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

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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  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION  
TO PETITIONS FOR RECONSIDERATION

*Of Counsel:*

David A. Nall  
Jonathan Jacob Nadler  
Squire, Sanders & Dempsey L.L.P.  
1201 Pennsylvania Avenue, N.W.  
Post Office Box 407  
Washington, D.C. 20044  
(202) 626-6600

George A. Hanover  
Vice President,  
Engineering

Gary S. Klein  
Vice President,  
Government and Legal Affairs

2500 Wilson Boulevard  
Arlington, Virginia 22201  
(703) 907-7600

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## SUMMARY

The Consumer Electronics Manufacturers Association (“CEMA”) opposes the petitions for reconsideration filed by the National Cable Television Association, the Telecommunications Industry Association, Time Warner Entertainment Company, and the Wireless Communications Association International (collectively “Petitioners”). Petitioners provide no basis for urging the Commission to eviscerate the pro-competitive regime that the Commission adopted in the *Navigation Devices Order*.

Petitioners request that the Commission abandon its decision that, effective January 1, 2005, cable systems may not provide “new” navigation devices that bundle security and non-security functions. While Petitioners make a number of arguments about the proper interpretation of Section 629 of the Communications Act, concerns about security, prior Commission decisions in the *Cable Compatibility* docket, and the alleged benefits of equipment bundling by cable monopolists, none of these arguments are persuasive or founded on substantial evidence. CEMA believes that the Commission correctly determined that allowing cable systems and other multi-channel video program distribution systems (“MVPDs”) with market power to continue to bundle security and non-security functionality would “interfere with the statutory mandate of commercial availability” of navigation devices, a holding based upon proper statutory interpretation and the empirical evidence provided by the Commission’s prior experience in unbundling customer-premises equipment from common carrier services. CEMA therefore urges the Commission to reject Petitioners’ request and, instead, require cable systems and other MVPDs with market power to cease providing new bundled boxes on July 1, 2000.

Petitioners also request that the Commission allow cable systems to continue to bundle security and non-security functionality in a single analog box – without providing

consumers with the option of obtaining a security-only analog device. Section 629, however, does not permit – much less require – the Commission to carve out an “analog exclusion.” Furthermore, the “practical problems” and security concerns that Petitioners claim do not justify depriving consumers of the benefits of a competitive market for analog set-top boxes. Alarmist incantations of the dangers of cable theft are not a basis for the blanket exclusion of analog navigation devices from the commercial availability requirements of Section 629. Because Petitioners provide no basis for the Commission to alter its pro-competitive decisions in the *Navigation Devices Order*, the Commission should deny their petitions for reconsideration.

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CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION  
TO PETITIONS FOR RECONSIDERATION**

The Consumer Electronics Manufacturers Association (“CEMA”) hereby opposes the petitions for reconsideration filed by the National Cable Televisions Association (“NCTA”), the Telecommunications Industry Association (“TIA”), Time Warner Entertainment Company (“Time Warner”), and the Wireless Communications Association International (“WCAI”).<sup>1</sup> The Petitioners invite the Commission to eviscerate the pro-competitive regime that the agency adopted in the *Navigation Devices Order*.<sup>2</sup> Specifically, they ask the Commission to abandon its decision that, effective January 1, 2005, cable systems may not provide “new” navigation device that bundle security and non-security functions.<sup>3</sup> The

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<sup>1</sup> See generally NCTA Petition for Reconsideration (“NCTA Petition”); TIA Petition for Reconsideration (“TIA Petition”); Time Warner Petition for Reconsideration (“Time Warner Petition”); WCAI Petition for Reconsideration (“WCAI Petition”).

<sup>2</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 98-116 (rel. June 24, 1998) (“*Order*”).

<sup>3</sup> NCTA Petition at 17-25; TIA Petition at 5-7; Time Warner Petition at 3-9; WCAI Petition at 4.

Petitioners further request the Commission to completely exempt analog devices from the commercial availability requirements.<sup>4</sup>

As CEMA demonstrates below, the Petitioners' requests are without merit. The Commission has determined – based on an exhaustive administrative record – that allowing cable systems and other multi-channel video program distribution systems (“MVPDs”) with market power to continue to bundle security and non-security functionality would “interfere with the statutory mandate of commercial availability” of navigation devices.<sup>5</sup> The Commission, therefore, has concluded that cable system provision of such equipment “should be phased out.”<sup>6</sup> The Commission has further determined that requiring the separation of security and non-security function is possible in both the digital and the analog environments.<sup>7</sup> The Petitioners provide no basis for the Commission to alter these pro-competitive decisions.

