

exclude OVS MVPDs from the core competitive availability obligations that otherwise apply.

There is nothing in the pro-competitive policy reflected in the 1996 Telecomm. Act in general, or in Section 629 in particular, to suggest such an outcome. To the extent an OVS is considered a telecommunications system, telecommunications CPE has long been subject to competitive availability and unbundling requirements. To the extent OVS is analogized to cable or DBS, there is no particular reason to prevent competition.

In fact, application of competitive availability requirements in the OVS context is likely to be less potentially disruptive than in areas where there are already entrenched local networks using divergent technologies. The Commission has an opportunity to achieve competition near the outset of services, where "grandfathering" issues are least intrusive.<sup>2/</sup>

As in the case of DBS and cable, the Commission should make its decisions with respect to OVS systems by determining whether the basic prerequisites for competitive availability are present. If, in an OVS system, navigation devices are available from a manufacturer and a retailer not affiliated with the system operator, and such devices meet the tests of usefulness in other local systems, then no

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<sup>2/</sup>See discussion in Comments of the Electronic Industries Association Consumer Electronics Manufacturers Association, And Consumer Electronics Retailers Coalition, in CS Docket No. 96-46, pp. 10-15 (filed April 1, 1996).

further regulation should be necessary in this proceeding. If the system and devices do not meet these tests, then they should be subject to the same regulations as apply to comparable MVPD systems.

II. THE COMMISSION SHOULD REQUIRE, BY DATES CERTAIN, THAT MVPD SYSTEMS THAT DO NOT SUPPORT COMPETITIVE AVAILABILITY MUST BECOME COMPLIANT AS TO THE ESSENTIAL TECHNICAL ELEMENTS IF THEY ARE TO CONTINUE TO OFFER DEVICES TO CONSUMERS.

We demonstrated in Part I that there is no point in ordering MVPD systems to support competitive availability if they have no capability to do so. Moreover, such capability -- which includes national portability of the device -- can exist only if similar systems in other localities are compliant and compatible. Therefore, for the Commission's regulations to be effective in achieving the result Congress intended, they must address systems' capability to support competitive availability -- not just the system operator's policies and intentions. Accordingly, to achieve competitive availability the Commission must require compliance of local systems with key essential elements.

A. Compliant Systems Must Support A Security Interface That Furthers National Portability.

Unless the circuitry that contains and processes security secrets can be separated from the rest of a navigation device, there is no chance that such a device could be manufactured and retailed independently of the local MVPD system. System operators have the legal power to

prevent the independent distribution of such devices.<sup>12/</sup>  
And even if the operator decided, or were forced, to allow such distribution (which no cable operator does at present), the device would not likely be functional with respect to security, transmission (if digital), and feature compatibility on any other local system of similar nature. Hence there would be no incentive for independent manufacturers and retailers to invest in its production and marketing.

To be capable of supporting competitive availability, and therefore capable of compliance, an MVPD system must support a security interface of national utility. Accordingly, the Commission's regulations must by some means assure that by a date certain, MVPD systems that do not presently comply with Section 629 will support a national security interface. Fortunately, the private sector standards process has already produced standard designs of such security interfaces for both digital and analog application.

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<sup>12/</sup>Even if the "right to connect" were interpreted as compelling local MVPD operators to accept independent manufacture and distribution of such devices, the system operator could reasonably argue that such a regulation would jeopardize system security and therefore would be inconsistent with Section 629(b).

1. For digital systems, the private sector standards process has already produced a National Renewable Security Standard.

As we discuss above, concern about the compatibility and competitive obstacles posed by embedded security in navigation devices did not begin with Congress's passage of Section 304 of the 1996 Telecomm. Act. Rather, passage was the result of a longtime focus on this problem in several quarters, and the emergence of technical solutions in the private sector.

In the realm of digital systems, a Joint Engineering Committee ("JEC") of the Consumer Electronics Manufacturers Association ("CEMA") and the National Cable Television Association ("NCTA") has been working for several years toward achievement of a National Renewable Security Standard ("NRSS"). The idea behind such a standard is potentially to allow any consumer electronics device, computer, or other product to function also as a navigation device, by devising a standard interface for receiving the necessary security information and circuitry from the system operator. All that is necessary is for there to be a common way for such devices to read the security information from a standard card (or other chip carrier) that contains the security information and circuits, and is provided by the system operator as a part of the network.

