the other Commissioners indicated, Best Buy has announced publicly that it *will* participate in the NTIA “CECB” Program. Similar public statements (some with qualifications based on facts yet to be known) have been made by our fellow CERC Board members Circuit City, RadioShack, Target, and Wal-Mart.³ Naturally, your Subcommittee, and members of the Other Body, are interested in further details, as you were on March 28 – *when* will we have the boxes on our shelves, *when* can we begin accepting coupons, *what* are our inventory plans, *how* will we serve our customers in a variety of situations, such as *expiring coupons, product returns, and upselling.*

As these are all business decisions, even though I am here for CERC as well as Best Buy, I can only address such questions on behalf of Best Buy, and I can only give you answers based on the best information that is available to us at this moment. These are important questions and I want to share with you our perspectives based on our latest information and perceptions:

³ CERC is also monitoring and encouraging non-CERC members’ interest in participation and can report that a number of retailers – both large and small – have also indicated great interest in the CECB program.

- **When we will have boxes and accept coupons.** As soon as we can *and* satisfy our customers' expectations and guard against fraud or mistake. The precise answer depends on close coordination among four groups: our vendors, the NTIA, the IBM / CLC team, and ourselves.
 - **Vendors.** As you know, only two vendors have been certified at this time. Nevertheless, Best Buy is working diligently on its specification and ordering plans. We do need to work with our vendors to gauge demand, manufacturing capacity, and determine appropriate inventory levels, which depend principally on the next several factors.
 - **NTIA.** As the Subcommittee heard on October 17, NTIA has struggled with competing considerations – on the one hand it would like to begin distributing coupons as close to January 1, 2008 as is possible. On the other hand, it has no control over the fact that coupons expire in 90 days, so does not want to mail them until there is a reasonable assurance of fulfillment – that retailers and CECB manufacturers will be ready to meet the demand.
 - **IBM / CLC Team.** Best Buy has been working with CLC on a frequent basis to meet our objective of being able to accept CECB coupons, *and* be reimbursed for them, at the earliest possible date. Based on these discussions, with respect to our stores we are now projecting that the date for having our Point of Sale and other necessary systems modified and thoroughly tested, so as to resist fraud and consumer disappointment, would be *closer to April 1 than to January 1.*

Based on our previous investigations and consultations we were encouraged with the selection of IBM / CLC and the redemption options they presented for retailers to participate in the CECB program. However there is some information we are still waiting to receive that is required for successful implementation of the coupon solution. In addition, their solutions do not work well for us with respect to our web store. We foresee providing full CECB information on our web site but at this point it is highly unlikely that we will be able to process coupons on line. *However*, this does not seem as vital to the success of the program as involving our storefronts, *provided* that there is a sufficient number of web sellers, because UPS and FedEx have the same geographical reach irrespective of the identity of the seller. (If there are *not* enough web-based sellers, this suggests an issue with the program rather than one as to Best Buy.)

- **Best Buy.** Best Buy's final determinations and plans must depend on the variables discussed above. I can assure you, however, that Best Buy wants to be able to offer a solution for our customers in any

product area of concern to them that is within our sphere, and the CECB is such a product area. We are working *very* aggressively with a vendor and with CLC, and to gauge and meet demand. We want to work with CERC, the rest of the Transition Coalition, the NTIA and the FCC to identify the sources of demand, track the issuance of coupons, and assure that we will have product positioned to meet the demand. This will entail some guesswork by all involved. To the extent it is commercially appropriate we will keep this Subcommittee informed as to our successes and challenges.

My candid evaluation and recommendation based on everything Best Buy knows today is that it would be prudent for consumers who send in their Coupon applications in early January to be told *not to expect* to receive their coupons before April 1. If government and industry, working together, can *exceed their expectations*, that will be great. But I think consumers will understand that the Transition will occur more than 9 months after April 1, 2008 and that no matter when received they will have about 90 days from receipt to use the Coupon. We always want to exceed consumer expectations. What we *don't* want to do is to leave our customers apprehensive, or to set unrealistic expectations that we and our government and manufacturer partners can meet only through implementations that would open the system up to fraud or consumer inconvenience. This would only lessen the public's confidence in it.

