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Before the  
FEDERAL COMMUNICATIONS COMMISSION *Federal Communications Commission*  
Washington, D.C. 20554 *Office of Secretary*

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In the Matter of )  
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Implementation of Section 304 of the )  
Telecommunications Act of 1996 )  
 )  
Commercial Availability of )  
Navigation Devices )  
\_\_\_\_\_ )

CS Docket No. 97-80

**JOINT REPLY COMMENTS OF THE  
INFORMATION TECHNOLOGY INDUSTRY COUNCIL  
AND THE  
COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION**

Fiona J. Branton  
Director, Government Relations  
and Regulatory Counsel  
Information Technology Industry Council  
1250 Eye St., NW., Suite 200  
Washington, DC 20005  
(202) 626-5751

Kevin DiLallo  
Levine, Blaszak, Block  
& Boothby, LLP  
1300 Connecticut Ave., NW.  
Suite 500  
Washington, DC 20036  
(202) 223-4980

Counsel for the Information Technology Industry Council

Bruce N. Hahn  
Director of Public Policy  
Computing Technology Industry Association  
6776 Little Falls Road  
Arlington, VA 22213  
(703) 536-0002

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## Summary

The Information Technology Industry Council ("ITI") and the Computing Technology Industry Association ("CompTIA") submit these Joint Reply Comments in response to the comments that have been filed on the Notice of Proposed Rule Making ("NPRM") in this proceeding. The members of ITI and CompTIA represent a broad cross-section of the other interest groups that have filed comments. As representatives of current and potential manufacturers of multi-channel video programming service customer premises equipment ("CPE"), ITI and CompTIA have a strong interest in stimulating vigorous competition in both the multi-channel programming services and associated CPE markets.

In furtherance of this objective, Section 629(a) of the Communications Act requires the Commission to adopt regulations ensuring the "commercial availability" of CPE to be used with multi-channel video programming service distributors' ("MVPDs") systems. We believe that, in non-competitive MVPD markets, commercial availability requires that CPE be available from at least one source that is unaffiliated with the MVPD whose system consumers access using the CPE. If CPE is manufactured by a non-competitive MVPD or its affiliate, it should also be manufactured by at least one producer that is unaffiliated with the MVPD, assuming that another firm wishes to produce the CPE. While these are the minimal standards that we would endorse for determining the commercial availability of MVPD CPE, ITI and CompTIA would not object to broader interpretations of the statutory language, such as that which the Business Software Alliance proposed in its initial comments in this proceeding.

For purposes of applying the commercial availability standards, "affiliates" of a non-competitive MVPD should be deemed to encompass not only relationships involving ownership or control of one entity by another, or involving common ownership or control, but also contractual relationships (such as exclusive licensing or distribution arrangements) that have the effect of inhibiting competition.

To promote competition in the production of MVPD CPE, prospective manufacturers must have timely access to technical information about physical and logical interfaces and protocols used by non-competitive MVPDs' systems. Non-competitive MVPDs should be required to disclose such information to the extent manufacturers request the information with a *bona fide* intention to use it to manufacture CPE for use with an MVPD's system. ITI and CompTIA acknowledge the chorus of commenters that have urged that intellectual property rights must be protected and that the Commission should forego any compulsory technology licensing requirement. We agree that intellectual property rights must be protected, but our initial comments provided a mechanism for balancing the interests of those owning intellectual property rights with prospective manufacturers' need for limited technical information and the public's legitimate right to a competitive marketplace. This mechanism should be familiar, in that it is similar to established industry standards-setting practices whereby firms agree to license their technology on non-discriminatory terms for reasonable compensation in exchange for the right to participate in voluntary standards-setting processes.

As other commenters have stated, any standards that would be desirable for promoting the purposes of Section 629 should be developed solely by industry, unless industry proves itself to be incapable of doing so after being given an ample opportunity. In this regard, any suggestions that the Commission should establish CPE performance standards (e.g., it should contain a mechanism to block copying of video content) should be flatly rejected and such decisions should be left to the marketplace.

