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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

CS Docket No. 97-80

**OPPOSITION OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL
TO PETITIONS FOR RECONSIDERATION**

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SUMMARY

The Information Technology Industry Council ("ITI") supports the pro-competitive rules and policies the Commission adopted in the *Navigation Devices Order* which is the subject of the pending Petitions for Reconsideration. The Commission's actions are consistent with the letter and spirit of Section 629 of the Communications Act. The relief addressed in this Opposition and sought in the Petitions for Reconsideration filed by Time Warner Entertainment Company, L.P. ("Time Warner"), The Wireless Communications Association International, Inc. ("WCA"), the Telecommunications Industry Association ("TIA"), and the National Cable Television Association, Inc. ("NCTA") would undermine the purposes of Section 629 and delay or deny consumers the benefits of a competitive market for navigation devices. Therefore the Commission should deny those Petitions to the extent described herein.

Specifically, the Commission should deny the requests of one or more of the Petitioners to: (1) exempt analog devices from some or all of the requirements concerning unbundling of conditional access and other functions; (2) extend the dates by which analog devices must meet such requirements; (3) eliminate the prohibition against bundling conditional access and other functions in both digital and analog devices as of January 1, 2005; and (4) require navigation devices to incorporate copy protection capability and modify the rules for devices used for signal theft to include those used to defeat copy protection mechanisms.

The Commission has thoroughly explained its reasons for adopting the

challenged rules, and substantial record evidence, which is cited throughout the Order, supports its adoption of those rules. Petitioners have made no tenable arguments for the Commission to grant reconsideration of the issues addressed in this Opposition.

As the Commission has explained, Section 629 draws no distinction among the categories of equipment to which it applies; therefore, there is no statutory basis for a blanket exemption of analog devices. Furthermore, the Commission's unbundling requirements for both analog and digital devices are consistent with both Sections 629 and 624A of the Communications Act. The Commission has provided ample allowances and exemptions for devices for which unbundling would jeopardize an MVPD's system security; thus, its unbundling requirements -- for analog and digital devices alike -- are consistent with the security-based limitations that Section 629(b) places on the Commission's implementation of Section 629. Moreover, as the Commission painstakingly explained in the Order, Section 624A applies only to rules promulgated under that section, and the legislative history of Section 624A makes it abundantly clear that the section was not intended to limit or restrict the Commission's implementation of Section 629.

Petitioners' arguments that the unbundling requirements and their implementation schedule would burden MVPDs are unpersuasive in light of (1) the flexibility of the unbundling rules; (2) the generous time period which the Commission has established for compliance, and its commitment to assess in the year 2000 the appropriateness of the deadline for phase-out of all integrated

devices; (3) the rules' exception for circumstances where unbundling either would not be feasible or would compromise the security of MVPDs' signals; and (4) ample evidence in the record of voluntary industry efforts to address technical issues in this area.

NCTA has argued that the Commission improperly relied on the decoder interface standard as the solution for unbundling components of analog devices, and that this approach entails "legal complications" under Section 624A. These arguments are flawed. The Commission did not require analog devices to use the decoder interface standard. It expressly left the task of establishing necessary standards to industry groups, and it noted the development and industry acceptance of the decoder interface only as proof that industry can resolve any technical issues relating to the unbundling of analog devices. Furthermore, as the Commission explained, Section 624A was intended to limit its standard-setting authority, and, since the Order clearly leaves standards-setting to the industry, it has not acted inconsistently with Section 624A.

NCTA argues that the Commission improperly relied largely on evidence of progress in the digital environment when it applied to analog devices the same compliance schedule for digital devices. But NCTA ignores the Commission's discussion of the progress made in the analog world with the decoder interface. And NCTA's arguments that the compliance dates may be inappropriate for analog devices are based only on broad, conclusory claims. Finally, as noted above, the Commission has stated that it will monitor industry progress and market conditions to evaluate the appropriateness of retaining its compliance

deadlines.

