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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	

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REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

TIME WARNER ENTERTAINMENT COMPANY, L.P.

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SUMMARY

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, submits these reply comments in connection with the ongoing FCC rulemaking concerning the commercial availability of navigation devices used by consumers to access the services provided by multichannel video programming distributors ("MVPDs"). Despite the complexity of this task, Time Warner is optimistic that the statutory goal of allowing a retail market to develop for navigation devices and other non-security equipment located on the consumer's premises can be achieved without jeopardizing the copyright interests of creative artists or undermining the signal security concerns of MVPDs. Time Warner's reply comments address specific points raised by various parties in their comments which Time Warner feels are inconsistent with the approach which it advocates.

Initially, Time Warner fully supports the establishment of a consumer's right to purchase and attach to an MVPD network equipment to access video programming and other services offered by the MVPD so long as the equipment does not harm the network, does not interfere with the communications of any other network users, and cannot be used to receive services or communications which are not directed to the recipient or to which the recipient has not subscribed. However, since telephony is a particularly inappropriate model on which to base the regulatory treatment of equipment that is intended for use with broadband video distribution systems, Time Warner does not believe it is appropriate or desirable to impose a Part 68 regime upon MVPD networks.

Further, as Time Warner demonstrated in its initial comments in this proceeding, Section 629 of the Communications Act of 1934 ("Communications Act") requires the Commission to adopt regulations assuring the commercial availability of equipment used to receive services from *all* MVPDs, with no exclusions. In addition, Time Warner believes the anti-subsidy provisions

of Section 629 are equally applicable to DBS operators and all other MVPDs. Thus, Section 629(a) should be interpreted either to prohibit *all* MVPDs from offering any equipment discounts tied to long-term programming service agreements, or all MVPDs should have the same marketing flexibility to offer equipment discounts.

With respect to the equipment covered by Section 629, the parties are split as to whether the Commission's rules should focus exclusively on digital equipment or should cover analog equipment as well. Time Warner believes that the Commission must be mindful of the important differences between analog and digital video navigation devices. Given the substantial embedded base of analog converter/descrambler, coupled with the special challenges associated with preventing theft of analog signals, under no circumstances should a device which includes analog descrambling capability be made available commercially. Instead, the development of the decoder interface standard under consideration by the Commission in its ongoing rulemaking to implement the equipment compatibility provisions of Section 624A of the Communications Act should be deemed to satisfy the commercial availability requirement imposed by Section 629 as far as analog services and equipment is concerned.

While Time Warner supports industry efforts to achieve portability and even interoperability as expeditiously as is feasible, the establishment of arbitrary compliance deadlines, or "default" standards which are known to be inadequate, would be premature and ultimately counterproductive. Rather, Time Warner believes these goals can best be accomplished through cooperative efforts by the affected industries and the involvement of recognized standards setting organizations, with active oversight and participation by the Commission to assure reasonable and timely progress. Indeed, the legislative history

accompanying Section 629 clearly reflects a Congressional desire to allow marketplace developments to facilitate commercial availability of navigation devices.

Time Warner believes the best way to foster portability and interoperability of navigation devices without unduly stifling innovation or compromising signal security or copyrights would have the Commission encourage the development of a basic digital navigation device architecture that maximizes the adaptability of such devices and which allows consumers to maximize the functionality of the device and their MVPD services. Any commercially available digital navigation devices that are to be marketed as "cable ready" must be able to accommodate the separation of network security functions from navigation functions. Any cable ready digital navigation device must also include an interface similar to that adopted for Digital Video Disks that ensures that encrypted digital programming is not delivered in an unencrypted form at the output of the device, which would allow the customer to make perfect unauthorized digital copies of copyrighted intellectual property using a simple home computer. Finally, any cable ready digital navigation device should establish a common integrated platform that would allow network communications protocols and functional applications which complement traditional MVPD offerings to be downloaded and executed directly, allow MVPDs to maintain the "look and feel" of their service offerings, and provide a means to allow the user interface to evolve in a backwards compatible manner in response to new technological and service innovations.

