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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	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	

ORDER ON RECONSIDERATION

Adopted: May 13, 1999 **Released: May 14, 1999**

By the Commission: Commissioner Ness issuing a statement; Commissioner Powell dissenting in part and issuing a statement.

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I. INTRODUCTION

1. Section 629 of the Communications Act (the "Act"),[1] requires the Commission to "assure" that "navigation devices" or customer premises equipment ("CPE"), used in conjunction with multichannel video programming distribution, are available for commercial retail purchase. Its purpose is to provide consumers with the benefits of competition from the manufacture and sale of such devices. These devices, such as cable television set-top boxes or direct broadcast satellite receivers, can be separated from the basic video distribution system but are necessary to the receipt, processing, or display of the underlying communications service involved.

2. In *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order ("*Navigation Devices Order*"),[2] the Commission adopted rules to implement the Congressional mandate expressed in Section 629. Petitions for reconsideration of the *Navigation Devices Order* were filed by the Consumer Electronics Manufacturers Association (CEMA), the National Cable Television Association (NCTA), the Telecommunication Industry Association (TIA), Time Warner Entertainment Company L.P. (Time Warner) and the Wireless Cable Association International, Inc. (WCA).[3] In this *Order on Reconsideration* ("*Order*") we review these petitions, reconsider one decision made in that Order relating to the application of the rules to analog equipment, but otherwise generally reaffirm the *Navigation Devices Order*.

II. BACKGROUND

3. Section 629 of the Act instructs the Commission to

> adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used . . . to access, multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[4]

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[1] 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat 56 (1996) ("1996 Act").

[2] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775 (1998).

[3] Appendix B is a list of parties filing petitions for reconsideration, opposition to petitions for reconsideration, and replies to opposition to petitions for reconsideration.

[4] 47 U.S.C. § 549(a).

4. In the *Navigation Devices Order*, the Commission adopted rules to implement Section 629 which expand opportunities to purchase navigation devices from sources other than the service provider, so that navigation devices become available through commercial retail outlets. The decisions made and rules adopted in the *Navigation Devices Order* were as follows:

(1) Section 629 is broad in terms of the multichannel video programming distributors ("MVPDs") covered including cable television, direct broadcast satellite ("DBS"), multichannel multipoint distribution service ("MDS") and satellite master antenna television ("SMATV");
(2) Section 629 covers not just equipment used to receive video programming, but also equipment used to access other services offered over multichannel video programming systems. Such equipment includes televisions, VCRs, cable set-top boxes, personal computers, program guide equipment, and cable modems;
(3) Subscribers have the right to attach any compatible navigation device to a multichannel video programming system;
(4) Service providers are prohibited from taking actions which would prevent navigation devices that do not perform conditional access functions from being made available by retailers, manufacturers, or other unaffiliated vendors;
(5) MVPDs must separate out conditional access or security functions from other functions by July 1, 2000 and make available modular security components, also called Point of Deployment Modules ("PODs");
(6) After January 1, 2005, MVPDs shall not provide new navigation devices that have security and non-security functions combined;
(7) MVPDs must provide information sufficient to permit the manufacture, retail sale, and operation of devices for their systems; and
(8) MVPDs can take the actions necessary to protect their operations from technical harm and theft of service.

5. Additionally, in the *Navigation Devices Order*, the Commission required the cable multiple system operators ("MSOs") supporting the project to standardize, design and produce digital security modules to file semiannual progress reports regarding the progress of their efforts.[5] The MSOs are also required to notify the Commission regarding changes in the schedule that could affect the July 1, 2000 deadline for making modular security components available. The first report, filed on January 7, 1999, states that the project is ahead of schedule.[6] The Commission continues to monitor the standards development project to ensure that satisfactory progress is being made toward achievement of the statutory goals of Section 629. We encourage interested parties concerned with the standards development process to comment on the status reports filed by the MSOs, which are available on the Commission's web site, www.fcc.gov.

[5]*Navigation Devices Order*, 13 FCC Rcd at 14808.

[6]*See* Status Report of NCTA, et al. (Jan. 7, 1999) ("Status Report").

6. Five petitions requesting reconsideration or clarification of the rules adopted in the *Navigation Devices Order* were filed. Petitioners seek reconsideration of: (1) the application of the separation of security requirement to analog equipment;[7] (2) the prohibition on MVPDs offering equipment combining embedded security functions and non-security functions after January 1, 2005;[8] (3) implementing the prohibition on integrated equipment starting in 2005 instead of an earlier date;[9] (4) the exemption for DBS operators from the requirement to separate security functions;[10] (5) the reliance on CableLabs to develop standards for separating security and non-security functionality;[11] and (6) the exclusion for Open Video Systems ("OVS") from the requirements of Section 629.[12] Clarification is sought regarding: (1) whether the prohibition on deploying integrated equipment applies to navigation devices which are in inventory on January 1, 2005; (2) whether the definition of a navigation device includes wireless cable antennas and downconverters; (3) whether Section 76.1204 allows functions other than those performing conditional access to be included in the security module; (4) what technical information must be released pursuant to Section 76.1205; (5) the extent of MVPDs liability to third parties for damages caused by customer attachment of equipment; and (6) the definition of the term "theft of service" as used in Section 76.1209. Additionally, petitioners asked that the Commission take further actions to implement the mandate of Section 629. Specifically, petitioners ask the Commission to: (1) establish a demarcation point for subscriber attachment of navigation devices; (2) prohibit the labeling of navigation devices as cable ready unless such equipment meets the OpenCable standard; and (3) apply the prohibition on MVPDs precluding the addition of extra features and functions into navigation devices to consumer electronics manufacturers and retailers.

III. DISCUSSION

A. Application of Rules to Analog Equipment

7. The rules adopted in the *Navigation Devices Order* implement a statutory right to allow subscribers to connect navigation devices to the multichannel video programming systems to which they subscribe. This authority, however, does not include the right to obtain and attach equipment that unscrambles scrambled programming or otherwise frustrates the operation of conditional access systems that prevent theft of service without authorization from the MVPD. In order to both protect operators against service theft and promote the right to attach and the retail availability of equipment, the rules require a separation of security (conditional access) from equipment that performs other functions. As

[7] *See Navigation Devices Order*, 13 FCC Rcd at 14793.

[8] *Id.* at 14803.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 14806-14808.

[12] *Id.* at 14783-14784.

these rules become fully effective, subscribers will have the option of obtaining the security portion of the equipment from the service provider and the remaining equipment from retail outlets. The Commission believed that this separation would enhance the development and commercial availability of navigation devices.[13] Although there are significant differences between analog and digital devices in the mechanisms available for separating security from non security functions, the rules adopted apply to both analog and digital equipment.