Time Warner has argued that digital navigation devices must include copy protection capability and that the rules for devices used for signal theft should also apply to devices used to defeat or assist in defeating copy protection. These proposals should be rejected. While the Commission has the statutory authority to adopt rules prohibiting the theft of MVPDs' signals, it does not have the authority to adopt rules that restrict or prohibit the use of those signals (including copying) by subscribers who lawfully receive them.

In addition, as industry demonstrated in the context of digital video disk ("DVD") technology, voluntary industry efforts – with minimal or no governmental intervention -- are the most efficient means of developing appropriate responses to concerns such as Time Warner's.

Moreover, Time Warner's proposed regulatory modifications are so overly broad that, if adopted, they would have a chilling effect on innovation and competition. And the Commission has already adequately addressed legitimate signal piracy concerns that are within its authority in Sections 76.1201, 76.1203, and 76.1209 of the new rules.

For the foregoing reasons, the Petitions for Reconsideration identified above should be denied to the extent explained herein.

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**OPPOSITION OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL
TO PETITIONS FOR RECONSIDERATION**

The Information Technology Industry Council ("ITI") submits this Opposition to the Petitions for Reconsideration of the Report and Order in this docket¹ which were filed by Time Warner Entertainment Company, L.P. ("Time Warner"), The Wireless Communications Association International, Inc. ("WCA"), the Telecommunications Industry Association ("TIA"), and the National Cable Television Association, Inc. ("NCTA") (collectively, the "Petitioners").² For the reasons set forth below, the Commission should deny the foregoing Petitions to the extent indicated herein.

¹ *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, FCC 98-116, Report and Order (rel. June 24, 1998), 63 Fed. Reg. 38095 (July 15, 1998) ("Order").

² Petition for Reconsideration of Time Warner Entertainment Company, L.P. in CS Dkt. No. 97-80 (filed Aug. 14, 1998); Petition for Reconsideration of The Wireless Communications Association International, Inc. in CS Dkt. No. 97-80 (filed Aug. 14, 1998); Petition for Reconsideration of the Telecommunications Industry Association in CS Dkt. No. 97-80 (filed Aug. 14, 1998); Petition for Expedited Reconsideration of the National Cable Television Association, Inc. in CS Dkt. No. 97-80 (filed Aug. 14, 1998).

INTRODUCTION

ITI is the leading trade association of manufacturers and vendors of computers, consumer electronics, computing, and information products and services. The members of ITI operate in briskly competitive markets that have fostered the introduction of countless innovative products, furthered technological progress, and benefited consumers.

As ITI asserted in the Comments and Reply Comments it filed in this proceeding,³ history teaches that vigorous competition in the provision of services and products -- including navigation devices -- will bring numerous benefits to consumers. ITI therefore encourages the Commission to maximize efforts to promote competition in the provision of navigation devices, consistent with the letter and intent of Section 629 of the Communications Act of 1934,⁴ which this proceeding implements. The rules the Commission adopted in the Order should foster the commercial availability of navigation devices in furtherance of Congressional intent.⁵ In contrast, a grant of the Petitioners' requests for reconsideration of the issues addressed herein would thwart the pro-competitive purposes of Section 629; therefore, the Commission should deny the Petitions, at least with respect to those issues.

³ ITI filed Joint Comments and Reply Comments with the Computing Technology Industry Association.

⁴ 47 U.S.C. § 549.

⁵ See Joint Explanatory Statement of the Committee of Conference, Conference Report on S. 652, Telecommunications Act of 1996, H. Rept. 104-458, January 31, 1996 ("Joint Explanatory Statement"), at 186.

ARGUMENT

I. THE COMMISSION SHOULD NEITHER ELIMINATE NOR EXTEND THE DEADLINE FOR UNBUNDLING OF CONDITIONAL ACCESS AND OTHER COMPONENTS.