All non-competitive MVPDs should be prohibited from subsidizing CPE with programming service revenues, and from bundling CPE with programming service to the extent that it may facilitate such subsidization. MVPDs facing effective competition in both programming service and CPE would be unable to use bundling or subsidization anticompetitively and so should not be subject to these prohibitions. Allowing all MVPDs to subsidize CPE with programming services will disproportionately aid dominant firms and disproportionately harm smaller ones.

Interpretations of Section 629 that conclude that rate-regulated cable systems are exempt from the anti-subsidy prohibition must be judged in light of real market conditions. If reality fails to measure up to expectations in the form of a regulated cable system's retaining a dominant market position in CPE or programming service, the cable system should be subject to the anti-subsidy rules. Also, while ITI and CompTIA believe that MVPDs should be able to protect the security of their systems, they should not be permitted to bundle security and non-security CPE in a way that would disadvantage competitors.

All non-competitive MVPDs, and all the CPE they furnish to consumers to access their systems, should be subject to the rules adopted in this proceeding. Claims that certain equipment furnished by non-competitive MVPDs is "network equipment" rather than CPE consumers use to access MVPD services (thereby within the scope of Section 629(a)) should be closely analyzed in light of the equipment's function. The three-part standard prescribed by Section 629 for sunseting the rules should be used to determine whether an MVPD faces effective competition so as to be exempt from the Section 629 rules.

The Commission should heed the clear language of Section 629(e) in determining when to sunset the rules adopted herein. Similarly, any procedures for waiving the rules should be true to Congressional directives in terms of the purpose and need that must be demonstrated for a waiver and the duration of any waiver that may be granted.

While a number of competing policy concerns have been raised in the initial comment round, the Commission's overwhelming goal -- and that with which Congress infused Section 629 -- is to promote competition in non-competitive MVPD markets. Only if the Commission remains focused on that goal will it fulfill its statutory mandate.

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The Information Technology Industry Council ("ITI") and the Computing Technology Industry Association ("CompTIA") submit these Reply Comments to the initial comments that were filed in response to the Notice of Proposed Rule Making in this proceeding.<sup>1</sup>

**INTRODUCTION**

The comments submitted to date represent a broad range of interests, including cable television systems; direct broadcast satellite ("DBS") operators; manufacturers of navigation devices (also known as "customer premises equipment" or "CPE") used with multichannel video programming distributor ("MVPD") systems; consumer electronics and CPE retailers; information

<sup>1</sup> *Implementation of Section 304 of the Communications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 97-53 (released February 20, 1997) ("NPRM").

technology industry representatives; video programming producers; and telephone companies that provide or appear poised to provide multichannel video programming or underlying transport services.

The members of ITI and CompTIA represent a cross-section of several of these interests, including manufacturers of CPE for MVPD systems, other consumer electronics manufacturers, and members of various sectors of the information technology industry. Perhaps most significantly, however, many of the firms ITI and CompTIA represent are potential new producers of MVPD CPE or manufacture products that interface (or will interface in the foreseeable future) with MVPD systems using CPE manufactured by other firms.

The rapid convergence of telecommunications, computing, and consumer electronics products and services is accelerating the inevitable interdependence of ITI's and CompTIA's members' products with the CPE and MVPD systems that are the subject of this proceeding. ITI and CompTIA therefore have a substantial interest in the adoption of rules that will promote competition in the production and sale of MVPD CPE as well as the provision of MVPD programming services, thereby opening markets and encouraging the development of new products and services by members of ITI and CompTIA, as well as others.

I. ACHIEVING COMMERCIAL AVAILABILITY OF NAVIGATION DEVICES

- A. Section 629's goal of creating "commercial availability" would be satisfied by the existence of at least one CPE provider that is unaffiliated with the MVPD with whose system the CPE will be used.
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Section 629(a) of the Communications Act (the "Act") requires the Commission, "in consultation with appropriate industry standard-setting organizations, [to] adopt regulations to assure the commercial availability" of CPE offered to consumers to access video and other services offered by MVPDs from "manufacturers, retailers, and other vendors" not affiliated with an MVPD.<sup>2</sup> While the initial comments in this proceeding reflect a range of interpretations of this basic requirement, there appears to be a consensus as to the minimum standard that must be satisfied for "commercial availability" of CPE to exist, and that consensus is consistent with the position ITI and CompTIA have taken in their initial Joint Comments.

