

624(e) mandates that cable operators be subject to signal quality standards and Section 624A requires the FCC to adopt rules regarding the compatibility of television sets and video cassette recorders with the signals delivered by cable. In light of these requirements, we agree with the Notice that “parallel” protections should be applied to the CPE made available at retail for use with the systems of other MVPDs⁵⁰ -- at least as long as the statutory mandates apply to cable.

**VI. SEPARATION OF SECURITY FROM NON-SECURITY FUNCTIONS IN
COMMERCIALY-AVAILABLE CPE**

Theft of cable service is a multi-billion dollar problem today. Decoder devices are in such demand that armed robberies of cable warehouses are not uncommon. As noted earlier, based on a 1995 survey addressing cable piracy, an NCTA Office of Cable Signal Theft Study concluded that the industry loses an estimated \$5.1 billion in unrealized revenue annually (not including unauthorized reception of pay-per-view programming). Signal theft affects not only a cable operator’s costs and ultimately the prices paid by customers. It also results in significant loss of revenue for cable programmers who generally are paid license fees on a per-subscriber basis. In addition, signal theft adversely affects picture quality of the system by weakening the signal received by all subscribers and by possible ingress of noise caused by improper hookups. Moreover, since most of the equipment used by cable pirates is not built to system specifications, the radio signals used to transmit cable television can leak into frequencies reserved for aeronautical and emergency communications, producing potential safety problems.

In the current state of the market, the retail sale of cable descramblers would increase signal theft significantly since there would be easy access to unlimited numbers of boxes. A

⁵⁰ Id. at ¶63.

person who wished to modify cable boxes would be able to purchase any number of them at retail, modify them to illegally receive encrypted services, and then resell them to others at whatever price the market would bear. For this reason, Congress explicitly cautioned the Commission to “continue to protect” the cable operators’ interests in system or signal security and in preventing theft of service in the course of adopting rules on the commercial availability of set-top boxes and other CPE.⁵¹ Specifically, Section 629(b) requires that any FCC rules in this area “shall not ... jeopardize security of ... services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.”⁵²

The Notice seeks comment on what it means to “jeopardize” security or to “impede” a provider’s legal rights to prevent theft of service.⁵³ In essence, the statutory command simply means that the provider must continue to have control over the security functions of CPE. Decoder boxes in the home are the only viable form of security for video service, due to the “point-to-multipoint” nature of cable industry architecture. While there are other ways to secure a program service, all of the known techniques have problems that make them useful only in limited circumstances. For example, by eliminating the need for boxes for some customers,

⁵¹ House Report at 112. As the Commission observes, in the 1984 Cable Act Congress stated that “theft of cable service poses a major threat to the economic viability of cable operators and programmers, and creates unfair burdens on cable subscribers who are forced to subsidize the benefits that other individuals are getting by receiving cable service without paying for it.” Notice at ¶32, citing House Report on 1984 Cable Communications Policy Act, H.R. Rep. No. 934, 98th Cong., 2d Sess. 84 (1984).

⁵² 47 U.S.C. §549(b).

⁵³ Notice at ¶28.

“negative traps” help solve some of the compatibility problems associated with set-top boxes. In the days of one or two premium services, these were a solution. But they are not practical with today’s array of multiple pay services because a string of traps causes degradation to the signal quality of other programs delivered by cable. Thus, boxes must be used. Interdiction, which has been proposed as an alternative, is also possible. But the economics and presumed reliability of this technology have made this technology less than successful.

Finally, it has been suggested that signals protected by digital techniques such as “smart cards” are immune from signal theft. But, as recent history demonstrates,⁵⁴ the security of other television services that have depended on digital techniques and smart cards (which fit into descramblers) have been quickly compromised. Indeed, such security systems used by program providers in Europe were broken within months of their deployment. While it is true that smart cards may be replaced if system security is breached, the expense of such a scheme could be prohibitive for cable operators and consumers alike. Effective smart cards cost \$30-\$40 apiece. Sending out new cards to all customers every time signal security is breached would become a prohibitive recurring cost.

