private industry. For example, while Viacom asks the FCC to adopt rules that "prohibit, going forward, the production of any digital navigation device intended for resale that is not universal and multi-choice," it assumes the industry, not the FCC, would adopt standards to comply with the FCC rule.[68] Similarly, while Bell Atlantic/NYNEX calls for the FCC to establish the "principles" of portability and interoperability in its rules, it then concludes that market forces should take over at that point without further government involvement.[69] The Information Technology Industry Council endorses the concept of portability and seeks FCC rules requiring the disclosure of technical information necessary for competitors to produce CPE compatible with an MVPD's network. But it also says the FCC should rely on voluntary "market-driven industry standards" in achieving that goal.[70] Even the CERC, Circuit City and Tandy proposals, which we discuss in greater detail in the following section, assume (erroneously we believe) that their "performance rules" can be satisfied without government-mandated standards because private industry has adopted standards in those areas.[71]

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68 Viacom at 12.

69 Bell Atlantic/NYNEX at 1-2.

70 Info. Tech at 9-15. Indeed the Council makes a persuasive case against government-mandated standards, citing their tendency to stifle innovation, perpetuate obsolete technologies beyond their normal lives, and their failure to consider technological and economic considerations "that drive sound business decisions in a free market." Id. at 15.

71 CERC at 17-24 (citing NRSS and Decoder Interface standards); Circuit City at 27-28 (FCC should adopt standards developed by private sector committees); Tandy at 10 ("Tandy's proposed equipment authorization rule would not require the Commission to adopt specific standards to promote portability.").

In sum, commenters are virtually unanimous in agreeing that the FCC should not impose its own set of technical standards to insure portability or interoperability of CPE. Most of the commenters agree either that the statute does not give the Commission the authority to address portability or interoperability at all, or that, even if such authority could be found, Congress intended that the Commission rely upon industry standards-setting organizations to achieve such goals. The record also demonstrates that there are practical problems with achieving portability and interoperability but that, in any event, FCC intervention is unnecessary because industry-wide efforts are underway addressing portability and interoperability.

VIII. THE COMMISSION SHOULD ADOPT PERFORMANCE RULES BUT SHOULD NOT MANDATE TECHNICAL STANDARDS IN THE GUISE OF PERFORMANCE RULES

Recognizing that the unbundling of security from non-security capabilities might be warranted to achieve commercial availability of CPE, the Commission in the Notice expressed a clear preference for a "conduct or performance rule mandating the separation involved, leaving to the industry participants involved the task of developing the necessary interface standards."[72] NCTA, as well as numerous other commenters, endorsed this approach to determining the appropriate interface between security and non-security CPE. While proposals for particular performance rules varied, most shared the common goal of establishing a reasonable deadline by

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[72] Notice at ¶73.

which time commercial availability would be required without the government mandating a particular standard to achieve that result.[73]

For example, General Instrument proposes that the Commission should "establish commercial availability requirements that the covered MVPDs would have to meet by a date certain and afford the MVPDs broad flexibility to meet such requirements using any of a variety of acceptable distribution models."[74] Similarly, Time Warner urges the Commission to

> (1) establish a reasonable phase-in period allowing the MVPD offering equipment combining security and navigation functions to make available, upon request, a component device which provides security options; (2) facilitate the development of a digital interface, similar to the analog decoder interface, thus allowing navigation devices to be commercially available while retaining MVPD control over security devices; (3) prohibit MVPDs from interfering with a consumer's right to attach any authorized navigation device to the network so long as it does not harm the network and is not used or usable to facilitate unauthorized reception of service or copying of copyright material; and (4) prohibit MVPDs from taking any action to disable or restrict a consumer from using an authorized navigation device supplied by others to receive authorized service.[75]

In light of the proposals submitted by some parties, the comments of Scientific-Atlanta and Motorola were particularly prescient on the issue of a performance rule. In this regard, Motorola "caution[ed] the Commission that adopting mandated standards or performance criteria

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[73] NCTA at 31; GI at 50-51; TWE at 7, 28; TIA at 12-13; Ad Hoc at 10; Eschelon at 31-33; Viacom at 16.

[74] GI at 50. GI proposes that this performance rule be combined with an "incentive mechanism," providing regulatory incentives for MVPDs to achieve commercial availability for CPE not covered by the performance rule. Id.