As ITI and CompTIA have stated, "commercial availability" fundamentally requires that consumers have the same right to attach competitively provided CPE to MVPD systems that they have to attach their own telephony CPE to the public switched telephone network ("PSTN"). As in the telephony context, that right would be subject only to the qualification that the CPE not harm the MVPD system with which it is used.

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<sup>2</sup> 47 U.S.C. § 549(a).

To make this right a reality, consumers that subscribe to programming services provided by a non-competitive MVPD system<sup>3</sup> should be able to obtain the CPE they need to access that MVPD's programming services from at least one source that is unaffiliated with the MVPD.<sup>4</sup> In addition, if a non-competitive MVPD manufactures its own CPE or purchases it exclusively from one or more affiliated manufacturers, "commercial availability" would require that the CPE be *manufactured as well as sold* by one or more firms that are unaffiliated with the MVPD. Absent such a requirement, a non-competitive MVPD would still be in a position to control the availability of its CPE, even if multiple retail outlets carried the product.<sup>5</sup>

Although ITI and CompTIA believe that these should be the *minimal* requirements for establishing commercial availability, we do not object to the statutory interpretation advanced by the Business Software Alliance ("BSA"), which is based on the presence of multiple unaffiliated CPE sources.

Accordingly, ITI and CompTIA have joined others in submitting separate Reply

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<sup>3</sup> As explained in Section III.A, below, an MVPD should be deemed to be "non-competitive" for purposes of this proceeding if it does not face meaningful competition in both the CPE and programming service markets within its service area(s).

<sup>4</sup> In Section I.B, below, ITI and CompTIA provide their interpretation of the term "affiliate" as used in Section 629(a).

<sup>5</sup> The Business Software Alliance took a similar position in its initial Comments. BSA Comments at 2. This requirement should, however, be waived if no unaffiliated firm chooses to produce competing CPE notwithstanding an MVPD's good faith compliance with the rules.

Comments in this proceeding<sup>6</sup> that endorse BSA's earlier interpretation of "commercial availability." In its initial Comments, BSA had asserted that

MVPD equipment should be deemed to be commercially available if consumers have the ability to choose from a variety of brands available from a variety of sources -- at least some of which are independent of the system operator. . . . [7]

We submit that our own interpretation of "commercially available," which would establish a minimum standard, and BSA's proposed interpretation, which describes the ultimate goal of Section 629(a) -- full scale competition -- are complementary.

A number of commenters has supported the basic proposition that "commercial availability" requires no more than one unaffiliated source of CPE;<sup>8</sup> however, as explained below, several of these commenters have effectively negated this core requirement by advocating loose interpretations of affiliations and/or narrow readings of the types of MVPDs and CPE that should be subject to these rules.<sup>9</sup> Such attempted end runs around the basic requirements of Section 629(a) should not be enshrined in the Commission's rules.

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<sup>6</sup> Those Reply Comments are being filed by the Navigation Device Competition Coalition, formerly the Computer, Electronics and Consumer Coalition, of which ITI and CompTIA are members.

<sup>7</sup> BSA Comments at 2.

<sup>8</sup> *E.g.*, Comments of General Instrument Corporation ("GI") at 16; Comments of Echelon Corporation at 28; Comments of the National Cable Television Association ("NCTA") at 21; Comments of Time Warner Entertainment Company, L.P. ("TW") at 27.

<sup>9</sup> See Sections I.B and III.A & B, below.

The Commission should also reject any interpretation of "commercial availability" that would impose burdensome, stultifying requirements on particular industry segments. For example, two consumer electronics retail interests have argued that "commercial availability" requires all CPE to be nationally portable and all digital CPE to be capable of accessing every digital video transmission system within a geographic market at minimal cost to consumers.<sup>10</sup> While these might be worthwhile long-term goals, the Commission should allow them to evolve in response to natural market forces, rather than requiring them by regulation.

If mandated at this stage, these requirements would not only impose significant burdens on industry and paralyze technological advances, but they would embroil the Commission in complex administrative oversight that would strain the Commission's limited resources. Far less onerous requirements, such as those proposed above by ITI, CompTIA, and BSA, will accomplish the objective of "commercial availability" in a more timely, effective fashion.

- B. Contractual arrangements with MVPDs that may inhibit competition in CPE should be considered "affiliations" for purposes of determining whether CPE is commercially available.

