advertising in regional or local media, direct mail, or any other marketing outlet by a cable competitor, as well as local or regional press coverage of the competitor's offerings, are sufficient to ensure that consumers are "reasonably aware" of the availability of a competing video service.[16]

The same standard should apply in this context. That is, if manufacturers, retailers, or other vendors unaffiliated with the MVPD promote the availability of MVPD navigation devices at their commercial outlets, the consumer awareness prong of the commercial availability definition should be satisfied.

In addition, the MVPD's own consumer notification and education efforts could satisfy this consumer awareness element. For example, cable operators provide consumers information regarding the availability of compatible remote control units through retail outlets and information regarding the types of commercially available remotes that would be compatible with the consumer's cable system.[17] As the Commission found in its Equipment Compatibility Order, such notices "provide adequate information to cable subscribers about the availability of

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[16] See 47 C.F.R. § 76.630(d)(2)(iii); Equipment Compatibility Order, 9 F.C.C.R. 1981, at ¶¶ 71-74 (1994) ("Equipment Compatibility Order").

[17] See 47 C.F.R. § 76.630(d)(2)(iii); Equipment Compatibility Order at ¶¶ 71-74.

compatible remote control units."[18] Consistent with this finding, the same operator efforts with respect to MVPD navigation devices would effectively assure consumer awareness of "commercial availability" under GI's proposed definition.[19]

***(3) Consumers May Take Advantage of Their Retail Option With A Reasonable Amount of Effort and Expense.*** The last element of GI's proposed "commercial availability" definition assures that consumers are actually able to exercise their option to purchase compatible navigation devices from a commercial outlet with the expenditure of a minimal amount of effort and expense. For example, this prong would be satisfied if the navigation device is available at a well-established regional or national retail chain, such as Circuit City, Best Buy, or Radio Shack.

Similarly, it would be satisfied if the consumer could order compatible MVPD equipment by means of a toll-free telephone number from a vendor that is unaffiliated with the MVPD.[20] This conclusion is compelled by the fundamental development that has

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[18] Equipment Compatibility Order at ¶ 74 (requiring that the cable operator provide customers with only a representative list of compatible remotes).

[19] Given their desire to reduce capital investment by having consumers purchase in-home equipment, cable operators and other MVPDs will have every incentive to ensure that consumers are aware of the commercial availability of compatible equipment.

[20] The Notice specifically inquires whether retail availability through a toll-free telephone number would satisfy the commercial availability standard. Notice at ¶ 23.

occurred in the way consumers purchase products today. No longer is the local store front the only (or, in many cases, the predominant) vehicle for retail purchases. Rather, consumers obtain products through television (e.g., QVC and infomercials) and through the Internet (e.g., online catalogs) just as readily and as frequently as they do through their local retail outlet. The Commission's rules must reflect this new consumer reality.

For example, the following marketplace reports regarding the significant competitive success of manufacturers, such as Gateway and Dell, which offer PC equipment through 1-800-numbers and mail-order operations, provide a particularly illuminating example of how this distribution model satisfies the commercial availability standard:

- "[T]he normal retail distribution channel for PC sales is losing market share to direct-channel sales from manufacturers like Dell and Gateway 2000."[21]

- "'[Dell and Gateway] are the benchmarks now,' said Compaq's Bohran. 'Dell is our biggest core issue. How do we compete against their model?'"[22]

- "Both firms [International Data Corp. and Dataquest Inc.] agreed that the star of the third quarter in the

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[21] William Schaff, "Our Expert Says: PC Demand to Stay Strong," InformationWeek, Mar. 3, 1997, at 38.

[22] Kelley Damore, "Riding the Channel Wave: Manufacturing Partnerships Throw Water on Dell's Fire," Computer Reseller News, Nov. 4, 1996, at 273.