By requiring that all operator-supplied navigation devices contain such an interface, the Commission would

solve obstacle (1) to competitive availability.<sup>11/</sup> The consumer would receive the necessary security circuitry directly from the system operator, on a card.<sup>12/</sup> The "navigation device" could be any computer CPU or accessory, or any TV, VCR, DVD player, DTV converter, etc., that provides tuner, decompression, menu and other "navigation" functions, whether implemented in hardware or software. Such a navigation device could be obtained from any manufacturer or vendor, including the MVPD system operator (so long as the anti-subsidy rules pertaining to system operators are complied with).<sup>13/</sup>

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<sup>11/</sup>See p. 9, above.

<sup>12/</sup>The circuitry supplied by the MVPD system operator should be limited to only the necessary security circuitry. Otherwise, the whole point and opportunity of facilitating the competitive integration of navigation device features into computer and consumer electronics products will be lost. The MVPD system operator will have an equal chance to include non-security circuitry in any navigation devices that it offers directly to consumers. But allowing the MVPD operator to include non-security circuitry on the "security" side of the interface would once again allow embedded security to be used to tie other functions and features with proprietary local system attributes, and prevent their long-term more efficient integration into standard computer and consumer electronics hardware and software applications. See Comments of Circuit City Stores, Inc., In re Telecommunications Services Inside Wiring, CS Docket No. 95-184, at 11-12 (filed Mar. 18, 1996).

<sup>13/</sup>Section 629(a), 47 U.S.C. § 549(a), provides in pertinent part:

Such [Section 629 implementing] regulations shall not prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video

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Recently the JEC balloted the NRSS as IS-679.<sup>14/</sup>

IS-679 provides for two possible implementations of a standard interface through which the security information and circuitry is supplied on a card that is readable by any device containing a standard "slot" to accept the card. Therefore, in the digital realm, the Commission can, in this proceeding, overcome the most basic and profound obstacle to competitive availability without itself having to set any standards, or even call for any standards proceedings. It need only devise an appropriate way to require that MVPD systems that do not presently support competitive availability become compliant with this private sector security interface by dates certain.

2. The Commission should require implementation and support of the NRSS by noncompliant systems by clear dates certain.

In its regulations, the Commission should require that MVPD systems that do not support national device portability must specify a version of the NRSS for use in all digital system devices deployed after January 1, 1999.<sup>15/</sup> By

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<sup>14/</sup>(...continued)

programming systems, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

<sup>14/</sup>This standard is in the process of comment resolution.

<sup>15/</sup>This requirement should apply equally to any devices supplied by the system operator. Otherwise, it is unlikely that system operators, in the design of their systems, will give adequate support to competitively supplied devices in  
(continued...)

January 1, 1998, the Commission should decide and publish in its rules whether such specification should include slots for both approved NRSS alternatives,<sup>13/</sup> some combination thereof<sup>17/</sup>, or only one. (To achieve national portability, it is essential that the "slot" in the consumer's device be compatible with the "card" used by a local system.)

System operators should be required to offer NRSS cards supporting competitively procured navigation devices no later than July 1, 1998. Operators failing to do so by this date should not be allowed to deploy any additional digital navigation devices to consumers until such NRSS cards are also available.

3. For analog systems, the private sector standards process has also produced a standard interface that separates security from non-security circuitry.

As we discuss above, congressional concern with competitive availability was first manifested in the 1992

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<sup>13/</sup>(...continued)

feature design, technical design and disclosure, or consumer information or marketing. Similarly, the system operator would be tied to devices of limited utility on other systems, further entrenching a localized rather than CPE model in the equipment market.

<sup>14/</sup>Option "A" employs an ISO 7816 card; option "B" employs a PCMCIA card. Each is a standard, off-the-shelf interface in widespread use.

<sup>17/</sup>For example, a single slot could read either a PCMCIA card supplied by the system operator or a PCMCIA adapter containing an NRSS version ("fat") ISO 7816 card supplied by the system operator. Or, the choice of which of the two slot options to use could be left to device manufacturers, provided that system operators are required to supply a card supporting the type of slot contained in the consumer's device.

