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Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Reply Comments of General Instrument Corporation  
in CS Docket No. 97-80: Erratum

Dear Mr. Caton:

General Instrument Corporation ("GI") timely filed its reply comments with the Commission in accordance with its Notice of Proposed Rulemaking in CS Docket No. 97-80 on June 23, 1997. The seventh page of the reply comments was inadvertently missing from that filing. GI respectfully requests that the Commission accept the attached original and (4) copies of GI's complete reply comments in lieu of those filed on June 23.

Sincerely,

  
Francis M. Buono

Enclosures

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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JUN 27 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF GENERAL INSTRUMENT CORPORATION

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June 23, 1997

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**APPENDIX**

Stanley M. Besen and John M. Gale, "A Further Economic Analysis of the Commercial Availability of 'Navigation Devices' Used in Multichannel Video Programming Systems," June 23, 1997

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
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Commercial Availability of )  
Navigation Devices )

**REPLY COMMENTS OF GENERAL INSTRUMENT CORPORATION**

General Instrument Corporation ("GI"), by its attorneys, hereby files its reply comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

In these reply comments, GI responds to specific issues raised by commenters who suggest that government standards, mandatory licensing, and national portability are required to satisfy the commercial availability standard of Section 629. Such far-reaching regulatory proposals are beyond the scope of the statute, which is intended to ensure that consumers have the opportunity to obtain navigation devices from a source other than the MVPD itself or an MVPD-affiliated vendor.

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<sup>1</sup> In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking, CS Docket No. 97-80, FCC 97-53 (released February 20, 1997) ("Notice").

Moreover, even assuming the Commission has the authority under Section 629 to require more than competition in the retail distribution of navigation devices, it cannot and should not adopt mandatory standards or impose compulsory licensing of proprietary technology. As the comments submitted by GI and others demonstrate, given the rapid pace of technological innovation in the area of MVPD navigation devices, adoption of the highly intrusive regulatory proposals advanced by certain commenters would stifle growth and innovation and thereby reduce, rather than enhance, consumer welfare. Commenters advocating a more interventionist government role with respect to standard setting, Part 68-type rules, national portability, and compulsory licensing mistakenly seek to apply the current regulatory scheme for telephone CPE to the vastly dissimilar realm of MVPD navigation devices. Not only is the telco analogy inapt, its application to MVPD navigation devices would significantly impede innovation.

The better approach is for the Commission to adopt a more restrained regulatory model that builds on industry efforts already underway and affords industry participants the flexibility to achieve Congress' commercial availability objectives in an efficient manner without the serious adverse effects associated with a government-mandated standard and/or licensing scheme. GI described such a flexible regulatory approach in its initial comments. Under GI's "Performance-Rule-Incentive-MEchanism" -- "PRIME" -- approach, the Commission would apply carefully targeted performance rules and incentive mechanisms to specific categories of navigation equipment in order to assure commercial availability. Consistent with the

Commission's goal as set out in the Notice, such a flexible regulatory approach "would both permit the commercial entities involved to themselves develop the best means of complying with Section 629 and would provide incentives for development of equipment susceptible to retail sales marketing."<sup>2</sup> Equally important, permitting the commercial entities involved to determine for themselves the best means to achieve congressional objectives is also consistent with the statutory bar against Commission actions that would jeopardize or impede network security and retard innovation.

GI makes the following additional points in these reply comments:

- **Analog/Hybrid Devices.** For reasons described in the comments submitted by GI and a number of other parties, it is both unnecessary and inappropriate for the Commission to apply whatever rules it may adopt under Section 629 to analog devices. GI also supports the proposal of NCTA that "hybrid" analog-digital navigation devices should not be subject to the commercial availability rules.
- **Technology/Distribution Models for Achieving Commercial Availability.** The Commission should not mandate the use of a particular technological or distribution approach to ensure commercial availability. Thus, for example, while GI believes that separation of security and non-security components may be an acceptable method of satisfying the statute, there may be others, such as the provision of integrated boxes using embedded/renewable security to an MVPD and to an independent retailer. Similarly, distribution of navigation devices using a 1-800 number or an online service is an acceptable distribution mechanism under the statute.
- **Sunset.** Contrary to the suggestions of certain commenters, effective competition among MVPDs does justify sunset of the commercial availability rules. Such competition protects consumers in the same manner as would

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<sup>2</sup> Notice at ¶ 67.

the presence of multiple suppliers of equipment used on the same MVPD system.

