

Moreover, Commission precedent regarding the attachment of telephone equipment in a party line context supports permitting network providers to adopt attachment standards in the MVPD context. While Part 68 of the Commission's rules generally establishes "uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment and associated wiring thereto . . . ,"¹³¹ the Commission exempted party lines.¹³²

This decision was based on the Commission's concern about potential harms to the network and about the feasibility of developing, administering, and implementing the general attachment rules in the party line context.¹³³ With respect to the potential for network harm, the Commission stated:

With as many as eight parties sharing a party line, improperly installed or malfunctioning terminal equipment could affect many more people than just the user of the equipment. Automatic answering machines, like telephones, would have to be designed to respond only to calls addressing the user of the machine. Otherwise, they would operate whenever any party on the line were called, infringing on that other party's privacy and possibly causing the caller unnecessary billing. . . . These risks of third party harm, in addition to those associated with ANI failures and other network related faults, constitute a substantially

¹³¹ 47 C.F.R. § 68.1.

¹³² See Party Line Order, 92 F.C.C.2d 1, at ¶ 2 (1982). See also 47 C.F.R. § 68.2 (Part 68 rules "apply to direct connection [o]f all terminal equipment to the public switched telephone network, for use in conjunction with all service other than party line service") (emphasis added).

¹³³ Party Line Order at ¶ 96.

increased array of potential harms than those generally associated with single party service.¹³⁴

With respect to the administrative nightmare of imposing Part 68 on party lines, the Commission stated:

[T]he number of possible party line equipment and system configurations is in the hundreds. ... Reconciling these variations through the promulgation of a unified set of technical-legal rules would entail a formidable administrative undertaking by this Commission. Implementation would impose a comparable, if not greater, burden on telephone companies and party line subscribers.¹³⁵

Thus, the Commission decided to allow telephone companies (subject to oversight by state regulatory Commissions) to establish and enforce their own standards on what can be attached to a party line:

Direct connection of customer-provided equipment to party line service will remain a matter for resolution by telephone companies and state regulatory commissions, and existing protective device procedures that have been effective since Carterfone. ... [For example,] telephone companies [may use] tariff provisions that set forth the conditions for party line equipment interconnection.¹³⁶

¹³⁴ Id. (footnote omitted).

¹³⁵ Id. at ¶ 95.

¹³⁶ Id. at ¶¶ 100, 102. In reaching this conclusion, the Commission also rejected as impractical proposals to accommodate party line customer equipment by requiring telephone companies to develop universal, modifiable telephones or a system of conversion devices. Id. at ¶ 99.

In all cases researched by GI, state regulatory agencies permit the telephone companies to self-regulate party line attachment.¹³⁷

Shared, tree-and-branch broadband networks, such as cable systems, are essentially the equivalent of one big party line. In fact, potential concerns with respect to such networks are even greater than that in the telephone party line context. First, the threat of intellectual property theft arising in the MVPD context is not even an issue with telephone party lines.¹³⁸ Second, the number of possible equipment and system configurations in the MVPD context is in the thousands, rather than the "hundreds," which the Commission found were potentially implicated in the telephone party line context. Thus, the notion that the Commission could establish a Part 68 regime to accommodate all potential harms in the MVPD navigation devices area is fanciful to say the least. Rather, the only workable approach is for the Commission to qualify the consumer's right to attach MVPD equipment by the right of the

¹³⁷ In New York, Virginia, and Idaho, for example, the State permits the local telephone company to regulate party line attachment. Telephone interview with Robert Lorenzo, Assistant Commissioner - Rates Analyst for the New York Public Service Commission (April 8, 1997); Telephone interview with Judy Shepard, Assistant to the Communications Division Director for the Virginia State Corporation Commission (April 8, 1997); Telephone interview with Wayne Hart, Telecommunications Analyst, Idaho Public Utilities Commission (April 11, 1997). Carriers often do so by including the prohibitions or similar party line attachment rules in tariffs filed with the state regulatory Commission. Id.