Cable Act. In addition to requiring to Commission to address issues of compatibility with consumer electronics devices, Congress also required that Commission regulations "promote" the competitive availability of cable "converter boxes."<sup>11/</sup>

The CERC and its members have played very active roles in ET Docket 93-7, which has addressed the congressional mandates under the 1992 Cable Act. Indeed, in its April 4, 1994 First Report and Order, the Commission cited, *inter alia*, the submissions of CERC member Circuit City in adopting a prime directive with respect to competitive availability issues: for any interface addressing compatibility issues to be accepted by the Commission, it must provide for the separation and separate provision to consumers of security and non-security circuitry.<sup>12/</sup>

The private sector standards activity relating to the 1992 Cable Act and ET Docket 93-7 has resulted in the balloting and acceptance of IS-105.1, an analog "Decoder Interface" standard that provides for a separate "security" module. *Whether or not the entire Decoder Interface is finally accepted by the Commission as a mandatory standard*

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<sup>11/</sup>Section 17 of the 1992 Cable Act, codified as Section 624A(c) of the Communications Act, 47 U.S.C. § 544a(c); see also supra note 3.

<sup>12/</sup>In the Matter of Implementation of Section 17 of the Cable TV Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, ET Docket No. 93-7, 9 F.C.C. Rec. 1981, at ¶¶ 37, 42 (1994).

for purposes of compliance with section 624A of the Act is not relevant to the instant proceeding. What is relevant is:

- (1) the Cable Consumer Electronics Compatibility Advisory Group ("C3AG") has balloted the "IS-105.1" interface as a private sector standards activity;
- (2) that standard interface (in compliance with Commission rules) provides for a "descrambler" module containing separate security circuitry; and
- (3) by means of such a separate module for security circuitry, obstacle (1) to competitive availability of analog navigation devices can be overcome.

To comply with Section 629, the Commission needs to require the adoption and support of a security module interface in noncompliant analog MVPD systems by dates certain. It can, and must, do so irrespective of other considerations that may apply to determinations in Docket 93-7.<sup>20/</sup>

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<sup>20/</sup>Irrespective of any constraints imposed by Section 301(f) of the 1996 Telecomm. Act (the "Eshoo" amendment) in implementing ET Docket 93-7, the Commission has full authority to use any available tool in this proceeding for the purpose of complying with Section 304. Docket 93-7 must be considered in light of Section 301(f), which directs the Commission to adopt minimal standards when implementing the cable-consumer electronics "compatibility" requirements of Section 17 of the 1992 Cable Act (Section 624A of the Communications Act). The legislative history, however, makes clear that the Eshoo amendment does not preclude the Commission from developing or enforcing standards, but merely clarifies that the Commission's implementation of Section 624A should not include adoption of requirements beyond the scope intended by that section. H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 111 (1995). Moreover, the House Commerce Committee report on the 1996 Telecomm. Act states that the Eshoo amendment has no application in these proceedings:

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4. The Commission should require implementation and support of an analog security interface by noncompliant systems by clear dates certain.

The Commission should require that analog MVPD systems that do not presently support competitive availability must support a nationally portable analog security interface for use in analog system devices deployed after January 1, 1999.<sup>21/</sup> By January 1, 1998, the Commission should decide and publish in its rules whether such a system is to be based on IS-105.1 or some other interface that separates security from non-security circuitry.<sup>22/</sup>

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<sup>20/</sup> (...continued)

[Subsection 301(f)] is not intended to restrict the Commission's authority to promote the competitive availability of converter boxes, interactive communications devices, and other customer premises equipment as required by [Section 304] of this legislation.

Id. Similarly, with regard to Section 304 of the 1996 Telecomm. Act, the House Report states that: "[T]he Committee does not intend that section [301(f)] in any way limits or circumscribes Commission authority under section [304]." Id. at 113.

<sup>21/</sup>This requirement should apply equally to devices supplied by system operators. See supra note 12. However, some analog systems avoid on-premises security secrets entirely, through use of "multichannel descrambling" or "interdiction" systems that control security through network, rather than CPE, techniques. For such systems, navigation devices should function properly without the necessity of any security module being furnished.

<sup>22/</sup>See generally Response of Circuit City Stores, Inc. to Petitions for Clarification and Reconsideration, ET Docket No. 93-7 (filed July 3, 1996) (urging the Commission, pursuant to Section 629, to change its conclusion in Docket 93-7 that there is no need to preclude cable operators from bundling access control functions with non-security functions in multi-function devices that connect to the  
(continued...)

