available and therefore need not be regulated . . . Examples include . . . even terminals which allow reception of programming guides, such as StarSight, utilizing proprietary distribution technologies to download updated program information, e.g., the VBI of a television broadcast station."[13/] Time Warner is correct to the extent that StarSight itself does not need to be regulated -- it is already portable nationally, competitively available, needs no standardization and does not impede any competing service or equipment. But it is critical to the effective implementation of Section 629 that StarSight, and all others, be protected from anticompetitive disabling in the new rules.

32. As noted above there have been instances in which certain cable systems have affirmatively stripped the StarSight EPG from the VBI of a television broadcast station. In each of those instances, retransmission of the StarSight navigational device posed no security threat to any system, nor did it adversely affect any technical aspect of the network. Indeed, retransmission occurred automatically and without expense to the operator; it took an affirmative act, and specially purchased equipment, to strip the StarSight transmission out, an action which can provide an anticompetitive advantage to another EPG affiliated with the MVPD.

13/ Id. at 21-22.

33. Such anticompetitive behavior now constitutes a violation of Section 629, which provides a new and independent legal basis for Commission prohibition of the practice. Contrary to Time Warner's assertion, this method of StarSight distribution has not always been competitively available universally due to instances of stripping, and it is essential that implementing regulations prohibit this type of anticompetitive disabling by any MVPD. Nothing is more central to the letter and intent of Section 629.

34. To the extent Time Warner and others suggest that regulation such as standard-setting is inappropriate for this type of EPG distribution, StarSight agrees. But it does not follow from this that retransmission of television station VBI material with navigational devices is not in need of inclusion in the ambit of Section 629 implementation. A clear, comprehensive ban on activity such as VBI stripping, or any affirmative disabling of the availability of an unaffiliated navigational device, must be a cornerstone of the new Commission rules.

D. The Initial Rules Must Apply to All Types of MVPDs.

35. There is no statutory basis for the initial blanket exemption of any category of MVPD, and to do so would be beyond the Commission's authority. The only statutorily-allowed limitations on applicability are with respect to jeopardizing system security (Subsection (b)), developmental waivers based on specific showings <u>after</u> rules are in effect (Subsection (c)), and

sunset upon showings meeting the criteria of Subsection (f). A rule cannot be waived or sunsetted before it is ever applied. Parties seeking waivers or sunsetting must do so via petitions to initiate adjudicatory proceedings to apply the criteria specified in the statute, not in the context of a general initial rulemaking proceeding. At this stage the only basis for exceptions to universal applicability are in Section 629. Neither it nor any other provision of the Communications Act provides any further ground for exemption, nor did Congress adopt a different definition of "MVPD" for purposes of Section 629 than for other sections. Congress defines an MVPD as:

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of programming.

47 U.S.C. § 522(13) (emphasis added). See also, Notice at para. 14, pp. 8-9.

36. Had Congress wanted to exempt, ab initio, DBS (direct broadcast satellites),[14/] LMDS,[15/] OVS[16/] or any other class of

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14/ PrimeStar Partners L.P. ("PrimeStar") at 6; Satellite Broadcasting and Communications Association of America ("SBCAA") at 3; Direct TV, Inc. and Hughes Network Systems, Inc. ("Direct TV") at 3; General Instrument Corporation at 41-42.

15/ CellularVision USA at 3.

16/ OVS systems should be included in Section 629 implementation. OVS is an MVPD that is essentially a hybrid of Title III and Title VI regulation. Section 302(b)(1)(E)(i) of the Telecommunications Act of 1996 ("Act") directed the Commission to adopt rules prohibiting OVS operators from

(continued...)

MVPDs, it certainly could have done so. Congress could have done that for any of the reasons now proffered by opening commenters, or for any other reason it chose. Instead, Congress chose not to create categories of MVPD exemption, but provided for specific showings that Commission rules must allow in the course of Commission implementation of the universally applicable rules.