[75] TWE at 28.

may prevent 'technologically neutral' solutions,"[76] while Scientific-Atlanta warned that "[p]erformance criteria should not become a euphemism for government standards."[77] Yet this is exactly what a few parties have proposed.

The most obvious proposal for a technical standard in the guise of a performance rule is that of the Consumer Electronics Retailers' Coalition. In its comments, CERC argues that the goal of the Commission in this proceeding should be to "achieve national portability."[78] As demonstrated above, the statute neither mandates nor requires portability of navigation devices to achieve commercial availability of CPE. Nevertheless, even if it did, the Coalition's method for achieving that goal requires the FCC to impose certain standards on the affected industries (even though the standards may be industry-developed) and to do so in an unreasonable time frame.

In particular, CERC argues that the Commission must support: (1) a national security interface; (2) national compatibility among like transmission standards; and (3) maximum feature interoperability of like devices with local networks.[79] To reach the first goal of a "national security interface," CERC proposes that the FCC: (1) require analog MVPD systems to support

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[76] Motorola at 9.

[77] S-A at 29.

[78] CERC at 8. Circuit City and Tandy, as CERC members, endorse the CERC proposal. Circuit City at 3; Tandy at 1, n.1.

[79] Id. It appears that Tandy's "equipment authorization" rule calling for "portability across similar MVPD systems, while broadly phrased without specific technical requirements, may well contemplate the same components of "portability" as does CERC of which it is a member. See Tandy at 8 -11.

a nationally portable analog security interface for use in analog system devices deployed after January 1, 1999; (2) decide by January 1, 1998 whether such a system is to be based on the Decoder Interface (IS-105.1) or some other interface that separates security from non-security circuitry; and (3) require that MVPDs offer descrambler modules supporting competitively procured navigation devices for analog systems no later than July 1, 1998.[80]

CERC proposes a similar approach for digital CPE: the FCC would (1) require that MVPD systems that do not support national device portability must specify a version of the National Renewable Security Standard ("NRSS") for use in all digital system devices deployed after January 1, 1999; (2) decide by January 1, 1998 whether such specification should include slots for both "approved" NRSS alternatives (NRSS-A and NRSS-B), some combination thereof, or only one; and (3) require MVPDs to offer NRSS cards supporting competitively procured navigation devices no later than July 1, 1998.[81] Under this plan and the analog plan, MVPDs that do not offer the specified security interface by July 1, 1998 would not be allowed to deploy any additional CPE until the security interface device is available.

The CERC proposal is certainly a good starting point for discussion about appropriate voluntary industry standards to achieve the goals of Section 629, and, for this reason, it has much to commend it. However, in its current form, the CERC proposal suffers from a number of fatal flaws. First, as to timing, the proposal completely ignores the amount of time it may take to

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[80] CERC at 20-24.

[81] Id. at 17-20.

negotiate and agree upon standards (interface or otherwise) when the interests of a number of independent companies, let alone different industries as is the case here, are involved.

There are some instances, of course, where industry standard-setting has been achieved rapidly, such as the case with the emerging cable modem standard.[82] The cable industry is committed to making similar efforts to implement the requirements of Section 629. Nevertheless, even assuming the good faith efforts of all affected parties, the CERC timetable is unrealistic.

For example, it took five years after the FCC adopted its First Report and Order in the equipment compatibility rulemaking for the consumer electronics community and the cable industry to agree to the Decoder Interface. The idea that the manufacturers of navigation devices and television sets and CPE providers will be able to design, test, prototype and agree to use a new analog security interface device in just the few months provided for in the CERC "performance rule" is just not tenable.

Timing is also an issue with the proposed digital security standard. The NRSS standard, while "balloted," is still not agreed to by the parties involved in its development, as is conceded by CERC in a footnote.[83] And it took five years of discussion, debate and negotiation to reach the point where that standard was balloted at all, with many parties, including cable industry representatives still opposing some aspects of it. The committee that balloted the NRSS is only

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82 Leslie Ellis, "MCNS Vows to Stay on Track for Rapid Rollouts of Modems," Multichannel News, Broadband Week, June 2, 1997, at 1A.