¹³⁸ The Commission's rules must make it very clear that theft of service is "publicly detrimental" to the MVPD's network, and that an MVPD has the right to refuse to allow the connection to its network of any piracy device.

network provider to establish and enforce what can be attached to its network.¹³⁹ This is especially true given that federal regulations typically hold the network operator responsible for ensuring that the network causes no harm to other spectrum users.¹⁴⁰ Of course, MVPDs may be required to provide to requesting consumers basic technical information about their network in order to facilitate the consumer's purchase of compatible equipment from a retail outlet.¹⁴¹

¹³⁹ In footnote 22 of the Notice, the Commission states that "interference upstream . . . can be controlled with filters and other equipment installed at nodal sites or amplifier housings." This statement is incorrect. Because of the tree-and-branch architecture of the cable plant, the plant acts as a noise funnel in the reverse direction. One approach to reduce such noise is to filter the return path, typically by placing a filter at the home. This filter could be used to: (1) block all return path signals from that home because that home does not subscribe to two-way services; or (2) split the spectrum into a filtered region for one type of transmission (e.g., telephony) and allow the other part of the spectrum to be used for less critical communications (e.g., pay-per-view transmissions, which can be repeated if corrupted by noise). Because two-way devices must transmit a signal upstream for return path communications, filtering only serves to reduce the overall noise in the system but in no way can protect the network from faulty or poorly designed devices which corrupt the spectrum. GI attaches as Appendix F an article describing the channel characteristics of the cable return path.

¹⁴⁰ See, e.g., 47 C.F.R. § 76.605(a)(12) and §§ 76.610 through 76.617.

¹⁴¹ Notice at ¶ 56. To further reduce the potential for harm to the network, the Commission should adopt a rule preventing unauthorized, harmful, or interfering transmissions by customer-owned and attached navigation devices. Such rules also should specify significant penalties for any violation.

2. **While the Part 15 Rules Plus Adoption of the SCTE Inside Wiring Standards Will Limit Signal Leakage in Most Commercially Available Equipment, Two-Way and Malfunctioning Equipment Present Special Concerns.**

GI supports the Commission's tentative view that application of the existing Part 15 certification rules to commercially available MVPD navigation devices will minimize signal leakage issues that may arise from commercially available navigation devices.¹⁴²

However, application of the Part 15 rules is not enough. A major cause of signal leakage is inadequately shielded coaxial cable that is widely sold in consumer electronics retail stores. To adequately address this problem, GI recommends that the Commission adopt Sections 1 through 8 of the Society of Telecommunications Engineer's ("SCTE") specification for coaxial drop cable ("SCTE IPS-SP-001a") as the standard for in-home cabling.¹⁴³

The SCTE standard should be adopted for three reasons. First, the standard carefully defines shielding requirements for coaxial cable, and proper shielding is necessary to maintain RF integrity

¹⁴² Notice at ¶ 61.

¹⁴³ GI described the SCTE in-home wiring specification in its comments filed in the Commission's Inside Wiring Proceeding. See GI Comments filed on March 18, 1996, in CS Docket No. 95-184 at 5-7. There was broad agreement in the comments filed in the Inside Wiring proceeding to adopt the SCTE standard. See GI Reply Comments, filed on April 17, 1996 at 1-2 (summarizing comments on this issue).

in the cable. Second, there is no national consumer standard for coaxial cable, and thus consumers often purchase substandard coaxial cable at retail unknowingly. This, in turn, leads to greater signal leakage. Third, SCTE IPS-SP-001a is an excellent standard, representing the culmination of years of work by cable television operators and coaxial cable manufacturers to define the essential electrical and physical cable parameters. The SCTE took into account system performance needs, coaxial cable design, installation, safety, and craftsmanship.

In short, requiring that all coaxial cable sold at retail for cable TV connections must comply with the SCTE standard, coupled with application of Part 15 to the MVPD customer devices, will help to minimize signal leakage concerns. However, two-way and malfunctioning one-way devices present unique signal leakage issues. Since neither the Part 15 rules nor the SCTE inside wiring standard addresses the "purity" of the signals in two-way devices, they are not entirely adequate with respect to reducing leakage in such devices. The same is true of one-way "malfunctioning" devices. However, GI believes it is premature at this time to suggest any specific rules to deal with such issues. Rather, as noted, the Commission should adopt a rule preventing unauthorized, harmful, or interfering transmissions by all customer-owned and attached navigation devices, and establish significant penalties for any violation.