Finally, attached to these reply comments is an analysis by Stanley M. Besen and John M. Gale of Charles River Associates, Inc., which addresses several of the economic issues raised in the comments.<sup>3</sup>

**II. THE PURPOSE OF SECTION 629 IS TO ENSURE THE AVAILABILITY TO CONSUMERS OF NAVIGATION DEVICES FROM SOURCES OTHER THAN AN MVPD OR ITS AFFILIATE.**

Certain commenters argue that Section 629 requires the Commission to establish standards and compel licensing of proprietary technology in order to enable any manufacturer to produce a navigation device that is portable across all similar MVPD systems.<sup>4</sup> However, the fundamental premise of these commenters is incorrect because, as GI and others demonstrated in their initial comments, the statute does not require the portability of navigation devices, nor does it authorize the Commission to involve itself in questions regarding the manufacture of such devices. Rather, it seeks to ensure competition in the retail distribution of navigation devices to consumers. As Besen and Gale describe it, "Congress' objective

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<sup>3</sup> Stanley M. Besen and John M. Gale, "A Further Economic Analysis of the Commercial Availability of 'Navigation Devices' Used in Multichannel Video Programming Systems," June 23, 1997 ("Besen and Gale Reply Comments").

<sup>4</sup> See, e.g., Comments of Circuit City at 4-5, 12; Comments of Consumer Electronic Manufacturers Association at 8-9, 12-16; Comments of Consumer Electronic Retailers Coalition at 8-10; Comments of Tandy at 9-10; Comments of Information Technology Council and the Computing Technology Industry Association at 8-13 ("ITI"); Comments of Viacom Inc. at 11; Comments of Zenith at 7-9, 12.

was to prevent any MVPD from exercising market power in the supply of such equipment to consumers."<sup>5</sup>

The plain language of Section 629 speaks solely in terms of assuring the availability of navigation devices from sources other than the MVPD:

The Commission shall...adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services ... of converter boxes, interactive communications equipment, and other equipment ... from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.<sup>6</sup>

Likewise, the Conference Report -- always the critical legislative history document,<sup>7</sup> and particularly so here given that the statute was narrowed considerably by the Conference Committee<sup>8</sup> -- reinforces

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<sup>5</sup> Besen and Gale Reply Comments at 1.

<sup>6</sup> 47 U.S.C. § 549(a) (emphasis added).

<sup>7</sup> Sutherland Stat. Const. § 48.08 (5th Ed. & Cum. Supp. 1992) ("[I]t is the most persuasive evidence of congressional intent" as it "represents the final statement of terms agreed to by both houses.") (footnote omitted).

<sup>8</sup> The Conference Committee narrowed the adopted House bill in two important respects: (1) it limited the scope to MVPD navigation devices, rather than all equipment used in connection with "telecommunications subscription services"; and (2) it changed the Commission's directive from assuring the "competitive" availability of navigation devices to assuring the "commercial" availability of such devices. Compare S. Conf. Rep. 230, 104th Cong., 2d Sess. 181 (1996) ("Conference Report") with H.R. Rep. No. 204, 104th Cong., 1st Sess. 112-113 (1995) ("House Report") and H.R. 1555, 104th Cong., 1st Sess. § 203 (1995). The narrowing of the provision in Conference is particularly important given that the Senate, after considered debate, overwhelmingly rejected a similar provision. See 141 Cong. Rec. S8000-S8001 (daily ed. June 8, 1995) (Senate rejecting, by a vote of 64-30, a provision to ensure the competitive availability of navigation devices). No hearings or debate occurred with respect to this provision on the House side.

that Congress' intent was to ensure that consumers have an alternative retail distribution source from which to obtain MVPD equipment. As Congress stated, Section 629 is intended to "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."<sup>9</sup>

By contrast, commenters advocating rules regarding the manufacturing or portability of MVPD navigation devices have cited nothing in the Act's language or its legislative history requiring the Commission to adopt such rules.

