

not intended to be "covered." The NPRM seeks comment on methods to narrow the focus of the rulemaking process and the rules adopted to best accomplish the intended statutory objectives. We address these issues in turn.

1. **Implementing regulations should not apply to devices, but to MVPD systems**

Section 629 intends that any device that does not harm the network can be a navigation device. But this does not mean that these devices need to be regulated or specifically addressed in regulations. Rather, it means that MVPD systems need to be made capable of supporting use of such devices as navigation devices.^{25/} The whole idea of competitive availability is to let competition--not the MVPD operator, or regulations--define the nature, form and features of the devices and software applications that provide broadband access to gateway systems.

The plain language of Section 629 provides that competitive availability must apply to: (1) any device, (2) used by consumers, (3) to access (a) video programming, or (b) any other service (4) offered over a multichannel video distribution system. The Conference Report similarly describes the scope of the regulations as covering "equipment used to access services provided by multichannel video programming distributors."^{26/}

^{25/} See discussion at page 5 above.

^{26/} H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 181 (1996).

"Access" in this context means to be capable of receiving any service offered by the MVPD through the use of an available competitive device. Not all competitive devices actually need to address all MVPD system features, but competitive devices that do so must be available for the consumer to have "access" through the use of such a device.

The emphasis in the Act and the Conference Report is the support of the system for competitive availability of devices--not whether various categories of devices can be made "competitive" in some abstract sense. Without reference to generic system capabilities, there is no point to generating any list of "covered" devices. Potentially, depending on system compliance and the achievement of a national security interface, *any* class of equipment can be used to gain access to *any* service offered over a multichannel video programming system--including televisions, VCRs, personal computers and other equipment which is not traditionally used to access video programming. So long as device and software do not harm the system, it is up to the manufacturer whether any device, such as a TV, VCR, computer, etc., should or should not be configured to function as a navigation device.

2. Competitive availability of cable modems requires only the disclosure and licensing aspects of system compliance

We have emphasized that for MVPD systems offering video entertainment programming to be capable of supporting

competitive availability, they must offer a national security interface and achieve sufficient commonality with respect to means of digital transmission. Neither challenge applies to devices such as cable modems. While there are security concerns with respect to encryption of particular transmissions, there is no security barrier to access to the network through the modem.

Accordingly, to assure competitive availability of cable modems, the Commission must achieve "step (3)" of the three compliance steps discussed above and in the CERC Comments: notice and fair, reasonable and nondiscriminatory licensing. Our general discussions of these requirements should apply to this more specific case.^{27/}

The Commission should address, and solve, the challenge of the emerging cable modem market at the same time that it does so for other classes of devices. To the extent that the solution for cable modems is expedited due to progress already made in private sector standards setting, however, this should be reflected in very ambitious compliance dates applicable to this MVPD service.

C. The Commission Need Not Draw Any Arbitrary Lines As To How To Achieve "Commercial Availability"

Section 629(a) mandates "commercial availability" of consumer equipment "from manufacturers, retailers, and other vendors not affiliated with any [MVPD]." The legislative

^{27/} See pp. 21-22 and 28-30, below.

intent is to assure that "consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator."^{28/}

1. Commercial availability principles for systems that do not support national portability imply that manufacturers and retailers that are not hand-picked by MVPDs should be able to offer compatible navigation devices

The Commission, at NPRM ¶¶ 20-23, seeks comment on the definition of "commercial availability" and the scope of this Section 629 requirement. Specifically, the Commission sets forth a lengthy series of questions regarding: the extent to which the service provider may select or retain control over the retail outlet; the extent to which the service provider may retain control over or influence technology and manufacture of the products involved; whether certain models of equipment availability satisfy Section 629's "commercial availability" standard; how to assure that unaffiliated manufacturers are able to produce navigation devices that are compatible with a given MVPD's network; and other questions regarding the requirements of commercial availability under Section 629.

At heart, these questions address the basic prerequisites for assuring that a given MVPD system supports

^{28/} S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 181 (1996).

commercial availability. If an MVPD system fulfills the security, transmission, disclosure and licensing measures necessary to achieve competitive manufacture and national portability, no other requirements are necessary; the MVPD system operator may make whatever arrangements with particular manufacturers or vendors it wishes, consistent with these support capabilities.