Lastly, several commenters have suggested that the Commission prohibit MVPDs from offering any type of integrated device that includes both security and non-security functions. While Time Warner supports the separation of security functions from other navigation functions as an important component in achieving commercially available navigation devices, such a blanket prohibition is unwise and unnecessary. As long as consumers have the option to

purchase or lease component devices, there is no reason they should not also have the option to obtain an integrated device from their MVPD.

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REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, submits these reply comments in connection with the above-captioned Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC or Commission") on February 20, 1997.[1] Time Warner is a partnership which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable systems nationwide; Home Box Office, an innovative provider of pay television programming services; and Warner Bros., a major producer of theatrical motion pictures and television programs. In addition, an affiliate of Time Warner holds an interest in a direct-to-home satellite programming service provider.

[1] Notice of Proposed Rulemaking, CS Docket No. 97-80, 62 Fed. Reg. 10011 (rel. February 20, 1997) ("NPRM").

I. INTRODUCTION.

In its initial comments filed May 16, 1997, Time Warner expressed its support for the Commission's efforts to implement Section 304 of the Telecommunications Act of 1996 ("1996 Act") which requires the FCC to assure the commercial availability of "navigation devices" used by consumers to access the services provided by multichannel video programming distributors ("MVPDs").[2] Despite the complexity of this task, Time Warner remains optimistic that the statutory goal of allowing a retail market to develop for video navigation devices and other non-security equipment located on the customer's premises can be achieved without jeopardizing the copyright interests of creative artists or undermining the signal security concerns of MVPDs.

There is a substantial degree of consensus reflected in the comments filed by various interests in this proceeding. Nearly all parties acknowledge the substantial progress which has been made by recognized standards setting organizations to resolve many of the technical issues that serve as impediments to the retail availability of navigation devices.[3] The development of standards for digital compression, modulation, and transport that take into account the different technologies employed by various classes of MVPDs and the substantial progress in developing

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[2] Pub. L. 104-104, 110 Stat. 56 (1996). Section 304 of the 1996 Act added Section 629 to the Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 151 *et seq.*

[3] *See, e.g.*, Comments of the Consumer Electronics Manufacturers Association ("CEMA") at 4-5; Comments of Scientific-Atlanta at 1, 11, 17-18; Comments of Time Warner at 4-5, 11-12, 34 n. 52; Comments of Ad Hoc Computer and High Technology Coalition at 6-7; Comments of Bell Atlantic and NYNEX at 3-4; Comments of the Consumer Electronics Retailers Coalition ("CERC") at 16-24; Comments of General Instrument Corporation ("GI") at 36-38; Comments of Motorola at 6, 14-15; Comments of the National Cable Television Association ("NCTA") at 32-34; Comments of Tandy Corporation at 10; Comments of the Telecommunications Industry Association at 5-6; Comments of US West at 12-13; Comments of Zenith Electronics Corporation at 8.

a flexible and effective national renewable security system will facilitate both the commercial availability of video navigation devices and the protection of signal security and copyrights.[4] Indeed, while there may be some disagreement over the details of implementing Section 629, there is almost universal agreement that the Commission should not itself seek to impose its own standards to achieve commercial availability, but should facilitate ongoing efforts by the marketplace to achieve the appropriate degree of equipment portability and interoperability that will optimize consumer choice.[5]

As set forth more fully in its comments, Time Warner has suggested some concrete steps that can be taken both in the short term and over the long term to promote the commercial availability of navigation devices in a manner that will not jeopardize signal security or devalue the rights of copyright holders. For example, the Commission could impose the following requirements in the short term:

- Within a reasonable phase-in period, any MVPD which offers equipment combining navigation functions and security functions shall also offer security functions in a separate device which would plug into the TV set or other video device. Manufacturers of security equipment shall have the concomitant obligation to manufacture security modules that are compatible with commercially available navigation devices containing an approved security interface. Moreover, MVPDs shall authorize at least one unaffiliated supplier where consumers are able to purchase stand-alone navigation devices. Consumers should have the option to either lease or purchase such navigation devices.