Moreover, in other sections of the 1996 Act where Congress actually sought to authorize the Commission's involvement with respect to the manufacture of equipment, it did so expressly. For example, Section 273, which addresses BOC entry into equipment manufacturing, sets forth specific requirements regarding standard setting, disclosure of network information, and access to such information by competing manufacturers.<sup>10</sup> The fact that Congress did not explicitly address such issues in Section 629 when it expressly did so in other sections of the 1996 Act reinforces the conclusion that Commission action with respect to the manufacture or portability of navigation devices is beyond the scope of Section 629.<sup>11</sup>

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<sup>9</sup> Conference Report at 181 (emphasis added).

<sup>10</sup> 47 U.S.C. §§ 273(c) and (d).

<sup>11</sup> It is an established rule of statutory construction that "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States,  
(continued ...)

Thus, as numerous commenters noted, the statute is satisfied as long as a navigation device compatible with a particular MVPD's network is available from a retailer, manufacturer, or other vendor that is unaffiliated with such MVPD.<sup>12</sup> For example, if an MVPD and an independent retailer distribute the same integrated converter box, the statute is satisfied. Similarly, if an unaffiliated manufacturer directly markets an MVPD navigation device to consumers through a 1-800 number, the statute is satisfied.<sup>13</sup>

**III. EVEN ASSUMING THE COMMISSION HAS AUTHORITY TO REQUIRE MORE THAN COMPETITION AMONG RETAIL SOURCES, IT CANNOT AND SHOULD NOT DO SO USING MANDATORY STANDARDS OR COMPULSORY LICENSING.**

Even assuming the Commission has the authority to require more than competition in the retail distribution of navigation devices, it cannot and should not do so through mandatory standards or compulsory

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(... continued)  
464 U.S. 16, 23 (1983) (citing United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

<sup>12</sup> See, e.g., Comments of Cellularvision USA, Inc. at 9-10; Comments of GTE at 8 (stating that commercial availability does not require that CPE be made available by retailers or manufacturers not selected by MVPDs); Comments of NCTA at 21; Comments of PRIMESTAR Partners L.P. at 20 (the Commission need only adopt a requirement that the MVPD not be the sole available source of its navigation equipment in order to satisfy the mandate of the statute); Comments of Time Warner at 27 (stating that the Commission should not require a certain number of outlets, but just the ability to purchase or lease equipment from an unaffiliated manufacturer, retailer, or vendor); Comments of U S West at 13 (defining commercial availability as the presence of at least two unaffiliated CPE providers, one of which can be the MVPD).

<sup>13</sup> See also Comments of Gateway 2000, Inc. at 1-7 (stating that retail sale of CPE by means of a toll-free telephone number or an online service meets the definition of "commercial availability" under Section 629).

licensing of proprietary technology, as some commenters advocate.<sup>14</sup> Such intrusive governmental measures are beyond the Commission's authority and would impede innovation, contrary to congressional directives and the public interest.

In its initial comments, GI demonstrated that the Commission is without authority to mandate technical standards to achieve portability,<sup>15</sup> or to compel licensing of proprietary technology.<sup>16</sup> Such intrusive governmental actions are also unwise as a policy matter because they will stifle innovation and reduce the incentives for manufacturers to invest in new technologies. As Besen and Gale describe it:

The Commission is being asked in this proceeding to choose between two widely different views about the market for navigation devices. Advocates of system standardization, mandated national portability, and widespread compulsory licensing apparently view navigation devices as relatively mature commodities for which few variations need be provided to consumers and for which most important innovations have already been undertaken. As a result, they would freeze, or substantially retard, the rate at which innovations are introduced and limit the variety of products that could be offered in order to achieve a high degree of price competition.