2. Disclosure requirements are needed to assure that manufacturers have timely access to standards and technical specifications for CPE interconnection

The Commission asks at NPRM ¶ 23, how do we assure that unaffiliated manufacturers are able to produce navigation devices that are compatible with a given MVPD's network? The answer is to require MVPDs to make sufficient disclosure of existing and new network features, functions, and facilities, to permit the initial development and continued viability of a competitive CPE market. Adequate network disclosure will help assure that manufacturers can make, retailers can sell, and consumers can buy, appropriate operable equipment.

To build competitive devices, manufacturers must have timely access to the standards and technical specifications necessary to enable equipment interconnection. The Commission should establish rules that will promote competitive equipment markets by requiring timely disclosure of technical information sufficient for manufacturers to connect their equipment to multichannel video service

networks. Disclosures must be sufficiently broad in scope and defined in detail to permit CPE manufacturers to design equipment that will be completely interoperable with the transmission systems. Accordingly, we urge the Commission to adopt network disclosure requirements for MVPDs similar to Part 68, 47 C.F.R. § 68.110(b) and/or the information disclosure requirements with respect to protocols and technical requirements for connection of CPE and changes thereto imposed upon BOCs under 47 U.S.C. § 273(c).

As a corollary to such network disclosure, the Commission should prohibit network services and controls that frustrate or interfere with the operation of competitively procured CPE and the configuration of closed systems based on proprietary designs. MVPD systems should be free to add enhancements that require new hardware or software, but should not jeopardize "backward compatibility" so as to make existing CPE obsolete.

3. The consumer's right to attach need be bounded only by harm to the network

Circuit City agrees wholeheartedly with the Commission proposal, at NPRM ¶ 56, to model competitive requirements for MVPD-compatible CPE upon the telephone model and the consumer's fundamental right to attach CPE to the network (the basic Carterfone principle). That is, consumers may attach devices to the MVPD network if the devices do not adversely affect the network and are privately beneficial without being publicly detrimental. To this end, as

discussed above, MVPDs must make available basic technical information regarding the network sufficient to enable consumers to make purchasing decisions.

Moreover, to assure that CPE does not cause harm to the network, at NPRM ¶¶ 57-63, the Commission sets forth several related proposals and queries regarding signal ingress, signal leakage, and signal quality. With respect to signal ingress, we suggest that the Commission expand or replicate the Part 68 standards and registration requirements for CPE manufacturers. Circuit City would not support another venture by the Commission into the use of "network protection devices," which for a period were employed as a system defense against consumer-obtained telephone CPE.

With regard to signal leakage, we concur with the Commission that Part 15 certification provisions can adequately address signal leakage issues that may arise with navigation devices available from retail sources rather than service providers.

Finally, as to signal quality, the marketplace should be given the opportunity to address quality issues without Commission-imposed standards. If these measures do not prove adequate, the Commission can later impose technical requirements for "MVPD compatible" or "MVPD ready" CPE available through retail channels (in addition to existing rules for TVs and VCRs and cable compatibility), or other measures to prevent network harm.

D. The Definition Of Affiliate Under Section 3 Of The Act Should Apply To Section 629

Section 629 further requires that CPE be commercially available from vendors not affiliated with any MVPD. We have no argument with the Commission's tentative conclusion, at NPRM ¶¶ 25-27, that the definition of affiliate under Section 3 of the Act, 47 U.S.C. § 153(1), should be applicable to Section 629. Under Section 3, affiliation is established when a person "owns or controls, is owned or controlled by, or is under common ownership or control with another person." Section 3 further establishes a ten percent equity interest threshold. We further agree with the Commission's tentative conclusion that both passive and active ownership interest should be attributable.

E. Practical Availability Requires National Portability So CPE Is Operable On All MVPD Systems In The Same Industry, And Minimal Standards To Make This Possible

At NPRM ¶ 24, the Commission questions the requisite level of portability and interoperability to assure "practical availability":

- Should devices simply operate with the particular MVPD's system that they are purchased for?
- Should devices be operable on all MVPDs' systems in the same industry, e.g., on all cable systems or on all MMDS systems?
- Should devices work for all multichannel video programming services--e.g., navigation device operable with a cable system also must be operable with MMDS, DBS, and other services?

Circuit City supports the "middle" option. To support national portability, and therefore create an incentive for manufacturers to configure their computers, TVs, VCRS, and stand-alone devices as navigation devices, local systems of a given basic configuration should be "device compatible." That is, CPE for a given MVPD system should be compatible with all essentially similar MVPD systems. While it is desirable--and a clear long-term goal of the Congress^{29/}--for consumer devices to be fully interoperable with MVPD systems using different modes of distribution, this does not appear necessary in order to comply with the statutory mandate.