**I. THE COMMISSION CORRECTLY FOUND THAT ALLOWING CABLE SYSTEMS AND OTHER MVPDS WITH MARKET POWER TO PROVIDE NAVIGATION DEVICES THAT BUNDLE SECURITY AND NON-SECURITY FUNCTIONS WOULD IMPEDE COMMERCIAL AVAILABILITY.**

NCTA and its allies ask the Commission to rescind its decision that, effective January 1, 2005, cable systems must cease providing new devices that bundle security and non-security functionality (“bundled boxes”).<sup>8</sup> The Petitioners make two principal arguments.

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<sup>4</sup> NCTA Petition at 3-17; TIA Petition at 2-5; Time Warner Petition at 3-9.

<sup>5</sup> *Order* at ¶ 69.

<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at ¶¶ 51-57.

<sup>8</sup> NCTA Petition at 17-25; TIA Petition at 5-7; Time Warner Petition at 3-9; WCAI Petition at 4.

First, they assert that Section 629 of the Communications Act<sup>9</sup> precludes the Commission from prohibiting bundling. Second, they insist that prohibiting bundling would not be in the public interest. Neither contention can withstand scrutiny. The Wireless Communications Association International requests, somewhat more narrowly, that the Commission allow MVPDs to continue to provide bundled boxes to new customers indefinitely – so long as the boxes were manufactured prior to January 1, 2005.<sup>10</sup> The Commission should reject this request. Instead, as CEMA demonstrated in its Petition for Reconsideration, the Commission should require cable systems and other MVPDs with market power to cease providing new bundled boxes on July 1, 2000.<sup>11</sup>

**A. The Commission Has Statutory Authority to Ban Bundling.**

As Congress recognized, the market for navigation devices is not competitive. Large cable system operators, which continue to enjoy significant market power, have established close relationships with a handful of preferred manufacturers. The operators allow these favored manufacturers to produce devices that bundle security and non-security features in a single box. The operators, in turn, sell or lease these devices to their subscribers. Because the operators have exclusive control over the security functionality necessary to access their services, bundling forces subscribers also to obtain non-security functionality from their system operator.

The goal of Section 629 is to transform the monopoly-driven market for navigation devices into one in which consumers are free to choose non-security equipment from

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<sup>9</sup> See 47 U.S.C. § 549.

<sup>10</sup> WCAI Petition at 4-5.

<sup>11</sup> CEMA Petition for Reconsideration (“CEMA Petition”) at 3-9.

a wide range of suppliers, which compete based on functionality, quality, and price. Acting pursuant to Section 629, the Commission has adopted a two-step process to bring the benefits of equipment competition to cable subscribers. By July 1, 2000, cable systems and other MVPDs with market power must allow consumers to purchase or lease devices that perform only security functions.<sup>12</sup> As of January 1, 2005, cable systems and other MVPDs with market power must cease providing new navigation device that bundle non-security functions with security functions.<sup>13</sup>

NCTA, joined by TIA, seeks to turn Section 629 on its head. The Petitioners insist that – rather than directing the Commission to bring competition to the navigation devices market – this provision provides cable systems with an affirmative right to continue to bundle security and non-security functionality.<sup>14</sup> The Commission should not be misled.

**1. Cable systems have no statutory “right to bundle.”**

NCTA and TIA first argue that Section 629(a) provides cable operators with an express right to provide bundled boxes.<sup>15</sup> This is plainly incorrect. Section 629(a) directs the Commission to adopt regulations that will “assure the commercial availability” of navigation devices.<sup>16</sup> Based on the record compiled in this proceeding, the Commission has concluded that

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<sup>12</sup> *Order* at ¶¶ 5, 80.

<sup>13</sup> *Id.* at ¶¶ 5 & 69. As CEMA demonstrated in its Petition for Reconsideration, this two-step process will unnecessarily delay the date on which consumers will be able to reap the benefits of a competitive market. CEMA Petition at 4-6. The Association therefore has requested that the Commission prohibit cable systems and other MVPDs with market power from providing new bundled equipment effective July 1, 2000.

<sup>14</sup> NCTA Petition at 18-19; TIA Petition at 6-7.

<sup>15</sup> NCTA Petition at 18-19; TIA Petition at 6.

<sup>16</sup> 47 U.S.C. § 549(a).

the only way to achieve this express statutory goal is to prohibit cable operators from bundling security and non-security functionality in a single device.<sup>17</sup>

This conclusion is entirely reasonable. Contrary to the Petitioners' assumption, merely requiring cable systems to provide subscribers with an "unbundled option" would not satisfy the statutory requirement.<sup>18</sup> The Conference Committee Report makes clear that "*one purpose* of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device, or other equipment from the cable system or network provider."<sup>19</sup> This, however, is not the *only* purpose of Section 629. Rather, Section 629 seeks nothing less than the creation of a competitive market for navigation devices.<sup>20</sup> This goal simply cannot be achieved as long as cable system operators can leverage their control over network security to obtain an unfair competitive advantage in the market for navigation devices.