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[4] Time Warner's commitment to the deployment of digital technologies is illustrated by the recent announcement of its HBO division to begin transmitting in HDTV format as early as summer, 1998. "HBO to launch HDTV in 1998," Broadcasting & Cable (June 16, 1997) at 60.

[5] *See, e.g.*, Comments of Time Warner at 33, 36-38; Comments of the Information Technology Industry Council and the Computing Technology Industry Association ("ITIC/CTIA") at 14-15; Comments of US West at 12-13.

- MVPDs shall not interfere with a consumer's right to attach any FCC certified navigation device so long as it does not harm the MVPD's network and it is not used or useable to facilitate unauthorized reception of service or unauthorized copying of copyrighted material. MVPDs shall take no actions to disable or restrict consumers from using navigation devices supplied by others in an authorized manner.

Over the long term, the FCC can greatly facilitate ongoing inter-industry efforts to develop standards for cable-ready navigation devices which will increase portability and interoperability[6] and allow a retail market for such equipment to develop through open competition rather than regulatory micromanagement by adhering to the following guidelines in the decision-making process:

- Protecting the security of MVPD networks and upholding the rights of copyright holders to protect against unauthorized use or copying of their works must be given the highest priority. Security must not in any way be compromised or sacrificed for the expediency of achieving commercial availability of navigation devices. The cable, computer and consumer electronics industries should be encouraged to continue to work together to develop specifications for a national renewable security system.

- The Commission must support a requirement that any digital equipment offered competitively either be equipped with the proper security to prevent digital signals from being delivered in the clear at the output of the device, or utilize an industry established protocol that will prevent unauthorized copying and piracy.

- The Commission must clearly distinguish between digital and analog navigation devices. There is a substantial embedded base of largely incompatible analog equipment which cannot be ignored. The cost of replacing this equipment in the short term merely to increase portability and interoperability cannot be justified, especially in light of the eventual transition to a digital environment. Furthermore, as the Commission itself has recognized in the NPRM, analog transmission is inherently less secure than digital transmission. Security concerns alone warrant differential treatment. On a going forward basis, compatibility and

[6]As explained *infra*, the Commission has no jurisdiction to mandate either portability or interoperability of video navigation devices. However, because portability and interoperability are likely to be valued by consumers, the marketplace is bound to respond to such demand.

portability concerns can be met through the decoder interface standard proposed in connection with the implementation of the equipment compatibility provisions of Section 624A of the Communications Act, 47 U.S.C. § 544a.

- The Commission must allow MVPDs to continue to offer integrated navigation/security devices that perform a variety of functions, as long as MVPDs also offer subscribers the option of utilizing commercially available component navigation devices in conjunction with proprietary security modules supplied or authorized by the MVPD.

- The Commission must ensure that video equipment designated, marketed and sold as "cable ready" provides a sufficiently robust hardware and software platform to support the downloading of network communications protocols and execution of applications, such as program guides, that may be offered to consumers over an MVPD's network. A standardized applications environment and display language, such as HTML, will facilitate portability and interoperability of equipment, while at the same time ensuring that the equipment is able to support the very services that the equipment is purchased to receive.

The remainder of these reply comments will address specific points raised by various parties in their comments which Time Warner feels are inconsistent with the approach which it advocates.

