unbundled and that equipment charges are not so low as to frustrate competition among equipment providers; or (3) apply some controls over all MVPDs except those facing meaningful competition.[33]

The Commission's first alternative – application only of existing regulations – is inadequate because existing regulations do not encompass MVPDs other than regulated cable systems. Moreover, these regulations have been ineffective in creating the sort of competitive environment Section 629 is intended to create. The second alternative, while better than the first, fails to establish procedures that would be adequate to address the systemic infirmities that presently characterize the MVPD CPE market.

ITI and CompTIA believe that only the third approach, as explained more fully below, would be effective in preventing MVPDs in non-competitive markets from subsidizing CPE with revenues from programming services. The focus of any anti-subsidy rules the Commission adopts should not be to prevent MVPDs and other CPE suppliers from engaging in price competition, *e.g.,* by offering discounts, but to prevent non-competitive MVPDs from siphoning revenues from their programming services to subsidize the price of their CPE.

A. The Commission Should Draw On Its Policies Regarding The Provision Of CPE By Monopoly Common Carriers In Crafting Rules To Implement Section 629(a).

The Commission has observed that many of Section 629's Congressional sponsors appear to have intended Section 629 to follow its approach to the

[33] NPRM at ¶ 45.

provision of telephony CPE when designing rules for the MVPD CPE market.[34] According to the Commission, the telephony CPE model

> is one in which, by rule, CPE must be permitted to be attached to the network, may not be provided on a bundled or subsidized basis by the service provider, involves interfaces and transmission systems that are to some extent standardized so that equipment is portable from provider to provider and, because individual transmission lines and switched service is involved, does not have scrambling or conditional access circuitry built into the CPE.[[35]]

The Commission went on to conclude that, "[a]lthough there are technical, marketplace, and regulatory differences between the telephone facilities and MVPD facilities that preclude a literal translation of this model into the MVPD context that is governed by Section 629, we nevertheless believe it provides a useful starting point."[36] ITI and CompTIA submit that the differences identified by the Commission are diminishing rapidly as technologies converge, and that the telephony regulatory model therefore will provide more than a useful starting point for grappling with the issues presented in this proceeding.

The pro-competitive purposes of Section 629 are analogous to the objectives underlying the Commission's efforts to introduce and sustain competition in the telephone CPE market where carriers' market power inhibited

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34 *See supra,* note 5.

35 NPRM at ¶ 8.

36 NPRM at ¶ 10.

the emergence of competition or threatened its viability. For example, in the *Second Computer Inquiry* Final Decision[37] the Commission wrote:

> Beginning with our *Carterfone* decision this Commission has embarked on a conscious policy of promoting competition in the terminal equipment market. As a result of this policy the terminal equipment market is subject to an increasing amount of competition as new and innovative types of CPE are constantly introduced into the marketplace by equipment vendors. We have repeatedly found that competition in the equipment market has stimulated innovation on the part of both independent suppliers and telephone companies, thereby affording the public a wider range of terminal choices at lower costs. . . . For the most part, these prior Commission decisions have been directed at removing tariff provisions that restricted non-carrier provided CPE from being attached to the network on a non-discriminatory basis.

The Commission's success in spurring competition in the telephone CPE market should inspire it to call upon its experience in that market when determining how best to implement Section 629. MVPDs that do not face meaningful competition in the provision of CPE and programming services are indistinguishable in many respects from monopoly telephone common carriers seeking to provide CPE and should be subject to analogous measures designed to promote competition.[38] Such measures should include restrictions on MVPDs'

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[37] *See, e.g., Second Computer Inquiry* (Final Order), *supra,* note 11, 77 F.C.C.2d, paras. 141-2 at 439-40 (footnotes and citations omitted).

[38] As a policy matter, harmonization of the regulations governing telephone companies and other information transmission media is logical given the convergence of the various services offered via these different media. Moreover, as technology converges, the Commission should strive for technology-neutral regulation, all other things (*e.g.,* competitive conditions) being equal.

CPE manufacturing except through separate affiliates; mandatory unbundling of CPE and programming services; and requirements for the disclosure of technical information.