So how can the Commission best reconcile the goals of protecting MVPDs’ signal security, preventing signal theft and making CPE commercially available? One answer -- in addition to applying any rules only to digital CPE -- is to separate the signal security functions from the non-security functions and include only the latter in commercially available CPE. In

⁵⁴ See Electronic Media, “DirecTV tried card switch to halt hackers,” July 8, 1996, at 8; Multichannel News, “Pirates Focus Sights on DBS,” February 10, 1997 at 53.

this regard it is important to observe that there will be a variety of CPE available in a digital environment:

1. Set-tops without security, a variant of the “plain Jane” converters currently available at retail, which should continue to be made commercially available at retail;
2. Integrated set-tops with both security and non-security functions, which operators should be permitted to supply given security concerns;
3. Set-top CPE that is separated from the security device but that will accept a security “card” or other device, which should be available at retail as well as operator-supplied;
4. A separate security device either as part of the set-top or as a set-back module which is operator supplied; and
5. television sets with all non-security functions built in that would otherwise be in a set-top box.

Given this diversity of current and future options, the Commission should recognize that the retail availability of set-tops will not necessarily be the only way in which the non-security “CPE” portion of the set-top will become available to consumers. It is likely that some consumers will be buying the features in CPE through the purchase of television sets with navigation capabilities included, thus fulfilling the Congressional concern for the broad retail availability of such devices and capabilities.

The Notice states that a potential solution to the problem of assuring commercial availability of CPE while permitting MVPDs to retain control over system security would be to require MVPDs desiring to retain control over the security equipment to provide it to consumers on a separated or unbundled basis. As the Commission describes it:

In theory, it would be possible to take a typical decoder box and divide it into two separate parts. One part would contain operational and functional components such as the tuner, the remote control circuitry, the power supply, and any other non-access control features. A second part would contain the access control features. With an interface, it would be possible to have the first part of the

device available through retail outlets and the second part, containing the more sensitive access control apparatus, available only from the service provider.⁵⁵

It is important to note that, as a general matter, security would be best provided by the MVPD on an integrated, rather than a separated, basis. Under that approach, both security and non-security functions would be “integrated” in the same CPE. Moreover, the use of integrated circuitry benefits consumers by lowering costs, permitting them to lease rather than purchase CPE, and paving the way for the introduction of new services, such as program guides. Nevertheless, to comply with the statute, cable operators will make digital CPE (without security functions) available at retail and will provide stand-alone security devices to be used in conjunction with retail boxes providing non-security functions.

Because of the security and cost benefits a single integrated set-top box affords operators, programmers and consumers, cable operators will continue to provide integrated boxes to their customers while making available security-only CPE to be used in conjunction with CPE containing non-security functions which consumers can obtain at retail. The Commission recently endorsed operator provision of such integrated boxes in its equipment compatibility proceeding, observing:

[I]t is our intention that the Decoder Interface serve as a means for promoting competition in the market for equipment used to receive cable service. We believe it is important that participation in this market be open to all parties, including cable operators and consumer equipment manufacturers. In order to ensure that this market is open to all parties, we conclude that it is necessary to require cable operators to offer component descramblers that perform only signal access control functions. At the same time, we see no need to preclude cable operators from also incorporating signal access control functions in multi-function component devices that connect to the Decoder Interface connector. Our decision ensures that subscribers will have several competitive alternatives in selecting

⁵⁵ Notice at ¶34.

component descrambler equipment.... [T]he subscriber could obtain a single device from the cable operator that would perform one or more special features and also incorporate the descrambling function.... [W]e do not intend to prohibit cable operators from using component modules that connect to the Decoder Interface to provide functions other than security.⁵⁶

Consistent with this approach -- and for the same public interest reasons -- MVPDs should be permitted to provide "integrated" CPE that includes both security and non-security functions. To prohibit MVPD provision of integrated CPE would not only be contrary to the public interest, but also it would exceed the Commission's mandate under Section 629. Section 629 only requires that CPE which does not jeopardize security, e.g., which separates out signal security functions, be made commercially available at retail from unaffiliated vendors. It does not require that an MVPD also must separate out security and non-security functions in the CPE it makes available to its customers.

Prohibiting MVPDs from providing integrated set-tops would, in effect, force consumers to purchase boxes with non-security functions at retail, rather than merely giving them a choice to do so, as Congress intended. Obviously, that result would be contrary to the public interest rather than furthering it. Therefore, whatever rules are adopted to protect against signal theft by separating security from non-security functions, an MVPD should be allowed to develop equipment and sell or lease equipment that works best for its system, including an "integrated" set-top which includes both security and non-security functions.