By contrast, we view navigation devices as novel products that are still undergoing rapid and substantial technical progress. Moreover, we see manufacturers and MVPDs undertaking substantial experimentation in the features of these devices and the associated services that are offered....<sup>17</sup>

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<sup>14</sup> See, e.g., Comments of Circuit City at 5, 12, 27-30; Comments of Consumer Electronics Manufacturers Association at 6-9, 13-18; Comments of ITI at 12-13; Comments of Uniden America Corp. at 2; Comments of Consumer Electronics Retailers Coalition at 7-33.

<sup>15</sup> See Comments of GI at 30-34.

<sup>16</sup> See id. at 100-109.

<sup>17</sup> Besen and Gale Reply Comments at 3-4. Congress has recognized that "[a]llowing the Commission to establish standards ... would have the effect of freezing technology, slowing innovation, and limiting  
(continued ...)

Stated another way, proponents of mandatory standards, required national portability, and compulsory licensing adopt a static view of the marketplace and seek to create a world in which navigation devices are increasingly homogenized and innovation is increasingly slowed in order to facilitate their ability to manufacture and distribute such equipment. The problem with such an approach is that while it may realize short-term consumer gains in terms of lower equipment prices, it will forego significant long-term benefits in terms of incentives for manufacturers and MVPDs to continue to invest in new technologies and innovative solutions.<sup>18</sup> Such a trade off is particularly unwise in a marketplace where dynamism is so evident and the future benefits for consumers so promising.<sup>19</sup>

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(... continued)

the development of new features and capabilities. House Report at 83. Rep. Eshoo commented that the computer/communications convergence would "wither and die if the government were to set the rules and stifle change." 142 Cong. Rec. H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Eshoo).

<sup>18</sup> See Besen and Gale Reply Comments at 3 ("[I]f wholesale prices are driven down through, for example, widespread compulsory licensing, the incentives of manufacturers to engage in R&D will be reduced and, thus, so will the rate at which new products are developed and brought to market."); *id.* at 8 ("[T]he standardization that some would impose because they claim it is required for retail availability would come at a significant cost in terms of reduced innovation and lost variety").

<sup>19</sup> GI finds particularly troubling the comments of ITI in this regard. By inappropriately relying on a telephone network model, ITI argues not only for MVPD disclosure of network information, but also for compulsory licensing of proprietary technology if the network information contains such protected intellectual property. Comments of ITI at 13. This position ignores the practical reality that in many cases it is the network equipment manufacturers, not the MVPDs themselves, that developed and own the proprietary technology. At the same time, ITI seeks government assurance that proprietary technology owned by manufacturers of CPE will not be subject to such mandatory licensing. *Id.* In other words, ITI seeks a government-sanctioned right to demand access to other manufacturers' proprietary  
(continued ...)

By contrast, implementing the plain language of Section 629 and focusing on competition among retail distribution outlets without mandated standards, compulsory licensing, or national portability, will not only promote additional consumer choice and reduce prices for navigation devices, it will also maintain the incentives of manufacturers and MVPDs to continue to invest in new technologies.<sup>20</sup>

The fundamental flaw in comments arguing for extensive standards, mandatory licensing, and/or government-imposed portability is their assumption that MVPD networks and equipment are no different than the traditional telephone network that led to the adoption of such policies. For example, these parties assert that the Commission should simply extend Part 68 of the Commission's rules to MVPD networks.<sup>21</sup> However, as GI and others have demonstrated, MVPD

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(... continued)

network technology to increase its ability to compete, while at the same time retaining the ability to deny others access to the proprietary technology of ITI's own members, who include many manufacturers of CPE. ITI members have been engaged in many court battles over the years to protect their rights to determine to whom they will license their proprietary technology, and the entire history and huge success of the computer industry has been predicated on investment in and the voluntary licensing of such technology. The Commission should reject ITI's self-serving "stick-it-to-them-but-not-to-us" proposal regarding access to proprietary technology. Further, it is not apparent that ITI even has agreement within its own membership. See Comments of Motorola at 28-35 (opposing compulsory licensing of the proprietary technology of all manufacturers and noting that requiring any manufacturer to disclose proprietary technology to all competitors "would leave manufacturers little incentive to develop innovative equipment and services").