B. Any Non-Competitive MVPD Should Not Be Permitted To Manufacture Its Own CPE Except Through A Separate Affiliate.

As an initial matter, non-competitive MVPDs should not be permitted to manufacture CPE except through a separate affiliate that meets criteria similar to those articulated for the BOCs in Section 272(b) of the Communications Act.[39] Adopting such a prohibition would be consistent with the Commission's treatment of common carriers that faced insufficient competition to prevent them from acting anticompetitively in CPE markets[40] and it would promote the same pro-competitive objectives that those common carrier restrictions – as well as Section 629 – were intended to further. Furthermore, the separate affiliate manufacturing restrictions that were imposed on telephone common carriers in non-competitive markets helped introduce competitive conditions in those markets and would do so in MVPDs' CPE and services markets as well.

C. Non-Competitive MVPDs Should Be Prohibited From Bundling CPE And Programming Service.

Non-competitive MVPDs should be prohibited from bundling the provision of CPE with programming services. Such a requirement would discourage

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[39] 47 U.S.C. § 272(b).

[40] *See, e.g.*, 47 U.S.C. § 273(d)(3)(A), 272(a)(2)(A); 47 C.F.R. § 64.702(b), (c); *Second Computer Inquiry*, Memorandum Opinion and Order, 84 F.C.C.2d 50, paras. 61-71 (1980) (subsequent history omitted).

MVPDs from subsidizing the CPE with programming revenues, and would be consistent with regulatory measures the Commission has adopted in the past with respect to telephone common carriers.[41]

In *Computer II,* for example, the Commission recognized the competitive dangers of allowing monopoly carriers to bundle equipment and services when it wrote:[42]

> In regulated markets characterized by dominant firms, there may be an incentive . . . to use bundling as an anti-competitive marketing strategy, e.g., to cross-subsidize competitive by monopoly services, that restricts both consumer freedom of choice as well as the evolution of a competitive marketplace.

The same concerns the Commission expressed in *Computer II* are clearly at the heart of Section 629; therefore, just as the Commission prohibited the bundling of telephone CPE and basic telecommunications services to encourage competition in the provision of CPE, so, too, should it prohibit non-competitive MVPDs[43] from bundling CPE with programming services.

This is not meant to suggest that MVPDs should be prohibited from offering "one-stop shopping" for both services and CPE; however, such MVPDs should be required to state the charges for CPE and programming services

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[41] 47 C.F.R. § 64.702(e) (requiring the provision of CPE to be detariffed and "separate and distinct" from the provision of common carrier telecommunications services).

[42] *Second Computer Inquiry,* Final Decision, *supra,* note 11, 77 F.C.C.2d 384, para. 149, note 52 at 443.

[43] The standard used to determine whether an MVPD faces effective competition and therefore should be exempt from these rules should be the same standard used to determine whether competitive conditions are sufficient to justify a sunset of the rules. See Section IV, below.

separately and should be prohibited from subsidizing the former with the latter. Moreover, to police the anti-subsidy requirement, the Commission should adopt a bright line test for the presence of CPE subsidies. An MVPD must not charge its programming customers less than it charges others (that do not subscribe to its programming) for the same CPE. If it does, the Commission should establish a presumption of subsidization that the MVPD must overcome in any formal enforcement proceeding.

III. MVPDs SHOULD BE PERMITTED TO PROTECT THE SECURITY OF THEIR SYSTEMS, BUT SHOULD BE LIMITED TO MEASURES ESSENTIAL TO THAT PURPOSE

The Commission has asked how it can allow MVPDs to protect their systems from theft and unauthorized use without frustrating the requirements of Section 629.[44] In addition, the Commission has asked whether it should require MVPDs to use a standard interface between their security devices and non-security CPE.[45]

ITI and CompTIA strongly believe that MVPDs' network security should be maintained and respected to the maximum extent possible without compromising the purposes and requirements of Section 629 and its implementing regulations. In non-competitive multichannel video services markets, safeguards should be designed to prevent the bundling by MVPDs of security devices and non-security devices and/or programming services. MVPDs should be required to state the

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[44] NPRM at ¶¶ 33-34.

[45] NPRM at ¶¶ 71-75.

charges for security devices separately from those for non-security devices and programming services, and they should be prohibited from subsidizing security devices with programming or non-security CPE revenues.

The affected industries (including MVPDs and competing CPE manufacturers) should cooperate in the development of interfaces for interconnection of security and non-security CPE. The Commission should assure that MVPDs do not define the scope of their "security" requirements so broadly as to effectively eviscerate the provisions of Section 629 governing non-security devices. The Commission should also establish safeguards to prevent MVPDs from packaging security and non-security devices in a way that places other CPE manufacturers at a technical disadvantage.