System operators should be required to offer descrambler modules supporting competitively procured navigation devices for analog systems no later than July 1, 1998. Operators failing to do so by this date should not be allowed to deploy any additional analog navigation devices to consumers until such modules are available.

B. A Compliant System Must Support National Transmission Compatibility With Respect To Its Mode Of Transmission.

Security is not the only potential obstacle to national portability. Navigation devices for digital systems also face the prospect of not working on a local system designed to a slightly different transmission standard.

Fortunately, the private sector standards world has made great strides in standardizing digital transmission since retailers first started drawing attention to this obstacle.<sup>22/</sup> Near the outset of discussions for compliance with the '92 Cable Act, EIA/CEG (now CEMA) and NCTA jointly supported the mandating of standards for digital cable transmissions. The Commission has also recognized the importance of this factor. In its April 4, 1994 Report and

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<sup>22/</sup> (...continued)

Decoder Interface; and further discussing how the draft IS-105.1 standard can provide the basis for fulfilling the mandates for competitive availability in Docket 93-7 and this proceeding).

<sup>21/</sup> See, e.g., July 1996 Comments and August 1996 Reply Comments of Circuit City Stores, Inc. filed in MM Docket No. 87-268 (Advanced Television Systems); ET Docket No. 93-7 filings, cited in supra note 22.

Order in Docket 93-7, the Commission explicitly declared its support of such standards.<sup>24/</sup>

The CERC recognizes that systems that differ in basic design and transmission concepts are not easily made compatible. However, thanks to progress in the private standards arena, it seems clear that the vast majority of DBS, local cable, wireless cable, and OVS systems are going to implement a transport layer that is based on or a variant of MPEG. Achieving compatibility within devices at the transport layer level is a software-based task that should be neither difficult nor expensive. The device manufacturer simply needs to know the details of the variants employed.

The cable industry similarly has move toward standardization on QAM modulation. The Commission needs to assure that modulation methods are sufficiently standardized that the expense for devices to deal with local variations is relatively trivial, and that information as to such variations is adequately disclosed.

1. Analog transmissions already are NTSC and broadcast compatible.

No action is necessary by the Commission to achieve analog transmission signal compatibility. Such systems may present feature compatibility challenges, which are discussed below.

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<sup>24/</sup>First Report and Order, ET Docket No. 93-7, supra note 19, at ¶ 143; accord, Memorandum Opinion and Order, ET Docket No. 93-7, 11 F.C.C. Rec. 4121, at 4122 n.9 (1996).

2. The private sector has made great progress on compatibility and standardization of digital transmission methods.

Before the advent of MPEG video compression and transport formats, the transmission standards process to which NCTA, CEMA and the Commission committed themselves seemed daunting. The number of alternative choices and paths was great. Today the path is much less complicated. Thanks to the use of MPEG variants in DBS, DVD and DTV, it is evident that in the near future most consumer electronics display and recording products and most computer products will be capable of decoding MPEG, in hardware, software, or some combination thereof. Those cable systems that have begun to implement digital transmission have also chosen MPEG2 variants. VSB modulation has been chosen for terrestrial digital broadcasts, while cable systems have coalesced around QAM.

3. The Commission should establish a date certain for achieving compatibility among like digital transmission methods.

The Commission has a manageable task to ensure that MPEG-variant local systems support devices used on similarly structured MPEG-variant systems and that, if necessary, implementation of QAM be further standardized. The Commission should require that MVPD systems that do not presently support competitive availability must, if MPEG-based, meet specified indicia of compatibility by July 1, 1998. Operators failing to do so should not be allowed to

deploy any additional digital navigational devices to consumers until they have done so.

The Commission should require any interested parties (such as the Society of Cable and Television Engineers) to submit a compatibility plan setting forth such indicia by January 1, 1998. After notice and public comment, the Commission can determine whether any additional time is necessary for systems to achieve compliance.

C. A Compliant System Must Support Compatibility With The Network Of Independently Manufactured And Procured Devices.

The third major obstacle to national portability is the differentiation among features of local systems. Some of these are based on proprietary techniques. Achieving national portability will require action by the Commission to afford device manufacturers sufficient notice and ability to design devices to work with such system features. Fortunately, there is constructive Commission precedent for accomplishing such a task.