In the NPRM, the Commission asked for comments on the appropriate interpretation of "affiliate" for purposes of implementing Section 629(a)'s objective of making CPE available from sources unaffiliated with MVPDs. The

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<sup>10</sup> Comments of Circuit City Stores (Circuit City) at 20 & 24; Comments of the Consumer Electronics Retailers Coalition ("CERC") at 7-8.

Commission tentatively proposed adopting the statutory definition of "affiliate" contained in Section 3 of the Communications Act.<sup>11</sup>

That definition, however, is limited to relationships involving ownership or control of one entity by another. A number of commenters has supported a narrow reading of the statutory definition, arguing that contractual relationships not involving ownership or control within the scope of that definition should not be considered "affiliations" subject to Section 629(a).<sup>12</sup>

ITI and CompTIA submit that this interpretation would create a gaping exception to the commercial availability requirement that would allow non-competitive MVPDs to bar other firms from producing or selling competitive CPE and continue controlling the availability of their CPE simply by entering into exclusive agency, manufacturing, distribution, licensing, or other contractual arrangements.

To avert this anti-competitive result, we have urged the Commission to define "affiliate" to include any contractual relationship with a non-competitive MVPD that has the effect of inhibiting competition, regardless of whether the contracting parties own or control each other or share common ownership or control. Our position in this regard has been echoed by several commenters,

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<sup>11</sup> NPRM at ¶¶ 26-27, 55 (citing 47 U.S.C. § 153(1)).

<sup>12</sup> *E.g.*, GI Comments at 25; NCTA Comments at 20; Joint Comments of DirecTV and Hughes Network Systems, Inc. ("DTV/Hughes") at 10; Comments of US West at 14.

including BSA and the Navigation Device Competition Coalition, formerly the Computer, Electronics and Consumer Coalition.<sup>13</sup>

ITI and CompTIA acknowledge that our proposed interpretation of "affiliate" is not strictly within the scope of the statutory definition urged by some commenters; however, the Commission should exercise its discretion under Section 4(i) of the Act<sup>14</sup> and adopt meaningful rules that would most effectively achieve Congress's intentions, rather than watered-down rules based on an overly technical reading of the Act.

- C. Achieving commercial availability of navigation devices requires non-competitive MVPDs to disclose technical information needed by competing manufacturers, subject to protection of intellectual property rights.

For robust competition to develop in the production of CPE used to access non-competitive MVPDs' systems, such MVPDs must be required to provide potential CPE manufacturers with timely technical network interface information needed to manufacture competing products.

ITI and CompTIA do not advocate unchecked disclosure of proprietary information regarding the *CPE itself*, nor do we support disclosure of technical information that would compromise the security of an MVPD's system.

Information subject to disclosure would be limited to specifications regarding the logical and physical interfaces and protocols used by an MVPD's transmission

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<sup>13</sup> BSA Comments at 2; Reply Comments of the Navigation Device Competition Coalition at 3-4.

<sup>14</sup> 47 U.S.C. § 154(i).

system (including its security interfaces) which are necessary for a manufacturer to produce CPE that can attach seamlessly to that system.

We urge the Commission to adopt rules requiring non-competitive MVPDs to make such disclosures, without which competition among CPE manufacturers may never get off the ground.<sup>15</sup> The Commission<sup>16</sup> and Congress<sup>17</sup> have both recognized the critical importance of requiring dominant firms to disclose the technical information that potential competitors need to enter (or survive in) markets the dominant firms control.

Non-competitive MVPDs have the same power to control the provision of CPE used with their systems as dominant telephone companies have had with respect to telephone CPE. Requiring such MVPDs to share technical information to the limited extent described herein should help unlock non-competitive CPE markets and further the purposes of Section 629(a).

We recognize that the rules we advocate may require disclosure of proprietary technical information regarding network interfaces. In our initial Joint Comments, we proposed that parties with proprietary interests in information

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<sup>15</sup> Additional details concerning our proposed disclosure requirements are set forth in our initial Joint Comments at 10-14.

<sup>16</sup> See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor – Phase II*, Report and Order, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989) (subsequent history omitted); *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded in part sub nom. California v. FCC*, 39 F.3d 919 (9<sup>th</sup> Cir. 1994), *cert denied*, 115 S.Ct. 1427 (1995).