All of these measures, however, should take into account manufacturers' need for flexibility and they should be designed, to the extent possible, to minimize additional equipment and component costs for manufacturers and consumers.

IV. THE COMMISSION'S RULES SHOULD ENCOMPASS ALL TYPES OF MULTICHANNEL VIDEO SERVICES NOT SUBJECT TO MEANINGFUL COMPETITION

As noted above, ITI and CompTIA believe that consumers should have the right, similar to their right with respect to telephone terminal equipment, to use their own CPE to access MVPDs' programming services. We therefore support the Commission's tentative conclusion that it should recognize the right

of consumers to attach CPE they procure from sources other than the MVPD providing their multichannel video programming, subject only to a no-harm-to-the-network requirement.[46] This right would be consistent with the right established in *Carterfone*[47] for consumers to attach their own CPE to the public switched telephone network ("PSTN"), subject only to a no-harm-to-the-network requirement. Consistency between regulation of traditional telephony CPE and regulation of CPE used with other information media is particularly appropriate in light of the convergence of services delivered via the PSTN and other media.

A. Any Non-Competitive MVPD Should Be Subject To The Rules Adopted Herein, Even If It Also Provides Non-Video Services.

In the NPRM, the Commission has asked for comment on the scope of the rules it will adopt in this proceeding, in terms of both the types of MVPDs and the types of CPE to which the rules apply.[48] The Commission has drawn certain distinctions between MVPDs providing analog services and those

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[46] NPRM at ¶ 56. The no-harm-to-the-network qualification would simply provide that consumers could interconnect any CPE they obtain with an MVPD's transmission system, provided that the CPE does not adversely affect the transmission system and is "privately beneficial without being publicly detrimental." *Id.*

[47] In *Carterfone,* the Commission wrote that "a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility to others." *Carterfone, supra* note 14, 13 F.C.C.2d at 424 (1968).

[48] NPRM at ¶ 14.

providing digital services, and has asked whether its rules should differ as to each class of MVPDs.[49]

We encourage the Commission to make no distinction between analog and digital MVPDs. To achieve the purposes of Section 629, the Commission should treat all MVPDs facing similar competitive conditions similarly. Any other approach would create competitive imbalances among classes of MVPDs and arbitrarily discriminate among consumers, based on criteria not articulated in Section 629. The Commission should address any perceived distinctions between analog and digital systems by crafting rules that are sufficiently flexible to avoid disproportionately burdening either type of system.

In addition, ITI and CompTIA urge the Commission to make it clear that the rules will apply to all MVPDs, even if some of the services they provide are non-video (*e.g.*, Internet access, e-mail, or telephony), as long as they also provide some multichannel video programming *and* use the same CPE to access all of their services.[50] This interpretation would be consistent with the statutory language of Section 629(a), which describes the types of CPE encompassed by

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[49] NPRM at ¶¶ 51, 30. The Commission has made these distinctions specifically with regard to protection of MVPDs' interests in maintaining the security of their systems and with regard to sunset of the rules.

[50] We believe that Open Video System ("OVS") operators should be subject to the same regulations, but we concede that they are excluded from the scope of Section 629 by Section 653(c)(1)(C) of the Communications Act, 47 U.S.C. § 573(c)(1)(C). Nevertheless, to the extent it would be consistent with the Communications Act, the Commission should attempt to harmonize the regulation of OVS operators with that of MVPDs under Section 629. Failure to do so would create regulatory and competitive imbalances, give OVS operators an undue advantage over other MVPDs, and ultimately harm competition among MVPDs and undermine the purposes of Section 629.

Section 629 as including CPE used to access "video programming *and other services*" offered over MVPDs' systems.[51]

The Commission should make only one exception to this broad interpretation: the rules should not apply to any MVPD facing full competition in the provision of services and equipment. Section 629(e) of the Communications Act provides that the rules adopted pursuant to Section 629 should terminate when any MVPD's services and CPE markets are fully competitive and the public interest would be served by terminating the rules.[52] The Commission has interpreted this provision as being "broad enough, in appropriate circumstances, to suggest that regulations for certain type[s] of equipment need not be adopted in the first instance."[53] We agree. If the Commission finds that an MVPD faces substantial competition in the provision of both programming services and the CPE used to access that programming, that MVPD should be excluded from the rules adopted herein.