For similar reasons, while industry standards-setting bodies will no doubt consider all relevant MVPD concerns in adopting a separations standard, any such standard must ensure that

⁵⁶ Memorandum Opinion and Order in ET Docket No. 93-7, supra, 11 FCC Rcd. at 4127 (¶38) (emphasis added).

the MVPD can control and pass through any of its services (e.g., program guides, pay-per-view options, enhanced television applications) to the consumer. The CPE acquired at retail should not inhibit the ability of the consumer to take advantage of any applications made available by the MVPD. Therefore, the commercially available CPE must have a common integrated hardware platform to permit MVPDs to download to and execute applications in that CPE to support features and services on a transparent basis.

VII. THE INTERFACE STANDARD TO DISTINGUISH BETWEEN SECURITY AND CPE TO BE MADE AVAILABLE AT RETAIL SHOULD BE DEVELOPED ON A VOLUNTARY BASIS

In concluding that the best way to reconcile the dual goals of commercial availability of CPE and prevention of signal theft was to separate out security from non-security CPE functions, the Commission observed that

To make such a separation of function practical, however, would appear to require a standard interface, or publication of interface specifications, permitting security control apparatus obtained from the service provider to be combined with other equipment obtained by the subscriber from retail outlets.... We seek comment on our authority to require such a separation as a means of accomplishing the objectives of §629 and in particular on our authority to provide for a standard interface in light of the 1996 Act amendments to Section 624A (“Consumer Electronics Equipment Compatibility”).⁵⁷

As the Notice correctly recognizes, the 1996 Act amendments to Section 624A restrict the FCC’s standards-setting authority, at least with respect to standards for the “decoder interface” which is the subject of the Commission’s equipment compatibility rulemaking. As noted above, the decoder interface standard would separate security from other functions performed by cable television set-top boxes and should resolve the issues in this proceeding as far as analog set-tops

⁵⁷ Notice at ¶34.

are concerned. While there is language in the legislative history which suggests that the amendments to Section 624A were not intended to limit the FCC's authority in implementing Section 629,⁵⁸ Section 624A's mandate to the Commission with respect to standard-setting limits expresses Congress' view that government standard-setting in a dynamic industry should be minimal. The Commission has adopted this salutary approach in a number of areas, including with telephone number portability.⁵⁹ It should be applied in the context of implementation of Section 629 as well.

We agree with the Commission's "preferred option" on the interface standards issue: "to adopt only a conduct or performance rule mandating the separation involved, leaving to the industry participants involved the task of developing the necessary interface standards."⁶⁰ The other option -- to use the decoder interface standard developed in the equipment compatibility rulemaking as a basis for a standard in this proceeding -- is a possibility. But it should not be used in the digital context until voluntary industry standards are considered. The equipment compatibility docket may provide some useful principles to help draw limits between security and non-security functions of CPE. But it was not intended to address the issues raised by Section 629 and, therefore, will not necessarily provide a solution.

⁵⁸ House Report at 111.

⁵⁹ See First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 FCC Rcd 8352 (1996).

⁶⁰ Notice at ¶73.

We support the Commission's preferred option and oppose adoption of government-mandated interface standards. The cable industry, as well as other affected industries, should be given the opportunity to develop interface standards that best meet each industry's needs.

Through SCTE, the cable industry has had a long history of developing industry standards. The industry has made great strides in harmonizing set-top boxes even though that equipment is not like telephone CPE where all the services provided through the CPE are the same nationwide. In analogous circumstances, SCTE, as well as the National Renewable Security Standard ("NRSS") Subcommittee,⁶¹ have developed industry standards. And, CableLabs,⁶² the cable industry's research and development laboratory, works with other industries to foster interoperable specifications for proposals to national and international standards bodies.

For example, the SCTE Engineering Committee has recently approved a standard for digital video formats. This standard, SCTE Video Compression Formats (DVS033), represents the third standard adopted for digital signal delivery over a cable distribution system. The others are Digital Video Transmission Standard for Cable Television (DVS031) which contains the

⁶¹ The NRSS Subcommittee is a subcommittee of the Electronics Industry Association - Consumer Electronics Manufacturing Association/NCTA Joint Engineering Committee ("JEC") which was formed in 1981 to establish and maintain dialogue between the cable and consumer electronics industries.