U.S. was Dell. Dataquest estimated 85% unit growth; IDC, 50%."[23]

- "Dell's direct sales model, a combination of telephone sales and managed accounts at major corporations, allows it to respond rapidly, the company said. . . . Explaining Dell's gains in market share from competitors selling through dealers, [Michael Dell] said, 'We keep converting indirect sales to direct sales.' . . . Dell does well in such a market because eliminating the cost of middle-man distributors allows it to sell quality machines at a lower price than many rivals."[24]

- "One way Dell intends to fight [competition] is to increase its sales over the Internet, where it's already selling a million dollars worth of machines a day."[25]

Thus, for example, if a manufacturer unaffiliated with a particular MVPD established its own retail distribution channel using a telephone or online-based mail order system through which consumers could obtain compatible equipment for that MVPD system, this would satisfy the commercial availability standard. Under this scenario, consumers would have the two options -- direct availability from the manufacturer and from the MVPD -- necessary to satisfy Section 629.

Finally, the three elements of GI's proposed commercial availability definition parallel the Commission's test for determining whether a viable video alternative provider is

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[23] G. Christian Hill, "PC Growth Rate Slowed to 16% in 3rd Quarter," Wall St. J., Oct. 28, 1996, at B4.

[24] Lawrence M. Fisher, "Dell Earnings Soar with Sales Growth Triple PC Industry's," N.Y. Times, Feb. 26, 1997, at D1.

[25] Kirk Ladendorf, "Dell Reports a Record-Shattering Year," Austin American-Statesman, Feb. 26, 1997, at D1.

available to consumers in a cable operator's franchise area. In order for the video programming services of a cable competitor to be deemed "offered" in the cable operator's franchise area, the Commission requires that:

1. the competitor is physically able to offer service to potential subscribers in the cable operator's franchise area (i.e., consumers have a choice);

2. potential subscribers are reasonably aware that they may purchase the services offered by the competitor; and

3. there are no regulatory, technical, or other impediments to households taking service from the competitor (i.e., the alternative service may be obtained with a reasonable amount of effort and expense).[26]

The Commission already has determined that, when these three elements are satisfied, consumers have a viable option for purchasing a product or service from someone other than the cable operator.[27] There is no reason why this model for determining whether alternative video service is "commercially available" does not similarly ensure that MVPD equipment is "commercially available." The Commission should therefore adhere to this proven

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[26] See 47 C.F.R. § 76.905(e).

[27] See, e.g., Paragon Communications d/b/a Time Warner Communications, Petition for Determination of Effective Competition, Memorandum Opinion and Order, DA 97-566, at ¶ 12 (released March 18, 1997). Congress specifically affirmed this conclusion by directing the Commission to use this three-pronged standard in determining whether effective competition exists in a cable operator's local franchise area. See Conference Report at 170.

test by adopting GI's proposed definition of commercial availability.[28]

### C. Definition of "Affiliate"

GI supports the Commission's tentative conclusion to employ the definition of "affiliate" established in Section 3 of the 1996 Act,[29] in construing and implementing the commercial availability provisions of Section 629(a).[30] As the Notice recognizes, the language and legislative history of Section 629 do not address this issue, and therefore do not preclude application of the Section 3 definition for this purpose.[31] Accordingly, the Commission clearly is permitted, if not compelled, to utilize the definitional language adopted in Section 3 in determining whether a vendor is affiliated with a particular MVPD. Also, because Section 3 specifies that the term "own" encompasses equity or equivalent interests of more than 10 percent,[32] it provides a clear benchmark

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[28] While the Commission requires cable operators to make a formal showing that a competing service is offered in the operator's franchise area and that the definition of effective competition has been met, GI proposes that such an affirmative MVPD showing not be required to demonstrate that compatible MVPD equipment is commercially available. Given the potentially numerous types of equipment and entities covered by Section 629, such an administrative process would be unworkable. Rather, the Commission should enforce its commercial availability rules either through an MVPD certification or complaint-driven process.

[29] 47 U.S.C. § 153(1).

[30] 47 U.S.C. § 549(a).

[31] Notice at ¶ 27.

[32] 47 U.S.C. § 153(1).

for assessing the implications of particular ownership arrangements under the statute.