8. Petitioners NCTA, TIA and Time Warner ask the Commission to reconsider the application of the separated security requirement to equipment performing conditional access functions in the analog environment.[14] This request is supported by a wide range of interested parties, including equipment manufacturers, the computer and electronic technologies communities, various MVPDs, and representatives of the consumer electronics industry.[15] Petitioners and supporting parties urge the Commission to reconsider the requirement based on what they allege are numerous logistical, technical, and economic concerns.[16] They contend that the inclusion of analog equipment in the separation requirements will force the industries involved to devote resources toward analog separation of functions instead of focusing on advanced technologies.[17] Application of the separation rules, it is said, will actually delay a rapid transition to digital technologies because the requirement will cause an increase in the embedded base of analog equipment.[18] NCTA notes that there are over 15 different analog scrambling systems in use today, including systems developed by companies that are no longer in existence. NCTA contends that the separation requirement too readily assumes that rights to license the particular analog scrambling technique to produce the necessary separated security devices can be obtained from defunct companies or their successors.[19]

9. The Consumer Electronics Manufacturers Association ("CEMA"), Circuit City and the Information Technology Information Council ("ITIC") propose that we adopt a rule that excludes MVPDs

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[13]*See Navigation Devices Order*, 13 FCC Rcd at 14793.

[14]NCTA Petition at 7; TIA Petition at 2; Time Warner Petition at 7.

[15]Ameritech Comments at 4; Circuit City Comments at 18; Echelon Reply at 2; GI Comments at 5; CEMA, Circuit City, ITIC joint *ex parte* filing at 2 (March 4, 1999).

[16]*See e.g.*, Ameritech Comments at 4 (modifying analog security systems would require the replacement of costly analog scrambling equipment at each cable system's headend); GI Comments at 4 (the cost of a separated analog security module is likely to be substantial given the declining market for analog products); TIA Petition at 4 (cost of designing and developing devices to separate analog security for the different scrambling methods could be considerable); Time Warner Petition at 6 n.7 (mandating separation of security and non-security functions in digital devices will be easier to accomplish and entail far less disruption than for analog devices).

[17]NCTA Petition at 10; Echelon Reply at 3; GI Comments at 5.

[18]Echelon Reply at 3; Time Warner Petition at 8.

[19]NCTA Petition at 9.

from the requirement to offer separated security equipment for any device that: (1) employs conditional access mechanisms only to access analog video programming; (2) is capable only of providing access to analog video programming offered over a multichannel video programming distribution system; and (3) does not provide access to any digital transmission of multichannel video programming or any other digital service through any receiving, decoding, conditional access, or other function, including any conversion of digital programming or service to an analog format.[20]

10. Under the proposed exception, an MVPD is free from the requirement to provide separated security devices for devices in which the conditional access component only performs conditional access for analog scrambled programming. The intent of the proposed rule is to exempt navigation devices that provide strictly analog service from the separation of security requirement. Digital security modules remain a requirement if an MVPD makes available equipment that performs conditional access for digital programming.

11. In the *Navigation Devices Order*, we concluded that Section 629 applies to all types of equipment and adopted rules covering analog, hybrid analog/digital and digital equipment.[21] We noted that considerable engineering work had already taken place in connection with the Commission's order in *Implementation of Section 17 of the Cable Television Consumer Protection Act of 1992*, Memorandum Opinion and Order ("*Equipment Compatibility Report and Order*"), looking toward the development of a "decoder interface" that would have permitted many of the functions of existing analog cable television convertor boxes to be incorporated into television receivers with the security features separated out into a separate device that would plug directly into the back of the receiver.[22] The industry work undertaken in connection with this proceeding persuaded us that such a separation was feasible from an engineering point of view. Given the additional flexibility that exists in the digital environment, it was also believed that digital devices could be separated out in this same manner.[23]

12. The objective of Section 629 is to open new competitive outlets for devices that have in the past tended to be exclusively available from or under the control of service suppliers. This is not a development that is easily mandated by a set of Commission rules. For this type of equipment to become effectively available through retail outlets, a confluence of events must take place that are not under the control of any of the market participants: service suppliers (MVPDs), equipment manufacturers, or retail sales outlets. Moreover, within each segment of the market there may be different visions of how the market will develop. In many respects, however, the market incentives of all of the parties are working synchronously. Service suppliers can potentially divest themselves of the large investment in equipment

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[20]CEMA, Circuit City, ITIC joint *ex parte* filing at 2 (March 4, 1999).

[21]*Navigation Devices Order*, 13 FCC Rcd at 14785.

[22]*Navigation Devices Order*, 13 FCC Rcd at 14794-95 *citing Implementation of Section 17 of the Cable Television Consumer Protection Act of 1992*, Memorandum Opinion and Order, 11 FCC Rcd 4121 (1996) and *First Report and Order*, 9 FCC Rcd 1981 (1994).

[23]*Navigation Devices Order*, 13 FCC Rcd at 14800.

that they have previously had to maintain. Retail outlets can both add new lines of equipment to their inventory as well as improve the appeal of electronic equipment that is sold by adding new features and functions previously under the exclusive control of service providers. Manufacturers can enter new markets and integrate a broader range of features into the devices they sell. For the market to flourish, however, it is necessary that consumers as well as all of the other participants have some confidence that the devices they manufacture, retail, supply service to, or purchase will interface and function with the service or equipment of other market participants.

13. Evidence presented to us on reconsideration leads us to conclude that our earlier decision to apply the separation rules to both analog and digital devices in July 2000 would not create the incentives for which Section 629 was intended. Section 629 is premised on a belief that consumers will benefit from competition in the manufacturing and sale of equipment.[24] There now appears to be a considerable consensus among the market participants that the confluence necessary to create competitive outlets is unlikely to take place in the analog environment and indeed that trying to force it to take place will have an adverse influence on progress with respect to digital equipment.[25] Given this situation we are now persuaded that at this time, we should focus exclusively on the emerging market for digital devices. Commenters maintain that shipments of analog set-top equipment have been declining rapidly,[26] and that there will not be a market demand for analog-only devices.[27] We believe that the perceived lack of consumer demand would make manufacturers unlikely to manufacture and retailers unlikely to carry analog navigation devices even if the Commission denied rehearing on this issue. Commenters also contend that, given the transition to digital services, the development of an analog security module is not economically feasible and that the application of Section 629 to analog devices would result in unnecessary expenditures by MVPDs for a module that will soon be obsolete.[28] In addition, we do not believe it would be advisable for the Commission to apply a rule in a manner which could interfere with the development of competition in the digital marketplace. With the limited exclusion from the requirement to offer analog security devices, MVPDs will be able to concentrate their resources on the

[24]In the portion of the House Report for the 1996 Telecommunications Act discussing the navigation devices, Congress noted that "competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

[25]*See e.g.*, Time Warner Petition at 6 n.7 (mandating separation of security and non-security functions for digital devices will be easier to accomplish and entail far less disruption than for analog devices); CEMA, Circuit City, ITIC joint *ex parte* filing at 1 (March 4, 1999) (cable operators not likely to face competition for providing analog non-security features and functions through a standard analog conditional access interface)

[26]GI contends that shipments of analog set-top equipment in 1998 declined 25% from 1997 levels. GI anticipates a similar reduction in shipments in 1999. GI Comments at 7 n.22.

[27]CEMA, Circuit City, ITIC joint *ex parte* filing at 1 (March 4, 1999); TIA maintains that a considerable cost would be incurred developing security modules for a non-existent analog equipment market. TIA Comments at 4.