<sup>20</sup> Besen and Gale Reply Comments at 3 ("If the markup is reduced through additional retail competition, there is likely to be little effect on variety and innovation") (footnote omitted).

<sup>21</sup> See, e.g., Comments of Circuit City at 22-23; Comments of ITI at 15-16; Comments of Uniden America Corp. at 3; Comments of Zenith at 6.

networks differ significantly from the highly standardized, non-security based, narrowband, circuit-switched network that formed the basis for the Commission's Part 68 rules.<sup>22</sup> Such fundamental differences between the embedded telephone network facilities and MVPD facilities "preclude a literal translation of [the telephone] model into the MVPD context."<sup>23</sup> Even assuming arguendo that the telephone precedent is relevant, MVPD networks and the navigation devices attached to them are more properly thought of in terms of the Commission's precedent regarding telephone party lines, which the Commission exempted from the standardization requirements of Part 68.<sup>24</sup>

The interventionist policies suggested by some commenters are particularly unwarranted because, as GI and other commenters have demonstrated, industry efforts in the standards-setting and licensing areas are already proceeding apace to facilitate portability and enhanced commercial availability where such solutions are

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<sup>22</sup> See Comments of GI at 69-73; Comments of Scientific Atlanta at 29; Comments of TIA at 11-12; Comments of Time Warner at 2-3.

<sup>23</sup> Notice at ¶ 10.

<sup>24</sup> See Comments of GI at 70-72. It is equally incorrect to argue that just because each DBS operator conforms its system to a national transmission standard and a uniform security system that all MVPDs can be or should be conformed to this model as well. This view overlooks two important facts: First, a DBS operator is compelled to these decisions based on the national nature of its distribution system, which is not the case for many MVPDs. Second, such a standardized, uniform approach forces DBS operators to forego the advantages that come with non-uniform, non-standardized systems, such as the ability to customize service offerings and system security to the needs and desires of a particular community.

economically efficient and pro-consumer.<sup>25</sup> Commercial availability can be and is being achieved without government-mandated transmission standards, portability, or licensing of proprietary technology. For example, DBS equipment, although not portable from one provider to another, is nonetheless widely available in the retail market without government-prescribed standards or regulations. Similarly, mobile telephones may work only with a single provider, but again these phones are offered primarily through traditional retail establishments.<sup>26</sup> Given these developments, there is simply no reason for the Commission to risk retarding innovation through the extreme government micromanagement advocated by some parties.

Of course, the Commission can build upon and help to further these industry and marketplace efforts by carefully targeting the use of performance rules and incentive mechanisms applied to specific types of equipment over time as described in GI's Performance Rule Incentive Mechanism ("PRIME") approach.<sup>27</sup> By applying the principles

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<sup>25</sup> See Comments of GI at 36-38 (noting industry standards efforts for digital consumer terminals and cable modems), 96-99 (describing voluntary licensing activities of equipment manufacturers); Comments of TIA at 9-11 (noting licensing and cross-licensing plans by GI and Scientific-Atlanta); Comments of Scientific-Atlanta at 11 (noting that the cable industry has developed a voluntary private industry standard to facilitate greater interoperability and portability in the cable modem market), 14-18 (noting that major suppliers are licensing, cross-licensing, and in compliance with CableLabs standards); Comments of Time Warner at 4 (discussing the work of the Cable-Consumer Electronics Compatibility Advisory Group).

<sup>26</sup> See Besen and Gale Comments at 21 (citing the DBS and PCS equipment markets for the proposition that portability is not required for retail availability). Accord Besen and Gale Reply Comments at 5-8.