83 CERC at 19, n.14.

the working group of a subcommittee assigned the task of developing the NRSS concept. The subcommittee itself will have to review and approve the result before the item goes to the parent committee (JEC) for approval. For these reasons, even if proposing specific standards for a digital interface were acceptable under a "performance rule" (which it is not), the deadlines in the CERC proposal are unrealistic.

As a substantive matter, CERC contends that, since both the Decoder Interface standard and NRSS have been produced by "the private sector standards process" there should be no impediment to their swift adoption as government-mandated standards.[84] First, as noted above, the record in this proceeding overwhelmingly rejects the imposition of government-mandated standards to achieve commercial availability of navigation devices -- including codification of private, voluntary standards into government rules which will have the same adverse effects as government-generated rules. Second, CERC's premise that there is widespread agreement on the analog and digital standards is simply incorrect.

As for the Decoder Interface, while the consumer electronics industry and the cable industry have submitted a proposal to the Commission, the comments in this proceeding alone (putting aside their merits) demonstrate that there will be extensive debate (and likely litigation) before the Decoder Interface would ever be codified in the Commission Rules, either in the equipment compatibility rules or the commercial availability rules. There is also no agreement to date on a digital security standard. All that has been agreed to with respect to NRSS is that the

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[84] Id. at 16, 17-19 (NRSS); 20-22 (Decoder Interface).

parties will attempt to reach a consensus around the idea of an NRSS device. The details are still the subject of an on-going and serious debate regarding a number of issues, including whether the PCMCIA form factor has sufficient space for electronics and the additional contacts necessary to support features and functions in the future; whether there is enough electrical isolation to make digital signals secure; and whether various NRSS proposals can support certain MVPD applications such as upstream transmission and in-band signaling.

For these reasons, the CERC proposal that the Commission codify in its rules particular technical standards for the security interface cannot be adopted. Nevertheless, NCTA and the cable industry agree that the private, voluntary standards-setting efforts which have led to the current iterations of the Decoder Interface and NRSS are and will be the foundations upon which the commercial availability of navigation devices will rest. We will continue our active participation in the standards-setting organizations which, as Congress intended, were to be relied upon by the Commission in developing any standards needed to facilitate the commercial availability of navigation devices. We welcome the involvement of CERC and its members in those efforts as they relate to implementation of Section 629.

Only a brief word need be added regarding CERC's other two proposals to achieve "national portability" -- "National Digital Transmission Compatibility" and "Maximum Feature Interoperability." Digital transmission compatibility purports to address the concern that "[n]avigation devices for digital systems also face the prospect of not working on a local system designed to a slightly different transmission standard," while maximum feature interoperability

addresses the differentiation among CPE features of local systems.[85] Neither of these proposals should be adopted, if for no other reason than they both assume that national portability is required by Section 629, which is not the case.

As for the digital transmission proposal, as CERC recognizes, the "private sector has made great strides in standardizing digital transmission."[86] Nevertheless, CERC asks the Commission to "assure that modulation methods are sufficiently standardized that the expense for devices to deal with local variations is relatively trivial, and that information as to such variations is adequately disclosed."[87] To this end, CERC argues that the Commission should require that MVPD systems "must, if MPEG-based, meet specified indicia of compatibility by July 1, 1998" and require "any interested parties" to submit a compatibility plan setting forth such indicia by January 1, 1998.[88]

For the reasons noted above with respect to the proposal for a security interface, the CERC timetable for requiring transmission compatibility is entirely unrealistic. Moreover, CERC's proposal also ignores the Congressional direction to let voluntary industry standards groups lead the way in implementing Section 629 -- even assuming Section 629 encompasses what CERC calls national digital transmission compatibility (which it does not). In addition,

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85 Id. at 24, 27.

86 Id. at 24. CERC says no action is necessary by the Commission to achieve analog transmission signal compatibility. Id. at 25.

87 Id. at 25.

88 Id. at 26-27.

while the cable industry is eager to achieve the type of portability envisioned by CERC where a cable set-top box will be portable among systems, there is no need for Commission involvement at this time when industry efforts to reach that goal are actively in progress. For these reasons, CERC's digital transmission proposal should be rejected.