B. Subsidy/Bundling Provision

1. The Subsidy and Bundling Prohibitions Do Not Apply to Any MVPD Whose Rates Are Not Rate Regulated.

a. The Subsidy/Bundling Prohibitions Do Not Apply to Non-Cable MVPDs.

GI supports the Commission's tentative conclusion that its existing equipment rate rules that are applicable only to noncompetitive cable systems properly address Section 629(a)'s requirement that MVPDs may offer navigation devices to consumers as 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."¹⁴⁴ This conclusion is compelled by legal and policy analyses.

As an initial matter, the Commission is without jurisdiction to extend these subsidization and bundling prohibitions to MVPDs that are not subject to rate regulation. The legislative history makes clear that Congress' intent in this provision is to preclude the use of "rate regulated services to subsidize equipment" and that when MVPD services are not rate regulated "such subsidy cannot be sustained and the prohibition on bundling is no longer necessary."¹⁴⁵ As a result, "The bill's prohibition on bundling and

¹⁴⁴ Notice at ¶ 37 (citing 47 U.S.C. § 549(a)).

¹⁴⁵ 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996) (colloquy between Sens. Faircloth and Burns) (emphasis added).

subsidization no longer applies when cable rates are deregulated."¹⁴⁶

Given this clear congressional intent (particularly the express reference to cable rates), the Commission may not, for example, apply the subsidy or bundling prohibition to DBS, MMDS, SMATV, or C-Band operators, since these providers are not subject to rate regulation. Moreover, since Section 629 does not authorize the Commission to extend rate regulation to such entities,¹⁴⁷ the Commission must conclude that it is without authority to apply these pricing restrictions to non-cable MVPDs.¹⁴⁸

Even assuming arguendo that the Commission had jurisdiction to extend the subsidy or bundling restrictions to non-cable MVPDs, it should not do so for sound policy reasons. First, as the Commission correctly observes, for example, DBS operators are already "highly competitive both because there are a number of DBS providers that are competitive with each other and because DBS faces competition from cable service."¹⁴⁹ In such a highly

¹⁴⁶ Id.

¹⁴⁷ 47 U.S.C. § 549(f) ("Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before [February 8, 1996].").

¹⁴⁸ As discussed in Section IV.D., supra, Congress specifically exempted OVS operators and OVS packagers from all aspects of Section 629.

¹⁴⁹ Notice at ¶ 42.

competitive business, anti-subsidy and anti-bundling provisions are simply not warranted.

Second, as Besen and Gale conclude, "promoting the widespread adoption of new technologies where there are important network externalities may require that early adopters be offered lower prices than later ones."¹⁵⁰ In addition, Besen and Gale explain that given the highly interdependent nature of MVPD equipment and MVPD service, below-cost pricing by MVPD operators may lead to greater efficiencies and increased MVPD competition.¹⁵¹ The Commission's own analysis concurs, noting that the use of bundling in both the cellular and DBS markets has produced positive results for consumers and for competition.¹⁵²

Based on the above legal and policy analyses, the Commission should not apply the subsidy or bundling prohibition of Section 629(a) to non-cable operators.

b. The Subsidy/Bundling Prohibitions Do Not Apply to Cable Systems Whose Rates Are Unregulated.

For the same reasons, the subsidy and bundling prohibitions do not apply to cable systems that are subject to effective competition under Section 623(1)(2) of the Communications Act.

¹⁵⁰ Besen and Gale at 29 (emphasis in original).

¹⁵¹ Id. at 29-30.

¹⁵² See Notice at ¶¶ 42-43. Nor has the use of such bundling impeded the development of a competitive equipment market. See id. at ¶ 43 (citing Cellular Bundling Order, 7 F.C.C.R. 4028 (1992)).

