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

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

CS Docket No. 97-80

CIRCUIT CITY STORES, INC.
OPPOSITION TO PETITIONS FOR RECONSIDERATION

September 23, 1998

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Attachment A

Summary

As an active participant in every debate and proceeding that led to the Report and Order, Circuit City submits its general opposition to the petitions seeking reconsideration of the Navigation Device rules.

In its Order, the Commission did no more than is necessary to comply with Congress' intent as expressed in § 629. Cable MVPDs control the current set-top box market. This monopoly is based on the historic lack of a creative solution for maintaining control over the circuitry that protects against unauthorized reception of services. However, the record in this proceeding demonstrates that the technology is at hand to provide and support an interface that allows the signal provider to maintain a device monopoly over *only* the circuits on the "security" side of the interface and permits the competitive availability of navigation devices. Section 629 states that "The Commission shall ... adopt regulations to *assure* the commercial availability, to consumers of multichannel video programming" of navigation devices. Congress was well aware that, in instructing the FCC to assure this result in its regulations, the task was to relieve a longstanding monopoly on consumer choice that was no longer justified by technical requirements. Consequently, the FCC's decisions in the Navigation Device proceeding fall squarely within the constructs of § 629 and are further supported by the agency's broad authority.

Indeed, no party moving for reconsideration challenges the Commission's basic determination: to achieve competition in the navigation device market, it is necessary to establish a standard interface between circuitry directly related to a conditional access function that should be supplied only by an MVPD, and all other features and functions, for which competition is long overdue from the world's consumer electronics and computer manufacturers. Instead, the petitions focus on the steps the Commission took to assure that consumers experience the real benefits of competition.

The Commission required that after January 1, 2005, navigation devices supplied by cable MVPDs would, like those supplied by competitors, have to rely on the private sector "POD" interface for security. In challenging this decision, NCTA and TIA cite to § 629's reservation that MVPDs *may*, subject to subsidization provisos, continue to provide navigation

devices to customers for the proposition that MVPDs *must* be allowed to provide navigation devices in any form, format or configuration they choose. It is argued that the presence of an exception must mean that the exception was intended to defeat the rule. Neither the statute nor the legislative history supports this position. In addition, as CEMA argues, it is bad enough that the FCC has given cable MSOs over six years to entrench reliance on non-POD devices and undermine reliance on PODs. The only hope that competition in the navigation device market will take hold is the knowledge that *after January 1, 2005*, MSOs and their suppliers *will themselves have to rely on PODs in the new devices that they put into service.*

In furtherance of its argument that the FCC must not phase out integrated devices, NCTA reads § 629(d)(1) as *obliging* the agency to follow prior determinations, including those made in the Equipment Compatibility proceeding, even if they occurred on the same issue *before* Congress instructed the FCC to assure competitive availability of navigation devices. Construed so broadly, this would be a mandate to do nothing – the opposite of Congress’ instruction that the Commission “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.” Instead, § 629(d)(1) allows the FCC not to re-open entire *proceedings* in tangentially related areas, where an argument might be made that a device could be construed as a “navigation device.” Finally, reliance on the Equipment Compatibility proceeding specifically is misplaced because the FCC stated it was only dealing with set-back technology. In no sense can this be styled a “prior determination.”

NCTA and Time Warner also challenge the phaseout rules on the basis of security. For example, NCTA resorts to the argument, disproved by the very existence of the OpenCable project, that hardwired security is necessary to protect system security. If this were so, NCTA would never have endorsed the OpenCable project and would have asked for reconsideration of the requirement that MVPDs furnish PODs for use in *any* navigation device. Time Warner argues that MVPDs should be able to re-build navigation devices with embedded security by adding non-security functions to security modules. This too must be rejected because every non-security feature and function added in component security modules would be unique and noncompetitive and would create redundancy, confusion and incompatibility with respect to

competitive products that include such features.

Circuit City recognizes that proper operation of a security module may require that some additional *security-related* circuitry be included in the POD. Again, however, there is no need to obliterate the rule with the exception. The Commission can adhere to its principled determination, yet provide for and accept the need for inclusion of ancillary functions in PODs, when the additional circuitry is (1) closely related to the security function of the module; (2) enhances, rather than assumes, a function of the host device; and (3) is not efficiently available in the host.

In all other instances, the record supports the FCC's finding that the only way to give consumers a real choice as to equipment suppliers is to ensure that MVPDs are not allowed to offer access equipment that contains proprietary security functionality controlled by the MVPD. Cable MVPDs can compete for customers under either model – hardwired security or the POD interface. Competitive consumer electronics, computer and telecommunications manufacturers, however, cannot compete at all under the hardwired model. Their only chance to enter is through reliance on the POD, which can be sourced ONLY from the monopolists with whom they are trying to compete.

Circuit City agrees with CEMA that waiting until 2005 to phase out integrated devices could allow MVPDs to “lock up” the market for navigation devices in the interim because MVPDs will continue to be the sole providers of integrated devices during this window. The record clearly supports a phaseout by an earlier date and it is wholly within the FCC's discretion to assure competition by shortening the deadline. If the FCC adheres to the 2005 phaseout date, it will have to be aggressive in assuring that PODs are available from suppliers on the earliest possible schedule, at the lowest possible cost, and configured to cause the fewest operating problems.