The Notice also requests comment on the extent to which manufacturers may maintain various types of contractual relationships (e.g., patent licensing arrangements) with an MVPD without being deemed an "affiliate" for purposes of Section 629.[33] A manufacturer clearly cannot and should not be deemed an "affiliate" of an MVPD on the basis of contractual arrangements which do not give the MVPD an ownership interest above the 10 percent threshold.[34] The mere existence of a customer-supplier relationship between an MVPD and a manufacturer plainly does not in itself suffice to make the manufacturer an "affiliate" of the MVPD for purposes of Section 629. Even where the Commission has established affiliation rules that provide for the possibility that an affiliation between two entities may arise through contractual arrangements, the Commission has made clear that affiliation will exist only "where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern."[35]

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[33] See Notice at ¶¶ 20, 27.

[34] Of course, if a determination is made that the MVPD has acquired de facto "control" of the manufacturer, affiliation would exist.

[35] 47 C.F.R. § 24.720(l)(9) (emphasis added).

Nor is the existence of an agreement between an MVPD and a manufacturer providing for the licensing of proprietary technology developed by the MVPD in itself a valid basis for a determination that the licensee is an "affiliate" of the MVPD. GI notes that in applying its broadband PCS affiliation rules, the Commission's Wireless Telecommunications Bureau recently determined that a PCS provider's contractual commitments to purchase and utilize a particular vendor's proprietary technology, together with associated vendor financing arrangements, were insufficient to demonstrate "control" and therefore did not support a finding of affiliation.[36] Similarly, where an "MVPD has developed the equipment involved, has patent or other proprietary rights in the equipment or its critical components, or selects a technology that has only a single source supplier through a contractual process,"[37] no affiliation would arise unless the MVPD actually controls (or has a 10% equity or equivalent ownership interest in) the business of the manufacturer.[38]

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[36] In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licensees, Memorandum Opinion and Order, 12 F.C.C.R. 2030, at ¶ 22 (1997).

[37] Notice at ¶ 27.

[38] An MVPD's interest in or participation in the selection of a manufacturer's technology is entirely appropriate, and indeed essential, to maintaining network security, facilitating innovation, and maximizing the MVPD's return on its R&D investment. See Notice at ¶ 22 (noting that such MVPD-manufacturer relationships exist in the small-dish DBS context and that the "legislative history of Section 629 does not appear to reflect any concern with this mode of operation").

The foregoing analysis is equally applicable with respect to an MVPD's relationship with a retailer or other vendor. For example, if a retail outlet serves as a distributor or agent for the marketing and/or sale of an MVPD's service and/or related navigation devices, this relationship alone should not be deemed to trigger an affiliation between the retailer and the MVPD.[39] In this regard, GI notes that such service provider-retailer relationships are common in the cellular context and that such relationships have actually enhanced, rather than diminished, the commercial availability of cellular equipment, and have also fostered a high degree of competition in the cellular service industry.

In short, in applying the Section 3 definition of "affiliate" in the context of the Section 629 "commercial availability" provisions, the Commission cannot conclude that an "affiliate" relationship exists solely on the basis of a patent licensing agreement or any other contractual arrangement, absent a clear demonstration that an MVPD has acquired de facto control of the manufacturer, retailer, or other vendor's business.

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[39] For example, the notion that an MVPD that has a contract with an electronic retailer to market and/or sell navigation devices compatible with the MVPD's network somehow controls the retailer's business is equally unsustainable. See Notice ¶ 20. This is especially true given that such electronic retailers typically also offer competing MVPD products and that the provision of MVPD navigation devices constitutes but one part of the retailer's multifaceted business operation.

### D. Portability/Interoperability

The Notice asks whether the commercial availability standard in Section 629 requires that navigation devices are portable and/or interoperable across various types of MVPDs.[40] As discussed above, the commercial availability standard requires only that consumers have a choice of obtaining their navigation devices for a particular MVPD from an alternative source that is unaffiliated with the MVPD. Nothing in Section 629 requires such portability and/or interoperability. Moreover, given the potentially innovation-stifling effects of government-mandated standards and the fact that industry is already moving to a more portable/interoperable environment, the Commission need not and should not impose any type of portability/interoperability requirement implementing the commercial availability standard.

#### 1. Portability/Interoperability is Not Required By Section 629.

Nothing in Section 629 or in its legislative history requires that navigation devices available at retail must be portable or interoperable with an MVPD network other than the particular MVPD network for which it is purchased. Congress was very specific in other areas of the 1996 Act when it intended to require interoperability among different networks.[41] Accordingly, the fact

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[40] Notice at ¶¶ 24, 64-68.