To be sure, Section 629(a) also states that cable system operators may continue to provide navigation devices to their subscribers – provided the price is separately stated from, and not cross-subsidized by, the operator's charge for its programming service.<sup>21</sup> This language, however, does nothing more than to preserve the *status quo*. It does not limit the Commission's authority to take *additional actions* necessary to promote commercial availability of navigation devices. The Commission has done so by allowing cable systems to continue to

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<sup>17</sup> *Order* at ¶ 69 (“[T]he continued ability to provide integrated equipment is likely to interfere with the statutory mandate of commercial availability . . .”).

<sup>18</sup> *See* Time Warner Petition at 3.

<sup>19</sup> H.R. Rep. No. 104-458, 104<sup>th</sup> Cong. 2d Sess. 181 (emphasis added).

<sup>20</sup> *See* H.R. Rep. No. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 112 (1995) (“[C]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution sources.”).

<sup>21</sup> 47 U.S.C. § 549(a).

provide navigation devices, but requiring that such devices separate security and non-security functionality.

Any suggestion that Section 629(a) restricts the Commission's authority to order the unbundling of security and non-security functionality is doomed by Section 629(f). That provision states that "[n]othing in this section shall be construed as . . . limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."<sup>22</sup> The Commission's authority over cable system provision of premises equipment is well established.<sup>23</sup> Consistent with Section 629(f), Section 629(a) cannot be read to restrict that authority.

## **2. The Commission has not jeopardized security.**

NCTA, again joined by TIA, next claims that Section 629(b) precludes the Commission from requiring the separation of security and non-security functionality because bundled boxes allegedly provide "a more secure method" of preventing programming theft.<sup>24</sup> Section 629(b), of course, does no such thing. The provision merely restates existing law: the Commission may not promulgate rules that "jeopardize security" of services provided over cable systems or "impede the legal rights of a provider of services to prevent theft of service."<sup>25</sup>

Contrary to the Petitioners' apparent assumption, Section 629(b) does not require the Commission to abandon its obligation to ensure commercial availability of navigation

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<sup>22</sup> 47 U.S.C. § 549(f).

<sup>23</sup> See *In re Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5805-807 (1993); see also 47 U.S.C. § 543(b)(3) ("The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for . . . installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming . . . .")

<sup>24</sup> NCTA Petition at 19-20; TIA Petition at 6.

devices in any situation that could conceivably raise a security concern. Rather, the Commission must adopt regulations that promote commercial availability while protecting network security. This is precisely what the Commission has done.

The *Navigation Devices Order* allows cable systems “to retain control over the security equipment,” but requires them to provide this equipment “to consumers separated or unbundled from those portions of the devices performing non-security functions.”<sup>26</sup> Moreover, the rules adopted pursuant to the *Order* specifically state that the obligation to separate security and non-security functionality do not apply where “it is not reasonably feasible” to do so “without jeopardizing security.”<sup>27</sup> The rules further provide that consumer may not use “equipment that would violate . . . any . . . provision of law intended to preclude unauthorized reception of multichannel video programming service.”<sup>28</sup> The Commission has made clear that, pursuant to this provision, MVPDs may “disconnect service to subscribers using a navigation device which assists in the unauthorized reception of service.”<sup>29</sup> Finally, the Commission has reiterated that MVPDs retain their ability to seek civil damages against parties for the unauthorized reception of service.<sup>30</sup>

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<sup>25</sup> 47 U.S.C. § 549(b).

<sup>26</sup> *Order* at ¶ 48.

<sup>27</sup> 47 C.F.R. § 76.1204(d)(2).

<sup>28</sup> 47 C.F.R at § 76.1209.

<sup>29</sup> *Order* at ¶ 42. NCTA objects that the Commission’s rule does not specifically codify the right to disconnect service, or specify the circumstance in which this right may be invoked. *See* NCTA Petition at 5. CEMA has no objection to the Commission codifying this right, subject to appropriate procedural protections to ensure that cable systems do not use this authority to discriminate against subscribers that choose to attach competitively provided equipment.

<sup>30</sup> *Order* at ¶ 42.