NCTA, Time Warner and TIA aim their other main challenge at the application of the FCC's rules to analog devices. Circuit City believes that the FCC went further than is necessary to promote competition in *new* technology, and so supports the limited analog exception proposed in our June 4, 1998 *ex parte* filing and now advocated by NCTA. To the extent that an

MSO carries some content protected by conditional access in a digital tier, and other content protected by conditional access in an analog tier, the only efficient solution is – *for those instances where analog scrambling is used as to content not available in digital form* – to add analog conditional access and descrambling capability, as appropriate, to PODs used on such systems.

Time Warner suggests that the FCC require the incorporation of an analog decoder interface into all analog television tuners included in VCRs, converters and televisions larger than 18 inches that are sold after July 1, 2000. However, building the Decoder Interface into new TVs and VCRs would do nothing to address the imposition of analog scrambling with respect to any of the 200 million analog TVs and VCRs now owned by consumers. Nor does Circuit City believe that the Decoder Interface, developed for another purpose, is the most efficient solution. Once the OpenCable process refines an analog interface standard and MVPDs are prepared to make the analog security components available in 2000, equipment manufactures will have an incentive to make analog equipment that will use the separate security models. Any further government mandate would constitute over-regulation and is not supported by the record.

In addition to the arguments presented on the need to eliminate the offering of integrated devices and the creation of limited exceptions for analog systems meeting certain criteria, Circuit City:

- Supports the FCC's decision not to apply the security separation rules to DBS because DBS operators are new entrants that do not have monopoly control over their market, DBS equipment is readily available from retail stores and is portable throughout the continental United States.
- Agrees with Time Warner that the FCC should require that OVS MVPDs that have technologically configured their systems as cable systems comply with the Navigation Device rules. Section 629 is written as a broad mandate applicable to all MVPDs. OVS operators are MVPDs that compete with other MVPDs subject to § 629. It is unfair that the FCC has excluded a single type of MVPD from the Navigation Device rules while all other MVPDs are required to comply.

- Supports the use of the OpenCable process to set standards. This will ensure that a particular industry will be held accountable for the success or failure of the effort. The same level of accountability would not be possible if the FCC were to adopt CEMA's recommendation that the C³AG – which must operate as a due process, multi-industry organization – be given responsibility. Then *everyone* – which is to say *no-one* – would be accountable. Nonetheless, the members of the consumer electronics industry, the IT industry, WCA and, of course, vitally interested retailers should be meaningfully consulted, and have their views taken into account in the standards process.
- Supports WCA's proposal that the definition of a navigation device does not include wireless cable antennas and downconverters because these are part of the provider's network. However, Circuit City believes it would be premature for the Commission to establish a formal demarcation point that would govern the categorization of devices in the future.
- Rejects Time Warner's request that the FCC regulate the use of the words "cable ready" on devices that are not OpenCable-compliant or adopt prohibitions against manufacturer and retailer actions that would block the reception of MVPD services. The market itself will perform this function *vis-a-vis* new entrant products and services, so government regulation is not needed. Again, the focus in this proceeding must be on opening a monopoly to competition; there is no basis in the record for so shackling the potential entrants.

Circuit City supports partial reconsideration by the Commission of its Navigation Device *R&O* insofar as it allows MVPDs to offer integrated devices after July 1, 2000, excludes OVS operators from the obligations required under § 629 and applies to analog-only systems meeting certain criteria. The remainder of the *R&O* should be reaffirmed with the clarifications set forth herein.

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CIRCUIT CITY STORES, INC.
OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to § 1.429¹ of the rules of the Federal Communications Commission ("FCC" or "Commission"), Circuit City Stores, Inc. ("Circuit City") respectfully submits its opposition in response to the several petitions for reconsideration of the FCC's Report and Order adopted in the above-captioned proceeding regarding the commercial availability of navigation devices.²

Circuit City has been an active participant in every debate and proceeding that led to the Commission's *R&O* in this matter, including all phases of the legislative process that resulted in the passage of § 304 of the Telecommunications Act of 1996 (the "1996 Act").³ From the beginning, we have emphasized that only through private sector standards activity could the barriers to real competition and consumer choice in the market for navigation devices be brought down, once and for all. Section 304 explicitly recognized, in its text and in the Conference Report, that implementation of such standards under FCC oversight was the main

¹ 47 C.F.R. § 1.429.

² *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report and Order* (Released June 24, 1998) ("*R&O*").

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) and integrated into the Communications Act of 1934 as § 629.

objective of Congress and should be the main task of the Commission.⁴

In its *R&O*, the Commission did no more than is necessary to comply with Congress' intent. Indeed, no party moving for reconsideration challenges the Commission's basic determination: to achieve competition in cable – the MVPD market heretofore entirely closed to competition – it is necessary to establish a standard interface between circuitry directly related to a conditional access function, and hence appropriately supplied only by the MVPD, and all other features and functions, for which competition is long overdue from the world's consumer electronics and computer manufacturers.