- **Expiring Coupons.** CERC had opposed the 90-day expiration of CECB Coupons on grounds of potential customer confusion and disappointment, but it is statutory and hence binding on the NTIA so we must deal with it. On October 17 Secretary Kneuer was asked what a retailer who happened to be out of stock would do if a customer came in with a Coupon that was about to expire, and he (rightly, in my view) said that he expected the retailer to handle it in a commercially reasonable way. I can give you a more specific answer for Best Buy. We could give that customer a number of options that are consistent with the requirements of the law and the Program:
 - **Complete the sale** and give the customer the choices of –
 - Pickup at the same store at a later date.
 - Home delivery (a standard charge for shipping may apply).
 - **Refer the customer** to another Best Buy store with inventory (we do not understand the Program to allow us to accept the coupon but to complete the sale at a later date).

These options involve time-consuming work for us as well as our customers. Obviously, this provides a **commercial incentive** for us simply to have the boxes on-hand whenever customers come in with Coupons. As I testified in March, however, the **demand** for CECBs is exceedingly difficult for us, our vendors, the NTIA, and the IBM Team to predict, either in the aggregate or in terms of timing; not to mention the complexity of getting each store's inventory correct in a multi-store national chain.⁴ So we can only do our best. Please remember, Best Buy regards every CECB customer as a potential Best Buy customer for life over a broad range of products, so we have no incentive to disappoint or frustrate any customer.

- **Product Returns.** When the NTIA sought public comment in its Notice of Proposed Rulemaking, it proposed not allowing product returns due to the difficulties these could cause for the Coupon program. CERC commented that this would disappoint customers, and proposed that all elements of the program should be reversible and refundable, including the Coupon itself. NTIA did provide a more flexible scheme as to *exchanges*, but ruled that it could not allow a retailer to re-validate a used Coupon, as only the Government can issue them.
 - So, a retailer that carries more than one CECB model can exchange one CECB model for another, subject to its returns and exchange policy. If the model is higher priced, the consumer would be expected to pay the difference. If the model is lower priced, the retailer can refund the difference (only as much as it exceeds the coupon value). Similarly, a retailer can accept a return and in such case can refund to the consumer the price paid over and above the Coupon value. But it is not in our power to restore value to a coupon if a consumer wishes to return the CECB that he or she purchased. *This is one of many reasons that we need to work with government and industry to help educate consumers against unnecessary and improvident use of Coupons to buy CECBs that the consumer ultimately would want to return.*
 - Of course, for every return of a product for which we had accepted a coupon, we will need to inform CLC and/or the NTIA that the product was returned. We will need to work out the accounting for the \$40 reimbursement. If we cannot re-sell the product as new, we are likely to lose money on it through no fault of our own or of our vendors.

⁴ Just last week, Zoran, a major component supplier, predicted publicly that the aggregate demand will not exceed 25 million CECBs. Such estimates have varied very widely and will be subject to a number of decisions, by others, yet to be taken, and events yet to occur.

Obviously, then, *Best Buy has a strong commercial incentive to try to avoid product returns*, as they are inconvenient for our customers, damaging to our business, and complicated for the NTIA Program. (This is true for all the products we sell.) We will, however, accept them, as we must.

- **“Upselling.”** On March 28 I was, I must admit, somewhat surprised to hear the level of concern about potential “upselling” – steering consumers away from CECBs and toward new TVs, or other non-subsidized products, instead. Let me restate that *if an informed customer wants and needs a CECB, that will be the focus of the transaction at Best Buy. Anything else would be self-defeating on our part as it would damage long-term relationships with our customers, which are our lifeblood, and would lead to product returns which, as I have described, will cost us money and harm the NTIA program.* Conversely, as I indicated above, if a customer *has no over-the-air antenna and does not expect to use one*, the customer likely has no need of a CECB and it would ill-serve this customer, as well as the NTIA program and the Congress and the FCC, for us to try to sell one to this customer.

On the subject of “upselling,” CERC’s Executive Director, Marc Pearl, made some important points when he testified in the Other Body on October 17, and I want to share them with you and to assure you that Best Buy was consulted in their preparation, and endorses them:

“We have to bear in mind that we have two transitions, in parallel, in which our customers are interested. One is from analog to digital *broadcasting*. The other, which is of more interest to the majority of our customers, is from Standard Definition to High Definition *programming*. Our challenge and goal is to fully explain, to all customers, their options with respect to each of these transitions, which overlap but are of different natures. Already, *most* of the TV products on display in stores today are HDTV receivers. Retailers would not be serving their guests if they failed to explain how these products, and the programming they can support, differ from older, conventional displays and programming.