Finally, CERC's "Maximum Feature Interoperability" proposal should not be adopted. CERC asks the FCC to impose Part 68-like rules requiring that there be (1) a "standard physical and electrical interface through which system-compliant devices can be attached," (2) disclosure of MVPD network specifications, and changes thereto, on a timely basis, and (3) nondiscriminatory licensing for necessary intellectual property rights.[89] This proposal essentially asks the Commission to adopt telephone-like notice, disclosure and licensing requirements for MVPDs so that navigation devices may be used on a variety of local systems.[90]

As noted earlier, the comments in this proceeding demonstrate that the telephone model, while instructive, is not directly applicable to the MVPD CPE market and the former's requirements should not be imposed upon the latter without serious consideration of the differences between the two. In particular, General Instrument persuasively demonstrates that the MVPD situation is more akin to the party line situation in the telephone industry and that the reasons which led the Commission to exempt party lines from the Part 68 rules (e.g., potential harm to

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89 Id. at 28. Other parties suggest that similar Part 68-like requirements be imposed on MVPDs. See Circuit City at 21-22; CEMA at 13-15; BSA at 8-9; Info. Tech. at 15-16.

90 Id. at 27-30.

the network and the difficulty of implementing the full panoply of Part 68 rules) apply equally to MVPDs.[91]

This is not to say that standard interfaces and limited disclosure requirements to accommodate those interfaces for navigation devices should not or need not be adopted eventually. In fact, the Commission recognized in the Notice that the affected industries should develop standards to assure that their networks are not harmed by the connection of commercially available CPE.[92] Such efforts will include standard interfaces. However, as we demonstrate below, the FCC has no authority to require compulsory licensing. Moreover, the CERC proposal is intended to implement national portability and interoperability which, as we have shown, is not required nor authorized by Section 629. For this and other reasons, CERC's "maximum feature interoperability" proposal is well beyond the scope of this proceeding.

IX. OTHER ISSUES

A. Entities and Equipment Covered

In our comments we urged the Commission to make all MVPDs, including OVS providers, subject to commercial availability rules.[93] We also said that application of the rules to the list of CPE proposed in the Notice was appropriate except in the case of in-home wiring, network interface units, so-called "residential gateways" and other network devices because they were

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91 GI at 69-73.

92 Notice at ¶59.

93 NCTA at 14-18.

beyond the scope of the statute.[94] As might be expected, the comments in this proceeding are all over the lot as to what entities or equipment is -- or should be -- covered by any FCC commercial availability rules. Nevertheless, some patterns are clear and should guide the Commission in resolving these issues.

The statute refers to all MVPDs. Accordingly, the pleas by some MVPDs for exemption must be rejected by the Commission.[95] All MVPDs are subject to the statutory command, although the Commission has some discretion in determining how to apply the rules to a particular MVPD, bounded at least by the principle that it treat similarly-situated (and competitive MVPDs) similarly. For this reason, contrary to the arguments of some MVPDs, any rules adopted in this proceeding must cover (at least initially) DBS providers, LMDS, and OVS providers.

In particular, the record demonstrates that OVS providers (and, at a minimum, OVS packagers) should be covered by the commercial availability rules despite the questions raised in the Notice about the applicability of Section 629 to OVS. While the answer is not free from doubt,[96] as we said in our comments, both legal and policy considerations strongly suggest that

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94 Id. at 18-19.

95 See DirecTV at 3-8 (exempt DBS); Primestar at 6-11 (same); SBCA at 3-6 (no need for rules because DBS is competitive); but see USSB (impose interoperability requirement on DBS providers using same orbital slot). See also CellularVision at 3-8 (exempt LMDS); Bell Atlantic/NYNEX at 5 (exempt OVS provider but not packager); PacBell at 5 (exempt OVS).

96 Compare PacBell at 5, Bell Atlantic/NYNEX at 5 and GI at 47-49 (OVS exempt) with TWE at 24-25, Ameritech at 4, U S WEST at 9-10, Circuit City at 14-15, Tandy at 4, and CEMA at 10, n.8

OVS providers (and OVS packagers at a minimum) be subject to the rules implementing Section 629.

As for CPE covered, as we indicated in our comments, equipment which is network equipment or is otherwise not normally considered CPE is beyond the scope of Section 629. For this reason, in-home wiring (which, in any event, is already commercially available), network interface units and so-called "residential gateways" should not be covered by any rules adopted in this proceeding. To the extent that anyone addressed these particular issues, they supported NCTA's views. For example, General Instrument demonstrated that network interface modules and residential gateways, as network devices, are beyond the scope of Section 629, and even if they were not, they should not be subject to commercial availability rules "to avoid the complexities and confusion that would arise due to the disparate regulatory regimes which might otherwise arguably apply to such equipment."[97] U S WEST made a similar showing.[98] Accordingly, the Commission should limit the scope of the equipment covered in this proceeding as suggested in the comments.