What NCTA, Time Warner and TIA challenge instead are the steps taken by the Commission to assure that the marketplace actually receives the benefits that Congress intended. This result is by no means assured: It is one thing for the Commission to oversee the establishment of an available standard that would enable competition on a national basis. It may be quite another to assure that those who profit from the existing, anachronistic monopoly on all features and functions of navigation devices actually support the standard that enables competition. Indeed, in an *ex parte* filing, Circuit City argued for the record that the FCC can be assured that the enabling standard will withstand such resistance *only* if cable MSOs themselves will have to rely on the standard interface *in their own products*.⁵

The Circuit City observation for the record proved prophetic. The September 7, 1998 issue of *Multichannel News* featured a front-page article headlined "Operators Worry About PODs." The article, appearing in an authoritative organ of the Cable TV industry, reported:

⁴ Section 629(a); S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. at 181 (1996).

⁵ In its *ex parte* filing of June 2, 1998, Circuit City observed: "The most effective way for the Commission to assure the commercial availability of navigation devices is by embracing private sector standard-setting to enable the result specifically sought by the Congress. The essential specification is that for a standard security interface that enables national portability. For such an interface to be adequately supported in fact, as well as in theory, navigation devices supplied to subscribers by the MVPD must also embrace the separation of navigation and security functionality that is necessary to support competition from others. Subscriber access to an MVPD's services through such devices must be activated through the same security mechanism. Without these requirements, there will never exist the level of unified interest, commitment and demand necessary to ensure the production and support of commercially available and nationally portable navigation devices."

Now, MSOs are concerned that General Instrument Corp. and Scientific-Atlanta Inc. – the two companies that essentially own the signal-security and set-top segments for cable – will not stay on track with the removable security module, which is called a POD (point of deployment). *** [S]enior MSO executives wondered privately last week whether the vendors will drag their feet because of concerns about lost revenue.

The report went on to quote a senior MSO executive: “Both companies have privately indicated that they have no real interest in building the PODs... This needs to get out. We’re tired of being held hostage to these guys.”⁶

Nor is it clear that every MSO is willing to invite competition for its own device distribution business. With the apparent reluctance of monopolistic suppliers to support the essential interface by supplying PODs as quickly and inexpensively as is possible, and the likely reluctance of some MSOs to support POD-enabled competition for their own devices, it becomes clearer and clearer that the Commission was correct in its conclusion: only through a phaseout of the non-POD configuration, with which other suppliers cannot compete, will the supply monopoly be eased and competition evolve.

Indeed, Circuit City agrees with CEMA that the Commission allowed too much time for the phaseout, and has allowed an undue advantage for the establishment of the non-POD device model in the market, just when the competitive, POD-reliant model ought to be emerging as the *de facto*, as well as *de jure* standard.⁷ Unlike CEMA, however, Circuit City does not question the Commission’s authority to make this determination. This authority – both to require the phaseout as effective relief and to determine the appropriate time table – is made clear from our review, below, of applicable law and precedent. Circuit City does believe, however, that the record clearly supports a phaseout by an earlier date and that the reasons advanced by CEMA in support of the need for the earlier date are sound.

NCTA, Time Warner and TIA aim the other main challenge to the Commission’s *R&O* at its application to analog devices. Circuit City believes that the *R&O* did go further than is

⁶ Leslie Ellis, *Operators Worry About PODs*, Multichannel News, Sept. 7, 1998, at 1. See Attachment A.

⁷ CEMA Petition at 5.

necessary to promote competition in *new* technology, and so supports the approach now advocated by NCTA (which is based on the Circuit City *ex parte* filing of June 4, 1998). Again, however, the basic issue is not the Commission's power, which one and all ought finally to acknowledge, but rather the *effectiveness* of the Commission's action. To the extent that an MSO carries some content protected by conditional access in a digital tier, and other content protected by conditional access in an analog tier, a customer wishing to receive both sets of content could not do so with a competitively procured navigation device plus a POD from the MSO, unless the POD performed the analog conditional access and descrambling as well. The MSO monopoly would be preserved: ONLY a navigation device procured from an MSO, and not one procured otherwise, would serve the customer's needs. It is this situation – where analog scrambling defeats the utility of the digital POD interface – that, in Circuit City's view, must be addressed.

NCTA argues that the Decoder Interface is not the solution to this problem.⁸ We agree. The only efficient solution is – *for those instances where analog scrambling is used as to content not available in digital form* – to add analog conditional access and descrambling capability, as appropriate, to PODs used on such systems. NCTA has advised the FCC that this solution has been identified as a task of the OpenCable project.

The issue of effectiveness of the Commission's orders, and the measures necessary to *assure* such effectiveness, as Congress required, frame the discussion of the support, in case law and precedent, of the Commission's action. In Circuit City's view and analysis, the case is overwhelming that the Commission has and retains the necessary authority, and that Congress explicitly intended the Commission to use such authority, to assure competition. Arguments advanced to the contrary essentially fall back on the ultimate bootstrap: because Congress acknowledged that exceptions are *possible*, they must in fact be *required* to alleviate any

⁸ Time Warner suggests, to the contrary, that the solution is to require inclusion of the Decoder Interface in all new TVs and VCRs. Even if this were feasible and efficient (which we dispute), it would not address the imposition of analog scrambling as to the 200 million TVs and VCRs in use by consumers today, as to which such a solution would be irrelevant. The average useful lifetime of a TV receiver sold yesterday is 15 years.

challenged measure. If this were so, the Commission would have discretion to do everything yet nothing.