[28]NCTA argues that due to the costs involved, *e.g.*, royalty payments, patents, etc., the cost of the security device could be more than the cost of the commercial navigation device to which the device would be connected. NCTA Petition at 9.

development of digital technologies and services. Likewise, the deferral allows a more efficient use of the Commission's resources by permitting the Commission to focus on monitoring digital developments. As we stated in the *Navigation Devices Order*, we believe that the digital age promises to bring broader choices and opportunities to a wider group of consumers.[29] Subscribers benefit from the additional video and other services digital technology allows MVPDs to provide. Digital services cannot be accessed by existing analog equipment, and thus require the provision of new navigation devices to support these services.

14. Accordingly, on reconsideration we are persuaded that the statute does not require us, at this time, to apply our rules to the type of equipment set forth in the joint proposal of CEMA, Circuit City and ITIC, i.e, devices that (1) employ only an analog conditional access mechanism; (2) are capable only of providing access to analog video programming offered over an MVPD system and (3) do not provide access to any digital transmission of MVPD programming or any other digital service through any receiving, decoding, conditional access, or other function, including any conversion of digital programming or services to an analog format. Instead, we believe that deferring application of the rule to such equipment will foster the transition from analog to digital services consistent with the goals of Section 629. Specifically, we find that excepting analog devices from the rules at this time will further Section 629's goal of commercial availability more expeditiously.

15. We will continue to monitor developments relating to the transition and to the rollout of navigation devices in order to determine whether the marketplace develops in a manner consistent with our expectations. If analog boxes do not become obsolete, as we expect, the Commission intends to act promptly to ensure that analog-only boxes are made commercially available. We are reconsidering the scope of our rule and limiting it to hybrid and digital equipment in part because we believe it will hasten the rollout of digital services by MVPDs and bring consumers the numerous technological advances associated with this transition. Section 629(c) allows the Commission to grant waivers that are necessary to assist in the introduction of new multichannel video programming or other services offered over multichannel video programming systems.[30]

16. Under the rules we adopt, we defer the requirement that MVPDs provide security devices for analog-only equipment. Hybrid devices which perform conditional access for both analog and digital scrambled services are not covered by the deferral. Unlike analog-only devices, we believe that hybrid devices could interfere with competition in the digital marketplace. If hybrid devices were included in the deferral, it is more likely that subscribers would lack incentives to look to the marketplace for a digital navigation device if their equipment choice to receive all services was either to lease a box from the MVPD, or to purchase a digital box at retail and obtain a separate analog box and a digital security module from the MVPD.

17. Although some parties oppose any deferral to the separation of security requirement, we do not believe their concerns are sufficiently compelling to warrant a different conclusion for analog-only

[29] *Navigation Devices Order*, 13 FCC Rcd at 14782.

[30] *See* 47 U.S.C. § 549(c).

devices.[31] Tandy contends that allowing cable operators to maintain their monopoly on analog equipment provides an incentive not to introduce digital technology.[32] We find Tandy's argument unpersuasive in light of the digital technological developments of cable operators and other MVPDs. Cable operators have already placed orders for over 200,000 digital security modules in anticipation of consumer demand for digital services.[33] The *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* Fifth Annual Report, (*"Fifth Annual Report"*) noted the activities of cable operators and other MVPDs to develop and deploy advanced technologies in order to deliver additional video programming and other services (e.g., data access, telephony) to their customers.[34] In addition, television broadcast stations are transitioning from analog to digital television broadcasting.[35] We do not believe that it would be in the interest of cable operators to decline to introduce potentially profitable new services, especially in light of the potential for increased competition in the MVPD marketplace and consumer demand for digital services.[36] Contrary to the assertion of Motorola, we do not see our decision to defer application of this rule to analog-only devices as one that favors one technology over another.[37] Rather as explained above, we have decided to defer application of the rule on the basis of practical and legal considerations that recognize the differences between the types of equipment for purposes of advancing the goals of Section 629.

18. Because we are persuaded that deferring the application of our rules to analog devices at this time will actually advance accomplishment of the retail availability objectives of Section 629, we need not discuss in detail several arguments suggesting that application of the separation requirement in the analog context is impermissible. NCTA, TIA, GI, and Ameritech argue that this requirement violates the mandate in Section 629(b) that the Commission not prescribe regulations that would jeopardize the security of MVPD systems because analog delivery of signals presents a substantially greater security risk than digital delivery.[38] NCTA maintains that not only does Section 629(b) prohibit the Commission from prescribing regulations which would jeopardize security, but given the history of theft with analog service,

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[31]Motorola Comments at 2; Tandy Comments at 6.

[32]Tandy Comments at 5.

[33]*See* Status Report of NCTA, et al. (Jan. 7, 1999).

[34]*See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No.98-102, Fifth Annual Report, FCC 98-335 (rel. Dec. 23, 1998) at ¶ 196 (*"Fifth Annual Report")* (noting TCI's employment of an advanced digital compression technique in order to provide more digital services).

[35]*See Advance Television Systems and Their Impact Upon of Existing Television Broadcast Service*, Fifth Report and Order, MM Docket 87-268, 12 FCC Rcd 12809 (1997).

[36]For example, the number of DBS subscribers, a competing digital multichannel video programming service, has grown 43% from June 1997 to June 1998. *Fifth Annual Report* at ¶ 62.

[37]Motorola Comments at 2.

[38]Ameritech Comments at 2; GI Comments at 3; NCTA Petition at 7; TIA Comments at 4.

Section 629(b) also can be read to require the Commission to take affirmative steps to protect against theft of cable service, including the exclusion of analog equipment from the separation requirement.[39] The rules adopted place a high priority on the protection of system security as is required by Section 629(b). No device need not be made available for retail sale when to do so would jeopardize system security and no obligation to separate security and non-security functions applies where that would not be feasible without jeopardizing system security.[40] Thus, NCTA's argument is essentially that analog devices inherently cannot be made in a fashion that will both protect security and permit retail sales. As a technical matter we recognize that analog devices are more dependent than digital devices on physical control over the equipment in question. The difficulties involved were demonstrated in the industry work done in connection with the "decoder interface" device and our proceeding in the *Equipment Compatibility Report and Order*.[41] However, we continue to believe that engineering techniques are available that could be used to separate analog security from the other functions of analog devices.

19. Section 629(d)(1) of the Communications Act, under a general heading entitled "Avoidance of Redundant Regulations," contains the following:

> Determinations made or regulations prescribed by the Commission with respect to commercial availability to consumers of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, before the date of enactment of the Telecommunications Act of 1996 shall fulfill the requirements of this section.[42]

20. Some commenters contend that the Commission's policy decisions with respect to the decoder interface constitute prior decisions under Section 629(d)(1), and thus exempt analog devices from compliance with the commercial availability requirement.[43] Parties argue the Commission's decision in the *Equipment Compatibility Report and Order* to reject proposals to require cable operators to allow consumers to own descrambling equipment and to purchase such equipment from third parties is a determination that the requirements of Section 629 should not be applied to analog equipment.[44]

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[39]NCTA Petition at 8-9.