This conclusion is compelled for three reasons. First, congressional intent requires it. As noted, Congress was clear that "the bill's prohibition on bundling and subsidization no longer applies when cable rates are deregulated."¹⁵³

Second, since the subsidy and bundling prohibitions represent a form of rate regulation,¹⁵⁴ the Commission is without authority to continue to apply these restrictions after a cable system becomes subject to effective competition.¹⁵⁵

Third, GI agrees with the Notice's conclusion that "DBS providers are in the same category as cable systems facing effective competition" ¹⁵⁶ Since the Commission is without authority to apply the subsidy and bundling prohibitions to DBS and other non-cable MVPD providers who are not subject to rate regulation, removal of these prohibitions from effectively competitive cable systems is required in order to foster a level

¹⁵³ 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996).

¹⁵⁴ See, e.g., 47 C.F.R. § 76.923(b) (anti-bundling rule adopted as part of the Commission's cable equipment rate regulations).

¹⁵⁵ See Time Warner Entertainment Co., L.P. v. F.C.C., 56 F.3d 151, 191 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 911 (1996) (holding that Section 623(a)(2) of the Communications Act precludes the Commission from continuing to apply the uniform rate structure requirement, or any other rate regulation, to a cable system that becomes subject to effective competition). Moreover, as noted, Section 629(f) precludes the Commission from citing the commercial availability provision as a new source of authority to overcome this pre-existing jurisdictional limitation.

¹⁵⁶ Notice at ¶ 42.

playing field where MVPD providers compete on comparable regulatory terms.¹⁵⁷

Finally, the subsidy and bundling prohibitions should not apply to cable systems which are not subject to effective competition but whose rates are nevertheless unregulated. In many instances, LFAs forbear from imposing rate regulation on an operator's basic service rates, and often no complaints have been filed against an operator's CPST rates. In such instances, the marketplace has determined that the operator's rates are reasonable and that regulation is not required. There is no sound policy basis for treating such systems differently for purposes of the subsidy and bundling prohibitions than systems that face effective competition.

2. The Commission's Current Cable Rate Rules Satisfy the Subsidy/Bundling Requirement for Regulated Cable Systems.

As the Notice correctly states, the Commission's rules already require rate regulated cable systems to establish cost-based rates for equipment which must then be separately stated on customers' bills.¹⁵⁸ Regulated cable systems must also periodically file rate forms with their local franchising authorities to justify their compliance with these rate rules. Thus, the Commission has already

¹⁵⁷ See Notice at ¶ 45 (recognizing potential difficulties of an asymmetric regulatory approach in this context and that parity should be restored when a cable system becomes subject to effective competition).

¹⁵⁸ See 47 C.F.R. §§ 76.923(b) and (c).

ensured that rate regulated cable systems meet the Section 629 subsidy and bundling prohibitions. Additional rules enforcing these requirements are therefore unnecessary and, in fact, would be inconsistent with the express limits placed on the Commission's authority under Section 629.¹⁵⁹

Finally, nothing in Section 629(a) precludes a cable operator from offering navigation devices below cost, as long as such below-cost equipment pricing is not offset by an increase in regulated service pricing.¹⁶⁰ As explained by Besen and Gale, absent an improper cross subsidy, such lower-cost equipment offerings benefit consumers and could increase the level of MVPD competition.¹⁶¹ In fact, the Commission's rules which pre-dated enactment of Section 629 expressly permitted cable operators to price their customer equipment below cost,¹⁶² and nothing in Section 629 limits this pre-existing right.

¹⁵⁹ See 47 U.S.C. § 549(f) (nothing in Section 629 expands the Commission's pre-existing authority).

¹⁶⁰ See Notice at ¶ 44. Of course, such below-cost pricing would also have to comport with antitrust jurisprudence regarding predatory pricing.

¹⁶¹ See Besen and Gale at 26-30. See also Notice at ¶¶ 42-43.

¹⁶² See 47 C.F.R. § 76.923(j). Of course, since non-cable MVPDs are not covered by the anti-subsidy provision, they also may price their equipment below cost.