[41] See, e.g., 1996 Act, § 256 (requiring efficient interconnection among public telecommunications networks and the (continued ...)

that Congress never mentioned portability or interoperability in Section 629 must be read to mean that Congress did not intend such a requirement in order to satisfy the commercially available standard of Section 629.[42]

### 2. Even if Required Under Section 629, the Commission May Not Achieve Portability or Interoperability Through Government-Mandated Standards.

The Commission cannot require portability/interoperability by establishing its own technical standards. Section 629 does not give the Commission authority to promulgate standards that would govern the architectures or engineering characteristics of MVPD networks or the equipment which is used to access them. At most, the Commission is authorized to work with industry standard-setting bodies and may ratify their decisions.[43]

This conclusion is consistent with Congress' universal disfavor, expressed throughout the 1996 Act, of any form of government standard-setting which might stifle innovation or competition. A guiding principle of the 1996 Act was "to

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seamless and transparent transmission and reception of information across such networks).

[42] See Russello v. United States, 464 U.S. 16, 23 (1983) (omission of specific language in one section of an Act, where Congress had inserted such language in other sections was conclusive evidence that Congress intended that the specifying language not be applied to that section).

[43] 47 U.S.C. § 549(a) ("The Commission shall, in consultation with appropriate industry standard-setting organizations ...."); Conference Report at 181.

accelerate rapidly private sector deployment of advanced telecommunications and information technologies,"[44] and Congress recognized that this could best be achieved by "minimizing government limitations on the commercial use of those technologies."[45]

In this regard, Congress recognized that "premature or overbroad Government standards may interfere in the market-driven process of standardization in technology intensive markets."[46] For example, in Section 301(e), Congress banned state and local imposition of cable technical standards because complying with such standards would be "particularly inappropriate in today's intensely dynamic technological environment."[47]

Similarly, although Congress found strict interconnection standards necessary for the introduction of local telephony competition, it nonetheless specifically prohibited the extension of any such standards "to telephone equipment or other CPE."[48] As with cable equipment, Congress found that "[a]llowing the Commission to establish standards ... would have the effect of

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[44] Conference Report at 1.

[45] S. 652, 104th Cong., 1st Sess. § 3(5) (1995).

[46] Conference Report at 170-171.

[47] H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995).

[48] Id. at 83.

freezing technology, slowing innovation, and limiting the development of new features and capabilities."[49]

As Rep. Eshoo commented on this issue:

> The principle of keeping government out of technical standards is taking on increasing importance as we observe the accelerating convergence of the computer and communications industries. Companies throughout America, and all over the world, are feverishly working on the communications applications of tomorrow. ... Computers and communications are at the very center of this automation revolution. But like most revolutions, this one would only wither and die if the government were to set the rules and stifle change.[50]

Viewed against this backdrop, Congress' directive to the Commission in the context of Section 629 to "avoid actions which could have the effect of freezing or chilling the development of new technologies and services"[51] must be understood to preclude the Commission from mandating technical standards to achieve commercial availability and/or "practical" availability of MVPD navigation devices.

Moreover, the congressional determination to limit Commission standard-setting in this context is entirely consistent with well-established Commission policy. The Commission consistently has relied on the marketplace to set standards for rapidly changing telecommunications technologies such as PCS, DBS, MMDS, and DARS.

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[49] Id.

[50] 142 Cong. Rec. H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Eshoo).

[51] Conference Report at 181.

In each of these instances, the Commission concluded that, in an emerging and rapidly changing technological environment, adopting technical standards was both inefficient and inappropriate.[52] For example, after noting the differing and changing technologies being developed in the DBS area, the Commission concluded:

> [I]n view of the controversy and contradiction raised in the comments, the Commission ... believes that only actual operating experience will prove which of the various technical approaches are the most feasible. In view of this, it is inappropriate to adopt standards ... [T]he Commission continues to believe that industry groups provide the appropriate mechanism for study and resolution of technical issues at this stage of development.[53]