In the Order, the Commission adopted two principal rules governing the bundling of conditional access (*i.e.*, signal security) and other functions in navigation devices. By July 1, 2000, multi-channel video programming distributors ("MVPDs") that offer navigation devices combining conditional access and other functions must separately offer devices that perform only the conditional access functions "so that equipment may be commercially available from unaffiliated manufacturers, retailers, and other vendors."⁶ MVPDs will be allowed to offer devices that integrate security and non-security functions until January 1, 2005, provided that modular security components are also made available.⁷

As of January 1, 2005, MVPDs may not offer navigation devices that integrate security and non-security functions, although this prohibition is limited to the sale, lease, or use of new devices.⁸ The Commission noted that strong evidence in the record supports these requirements, and it concluded that the rules "will facilitate the development and commercial availability of navigation devices by permitting a larger measure of portability among them, increasing the

⁶ Order at ¶¶ 49, 69; 47 C.F.R. § 76.1204(a)(1), (e).

market base and facilitating volume production and hence lower costs."⁹

All of the Petitioners named above have asked the Commission to reconsider the unbundling requirements in various, but generally similar, ways.

Time Warner has asked the Commission to eliminate the requirement that MVPDs cease offering bundled navigation devices by January 1, 2005.¹⁰ If the Commission retains that requirement, Time Warner has argued that it should not apply to analog-only equipment. In addition, MVPDs should be allowed to offer "security modules that also contain circuitry [providing] new functionalities and features which are provided as part of the MVPD's service and which may not be supported by a commercially available terminal device."¹¹ And Time Warner has warned the Commission that "it may be impossible to achieve a [compliance] deadline" for analog equipment similar to that for digital equipment.¹²

NCTA has proposed exemptions to the unbundling rules for cable operators, including a blanket exemption for cable analog set-top boxes.¹³ In the alternative, NCTA has requested reconsideration of the compliance dates for analog equipment.¹⁴ Finally, NCTA has asserted that the Commission may not prohibit cable operators from providing integrated set-top boxes -- whether

⁹ Order at ¶ 49.

¹⁰ Time Warner Petition at 4-5.

¹¹ *Id.* at 5.

¹² *Id.* at 7, n. 9.

¹³ NCTA Petition at 16-17.

¹⁴ *Id.* at 17, n.37.

analog or digital.¹⁵

WCA has asked the Commission to clarify that integrated set-top boxes that have been sold but not deployed or sold and returned to inventory are not subject to the prohibition against furnishing integrated devices after January 1, 2005.¹⁶

TIA echoes the positions of other petitioners that the Commission should reconsider its unbundling requirements so as to exempt analog devices from those requirements¹⁷ and to eliminate altogether the prohibition against MVPDs' offering integrated devices as of January 1, 2005.¹⁸

A grant of the Petitioners' requests would undermine the purposes of Section 629, and would unnecessarily delay the day that consumers have competitive access to navigation devices. Contrary to the Petitioners' positions, the unbundling of security and non-security functions will not harm, but rather will advance, consumer welfare. As the Commission explained in the Order, its unbundling requirements will allow individual MVPDs to design equipment that meets their peculiar security needs "while still facilitating portability and the development of the consumer equipment market."¹⁹

Moreover, as the Commission has noted, the unbundling requirements not only advance the purposes of Section 629, but they are consistent with the

¹⁵ *Id.* at 17-22.

¹⁶ WCA Petition at 4-5.

¹⁷ TIA Petition at 2-5.

¹⁸ *Id.* at 5-7.

¹⁹ Order at ¶ 61.

legislative histories of both Sections 629 and 624A.²⁰ Petitioners' arguments that the unbundling requirements and their implementation schedule would burden MVPDs are unpersuasive in light of (1) the flexibility of the unbundling rules;²¹ (2) the generous time period which the Commission has established for compliance, and its commitment to assess in the year 2000 the appropriateness of the deadline for phase-out of all integrated devices;²² (3) the rules' exception for circumstances where unbundling either would not be feasible or would compromise the security of MVPDs' signals;²³ and (4) ample evidence in the record of voluntary industry efforts to address technical issues in this area.²⁴ These considerations and substantial record evidence²⁵ also nullify claims by some of the Petitioners that technological differences between analog and digital devices warrant a blanket exemption of analog equipment from the unbundling requirements.²⁶

In short, the Commission has thoroughly articulated sound reasons, well supported by the record, for adopting the unbundling requirements, and none of the Petitioners has made any showing that the Commission's reasoning or factual underpinnings are flawed.