1. **Optimum device configuration should be left to competitive manufacturers, based on adequate disclosure and reasonable and nondiscriminatory licensing terms**

At NPRM ¶ 65, the Commission asks how to assure the optimal degree of interoperability and portability of navigation devices among services and providers without unduly increasing cost or impeding retail availability at the outset.^{30/}

^{29/} The House Commerce Committee observed: "A competitive market in navigation devices and equipment will allow common circuitry to be built into a single box or, eventually, into televisions, video recorders, etc." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

^{30/} Specifically, the Commission requests comment on: the incremental cost of additional capabilities and the extent to which it is desirable for consumers to have the option of purchasing less expensive single purpose types of equipment; the extent to which navigation devices should
(continued...)

The configuration and capabilities of specific navigation devices should be left to the design and discretion of independent manufacturers. Once independent manufacturers are able to make devices that can access all systems and features, it is up to the manufacturers to decide whether to make devices that address local transmission variants and/or particular system features. Then, it is up to individual retailers and vendors as to which navigation devices to offer to consumers.

Circuit City anticipates that, as happened with telephone CPE, once MVPD systems adopt a standard security interface and follow disclosure requirements necessary to support competitive availability, the competitive market swiftly will develop and offer an array of navigation devices (both integrated products and modular enhancements), with a wide range of prices and capabilities to meet the needs and pocketbooks of a wide range of consumers.

2. **The Commission should not engage in standard-setting beyond that necessary for MVPD systems to become capable of supporting competitive availability**

At NPRM ¶¶ 64 and 66, the Commission questions the extent to which industry-wide standardization is necessary

^{30/} (...continued)
have to accommodate the full range of frequencies and modulation schemes used by MVPDs; whether issues in this area can be addressed through devices that are programmable or modular in design; how to prevent navigation equipment from being used as a bottleneck to access of competing MVPD providers; and whether input selector switches can be utilized to address any concerns in this area.

to foster portability and interoperability and the process whereby standards might be developed. As discussed herein, system support of competitive availability of CPE on a national basis implies compatibility of any given local system with other local systems. To achieve this, support of fundamental standards is necessary with respect to security and transmission. Beyond this, the marketplace should be free to develop MVPD services and product functions and features.

3. **To the extent standards are necessary, the Commission should adopt standards developed by private sector committees**

At NPRM ¶¶ 66-68, the Commission questions the appropriate procedure by which standards might be adopted (e.g., voluntary, Commission-imposed, formal advisory committee, negotiated rulemaking, etc.), and queries whether simply setting performance criteria that must be met by a date certain would be a viable alternative to standard setting.

Circuit City supports the proposal made in the CERC Comments, and likewise urges the Commission to require that noncompliant MVPD systems must support particular technical performance goals by dates certain.^{31/} The Commission should expect that private industry will react to such clear and firm technical requirements by specifically adapting standards already set in the private sector. Having clearly

^{31/} See CERC Comments at pp. 15-27.

required performance that is sufficiently specific technically, the Commission should not have to engage in the actual adoption of private sector standards, unless--as happened with the telephone CPE interface--circumstances clearly warrant.^{32/}

F. Necessary Proprietary Technologies Must Be Available On A Fair, Reasonable And Nondiscriminatory Basis

The Commission, at NPRM ¶¶ 69-70, sets forth several proposals and queries with respect to proprietary technologies and the limitations, if any, that existing proprietary rights may place on the FCC's authority to mandate commercial availability of multichannel video programming access equipment. There is ample precedent, discussed above in Part II, for the Commission to recognize such proprietary rights, but make them subject to fair, reasonable and nondiscriminatory licensing. In the case of MVPD systems and navigation devices, as in the case of telephones, the proprietors have benefited from decades of regulation that insulated them from device competition. Fair, reasonable, and nondiscriminatory licensing, as necessary to restore such competition, is sound policy and clearly supported by precedent.

^{32/} At NPRM ¶ 68, the Commission considers the appropriateness of market-developed performance standards, such as those in the cable modem model. See Section II.B.2, pp. 18-19 above, for a discussion of cable modem model.

To make sure that the rules adopted achieve their intended objective of commercial availability of CPE, yet do not create impediments to technological development or unnecessarily interfere with competitive mechanisms, the Commission should require proprietors of technologies necessary to enable marketplace devices to achieve access to any local system to commit to making such technology available on a reasonable and nondiscriminatory basis.