Section 629 was intended in part to address Congressional concerns that MVPDs with market power in the provision of services could leverage that power to thwart competition in the adjacent CPE market.[54] Thus, in determining whether an MVPD should be exempted from the Section 629 rules, the

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51 47 U.S.C. § 549(a) (emphasis added).

52 47 U.S.C. § 549(e).

53 NPRM at ¶ 51.

54 *See* NPRM at ¶¶ 38-40.

Commission should consider both the multichannel video *programming* market and the market for *CPE* to access such programming.

The Commission has indicated that it might find an MVPD's CPE market to be competitive merely because integrated service and CPE competition exists among MVPDs, notwithstanding a lack of competitive independent sources of CPE.[55] We urge the Commission to take the utmost care in making assumptions about an MVPD's market power: competition in one market does not necessarily indicate the presence of competition in another market. And the presence of multiple *CPE* providers in a geographic market may not indicate meaningful competition if competitive conditions do not exist in the *programming* market. An MVPD that dominates the programming market could control the CPE market, *e.g.*, by entering into an exclusive relationship with one of the CPE vendors and providing one-stop shopping for both programming and CPE. For these reasons, Section 629(e)[56] requires the Commission to find competition in both the CPE *and* programming service markets before the rules adopted herein can sunset.

The markets for some products, such as computers and video cassette recorders ("VCRs"), do not appear to be affected by the competitiveness of MVPDs' programming or CPE markets. The Commission has tentatively concluded that certain types of equipment, specifically including television receivers, computers, and VCRs, should not be subject to the rules adopted

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55 NPRM at ¶ 53.

56 47 U.S.C. § 549(e).

herein, because they are already widely available from numerous sources, and, despite certain MVPDs' market power in the provision of programming services, they can not control the availability of such devices in the same manner that they control the provision of set-top CPE.[57] We agree with the Commission's tentative conclusion, except that any exempted MVPD's CPE should be subject to whatever rules the Commission may adopt to protect such networks or the services they provide from harm.

B. The Commission Can Use Established Tests To Determine Whether An MVPD Faces Meaningful Competition In Its Provision Of CPE Or Services.

As noted above, the rules adopted herein should apply only to MVPDs that face less than full competition in the provision of programming services and CPE. To determine whether an MVPD faces meaningful competition, the Commission will need to define the relevant geographic and product markets in which the MVPD provides CPE and services and determine whether the MVPD has market power in those markets.[58] ITI and CompTIA believe that the appropriate geographic market for assessing competitive conditions facing an MVPD is the service area of that MVPD, rather than local geographic markets.[59] As the Commission has recognized, this would mean that the geographic market for direct broadcast satellite ("DBS") providers would be a national market, while

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[57] NPRM at ¶¶ 16-17, 55.

[58] *See* NPRM at ¶¶ 50 - 51.

[59] In some cases, *e.g.*, for cable system operators, an MVPD's service area and local geographic markets will be identical.

the geographic market for a cable system operator would be a much smaller local market.[60]

To define each product market, the Commission should follow the approach it proposed in CC Docket No. 96-61,[61] and consider all CPE products and programming services that are close substitutes for each other. Such a definition would be consistent with established approaches to defining product markets. Indeed, the Commission has recently explained that[62]

> [a] relevant product market is typically defined to encompass products that are "sufficiently close substitutes such that if a firm . . . tries to raise its price substantially on any product in that market, it would promptly lose substantial business to these substitutes."

Similarly, the 1992 Department of Justice/Federal Trade Commission Merger Guidelines provide that "market definition focuses solely on demand substitution factors – i.e., possible consumer responses."[63]

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60 NPRM at ¶ 50.

61 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996) ("*Interexchange NPRM*").

62 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* CC Docket No. 96-149 ("*Non-Accounting Safeguards*"), Notice of Proposed Rulemaking, FCC 96-308 (released July 18, 1996) (subsequent history omitted) at note 212 (quoting Robert Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1810 (1990)).

63 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,571 (cited in *Non-Accounting Safeguards* NPRM, *supra,* note 62, at ¶ 117 and note 215).

Thus, to determine whether an MVPD faces meaningful competition in the provision of its CPE and services, the Commission should consider all close substitutes for those services and CPE that are available within the MVPD's geographic market.[64]

Once it has defined the geographic and product markets for a certain MVPD, the Commission should evaluate whether any MVPD in the geographic market has market power in the provision of either services or CPE. To make this determination, the Commission could look to a number of different criteria it has considered or employed in other contexts, including market share, supply and demand substitutability, and control of bottleneck facilities, among others.[65] If an MVPD has market power in its services market, the Commission should not exempt the MVPD from the rules adopted herein, since the MVPD could leverage its market power in services to create anticompetitive conditions among providers of the CPE used to access the MVPD's programming.