37. Proponents of DBS exemption misconstrue not only the Commission's authority and the Congressionally-prescribed procedure of Section 629, but also the concept of competitiveness in the context of Section 629. The issue in Section 629 is competitive availability of navigational devices with respect to a particular type of MVPD. That is the "relevant market," not the competitiveness of same-class MVPD providers in general or in some other sense. Comments of opening parties to the contrary miss this point. The claimed overall competitiveness of the DBS

16/(...continued)
discriminating against unaffiliated video programming providers with regard to program selection material available to viewers. Subsection (iv) of the same section required Commission rules to prohibit OVS operators from omitting programming services unaffiliated with them from "any navigational device, guide or menu." These directives were intended to facilitate the overall objectives of the OVS provisions, and of the Act as a whole, to promote fair competition in all aspects of video program provision, and to achieve maximum, unimpeded consumer choice. It would be inconsistent with those provisions, as well as the provisions of Section 629, to exclude OVS from Section 629 implementing rules. On April 11, 1996, StarSight filed Reply Comments in the Commission's OVS implementation docket, CS Docket No. 96-46; those Reply Comments are incorporated herein by reference.

industry,[17] the LMDS industry[18] or OVS[19] is a "red herring" here. Its only relevance to Section 629 is as one of three criteria for the sunset of regulations that have yet to be adopted.

38. Claims that the statutorily-required application of Section 629 -- mischaracterized as "Commission intervention" by DirecTV[20] -- will undermine DBS innovation and progress are without merit. Section 629 requires, inter alia, that the Commission prohibit anyone from acting anticompetitively vis-a-vis the navigational devices of others. The only innovation that the section deters is creative approaches to disabling an unaffiliated equipment or service, which the section makes illegal. Neither DBS nor anyone can be exempt from that prohibition. DBS operators cannot, under Section 629, preclude DBS subscribers from navigational devices and the services they facilitate when supplied by non-DBS sources. DBS operators should be required to restore VBI material when the equipment is available. In terms of unnecessary regulation that goes beyond these bedrock requirements of the statute, however, StarSight tends to agree with a hands-off approach; see, for example,

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17/ PrimeStar at 7; SBCAA at 3; DirectTV at 4; General Instrument at 4.

18/ Cellular Vision USA at 3.

19/ GTE Reply Comments, filed June 16, 1997, at 5.

20/ DirectTV at 3.

Section IIIA of these Reply Comments below concerning intellectual property.

E. Commission Rules Should Assure That System Security is Not Useable as a Pretext for Circumvention of Section 629.

39. It is indisputable that Congress recognized the importance of system security in Section 629, as discussed above. But the role of security in implementation has been distorted in some opening comments to the point that it no longer bears any rational relationship to the statute of which it is a part. The Commission must guard against the perversion of legitimate security concerns to nullify Section 629, just as, in the law of employment discrimination, unlawful discrimination cannot be justified pretextually.[21/]

40. The Time Warner opening comments illustrate this need. Time Warner takes the security concern so far as to advocate that ". . . the term 'navigation device' for purposes of Section 629 should not encompass any device which provides any security . . . function, but rather should be strictly limited to devices which add features or functionalities to any service <u>which a consumer has been expressly authorized to receive from an MVPD</u>."[22/] This would stand Section 629 on its head by restoring full gatekeeper power over availability of navigation devices to

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21/ <u>See</u>, <u>e.g.</u>, <u>McDonnell Douglas Corp. v. Green</u>, 411 U.S. 792, 806, 93 S. Ct. 1817, 1826 (1973).

22/ Time Warner at 11 (emphasis added).

the MVPD who is expressly prohibited from that power in the statute. In this respect, StarSight supports the opening comments of Viacom, Inc. that security concerns should not be used as a pretext for MVPD exclusivity in distribution of set-top boxes,[23/] or otherwise. Moreover, excluding any equipment containing any modicum of security feature would exempt all equipment having hybrid security and other functions. Stopping piracy cannot be a subterfuge for stifling competition.

41. Time Warner lists a "parade of horribles" which could flow from excessive FCC regulation. StarSight concurs in a minimalist approach by the Commission, as long as the main bases, such as the inviolability of non-discrimination, are covered. The problem with the Time Warner approach is that it would empower MVPDs to accomplish many of the same "horribles" it fears from the Commission, such as impeding the business judgment of marketplace competitors[24/] and stifling innovation.[25/] This cannot be done in the name of system security, which certainly has its legitimate place in implementation of express provisions of the statute, or on any other basis.

42. Nor can Section 629 implementation be parsed into other proffered distinctions that would undermine its anticompetitive goals. Pacific Bell, for example, notes correctly that custom

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23/ Viacom at 14.

24/ Time Warner at 21.

25/ Id. at 4.