⁶² CableLabs, founded in 1988, is a research and development consortium of cable television system operators representing more than 85% of the cable subscribers in the United States, 75% of the subscribers in Canada, and 12% of cable subscribers in Mexico. CableLabs plans and funds research and development projects that will help cable companies take advantage of future opportunities and meet future challenges in the television industry. It also transfers relevant technologies to member companies and to the industry. In addition, CableLabs acts as a clearinghouse to provide information on current and prospective technological developments that are of interest to the cable industry.

transport specifications and Cable and Satellite Extensions to ATSC System Information Standard (DVS011) which contains the system information and definitions of stream types and descriptors. Together these SCTE voluntary standards establish the basic building blocks of digital services, allowing set-top terminals and data modems built by different manufacturers to interoperate on the same cable system.

Moreover, CableLabs in conjunction with Continental Cablevision, Inc., Rogers Cablesystems Limited, and the MCNS consortium (MCNS -- Multimedia Cable Network System, -- is comprised of Comcast Cable Communications, Inc., Cox Communications, Tele-Communications, Inc., and Time Warner Cable) has developed a set of interface specifications that will facilitate interoperable high-speed cable modems. The set of specifications includes a radio frequency (RF) interface specification, a network security specification, and an operations support system interface specification.

Finally, the NRSS Subcommittee is working on standards to define devices to provide the basis for conditional access and renewable security systems for consumer electronics and cable television devices. The NRSS is an interface specification between a host device and removable modules which contains the cryptographic system for securing digital signals to the consumer's home. The host device could be a set-top or set-back unit, a TV set, a VCR, a personal computer, or any other device needing access to cryptographically secured signals. NRSS does not define what cryptographic system or value-added features are to be in the module, which is left up to the market to determine. The specification refers only to the interface, not to the mechanisms inside the module.

Even before the Notice in this proceeding was released, the SCTE began considering how to develop a voluntary standard for an interface between CPE providing security and non-

security functions. This voluntary, industry-wide effect is the only way to insure that the development of the interface standards is robust. Under these circumstances, the Commission should defer consideration of a government-mandated interface standard until SCTE and similar bodies from other affected industries have had the opportunity to develop such a standard.

Consistent with the Commission's preference for a voluntary interface standard, we agree that a conduct or performance standard should be adopted to determine if the statute's goals -- i.e., the commercial availability of CPE -- have been achieved. In this regard, it seems plain that it is impossible to test whether each and every CPE product is commercially available. But for some CPE the answer is obvious. For instance, there is currently widespread availability in the retail marketplace of navigation and other devices related to cable television, including remote controls, converters, and program guides.

Similarly, as the Notice points out,⁶³ cable modems will be made available on a retail basis without the imposition of rigid performance requirements. Accordingly, we agree with the Notice that there should be a phased-in requirement for retail availability.⁶⁴ Under this approach, cable operators and other MVPDs could continue to lease or sell CPE so long as equipment serving the same (non-security) functions also is commercially available, after a date certain, through retail outlets.

In any event, the Commission should resist an inflexible approach given that retail availability will occur when consumers purchase new television sets with the required interface

⁶³ Notice at ¶68.

⁶⁴ Id. at ¶67.

devices built in. For this reason, commercial availability cannot be measured by the deployment of cable set-top boxes alone. Indeed, given broadcasters' anticipated deployment of digital television and the need for converters for consumers who want to receive the digital signals over the air on their existing analog sets, we may see the deployment of digital-to-analog set-top boxes early on, unrelated to security functions, and that development may well influence the way in which retail availability of CPE progresses.

VIII. PORTABILITY AND INTEROPERABILITY

The Notice asserts that "MVPDs in general have little standardization either between different types of MVPDs or between MVPDs in the same market segment."⁶⁵ On the theory that the "lack of standardization creates a potential obstacle to the ability of manufacturers to produce and retailers to sell CPE equipment that can be widely used," the Commission seeks comment on the extent to which standards for the portability and interoperability of such CPE are necessary, and the process by which such standards should be developed.⁶⁶

At the outset, it is important to recognize that Section 629 does not mandate that CPE be portable or interoperable. By its terms, Section 629 only calls for assuring the "commercial availability" of certain CPE. The legislative history reflects this limited goal, noting that "[o]ne purpose of this section is to help ensure that consumers are not forced to purchase or lease a

⁶⁵ Id. at ¶64.