<sup>17</sup> See 47 U.S.C. § 273(c) (requiring Bell Operating Companies to disclose certain technical information in connection with their manufacturing operations).

subject to disclosure should be required to license that information on reasonable, non-discriminatory terms, for reasonable compensation, and in accordance with certain other safeguards.

Few commenters have advocated information disclosure requirements as fervently or with as much specificity as ITI and CompTIA have. Indeed, several commenters have taken the position that protection of intellectual property rights should be a paramount concern, and that the Commission should not require compulsory licensing of proprietary technology.<sup>18</sup> We believe that our proposed disclosure requirements, if properly circumscribed and implemented, would adequately protect intellectual property rights and allay other commenters' concerns.

The disclosure and technology licensing requirements ITI and CompTIA have proposed are consistent with the common practice of standards-setting bodies whose members agree to license their intellectual property on nondiscriminatory terms in exchange for the opportunity to participate in the standards-setting process and to incorporate their intellectual property in an industry standard.

The Commission should define a clear demarcation point or network interface between MVPDs' systems and customers' CPE to help distinguish information that may be subject to disclosure from information that is

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<sup>18</sup> *E.g.*, GI Comments at 96; NCTA Comments at 45; Motorola Comments at 30; DTV/Hughes Comments at 3.

presumptively immune from disclosure.<sup>19</sup> Technical information regarding MVPD network interfaces (including interfaces of security and non-security components) should be presumptively disclosable; other information should be protected.<sup>20</sup> Any party seeking information about an MVPD's CPE should be required to make a compelling case that it requires the information to produce competitive CPE that can be attached to the MVPD's system, and the affected MVPD should be given a reasonable opportunity to oppose the request before a decision as to compulsory disclosure is made.<sup>21</sup> Any information disclosure requirements should be very flexible and not require disclosure of more information than a requesting party needs to produce competitive CPE in furtherance of Section 629.<sup>22</sup>

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<sup>19</sup> As ITI asserted in its Comments in the *Cable Inside Wiring* proceeding, CS Dkt. No. 95-184, the Commission could facilitate competition in non-competitive MVPD markets by following its definitions of the telephone company/customer demarc point and customers' rights on their side of the demarc. Given the convergence of technologies, services, and transmission media provided by telephone companies and MVPDs, such regulatory parity would be appropriate.

<sup>20</sup> Proprietary information concerning CPE alone should be protected regardless of whether the CPE is produced by an MVPD, an affiliate of the MVPD, or an unaffiliated party; and such information should be protected at all stages of CPE development, production, and distribution.

<sup>21</sup> The Commission should develop the procedures to implement these principles in consultation with a cross-section of all affected industry organizations.

<sup>22</sup> In the absence of a *bona fide* expression of interest in producing CPE to compete with an MVPD (as opposed to a mere "fishing expedition"), no MVPD should be required to disclose its technical information.

- D. Any standards that may be desirable to achieve the purposes of Section 629 should be developed by voluntary industry processes, not imposed by government fiat.

With very few exceptions,<sup>23</sup> the majority of commenters that discussed the role that industry standards could play in advancing the purposes of Section 629(a) echoed ITI's and CompTIA's position that any such standards should generally be developed only through voluntary industry processes, not mandated by government action.<sup>24</sup>

These commenters have collectively cited numerous reasons that industry-set technical standards are superior to government-mandated standards, and because of the lack of persuasive arguments in the record to the contrary, we will not elaborate on these arguments here.

Instead, we will address the arguments of three commenters that advocated some form of government participation in the standards-setting process. One such commenter was NCTA, which advocated the establishment of a standard hardware platform for navigation devices "to permit MVPDs to download to and execute applications in [the] CPE to support features and services on a transparent basis."<sup>25</sup> In addition, NCTA asserted that standard

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<sup>23</sup> Two exceptions are Circuit City and the CERC, which both argued that the Commission should "receive and publish" certain national standards as part of a comprehensive, complex regulatory program. Circuit City Comments at 5; CERC Comments at 22.

<sup>24</sup> *E.g.*, GI Comments at 34; Echelon Comments at 24; Motorola Comments at 20; US West Comments at 12.