I. The FCC's Navigation Device Rules Are In Compliance With The Communications Act

Do the Commission's Navigation Device rules comply with Congress' intent and were they promulgated pursuant to the agency's proper authority? They do, and they were.

A. *The Explicit Language and Legislative History of § 629 Support the FCC's Decisions*

Section 629 states that "The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to *assure* the commercial availability, to consumers of multichannel video programming" of navigation devices.⁹ Congress was well aware that, in instructing the FCC to assure this result in its regulations, the task was to relieve a longstanding monopoly on consumer choice that was no longer justified by technical requirements – hence the reference to reliance on industry standards.

Congress recognized too that it was not necessary to grant any new powers to the Commission to accomplish this task. Moreover, it stated explicitly that, notwithstanding any exceptions or instances of forbearance, nothing in § 629 was to be read as *diminishing* any authority that the FCC already had.¹⁰

In the 1992 Cable Act, Congress had directed the FCC to address compatibility problems and urged it to "promote" the competitive availability of "converter boxes."¹¹ In 1996, with no such result in sight, Congress returned to the subject and ordered the Commission to *assure* the availability of such devices. It would be strange indeed, and contrary to explicit legislative history, if Congress, in amplifying its earlier concern, were now to be understood to be in any way confining the FCC's authority.

⁹ Section § 629(a) (*emphasis added*).

¹⁰ Section § 629(f).

¹¹ Section 624A of the Communications Act requires the Commission to prescribe regulations "to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes." 47 U.S.C. § 544a(c)(2)(C).

B. The FCC's Decisions are Supported by its General Authority

The Commission's authority to adopt its Navigation Device rules is well supported by § 2 and § 4(i) of the Communications Act. The FCC, of course, has broad authority to regulate broadcast, cable and communications services. In 1968, the Supreme Court found that such authority over "all interstate and foreign communication by wire or radio" set forth in § 2 of the Communications Act extends to cable television service.¹² Four years later, the Supreme Court noted that the FCC's general regulatory authority under § 2 could be used to further statutory objectives that the Commission reasonably determined would fulfill such public interest goals as facilitating consumer choice.¹³ The courts have echoed this interpretation of the Commission's authority numerous times.¹⁴

Complementing the powers specified in § 2, § 4(i) states, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."¹⁵ This section also vests the agency with broad powers.¹⁶ Section 4(i) has been interpreted as giving the Commission authority to "promulgate necessary and reasonable regulations" to carry out the Communications Act and to "prevent the frustration of the regulatory scheme" by entities subject to the Act.¹⁷

¹² *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Circuit City understands that, until Congress passed legislation in 1984 giving the Commission explicit authority over cable services, the agency had to rely on its ancillary jurisdiction under Title I in order to regulate cable services. Cases dealing with the FCC's regulatory authority over cable must be read in this light. However, the later enactment of cable-specific legislation did not eliminate the Commission's broad authority under § 2 and § 4(i) and the jurisdictional analysis in these cases continues to be instructive.

¹³ *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

¹⁴ *See, e.g., TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 136 (D.C. Cir. 1989); *ACLU v. FCC*, 823 F.2d 1554, 1557 (D.C. Cir. 1987); *Alascom Inc. v. FCC*, 727 F.2d 1212 (D.C. Cir. 1984); *Belluso v. Turner Comm. Corp.*, 633 F.2d 393, 396 (D.C. Cir. 1980).

¹⁵ 47 U.S.C. § 154(i).

¹⁶ *U.S. West, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985).

¹⁷ *Regulation of CATV Systems*, 4 Rad. Reg. 2d 1679 (1965).

The Commission may exercise this authority even when another specific provision of the Act does not empower the Commission to take certain actions.¹⁸

The FCC's decisions in the Navigation Device *R&O* fall squarely within the constructs of § 629 and are further supported by the Commission's broad delegated authority in § 2 and § 4(i).

II. Maintaining A Strict Separation Between Security And Non-Security Functionality Is Well In Accordance With Precedent

When monopoly control exists over a market or facilities, the FCC, Congress and the courts have found ways of eliminating the barrier to competitive entry.¹⁹ Cable MVPDs completely control the set-top box market. This control is based on the lack of a creative solution, to date, for maintaining control over the circuitry that protects against unauthorized reception of services. The regulatory reward for this lack of creativity has been a monopoly over *all* of the circuitry included in any "set-top box." This, as Congress has twice recognized, is a situation more than ripe for redress by the Commission.

¹⁸ See, e.g., *United States v. Midwest Video Corp.*, 406 U.S. at 656 quoting *Philadelphia Television Broadcasting v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) (stating "in a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."); *Lincoln Telephone and Telegraph Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1980) (stating that while the laws governing common carriers did not grant the FCC authority to establish billing and collection arrangements, the Commission's action was within its authority under § 4(i) and was helpful and necessary in implementing the Commission's objectives.).