"look and feel" features will enable providers to distinguish their products from the competition.[26] StarSight applauds and embodies that view. But Commission rules must make clear that no competitor may distinguish itself by making competing products and services unavailable to consumers.

III. THOUGH THE REACH OF IMPLEMENTATION MUST BE WIDE, THE ROLE OF THE FCC SHOULD BE NARROWLY TAILORED TO PROMOTE EXISTING AND FUTURE COMPETITIVE AVAILABILITY VIA THE MINIMUM REGULATION NECESSARY

A. The Commission Should Limit Its Role in Proprietary Rights to Precluding the Anti-competitive Impeding or Disabling of the Exercise of Those Rights.

43. Most commenters addressing the issue of proprietary technologies[27] argue correctly, in response to Paragraphs 69 and 70 of the Notice, that the Commission lacks the authority to regulate intellectual property rights by means such as compelled licensing to implement the commercial availability requirement of Section 629. However, some commenters[28] argue the opposite -- that the Commission can and should impose mandatory licensing requirements. Starsight believes that this latter position not only rests on a fundamental misunderstanding of the

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26/ Pacific Bell Reply Comments, filed June 16, 1997, at 5.

27/ See, e.g., General Instrument Corporation at 69, 100-101, Telecommunications Industry Association at 2, Primestar at 20, Americast at 6, Uniden America Corporation at 2-3, SBCAA at 12, Scientific-Atlanta, Inc.at 30, National Cable Television Association at 45, Direct TV at 11.

28/ See, e.g., Circuit City Stores, Inc. at 5, 28, Zenith at 12, Commercial Engineering at 8, and Consumer Electronics Manufacturers Association at 14.

constitutional and statutory law governing intellectual property, but also would undermine the policy goals of Section 629 -- the commercial availability of navigation devices and the deployment of innovative technology.

44. In the Notice, the Commission requests comment on whether and to what extent it has authority to "affect" proprietary rights in order to implement Section 629. Notice at para. 69, p. 31. The Commission specifically asks whether, to promote the commercial availability of navigation devices, it has authority to order a manufacturer to license proprietary technology, and prohibit an MVPD from entering into exclusive contracts with such manufacturers. Id.

45. The Commission expressly acknowledges the potential for conflict between its Section 629 obligation to "assure" competitive availability, and complying with existing constitutional and statutory requirements designed to promote technological development through the grant of exclusive intellectual property rights. Notice at para. 70, p. 31. Accordingly, the Commission seeks comment on how to ensure that its rules do not impede such development or interfere with market competition. Id.

46. StarSight believes that the Commission can avoid this conflict, and strike an appropriate balance, by taking the following steps:

(a) Recognizing explicitly in its resolution of this proceeding that imposing a mandatory licensing scheme

or prohibiting proprietary rights holders from engaging in exclusive contracts, as postulated in the Notice, are beyond the Commission's statutory authority and counterproductive to Section 629; and

(b) Establishing rules prohibiting the misuse of proprietary rights to affirmatively undermine the goals of Section 629 by impeding or disabling another's technology or service. Such a role is contemplated by the Communications Act and, thus, is within the Commission's authority.

1. The Commission Lacks Authority to Impose Compulsory Licensing Upon Proprietary Rights and Intellectual Property.

47. Article 1, Section 8, Clause 8 of the U.S. Constitution grants plenary power to Congress to legislate federal laws governing patents and copyrights.[29/] Thus, before the Commission may adopt rules that affect proprietary rights, Congress must delegate the authority to do so. Yet, as General Instrument and Primestar point out,[30/] to date Congress has not done this: nowhere in the Communications Act, as amended, or elsewhere, does Congress authorize the Commission to impose mandatory licensing, prohibit exclusive contracts, or otherwise impinge upon the

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29/ U.S. Const. art. I, § 8, cl. 8.

30/ General Instrument at 100; Primestar at 20.

exercise of proprietary rights except to prohibit use of those rights to disable the exercise of someone else's proprietary rights or intellectual property, which is necessary to implement Section 629.