[40]*See* 47 C.F.R. § 76.1204(d)(2) (obligation to separate security and non-security does not apply where it is not feasible to do so without jeopardizing security); 47 C.F.R. § 76.1209 (commercial availability rules shall not be construed to authorize or justify use of equipment intended for the unauthorized reception of multichannel video programming service).

[41]*Implementation of Section 17 of the Cable Television Consumer Protection and Competitive Act*, Report and Order, 9 FCC Rcd 1981 (1994) ("*Equipment Compatibility Report and Order*").

[42]47 U.S.C. § 549(d)(1).

[43]GI Comments at 2; TIA Petition at 2.

[44]GI Comments at 2; TIA Petition at 2 *citing Equipment Compatibility Report and Order*, 9 FCC Rcd at 1986.

21. We believe these claims misconstrue the relevance of our decisions in the equipment compatibility proceeding regarding commercial availability. Although Section 629(d)(1) precludes the Commission from revisiting some prior policy decisions, the decision cited by petitioners is consistent with the approach taken in the *Navigation Devices Order*. The Commission's decision in the *Equipment Compatibility Report and Order* did not bear on the issue of the separation of security, but rather gave MVPDs exclusive control of their systems' security. The decisions in the *Navigation Devices Order* are congruous with this determination. The *Navigation Devices Order* allows MVPDs to maintain control of system security. The *Order* specifically states that separated security allows individual cable operators to design and operate equipment reflecting their particular security needs.[45] Further, the decision to require separation of security conforms to the statement in the *Equipment Compatibility Report and Order* maintaining that separation of security functions is a means to promote competition in the market for equipment used to receive cable service.[46]

22. In its comments, Echelon argues that the 1996 Amendments to Section 624A limit the Commission's ability to take actions in this proceeding.[47] Section 624A(c)(2)(D) directs the Commission, in implementing the consumer electronics equipment compatibility provisions of the law, "to ensure that any standards or regulations developed . . . do not affect features, functions, protocols, and other product and service options. . . ."[48] In the *Navigation Devices Order*, we concluded that Section 624A does not preclude adoption of the rules because no specific or detailed standards are included in the rules implementing Section 629.[49] We also noted that the amended language of Section 624A, by its terms, applies only to rules required or prescribed by Section 624A, not another statutory section, such as Section 629.[50] Echelon has presented no new evidence that would persuade us to change our earlier decision.

B. Prohibition on MVPD Sale or Lease of Integrated Boxes

23. The *Navigation Devices Order* concluded that MVPDs' continued ability to provide integrated equipment combining both security and non-security functions would likely interfere with the statutory mandate of commercial availability.[51] Section 76.1204(a)(i) prohibits MVPDs from selling or

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[45]*Navigation Devices Order*, 13 FCC Rcd at 14799.

[46]*Equipment Compatibility Report and Order*, 9 FCC Rcd at 1986.

[47]Echelon Reply at 6.

[48]47 U.S.C. § 544a(c)(2)(D).

[49]*Navigation Devices Order*, 13 FCC Rcd at 14804.

[50]*Id.*

[51]*Id.* at 14803.

leasing new integrated equipment after January 1, 2005.[52] Petitioners NCTA, Time Warner and TIA seek reconsideration of this requirement, maintaining that the prohibition is beyond the Commission's legal authority and does not serve the public interest.[53] They argue that the prohibition on the sale of integrated equipment after January 1, 2005 violates the express language of Section 629(a) which states that "regulations shall not prohibit any multichannel video programming distributor from also offering convertor boxes," conveys an express right to provide integrated boxes.[54] GI argues that at the time the 1996 Act was adopted the term convertor boxes was commonly understood by the Commission and Congress to include integrated boxes incorporating both security and non-security features and functions.[55]

24. A number of parties in opposition contend that the restriction on combining security and non-security functions complies with the Communications Act and is within the Commission's statutory authority.[56] Circuit City argues that the authority to adopt rules related to navigation devices is supported by the Commission's broad authority under Sections 2 and 4(i) of the Act.[57] CEMA contends that Section 629(f) does not limit the authority the Commission had in effect before enactment of the 1996 Act, and the Commission's authority over cable system provision of premises equipment is well established.[58]

25. We disagree with the contention that Section 629(a) provides MVPDs with an express right to provide integrated boxes. Further, we do not believe that Section 629(a) implies a mandate that hardwired security could never be regulated for any reason.[59] The directive in Section 629(a) that MVPDs be allowed to offer navigation devices is one of several directives in Section 629. Section 629(a) also directs the Commission to take actions to assure that consumers have the ability to obtain navigation devices from manufacturers, retailers, and other vendors not affiliated with the MVPD. In the *Navigation Devices Order*, we concluded that achievement of this express mandate required prohibition of MVPDs providing security and non-security functionality in a single device.[60] The resulting restriction is one of

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[52]47 C.F.R. §76.1204(a)(1) states, "Commencing on January 1, 2005, no multichannel video programming distributor. . . shall place into service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device."

[53]NCTA Petition at 17; TIA Petition at 5; Time Warner Petition at 3; *see also* Echelon Comments at 20.

[54]47 U.S.C. § 549. *See* Ameritech Comments at 6; GI Comments at 10; NCTA Petition at 19.

[55]GI Petition at 8.

[56]CEMA Comments at 6; Circuit City Comments at 5; ITIC Comments at 5; Tandy Comments at 7.

[57]Circuit City Comments at 6, *citing* 47 U.S.C. §§ 152 & 154(i).

[58]CEMA Comments at 6, *citing* 47 U.S.C. § 543(b)(3).

[59]Circuit City Reply at 5.

[60]*Navigation Devices Order*, 13 FCC Rcd at 14803.

the actions taken under the authority granted in Section 629 in order to assure the commercial availability of navigation devices.

26. Petitioners NCTA and GI make similar arguments regarding the application of Sections 629(b) and 629(d) to the integrated device prohibition as they make regarding the general requirement to separate analog security and non-security functionality.[61] NCTA argues that the prohibition is contrary to the requirement of Section 629(b) that security not be jeopardized because embedded security contained in integrated equipment is a more effective method of protecting intellectual property than having separated security modules.[62] GI maintains that Section 629(d) binds the Commission by its decision in the equipment compatibility ruling, which allowed cable operators to incorporate signal access control functions in multi-function component devices.[63]

27. Section 629(b) does not, in our view, require the Commission to abandon its obligation to ensure commercial availability of navigation devices in any situation that could raise a security concern. Rather, Section 629(b) requires the Commission to adopt regulations that promote commercial availability while protecting system security. The rules adopted to implement Section 629 are consistent with this requirement. Under the rules, MVPDs retain control and ownership of the security equipment for their systems. The *Navigation Devices Order* noted the consensus of several cable operators, as well as two equipment manufacturers, that separation of security from non-security functions in the digital context is possible.[64] Likewise the Commission has acted consistently with its obligations under Section 629(d)(1). The Commission's actions in the equipment compatibility proceeding regarding the functionality of the decoder interface standard were adopted in response to the provisions of Section 624A which required the Commission to adopt regulations to ensure compatibility between cable systems and consumer electronics equipment.[65] The Commission made no decision regarding the contents of security modules attaching to set-top boxes, stating specifically in the *Equipment Compatibility Reconsideration Order* that issues regarding separating security in set-top boxes would be addressed at a later time.[66]

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[61]GI Comments at 12; NCTA Petition at 19-21.