¹⁹ The history behind the deregulation of customer premises equipment, collocation and other matters demonstrates the ability of government to protect the interests of the incumbent service provider while also implementing regulations that allow others to provide competitive services to the benefit of consumers. See, e.g., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-91, *Memorandum Opinion and Order*, ¶ 62-64 (Released Aug. 7, 1998) (Finding that "the availability of cost efficient collocation arrangements is essential for the deployment of advanced services by facilities-based competing providers.... [I]ncumbent LECs will fulfill their statutory collocation duty by taking steps to offer collocation arrangements that permit new entrants to provide advanced services using equipment that the new entrant provides."); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 424 (1968) (holding that "[A] customer desiring to use an interconnecting device to improve the utility to him of . . . the telephone system . . . should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others.... There has been no adequate showing that non-harmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsibilities.").

The record in this proceeding, supported by the filings of NCTA and Time Warner themselves, demonstrates that the technology is at hand to provide and support an interface that allows the signal provider to maintain a device monopoly over *only* the circuits on the “security” side of the interface and permits the competitive availability of navigation devices.

A. The FCC’s Decision Represents a Logical Progression from Past Precedent

As the Commission itself noted, its decision to require the phaseout of integrated devices in the Navigation Device proceeding is but one of many decisions where the Commission has sought to implement a statute or policy by regulating the use or capabilities of equipment.²⁰ For example, in its Refarming proceeding, the FCC established rules that limit the ability of manufacturers to secure FCC equipment authorization for transmitting equipment that does not comply with new narrowband channel allocations.²¹ The FCC adopted these rules in an effort to promote the efficient use of spectrum and to make additional spectrum available for technologies operating in frequency bands below 800 MHz.

A second example involved a shortage of carrier identification codes (“CICs”) that new telecommunications carriers needed to properly route their subscriber traffic through the network.²² In order to increase the number of new CICs, the FCC determined that it should move from three to four-digit CICs. However, implementation of this plan required that telecommunications equipment could recognize the new CICs. The FCC mandated that carriers and owners of telecommunications equipment such as central office switches, PBXs and alarm panels ensure that equipment could accept four-digit CICs by January 1, 1998.²³

Finally, the FCC cites to its Emergency Broadcast System proceeding in which it determined that the establishment of the Emergency Alert System (“EAS”) required that

²⁰ *R&O* at n.167.

²¹ *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Covering Them*, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 10076 (1995).

²² *Administration of the North America Numbering Plan Carrier Identification Codes*, CC Docket No. 92-237, *Second Report and Order*, 12 FCC Rcd 8024 (1997).

²³ *Id.* at 8040.

broadcast stations and cable systems take steps to secure equipment capable of sending or receiving EAS alerts.²⁴ The FCC even went so far as to prescribe a mandatory protocol and EAS codes that must be used to construct an EAS message.²⁵

These are only selected examples from a history of such proposals and decisions that are wholly relevant to the debate over whether the Commission's decisions in the Navigation Device proceeding are in line with past precedent.²⁶ It is obvious that the phaseout rules are consistent.

B. NCTA Infers Too Much from FCC Discretion Not to Disturb Settled Proceedings

Section 629(d)(1) provides that the Commission's prior decisions and determinations made before the passage of the 1996 Act regarding navigation devices fulfill the requirements of § 629. NCTA reads this section as *obliging* the Commission to follow prior specific determinations, even if they occurred on the same issue *before* Congress instructed the FCC to assure competitive availability of navigation devices. Construed so broadly, this would be a mandate to do nothing – the opposite of what Congress intended.

The provision in question is quite different. It allows the FCC not to re-open entire *proceedings* in tangentially related areas, where an argument might be made that a device could be construed as a “navigation device.” The example given at the time was the unbundling regime for telephone CPE. Out of concern that this product area might be swept up in this proceeding and then eventually sunset thereunder, Congress was careful to clarify that the FCC was not *obliged* to revisit settled determinations in such areas.²⁷ Arguing, instead, that the FCC

²⁴ *Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, FO Docket No. 91-301, *Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 1786, 1816 (1994).

²⁵ *Id.* at 1813.

²⁶ *See, e.g., Access to Telecommunications Equipment and Services by Persons with Disabilities*, CC Docket No. 87-124, *Report and Order*, 11 FCC Rcd 8249 (1996) (In the rules governing the manufacture and deployment of hearing aid compatible (“HAC”) telephones, the FCC established that manufacturers and importers of telephones to be used in the United States must meet the HAC standards by a set deadline.); *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *Second Report and Order*, 8 FCC Rcd 6495, 6514 (1993) (To minimize the use of equipment that does not meet new data rate efficiency standards, the FCC imposed a set deadline on the manufacture of such equipment.).

²⁷ *See* H.R. Rep. No. 104-204, 104th Cong. 2d Sess. at 111-113 (1995).

is bound to the *status quo* in the very area as to which the Congress sought action is an ultimate *Catch 22*: whatever disturbs the *status quo* is hereby forbidden.