<sup>25</sup> NCTA Comments at 30.

interfaces for security and non-security CPE would advance commercial availability while protecting MVPD system security.<sup>26</sup>

Although NCTA noted its preference for industry-set standards, it conceded that, if industry fails to develop appropriate standards, it might be necessary and acceptable for the government to define what those standards should be.<sup>27</sup> ITI and CompTIA agree that technical standards for consumer electronics equipment should almost always be developed through voluntary industry standards-setting processes.<sup>28</sup> If, however, such processes are hopelessly unable to produce a desirable standard after ample opportunity, only then should government intervene in a limited manner to facilitate completion of the process by the industry members involved.

This view is in sharp contrast to the proposals advanced by Viacom, Inc., that the Commission should *require* all set-top navigation devices to be capable of use with *any* MVPD system the consumer selects *and* to be manufactured in accordance with universal technical standards.<sup>29</sup> In addition, Viacom asks the Commission to mandate that all digital navigation devices include a "smart card" security device with a national standard interface.<sup>30</sup> To avoid embroiling the

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<sup>26</sup> *Id.* at 30-32.

<sup>27</sup> *Id.* at 31.

<sup>28</sup> ITI and CompTIA do not express an opinion regarding NCTA's proposals that a standard hardware platform and standard interfaces for security and non-security CPE be established.

<sup>29</sup> Comments of Viacom, Inc. at 10-13.

<sup>30</sup> *Id.* at 13-17.

Commission in the business of setting standards to carry out these proposals, Viacom suggests that the Commission should merely adopt its proposed requirements and prohibit the manufacture of any non-conforming CPE after a specified date.<sup>31</sup> Such action, Viacom asserts, would spur industry to adopt the necessary standards.

Viacom fails to see the forest for the trees. The measures it has proposed might not involve Commission development of specific technical standards, but they would require the Commission to establish uniform product requirements that would be unnecessarily broad, unduly burdensome on CPE producers, and stifling to product innovation. The Commission should flatly reject Viacom's proposals.

Time Warner Entertainment has taken a position similar to Viacom's that should be dismissed for the same reasons. Time Warner has argued that all digital CPE used with cable systems should have: (1) replaceable security components that allow selected delivery of digital content to the consumer; (2) anti-piracy and signal theft systems that can not be defeated;<sup>32</sup> and (3) robust

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<sup>31</sup> *Id.* at 12, 17.

<sup>32</sup> Time Warner identifies the standard anti-copying mechanism developed by industry for Digital Video Disc ("DVD") equipment as an example of the type of mechanism the Commission should require for all digital CPE used with cable systems. TW Comments at 13-14, 41. ITI and CompTIA emphatically oppose any suggestion that the Commission should mandate a standard of this sort for CPE. As several other commenters have argued, there is no statutory basis for the Commission to require industry to adopt any standards to implement Section 629, much less to mandate a specific standard such as the DVD anti-copying mechanism. As industry has proved in the context of DVD, when a technical response is appropriate to address industry concerns (such as those of Time Warner), voluntary industry efforts are the most efficient means of developing such a response.

hardware platforms that allow downloading and execution of varying applications that differ among MVPDs or alternative vendors of a single MVPD.<sup>33</sup>

Although Time Warner concedes that the Commission should not mandate the technical standards that would achieve these results, like Viacom, it has asked the Commission to impose overly burdensome industry-wide CPE standards while leaving the technical nitty gritty of those standards to the industry. The Commission should leave all technical decisions about the features and functionalities of CPE to the marketplace.

## II. SECTION 629's PROHIBITIONS ON SUBSIDIZING CPE WITH PROGRAMMING SERVICE REVENUES

Section 629(a) of the Act permits every MVPD to offer consumers CPE used with its system as long as it (1) states the price for the CPE separately from the price for its programming services, and (2) does not subsidize the former with revenues from the latter. There is wide disagreement among commenters on the limitations this provision imposes on MVPDs.

- A. Non-competitive MVPDs should be prohibited from bundling CPE and programming service to the extent that bundling may facilitate subsidization of CPE with revenues from non-competitive programming services.