**3. The Commission's decision in the *Cable Compatibility* docket does not preclude adoption of the unbundling requirement.**

NCTA next looks to Section 629(d) as a means to avoid the Commission's bundling prohibition. Section 629(d) provides that "[d]eterminations made or regulations prescribed by the Commission with respect to commercial availability to consumer" of navigation devices "before the date of enactment of the Telecommunications Act of 1996 shall fulfil the requirements of this section."<sup>31</sup> NCTA contends that "[j]ust such a determination was made in the Equipment Compatibility Rulemaking," in which the agency allowed cable systems to bundle security and non-security functionality in "devices that connect to the Decoder Interface connection."<sup>32</sup> This conclusion, NCTA adds, is "binding on the Commission in [the present] proceeding."<sup>33</sup> NCTA's assertion is unavailing.

As an initial matter, Section 629(d) does not codify the Commission's prior policy decisions. Rather, it is designed to avoid "redundancy" by enabling the Commission to rely on prior factual and legal determinations.<sup>34</sup> For example, in applying the "sunset" provision to a particular category of navigation device, the Commission could rely on a pre-Act finding that the market for the programming service used in connection with that device is "fully competitive."<sup>35</sup>

Even if Section 629(d) did preclude the Commission from revisiting prior policy decisions, the agency's decision in the *Cable Compatibility Reconsideration Order* to allow

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<sup>31</sup> 47 U.S.C. § 549(d)(1).

<sup>32</sup> NCTA Petition at 21 (quoting *Equipment Compatibility Recon. Order*, 11 FCC Rcd 4121, 4127 (1996)).

<sup>33</sup> *Id.*

<sup>34</sup> Section 629(d) is entitled "Avoidance of Redundant Regulations."

<sup>35</sup> See 47 U.S.C. § 629(e).

cable systems to provide set-back boxes that bundle security and non-security functionality is not “a determination . . . with respect to commercial availability to consumers of [navigation devices].” The *Cable Compatibility* proceeding did not concern the *commercial availability* of navigation devices. Rather, it addressed a far narrower issue: the rules necessary to implement Section 624(a) of the Communications Act – which requires “compatibility between televisions and video cassette records and cable systems.”<sup>36</sup>

Finally, the Commission’s decision to allow cable operators to offer bundled set-back devices was not made “before the date of enactment” of the Telecommunications Act. The Act was signed into law on February 8, 1996. The Commission’s *Cable Compatibility Reconsideration Order* was adopted six weeks later, on April 22.<sup>37</sup>

#### **4. Unbundling will not “chill” innovation.**

Unable to make a convincing argument under any of the specific statutory provision, NCTA asserts that the Commissions actions are inconsistent with the *legislative history* of the Act. NCTA contends that the Conference Committee report contains an “instruction” that directs the Commission not to take any “actions which could have the effect of freezing or chilling the development of new technologies and services.”<sup>38</sup> The fragment that NCTA has lifted from the Conference Report cannot be construed as a limitation on the

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<sup>36</sup> 47 U.S.C. § 544A.

<sup>37</sup> While the Commission styled its determination that cable systems were permitted to bundle security and non-security features in the set-back box as a “clarification,” the Reconsideration Order marked the first time that the agency addressed this issue. The Commission’s initial decision in the *Cable Compatibility* docket, adopted in 1994, provided only that “the Decoder Interface should provide the capability to separate signal access control functions from other functions . . . .” *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment*, First Report and Order, 9 FCC Rcd 1981, 1998-99 (1994).

<sup>38</sup> See NCTA Petition at 20 (quoting H.R. Rep. No. 104-458, at 181).

Commission's ability to require cable systems to fully unbundle security and non-security functionality.

The language that NCTA quotes must be read in context. The preceding sentence of the Committee Report makes clear that, in developing its commercial availability regulations, the Commission is to "consult with private standards setting organizations . . . and other appropriate bodies."<sup>39</sup> The sentence on which NCTA relies does nothing more than to explain that Congress adopted this requirement in order to avoid the imposition of inflexible, government-mandated standards that could "freeze or chill" innovation.<sup>40</sup> In any case, even if the Conference Committee Report contains a general "instruction" not to take any action that could deter innovation, it would not preclude the action that the Commission has taken. As discussed below, the Commission's decision to prohibit bundling of security and non-security functions will promote – rather than chill – innovation.<sup>41</sup>

**B. Allowing Incumbent Monopolists to Continue Bundling Would Not be in the Public Interest.**

The Petitioners also contend that allowing cable system operators to continue to provide navigational devices that bundle security and non-security functions is in the public interest because bundling supposedly provides numerous consumer benefits. They further claim that the Commission would be acting in an "inconsistent" manner if it barred cable systems from bundling non-security products into their conditional access devices, while allowing

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<sup>39</sup> H.R. Rep. No. 104-458, at 181.