There is one area of apparent dispute which, in fact, is susceptible to prompt resolution. That involves the appropriate regulatory approach (if any) to cable modems. U S WEST argues

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(apply rules to OVS). See also Uniden at 2 (apply broad definition of MVPD) and Motorola at 7-8 (implement statute in a "technology neutral" manner, so all MVPDs subject to same rules).

97 GI at 43-47. See also TWE at 18-22 (narrow scope of equipment covered; in-home wiring exempt); Motorola at 15-16 (rules should not cover equipment used by cable to deliver telephone service to PSTN); Primestar at 17 (inside wiring is commercially available).

98 U S WEST at 10-11.

that cable modems should not be subject to section 629 because that provision should encompass only "items specifically used to access [basic video] services offered over multichannel video programming systems."[99] Time Warner makes a similar argument.[100] On the other hand, GI, CEMA, Scientific-Atlanta, Tandy, Circuit City and the CERC urge the Commission to focus on cable modems now, because there are no barriers to the commercial availability of that equipment, among other reasons.[101]

How the Commission should "focus" on cable modems is a matter of some disagreement, however. Tandy proposes that the FCC should promote the commercial availability of cable modems by requiring that an MVPD cannot be the exclusive distributor of cable modems, that the MVPD's charges for modems be "separately stated" from charges for Internet access service and that MVPDs be prohibited from subsidizing their modem charges with revenues from Internet access service.[102] Circuit City proposes that cable modems be subject to network disclosure requirements and fair, reasonable and nondiscriminatory licensing.[103] CERC favors "regulations requiring MVPD support of cable modem portability and feature compatibility at the earliest

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99 Id. at 10.

100 TWE at n.23.

101 GI at 63-66; CEMA at 10; Tandy at 7-8; Circuit City at 18-19; CERC at 30-31; S-A at 11.

102 Tandy at 7-8.

103 Circuit City at 18-19.

possible time."[104] GI proposes that the FCC leave in a performance rule mandating the commercial availability of cable modems within two years.[105] Scientific-Atlanta, by contrast, notes the industry efforts to develop cable modem standards, and urges the Commission to "recognize that the industry is headed in the right direction and be sure to leave room for product and feature differentiation in order to allow the industry to meet the needs of consumers."[106]

Given the substantial questions raised about the applicability of Section 629 to cable modems at all, we think the better course for the Commission to take is to refrain from taking any regulatory action on cable modems. While no one is more eager to have cable modems commercially available on a widespread basis than the cable industry, as Motorola said, "[r]egulation of cable modems is unnecessary and would decrease the availability of such devices in light of ongoing efforts to develop consensus-based industry standards."[107] At most, the Commission should adopt the General Instrument suggestion and adopt a true performance rule requiring the commercial availability of cable modems by a date certain.[108] Therefore, for the time being, the Commission should take no direct regulatory action with respect to cable modems.

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104 CERC at 30-32.

105 GI at 64-65.

106 S-A at 11.

107 Motorola at 14.

108 GI at 63-66.

B. Definition of Commercial Availability and Affiliate

The Commission asked parties to comment on the appropriate definitions of "commercial availability" and "affiliate" for purposes of section 629. In Section VII above, we have addressed the claims of CERC and Circuit City that "commercial availability" requires that navigation devices must be "nationally portable." Here we focus on other comments addressing that definition.

In our comments we said that so long as the particular CPE at issue is available to the public from at least one unaffiliated vendor, the statutory command is met. We noted that the statute itself gives no guidance on the question, and that the legislative history was ambiguous at best. Under those circumstances, the "one unaffiliated provider" standard seemed to make sense.[109]

That approach found favor with the majority of commenters addressing the issue. For example, commenters as disparate as CellularVision, Bell Atlantic/NYNEX, U S WEST, Time Warner, and General Instrument support the "one unaffiliated provider" standard for commercial availability.[110] As a corollary to this standard, those who raised the issue strongly urged the Commission not to require that the MVPD make its equipment available to any particular retailers or manufacturers.[111]

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[109] NCTA at 21.