In the recent DTV proceedings, for example, the Commission required system proponents who participated in the Advisory Committee's competitive testing process (a) to submit a statement that they would comply with the ANSI patent policies and (b) to agree that they would make any relevant patents they owned available either free of charge or on a reasonable, nondiscriminatory basis. Because it did not appear that licensing would be an impediment to the development and deployment of DTV products for broadcasters and consumers, the Commission refrained from further regulatory action.^{33/}

Here, too, the Commission can take similar steps to assure the availability of proprietary technology without undue interference with the competitive market. If a future problem develops, then the Commission can and should take further action. For example, with respect to telephone CPE,

^{33/} In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket 87-268, Fourth Report and Order, 11 F.C.C. Rec. 17771, 17794 at ¶¶ 54-55 (1996).

the Commission adopted proprietary standard plug and jack designs, and then prescribed a universal patent license agreement to help ensure that telephone carriers could not use their market power to discriminate against independent manufacturers.^{34/}

G. MVPD Security Functions Should Be Provided Separate From Operations Functions, Through A Common Interface

Section 629(b) cautions that the Commission's rules "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." 47 U.S.C. § 549(b).

At NPRM ¶¶ 28-36, the Commission requests comment on how to accomplish the underlying objectives of Section 629 to assure commercial availability while also meeting Section 629's requirement that the security of services not be jeopardized. Specifically, the Commission seeks comment on its authority to require a separation of CPE operational functions and security functions as a means of accomplishing the objectives of Section 629.

In tentative proposals, NPRM ¶¶ 71-75, the Commission questions:

- Whether the respective industries could voluntarily adopt and the FCC approve a variant of the decoder interface connector (under discussion in ET Docket No. 93-7) as a solution to the security issues raised by Section 629?

^{34/} See supra note 9 and accompanying text.

- The feasibility of establishing and implementing a requirement that MVPD suppliers construct converter boxes such that an MVPD can retain necessary security while at the same time meeting the commercial availability requirements of Section 629?
- How to avoid hindering advances of digital delivery systems in attempts to standardize delivery techniques or associated equipment?

Ideally, as is the case in consumer telephone systems, all network devices (*i.e.*, provided only by the system operator) should be transparent and outside the customer premises. Where there is no security constraint (*e.g.*, switched systems, cable modems), there is no justification for any system operator exclusively to provide any class of device. The Commission's responsibility is to achieve a competitive environment, as in the case of telephones, in which any product that might be offered by a system operator can also be offered competitively by independent manufacturers and retailers.

In some circumstances, however, security constraints recognized by Section 629 limit the extent to which this can be accomplished. Where there is a security constraint that requires any circuitry to be offered exclusively by the system operator (*e.g.*, certain circuitry presently embedded in addressable set-top boxes), such circuitry should be minimized and limited to the greatest extent possible, and considered part of the network. If a security concern requires the network operator to retain control over some security circuitry, then:

- (a) the security circuitry should be isolated from all other circuitry so that it can be provided separately and directly by the network operator to the customer; and
- (b) a common interface for mating such security circuitry to other circuitry, including devices provided by system operators and competitive manufacturers and retailers, needs to be established.

The Commission has the authority (and should exercise it) to require that any security circuitry over which the system operator retains physical control, as part of the network, may not be integrated with any other circuitry other than through a common interface.^{35/} Such integration would allow the system operator to provide products that mix network and non-network circuitry, establishing a new monopoly with which no independent manufacturer or retailer could compete. While such integration superficially might appear efficient, in the long term it would be grossly inefficient, as it would frustrate integration in consumer-owned devices of the ability to access competing systems.

In digital devices (including set-top boxes, TVs, VCRs, computer accessories), a standard security interface allows operation of independently manufactured and retailed navigation devices with an operator-supplied component descrambler device and/or software carrier which controls subscriber access and signal decryption. This technology is now readily available. For example, the National Renewable

^{35/} Recognizing that this obstacle must be overcome, Section 629(a) explicitly urges the Commission to consult with industry standard-setting organizations.

Security Standard ("NRSS") allows system operators to place all security-related circuitry on a software carrier (e.g., a key or card).^{36/} Security against theft of signal is actually improved in this implementation, compared to security fixed in the box or split between the box and a card (as is done presently in DBS and in Europe). Encryption can be customized for small geographic areas without any modification to the box, greatly diminishing the incentive to attack it. If the security is compromised, only the key/card--not the entire device--needs to be replaced.