In fact, NCTA itself quotes a relevant passage from the legislative history of § 629 that supports this interpretation: Congress instructed the Commission to “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.”²⁸ NCTA’s reading of § 629(d)(1) would freeze navigation device technology for the foreseeable future at the level established in 1996.

In addition, NCTA has misconstrued the significance of the FCC’s decision in the Equipment Compatibility proceeding. At a time in which that proceeding was confined to deliberations as to the “set-back” Decoder Interface, Circuit City further proposed that the FCC mandate the inclusion of the Decoder Interface in set-top, as well as set-back, boxes. The Commission responded that the Equipment Compatibility proceeding only dealt with set-back technology and that it would address the set-top box issue in another proceeding, or in a further stage of that Docket.²⁹ In no sense can this be styled a “prior determination,” even under the most liberal sensible reading of the statute.

III. MSO Boxes With Bundled Security Circuits Must Be Eliminated To Assure The Commercial Availability Of Navigation Devices

The Commission, charged by the Congress with achieving an effective result in this proceeding, required that after January 1, 2005, navigation devices supplied by cable MVPDs would, like those supplied by competitors, have to rely on the private sector “POD” interface for security.³⁰ This was an absolutely critical determination by the Commission. The challenge here

²⁸ NCTA Petition at 20 quoting H.R. Rep. No. 104-458, 104th Cong. 2d Sess. at 181 (1996).

²⁹ *Implementation of the Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, *Memorandum Opinion and Order*, 11 FCC Rcd 4121, 4127 (1996) (“*Equipment Compatibility MO&O*”).

³⁰ *R&O* ¶ 49. The language of the statute suggests this result as well. Congress charged the FCC with the task of developing rules to assure the commercial availability of converter boxes, interactive devices, or other equipment. The same terms were used to describe the limits on the FCC’s authority over MVPD-provided equipment. The identical limiting and enabling language used by Congress in § 629(a) is dispositive. Arguably, Congress intended that the Commission assure the

is enormous: not only are consumers being asked to accept a new form of service (digital) involving a new resolution and format (HDTV), they also must adjust to a new, competitive means of device distribution. The credibility of this means – relying on a security card to be supplied separately from the navigation device itself – would be undermined from the beginning if cable MVPDs were never to indicate any willingness themselves to rely on these PODs, or on products configured to accept them.

As CEMA argues, it is bad enough that the FCC has allowed 6.5 years, from the date of the *R&O*, for Cable MSOs to entrench reliance on non-POD devices and undermine reliance on PODs.³¹ Circuit City submitted information for the record that, not only is this period much longer than is necessary, the period allowed before PODs must be available at all is a year longer than might otherwise be attainable.³² The only saving grace in this scenario – the only hope that competition, as intended by the Congress, will take hold – is the knowledge that *after January 1, 2005*, MSOs and their suppliers *will themselves have to rely on PODs in the new devices that they put into service*. Thus, they cannot afford to lead subscribers too far away from POD reliance, nor can they allow monopolistic suppliers to “walk away from” promises to support efficient and inexpensive POD development, manufacture and utilization.³³

Against this compelling need to open a market that has seen 50 years of monopoly, the legal and practical arguments trained on the *R&O* are, once again, essentially circular in nature. Legally, NCTA and TIA cite the statute’s reservation that MVPDs *may*, subject to subsidization provisos, continue to provide navigation devices to customers for the proposition that MVPDs *must* be allowed to provide navigation devices in any form, format or configuration they choose.

availability of the same devices from both unaffiliated vendors and MVPDs. The purpose of the limiting language is to allow MVPDs to compete fairly with unaffiliated equipment vendors. The purpose of the enabling language is to ensure that unaffiliated equipment vendors can compete fairly with MVPDs. The only way that the FCC can achieve this balance is if it bars an MVPD from offering navigation devices with security functionality that only it can control. Despite claims to the contrary, MVPDs can provide the equipment listed in the statute. The FCC’s rules merely ensure that unaffiliated vendors can provide comparable equipment.

³¹ CEMA Petition at 4-5.

³² Circuit City *Ex Parte* Presentation, June 4, 1998.

³³ Ellis, *supra* note 6.

Again, it is argued that the presence of an exception must mean that the exception was meant to defeat the rule. There is not an iota of support for such a notion in the legislation or its history.

From a practical perspective, NCTA also argues that MVPDs need integrated devices to protect system security.³⁴ Time Warner argues that the phaseout of integrated devices is not necessary under § 629 and that consumers would benefit from having the choice of leasing integrated devices from MVPDs.³⁵ These arguments are also based on the assumption, contrary to legislative intent, that the most efficient model of device distribution will remain that of monopoly rather than competition.

A. Congress Intended to Allow MVPDs to Remain In, But No Longer to Monopolize, the Market for Navigation Devices

Congress stated that “one of the purposes of [§ 629] is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device, or other equipment from the cable systems or network operator.”³⁶ The record supports the Commission’s finding that the only way to give consumers a real choice as to equipment suppliers is to ensure that MVPDs are not allowed to offer access equipment that contains proprietary security functionality controlled by the MVPD.