II. RELIANCE ON A TELEPHONE REGULATORY MODEL.

In its NPRM, the Commission proposed to use its experience with unbundling equipment and services in the telephone context as a starting point to develop a regulatory model for fostering the retail availability of navigation devices used to access multichannel video programming services and other services offered by MVPDs.[7] In response to this proposal, several commenters urged the Commission to go beyond establishing a general "right to attach" customer owned equipment to an MVPD's network, and establish an equipment

[7] NPRM at ¶¶ 8-10.

registration/certification process for MVPDs patterned after the Part 68 process applicable to telephone networks.[8]

Time Warner fully supports the establishment of a consumer's right to purchase and attach to an MVPD network any ancillary equipment to access video programming and other services offered by the MVPD so long as the equipment does not harm the network, does not interfere with the communications of any other network users, and is not used to receive services or communications which are not directed to the recipient or to which the recipient has not subscribed. Time Warner also supports the development of a transparent and flexible platform that will allow manufacturers to design and build component navigation devices that will be compatible with MVPD networks. However, Time Warner does not believe it is appropriate or desirable to impose a Part 68 regime upon MVPD networks.[9]

Telephony is a particularly inappropriate model on which to base the regulatory treatment of equipment that is intended for use with broadband video distribution systems. The Commission itself notes that the uniformity of telephone technology, equipment, and connectivity arises from the fact that for most of its history, the telephone industry was a national monopoly.[10] This stands in stark contrast with the development of the multichannel video programming services technologies which utilize a variety of transmission and security techniques and have had to endure extensive and often inconsistent regulation at the federal, state

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[8] *See* Comments of CEMA at 7; Comments of ITIC/CTIA at 15-16; Comments of Circuit City Stores, Inc. ("Circuit City") at 23; Comments of Uniden America Corporation at 3.

[9] *See also* Comments of GI at 72.

[10] NPRM at ¶ 10.

and local levels. Broadband cable television distribution systems utilize a radically different network architecture than the centralized switched star configuration traditionally employed by narrowband telephone networks. With its tree and branch architecture, cable television signal routing and security functions are often accomplished at or near the subscriber's premises, whereas in the telephone model, such functions are normally accomplished at the telephone company's central office.

The historic lack of uniform broadband transmission standards, network architectures, and security approaches strongly militate in favor of the development of a new model that fully takes into account the unique and inherently local characteristics of broadband cable television distribution systems. Indeed, as pointed out in the Comments of GI, broadband distribution is much more akin to a party line than a private line, given that upstream communications initiated at the subscribers' premises, an essential component of services such as impulse pay-per-view, have the capability to affect signal transmissions across the network. Thus, the same reasons which led the Commission to exempt party lines from Part 68 requirements apply with even more force to broadband distribution networks.[11] For these reasons, Time Warner favors a regulatory approach that would give individual MVPDs reasonable latitude to establish variations from industry established technical standards to account for any unique characteristics of a particular local network, as long as such variations were not simply a pretense to require consumers to acquire their navigation devices from the MVPD.

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[11] Comments of GI at 69-73.

III. ENTITIES COVERED BY SECTION 629.

As Time Warner demonstrated in its initial comments in this proceeding, Section 629 of the Communications Act requires the Commission to adopt regulations assuring the commercial availability of equipment used to receive services from *all* MVPDs, with no exclusions.[12] Section 629 thus encompasses a wide range of video distribution systems, including, but not limited to, cable television systems, high and medium power DBS and satellite service systems (C-band, Ku band FSS, and Ku band BSS), satellite master antenna systems, wireless cable systems (multichannel multipoint distribution service, instructional television fixed service, and local multipoint distribution service), multichannel digital television broadcast stations, and open video systems ("OVS").

Several other commenters also noted the all-inclusive scope of Section 629.[13] For example, U S West notes that "there can be little doubt that Congress intended to apply the provisions of Section 629 to all MVPDs as that term is defined in Section 602(13) of [the Communications Act]."[14] NCTA explains that in choosing broad language regarding the entities to which Section 629 would apply, "Congress clearly intended to ensure that subscribers of any multichannel video programming distributor would have the widest choice of equipment vendors . . . . Congress did not limit the scope of Section 629 to only certain

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[12] Comments of Time Warner at 22-25.