C. Waivers

As an initial matter, if the Commission adopts GI's proposal described in Section VI, supra, to phase in the commercial availability rules and to apply the rules to a different type of equipment during each phase, it will reduce the number of situations where a need for a waiver exists.

However, to the extent waivers are required, GI agrees with the Commission's tentative conclusion that waiver requests should be viewed "sympathetically and expansively."¹⁶³ Such an approach is required to implement Congress' intent to avoid any unnecessary obstacles to innovation and rapid diffusion of new services and consumer equipment.¹⁶⁴

1. Waivers Are Not Required Prior to the Time a Navigation Device Is Sold or Leased to Consumers.

To begin with, it is important to observe that there may be a substantial period during which equipment manufacturers and MVPDs will need to test new equipment in an operational setting before it is ready for sale to consumers. This is especially so because of the need to coordinate the equipment with the operations of the MVPD system itself, a process that may prove difficult when new services are being introduced along with the new equipment. During

¹⁶³ Notice at ¶ 48.

¹⁶⁴ Id.; Conference Report at 181; 47 U.S.C. § 157 (parties opposing "a new technology or service proposed . . . shall have the burden to demonstrate that such proposal is inconsistent with the public interest.").

this period, there should be no need for a waiver because the operator will not be generally offering to lease or sell equipment, and thus there is no need for a retail alternative. The Notice recognizes this point,¹⁶⁵ and the Commission's rules should make clear that MVPDs and manufacturers are not required to obtain a waiver to engage in such pre-sale testing of the equipment.

2. There Are Numerous Potential Equipment/Service Scenarios That Will Justify a Waiver.

Waivers may be required after the operator begins to sell or lease new equipment. For one thing, it may be difficult to find entities that are willing to sell at retail equipment that is needed to obtain new services during the period before it is clear that a significant market exists for these services.¹⁶⁶ During this period, only the MVPD operator may be willing to take the risk and incur the costs of offering the new equipment because it alone will benefit from the growth of the service market that may eventually occur; in such cases, it would be inappropriate to condition the provision of the equipment by the operator on the existence of a retail alternative.

Second, even after the initial research and development phase, there may remain unsolved technical difficulties in particular MVPD

¹⁶⁵ See Notice at ¶ 47 ("'Beta testing' of new products is an extremely important element of the process but it must necessarily take place with a controlled group of users.").

¹⁶⁶ See id. ("It may be difficult to find retail vendors to sell equipment needed to receive or to navigate through a new service before the service proves itself in the market.").

systems which may be more difficult to resolve if consumers have obtained their equipment from multiple retail outlets and, possibly, from multiple manufacturers. Because consumers are likely to hold the operator responsible for these difficulties, the demand for both new and existing services may be adversely affected. Providing a waiver of the commercial availability requirement may substantially simplify the resolution of any technical problems that may arise during this phase, and MVPDs may be unwilling to offer the new equipment until they can obtain a "breathing period" during which these problems can be resolved without the additional complications created by the existence of commercial availability.

Third, an MVPD may need to be able to test alternative pricing strategies for new services by initially limiting the availability of these services to a restricted set of customers. However, the ability to conduct such tests may be undermined if commercial availability prematurely expands the number of customers who have access to the new services.¹⁶⁷

Fourth, an MVPD may initially offer new services only to a limited set of customers, say those served from a particular headend, and only gradually roll out these services to their entire customer base. In these circumstances, there is some risk that

¹⁶⁷ The Notice correctly recognizes that Section 629's reference to both "technologies and services" suggests that "concern ought to be given to both technology and marketing issues in the waiver process." Notice at ¶ 48.

consumers may not realize that the equipment they have purchased at retail cannot provide the services for which it has been designed because those services are not offered in the area in which they reside. This problem is eliminated, however, if the new equipment is offered by the operator only to customers in the areas in which the complementary new services are being provided and is available at retail only after the rollout is completed.