<sup>27</sup> Comments of GI at 49-52. See also Comments of Ad Hoc Computer and High-Technology Coalition at 10 (noting that the Commission  
(continued ...)

of GI's PRIME model, the Commission can facilitate industry and marketplace efforts toward increased commercial availability without stifling innovation.

#### IV. OTHER ISSUES

##### A. There Is Substantial Record Support In This Proceeding For The Commission To Refrain From Adopting Regulations For Analog Devices.

In its initial comments, GI demonstrated that the Commission's prior decisions in the Equipment Compatibility proceeding regarding the Decoder Interface and customer ownership of analog descramblers constitute "prior determinations" under Section 629(d)(1) which thereby exempt analog navigation devices from Section 629 regulations. GI also pointed out that this conclusion comports with sound public policy in that it allows the Commission to focus its efforts on the unfolding future -- digital technology.<sup>28</sup>

A number of commenters agreed with GI and urged the Commission to apply section 629 only to digital navigation devices.<sup>29</sup> GI

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(... continued)

should pursue a performance rule approach by setting a goal and allowing the industry to achieve the goal in the most efficient way); Comments of Echelon Corporation at 31-33 (agreeing with a performance standard that does not specify how MVPDs or cable operators must satisfy the retail availability obligation); Comments of NCTA at 30-32 (noting that a performance-rule approach is the best option); Comments of TIA at 12-13 (the Commission should promulgate performance rules without specifying how MVPDs must satisfy the retail availability obligation).

<sup>28</sup> See Comments of GI at 39-41.

<sup>29</sup> See, e.g., Comments of Ad Hoc Computer Coalition at 9; Comments of GTE at 5-7; Comments of Ameritech New Media at 9-10; Comments of Echelon at 11, 15; Comments of TIA at 14; Comments of Zenith at 4; Comments of NCTA at 8-14; Comments of Pacific Bell Video Services at 2.

reiterates its support for a Commission focus in this proceeding on digital navigation devices. GI also supports NCTA's proposal to exempt "hybrid" navigation devices (i.e., devices with both analog and digital capabilities).<sup>30</sup> As NCTA correctly points out, because such devices would be subject to "the same concerns about security and signal theft" as purely analog devices, and will be available for only a relatively brief period, an exemption is warranted.<sup>31</sup>

**B. The Commission Should Not Mandate the Use of Any Particular Technology or Distribution Approach to Ensure Commercial Availability.**

Several parties suggest that separation of security and non-security components using a standard interface should be pursued by the Commission to assure the commercial availability of certain navigation devices.<sup>32</sup> While GI believes that separation may be an acceptable method of achieving commercial availability, neither it nor any other technology solution may be mandated by the Commission.

As GI demonstrated in its initial comments, a mandatory separation requirement would be inconsistent with Section 629(b)'s prohibition on the adoption of regulations that would jeopardize the security of services offered over MVPD systems. Stated another way, the Commission is not authorized to adopt regulations -- even if they

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<sup>30</sup> Comments of NCTA at 13.

<sup>31</sup> Id.

<sup>32</sup> See Comments of Ad Hoc Computer and High-Technology Coalition at 9; Comments of Bell Atlantic and Nynex at 7; Comments of Circuit City at 31-32; Comments of Consumer Electronics Manufacturers Association at 17-18; Comments of Time Warner at 7, 9, 12, 19, 40-41; Comments of Viacom at 6-7, 15; Comments of Zenith at 9.

would assure commercial availability -- if such regulations also would jeopardize system security.<sup>33</sup>

For example, if the Commission were to mandate that commercial availability for digital consumer terminals must be achieved via a standard interface separating security and non-security components, and such an interface resulted in increased levels of piracy, the Commission's action would violate Section 629(b)'s proscription on government-mandated solutions that impair network security.<sup>34</sup> In light of this possibility, the Commission may not require that any particular technology solution be used by MVPDs to achieve commercial availability for navigation equipment that includes security technology, leaving that decision to MVPDs, who have the appropriate incentives to promote security.<sup>35</sup>

Rather, the Commission should adopt a flexible regulatory approach, such as GI's PRIME model, which uses performance rules and incentive mechanisms to assure commercial availability. Under such an approach, MVPDs may, in fact, determine that the best method of achieving commercial availability for security-related equipment is

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<sup>33</sup> Comments of GI at 54-56.