⁶⁶ Id. By "portability" the Commission means the ability of equipment to work with networks of other similar MVPD providers in different geographic locations, while "interoperability" means the ability of such equipment to work interchangeably with networks of different types of MVPD providers. Id. at ¶11.

specific, proprietary converter box... from a cable system or network operator.”⁶⁷ The Commission is not directed to require that CPE be made portable or interoperable. As a result, the Commission’s authority to adopt rules requiring -- or even encouraging -- portability or interoperability is limited, if any exists at all. Moreover, contrary to the suggestion in the Notice,⁶⁸ development of standards for CPE so that it is either geographically portable and will work with similar types of MVPDs in different parts of the country, or interoperable and will work with different types of MVPDs in the same area -- or both -- is not necessary for a retail market to develop.

Nevertheless, we agree that as a policy matter, portability is a valid public interest goal. And, at the same time that portability of CPE is good for the consumer, it is good for cable operators because it will help make our products easier to use, transportable when cable customers move, and national in scope.

The cable industry has not focused on the portability issue in the past; the analog set-top box requires an emphasis on security for which portability creates a serious problem. With the advent of digital set-tops, those security concerns are somewhat alleviated. Consideration can be given to making those boxes portable and interoperable, as long as security functions can be separated out of the CPE. Under such a scenario, so long as only the security module is different for each system, there should be little reason not to permit the set-top box to be capable of working with all cable systems.

⁶⁷ H.R. Rep. No. 104-458, 104th Cong. 2d Sess. 181 (1996) (“Conference Report”).

⁶⁸ Notice at ¶24.

The Notice expresses a clear preference for voluntary industry standards addressing the portability and interoperability issues.⁶⁹ It recognizes that there are “active ongoing industry standards bodies addressing a number of related standards issues and that these may independently resolve a number of issues in this area.”⁷⁰ At the same time, the Commission also acknowledged that “requiring portability or interoperability at this time could impede the development and marketing of devices that are intended to work with one specific MVPD and restrict consumer choice to excessively costly units.”⁷¹

As we have said in other contexts, government-mandated technological standards should be a last resort.⁷² As a general matter, government-mandated standards freeze technology and chill innovation. At a minimum, there is the risk of establishing a premature standard based on unproven technology. At worst, a government-imposed standard will reduce the incentive to develop a superior one. Moreover, mandatory standards mean a loss of variety and consumer choice as well as technological competition, because equipment manufacturers will not be able to offer differentiated products using different technologies. Companies will be reluctant to invest in research and development because of impediments to market acceptance of a technology that

69 Id. at ¶66.

70 Id. at ¶64.

71 Id. at ¶65.

72 See Comments of the National Cable Television Association, Inc. in MM Docket No. 87-268, filed July 11, 1996 and Declaration of Dr. Bruce M. Owen in Response to the Fifth Further Notice of Proposed Rulemaking, attached thereto as Attachment A, and Reply Comments of the National Cable Television Association, Inc. in MM Docket 87-268, filed August 12, 1996, which support the following discussion.

departs from the government standard. Vendors will be reluctant to build new and improved products if the product deviates from the standard or risks being non-compliant. In short, government-mandated standards create barriers to entry for new technologies.

Moreover, if government codifies a technological standard, regulatory processes will impede modifications of the standard or the introduction of new technologies. Incumbents who benefit from the codified standard will fight to keep the standard with regulatory muscle that would not be available in the marketplace. Therefore the Commission should take a hands-off approach to adopting portability or interoperability standards, eschewing even the formal advisory committee process or negotiated rulemaking process raised in the Notice.⁷³ Voluntary standard-setting and publication of interface specifications should be pursued since it is consistent with congressional intent that the Commission “consider the results of private standards setting activities” in implementing Section 629.⁷⁴

IX. PROHIBITION ON SUBSIDIES

Section 629(a) requires that the Commission not prohibit any MVPD from providing CPE to consumers to access any service provided by the MVPD, so long as “the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.”⁷⁵

⁷³ Notice at ¶66.

⁷⁴ S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 181 (1996).

⁷⁵ 47 U.S.C. §549(a).