Fifth, in certain instances, an equipment manufacturer will need a waiver to justify a decision to expend the R&D resources to design, produce, and deploy a new technology. Without the assurance that such equipment will not have to be made available at retail at least for some reasonable initial period, the manufacturer may decide to forego the investment altogether.

Finally, for equipment needed to provide two-way services, there is a risk that the system will have inadequate capacity to meet the demands imposed by consumers with new equipment. As a result, the operator may prefer a controlled rollout in which the capacity of the network itself is coordinated with growth in the installed base of consumer equipment. However, such coordination may be complicated if retailers are able to promote the equipment aggressively without regard to the effect on the ability of the MVPD to meet the resulting demand. In these circumstances, a waiver that permits the operator to control the pace of the rollout during the early stages of the introduction of a service may be needed if the operator is to be willing to offer the service at all. The waiver can be removed when it is clear what demand for

the new service will be and the operator can more easily plan for the needed growth in the capacity of his system.¹⁶⁸

3. A Flexible, Ad Hoc Waiver Approach Is Required to Accommodate the Various Potential Equipment/Service Scenarios.

Given the potentially numerous and diverse scenarios under which a waiver may be justified and the varying requirements under each, the Commission should not establish at this point any substantive waiver standards. Rather, it should proceed on a case-by-case basis at least until it has established a line of precedent which can then be used to codify such general substantive standards.

For the same reasons, the Commission should not prescribe at the outset what types of information are required to be filed in conjunction with a waiver request.¹⁶⁹ Beyond a requirement to explain the general nature of the new or improved service or technology involved, the Commission should leave it up to the

¹⁶⁸ The significant network problems that may be imposed by unanticipated consumer demand were recently highlighted by the congestion issues experienced by America Online when it introduced an unlimited access, flat-rate \$19.95 plan. AOL had a hard enough time dealing with the unprecedented volume generated by its own advertising and marketing efforts, over which it had control. The situation would be that much more complicated when the marketing and sales efforts of third parties (such as equipment retailers) can affect consumer demand and network performance.

¹⁶⁹ Notice at ¶ 79.

petitioner to attach whatever information it feels is required to justify a waiver under Section 629(c).¹⁷⁰

In addition, the Commission should establish a rebuttable presumption that the waiver will be granted and that the waiver period requested by the petitioner is reasonable.¹⁷¹ Such presumptions are fully consistent with congressional intent which requires that those who "oppose a new technology or service proposed ... shall have the burden to demonstrate that such proposal is inconsistent with the public interest."¹⁷²

Finally, parties should be permitted to submit their request for a waiver to the Commission at any point in the product's development cycle, even prior to the development of an actual prototype. This is because grant or denial of the waiver could actually determine whether or not the manufacturer and/or the MVPD decide to invest the necessary R&D into the new technology.

4. Waiver Requests Should Be Deemed Approved if Not Acted Upon Within 90 Days.

The Commission asks whether it would be "possible or desirable" to use a process whereby waivers which are not acted

¹⁷⁰ See, e.g., 47 C.F.R. § 76.605(b) (providing for waivers of certain technical standards on "an adequate showing ... which establishes that the public interest is benefited.").

¹⁷¹ Given the diverse nature of the technologies and services that may be the subject of waiver petitions, it is difficult to see how the Commission could, particularly at this early stage, give meaning to the "limited time" phrase in Section 629(c).

¹⁷² 47 U.S.C. § 157.

upon within the statutory 90-day review period are automatically "deemed approved."¹⁷³ The Commission has the authority to implement such a procedure, has exercised this authority in the past, and should do so again in this proceeding.

There is substantial precedent supporting the Commission's authority to adopt automatic-grant procedures such as those contemplated in the Notice. For example, any request for forbearance under new Section 401 of the Communications Act "shall be deemed granted if the Commission does not deny the petition ... within one year...."¹⁷⁴ Similarly, a common carrier's application to supplement its facilities is deemed granted if the Commission does not act within 21 days.¹⁷⁵

Such automatic grants should be used by the Commission in this context as well. While the Commission may want to issue written orders with respect to certain waiver requests to provide the industry with guidance on various issues relating to its decisionmaking process, in many situations, a written decision may

¹⁷³ Notice at ¶ 79.