<sup>34</sup> See Comments of GI at 58-60 and Appendix D (describing the security risks and certain breaches of smart cards). Similarly, to the extent any such Commission-adopted interface standard improperly drew the line between network and non-network functions, the MVPD operator's ability to create and deliver innovative services in the future could be seriously impaired, contrary to Congress' express directive to avoid all such innovation-stifling regulations. See Conference Report at 181.

<sup>35</sup> See Notice at ¶ 72. For example, nothing should prevent MVPDs from satisfying the commercial availability standard using "embedded" security solutions, in which the security element is incorporated inside an integrated product. See Comments of GI at n. 103.

through a separation of security and non-security components.<sup>36</sup> However, an MVPD may instead decide that the best method for achieving commercial availability for such equipment while preserving network security is to authorize its manufacturer-supplier to provide to an unaffiliated retailer the same integrated navigation device (including embedded security components) that the manufacturer also provides to the MVPD. Either way, Congress' goal is met, because commercial availability is achieved.

Because the MVPD industry is evolving at a rapid pace, what works in terms of assuring commercial availability for security-related equipment today may not work a year from now. Moreover, this analysis may be different for each MVPD given the inherent differences in network configuration. In such a highly dynamic and diverse environment, and particularly in light of Congress' directives not to jeopardize network security or network innovation, a flexible regulatory approach is essential.

Finally, for similar reasons, the Commission should not mandate any particular distribution model to satisfy the commercially available standard. For example, as GI demonstrated in its initial comments, direct distribution of navigation devices through a telephone-based or an online-based mail order system constitutes commercial availability under the statute.<sup>37</sup> In this regard, GI

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<sup>36</sup> Such a voluntary, MVPD or industry-driven determination does not implicate Section 629(b) since it would not be pursuant to a regulation "prescribed" by the Commission.

<sup>37</sup> See Comments of GI at 21-23.

supports the comments of Gateway 2000, Inc.<sup>38</sup> So long as commercial availability is achieved, the Commission should be indifferent as to the particular method of retail distribution that is used.

**C. Effective Competition Among MVPDs Justifies Sunset of the Commercial Availability Rules.**

A few commenters suggest that inter-system competition among MVPDs is insufficient to achieve the objectives Congress intended under Section 629.<sup>39</sup> This view is incorrect. In fact, as GI demonstrated in its initial comments, such inter-system competition protects consumers against excessive equipment prices in the same manner as would multiple suppliers of equipment to be used on the same system.<sup>40</sup>

As the Commission properly pointed out in the Notice, "If a market developed in which numerous service suppliers compete based on programming, rates, and technology ... program service and equipment in combination could be a highly competitive market, justifying the Commission's forbearance to apply regulations."<sup>41</sup> Such "fully competitive" offerings of integrated service and equipment would

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<sup>38</sup> See Comments of Gateway 2000, Inc. at 1-8. See also Besen and Gale Reply Comments at 11 ("Apart from the dubious validity of the premise that a high degree of standardization is required in order for these retailers to stock and sell navigation devices, a more important point is that consumers may be better off if they acquire less-standardized products through outlets such as mail order catalogs, direct ordering through 800 numbers, or the Internet").

<sup>39</sup> See Comments of Circuit City at v, 12; Comments of Consumer Electronic Retailers Coalition at 37; Comments of Tandy at 17-18.

<sup>40</sup> See Comments of GI at 91-94.