“We need to explain about the DTV Transition as well, but this is of concern primarily to those customers who rely on antennas. We have published much material on this subject and will address it on the sales floor as well. At present, with no CECBs on the shelves and some details still to be learned, we can only give these assurances, which are based on consultation with our members:

- Legitimate retailers are dedicated to learning and meeting a customer’s needs and wants. These will largely be determined by the sources of programming in which the customer is most interested, and the available viewing space and budget.
- If a customer is interested in obtaining a CECB to service an existing TV, VCR, etc., this will be the focus on the sales discussion and transaction. If the customer is interested in upgrading to a new digital TV or an HDTV display, to better experience and enjoy watching DVDs or high definition DVDs, or in receiving digital broadcasts in a new TV or recording product, this will be the focus of the transaction.
- It would be foolhardy to try to divert a customer from his or her needs or wants. Most customers do substantial research before visiting a store to make a purchase, and improvident purchases lead to product returns, which are costly for retailers.”

“Enforcement”

Knowing the interest of this Subcommittee in the FCC’s role in consumer education, and in potential “enforcement” of requirements, I want to share with you our experience to date, as both a caution and a candid plea for this Subcommittee, through its oversight authority, not to push the Commission into areas in which the FCC’s authority is questionable at best, and in which it has little experience or expertise.

The original “DTV Transition” legislation, as crafted in this Subcommittee, required manufacturers of televisions with only analog tuners to affix consumer advisory labels, which retailers could leave on the product or move to an adjacent shelf position. This provision, on which the CERC worked closely with CEA and with Committee staff,

unfortunately was dropped from the Senate Budget Reconciliation bill on grounds of germaneness, despite having been uncontroversial.

In late April of this year, without appreciably consulting retailers, the FCC adopted a labeling rule that applied only to retailers (by this point further importation of “analog-only” products was no longer allowed), and, unlike the House bill (or the current H.R. 608), covered recording products as well as TVs. It was adopted at the FCC’s April 25 meeting, not released until the next week, and in the absence of an FCC press conference after that particular Public Meeting, it took several days and inquires to confirm what it was meant to cover. It became effective, on extremely short notice, on May 25.

Beginning May 29, the FCC sent inspectors from all of its regional offices into retail stores to gauge compliance and issue citations. *In the absence of manufacturer labels or information, even these inspectors – trained engineers – made numerous mistakes as to which TVs and recording products had only analog TV tuners.* Best Buy and other retailers made extensive, comprehensive, and good faith efforts to label every affected product – even though this is not at all a normal process for most retailers – but starting in July the FCC began recording proposed fines of \$8,000 for *every instance* of a single store offering a product without a label. Despite these good faith, and largely effective executions in stores, Best Buy and other retailers face considerable fines.

Our communications with the Commission on this issue, and on the Commission’s current DTV Consumer Education rulemaking, have begun a dialog in which Best Buy and other retailers have offered to work *with* the Commission on a voluntary basis to devise and execute a plan to provide consumer educational material in

stores and to help meet other goals of Chairman Martin. As part of this dialog Best Buy announced that, as of October 1, it had stopped selling “analog-only” tuner products entirely. Therefore we should have no remaining labeling issues, and we have informed the Commission as to specific plans to implement their Consumer Education goals, as well as our own, which have been in preparation for more than a year. Other retailers have made similar initiatives. We have spent much more on these initiatives than the FCC had proposed to fine us. Yet because the Commission’s enforcement procedures were not designed for our industry, we find ourselves in the position of dealing with an agency that seemingly cannot take “yes” for an answer. This has been very frustrating and has diverted us from the partnership that we wish to pursue with the Commission.

In your hearing on October 17, it was suggested that the Commission should similarly involve its enforcement engineers in policing, and potentially assessing its own sanctions, in parallel with those of the NTIA, as to retailer implementation of the NTIA program. While our counsel have now dealt with most of the District Offices and have only admiration for the diligence and good faith and intentions of their personnel, based on our frustrating experience with labeling, I must say in all candor that such a parallel enforcement and sanctioning regime would likely pose a disincentive to retail participation in this vital program. Based on all its members’ experiences, here is what CERC had to say on this subject in an October 19 filing with the Commission in the DTV Consumer Education docket:

While not privy to the language of any potential Order or Rule, the CERC representatives expressed concern over the potential effect such a measure might have on attracting retail participation in this *voluntary* NTIA program. In particular, the CERC representatives expressed concern over any provision that would involve FCC Enforcement Bureau personnel in FCC enforcement proceedings to penalize observed retailer practices in implementing this program, for which NTIA was given sole legal responsibility.