At the outset of the conversion to digital transmission, one or the other of the models of navigation device distribution will prove dominant. Cable MVPDs can compete for customers, without disadvantage, under either model – hardwired security or the POD interface. Competitive consumer electronics, computer and telecommunications manufacturers, however, cannot compete at all under the hardwired model. Their only chance to enter is through reliance on the POD, which can be sourced ONLY from the monopolists with whom they are trying to compete. Under these circumstances, the Commission was correct in concluding that the fox cannot be put permanently in charge of the chicken coop, with no long-term interest in the maintenance of the flock.

³⁴ NCTA Petition at 19.

³⁵ Time Warner Petition at 3-5; *see also* TIA Petition at 6.

³⁶ S. Conf. Rep. 104-230, 104th Cong. 2nd Sess. at 181 (1996).

B. MVPDs Retain the Ability to Control System Security

NCTA resorts to the argument, disproved by the very existence of the OpenCable project, that hardwired security is necessary to protect system security.³⁷ If this were so, NCTA would never have endorsed the OpenCable project and would have asked for reconsideration as to the requirement to furnish PODs for use in *any* navigation device. Can NCTA really believe that operation of a POD is acceptably secure when done through a host device obtained from a competitor, but must be less secure when done through a device obtained from the MSO itself? Alternatively, NCTA may actually intend that PODs never be widely deployed. If so, this underscores the wisdom of the Commission's requirement that, to survive and be perfected in the marketplace, PODs must be relied upon by all navigation devices.

In reality, the FCC's rules do not prevent MVPDs from taking steps to protect their system security. Time Warner and Viacom, as well as other participants in the rulemaking, supported the idea that security functionality could be separated from navigation devices and that such separation could enhance the ability of MVPDs to control security.³⁸ The FCC noted that the record supported claims that separate security would give MVPDs greater flexibility to customize their approach to security and make it easier and less costly to replace compromised security mechanisms.³⁹ The FCC also adopted rules that allow MVPDs to suspend service and take other steps to prevent security breaches.⁴⁰ Thus, the FCC has not compromised MVPD system security.

C. Back-Door Re-Integration of Cable MVPD Navigation Devices Would be Similarly Inappropriate and Destructive to the Commission's R&O

Time Warner argues that MVPDs should be able to re-build navigation devices with embedded security by adding non-security functions to security modules.⁴¹ It points to a determination in ET Docket 93-7, regarding set-back boxes, for precedent.

³⁷ NCTA Petition at 19, 22.

³⁸ See, e.g., Time Warner Comments at 11-13; Viacom Comments at 16.

³⁹ R&O ¶ 61.

⁴⁰ E.g., 47 C.F.R. § 76.1201, § 76.1203-1204 & § 76.1209.

⁴¹ Time Warner Petition at 5.

This argument is a thinly disguised attempt to evade the Commission's key determination in this proceeding. Every non-security feature and function added in component security modules would be unique and noncompetitive and would create redundancy, confusion and incompatibility with respect to competitive products that include such features. This emphasizes the wisdom of, and need for, the Commission's separation and phaseout rules. Moreover, the FCC made its determination in ET Docket 93-7 in a more limited set-back context and before the passage of the 1996 Act.⁴² In that proceeding, the FCC deferred making any decision as to the applicability of its rules to set-top boxes.⁴³

Circuit City recognizes that proper operation of a security module may require that some additional *security-related* circuitry be included in the POD. Again, however, there is no need to obliterate the rule with the exception. The Commission can adhere to its principled determination, yet provide for and accept the need for inclusion of ancillary functions in PODs, when the additional circuitry:

- is closely related to the security function of the module,
- enhances, rather than assumes, a function of the host device, and
- is not efficiently available in the host.

Circuit City urges the FCC to clarify this issue, along the lines outlined above, as an aid to MSOs that (like Time Warner) are making good-faith efforts to make the POD model work.

D. CEMA is Correct that the Period Provided for Reliance on Hardwired Security, Once PODs are Available, is Too Long

CEMA argues that waiting until 2005 could allow MVPDs to "lock up" the market for navigation devices in the interim because MVPDs would continue to be the sole providers of integrated devices during this window.⁴⁴ While it may seem like a small difference to the FCC, consumers may be less willing to purchase competitively available navigation devices that differ from the equipment offered by the MVPD. This result would make it difficult or impossible for

⁴² NCTA Petition at n.25, citing *Equipment Compatibility MO&O*.

⁴³ *Id.*

⁴⁴ CEMA Petition at 5.

unaffiliated vendors to establish a competitive market for navigation devices with separate security.

Circuit City believes that the record supports its argument, and CEMA's, that the phaseout of devices with hardwired security is essential to achieving acceptance of the POD model in fact, as well as in principle. While we disagree with CEMA's argument that the Commission has no discretion in this matter, we think that the success of competitive entry into the consumer market for navigation devices relies very heavily on the need for the current MSO monopolists, as well as any potential entrants, to rely on the POD interface as soon as possible. The Commission emphasized throughout its *R&O* that it intends to monitor closely the progress that the Cable industry makes in implementing the POD interface. Yet, any delay in such reliance will make it extremely difficult for the Commission to make any objective evaluation on this score. When one is tasked with assisting one's competitors, there may be dozens of conflicting and subjective claims as to why the help has not been successful. When one must accomplish a transition oneself, responsibility and accountability are there for all to see.