48. Moreover, whenever Congress has intended to confer broad authority regarding proprietary rights or intellectual property on a federal agency, it has done so expressly in statutory language which limits the scope of that authority and defines the circumstances of its exercise.[31/] For example, Congress has authorized the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency ("EPA") to impose compulsory licensing on patents and other proprietary interests in very specific, narrowly tailored circumstances.[32/] As the Congress did not confer, but could have conferred, similar authority on the Commission, such authority should not be implied, particularly because Congress had the opportunity to expand the Commission's powers over proprietary rights in or in connection with Section 629, but declined to do so. Indeed, as noted by General Instrument,[33/] in providing for the competitive availability of navigational devices under Section 629, Congress

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31/ General Instrument at 103.

32/ The Atomic Energy Act empowers the NRC to license private persons to use patented inventions involving the production or use of special nuclear materials or atomic energy. See 42 U.S.C. § 2183. The Clean Air Acts empowers the EPA to impose compulsory licensing on proprietary technologies necessary to ensure compliance with pollution standards. See 42 U.S.C. § 7608.

33/ General Instrument at 100.

expressly chose not to expand the FCC's authority. Section 629(f) provides:

> Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.

47 U.S.C. § 629(f).

2. The Commission Has Authority for Purposes of Section 629 to Prohibit the Misuse of Rights and Technology to Impede or Disable the Rights, Technology or Service of a Competitor.

49. Congress does authorize the FCC to restrict the exercise of proprietary rights only to the extent that such exercise affirmatively creates technological impediments or disabilities which prevent competitors from entering or competing in the market, or which the market itself cannot overcome efficiently. Beyond the narrow purpose of ensuring that rights holders do not abuse their protections to impose technical incompatibilities to block competitive entry or participation, Congress intends the market, not regulation, to determine the availability of specific features.

50. For example, Section 624A of the Communications Act ("Consumer Electronics Equipment Compatibility") indicates that the purpose of regulations required by that section are to prevent manufacturers from using their proprietary technologies to disable competitors' equipment or otherwise impede access to competitors' proprietary features. 47 U.S.C. § 544a. Section 624A(a)(4) includes the Congressional finding that "compatibility

among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operations, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market." 47 U.S.C. § 544a(a)(4) (emphasis added).

51. Absent an express Congressional directive to follow a different approach in implementing Section 629 (which lacks Congressional findings of its own, and is related to Section 624A in purpose and intent), the Commission should apply the Section 624A approach to its implementation of Section 629 as well.

52. This approach finds further support in the legislative history of Section 624A:

> The conferees intend that the Commission should promptly complete its pending rulemaking on cable equipment compatibility, but not at the risk that premature or overbroad Government standards may interfere in the market-driven process of standardization in technology intensive markets.[34/]

53. The legislative history of Section 629 indicates a similar intent by Congress with respect to navigational devices:

> The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services. One purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator. Thus, in implementing this section, the Commission should take cognizance of the current state

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34/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 170-71 (1996).

of the marketplace and consider the results of private standards setting activities.[35]

54. Notwithstanding statutory law and legislative history to the contrary, several commenters, notably Circuit City Stores, argue that the Commission has authority to impose mandatory licensing on proprietary licensees of navigation devices. Circuit City Stores maintains that the Commission's decisions in Carterphone and the recent DTV rulemaking proceeding indicate that the Commission already has authority to impose mandatory licensing to make technology available on reasonable and nondiscriminatory terms.[36] Yet nowhere does Circuit City Stores identify the source or basis for that authority. It fails to distinguish between the Commission's potentially limited authority to oversee voluntary standards setting, on the one hand, and broad regulation of proprietary rights, on the other. As to the latter, the Advisory Committee to the DTV proceeding expressly concluded that the Commission had no such authority to regulate broadly.[37]

35/ Id. at 181.

36/ Circuit City Stores at 28-29.

37/ In its Third Interim Report, the Implementation Subcommittee of the FCC Advisory Committee on Advanced Television Service concluded that the Commission lacked authority to require "compulsory licensing" or to otherwise regulate the licensing and royalty practices associated with patents. During the intervening years since 1980, when the interim report was published, Congress has apparently chosen to "stay the course" on this point, and in recent decisions on DTV, the Commission does not seek to "affect" proprietary rights. Advanced Television Systems and Their Impact Upon the Existing Television Broadcast

(continued...)