²⁰ *Id.* at ¶¶ 49, 51, 53-54, 71-72. The primary purpose of Section 624A, 47 U.S.C. § 544A, was to promote compatibility among cable systems, televisions, and video cassette recorders.

²¹ Order at ¶¶ 70, 72.

²² *Id.* at ¶¶ 69, 76, 80, 81.

²³ *Id.* at ¶ 73; 47 C.F.R. § 76.1204(d)(1), (2).

²⁴ See, e.g., Order at ¶¶ 51-54, 69, 71-81.

²⁵ See *id.* at ¶¶ 51-54, 71-81.

²⁶ See, e.g., TIA Petition at 2-4; NCTA Petition at 9, 11-12.

II. THE COMMISSION SHOULD NOT GRANT ANALOG DEVICES A BLANKET EXEMPTION FROM THE UNBUNDLING REQUIREMENTS.

TIA, Time Warner, and NCTA have asked the Commission to reconsider the Order's unbundling requirements insofar as they apply to analog navigation devices, and to declare that some or all of those requirements do not apply to such devices.²⁷

To establish and maintain a level playing field among competing technologies, and to fulfill the mandate in Section 629, it is important for the Commission to draw no distinction between analog and digital technology, and to adopt rules that are technology-neutral. As the Commission has properly observed, Section 629 is expansive in scope and "neither exempts nor limits any category of equipment"²⁸

The Commission has addressed claimed technical distinctions between analog and digital systems by crafting rules that are sufficiently flexible to avoid disproportionately burdening either type of system.²⁹ As explained in Section I above, the Commission has thoroughly considered and recited record evidence refuting claims that unbundling is technologically infeasible for analog devices.³⁰

NCTA claims that application of the unbundling requirements to analog

²⁷ TIA Petition at 2-5; Time Warner Petition at 5-9; NCTA Petition at 4-17. Time Warner sought to exempt analog devices only from the prohibition against offering integrated devices as of January 1, 2005. It did not seek a corresponding analog exemption from the requirement that MVPDs offer separated security modules as of July 1, 2000, though it suggested that meeting that deadline might be difficult with respect to analog devices. Time Warner Petition at 7 & nn. 8, 9.

²⁸ Order at ¶ 25.

²⁹ See *id.* at ¶¶ 70, 72.

³⁰ *Id.* at ¶¶ 52, 71, 73.

devices is inconsistent with Section 629(b),³¹ which states that the Commission "shall not prescribe regulations . . . which would jeopardize security . . . or impede the legal rights of [an MVPD] to prevent theft of service."³² The Commission has, however, addressed this concern in a manner consistent with Section 629(b), by allowing MVPDs to offer devices that bundle security and non-security functions where "(1) [i]t is not reasonably feasible to prevent [unbundled] devices from being used for the unauthorized reception of service; or (2) [i]t is not reasonably feasible to separate conditional access from other functions without jeopardizing security."³³ These exceptions adequately address the concerns to which Section 629(b) was directed, and eliminate any arguments that application of the unbundling requirements to analog (or for that matter, digital) devices would be inconsistent with that section or would jeopardize the security of analog or digital systems.

NCTA has also argued that the Commission improperly relied on the decoder interface as the standard for unbundling components of analog devices, and that use of the decoder interface could involve "potential legal

³¹ NCTA Petition at 4-9. NCTA also claims that Section 629(b) does not allow the Commission to prohibit cable operators from offering integrated set-top boxes -- whether digital or analog -- as of January 1, 2005. *Id.* at 18-20. This argument is incorrect for the same reasons (stated above) that NCTA's argument that Section 629(b) does not allow the Commission to apply its unbundling requirements to analog boxes.

³² 47 U.S.C. § 549(b).

³³ 47 C.F.R. § 76.1204(d)(1), (2). Concededly, the Commission carved out an exception from its "infeasibility" exemption for equipment whose security and non-security functions could be separated using the decoder interface standard; however, if use of that standard (or a modified version of it) could adequately protect MVPDs' system security, Petitioners would have no legitimate basis for opposing the unbundling requirements. Moreover, the existence of the decoder interface and its acceptance by industry standards bodies demonstrate that industry is capable of developing other technological approaches to unbundling analog devices, if there is sufficient MVPD demand for alternative approaches.

complications."³⁴ These arguments are meritless.