<sup>40</sup> In its Petition for Reconsideration, CEMA has demonstrated that turning over responsibility for the standards development process to CableLabs would not fulfill the Commission's responsibility to consult with private standard-setting bodies. CEMA Petition at 11-15. *See* WCAI Petition ("Though the Commission 'expects that entities outside the membership of CableLabs will be able to participate in the eventual standards setting process,' to date that has not been the case. It is WCAI's understanding that several MVPDs (including at least one major wireless cable operator) have been denied membership in CableLabs, apparently for anti-competitive reasons.").

<sup>41</sup> *See* § I.B.1, *infra*.

consumer electronics manufacturers to integrate non-security functions into televisions and VCRs. These contentions are entirely unpersuasive.

**1. Monopoly bundling does not benefit consumers.**

The Petitioners contend that allowing cable systems to continue to offer bundled boxes would provide significant consumer benefits. Specifically, the Petitioners insist that bundling benefits consumers by increasing user choice, increasing efficiency, promoting innovation, and reducing consumer confusion. We address each argument below.

**User choice.** The Petitioners assert that allowing cable systems to continue to offer bundled boxes will increase user choice. Time Warner, for example, contends that “[a]s long as consumers have the *option* to purchase or lease component devices, there is no reason they should not also have the option to obtain an integrated device from their MVPD.”<sup>42</sup> While this argument may be superficially appealing, it can not withstand analysis.

The most effective way for the Commission to increase user choice is to foster the development of a competitive market for navigation devices. In order to do so, the Commission must ensure that cable systems and independent manufacturers can compete on a “level playing field.” The cable operators, however, have a significant advantage: they are the *only* entity that can provide the security functionality necessary to access multi-channel video programming services. Consequently, cable system operators are the only entity that can offer bundled boxes. If the Commission allows cable systems to exploit this monopoly advantage few, if any, independent manufacturers are likely to enter the navigation devices market. The end-result would be fewer – rather than more – choices for consumers.

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<sup>42</sup> Time Warner Petition at 3 (emphasis in original); see NCTA Petition at 22; TIA Petition at 7.

This conclusion is supported by nearly two decades of experience in the market for customer premises equipment (“CPE”) used in connection with wireline telecommunications service. The Commission’s No-Bundling Rule, which was adopted in 1980, flatly prohibits local exchange carriers from bundling monopoly telecommunications services with CPE.<sup>43</sup> The Commission has *never* held that a monopolist may bundle telecommunications service and CPE – provided it also offers an unbundled telecom-only “option.” The Commission has recognized that, as a result of the No-Bundling Rule, the CPE industry “is a competitive marketplace, permitting users to select from a large variety of products at a wide range of prices.”<sup>44</sup> Prohibiting cable systems and other MVPD with market power from bundling security and non-security functionality will provide the same benefits in the navigation devices market.

**Efficiency.** There also is no evidence to support the Petitioners’ contention that bundling increases efficiency.<sup>45</sup> The Petitioners have failed to provide a single concrete example of how bundling can reduce costs. Nor have the petitioners attempted to explain why monopoly service providers would pass on to their users any savings that might be realized.<sup>46</sup> Ultimately, as the Commission has recognized in the telecommunications CPE market, the most

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<sup>43</sup> See 47 C.F.R. § 64.702(e).

<sup>44</sup> *NYNEX Telephone Companies Tariff FCC No. 1 Application for Review*, 9 FCC Rcd 1608 (1994); see also *Verilink Corporation’s Petition for Rulemaking to Amend the Commission’s Part 68 Rules to Authorize Regulated Carriers to Provide Certain Line Build Out Functionality as Part of Regulated Network Equipment on Customer Premises*, 10 FCC Rcd 8914, 8921 (1995) (noting the consumer benefits resulting from the Commission’s No-Bundling Rule).

<sup>45</sup> NCTA Petition at 23.

<sup>46</sup> Time Warner makes a feeble attempt to argue that it would be efficient to add additional memory or other features to a security module so that it can accommodate new services offered by the cable system. This, the cable operator contends, would avoid the possibility of competitively provided equipment being rendered obsolete as a result of a cable system service upgrade. Time Warner Petition at 5. Time Warner completely fails to explain why it would be more efficient to integrate additional memory or other features into the cable-system-provided security module, rather than into competitively provided navigation devices. In practice, the only beneficiary of such integration would be the cable system – which would have a competitive “leg up” in offering consumers equipment that can interoperate with new system-provided services.

effective way to increase efficiency is not to rely on incumbent monopolists to exploit alleged “economies of scope.” Rather, it is to foster the development of a vibrant competitive market in which manufacturers must constantly increase efficiency in order to survive.