[110] See CellularVision at 9, n.9; Bell Atlantic/NYNEX at 7; U S WEST at 13-14; TWE at 27-28; GI at 16.

[111] As Time Warner opined: "Any other test, such that equipment be available from a certain number of outlets, or that local consumer electronics retail stores must be licensed by the MVPD, not only

We also agree with Gateway 2000 and Commercial Engineering that commercial availability would be satisfied if the subject CPE were available through direct marketing, toll-free telephone numbers, or on-line distribution.[112] In sum, a common-sense approach to when CPE is commercially available is most consistent with Congressional intent to provide an alternative to the local MVPD where providers could obtain navigation devices compatible with that MVPD's network. As the Conference Report states: "[o]ne purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box ... from a cable system or network operator."[113] The "one unaffiliated provider" standard accomplishes this goal.

As for the definition of "affiliate," we supported use of the definition in Section 3 of the Communications Act, as proposed in the Notice. We also urged the Commission to reject any suggestion that contractual relationships or other non-ownership relationships would constitute affiliations for purposes of Section 629.[114] Most of the commenters in this proceeding who address the issue support use of the Section 3 definition of affiliate for purpose of Section 629 and reject expansion of that definition to include contractual relationships, exclusive or other-

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would be beyond the scope of Congress's mandate, but would be unworkable and burdensome to implement and enforce." TWE at 27. See also GTE at 8 ("Commercial availability" should not require that CPE must be made available through parties not selected by the MVPD).

112 See Commercial Eng. at 3-5; Gateway 2000 at 1, 4, 7.

113 H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 181 (1996).

114 NCTA at 19-20.

wise.[115] While some urge the Commission to consider certain contractual relationships as affiliations for purposes of Section 629, that is a minority view.[116]

For example, the Information Technology Industry Council argues that "even where there is no ownership or control between an MVPD and a particular source of CPE, the MVPD could nevertheless effectively exclude or limit CPE competitors from the MVPD's markets through exclusive arrangements between the MVPD and manufacturers, retailers, or other sources of CPE."[117] But, as General Instrument, U S WEST, and others point out, even where the Commission has extended the concept of "affiliate" or otherwise attributed ownership of one entity to another because of contractual relationships, it required that those relationships, in effect, give one entity de facto control (or the potential for such control) over the other.[118]

The same argument applies to the suggestion that affiliate-type relationships may arise when "the MVPD has developed the equipment involved, has patent or other proprietary rights in the equipment or its critical components, or selects a technology that has only a single source

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115 Circuit City at 24; Tandy at 5; Gateway 2000 at 8, n.11; GI at 25; U S WEST at 14-15; GTE at 9; S-A at 22-23. See also Zenith at 12-13 (questioning impact of exclusive contracts but concluding that "[o]wnership or control should be the operative criterion."); CERC at 33-34 (exclusive manufacturing or retailing arrangements permissible if disclosure and licensing requirements for national portability are applicable to MVPD); Circuit City at 20-21(same).

116 See Info. Tech. at 16-18.

117 Id. at 17.

118 GI at 26 citing 47 C.F.R. §24.720(l)(9) (affiliation exists "where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern."); U S WEST at 15 ("In the context of Title VI, the Commission has never used a contractual relationship test alone in finding affiliation.").

supplier through a contractual process."[119] Even if it had the power to do so, the Commission should not extend the statutory definition of affiliate in this proceeding to encompass non-control relationships. In the unlikely event that such control results from an exclusive contractual relationship, a case-by-case determination under the Section 3 definition should accommodate any Commission concerns in this regard.

C. Proprietary Technologies

In the Notice, the Commission sought comment on its authority to affect proprietary rights in implementing Section 629.[120] The initial comments that addressed this issue demonstrate that, as NCTA showed in its comments,[121] the FCC's authority to affect proprietary rights in implementing Section 629 is limited at best. For example, Motorola demonstrates in its comments that there is no statutory basis upon which the Commission could rest an assertion of jurisdiction over the intellectual property rights of manufacturers or MVPDs.[122] Echoing NCTA's comments, Motorola points out that Section 629(f) specifically disclaims an intent to expand the authority the Commission had prior to the enactment of Section 629 and that nothing elsewhere in the Communications Act gives the FCC the authority to adopt a compulsory licensing arrangement or similar mechanism which infringes upon intellectual property rights.