1. The Commission has taken an essential first step in recognizing a right to connect.

In a single page, the Commission's Notice both establishes a "right to connect" and adds the qualification that it is subject to existing state and federal laws that criminalize use of devices that function without the system operator's security authorization. There could not be a clearer endorsement of the need to solve the security

conundrum through a standard interface separating security circuitry from the navigation device. Otherwise, the "right to connect" would be self-canceling.

The right to connect also clearly must carry with it an obligation on an MVPD system operator to furnish a system as to which the connection of externally procured devices is a feasible and productive exercise. This is not to say that system operators must somehow make their systems work with any and every device to which the proper physical connectors might be attached. Rather, it means -- as in the case of the right of connection to telephone CPE through an RJ-11 jack -- that:

- there is a standard physical and electrical interface through which system-compliant devices can be attached;<sup>25/</sup>
- the system's operation and specifications (other than security secrets) are adequately described, with appropriate notice, so that device manufacturers can fashion compliant devices;<sup>26/</sup> and
- any necessary intellectual property rights are available for license on a reasonable and nondiscriminatory basis.<sup>27/</sup>

As it did in deregulating telephone CPE, the Commission needs to address each of these areas, as necessary, to facilitate the use as MVPD navigation devices of consumer

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<sup>25/</sup>47 C.F.R. § 68.104 & subpart F.

<sup>26/</sup>Id. § 68.110; see also 47 U.S.C. § 273(c) (information requirements for manufacturing Bell operating companies).

<sup>27/</sup>See 47 C.F.R. § 68.504 (universal patent license agreement).

electronics products, computer CPUs and accessories, and other products newly designed for this purpose.

2. Key system specifications and changes thereto should be published on a timely basis.

As in the case of Part 68, the Commission should require that network specifications, and changes thereto, be published on a timely basis. Such publication should be sufficient to allow independent manufacturers to make system features accessible in their devices to the same extent that they are accessible through devices (if any) provided by the system operator or any particular licensee thereof.<sup>28/</sup>

3. Intellectual property necessary to the manufacture and use of system-compatible devices should be subject to licensing on reasonable and nondiscriminatory terms.

For standard products such as computer CPUs and accessories, DTV converters, etc., to be able to function as navigation devices, license to any IP necessary for their use with particular features of local MVPD systems must be available on a reasonable and nondiscriminatory basis. The issues of registration and nondiscriminatory disclosure were discussed in several filings, solicited by the Commission on

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<sup>28/</sup>The workings of Part 68 in this respect, and the requirements for a similar regime for MVPDs with respect to regulations pertaining to Section 629 are discussed in the Comments of CERC member Circuit City Stores, Inc., filed concurrently herewith in response to the Notice in the above-captioned proceeding.

the subject of MVPD CPE competitive availability, in the Inside Wiring proceeding.<sup>22/</sup>

As retailers, CERC members generally do not have a direct interest in the operation of a disclosure regime, so long as it works to support competition and innovation in the marketplace. We are heartened, however, by the support for such a regime expressed by major manufacturers and intellectual property proprietors in the Inside Wiring proceeding. In the instant proceeding, we note also the precedent provided by Part 68, and stress that such a regime is essential to the sort of deregulatory activity that would comply with the congressional mandate.

4. Cable modems can be competitively available products as soon as notice, registration and licensing requirements are implemented.

As the Commission notes, Section 629 applies to any service, whether or not audiovisual in nature, offered by an MVPD. Therefore, compliant MVPD systems that support cable modem services should be obliged to become capable of supporting national device portability for these services as well.

Access to the Internet itself is not controlled by the sort of security systems that apply to enhanced cable

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<sup>22/</sup>See generally Comments of Compaq Computer Corporation, Inc., The Information Technology Industry Council, and the Independent Communications Manufacturers Association, In re Telecommunications Services Inside Wiring, CS Docket No. 95-184 (filed Mar. 18, 1996).

services. Therefore, while encryption may be applied to some cable modem transmissions, there is no need in these products for the sort of access control circuitry that has been an obstacle to competitive availability of audiovisual converter boxes. Accordingly, the Commission has asked whether some special priority or early implementation date should apply to MVPD support of portable cable modem devices.