55. In sum, the Commission currently lacks the authority to order a manufacturer or provider of navigational devices and services to license proprietary technologies, or to prohibit an MVPD from entering into exclusive contracts with such manufacturers, for the purpose of promoting the competitive availability of navigational devices. In response to the Commission's request for comment on how to ensure that its rules implementing Section 629 do not impede technological development or interfere with market competition, StarSight urges the Commission to limit its rules in this regard to prohibiting, and providing appropriate sanctions for, the misuse of proprietary rights as affirmative weapons to impede or disable another's technology or service.

3. The Statutory Objectives of Promoting New Technologies and Competitive Availability Are Best Served by Permitting Holders of Proprietary Rights to Contract Freely in the Marketplace.

56. The United States Constitution grants exclusive rights in intellectual property to foster artistic and technological developments:

> To promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.[38/]

37/(...continued)
Service, FCC 97-115, FCC 97-116, both released April 21, 1997 (Fifth Report and Order and Sixth Report and Order).

38/ U.S. Const. art. I, § 8, cl. 8, cited in the Notice, para. 70.

By its terms, this Copyright and Patent Clause recognizes an essential link between granting artists and inventors temporary exclusive rights in their creations, on the one hand, and promoting art and technology, on the other. The Clause also implies the opposite: failure to grant exclusive rights to the creators of intellectual property will remove the incentive to create and, thus, threaten advancement in these areas.

57. To fulfill the policy of the Communications Act of encouraging the provision of new technologies and services to the public,[39/] the Commission must foster a stable competitive environment in which holders of intellectual property and exclusive proprietary rights are secure in the knowledge that they will be free to contract with respect to their technologies in the marketplace, and not be required to make them available under compulsory licensing. The legal right to contract freely in the marketplace was essential to the development of StarSight's pioneering video navigational technology.[40/] Companies such as StarSight and many others would be less likely to undertake the effort and attendant risks in research and development if the fruits of their efforts could be appropriated through compulsory licensing.

39/ See 47 U.S.C. § 157.

40/ In design, distribution and operation, StarSight, as noted above, does not interfere with provision of equipment or services by competitors.

58. To encourage continued developments in navigational devices technology, companies must be able to rely on the full complement of safeguards provided under the system of intellectual property rights stemming from the Constitution. Uncertainty as to whether a technology, once developed, will have to be made available to others under government-ordered compulsory licensing could hinder technological advancement and undermine the objectives of the 1996 Act overall, and particularly of the letter and intent of Section 629.

B. Commission Rules Should Establish the "Right to Attach" and Prohibit Impediments to Competitive Availability.

59. StarSight supports the principle of the "right to attach" as a useful import from the telephone model of regulation. This should be limited by legitimate concerns about system security, network technical integrity and the preclusion of attachments designed or operated to impede customer receipt of navigational services (Notice at paras. 11-12, pp. 6-8). Several opening comments express support for the Commission's right to attach proposal.[41/]

60. Other aspects of the "telephone model," however, appear to be overkill in the context of Section 629. For example, absent evidence of abuse, it appears to be sound policy to resist rate regulation, and refrain from standardization of equipment

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41/ See e.g., Commercial Engineering at 2; Consumer Electronics Manufacturing Association at 6.

except to the minimum extent necessary to promote the right to attach and prevent the deliberate or inadvertent disabling of a competing service. Exclusive contracts that do not impede the objectives of Section 629 should be allowed absent evidence of coercion, as in the context of the cable television access-to-programming rules implementing Section 628.[42]

C. The Commission Should Adopt, From the Outset of Implementation, Adequate Procedures and Remedies to Enforce Section 629

61. Particularly where minimalist regulation is appropriate, it is important that expedited mechanisms exist to adjudicate and correct abuses when they occur. To this end, the Commission should adopt a clear set of streamlined procedures to enable complaints to be processed and resolved expeditiously and well. In addition, remedies and sanctions, including the ability to order compliance or the cessation of noncomplying activity,

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42/ 47 C.F.R. §§ 76.1300-76.1302.

along with monetary forfeitures and other appropriate sanctions, should be in place.

Respectfully submitted,

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Attachment (Certificate of Service)

VLDC01-178668.7

CERTIFICATE OF SERVICE

I, Tina Harris, a legal secretary with the law firm of Verner, Liipfert, Bernhard, McPherson & Hand, hereby certify that on this 23rd day of June, 1997, I placed in the mail via first class, postage prepaid, copies of the foregoing **Reply Comments of StarSight Telecast, Inc.** in **CS Docket No. 97-80**, to the following:

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