[13] *See, e.g.,* Comments of U S West at 9-10; Comments of NCTA at 15-18; Comments of United States Satellite Broadcasting Company, Inc. ("USSB") at 1-5; Comments of CEMA at 10-12; Comments of Circuit City at 13-15; Comments of Tandy Corporation at 2-4.

[14] Comments of U S West at 9.

distributors . . . ."[15] Indeed, as Tandy Corporation points out, Section 629 is "a decidedly procompetitive statute that should be construed broadly to promote the public interest."[16]

Some commenters believe that certain services, such as OVS or DBS/DTH, are either not included within the scope of Section 629 (*i.e.*, OVS) or else should be exempted from the provisions of that statutory section (*i.e.*, DBS/DTH).[17] However, with respect to OVS, the statute on its face does not grant the Commission any authority to pick and choose from among various types of MVPDs in applying the standards set pursuant to that statutory section. While Section 653(c)(1) of the Communications Act provides that certain specific provisions of Title VI apply to OVS operators certified under Section 653(a) of the Communications Act, but does not list Section 629 as one of the statutory sections specifically applicable to OVS operators,[18] this fact is not at all compelling in light of the express language of Section 629 encompassing *all* MVPDs within its scope.[19] Indeed, the fact that the entirety of Section 629 was newly added to Title VI by the 1996 Act provides compelling evidence that it was *not* intended to be among the pre-existing Sections of Title VI from which OVS operators are exempt pursuant to Section 653(c)(1)(C), a provision also added by the 1996 Act.

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[15] Comments of NCTA at 16.

[16] Comments of Tandy Corporation at 2.

[17] Comments of the Satellite Broadcasting and Communications Association of America at 3-6; Joint Comments of DIRECTV, Inc. and Hughes Network Systems, Inc. at 2-8; Comments of PRIMESTAR Partners, L.P. at 6-10; Comments of GI at 41-43, 47-49; Comments of Bell Atlantic and NYNEX at 5; Comments of Scientific-Atlanta, Inc. at 9-10.

[18] *See* 47 U.S.C. §§ 573(a), 573(c)(1).

[19] *See, e.g.*, Comments of Time Warner at 22-25.

Moreover, as both NCTA and CEMA noted in their initial comments, Section 653(c)(1) delineates which Title VI requirements specifically applicable to *cable operators* also apply to OVS operators and which do not.[20] By contrast, Section 629, as noted earlier, applies to all MVPDs, not just cable operators. Accordingly, it is not surprising that Section 629 is not specifically listed in Section 653(c)(1) as one of the cable-specific provisions which either applies or does not apply to OVS operators.[21]

Further, as Tandy Corporation points out, the choice of a particular delivery system for multichannel video programming (*i.e.*, an OVS system versus a franchised cable system) should not dictate whether or not the rules promulgated pursuant to Section 629 apply in any given instance.[22] Time Warner notes again that, in describing the goals underlying Section 629, Congress stated as follows:

> Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among *telecommunications subscription services arriving by various distribution sources.*[23]

The express statutory purpose of providing consumers with the benefits to be reaped from a competitive environment for MVPD navigation devices and to ensure that consumers have choices among "telecommunications subscription services arriving by various distribution

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[20] 47 U.S.C. § 573(c)(1).

[21] *See also* Comments of NCTA at 15-17; Comments of CEMA at 10 n.8.

[22] Comments of Tandy Corporation at 4.

[23] H.R. Rep. No. 204, 104th Cong., 1st Sess. 112 (1995) (emphasis added).

sources" would be undermined by exempting the equipment utilized to obtain multichannel video programming service from certain types of MVPDs but not others.

The overarching purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies . . . ."[24] If different classes of MVPDs face differing regulatory hurdles, the goal of a fully competitive marketplace underlying the 1996 Act will be exceedingly difficult to accomplish. Accordingly, Section 629 must be implemented in a manner which provides "marketing parity" among competing MVPDs. If DBS operators are permitted to subsidize equipment from programming service revenues, cable operators must be allowed to do so as well.[25] To the extent that any class of MVPDs is not permitted to offer equipment discounts, Section 629 should require that all MVPDs be prohibited from doing so.