¹⁷⁴ 47 U.S.C. § 160(c).

¹⁷⁵ 47 C.F.R. § 63.03(d). See also 47 C.F.R. § 63.71 (application of a non-dominant common carrier seeking to discontinue, reduce, or impair its service deemed granted after 31 days if no Commission action); In the Matter of Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications, Report and Order, 59 Rad. Reg. 2d (P&F) 982 at ¶¶ 1, 3-4 (1986) ("waiver applications" of domestic telecommunications carriers to modify their agreements with foreign carriers deemed granted after 60 days if no Commission action).

not be necessary for such purposes. In such situations, an automatic grant would allow the Commission to conserve valuable administrative resources. Of course, if the waiver request is very straightforward and justified, the Commission may and, indeed, should grant the waiver request prior to the expiration of the 90-day statutory review period.

D. Sunset

1. The Commission Has Broad Discretion to Interpret the Sunset Provision Flexibly.

GI supports the Commission's tentative conclusion that the sunset provision should be read "as flexibly as possible."¹⁷⁶ Particularly given the highly dynamic nature of the MVPD marketplace, a flexible approach which seeks to avoid unnecessary regulation is entirely appropriate.

Moreover, such a flexible approach is well within the Commission's authority. First, while Section 629's sunset provision speaks of "ceasing" to apply regulations "adopted under this section," nothing in this provision or anywhere else in Section 629 requires the Commission to adopt commercial availability regulations for all MVPDs or all MVPD equipment in the first instance. Indeed, as shown in Sections IV and VII.B., supra, the extension of commercial availability requirements or anti-subsidy/bundling rules to certain MVPDs/MVPD equipment is outside

¹⁷⁶ Notice at ¶ 82.

the Commission's jurisdiction and/or is inconsistent with sound public policy.¹⁷⁷

2. Under a Sunset Analysis, the Commission May Refrain from Applying the Commercial Availability Requirements to DBS and C-Band Operators.

In Section IV.B., supra, GI demonstrated that the Commission's rules adopted in this proceeding should not apply to DBS and C-Band because the navigation equipment they provide already satisfies the commercially available standard of Section 629. GI also believes that an independent basis for reaching this same conclusion is the sunset provision in Section 629(e). Specifically, the competitive status of DBS and C-Band providers justifies a "sunset" of the commercial availability requirements with respect to these entities. As the Commission notes, DBS providers face robust competition by other DBS providers and by cable operators. Such competition has resulted in dramatic reductions in DBS equipment prices and expanded channel capacity.¹⁷⁸ Similarly, C-Band operators continue to lose market share to their new and less expensive, smaller dish national DBS competitors.¹⁷⁹ There is no

¹⁷⁷ GI also demonstrated in Section IV.C.2., supra, that the Commission has broad discretion to forbear from imposing regulations that are otherwise within its authority to prescribe.

¹⁷⁸ See, e.g., Third Annual Video Competition Report, 5 Comm. Reg. (P&F) 1164, at ¶ 43 (1997) (describing dramatic price reductions in DBS equipment pricing as a result of competition).

¹⁷⁹ See id. at ¶ 50 (noting decline in C-Band subscribership as a result of DBS growth).

sound policy basis for extending commercial availability regulations to such fully competitive markets. In fact, application of such rules could actually reduce the level of competition by constraining the pricing flexibility of DBS and C-Band providers.

Accordingly, the Commission should find that since the sunset criteria of Section 629(e) are already satisfied in the case of the DBS and C-Band markets, the commercial availability rules do not apply to DBS or C-Band operators or to the MVPD navigation devices they provide.

3. The Rules Should Sunset with Respect to Cable Systems Where: (1) Effective Competition is Present in the Individual Franchise; or (2) DBS Attains a 10% National Penetration.

a. Effective Competition Analysis

GI proposes that the Commission sunset the application of the commercial availability requirements with respect to an individual cable system that is or becomes subject to effective competition and with respect to all cable systems nationwide if and when DBS attains a national penetration level of 10%.