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119 Notice at ¶27.

120 Id. at ¶69.

121 NCTA at 44-45.

122 Motorola at 32-35.

Motorola also demonstrates that (1) the Commission has only "limited and specific" regulatory authority over third-party equipment manufacturers' communications equipment; (2) given these clear grants of authority in other contexts, Congress would have been more explicit if it had intended to grant the FCC authority over proprietary rights under Section 629; and, in any event, (3) the Commission "has previously required equipment manufacturers to license proprietary technology only as a precondition to adoption of an official industry standard which incorporates the manufacturer's protected technology and only when authorized by specific congressional direction to adopt a technical standard or requirement."[123] General Instrument makes a detailed and equally compelling legal argument against compulsory licensing in the context of Section 629, observing, among other things, that such requirements "have been permitted to constrain the rights of patent holders only in a relatively few, discrete areas," none applicable here.[124]

In contrast to the well-supported arguments against compulsory licensing, a number of parties essentially assert, without citation, that the Commission has the ability to impose compulsory licensing and take other actions impacting proprietary rights in implementing Section 629.

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123 Id.

124 GI at 100-109. See also TIA at 2 ("The law and sound policy forbid the compulsory licensing of technology and intellectual property."); Uniden at 2 ("proprietary intellectual property involved in any specialized transmission system also needs to be protected."); Info. Tech. at 13 ("Commission's rules should protect proprietary information provided by a CPE manufacturer to an MVPD"). But see Commercial Eng. at 8 ("Claims of proprietary technologies or demands for unreasonable licensing fees, however, should not be allowed to protect existing tie-in arrangements between manufacturers and cable service providers....").

In this regard, CEMA contends that "the Commission should require compulsory licensing, on non-discriminatory terms and conditions, of protocols and software that have a material effect on the interconnection and interoperation of competitively-supplied CPE," but concedes that "the Commission possesses no express statutory authority to order compulsory licensing of intellectual property that affects CPE-MVPD interconnection."[125] Nevertheless, it contends that the FCC's mandate under Section 629 and its "general authority under Section 4(i) of the Communications Act provide such authority.[126] But, for the reasons stated by General Instrument, Motorola and others, no such authority can be found in Section 629 nor inferred from other sections of the Act.

Similarly, CERC argues that what it calls the "right to connect" includes a requirement that "any necessary intellectual property rights are available for license on a reasonable and non-discriminatory basis."[127] However, rather than supporting this proposal with any citations to precedent authorizing the FCC to assert such jurisdiction, CERC merely refers to filings in the Commission's inside wiring proceeding as well as the comments of one of its members, Circuit City, in this proceeding.[128] But Circuit City's comments also are devoid of legal citation to support assertion of FCC jurisdiction to impose compulsory licensing in this proceeding.

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125 CEMA at 14.

126 Id. at n.14.

127 CERC at 28.

128 Id. at 28-29.

In fact, Circuit City's main claim on this score is demonstrably incorrect. It asserts that "[i]n 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."[129] For reasons made clear in the comments filed in this proceeding, the telephone model is not directly applicable to the MVPD model; but to equate the regulatory history and status of telephone CPE with that of MVPD CPE is absurd.

Among other things, telephone CPE was for decades a part of a regulated utility which government deemed such a necessity that it limited competition and set rates for telephone companies so that they could earn a reasonable rate of return on their investments. Because captive ratepayers who viewed telephone service as a necessity essentially paid for telephone company research and development, it was reasonable for the government to require the telephone companies to license to others certain products developed with the funds provided by the ratepayers under government mandate. For example, this was the rationale used to subject the pre-divestiture AT&T to compulsory licensing requirements which were eliminated in the AT&T consent decree when the Bell Operating Companies (and their captive ratepayers) were spun off from AT&T.[130] There is no comparable history for cable or other MVPDs. Indeed, Congress

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129 Circuit City at 28 (emphasis added).