For example, Time Warner believes the anti-subsidy provisions of Section 629 are directly applicable to the marketing practices employed by certain DBS operators and DBS equipment retailers, and should be interpreted to prohibit *all* MVPDs from offering any equipment discounts tied to long-term programming service agreements. The relevant statutory section could not be more clear. Section 629(a) permits MVPDs to offer navigation equipment directly to consumers only if "charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service."[26] As Tandy Corporation

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[24] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) ("Conf. Rep.").

[25] *See also* Comments of U S West at 15-17.

[26] 47 U.S.C. § 549(a).

also recognizes, the "statutory ban on subsidization is absolute and does not admit any exceptions."[27]

Time Warner has noted the pro-consumer and competitive benefits that result from the offering of navigation devices at discounted prices.[28] However, one category of equipment "discounts" runs counter to the competitive goals underlying Section 629 -- the deep equipment discounts currently offered by DBS providers for their equipment, in which the DBS providers subsidize the sale of video decoders and dishes at low prices in exchange for long-term service contract commitments from subscribers. Not surprisingly, DBS providers argue that this form of equipment subsidization should escape the scope of Section 629.[29] To the contrary, this form of subsidization is precisely the type of practice Congress was concerned about in enacting Section 629.[30] Either the retail price of DBS integrated receiver/descramblers ("IRDs") should not be allowed to be subsidized through long term DBS programming service contracts, or all MVPDs should be afforded this same marketing flexibility.

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[27] Comments of Tandy Corporation at 14.

[28] Comments of Time Warner at 44.

[29] *See* Joint Comments of DIRECTV, Inc. and Hughes Network Systems, Inc. at 19-22; Comments of PRIMESTAR Partners, L.P. at 12-13.

[30] *See also* Comments of Tandy Corporation at 14-15.

IV. A DISTINCTION BETWEEN DIGITAL AND ANALOG IS WARRANTED.

Most commenters have advocated that any rules adopted by the Commission in this proceeding should focus on digital equipment.[31] Time Warner believes that the Commission must be mindful of the important differences between analog and digital video navigation devices. Unlike digital navigation devices, analog devices enjoy a sizable embedded base, but that base can be expected to diminish over time as MVPDs convert their networks to digital transmission. Digital navigation devices have yet to be widely deployed, and thus it is still possible to design a paradigm that will facilitate commercial availability of such devices, without stifling innovation or posing undue signal security risks.

This is not to say that navigation devices used to receive analog signals cannot be made available commercially, so long as they do not contain embedded analog descrambling capability. Clearly, analog transmission of certain services can be expected to continue for some time, possibly indefinitely. The cable television and consumer electronics industries have already taken significant steps to foster the commercial availability of analog equipment on a going forward basis. Working together through the Cable-Consumer Electronics Compatibility Advisory Group ("C3AG") of the NCTA/EIA Joint Engineering Committee, the industries have developed an analog decoder interface specification that will allow security functions to be

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[31] *See, e.g.*, Comments of NCTA at 8-14; Comments of Scientific Atlanta at 12; Comments of GI at 40-41, Comments of Zenith Electronics Corporation at 4, 6, 8, 13; Comments of Time Warner at 11, 34; Comments of U S West at 3-8; Comments of Ameritech at 8-10; Comments of PacBell at 2; Comments of Viacom at 3, 14. *But see* Comments of Commercial Engineering at 8; Comments of ITIC/CTIA at 27.

segregated from non-security functions in analog cable compatible equipment.[32] This interface also supports a rich command set flowing from the consumer electronics equipment to the decoder module which allows the decoder interface to support the applications and services offered by the MVPD.