As a general matter, such subsidization can occur when a provider is rate regulated in one market and also competes in another market. But as the Notice recognizes, for cable operators subject to the Commission's rate regulation rules, there can be no question about the subsidizing of equipment with service revenues since equipment must be made available "at cost" and unbundled from service rates.⁷⁶ And for cable operators subject to effective competition, and therefore not rate regulated, the legislative history of Section 629 states that anti-subsidy rules are not needed.

For this reason, the Notice concludes that "existing equipment rules, that are applicable only to noncompetitive cable television systems, properly address the Section 629(a) requirement that MVPDs may offer CPE to consumers 'if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.'"⁷⁷ For cable systems facing effective competition, the Commission correctly concludes that no anti-subsidy prohibition should apply. The legislative history, cited in the Notice,⁷⁸ makes this clear. In the colloquy quoted by the Commission, Senators Burns and Faircloth concurred that where services are not rate regulated, any cross-subsidy cannot be sustained and Section 629's prohibition "is no longer necessary." Specifically, Senator Burns observed that the "bill's prohibition on bundling and subsidization no longer applies when cable rates are deregulated."

⁷⁶ Notice at ¶39, citing 47 U.S.C. §623(a)(2) and 47 C.F.R. §76.905.

⁷⁷ Id. at ¶76.

⁷⁸ Id. at ¶40, citing 142 Cong Rec. S700 (daily ed. Feb. 1, 1996).

The Notice also observes that DBS providers are currently offering substantial rebates on system receivers and satellite dishes and asks whether they should be considered “subsidies” within the meaning of the anti-subsidy prohibition of Section 629.⁷⁹ It seeks comment on whether to allow their equipment rebates even if they are “subsidies,” since DBS providers compete with each other and with cable systems, and therefore are subject to “effective competition.”⁸⁰

As a general matter, discounted products serve valuable competitive purposes and we do not oppose such discounts provided they are not cross-subsidized by revenues from rate-of-return regulated services. However, the deep CPE discounts offered by DBS providers to consumers are often tied to long-term programming contracts, limiting the consumer’s choice of MVPDs for a significant time. For this reason, in considering the “subsidy” question, the Commission should consider whether permitting DBS providers to require long-term services contracts in conjunction with a “subsidized” CPE is in the public interest and consistent with the intent of Section 629.

X. DEVELOPMENTAL WAIVERS

Congress recognized that strict application of Section 629’s commercial availability provision could inhibit the development or introduction of new or improved services and equipment. A strict reading could put obstacles in the path of coordinating product and service design, manufacture, and marketing during the initial stages of product and service development.

⁷⁹ Id. at ¶42.

⁸⁰ Id.

For this reason, Congress included a waiver provision, Section 629(f), in the statute addressing these concerns. In the Notice, the Commission states that waiver requests “should be looked on sympathetically and expansively to avoid unnecessary procedural obstacles to innovation.”⁸¹

We agree that developmental waivers should be liberally granted. The commercial availability rules must not be used to stifle innovation. For this reason, there is no need for the Commission to develop substantive waiver standards now. Instead it should proceed on a case-by-case basis at least until it gains enough experience in dealing with waiver requests that it can “codify” its precedents into general substantive standards. Similarly, rather than describe in detail the showings required or the circumstances requiring a waiver, those issues too should be left to the future. However, we agree with the suggestion in the Notice that waivers not acted upon by the Commission (or the staff on delegated authority) within a time certain (e.g., no more than the 90 days within which the Commission is required to act by the statute) should be “deemed approved.”

Finally, the statute requires that all waivers “shall be effective for all service providers and products in that category and for all providers of services and products.”⁸² Rather than defining such categories at the outset, the Commission should require MVPDs and other interested parties to submit statements following public notice of the waiver request in which they could claim that any waiver should be applicable to them or the CPE they produce. If someone opposes that claim, there seems to be no requirement that the Commission decide that issue within the 90 days it must decide the original waiver request.

81 Id. at ¶48.

82 47 U.S.C. §549(c).