The Coalition and its members favor regulations requiring MVPD support of cable modem portability and feature compatibility at the earliest possible time. Given the lack of any security interface obstacle, there are fewer barriers to accomplishing this. The cable modem will be a good example of achieving national portability with respect to device features.

There should be no implication, however, based on the prospect of expeditious success with respect to cable modems, that achieving system portability for devices that do require a security interface should be any less a priority or should take longer to accomplish. Solving the security, transmission, and feature compatibility obstacles to national portability will involve separate tasks that already engage different interests in the private sector. There is no reason that these tasks cannot be performed simultaneously by those in the industries most interested in them.

III. ONCE THE KEY ELEMENTS OF NATIONAL PORTABILITY ARE REQUIRED OF SYSTEM OPERATORS, THE COMMISSION'S NECESSARY DIRECTION WITH RESPECT TO QUESTIONS OF SCOPE AND APPLICABILITY BECOMES CLEAR.

The Commission asks many "line-drawing" questions with respect to whether services and devices should be considered "covered" by the regulations to be written in this proceeding. Considered in the abstract, these might present questions for which only arbitrary and lengthy attempts at resolution are available. If, however, the analysis set forth above is accepted, the answers are easily derived, and any lines drawn are supported by a clear and purposeful rationale.

A. Only Those Services That Do Not Offer Competitive Availability Through National Portability Need Be Subject To Regulatory Requirements Under This Proceeding.

The Commission asks (Notice ¶¶ 14-15) which services should be "covered" by requirements in this proceeding, and which should not. We argue at pages 8-9 above that this determination should not be made according to any *faux* "subject to competition" or "sunset" analysis which has no basis in Section 629, and which would contravene the actual sunset provision therein. Rather, the question is answered by looking at the actual situation that the statute aims to reform: which systems presently are capable of supporting the use of nationally portable devices manufactured and sold by entities not affiliated with the system operator? Those systems that allow a consumer to obtain such a device that

can be used anywhere in the United States appear to comply with Section 629 and therefore are in no further need of regulation. Others are.

Similarly, the Commission asks (at Notice ¶¶ 16-19) which devices ought to be considered "navigation devices." Once MVPD systems are compliant with respect to support of a security interface and availability of system information and licenses, any device or computer application program that does not harm the network can be a "navigation device." That is the entire congressional objective of this proceeding.

B. Significant Questions Regarding Exclusive Manufacturing Or Retailing Agreements Do Not Arise Or Are Easily Answered In An Environment Of Local Systems That Support National Portability.

Similarly, answers to the Commission's questions with respect to "how much competition is enough" are readily derived from a focused approach:

- (1) To the extent that a system -- e.g., a DBS system that already supports manufacture by one independent manufacturer and one independent retailer -- supports competitive availability on a national basis, it should not be subject to further regulation under this proceeding at this time.
- (2) To the extent that a system does not support national portability, achieving competitive availability requires compatibility of devices with other local systems. Therefore, availability of necessary system information and licensing on a fair, reasonable and nondiscriminatory basis is a must.
- (3) Accordingly, while a local MVPD system operator is free to contract with a single manufacturer or retailer in general, the MVPD system must be subject to requirements for disclosure and licensing on a fair,

reasonable and nondiscriminatory basis with respect to information and intellectual property necessary for other devices to function equally well on its system.

(4) The Commission's determination that consumers have a right to attach means that, although the local operator may have an agreement only with one or a few manufacturers and operators, consumers must be able to attach devices obtained from other manufacturers and vendors so long as they do no harm to the network and are compliant with the security interface.

(5) For purposes of the above analysis, CERC sees no difference between vendors operating through retail stores or by direct mail, etc., so long as they are not affiliated with the system operator.

To summarize: systems that are already compliant in supporting the competitive availability of nationally portable navigation devices are subject to a consumer's right to connect, but need not have freedom of contract otherwise impaired. Systems that will be subject to additional compliance requirements also enjoy freedom of contract, but subject to: (a) a consumer's right to connect, and (b) disclosure and fair, reasonable and nondiscriminatory licensing requirements.