[62]NCTA Petition at 19-20.

[63]GI Comments at 12; NCTA Petition at 19-21. Petitioners cite the clarification made in the *Equipment Compatibility Reconsideration Order* that, at the present time, cable operators could provide multi-function component descramblers that connect cable systems to "cable ready" televisions and VCR through the decoder interface connector without the need for a set-top box. *Implementation of Section 17 of the Cable Television Consumer Protection and Competitive Act*, Memorandum Opinion and Order, 11 FCC Rcd 4121, 4127 (1996) (*"Equipment Compatibility Reconsideration Order"*). CEMA argues that this decision is not a prior decision because it was not made before the date of enactment of the 1996 Act. The Act was signed into law February 8, 1996. The *Equipment Compatibility Reconsideration Order* was adopted on March 22, 1996. CEMA Comments at 9.

[64]*Navigation Devices Order*, 13 FCC Rcd at 14800.

[65]*Equipment Compatibility Reconsideration Order*, 11 FCC Rcd at 4121 n.1.

[66]*Id.*

28. Petitioners also maintain that the ban on integrated devices will not serve the public interest.[67] Petitioners argue that in banning integrated devices after 2005, the Commission has ignored the engineering and economic benefits of product integration.[68] Requiring separation, even when both parts of the device will be packaged, leased, and used as a single piece of equipment, it is argued, will increase costs to consumers due to the requirement of manufacturing two separate devices.[69] Petitioners also claim that continued availability of integrated devices would prevent confusion among consumers who are not technically sophisticated.[70] NCTA argues that as long as consumers are aware of their options, cable operator provision of integrated boxes will not impede the development of a retail market for navigation devices.[71] Some parties contend that preventing consumers from obtaining integrated devices from MVPDs limits consumer choice rather than enhances it.[72] NCTA maintains that because consumer electronics manufacturers intend to incorporate non-security functions into other electronics equipment such as television sets, VCRs and DVD players, it would be inconsistent to prohibit cable systems from providing bundled equipment.[73]

29. Other parties support the phase-out of integrated boxes.[74] Tandy argues that allowing monopolists to continue bundling is not in the public interest.[75] Motorola maintains that unbundling will benefit consumers and petitioner's request would delay, if not defeat the ultimate availability of a competitive marketplace for navigation devices.[76] CEMA disputes that bundling increases efficiency, maintaining that petitioners fail to provide any specific example of how bundling reduces costs.[77] Circuit City argues that making cable operators reliant on the separate security module provides assurances that they will not allow monopolistic equipment suppliers to walk away from promises to support efficient and

[67]NCTA Petition at 18-21; Time Warner Petition at 5.

[68]NCTA Petition at 23; Time Warner Petition at 5; WCA Comments at 6.

[69]TIA Petition at 7.

[70]NCTA Petition at 23; TIA Petition at 5.

[71]NCTA Petition at 25.

[72]Ameritech Comments at 7; WCA Comments at 5.

[73]NCTA Petition at 24.

[74]CEMA Comments at 6; Circuit City Comments at 5; ITIC Comments at 5; Tandy Comments at 7.

[75]CEMA Comments at 11; Tandy Comments at 8.

[76]Motorola Comments at 2.

[77]CEMA Comments at 13.

inexpensive security device development, manufacture and utilization.[78] CEMA contends that the regulatory treatment of cable operators is not comparable to the treatment of consumer electronics manufacturers because cable operators retain monopoly power, whereas consumer equipment manufacturers compete in a vigorously competitive market.[79]

30. We continue to believe that the ban on integrated devices will serve the public interest. In the *Navigation Devices Order,* we stated our belief that competition among equipment manufacturers in the marketplace will lead to increased consumer choice and a corresponding decrease in the cost of equipment.[80] The ban does not impede MVPDs from their current practice of leasing equipment to subscribers, provided the boxes have a severable security component. Consumers also will have the additional opportunity of purchasing their own equipment from sources other than the MVPD. Allowing MVPDs the advantage of being the only entity offering bundled boxes could adversely affect the development of this equipment market. Thus, the prohibition on integrated boxes allows for equal competition in the marketplace. We agree that cost savings in bundled equipment have not been specified and are in any event likely to be offset by the manufacturing savings an open, competitive market offers. For example, the *Navigation Devices Order* notes that the requirement to separate security should lead to lower equipment costs by increasing portability, which increases the market base and facilitates volume production.[81]

31. Regarding petitioner's contention that the unbundling requirement creates consumer confusion, the *Navigation Devices Order* addressed this issue, stating that "[w]e anticipate that subscribers who obtain their boxes from their MVPD will obtain security modules at the same time, and will not notice a functional difference between integrated and non-integrated boxes."[82] We expect that plugging a security module into the back of a navigation device should be no more complicated than connecting a television to a VCR, a printer to a computer, or a phone to an answering machine.

C. Provision of Integrated Equipment Until 2005

32. CEMA in its reconsideration petition, with the support of Circuit City and ITIC in subsequent responsive pleadings, urges the Commission to accelerate implementation of the ban on MVPDs offering integrated navigation devices.[83] CEMA argues that the prohibition should become effective on July 1, 2000, the day that operators are first required to separate out security functions from

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[78]Circuit City Comments at 11; Tandy Comments at 8.

[79]CEMA Comments at 15.

[80]Such a result was achieved when ownership of telephones moved from the network operator to the consumer. *Navigation Devices Order*, 13 FCC Rcd at 14780.

[81]*Id.* at 14793.

[82]*Id.* at 14803.

[83]CEMA Petition at 2; CEMA, Circuit City, ITIC joint *ex parte* filing at 2 (March 4, 1999).

non-security functions in their navigation devices. CEMA also argues that the Commission ignored its precedent in the context of telephone customer premises equipment ("CPE"), where the Commission gave phone carriers only two years to cease the practice of bundling of telecommunications service and CPE.[84] CEMA maintains that allowing MVPDs to provide integrated equipment after July 1, 2000 will impede the competitive availability of navigation devices by providing cable operators time to lock up the market before new manufacturers enter.[85] In opposition, GI argues that accelerating the ban on integrated devices to an earlier date increases the adverse impact of the ban.[86] NCTA argues that the requirement to unbundle telecommunications CPE from service rates has no relevance here.[87]

33. We decline, at this time, to adopt the suggestion to require the phaseout of integrated boxes by an earlier date. In the *Navigation Devices Order*, we explained that a transition period will help to minimize the economic impact of the prohibition on manufacturers and MVPDs by allowing them sufficient time to respond to equipment modifications and a changed market.[88] The *Navigation Devices Order* cited several instances in which the Commission, in other contexts, has provided for the phase-out of equipment for both technical and economic reasons.[89] CEMA's proposal to ban integrated boxes on July 1, 2000 could have an adverse impact on MVPDs who have purchased, but not deployed new integrated boxes in anticipation of consumer demand for digital services. We do not believe that MVPDs will be able to use the transition period to establish a monopoly in the equipment market. The requirement that MVPDs provide separated security devices beginning on July 1, 2000 allows manufacturers to offer equipment in markets to which MVPDs had been able to restrict access. The separated security requirement also ensures that manufacturers will be able to offer consumers equipment choices during the phase-out. In addition, as we made clear in the original Order, in the year 2000, once non-integrated equipment is available, the Commission will assess the state of the market to determine whether the designated time frame is appropriate and will review the mechanics of the phase-out of integrated boxes.[90] In the course of that assessment, we will seriously consider whether acceleration of the phase-out date would be appropriate. In particular, if the commercial market in navigation devices is not developing as expected, one option that we would review would be moving the date from the year 2005 to 2003. Finally, we note that although the length of the current transition period is longer than the transition period allowed following the decision to require that telephone CPE be provided on an untariffied unbundled basis, the underlying circumstances are distinguishable. The telephone CPE decision

[84]CEMA Petition at 9, *citing Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384, 447-49 (1980).