**Innovation.** NCTA makes an astounding assertion. Allowing cable systems to continue to bundle security and non-security functions in a single box, the Association claims, will encourage cable systems to deploy the next generation of navigation devices. This, in turn, “will spur innovation of advanced services by cable operators who will have a base of advanced boxes available to accommodate those services.” The end-result, NCTA assures us, will “prime the pump” for an *eventual* retail market for such devices.”<sup>47</sup>

NCTA has gotten it backwards. Allowing cable systems to extend their monopoly into the market for navigational devices that can access the next generation of advanced services is not necessary to facilitate the deployment of those services. If cable operators provide adequate disclosure of network interface information – as required by the Commission’s Rules<sup>48</sup> – independent manufacturers will be fully capable of creating devices that can interoperate with cable-provided advanced services. Competition among manufacturers, in turn, will lead to innovation. The end-result will be to spur demand for the cable system’s services. This, of course, is precisely what happened in the highly competitive computer industry – where the phenomenal drop in the cost of processing power has spurred the growth of the Internet and other on-line services.<sup>49</sup>

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<sup>47</sup> NCTA Petition at 23 (emphasis added).

<sup>48</sup> See Order at ¶ 34.

<sup>49</sup> TIA’s suggestion that the Commission’s unbundling requirement could preclude the attachment of personal computers to cable systems is entirely unfounded. See TIA Petition at 6. If cable operators have provide a security-only device, and comply with the Commission’s interface disclosure requirements, consumers will be able to attach the PC of their choice to any cable system.

**Consumer confusion.** Having failed to provide a convincing rationale for continued bundling, the Petitioners are reduced to asserting that the creation of a fully competitive equipment market would create “confusion” by forcing “consumers who are not technically sophisticated” to “overcome concerns about purchasing unnecessary equipment.”<sup>50</sup>

This Commission has heard this before. For years, the pre-divestiture Bell System vehemently argued that the introduction of competition – whether in CPE or long-distance telecommunications service – would overwhelm consumers. The evidence, however, is to the contrary. Today’s consumers have proven remarkably adept at obtaining information and making rational choices among competing products. Some consumers have continued to obtain service and equipment from their original provider, while others have exercised the right to switch to new providers. The same result should obtain in the cable equipment market. There is simply no need for the cable industry to “protect” its captive customers from the burdens of a competitive market.

**2. The Commission’s rules appropriately distinguish between cable monopolists and competitive consumer electronics.**

NCTA raises a final objection to the Commission’s decision. Consumer electronics manufacturers, the association notes, “intend to provide integrated equipment in ways cable operators cannot.”<sup>51</sup> NCTA complains it would be “inconsistent” to allow consumer electronics manufacturers to integrate non-security functions into television sets, VCRs, and

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<sup>50</sup> NCTA Petition at 23; TIA Petition at 5.

<sup>51</sup> NCTA Petition at 24.

DVD players, while prohibiting cable systems from providing devices that bundle these functions with security functions.<sup>52</sup>

NCTA has ignored the critical difference between the cable and consumer electronics markets. In most markets, cable system operators retain monopoly power. As a result, a cable system operator can use its exclusive control over the security functions necessary to access multichannel video programming in order to foreclose competition in the market for non-security devices. Consumer equipment manufacturers, in contrast, participate in a vigorously competitive market. Consequently, they lack the ability to use their products to obtain an unfair competitive advantage in the market for non-security navigation functionality. Indeed, any manufacturer that tried to offer an undesirable combination of consumer electronics equipment and non-security navigation functionality would rapidly lose market share to rival consumer electronics manufacturers.

The Commission's treatment of the cable and consumer electronics industries may not be identical. But it is based on a reasonable recognition of the fundamental differences between the two industries.

**C. The Commission Should Not Allow MVPDs to Deploy Equipment to New Customers After the Phase-Out Date.**

The Wireless Communications Association International takes a different tack. WCAI does not directly challenging the Commission's decision to prohibit cable systems and other MVPDs with market power from providing "new" bundled boxes to their customers as of January 1, 2005. Rather, it asks the Commission to *interpret* the rule in a manner that would render it ineffective.<sup>53</sup> The Commission should decline to do so.

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<sup>52</sup> *Id.*

<sup>53</sup> WCAI Petition at 4-5.