First, the Commission did not *prescribe* any standard, including the decoder interface, for use to separate conditional access from other functions. On the contrary, it expressly left to industry groups the task of establishing necessary standards.³⁵ The Commission cited the decoder interface only as evidence that industry is capable of resolving any technical issues relating to the separation of security and non-security components of analog devices.³⁶

Second, as the Commission noted in the Order, the statutory provision to which NCTA is referring³⁷ -- Section 624A of the Communications Act -- applies only to rules promulgated pursuant to that section³⁸ and was "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 629]."³⁹ Finally, as the Commission has stated, Section 624A was intended to limit the Commission's authority to set standards, and, since the Commission expressly refrained from prescribing any

³⁴ NCTA Petition at 5 & n.11 (citing Order at ¶¶ 71-73). The legal issues to which NCTA refers arise under Section 624A of the Communications Act, 47 U.S.C. § 544(a)(2)(D), which requires that any standards or regulations the Commission develops do not affect features or functions of certain consumer electronics equipment, including navigation devices.

³⁵ Order at ¶¶ 70, 72.

³⁶ *Id.* at ¶¶ 52, 71, 73.

³⁷ See NCTA Petition at 10-11 & nn.24, 25.

³⁸ Order at ¶ 72.

³⁹ *Id.* at ¶ 54 (quoting House Report on 1996 amendments to Section 624A, H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 111 (1995)).

standards in the Order, it has not acted inconsistently with Section 624A.⁴⁰

NCTA has also argued that the FCC's heavy reliance on evidence regarding the timetable for developing compliant **digital** devices does not support extending the unbundling requirements and timetable to analog devices.⁴¹ While the Commission did rely heavily on evidence of past and anticipated progress in the digital environment, it also cited the industry's success with the decoder interface as an indication that it is technically feasible to develop solutions that will make analog compliance possible.⁴² NCTA has proffered only broad, conclusory claims to support its suggestion that it will be difficult, if not impossible, to meet the unbundling compliance schedule for analog devices. Moreover, as noted above, the Commission has stated that it will monitor industry progress and market conditions to evaluate the appropriateness of retaining its compliance deadlines.⁴³

III. THE COMMISSION SHOULD NOT MANDATE THAT DIGITAL NAVIGATION DEVICES INCORPORATE A COPY PROTECTION CAPABILITY.

Time Warner has argued that "copy protection must be incorporated into any standard developed for commercially available digital terminal devices and that the Commission must take an active role to ensure that the integrity of

⁴⁰ Order at ¶ 53.

⁴¹ NCTA Petition at 4 & n.3, 6 & n.13.

⁴² Order at ¶ 52.

⁴³ See *supra*, note 22 & accompanying text.

copyright protection is maintained."⁴⁴ Time Warner has asked the Commission to clarify that, for purposes of Sections 76.1201 and 76.1209 of the rules adopted in the Order,⁴⁵ the term "theft of service" "includes any device which can be used to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders."⁴⁶ In addition, it has proposed that the Commission revoke its certification of "any navigation device which has been found to have been *used* or designed to assist in the unauthorized reception of cable services, or which *can be used* to defeat or assist in defeating copy protection technology."⁴⁷

For several reasons, the Commission should deny Time Warner's proposals. First, Section 629 confers no statutory authority for the Commission to coerce industry to adopt any particular standards to implement Section 629, particularly not a rigid standard such as that Time Warner has proposed, directed at the copyright interests of content providers, as opposed to the piracy of MVPDs' signals. While the Commission has the authority to adopt rules prohibiting the theft of MVPDs' signals, it does not have the authority to adopt rules that restrict or prohibit the use of those signals (including copying) by subscribers who lawfully receive them. Adoption of a rule aimed at copyright protection for content providers (rather than signal theft) would therefore exceed the Commission's authority under Section 629.

⁴⁴ Time Warner Petition at 15.