The development of an analog decoder interface has opened the door for manufacturing commercially available analog cable boxes, TV sets, VCRs and other video devices that will be both portable and compatible.[33] Subscribers should be able to take equipment equipped with this interface and use it with any cable system that offers to provide the component security module. Time Warner has clearly signaled its willingness to make available component analog descramblers that can be used with a cable box, TV set, VCR or other video device equipped with the IS-105 analog decoder interface. To the extent that equipment manufacturers respond by offering products incorporating an analog decoder interface, consumers will thus have the option to lease analog converter/descramblers from their cable operator, or to purchase an analog converter from a consumer electronics retailer.

The analog decoder interface standard under consideration by the Commission in its ongoing rulemaking to implement the equipment compatibility provisions of Section 624A of the Communications Act should thus be deemed to satisfy the commercial availability requirement

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[32] *See* Notice of Written Ex Parte Presentation, dated March 10, 1997, submitted in ET Docket 93-7, Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992--Compatibility Between Cable Systems and Consumer Electronics Equipment.

[33] *See also*, Comments of CERC at 20; Comments of Circuit City at 33; Comments of Tandy at 13; Comments of CEMA at 5.

imposed by Section 629 as far as analog services and equipment is concerned. Not only will this standard foster the development of a retail market for analog navigation devices by facilitating equipment portability, it will accomplish this in precisely the manner intended by Congress. The decoder interface was developed in consultation with private industry standards setting organizations in precisely the manner intended by Congress with respect to the development of regulations under Section 629.[34] Furthermore, Section 629(d)(1) of the Communications Act expressly contemplates that the Commission could determine that its equipment compatibility rules adopted pursuant to Section 624A would satisfy, at least in part, its obligation to adopt regulations to implement the provisions of Section 629. That Section provides:

> (1) COMMERCIAL AVAILABILITY DETERMINATIONS -- Determinations made or regulations prescribed by the Commission with respect to commercial availability to consumers of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, before the date of enactment of the Telecommunications Act of 1996 shall fulfill the requirements of this section.[35]

Taking this approach would allow the Commission to avoid redundant regulations and focus its efforts in a forward looking and resource efficient manner on the development of regulations to assure the commercial availability of newly developed digital navigation equipment which is only just now being deployed.

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[34] Conf. Rep. at 181; 142 Cong. Rec. S700 (Feb. 1, 1996).

[35] 47 U.S.C. § 549(d)(1).

V. PORTABILITY AND INTEROPERABILITY.

Several commenters have urged the Commission to adopt regulations that would require MVPD systems to meet governmentally imposed portability and interoperability standards. Some have even advocated that the Commission not authorize any equipment after July 1, 1998 unless that equipment was portable across all similar MVPD systems.[36] Time Warner certainly supports industry efforts to achieve portability, and even interoperability, as expeditiously and to the widest extent as is feasible and is sympathetic to concerns that the commercial availability of equipment not be unduly delayed. However, the establishment of arbitrary compliance deadlines, or "default" standards which are known to be inadequate, would be premature and ultimately counterproductive. Rather, Time Warner believes these goals can best be accomplished through cooperative efforts by the affected industries and the involvement of recognized standards setting organizations, with active oversight and participation by the Commission to assure reasonable and timely progress.

Section 629 directs the Commission, "in consultation with appropriate industry standard-setting organizations," to adopt regulations to assure the *commercial availability* of CPE utilized to access multichannel video programming and other services offered by MVPDs.[37] As Time Warner and several other commenters have noted, Section 629 does not require or even authorize the Commission to mandate portability and/or interoperability requirements upon such

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[36] *See* Comments of CERC at 16, 19-20, 23-24, 26-27; Comments of Tandy Corporation at 9-12; Comments of Circuit City at 27.

[37] 47 U.S.C. § 549(a).

devices.[38] While Time Warner fully supports industry efforts to improve video equipment portability and interoperability, Time Warner does not believe that it is feasible or even desirable to specify standards for a particular navigation device and then require all MVPD systems, or all cable systems, even if operated by different companies, to ensure that their networks will function with that device.