In the *Navigation Devices Order*, the Commission recognized the need to avoid rendering obsolete bundled boxes that were lawful on the date that they were put into service, and which remain in service on the day the prohibition on bundled boxes goes into effect. The Commission therefore provided that, when its goes into effect, the prohibition on bundled boxes will apply “only to the sale, lease, or use of new boxes.”<sup>54</sup> The Commission added that it did “not intend that equipment which has actively been placed in service by the MVPD before the phase out date be rendered obsolete” by this prohibition.<sup>55</sup> CEMA does not object to this decision.<sup>56</sup>

WCAI asks the Commission to interpret the exception for “equipment placed in service” broadly. Under WCAI’s proposed interpretation, after January 1, 2005, MVPDs would remain free to deploy bundled boxes to new customers – for an infinite period of time – provided the box was “in inventory” or had been deployed to a previous customer prior to January 1, 2005.<sup>57</sup>

WCAI’s proposed interpretation would render the January 1, 2005 deadline almost meaningless. Cable system operators and their favored manufacturers would have an incentive to “stock pile” bundled equipment prior to the deadline. This would enable them to continue to offer this equipment for years to come. The Commission has given cable systems and other MVPDs with market power sufficient advanced notice as to their regulatory

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<sup>54</sup> *Order* at ¶ 69.

<sup>55</sup> *Id.*

<sup>56</sup> As noted above, however, CEMA believes that the cut-off date for the introduction of new bundled boxes should be July 1, 2000 – rather than January 1, 2005.

<sup>57</sup> WCAI Petition at 4-5.

obligations. The operators must adjust their production plans to accommodate their regulatory obligations.

## **II. THE COMMISSION CORRECTLY APPLIED THE UNBUNDLING REQUIREMENT TO CABLE-SYSTEM-PROVIDED ANALOG DEVICES.**

NCTA – again joined by Time Warner, and TIA – launches a second attack on the *Navigation Devices Order*. They contend that the Commission exceeded its legal authority, relied improperly on the decoder interface standard, and ignored “practical problems” by applying to analog devices the unbundling requirements established in the *Order*.<sup>58</sup> The Petitioners ask the Commission to allow cable systems to continue to bundle security and non-security functionality in a single analog box – without providing consumers with the *option* of obtaining a security-only analog device. The Commission should reject the Petitioners’ call to retreat from this important aspect of the pro-competitive rules adopted in the *Order*.

### **A. Section 629 Does Not Permit – Much Less Require – the Commission to Carve Out an “Analog Exclusion.”**

In the *Order*, the Commission concluded that requiring cable systems and other MVPDs with market power to unbundle security and non-security functionality is necessary to implement the commercial availability requirement contained in Section 629. The Commission made clear that the unbundling requirement is equally applicable to digital and analog devices, including the cable set-top box.<sup>59</sup> The Petitioners, however, contend that – rather than requiring the unbundling of security and non-security functionality in the analog environment – Section

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<sup>58</sup> NCTA Petition at 3-17; Time Warner Petition at 6-9; and TIA Petition at 2-5.

<sup>59</sup> See *Order* at ¶¶ 49-62; see also *id.* at ¶ 27 (“Section 629 applies to all types of equipment, including analog, hybrid analog/digital and digital equipment.”).

629 actually *forbids* the Commission from doing so. Alternatively, they suggest that the statute *permits* the Commission to carve out an “analog exclusion” to the unbundling requirements.

**1. Section 629(b) does not mandate an “analog exclusion.”**

The Petitioners first rely on Section 629(b).<sup>60</sup> This provision, as discussed above, states that the Commission’s commercial availability requirements are not to “jeopardize security” of MVPD-provided programming and other services. NCTA contends that, because there is “no assurance that security protections would not be adversely affected” if the Commission requires the separation of analog security and non-security functions, Section 629(b) “require[s] that the Commission take affirmative steps, including adoption of an ‘analog exclusion,’ to protect against theft of cable services.”<sup>61</sup> TIA makes the identical argument.<sup>62</sup>

Once again, NCTA and its allies have misconstrued the scope of Section 629(b). This provision does not require the Commission to disregard the commercial availability goal any time there is a conceivable threat to network security. Rather, it requires the Commission to craft rules that both achieve commercial availability of navigation devices *and* protect program security. The Commission, as demonstrated above, has fully considered the security issue and has concluded that its rules are consistent with the statute.

The Commission has provided ample support for its conclusion. The *Order* expressly relies on the work – jointly undertaken by CEMA and NCTA – on the decoder interface standard. As the Commission correctly observes, the progress made on the decoder interface standard “indicates that, even in the analog environment, it is generally possible to

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<sup>60</sup> 47 U.S.C. § 549(b).

<sup>61</sup> NCTA Petition at 8-9.

<sup>62</sup> See TIA Petition at 5.

separate out security . . . from other functions . . . [without] jeopardiz[ing] security.”<sup>63</sup> The Petitioners’ empty rhetoric cannot overcome this factual finding.