We noted that the NTIA's own regulations, adopted after public notice and comment, already address the issue of penalizing retailer execution of the program. These regulations provide only for de-certification in the event of poor performance.⁵ An order making FCC field personnel available to *assist the NTIA in enforcing its own regulations* might not be inconsistent with the statutory scheme or with legitimate retailer expectations. We emphasized, however, that to the extent the involvement of FCC field personnel could lead to the assessment of forfeitures by the Commission, such activity would likely be a strong disincentive to retailer participation in the voluntary NTIA program – particularly given retailers' recent and ongoing experience with the potential assessment of forfeitures as to their good faith execution of the Commission's "analog-only" product labeling regulations.

The CERC representatives stressed that as an association of competitors, CERC could not predict, discuss, or address whether any retailer would decide to participate in or remain in the CECB program, with or without FCC adoption of such a rule. We reviewed the facts, however, that –

- In recent days and weeks, several major retailers, who are CERC Board members, have publicly announced their strong intentions to participate in the CECB program.
- CERC has urged all retailers of any size, whether or not CERC members, to favorably consider participating in the NTIA program, and has pledged to NTIA to make *all* information about the program available to all retailers, via the CERC web site, www.ceretailers.org. We stressed that CERC does not want to be in the position of advising retailers of the potential for Notice of Apparent Liability penalties to apply to those retailers who choose to participate, based on subjective evaluations, by FCC enforcement personnel, of their practices in dealing with consumers.

We noted that participation already involves a widely acknowledged difficulty in gauging consumer demand and retail inventory requirements, and additional expenses and risks inherent in modifications to Point of Sale and other

⁵ 47 C.F.R. 301.6(b)(3).

systems, plus specific training, for a time-limited product. Therefore, retailers who choose to participate in this voluntary NTIA program are likely to have strong reasons for desiring to do so, and strong investments in their participation. Therefore, the sanction – arrived at by the NTIA after public notice and comment under its authority delegated by the Congress – of de-certification ought to, and indeed in the scheme enacted by the Congress must, be considered sufficient.

In summary, we stressed that CERC and its members have worked cooperatively with the Commission and with the NTIA on all occasions, beginning well before passage of the DTV Transition legislation, and that CERC and its members look forward to continuing to do so. While CERC greatly respects the competence and fairness of FCC field personnel, and recognizes their potential to assist the NTIA and the IBM Team in performing *their* responsibilities, we urged the Commission to refrain from potentially invoking the FCC's own forfeiture procedures and thereby posing a severe and obvious disincentive to retailer participation, at a time when major retailers have begun actively committing to this voluntary program.

Without going into business confidential detail, I can tell you that Best Buy has already made a very heavy investment in the NTIA program. We ourselves are, basically, past the “point of no return;” we have locked in various commercial commitments and, as I said, are working with the IBM / CLC team on a frequent basis. Other retailers, however – particularly the small independents in many of the communities that even our own 904 U.S. stores don't reach, are still looking at this program and the potential costs, liabilities, and pitfalls of participation. Best Buy has inside and outside counsel looking at the NTIA regulations, documents, and requirements. I expect that many independents are still struggling with the official requirements. CERC has pledged to try to assist *all* retailers in understanding and implementing the requirements. CERC's Executive Director and its outside counsel

spent *August 29th and 30th in Las Vegas* at a convention of independent retailers, none of whom is a CERC member, to promote and explain the NTIA program.⁶

As the CERC filing indicated, participation in the NTIA program entails a substantial investment of time, money, and risk for any retailer, large or small. Once into the program, no retailer wants to have to explain to its customers that it has dropped out because it has been “de-certified” for faulty execution. That is the penalty for which the NTIA regulations, adopted via direct statutory delegation after public notice and comment, provides. If the FCC is going to lend its enforcement personnel to assist the NTIA enforcement efforts, via an “MOU” as it has with respect to device certification, Best Buy and CERC can have no complaint. However, I respectfully suggest, and we have suggested to the Commission, that it would be counterproductive if the FCC Enforcement Bureau were to run an enforcement regime in parallel with the statutory one, with different metrics, expectations, and penalties.

* * *

In conclusion, regardless of the complexity, we in the private sector have reached the point in the Transition where we have demonstrated that we are capable of partnership with each other and with the government. We are now reaching out to the government to help forge a coherent and effective solution. In return, we need partnership, not confrontation.

Thank you again for inviting me back.

⁶ The CERC website posts NTIA and FCC documents related to the Transition for the benefit of all retailers as soon as they come out. CERC has written advisories for retailers and was one of the first organizations to write and then continually update a Consumer Guide. The National Hispanic Media Coalition – whose CEO sat next to me at the March hearing – has co-logo’d the Spanish version of the Guide, as well.