If the Commission adheres to the 2005 date for phaseout, it will have to be aggressive indeed in assuring that PODs are available from suppliers on the earliest possible schedule, at the lowest possible cost, and configured to cause the fewest possible problems in operation. Waiting until 2005 means that, in the interim, the FCC will be trying to administer this market by command, from above, through bureaucratic mandate. Already, we have seen pleas in the trade press that MSOs cannot even control their own long-term suppliers to take steps that are against their own proximate market interests.⁴⁵ Requiring early reliance on PODs by these MSOs aligns market forces with the FCC's determination: the foxes, as well as the hens, will have to sink or swim with the POD model.⁴⁶

⁴⁵ Ellis, *supra* note 6.

⁴⁶ WCA and NCTA raise questions as to the phaseout of devices that have been placed into inventory but not into service, or that have been in service but presently are in inventory. Circuit City believes that the Commission should interpret its *R&O* flexibly to alleviate the concerns that have been expressed. In addition, TIA suggests that the phaseout of integrated devices could someday prevent personal computers from offering network facilities. TIA's argument assumes that the obstacle of

IV. Regulation Of DBS Systems Is Not Necessary To Promote Competition Or Dismantle Any Entrenched Monopoly, Nor Is Regulation Of Strictly Analog Service Necessary To Promote New Technology

The congressional objectives in adopting § 629 were to bring competition to cable access devices that had been subject to five decades of monopoly, and to promote acceptance of new, particularly digital, technology. The Commission properly recognized that application of its R&O to DBS providers, who already support nationally portable devices through independent manufacturing and retail channels, is not necessary to achieve the purposes of § 629. Circuit City also is persuaded that regulation of analog navigation devices for customers whose access to digital devices is not encumbered by analog scrambling is similarly not necessary.

A. The Record Fully Supports the FCC's Treatment of DBS

The FCC found that it would not apply the security separation rules to DBS. It based its decision on the fact that DBS is a competitive service, DBS is a new entrant that does not have monopoly control over its market, DBS equipment is readily available from retail stores and is portable throughout the continental United States.⁴⁷ The FCC did not exempt DBS from the overall requirements of § 629.⁴⁸

Time Warner cites the Commission's flexibility with respect to the competitive, nationally portable DBS entrant as a reason for again suggesting that an exception be broadened to swallow the entire rule.⁴⁹ This loses sight of the congressional goal in establishing this proceeding – to promote the very sort of entry that DBS represents. As Time Warner must recognize, Congress provided the real answer with respect to the cable device monopoly in the “sunset” provision. Circuit City also looks forward to the day when the Commission can make the necessary determinations that would result in termination of this proceeding.

security as a barrier to competitive availability has been solved and that all navigation devices are freely available in their entirety from independent vendors. Under such circumstances, the FCC has the authority to determine that this provision may be sunset.

⁴⁷ R&O ¶ 64-66.

⁴⁸ R&O ¶ 112.

⁴⁹ Time Warner Petition at 17.

B. Circuit City Supports NCTA's Proposed Analog Exception, Provided that ALL Options are Capable of Implementation

Time Warner and NCTA seek reconsideration of the Commission's decision that § 629 applies to analog and hybrid systems.⁵⁰ After repeating arguments considered by the FCC in the course of the proceeding, NCTA proposes a resolution for analog systems similar to that proposed by Circuit City in an *ex parte* filing made to the FCC.⁵¹ Time Warner, by contrast, argues that the Decoder Interface is a solution, and that the FCC should simply require implementation of the Decoder Interface in new analog TVs. NCTA does not regard the Decoder Interface as a solution.

More specifically, Time Warner suggests that the FCC require that an analog decoder interface is incorporated into all analog television tuners included in VCRs, converters and televisions larger than 18 inches that are sold after July 1, 2000.⁵² However, building the Decoder Interface into new TVs and VCRs would do nothing to address this obstacle with respect to any of the 200 million analog TVs and VCRs now owned by consumers. Nor does Circuit City believe that the Decoder Interface, developed for another purpose, is the most efficient solution. Once the OpenCable process refines an analog interface standard and MVPDs are prepared to make the analog security components available in 2000, equipment manufacturers will have an incentive to make analog equipment that will use the separate security models. Any further government mandate would constitute over-regulation and is not supported by the record.

Although NCTA, *pro forma*, gives service to the circular argument that the potential for any exception must invalidate the rule, it finally proposes a more limited exception that would address the need for an analog security interface only where such need represents an obstacle to the potential success of the OpenCable POD model. Circuit City has never believed that this proceeding should be punitive or overly harsh with respect to MSOs, who it views as potential business partners. Accordingly, as NCTA notes, Circuit City first proposed this limitation in its June 4, 1998 *ex parte* filing. We continue to support it.

⁵⁰ R&O ¶ 27.

⁵¹ NCTA Petition at 16 citing Circuit City *Ex Parte* Presentation, June 4, 1998.

⁵² Time Warner Petition at 6.