[85]CEMA Petition at 5.

[86]GI Comments at 17.

[87]NCTA Comments at 12.

[88]*Navigation Devices Order*, 13 FCC Rcd at 14803.

[89]*Id. See also* nn.167, 168.

[90]*Id.* at 14777, 14781-2.

required changes in existing tariffs, accounting practices, and in the organization of entities providing services and equipment, but did not entail redesign of the underlying equipment used by subscribers. In the context of navigation devices, our decision requires equipment to be redesigned because of new technical requirements after the January 1, 2005 deadline.

D. Devices in Inventory

34. In the *Navigation Devices Order*, we adopted new Section 76.1204(a)(1) which states "Commencing on January 1, 2005, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device."[91] Petitioners seek clarification of how this rule applies to navigation devices that are in inventory on January 1, 2005, and whether the prohibition applies to navigation devices that are in consumer use on January 1, 2005 and are returned to inventory at a later date.[92] NCTA interprets Section 76.1204(a) as allowing operators to continue to redeploy equipment that had been placed in service before January 1, 2005 because such boxes are not "new" equipment.[93] WCA and Ameritech argue that MVPDs should have the ability to deploy (or redeploy) equipment in inventory or in use prior to January 1, 2005 to prevent MVPDs from having to bear the cost of "stranded" inventory prior to the expiration of the useful life of such inventory.[94] CEMA disputes these interpretations of Section 76.1204(a), arguing that the ability to deploy bundled boxes in inventory to new customers for an indefinite period of time would make the January 1, 2005 deadline meaningless by allowing operators the ability to stockpile devices prior to the deadline.[95] CEMA argues that the Commission has provided MVPDs sufficient advanced notice to adjust their purchasing plans to accommodate their regulatory obligations.[96]

35. Section 76.1204 is not intended to allow MVPDs to stockpile integrated equipment nor is it intended to render equipment obsolete that has already been manufactured and deployed and still has a useful life. The January 1, 2005 date was chosen to allow an MVPD to recover its investment in subscriber equipment that has been placed into service prior to January 1, 2005 and a reasonable period of time to transition its equipment inventory to unbundled equipment. MVPDs' transition to boxes requiring a separate security module can begin in July 2000 once the digital security module is made available. We recognize that the unpredictable pace at which the competitive market will develop makes the prospective inventory requirements of MVPDs difficult to estimate. MVPDs should use this transition period to draw down their inventories of integrated devices. MVPDs should not use this transition period

[91] *See* 47 C.F.R. § 76.1204(a)(1).

[92] NCTA Petition at 17; WCA Petition at 4; *see also* Ameritech Comments at 7.

[93] NCTA Comments at 4.

[94] Ameritech Comments at 8; WCA Petition at 4.

[95] CEMA Comments at 16.

[96] *Id.* at 17.

to increase inventories of integrated devices once separate security modules are widely available. As we stated in the *Navigation Devices Order*, in the year 2000, once separate security modules are available, we will assess whether the continued deployment by MVPDs of integrated boxes is impeding commercial availability.[97]

E. Application of Rules to DBS Equipment

36. In the *Navigation Devices Order*, we concluded that differences in the marketplace for DBS equipment provided justification for not applying the rule requiring separation of security functions to devices used to receive DBS service.[98] Time Warner asks for reconsideration of this determination.[99] Time Warner argues that Section 629 does not grant the Commission authority to pick and choose from among various types of MVPDs in applying standards set pursuant to Section 629.[100] Time Warner argues that DBS should be deemed to have met the commercial availability and security separation requirement already rather than excluded from the unbundling requirement.[101] In doing so the Commission is urged to recognize, as a general matter, that devices using a "smart card" as part of the security system could satisfy the separation requirement even if some conditional access circuitry remained in the commercially available portion of the device. Several parties oppose Time Warner's petition, contending that the decision not to apply the unbundling requirement to DBS is distinguishable because navigation devices for that service are commercially available.[102] DirecTV and PrimeStar argue that it is not necessary to apply the unbundling requirement to an MVPD that already meets the goals that the requirement is designed to achieve.[103]

37. We believe that legitimate distinctions exist between DBS equipment and that used in connection with other MVPDs and decline to depart from our approach in the *Navigation Devices Order*. We reiterate our view that because DBS devices are widely available to consumers at retail from multiple vendors, as compared to equipment for other MVPD services, particularly cable operators, there is justification for not applying the rule requiring separation of security functions to DBS services.[104] Time Warner provides no basis to support its contention that Section 629(a) requires uniform regulations across all multichannel video service platforms. The statute mandates the outcome of competitive availability,

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[97] *Navigation Devices Order*, 13 FCC Rcd at 14803.

[98] *Id.* at 14800.

[99] Time Warner Petition at 15.

[100] *Id.* at 16.

[101] *Id.* at 15.

[102] CEMA Comments at 20; Circuit City Comments at 16; DirecTV Comments at 2; PrimeStar Comments at 2.

[103] DirecTV Comments at 5; PrimeStar Comments at 2.

[104] *Navigation Devices Order*, 13 FCC Rcd at 14800.

not uniform means to achieve this result. We similarly are not persuaded that because consumers have choices for DBS equipment, this service can be excluded from all regulations adopted in this proceeding. In the *Navigation Devices Order*, we fully considered whether to exclude DBS from the commercial availability regulations and concluded we did not have authority to do so because the standards of the "sunset" criteria in Section 629(e) have not been met.[105] Specifically, we concluded that the MVPD market for all services is not fully competitive.[106] Time Warner presents neither new arguments nor evidence to persuade us to change our earlier conclusions.