⁴⁵ 47 C.F.R. §§ 76.1201, 76.1209.

⁴⁶ Time Warner Petition at 14.

⁴⁷ *Id.* at 15 (emphasis added).

Second, as industry has proved in the context of digital video disk ("DVD") technology, when a technical response is appropriate to address industry concerns (such as those of Time Warner), voluntary industry efforts – with minimal or no governmental intervention -- are the most efficient means of developing such a response. The Commission has properly recognized that private industry should take the lead in standards-setting,⁴⁸ and ITI strongly supports that view. In fast-moving industries such as the telecommunications and information services industries, government-mandated standards stifle innovation and perpetuate obsolete technologies beyond their normal market life.⁴⁹ Furthermore, government-mandated standards are often not the product of the technological and economic considerations that would otherwise drive sound business decisions in a free market. Thus, the private sector (and market forces) are better suited than the government at establishing standards that meet consumer needs.

Third, the regulatory modifications Time Warner has proposed are so overly broad that, if adopted, they would have a chilling effect on innovation and competition. Manufacturers and distributors of navigation devices can not foresee and prevent all unlawful uses that a purchaser of their equipment might achieve, particularly if a purchaser alters the equipment. For that reason, a ban on equipment that has been, or can be, used for signal theft or for defeating, or

⁴⁸ Order at ¶¶ 70, 72, 74.

⁴⁹ Bruce M. Owen & Steven S. Wildman, *Video Economics*, (Harvard University Press: 1992) at 261; Stanley M. Besen & Leland L. Johnson, *Compatibility Standards, Competition and Innovation in the Broadcasting Industry*, (Santa Monica, CA: The Rand Corporation, 1986) at 131; Dr. Jeffrey Krauss, "Implications of FCC Regulation of Telecommunications Technical Standards," *IEEE Communications Magazine* (Sept. 1982) at 28, 31.

assisting in defeating, copy protection would be unduly broad.

Finally, the Commission has already anticipated and more than adequately addressed legitimate signal piracy concerns that are within its authority. At the same time, the Commission has balanced the concerns of MVPDs with those of consumers.

Section 76.1201 of the new rules permits MVPDs to prevent the connection to their systems of navigation devices that “may be used to assist or are intended or designed to assist in the unauthorized reception of service.”⁵⁰ Section 76.1203 allows MVPDs to restrict the attachment to their systems of “devices that assist or are intended or designed to assist in the unauthorized receipt of service.”⁵¹ While MVPDs can implement such restrictions by providing subscribers with descriptions of prohibited devices, the standards “shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of . . . theft of service.” Moreover, “where theft of service . . . occurs or is likely to occur, service may be discontinued.”⁵² Finally, Section 76.1209 of the rules provides that “[n]othing in this subpart shall be construed to authorize or justify any use, manufacture, or importation of equipment that would violate . . . any . . . provision of law intended to preclude the unauthorized reception of multichannel video programming service.”⁵³

In sum, the Commission should reject any suggestion that its rules be

⁵⁰ 47 C.F.R. § 76.1201.

⁵¹ *Id.*, § 76.1203.

⁵² *Id.*

⁵³ *Id.*, § 76.1209.

expanded to require incorporation of copy protection capability in digital navigation devices, and it should leave the resolution of such matters to the affected industries.

CONCLUSION

In the Order, the Commission has implemented Section 629 in a reasonable manner that balances the interests of consumers with those of the affected industries. The Petitioners' arguments for undoing the Commission's carefully tailored rules would serve only the interests of the Petitioners, not of consumers, and would undermine the purposes of Section 629. For these reasons, the Commission should deny the Petitions to the extent described above.

Respectfully submitted,

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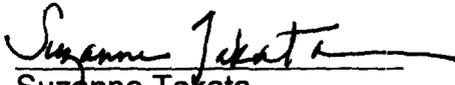
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September 23, 1998

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Certificate of Service

I, Suzanne Takata, hereby certify that true and correct copies of the preceding Opposition of the Information Technology Industry Council to Petitions for Reconsideration in CS Docket Number 97-80 were served upon the following list of parties, this 23rd day of September, 1998, via first class mail.


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