XI. SUNSET OF REGULATIONS

The statute sets out three conditions which, if satisfied, will “sunset” any regulations implementing Section 629. Specifically, the regulations adopted pursuant to Section 629 will cease to apply when the Commission determines that:

1. the market for the multichannel video programming distributors is fully competitive;
2. the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and
3. elimination of the regulations would promote competition and the public interest.⁸³

The Notice expresses the tentative view that local geographic markets such as DMAs or SMSAs would serve to define the relevant geographic markets, although comment is requested on whether markets more closely tied to the service area of a particular MVPD would be appropriate.⁸⁴ The Notice also approves of measuring the competitiveness of CPE in various discrete equipment markets.⁸⁵

We agree that this provision should be read as flexibly as possible. Relevant submarkets, both geographic and product, should be considered in determining whether the criteria for sunsetting the regulations for a particular MVPD or particular equipment have been met. Nevertheless, we cannot agree with the suggestion that the sunset provision authorizes the Commission not to apply commercial availability requirements from the outset in circumstances

⁸³ 47 U.S.C. §549(e).

⁸⁴ Notice at ¶50.

⁸⁵ Id. at ¶51.

where the “sunset” requirements arguably are met, such as (according to the Notice) the DBS market.⁸⁶

First, the statute speaks in terms of ceasing to apply “[r]egulations adopted under [Section 629],” which indicates that the Commission must first adopt regulations before it can “sunset” them. If Congress had wanted to exclude certain MVPDs such as DBS from the reach of section 629, it would have done so explicitly, especially since the competitive state of the various DBS markets was known to it at the time of enactment.

As to the DBS market in particular, the Commission’s rationale appears to be that it is competitive because a variety of DBS service providers compete among themselves and that the rules can be sunset (or not applied ab initio) in that discrete market.⁸⁷ The Notice also suggests that the “public interest” component of the sunset test could be met where “integrated service and equipment suppliers compete vigorously even if the ‘commercial availability’ of equipment were thereby eliminated.”⁸⁸

Whatever the merits of this approach generally, it should not be used to favor a particular category of competitor. The market in which DBS competes is the same as that in which cable operators, MMDS operators, OVS operators and others compete. The Commission should not slice-and-dice submarkets and relieve some competitors of statutory burdens without taking the

86 Id.

87 Id.

88 Id. at ¶53.

same action for other competitors in that market. If the market is competitive enough to meet the statutory sunset requirement for one participant, it must be so for all.

As to cable in particular, in each franchise area, the Commission should determine the competitiveness of the market by the statutory “effective competition” tests.⁸⁹ In addition, if DBS achieves a certain level of national penetration (e.g., 10%), that should also satisfy the service competition test in the sunset provision as far as cable is concerned.

XII. PROPRIETARY TECHNOLOGIES

In the Notice, the Commission recognizes that “the development and use of proprietary technologies, the integration of electronic devices to achieve efficiencies, the bundling of products and services for marketing purposes, and investments in brand identification, can all be useful competitive tools.”⁹⁰ Nevertheless, the Commission suggests that, in implementing Section 629, it may have to take actions “that may impact on various proprietary rights, including patents and copyrights,” and seeks comment on its authority to protect proprietary rights.⁹¹ Among other things, the Notice asks whether the Commission can order a manufacturer to license its proprietary security systems to others and whether it can prohibit an MVPD from entering into an exclusive contract with a manufacturer.⁹²

⁸⁹ 47 U.S.C. §623(l)(1).

⁹⁰ Notice at ¶69.

⁹¹ *Id.*

⁹² *Id.*

The Commission's authority to affect proprietary rights is limited, at best. The 1996 Act in general, and Section 629 in particular, did not grant the Commission any additional authority over proprietary rights. Indeed, Section 629(f) states that the commercial availability provision neither "expand[s] nor limit[s] any authority that the Commission may have under" pre-existing law.⁹³ And, as the Notice acknowledges, that pre-existing law includes the Constitutional command that Congress (and by extension the independent regulatory agencies implementing congressional enactments) "promote the progress of Science and the useful Arts."⁹⁴

Under these circumstances, the Commission should not mandate the compulsory licensing of proprietary technologies and intellectual property. The marketplace will address this issue without government intervention.

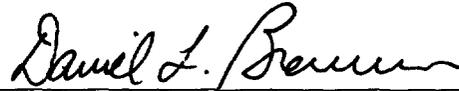
⁹³ 47 U.S.C. §549(f).

⁹⁴ U.S. Const. art. I, §8.

CONCLUSION

For the reasons stated above, the Commission should adopt the proposals made in these
Comments.

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk

1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3664

Wendell H. Bailey
Vice President, Science & Technology

May 16, 1997

Counsel for the National Cable
Television Association, Inc.