For analog devices, the security processing must be done in a hardware module. A Decoder Interface for an analog "descrambler" module with security circuitry has been defined, as a draft industry standard. The Commission concluded in ET Docket 93-7 that effective competition between competitively procured CPE and cable systems can be achieved through use of a standard Decoder Interface, which could eventually eliminate the use of "set-top boxes."^{37/}

^{36/} NRSS was developed and approved by a Joint Engineering Committee of the Consumer Electronics Manufacturers Association (CEMA) and the National Cable Television Association (NCTA).

^{37/} See Memorandum Opinion and Order, ET Docket 93-7, 11 F.C.C. Rec. 4121, at ¶ 3 (1996). Nothing in the 1996 amendment to Section 624A inhibits the Commission from applying this interface as necessary to implement Section 629. See discussion in CERC Comments, at pp. 22-23 n.20.

H. Section 629 Requirements For Subsidies, Developmental Waivers, And Sunset Of Regulations Should Be Strictly Construed

1. Equipment anti-subsidy provisions should apply to all MVPDs

Section 629(a) provides that the rules adopted by the Commission:

shall not prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, 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.^{38/}

Circuit City respectfully objects to the Commission's tentative view, at NPRM ¶¶ 76-77, that existing equipment rate rules, which apply only to noncompetitive cable TV systems, properly address the Section 629(a) no-subsidy requirement. Section 629 contains no such limitation, and neither should the Commission's implementing rules. Rather, as a matter of policy, and pursuant to the express terms of Section 629(a), the FCC should apply anti-subsidy rules to **all** MVPDs, including non-cable MVPDs, cable companies that face effective competition, and OVS providers, with respect to devices they offer directly to consumers.^{39/}

^{38/} 47 U.S.C. § 549(a) (emphasis added).

^{39/} We respectfully suggest that the legislative interpretation contained in the colloquy between Senators Faircloth and Burns, cited at NPRM ¶ 40, is inconsistent with the face of the statute and should not be accorded any weight here. See 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996).

At NPRM ¶¶ 37-45, the Commission sets forth a litany of questions regarding subsidization, the intended application and coverage of Section 629(a), and the limits of FCC jurisdiction in this area. In response to those issues of special concern to Circuit City, we reiterate that the language of Section 629(a) expressly prevents all MVPDs from "bundling" equipment with service. It would fly in the face of the statute to view such "bundling" as a permissible gradual capture of the equipment's cost through increased programming or service revenue that the MVPD would not otherwise receive.

2. Statutory provisions for developmental waivers should be narrowly construed

At NPRM ¶¶ 47-48 and 78-80, the Commission seeks comment on the scope and coverage of the statutory waiver process, as well as on substantive and procedural requirements for obtaining temporary waivers to introduce new services, technology or products pursuant to Section 629(c). The Commission tentatively concludes, at NPRM ¶ 48, that where developmental waivers are required and requested, these requests should be looked on "sympathetically" and "expansively" to avoid obstacles to technical and service innovation.

Circuit City respectfully submits, however, that the statutory mandate to assure a national competitive market through appropriate regulations ought not be so readily dismissed. Requests to waive the Section 629 implementing

regulations must be analyzed critically to ensure a sufficient showing that a waiver is necessary to the development or introduction of a new or improved service, technology, or product. Accordingly, it is not desirable to use a process whereby waivers not acted on within the prescribed time are automatically "deemed approved."

3. Statutory requirements for "sunset" of regulations ought not be diluted

Section 629(e) provides for sunset of the regulations as follows:

The regulations adopted under [Section 629] shall cease to apply when the Commission determines that--

(1) the market for [MVPDs] 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.

47 U.S.C. § 549(e).

The language of Section 629(e) is clear. There should be no sunset of the implementing regulations unless and until the MVPD market is fully competitive, the CPE market is fully competitive, and elimination of the regulations would promote competition and public interest. These requirements must be met on a national basis. Accordingly, Circuit City respectfully disagrees with any attempt to dilute these sunset requirements through creation of

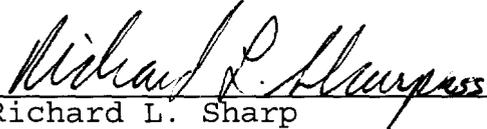
contrived submarkets based on specific product categories or geographic markets.

IV. CONCLUSION

For the foregoing reasons, and pursuant to Section 629's mandate, the Commission should adopt regulations to assure the availability to consumers of nationally portable MVPD navigation devices on a competitive basis as expeditiously as possible.

Respectfully submitted,

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May 16, 1997