As we argued in our initial Comments, the anti-subsidy requirements of Section 629(a) are straightforward. In our view, they would not prohibit any non-

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<sup>33</sup> TW Comments at 42 - 43.

competitive MVPD<sup>34</sup> from offering "one-stop-shopping" for both CPE and program services, or from offering discounts on CPE, as long as an MVPD's programming service revenues did not subsidize the price of its CPE. If a non-competitive MVPD offers CPE to its programming customers at a price lower than that which it offers customers who purchase only CPE, or if the MVPD sells its CPE below cost (except perhaps for a limited promotional period), the MVPD is likely subsidizing its CPE in violation of Section 629(a).

For all its clarity, the anti-subsidy prohibition has been interpreted by a variety of commenters in ways that would gut the purposes of the provision. For example, General Instrument and the NCTA have argued that the prohibition should not apply to rate-regulated cable systems, because they are subject to existing Commission rules having the same intended result.<sup>35</sup> But Section 629 does not expressly exempt rate-regulated cable systems from these provisions.

A number of parties cite Section 629(d)(1), which states that Commission decisions and rules adopted prior to the 1996 Telecommunications Act and concerning the commercial availability of CPE used with MVPDs' systems shall satisfy the requirements of Section 629.<sup>36</sup> The interpretation of this provision in light of prior Commission actions is at best unclear, and in the absence of an explicit statutory exemption for regulated cable systems, does not provide a firm

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<sup>34</sup> As explained below, we believe that the anti-subsidy rules should apply only to MVPDs that do not face effective competition.

<sup>35</sup> GI Comments at 80-81; NCTA Comments at 39.

<sup>36</sup> 47 U.S.C. § 549(d)(1).

foundation for the argument that such systems should be exempted. Indeed, if the drafters of Section 629 did not have non-competitive cable systems (whether or not rate-regulated) in mind when they crafted the substantive requirements of that Section, one wonders whom they *did* intend to reach through Section 629.

Before the Commission concludes that existing rules or decisions fulfill the purposes of Section 629 with respect to rate-regulated cable systems or any other non-competitive MVPDs, it should evaluate the effectiveness of such rules or decisions in achieving each distinct requirement and goal of Section 629. If existing rules or policies have failed to achieve any of Section 629's requirements or goals with regard to any non-competitive MVPD subject to them, the Commission should apply the appropriate rules from this proceeding to that MVPD to remedy the deficiency and achieve regulatory parity among all non-competitive MVPDs.

ITI takes issue with the position of Time Warner and Motorola regarding the applicability of Section 629's anti-subsidy prohibition. They have asserted that if *any* MVPD is allowed to bundle CPE with services and to subsidize the former with the latter, then *all* MVPDs should be given the same opportunity.<sup>37</sup> Although this position may have the surface appeal of fairness, if adopted, it would stifle competition and vitiate the purposes of Section 629(a).

Unlike Time Warner and Motorola, we believe that the anti-subsidy requirements should apply only to MVPDs that do not face meaningful

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<sup>37</sup> TW Comments at 45; Motorola Comments at 20.

competition in the provision of both CPE and services, and to all such MVPDs equally. Where competition is brisk, the requirements would be unnecessary. But where competition is nascent or non-existent, a dominant firm will benefit far more than new entrants from the ability to subsidize the price of competitive products with revenues from less competitive products. Therefore, allowing all MVPDs to subsidize their CPE would undermine the purposes of Section 629. A prohibition against all dominant MVPDs' subsidizing CPE -- which is unnecessary and inappropriate for any MVPD facing effective competition -- is critical to giving competition a real toehold in non-competitive MVPD markets.

- B. MVPDs should be permitted to protect the security of their systems as necessary; but they should be prohibited from bundling security and non-security CPE in a way that would disadvantage competing CPE suppliers or otherwise undermine the purposes of Section 629.

A large number of commenters have argued that one of the most critical issues the Commission must address in this proceeding is MVPDs' overarching need to maintain system security, to prevent both signal theft and system harm caused by attachment of unauthorized equipment.<sup>38</sup> Other commenters have focused on video programming, rather than protection of the MVPD's rights. These parties have urged the Commission to take whatever measures may be

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<sup>38</sup> E.g., NCTA Comments at 24; DTV/Hughes Comments at 17; US West Comments at 5; GI Comments at 39.