F. CableLabs Standards Process

38. The rules adopted in the *Navigation Devices Order* provide for a separation of security and non-security functions in navigation devices. To connect these two devices, the rules provide that the "conditional access function equipment" provided by MVPDs "be designed to connect to and function with other navigation devices available through the use of a commonly used interface or an interface that conforms to appropriate technical standards promulgated by a national standards organization."[107] With respect to the cable television, we relied on representations from the cable television industry that the CableLab's OpenCable initiative, an undertaking of major segments of the industry, would lead to the standardization, design, and production of digital security modules, permitting the design, production and distribution of navigation devices for retail sale and would provide a "commonly used interface" as provided for in Section 76.1204(b).[108]

39. In its petition for reconsideration, CEMA asks the Commission to direct the Cable-Consumer Electronics Compatibility Advisory Group (C3AG) rather than CableLabs to develop standards for the separation of security and non-security functions.[109] CEMA argues that CableLabs is ill-suited for

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[105]Section 629(e) provides when the regulations adopted pursuant to Section 629 shall terminate. The provision states:

> The regulations adopted under this section shall cease to apply when the Commission determines that--(1) the market for the multichannel video programming distributors is fully competitive; (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and (3) elimination of the regulations would promote competition and the public interest.

47 U.S.C. § 549(e).

[106]*Navigation Devices Order*, 13 FCC Rcd at 14819.

[107]*See* 47 C.F.R. § 76.1204(b).

[108]*Navigation Devices Order*, 13 FCC Rcd at 14806.

[109]CEMA Petition at 11; *see also* MSTV Comments at 3.

the task because it is not a standards-setting body, and does not represent all affected industries.[110] Parties express concern that the standards developed in the OpenCable project will only reflect the work and interests of the cable industry and its favored suppliers, will not reflect the views of other industry participants, and will not be optimized for the public interest.[111] Ameritech and WCA contend that certain MVPDs have been denied membership in CableLabs.[112] They ask that the Commission make clear that membership in CableLabs and participation in the standards-setting process should be open to all MVPDs, and that deliberate exclusion of alternate MVPDs from the private standards-setting process will not be tolerated.[113]

40. In opposition, parties support the OpenCable initiative and assert it is the proper forum for developing navigation device standards.[114] Circuit City maintains that it is important to assign responsibility for the success of the interface to CableLabs so that the cable industry will be held accountable if the effort does not meet all of its goals.[115] Circuit City argues that if a multi-industry organization such as C3AG were given responsibility, then there would not be accountability.[116] NCTA maintains that the cable operators and manufacturers that vouched for achieving the July 2000 date for availability of digital security modules would not have done so without responsibility for the OpenCable initiative.[117]

41. We continue to believe that the CableLabs/OpenCable efforts will lead to a useable standard for the separation of security and non-security functions by July 1, 2000 and decline to assign responsibility for this development to another group such as C3AG.[118] In the *Navigation Devices Order*, we ordered the eight MSOs involved in the OpenCable project, whose statements concerning their commitments to that project were included in the record of this proceeding, to file semiannual progress

[110]CEMA Petition at 11.

[111]CEMA Petition at 11; MSTV Comments at 6.

[112]Ameritech Comments at 9; WCA Petition at 12

[113]Ameritech Comments at 9; WCA Petition at 12

[114]Circuit City Comments at 19; NCTA Comments at 17.

[115]Circuit City Comments at 20.

[116]*Id.*

[117]NCTA Comments at 17.

[118]We note that OpenCable is a voluntary standards development underwritten by several cable operators. These operators committed to the Commission that OpenCable would result in standards that allow equipment manufacturers to make equipment that can operate with their systems. *See Navigation Devices Order*, 13 FCC Rcd at 14807. We are not aware of a similar offer to develop standards from C3AG.

reports.[119] The first report, filed on January 7, 1999, states that OpenCable is ahead of schedule with respect to the development of specifications for the digital security module and for the digital security module interface.[120] Orders for over 200,000 digital security modules supporting the OpenCable standard have been placed.[121] Switching the initiative to another group, such as C3AG, at this time would lead to an unnecessary delay in the development of the necessary interfaces.[122] Several milestones in the OpenCable process have occurred that allowed entities outside of the cable television industry input into the design of the interface specifications.[123] No party has brought forth evidence that their input is not being accepted or considered. The status report states that in December 1998, the digital security module interface specification was submitted to the Society of Cable Television Engineers ("SCTE"), an accredited standards organization whose members include equipment manufacturers and other members of the telecommunications community.[124] The specification has been reviewed and adopted by SCTE as a U.S. cable standard.[125] We expect that the standards developed through the OpenCable process will be sufficient (e.g., specific enough) for manufacturers and designers unaffiliated with MVPDs to build devices that can be sold through national retail distribution. We will continue to monitor the OpenCable project to ensure that the standards are specific enough and that a wide range of interests continue to have an opportunity to participate in the project.

G. Application of Section 629 to "Open Video System" Equipment

42. Section 76.1200(a) of the Commission's rules excludes open video systems from the definition of multichannel video programming systems with respect to application of the commercial availability regulations.[126] This rule was based on our conclusion in the *Navigation Devices Order* that Section 653(c)(1) of the Act states that any section of Part III of Title VI of the Communications Act

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[119]*Navigation Devices Order*, 13 FCC Rcd at 14808.

[120]*See* Status Report of NCTA, et al. (Jan. 7, 1999) ("Status Report").

[121]*Id.* at 5.

[122]NCTA Comments at 17.

[123]Companies signing OpenCable's nondisclosure agreement are provided the opportunity to review and provide input to all draft specifications. OpenCable *ex parte* presentation (Jan. 5, 1999).

[124]Status Report at 4.

[125]*Id.*

[126]47 C.F.R. § 76.1200(a) defines a multichannel video programming system as "A distribution system that makes available for purchase, by customers or subscribers, multiple channels of video programming other than an open video system as defined by § 76.1500(a). Such systems include, but are not limited to, cable television systems, multichannel multipoint distribution systems, direct broadcast satellite systems, other systems for providing direct-to-home multichannel video programming via satellite, and satellite master antenna systems."

which applies to cable operators shall not apply to open video system operators.[127] Part III of Title VI contains Sections 621 through 629 of the Act. Time Warner seeks reconsideration of the decision not to apply the requirements of Section 629 to open video system operators.[128] Time Warner argues that Section 653(c)(1) is designed to exempt open video system operators from regulations as a cable system, but does not exempt open video systems from Section 629, which applies to all MVPDs. Time Warner adds no new information or arguments that would persuade us to alter our decision on this issue. As we noted in the *Navigation Devices Order*, Section 653 makes no distinction regarding which rules apply to open video systems based on whether a rule applies to all MVPDs or only applies to cable operators.[129] In addition, Section 653 states which sections in Part III apply to operators of open video systems, and Section 629 is not listed.[130] Thus, we believe that Congress clearly excluded open video system operators from Section 629.

H. Wireless Cable Antennas and Downconverters

43. In the *Navigation Devices Order*, we mandated that subscribers have a right to attach any compatible navigation device to an MVPD system, as long as the attached equipment does not cause harmful interference, injury to the system, or compromise legitimate access control mechanisms.[131]

44. The Wireless Cable Association (WCA) argues that the rule, as written, would allow cable subscribers to attach any class of equipment, including network equipment, anywhere on a MVPD network. The WCA seeks a determination that wireless cable antennas and downconverters are excluded from the definition of navigation devices essentially because this equipment is located outside the subscriber's premises.[132] WCA requests that the Commission establish a demarcation point for subscriber attachment of navigation devices, asserting that a demarcation point is needed to clarify where the MVPD network ends and the subscriber's right to attach begins as is done in the context of inside wiring.[133]

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[127]*Navigation Devices Order*, 13 FCC Rcd at 14784.