Similarly, in the MMDS context, the Commission declined to require the use of a particular technology, stating, "[W]e do intend, when possible, to accommodate the widest possible voluntary usage of this or any other technology" in order to attain the highest efficiencies.[54]

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[52] See, e.g., PCS Second Report and Order, 8 F.C.C.R. 7700, at ¶ 137 (1993) (finding that the imposition of a technological framework at a developmental stage would stifle the introduction of new technology); Amendment of Subpart C of Part 100 of the Commission's Rules and Regulations Regarding Technical Standards for the Direct Broadcast Satellite Service, Report and Order, 60 R.R.2d (P&F) 1539, at ¶¶ 7, 11 (1986)("DBS Order"); Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, Report and Order, 5 F.C.C.R. 6410, at ¶ 47 (1990)("MMDS Order"); Establishment and Regulation of New Digital Audio Radio Services, Notice of Proposed Rulemaking and Further Notice of Inquiry, 7 F.C.C.R. 7776, at ¶ 14 (1992) (declining to impose a transmission standard at the developmental stage).

[53] DBS Order, 60 R.R.2d (P&F) 1539, at ¶¶ 7, 11.

[54] MMDS Order, 5 F.C.C.R. 6410, at ¶ 47.

The same reasons which dictated the Commission's decisions not to adopt technical standards for DBS, PCS, MMDS, and DARS are present in this context. As noted, the MVPD industry is experiencing an unprecedented period of experimentation and innovation. Moreover, digital video technology is in its infancy, and there is no way to predict which services, equipment, or technologies the consumer will prefer. As with MMDS, DBS, PCS, and DARS, the Commission should refrain from skewing market choices and impeding innovation by imposing unnecessary government standards at this critical stage of development.[55]

### 3. To the Extent Portability or Interoperability of MVPD Customer Equipment is a Worthwhile Goal, it Should Be Market-Driven, Not Government-Mandated.

Even if mandated portability/interoperability of MVPD navigation devices is within the Commission's discretion and can be achieved without government-prescribed standards, the Commission should nonetheless refrain from imposing such a mandate on the industry. First, as Besen and Gale point out, portability and

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[55] GI thus strongly supports the Commission's statement in the Notice that "[w]e seek not to develop standards ourselves, but rather to urge the adoption of voluntary standards by those affected." Notice at ¶ 66. For an economic analysis of government and private standard-setting, see Stanley M. Besen and John M. Gale, "An Economic Analysis of the Commercial Availability of 'Navigation Devices' Used in Multichannel Video Programming Systems," attached to these comments as Appendix A ("Besen and Gale"). While the Commission recently adopted a standard for digital broadcasting, there were two fundamental differences that justified a Commission-approved standard in that unique context, namely: (1) the free, over-the-air nature of broadcasting; and (2) the fact that the Commission was simply approving an industry-developed consensus standard.

interoperability are not necessary to ensure the development of a vibrant retail equipment market.[56]

Second, there are significant consumer benefits associated with diversified navigation devices that are customized for particular systems. In this regard, GI would emphasize the fact that cable navigation devices are not portable today not because cable operators had or have any interest in preserving for themselves the monthly lease revenues for this equipment. Rather, it is simply because as each of the currently 11,000+ cable systems were established and upgraded, they contracted for and implemented a variety of technologies to secure and manage their respective networks and to respond to the particular functionality demands of their local communities. Moreover, as Besen and Gale describe it:

> The absence of national standards for cable transmission and subscriber equipment has also allowed cable systems to experiment with new equipment, features, and services. Equipment that facilitates the use of a particular service can be introduced into a single cable system in order to test consumer response to the service. With national standards and mandated equipment portability, this opportunity for experimentation and testing may be lost.[57]

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[56] See Besen and Gale at 21 (citing DBS and PCS examples). In particular, GI notes the incompatibility between TDMA and CDMA PCS handsets, and the potentially large costs of requiring handset manufacturers to produce a dual-mode PCS handset. Notwithstanding this lack of portability/interoperability, the Commission has wisely decided not to establish technical standards in the PCS environment because the "imposition of a rigid technical framework at this time may stifle the introduction of important new technology."). PCS Second Report and Order, 8 F.C.C.R. 7700, at ¶ 137 (1993).