Before the Commission determines that an MVPD or class of MVPDs should be exempted from the rules it adopts herein, it should determine with confidence that competitive conditions in the relevant CPE and services markets are sufficient to achieve Section 629's primary objective: maximizing consumer choice.

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[64] Because of differences in their programming, among other distinctions, DBS services and cable TV services do not appear to be close substitutes for each other at this time.

[65] *Non-Accounting Safeguards* NPRM, *supra,* note 62, at ¶¶ 132 - 134.

V. THE RULES ADOPTED HEREIN SHOULD SUNSET WHEN BOTH THE CPE AND ADJACENT PROGRAMMING MARKETS BECOME FULLY COMPETITIVE

ITI and CompTIA wholeheartedly support a sunset of the regulations adopted herein when competitive conditions in an MVPD's CPE and programming service markets justify elimination of the regulations.

The analysis described in Section IV above would not only be useful for determining what CPE should be subject to the rules promulgated herein *ab initio*, but it would also assist the Commission in evaluating whether competition has reached a level sufficient to justify a "sunset" of the regulations, as provided in Section 629(e) of the Communications Act.

Under that Section, the regulations are to terminate when (1) an MVPD's programming market is fully competitive; (2) the market for the CPE used with that MVPD is fully competitive; and (3) elimination of the regulations would promote competition and the public interest.[66]

The Commission has asked for comment regarding the proper interpretation of this provision.[67] As a general matter, relaxation of regulation could act as an incentive for industry to move toward a more competitive environment. We agree with the Commission's tentative conclusion that it should apply the provision as flexibly as possible, including the evaluation of

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[66] 47 U.S.C. § 549(e).

[67] NPRM at ¶ 82.

relevant geographic and product submarkets.[68] It is unlikely that competition will emerge at the same pace in every geographic market; therefore, a market-by-market approach to relaxation of the rules would be more effective for achieving the purposes of Section 629 than across-the-board relaxation of the rules on a national scale at some pre-determined point.

Any MVPD seeking termination of the rules in any of its geographic markets should have the burden of demonstrating that the provision of both CPE and programming services in that market has become sufficiently competitive to justify termination of the rules. The MVPD's request for elimination of the rules should be placed on public notice and public comment on the request should be invited and considered.

VI. THE COMMISSION SHOULD ENCOURAGE THE DEPLOYMENT OF BROADBAND TECHNOLOGIES

The Commission has stated that it intends to incorporate in the record for this proceeding comments that were filed in response to the *Inside Wiring* NPRM[69] to the extent they address issues raised herein.[70] ITI participated in the *Inside Wiring* proceeding, and several of the points it made in that docket have been reiterated above. For example, in light of the convergence of cable and telephone systems, ITI earlier supported the harmonization of the disparate

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68 *Id.*

69 *Telecommunications Services Inside Wiring – Customer Premises Equipment,* CS Docket No. 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1995).

70 NPRM at note 11.

regulatory regimes that have traditionally been applied to telephony and cable. ITI also encouraged the Commission to adopt policies that would enable cable subscribers to attach CPE obtained from alternative sources with their cable systems.

ITI urged the Commission to adopt policies that would foster the evolution of cable systems from one-way distribution conduits to switched, interactive broadband networks. And it argued that consumers should have the right to provide, maintain, and configure inside wiring used with their cable systems to the same extent they can do so with their telephone inside wiring. Such flexibility would facilitate consumers' ability to change cable providers and promote competition in cable service.

Moreover, policies such as these would respond to the increasing convergence of technologies, products, and services, and ensure regulatory parity across industries that are beginning to compete with each other and therefore should be subject to similar (but not identical) requirements and policies. ITI and CompTIA encourage the Commission to consider these principles in the context of this proceeding.

CONCLUSION

Section 629 lays the groundwork for the Commission to create a healthy, competitive environment in which consumers will be able to select from among numerous providers of multichannel video CPE. The benefits consumers will realize from such competition have already been demonstrated in the telephone

CPE market. They can be duplicated here if the Commission draws on its experience with telephone CPE in crafting the rules to implement Section 629.

Respectfully submitted,

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May 16, 1997

278.05/COMNavD3