<sup>41</sup> Notice at ¶ 53.

satisfy the plain language of Section 629(e), even "if the 'commercial availability' of equipment were thereby eliminated."<sup>42</sup>

This analysis recognizes the highly interdependent nature of MVPD equipment and MVPD service and that substantial consumer choice with respect to each interdependent part is created when integrated service/equipment suppliers compete vigorously in a given market. Besen and Gale further expound on the effects on service and equipment when integrated service/equipment suppliers compete in a given market:

Consumers will compare the combined prices of service and equipment charged by various MVPDs in determining the system to which they subscribe. An MVPD that raises the price of equipment also raises this combined price and loses patronage to competing MVPDs. Thus, this form of system-level competition constrains the ability of an MVPD to raise prices, and protects consumers against the exercise of market power in the supply of equipment by an MVPD, just as does the existence of multiple outlets for equipment that is supplied by that MVPD.<sup>43</sup>

Besen and Gale then conclude that the "Commission can 'sunset' the commercial availability requirement for any MVPD that faces effective competition from other MVPDs."<sup>44</sup>

Finally, contrary to the suggestions of certain commenters, nothing in the Act or in sound public policy requires sunset of the

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<sup>42</sup> Id. As GI noted in its initial comments, Section 629(e) does not require that the MVPD navigation devices at issue must be "fully available at retail" for the second prong of the test to be satisfied. Rather, it simply requires that the MVPD navigation devices market is "fully competitive." Comments of GI at 90-91.

<sup>43</sup> Besen and Gale Reply Comments at 10 (footnote omitted). See also Besen and Gale Comments at 32.

<sup>44</sup> Besen and Gale Reply Comments at 10-11. See also Comments of GI at 91-94; Besen and Gale Comments at 33.

rules to be considered on a nationwide, as opposed to an individual geographic market basis.<sup>45</sup> The sunset provision in Section 629(e) simply refers to the "market" for MVPD services and the "market" for MVPD equipment. Given the absence of a specific qualifier (national or otherwise) in the statute, the Commission has broad discretion to apply the sunset provision to smaller geographic markets, such as to cable franchise areas. Moreover, it makes good economic sense to apply the sunset provision in this manner, since not all MVPDs operate or compete on a national basis. For this reason, GI reiterates its proposal that the Commission sunset the commercial availability requirements with respect to an individual cable system that becomes subject to effective competition under 47 U.S.C. § 543(1)(1) and with respect to all cable systems nationwide if and when DBS attains a national penetration level of 10%.<sup>46</sup>

#### CONCLUSION

The Commission should reject the proposals of certain commenters to adopt intrusive government regulations mandating transmission or technical standards, licensing of proprietary technology, or national portability. Not only are such requirements beyond the scope of Section 629, they are unwise as a policy matter in that they will stifle investment and technological innovation. Such precipitous governmental action is particularly unwarranted given that market forces and industry efforts are already producing standards, open

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<sup>45</sup> See, e.g., Comments of Circuit City at 36.

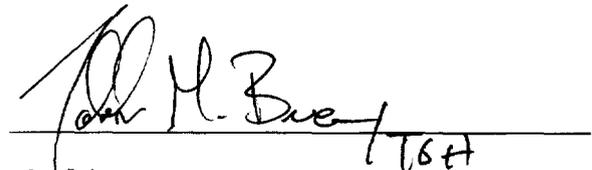
<sup>46</sup> See Comments of GI at 91-95.

licensing, and portability where it is economically efficient and pro-consumer to do so. Rather, the Commission should adopt a flexible regulatory approach, such as GI's PRIME model, which would employ carefully targeted performance rules and incentive mechanisms that build on and encourage these industry and marketplace efforts in a manner consistent with the provisions and purposes of Section 629.

Finally, the Commission should not apply the commercial availability rules to analog or hybrid devices, should sunset its rules with respect to MVPDs that face effective competition, and should not mandate any particular technological or distribution approach to ensure commercial availability of navigation devices.

Respectfully submitted,

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June 23, 1997

**A Further Economic Analysis of the Commercial Availability of  
"Navigation Devices" Used in  
Multichannel Video Programming Systems**

**Stanley M. Besen and John M. Gale**

**Charles River Associates, Inc.**

**June 23, 1997**

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