[57] Besen and Gale at 23.

The Commission must be mindful of this history and of the potential loss of these consumer benefits when it considers a mandatory requirement for the portability/interoperability of MVPD navigation devices.

Third, mandated equipment portability and/or interoperability could substantially increase consumer costs. For example, GI estimates that the incremental cost to create a consumer terminal that would accommodate the full range of transmission schemes and operating environments (i.e., cable, DBS, MMDS, SMATV, OVS) would be significantly more (approximately double) the cost of comparable terminals designed to support a single network architecture.

Finally, there is simply no need for the Commission to mandate portability and/or interoperability since marketplace forces and industry efforts already are driving such outcomes where they are economically feasible and pro-consumer. For example, the cable industry, through CableLabs, announced a voluntary digital cable specification, the purpose of which is to "establish[ ] the basic building blocks of digital services, allowing set-top terminals and data modems built by different manufacturers to work together (interoperate) on the same cable system."[58] Subsequently, that

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[58] See Cable Industry Agrees on Key Elements of Digital Systems Specification, Press Release, Oct. 3, 1996 at 1 (on file with CableLabs). This digital cable specification incorporates MPEG-2 video and transport, Dolby AC-3 audio, 64 QAM and 256 QAM modulation, and service information tables that encompass the ATSC specification that will be used by broadcasters. The CableLabs specification also includes GI's DigiCipher® II implementation of the DES encryption standard as the core encryption system.

system specification was adopted as a standard by the Society of Cable Telecommunications Engineers ("SCTE"), an ANSI-certified standards body.

Following on the heels of this effort, CableLabs joined Comcast Cable Communications, Continental Cablevision, Cox Communications, Rogers Cablesystems, TCI, and Time Warner to develop a specification for cable modems.[59] This specification will also become an SCTE cable industry standard.

In short, cable operators and key equipment manufacturers are developing digital transmission and cable modem standards that will permit portability, and are doing so without governmental directives or intervention.[60] Accordingly, the Commission should

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[59] See "US Cable Operators Agree to Modem Specification," The Financial Times, December 19, 1996. The MCNS ("Multimedia Cable Network Systems") standard includes protocols for the speed, modulation, and frequency of digital traffic on cable system. It allows consumers to download data at up to 10 Mbit/sec. and send data upstream at up to 3 Mbit/sec. Moreover, the standard includes a prioritization system by which packets carrying data, video, and audio are labeled and delivered according to the degree of their time-sensitivity. In conjunction with the cable modem specifications, private firms agreed to license their technology. MCNS will grant nonexclusive technology licenses to vendors that agree to contribute their technology. See "U.S. Takes Lead with Cable Modem Specs," CommunicationsWeek International, October 21, 1996, at 29. MCNS revised slightly and released an "Interim" cable modem specification on March 16, 1997. See Online, CableFAX Daily, March 18, 1997. This Interim standard enables vendors to "proceed with minimal risk in developing interoperable product[s] by the end of 1997." Memorandum from MCNS to Vendor Participants (Mar. 21, 1997) (on file with MCNS).

[60] Other standards for critical customer equipment interfaces are also being driven by industry standards-setting bodies. For example, Asynchronous Transfer Mode ("ATM") interfaces such as the "Utopia" interface have been standardized by industry consensus. "Utopia" stands for Universal Test & Operations PHY Interface for

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conclude that these voluntary standards efforts "independently resolve a number of issues in this area [of portability/interoperability]"[61] and that any government action is unnecessary and unwise at this time.

## IV. ENTITIES AND EQUIPMENT TO WHICH THE COMMISSION'S REGULATIONS SHOULD NOT APPLY

The Commission is correct in noting that Section 629 is broad in terms of the entities and MVPD equipment to which it applies on its face.[62] However, there is no need for the Commission to develop and impose regulations with respect to certain types of entities and equipment for a number of reasons. Specifically, as discussed in the sections below, the Commission should not impose regulations pursuant to Section 629 for the following entities and MVPD equipment:

- Security devices using analog technology;
- Direct-to-home satellite providers (i.e., small and medium dish DBS providers and C-Band providers);
- Multi-function, network equipment, such as residential gateways and NIMs; and

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ATM. In addition, a number of standards bodies, including DAVIC, the ATM Forum, the Digital Storage Media - Command and Control ("DSM-CC") working group of MPEG, and the IEEE 802.14 Committee (for hybrid-fiber coax networks) are working towards industry-defined standards for networks (and in some cases, terminal interfaces) that will allow manufacturers to produce equipment which is interoperable with different access networks.