Sunsetting the rules for effectively competitive cable systems is consistent with Section 629(e). Significantly, this section does not require that the MVPD navigation devices at issue must be "fully available at retail" for the second prong of the test to be satisfied. Rather, it simply requires that the MVPD navigation devices market is "fully competitive." As the Notice properly points out, "If a market developed in which numerous service suppliers compete based on programming, rates, and technology ...

program service and equipment in combination could be a highly competitive market, justifying the Commission's forbearance to apply regulations."¹⁸⁰ Such "fully competitive" offerings of integrated service and equipment would satisfy the plain language of Section 629(e), even "if the 'commercial availability' of equipment were thereby eliminated."¹⁸¹

This analysis recognizes the highly interdependent nature of MVPD equipment and MVPD service and that substantial consumer choice with respect to each interdependent part is created when integrated service/equipment suppliers compete vigorously in a given market. Besen and Gale further expound on the effects on service and equipment when integrated service/equipment suppliers compete in a given market:

When consumers have access to multiple 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. In this case, competition among MVPDs will lower equipment prices and spur innovation in the same way that having independent outlets does when there is a single MVPD. ... Here, competition among delivery systems provides the same benefits as does competition in the sale of equipment for any particular system.¹⁸²

Besen and Gale then conclude that when MVPD competition reaches a certain point, the commercial availability rules can be sunset:

¹⁸⁰ Notice at ¶ 53.

¹⁸¹ Id.

¹⁸² Besen and Gale at 32.

At some point, therefore, the Commission may be able to conclude that there is sufficient competition among MVPDs to prevent any possible anticompetitive behavior in the supply of equipment. When this occurs, the commercial availability regulations can be abandoned because consumers can switch to alternative delivery systems if the price of equipment, and thus the price of receiving service, is increased. For example, when a cable system faces effective competition, sunset of the commercial availability rules is justified for that system.¹⁸³

Moreover, Congress, the Commission, and the courts have recognized that when cable systems become subject to effective competition under Section 623(1)(1) of the Communications Act, no regulation of cable service or equipment pricing may continue. For the same reasons that led to this conclusion (in addition to the bases discussed above), the Commission should find that the commercial availability requirements no longer apply when a cable system becomes subject to effective competition.¹⁸⁴

Finally, the Notice states in its discussion of the anti-subsidy provision that DBS providers are in the same category as cable systems facing effective competition.¹⁸⁵ GI believes that this statement is correct and that it applies equally in the context of a sunset analysis. Stated another way, for the same

¹⁸³ Id. at 33 (emphasis added).

¹⁸⁴ The foregoing analysis regarding competition by integrated service/equipment suppliers provides yet another independent basis for Commission forbearance from applying the commercial availability requirements to DBS and C-Band providers, since these markets are already fully subject to these competitive dynamics. See Notice at ¶ 53.

¹⁸⁵ Id. at ¶ 42.

reasons that the Commission can refrain from applying (or "sunset") Section 629 requirements to DBS at the outset, it can, and should, cease applying them to cable systems which become subject to effective competition.

b. DBS National Penetration Analysis

GI believes that the same dynamics which justify sunset of the rules for an individual cable system that faces effective competition also justify sunset of the rules for all cable systems nationwide if and when DBS reaches a certain penetration level, such as 10%.

The critical factor in this scenario is that once DBS systems are offering comparable services to 10% of the county, they will have a substantial competitive impact on how a cable system prices and configures its service and equipment offerings, even though the cable system may not technically be subject to "effective competition" under the literal terms of Section 623(1)(1). Dr. Leland Johnson, an economic expert on these competitive issues, described this phenomenon as follows:

[M]arket share data alone are not good measures of competitive pressures of concern here. The behavior of cable operators will be greatly affected by the threat of entry, quite aside from the actual subscribership recorded by competing networks. Especially with their nationwide coverage, DBS systems will be poised to exert competitive pressure only loosely tied to actual subscriber sign-ups. ... In short, cable will be under competitive pressure during the remainder of the 1990s,