IV. THE ACT IS CLEAR WITH RESPECT TO WHEN SUBSIDIES BY SYSTEM OPERATORS MAY BE ALLOWED; THE LAW'S PROVISION SHOULD BE NEITHER EXPANDED NOR CONTRACTED BY THE COMMISSION.

The Commission inquires as to the scope and interpretation of the anti-subsidy provision in Section 629(a). The statutory provision could not be clearer. It is explicitly, and only, a condition on the right of MVPD system operators to themselves provide navigation devices to consumers.

A. The Anti-Subsidy Provision Of Section 629 Clearly Applies Only To System Operators, As A Condition Of Their Being Allowed To Persist In Offering Navigation Devices To Customers.

The anti-subsidy provision of Section 629(a), in its entirety, reads as follows:

Such regulations shall not prohibit any multichannel video programming distributor from also offering 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, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

Clearly this provision is a condition applying to the right of MVPD system operators to continue to provide navigation devices directly to consumers.

B. The Anti-Subsidy Provision of Section 629 Has No Application Whatever To Manufacturers Or Retailers Not Affiliated With System Operators.

The Commission asks whether Section 629(a) should be interpreted as having any application to subsidies offered by manufacturers, retailers, or others. Clearly, no. To reach any such conclusion, the Commission would have to legislate. This provision is clearly and explicitly stated as a limitation only on the right of an MVPD system operator to use system revenues to subsidize its own direct provision of navigation devices to consumers, so as to forestall competition from those incapable of offering any such subsidy.

There is good reason for this provision, and for it to be so limited. The Congress was rightfully concerned that system operators wishing to resist the introduction of competitive devices might forestall competition by subsidizing the price of their own devices. Section 629 was added to the law not just to establish preconditions for competitive availability, but also to make sure competition has every chance to erode the decades of entrenched device monopoly enjoyed by system operators. In affirming that it was preserving the right of system operators to offer devices, Congress was also careful to make sure that this right would not be used to forestall entry. This concern, and the provision embodying it, have nothing whatever to do with any promotions offered by other than (1) an MVPD system operator, in favor of (2) a device that it or an affiliate supplies directly to the consumer.

C. The Commission Should Apply The Law With Respect To All Noncompliant Systems, As Directed By The Congress, Until The Explicit Sunset Requirements Have Been Satisfied.

The Commission asks whether the Commission should make interim determinations excusing particular MVPD systems, or classes thereof, from compliance obligations based on *ad hoc* line-drawing with respect to the amount of competition the system faces in its locale. Such determinations would be contrary to the text and clear intention of Section 629.

As we discuss in Part I above, the Commission should in fact apply its regulations under Section 629 only to those

MVPD systems that do not now support the competitive availability of nationally portable navigation devices from manufacturers and vendors not affiliated with the system operator. As to such systems, the Commission would be drawing a line with respect to the scope of its regulations.

It would be something else, entirely, to excuse systems based not on their *capability and conduct*, but rather on some formulation as to the amount of competition they face. Such factors, which have nothing to do with compliance with the law, were fully weighed and addressed in Section 629(e), the sunset clause. It says there that the regulations adopted under Section 629 shall cease to apply "when the Commission determines that--

- (1) the market for the multichannel video programming distributors is fully competitive;
- (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and
- (3) elimination of the regulations would promote competition and the public interest."

The statute says "and," not "or." For the Commission effectively to change the "and" to an "or" would be directly contrary to the clearly stated legislation and intention of the Congress.

#### V. CONCLUSION

In the next decade, the 300 million analog TVs and VCRs now in consumer hands will need to receive broadcast signals that are transported by digital means. If these analog

receivers are to receive programming via broadcast, as well as cable, transmissions, they will need conversion devices.

If the Commission does not comply with Congress's mandate, and create real, national competitive availability for navigation devices, it will be consigning consumers to unnecessary expense, redundancy, inconvenience, and frustration. Why should a consumer need to obtain one box to watch broadcast DTV, and another to watch digital cable, when 95% of the circuitry in each box is in the other? Why should the only single box alternative, that converts both, be one from the local cable operator (because that operator's security circuitry is embedded in it)? Why can't the consumer use his or her \$2,000 computer, and a built-in or off-the-shelf software application to do the necessary processing?

A national security interface will make a solution possible. Commonality among transmission methods and disclosure and licensing of local system features will make it practical. Expeditious action by the Commission will make it meaningful.