[61] See Notice at ¶ 64.

[62] See id. at ¶¶ 14, 16.

- OVS MVPDs or OVS packagers, since Congress specifically exempted these entities from the scope of Section 629.

### A. Section 629 Does Not Apply to Navigation Devices Using Analog Security.

Navigation devices using analog security are exempt from the commercial availability requirements by Section 629(d)(1). This section provides that Commission determinations made prior to February 8, 1996 "with respect to commercial availability to consumers of converter boxes ... and other equipment ... shall fulfill the requirements of this section."[63] The Commission's previous decisions with respect to the Decoder Interface and consumer ownership of analog descramblers constitute such "prior determinations" under Section 629(d)(1).

In its Equipment Compatibility Order, the Commission rejected a proposal to require cable operators to make analog descrambling equipment available for consumer purchase through retail outlets.[64] GI fully supports this conclusion. The history of piracy cited in the Notice with respect to analog descramblers is sufficient evidence that such a requirement should not be imposed on any MVPD.[65]

Also in the Equipment Compatibility Order, the Commission endorsed the Decoder Interface as the mechanism for "promoting

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63 See 47 U.S.C. § 549(d)(1) (emphasis added).

64 Equipment Compatibility Order, 9 F.C.C.R. 1981, at ¶ 29.

65 See Notice at ¶¶ 28-31.

competition in the market for equipment used to receive cable service."[66] The cable and consumer electronics industries have continued to work toward a final standard for the Decoder Interface and recently submitted a joint summary of agreement on this standard to the Commission for its review.[67]

These previous Commission decisions with respect to the Decoder Interface and customer ownership of analog descramblers constitute "prior determinations" under Section 629(d)(1). As such, they "fulfill the requirements under [Section 629]" with respect to navigation devices that use analog security technology. Since analog equipment is thus exempted from Section 629, the Commission may focus its efforts in this proceeding solely on the rapidly unfolding future -- digital technology.

This conclusion comports with sound public policy as well. Analog technology is increasingly giving way to digital technology in MVPD systems. The period of this transition is still unknown. It makes little sense for the Commission to undertake the complex

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[66] Equipment Compatibility Order, 9 F.C.C.R. 1981, at ¶ 42. See also 47 U.S.C. § 544a(c)(2)(C) (directing the Commission to promote the commercial availability of cable converters and remote controls). The Commission's decision regarding the Decoder Interface also implicated non-cable operators. See id. at ¶ 42 ("We therefore urge that representatives of [the DBS, C-Band, and wireless cable] and other affected industries be included in the Decoder Interface standard deliberations.").

[67] See Summary of Final Agreement on Cable Ready Television Receivers by the Cable-Consumer Electronics Compatibility Advisory Group, Notice of Ex Parte Presentation, ET Docket No. 93-7, March 11, 1997.

task of establishing new rules under Section 629 for analog devices when, in fact, such devices will increasingly be supplanted.

### B. The Commission Should Not Apply its Commercial Availability Requirements to DBS and C-Band Providers, Since The MVPD Customer Equipment They Provide Already Satisfies the Commercial Availability Standard.

GI believes application of the rules under Section 629 to MVPD navigation devices used by DBS and C-Band operators is unnecessary since the existing distribution arrangements through which such equipment is offered to consumers already satisfy the commercial availability standard.[68] In both areas, navigation devices are "readily available for consumer purchase through retail outlets."[69] In addition, in both contexts, the licensing of proprietary technologies by GI and others has led to competition in the manufacture of compatible devices which are then sold through various retail outlets.

The Primestar model of customer equipment distribution described at ¶ 21 of the Notice also satisfies the commercial availability standard. As the Notice points out, under this model, the retailer provides an alternative source for the consumer to obtain navigation devices for the Primestar network. Most importantly, this model allows the retailer to participate in the

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[68] Commission restraint from imposing its commercial availability requirements on such equipment is also justified under a forbearance analysis (discussed in Section IV.C.2., infra) or a sunset analysis (discussed in Section VII.D., infra).