As Time Warner previously noted, different cable systems operating in different environments utilize different bandwidth, security technologies and system architectures and offer widely varying services and service packages. Various considerations, including the age and current bandwidth of the existing distribution system, demographic and regulatory requirements, and budgetary considerations will guide MVPDs in determining which technology to employ to offer newly emerging services.[39] There is simply no way for any governmentally imposed standard to predict or efficiently respond to the evolving deployment of digital technologies.

Indeed, if the Commission were to mandate a comprehensive, uniform solution to such difficult questions as how new services will be introduced, the perverse result would be the stifling of certain technological innovations that do not "fit" within the governmentally mandated technological model. It would make no sense for the Commission to mandate a "one box fits all" standard at this early stage in the deployment of digital technologies. Such an approach

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[38] *See, e.g.*, Comments of Time Warner at 36; Joint Comments of DIRECTV, Inc. and Hughes Network Systems, Inc. at 13; Comments of PRIMESTAR Partners, L.P. at 15; Comments of Motorola at 18-19; Comments of the Telecommunications Industry Association at 16.

[39] *See* Comments of Time Warner at 36.

would actually reverse the standard progression of events surrounding technological innovation. In other words, instead of new technologies dictating the necessary equipment, premature standards-setting would result in the equipment dictating (and stifling) the technology. Congress specifically exhorted the Commission, in implementing Section 629, to "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[40]

Interoperability and portability requirements that are not driven by legitimate consumer demand in the marketplace can only stifle further innovation and the development of new services provided by local MVPDs, such as cable television.[41] Indeed, the legislative history accompanying Section 629 clearly reflects a Congressional desire to allow marketplace developments to facilitate commercial availability of navigation devices.[42] The current state of the retail market for DBS receiving equipment demonstrates the necessity of allowing the marketplace to dictate whether and when full CPE interoperability will be available. Currently, most DBS receiving equipment available at retail outlets only functions with DBS service delivered from a particular DBS service provider. While the technology exists to manufacture DBS equipment capable of receiving DBS signals from a common orbital location, as proven by the single DBS IRD capable of use with either the DIRECTV or USSB service (or both), there may never be sufficient consumer demand for more expensive DBS receiving equipment capable

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[40] Conf. Rep., *supra*, at 181.

[41] *See also* Joint Comments of DIRECTV, Inc. and Hughes Network Systems, Inc. at 14-16; Comments of Motorola at 19; Comments of the Telecommunications Industry Association at 16.

[42] Comments of Time Warner at 37-38.

of use with the service offered by any DBS provider, at any orbital location. The marketplace, not the Commission, should dictate whether such technological innovations are necessary or desirable.

Instead, the Commission should facilitate ongoing industry efforts to develop a basic architecture for digital navigation devices that alleviates MVPD security and copyright concerns, provides a minimum degree of open ended functionality and compatibility in all such commercially available devices, and thereby facilitates a robust market for such devices. Time Warner believes that set top devices will continue to be necessary for a significant segment of the population even after the television industry completes the transition from analog to digital broadcasting, since the life expectancy of a television set purchased today will extend well into the next century. Time Warner stands ready to work with broadcasters and others to design a digital/analog decoder which can be utilized for both digital television and digital cable systems. Such a device would certainly be more successful in the marketplace than digital/analog decoders that are geared to work with either digital television or digital cable, but not both.

Time Warner is continuing to develop, and indeed has published, initial specifications for a digital navigation device which will be portable to other Time Warner systems offering digital transmissions. Such a portable navigation device would undoubtedly fair much better in the marketplace than a digital navigation device limited in use to a particular Time Warner system. Through reliance on open network architecture and a non-proprietary applications environment, it is Time Warner's intent that such equipment will ultimately be compatible with and portable across *all* cable systems which transmit digital signals. However, MVPDs must remain free to innovate in the deployment of new technologies and the development of new