At the same time, the *Order* provides that, if the cable operators are able to provide concrete evidence that it is not possible to separate security and non-security functionality without jeopardizing security, the Commission’s rules contain a “security exception” that expressly excuses them from having to do so.<sup>64</sup> Contrary to NCTA’s contention, the Commission did not find that this exception can *never* apply to analog set-top boxes.<sup>65</sup> Rather, the Commission simply observed that the security exception is a “narrow” one, and that the agency does not “anticipate” that it will apply to devices such as the analog set-top box.<sup>66</sup>

**2. Granting an “analog exclusion” would constitute an unlawful permanent waiver.**

NCTA goes on to argue that, even if Section 629 does not *require* the Commission to carve out an exemption for cable-system-provided analog set-top boxes, the statute *permits* the Commission to do so. In support of this view, NCTA notes that the *Order* did not require DBS providers to unbundle security and non-security functionality.”<sup>67</sup> CEMA is compelled to disagree.

In effect, NCTA has asked the Commission to waive permanently the commercial availability requirement as applied to analog set-top boxes. As NCTA must be aware, Section 629(c) contains the exclusive provisions governing such waivers. This provision states that the

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<sup>63</sup> *Order* at ¶ 73.

<sup>64</sup> *Id.*; see 47 U.S.C. § 76.1204(d).

<sup>65</sup> NCTA Petition at 14.

<sup>66</sup> *Order* at ¶ 73.

<sup>67</sup> NCTA Petition at 13.

Commission may only grant a waiver “for as limited time” based on an “appropriate showing” by a manufacturer or service provider that the waiver is required to assist “development or introduction of new or improved” products.<sup>68</sup> The Petitioners’ request for a *permanent* exemption for an *existing* category of products plainly does not satisfy the statutory standard.

The Commission’s decision regarding equipment provided by DBS providers is readily distinguishable. There, the Commission found that – as a result of the unique structure of the DBS market – navigational devices currently are commercially available. As a result, there is no need to impose the unbundling requirement. The Commission further stated that, when the cable industry achieves the same level of portability for its equipment, the unbundling rule will sunset.<sup>69</sup>

**B. The Commission Appropriately Relied on the Decoder Interface.**

The Petitioners raise two strong, but inconsistent, objections to the Commission’s reliance on the decoder interface standard. On the one hand, NCTA argues that the Commission has gone too far – because it has relied on “the decoder interface standard as a means to separate to separate analog access from other functions,” even though “the Commission recognizes that the decoder interface was ‘intended for a somewhat different purpose.’”<sup>70</sup> On the other hand, TIA faults the Commission for not going far enough – because it required cable systems to unbundle analog devices without specifying the precise solution that would constitute “technical compliance with its requirements.”<sup>71</sup> Neither claim is availing.

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<sup>68</sup> 47 U.S.C. § 629(c).

<sup>69</sup> *Order* at ¶¶ 64-66.

<sup>70</sup> NCTA Petition at 5 (quoting *Order* at ¶ 52).

<sup>71</sup> TIA Petition at 3.

NCTA has fundamentally misconstrued the extent to which the Commission relied on the decoder interface standard. In implementing Section 629, the Commission declined to specify precise standards designed to achieve commercial availability of navigation devices. Instead, the agency chose to place primary reliance on the private industry standards-setting process. The *Order* does nothing more than to conclude that the progress made in developing the decoder interface standard demonstrates that it is possible to separate security and non-security functions in the analog environment.<sup>72</sup> The Petitioners do not deny that this is so. To the contrary, NCTA acknowledges that – at a minimum – it is “theoretically possible to utilize the decoder interface to isolate descrambling functions.”<sup>73</sup> Similarly, TIA concedes that “there are a variety of potential solutions” that would allow separation of security and non-security functions in the analog environment.<sup>74</sup>

Rather than seeking to obstruct progress in implementing Section 629, the cable industry should continue to work with the consumer electronics industry, in the context of the Cable Consumer Compatibility Electronics Advisory Group (“C<sup>3</sup>AG”), to adapt any additional standards necessary for analog unbundling. Given the fact that the Decoder Interface is virtually complete, there is no reason to believe that developing the standards to allow unbundling in the analog environment should take *longer* than developing the standards necessary to develop the necessary standards in the digital environment. Consequently, there is no basis on which to grant NCTA’s request to adopt a different (and presumably later) date for

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<sup>72</sup> *Order* at ¶ 71.

<sup>73</sup> NCTA Petition at 10-12.

<sup>74</sup> TIA Petition at 3-4.