[69] See Notice at ¶ 22.

transaction and also facilitates face-to-face competition in the store between various MVPD services, and in particular between Primestar and the other highly competitive national DBS services.[70] Such face-to-face competition ensures that the retail price for the Primestar navigation devices (and associated service) is reasonable, thereby satisfying the goal that commercial availability is intended to achieve. As Besen and Gale conclude in this regard:

> When consumers have access to multiple MVPD service providers, however, the benefits of commercial availability are obtained even if each service provider is the only source of consumer equipment that can be used on its system.[71]

Moreover, the Primestar model creates additional consumer choice by offering consumers a lease option that is accessible through a local retail outlet.[72]

In short, the premise of Section 629 is inapplicable to DBS and C-Band navigation devices: the Commission need not "adopt regulations to assure the commercial availability" of such equipment since it is already commercially available. The same conclusion is arrived at under a Section 629(d)(1) analysis. Section 629(d)(1) authorizes the Commission to find that determinations made by it prior to February 8, 1996 about the

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[70] Id. at ¶ 21.

[71] Besen and Gale at 32.

[72] In addition, approximately 20,000 Primestar customers have actually purchased their Primestar equipment.

commercial availability of MVPD navigation devices "shall fulfill the requirements of this section." Since the Commission did, in fact, make such prior determinations with respect to DBS[73] and C-Band navigation devices,[74] the requirements of Section 629 are already fulfilled, and no further Commission action is required.[75]

### C. Residential Gateways

#### 1. Residential Gateways Are Outside the Scope of Section 629 Because They Are Part of the MVPD's Network.

Residential gateways are outside the scope of Section 629.[76] A residential gateway is a broadband, multi-function piece of

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[73] See Second Annual Video Competition Report, 11 F.C.C.R. 2060, at ¶¶ 54-55 (1995) (noting retail availability of DBS navigation devices). See also Third Annual Video Competition Report, 5 Comm. Reg. (P&F) 1164, at ¶ 41 (1997) ("[b]oth [DBS] services and equipment are available to subscribers from a variety of retail outlets, including large national consumer electronics retailers.").

[74] See Report, 2 F.C.C.R. 1669, at ¶ 10 (1987); Second Report, 3 F.C.C.R. 1202 (1988).

[75] GI agrees with the Commission that this same analysis applies with respect to TVs, VCRs, and personal computers which clearly already satisfy the commercially availability standard. See Notice at ¶ 17. The same is also true with respect to certain cable converter equipment. For example, basic non-addressable cable converters ("plain Jane" converters) have been available in numerous retail outlets for years. This highly standardized, non-security based equipment serves as an advanced tuner to expand channel capacity and compensate for technical deficiencies in non-cable-ready TVs. Thus, the Commission should find with respect to this cable converter equipment, as with TVs, VCRs, and PCs, that no further regulatory action is required to assure commercial availability.

[76] Notice at ¶ 18.

equipment which may be located inside the consumer's residence, and which serves as an interface device between a broadband residential access network or networks and multiple types of customer terminal equipment, such as televisions, telephones, and personal computers. The design philosophy of this equipment is to extend the scope economies of the network to the residence by providing a low-cost platform with terminal equipment interfaces and relieving the subscriber of the burden of buying multiple network interface devices.

In short, residential gateways are in fact sophisticated network devices that for design efficiency reasons are often located on the customer's premises. However, since Section 629 applies only to customer equipment and not to network equipment,[77] residential gateways are beyond the scope of this provision. The mere fact that such broadband network equipment is located on the customer's premises for efficiency reasons does not change the fact that this equipment is outside the scope of the statute.[78]

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[77] See id. at ¶ 11 (Section 629 applies to "equipment that is not part of an MVPD's network distribution plant ....").

[78] The same analysis applies equally to network interface modules ("NIMs") which are network devices that are sometimes included as part of the architecture in hybrid-fiber coax or switched digital video systems. As such, NIMs are also beyond the scope of Section 629.