130 United States v. AT&T, 552 F. Supp. 131, 176 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1993) ("Until now, AT&T's research and development have been financed primarily through the licensing contracts with the local operating companies. As long as ratepayer-financed local exchange revenues were supporting this research and development, it made sense to require AT&T to share the fruits of its monopoly financing with others.").

recognized this distinction in 1984 in Section 621(c) of the Communications Act where it declared: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."[131]

Finally, even if the Commission had the authority to impose compulsory licensing or take other steps affecting proprietary rights to implement Section 629, it would not make sense to do so now. As General Instrument, Scientific-Atlanta and others emphasize, significant voluntary licensing is already occurring, which obviates the need for Commission action. Manufacturers have "every incentive to provide reasonable licensing terms. Otherwise, the wide deployment of [their] products by MVPDs will be jeopardized."[132] For these sound legal and policy reasons, the Commission cannot and should not take any action in this proceeding affecting proprietary rights.

D. Developmental Waivers and Sunset Rules

In our initial comments, we supported the Commission's tentative conclusion to be flexible and liberal in considering developmental waivers. We argued that such an approach would reduce the hurdles manufacturers encounter in designing and marketing CPE in the initial stages of product and service development.[133] The Commission's flexible approach to develop-

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131 47 U.S.C. §541(c). See also Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966) (affirming FCC's view that cable television systems should not be regulated as common carriers).

132 GI at 98, n.192. See also GI at 97-100; S-A at 30 ("Companies which do not license their technology where appropriate do so at their own risk, as Apple Computer discovered.").

133 NCTA at 40-14.

mental waivers was endorsed by virtually all parties that addressed the issue and should be adopted by the Commission.[134]

The only party which did not enthusiastically endorse the Commission proposal -- Circuit City -- nevertheless, in its one-paragraph critique, recognized the Congressional mandate for such waivers and merely asked that the Commission narrowly construe such requests, analyze them critically and not deem them approved if not acted upon within a certain period of time.[135] However, as all of the other parties commenting on this issue agreed, a liberal waiver policy would reflect Congress's intent on this issue and should be adopted by the Commission. While we would expect the Commission to analyze all waiver requests critically, consistency with Congressional intent requires that requests not acted upon within a time certain (which, at a minimum, must be the 90-day period within which the statute requires the Commission to act) should be deemed approved.

If this were not the case, Commission inaction on waiver requests would defeat the purpose for which Congress included the provision in the Act in the first place -- to prevent inhibiting the development or introduction of new or improved services and equipment.[136]

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134 See Primestar at 22; CellularVision at 12-13; U S WEST at 18; TWE at 45-47 (liberal waiver standard with opportunity to challenge post-grant); Motorola at 19 -20; GI at 82-89; S-A at 28; TIA at 18.

135 Circuit City at 35-36.

136 As Motorola observes: "[T]he Commission should liberally apply its waiver authority under the Act ... where it is necessary to promote the deployment of a new product or technology.... [A]ll MVPDs, including cable operators, should have the same degree of flexibility in bringing facilities-based services to the market." Motorola at 19-20.

The Commission's sunset proposals evoked more varied comment. In our comments, we essentially agreed that the sunset provision should be read liberally, that relevant submarkets, both product and geographic, should be considered in determining whether regulations should sunset with respect to a particular MVPD or CPE, and that the statute required the Commission to adopt and apply rules to particular MVPDs (such as DBS) before determining that it could "sunset" those rules as to them.[137] A number of parties argue that each of the statutory criteria must be met on a national basis in order for the sunset requirements to apply and that there should be no "premature" sunset of the regulations adopted in this proceeding for any MVPD or CPE.[138] Others, such as DBS providers, seek exemptions (in effect a "sunset") from the outset.[139]

On the latter point of a "premature" sunset, we continue to believe that it would be inconsistent with the statute to "sunset" application of Section 629 with respect to certain MVPDs (such as DBS) before those rules are even applied to them. The Commission should have the opportunity to ascertain how the rules are working with respect to those MVPDs and whether the statutory criteria for sunset have been met, as tested in a Commission proceeding where there is an opportunity for public comment, before it "sunsets" the rules for particular MVPDs.

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137 NCTA at 42-44.

138 Tandy at 17-18; Circuit City at 36-37; CERC at 36-37.

139 SBCA at 3-6; DirecTV at 3-8; Primestar at 6-11; GI at 90-91(DBS and C-Band). See also PacBell at 5 (OVS); Bell Atlantic/NYNEX at 5 (OVS); CellularVision at 3-8 (LMDS).