[128]Time Warner Petition at 15; *see also* Circuit City Comments at 19.

[129]*Navigation Devices Order*, 13 FCC Rcd at 14784.

[130]*See* 47 U.S.C. § 573(c).

[131]47 C.F.R. § 76.1201.

[132]*See* WCA Petition at 8-9 stating that "a wireless cable antenna is an *outdoor* device that directly receives a wireless cable operator's 2 GHz microwave signal. Once received, the signal is paçed to the downconverter (which is either integrated into the antenna of attached directly to it), which converts the wireless cable operator's 2 GHz frequencies to viewable frequencies. . .When wireless cable serves an MDU, each resident *shares* a common antenna/downconverter installed on the roof of the building."

[133]WCA Petition at 10, *citing* 47 C.F.R. § 76.5(mm)(2).

Circuit City concurs, and contends these devices fall outside the definition because they are part of the wireless cable provider's network.[134]

45. We do not agree that equipment used to access wireless cable service can be excluded from the definition of navigation devices in all circumstances or that we should adopt a separate demarcation point for attachment of navigation devices as suggested by WCA. WCA suggests that the test of whether a device is part of the MVPD network or a separate attachment to the network is whether the device is inside or outside of the subscribers residence. Where the "network" involved is a one way radio frequency communications path and the receivers are not licensed, we see no inherent reasons why reception equipment at a subscriber residence should not be treated as "navigation equipment." In the *Navigation Devices Order*, we noted that the language of Section 629 indicates that its reach is expansive and that no category of equipment used to access multichannel video programming or services offered over such systems is automatically exempt from its coverage.[135] Some equipment that is outside of residences, such as DBS receiving equipment, was explicitly discussed as being covered by the rules and has historically been commercially available through retail outlets without difficulty.[136] WCA states that the placement of antennas and downconverters used by MDS systems are often unique to a particular system or a particular receiver location.[137] However, without specific information regarding the variety of different equipment configurations that may be deployed by MDS operators, it is not possible to evaluate fully whether wireless cable antennas and downconverters should be excluded from the definition of navigation devices in every instance.

I. Permitted Functions of Separated Conditional Access Equipment

46. Time Warner seeks clarification of Section 76.1204(a), which states "A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices."[138] Time Warner asserts that MVPDs should be given the ability to provide security modules that also contain circuitry allowing the customer to receive new functionalities and features which are supported as part of the MVPDs' service and which may not be supported by a commercially available device.[139] Time Warner argues that this approach would permit MVPDs to offer additional functions and features through the component security module as new services are offered. Time Warner also seeks clarification that a navigation device that supports all services and functions offered over a particular system is not required

[134]Circuit City Comments at 18.

[135]*Navigation Devices Order*, 13 FCC Rcd at 14784.

[136]*Id.* at 14800.

[137]WCA Comments at 9 ("The circumstances under which a given antenna/downconverter combination will work necessarily changes on a case-by-case basis.")

[138]47 C.F.R. § 76.1204(a)(1).

[139]Time Warner Petition at 5.

to support all services and features provided over other systems operated by that operator or by other operators. Circuit City contends that Time Warner's argument regarding the contents of the security module evades the Commission's key determination in this proceeding that security functions must be separated from the other functions of navigation devices. Circuit City maintains that ancillary functions should only be included in the separated security device when the additional circuitry is closely related to the security function of the module, and enhances, rather than assumes, a function of the host device, and is not efficiently available in the host.[140]

47. We clarify that Section 76.1204(a) regarding the components of the security module allows for inclusion of circuitry used for conditional access functions. We agree with Circuit City that, were the security modules to contain features and functions not related to security, commercial availability of navigation devices could be impaired.[141] In general, we believe the formulation of what is permitted provided by Circuit City in its comments as referenced above provides a useful focus for issues that may arise in this area in the future in a specific context. Time Warner has provided only a limited description of the functions that it believes might appropriately be provided in association with the security device. In particular how functions such as additional memory might be used, as it suggests, to assure the "backwards compatibility of both network components and commercially available navigation aids" is not explained fully.[142] In light of the limited information provided we are not prepared to attempt to resolve this issue further here.

J. Portability

48. Time Warner also seeks clarification that the phrase "function with other navigation devices" used in Section 76.1204(b) does not mandate portability or interoperability.[143] The Commission did not mandate that navigation devices be portable or interoperable. In this regard, Section 76.1204(b) does not address portability or interoperability. Rather, it requires that MVPDs provide security modules that connect to and function with navigation devices through the use of a commonly used interface or an interface that conforms to appropriate technical standards promulgated by a national standards

[140]Circuit City Comments at 14.

[141]In the *Navigation Devices Order*, we found that separated security would allow individual cable operators to "design and operate equipment reflecting their security needs, while still facilitating portability and the development of the consumer equipment market . . . will also facilitate the commercial availability of navigation devices by allowing manufacturers to provide a diverse array of equipment." *Navigation Devices Order*, 13 FCC Rcd at 14799-800. We continue to believe that separation of security functions will facilitate the commercial availability of navigation devices.

[142]*Id.*

[143]Time Warner Petition at 9, *citing* 47 C.F.R § 76.1204(b), which states "Conditional access function equipment made available pursuant to subsection (a)(1) of this section shall be designed to connect to and function with other navigation devices available through the use of a commonly used interface or an interface that conforms to appropriate technical standards promulgated by a national standards organization."

organization.[144] In the *Navigation Devices Order*, we stated that the Commission has not adopted specific rules that mandate portability or interoperability, although we noted that portability and interoperability increase the likelihood of subscribers obtaining navigation equipment by purchasing it.[145] The Commission further stated that "[w]e are relying on the relevant industries to make progress towards achieving portability and interoperability, and in other areas. If they do not, or if the effort is unduly delayed, it will be necessary for the Commission to consider whether further action is necessary."[146] In the cable context, we understand that the specifications being developed as part of the CableLabs\OpenCable project should enable a subscriber that purchases a navigation device manufactured according to the CableLabs specifications to be able to use that device on any MSO's system anywhere in the United States that operates consistent with those specifications.

K. Interface Information

49. Section 76.1205 states "Technical Information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems shall be provided by the system operator upon request in a timely manner."[147] Time Warner seeks clarification regarding the type of technical information that must be disclosed by a system operator pursuant to Section 76.1205. Time Warner maintains that the type of interface parameters that are appropriate for disclosure are those included in the OpenCable initiative, but not proprietary information concerning signal security or other types of competitively sensitive information regarding the content of MVPD services.[148] We clarify that Section 76.1205 requires the release of information sufficient to allow for interaction between the multichannel video programming system and the navigation device through the separated security device. As to specifics of the information, as we noted in the *Navigation Devices Order*, Section 76.1205 requires the release of meaningful information to allow manufacturers and retailers the ability to provide compatible equipment.[149] In the cable context, we believe CableLabs and the ensuing standardization processes will develop interface specifications that help define the required information. If problems are brought to our attention we will address this subject in our review in 2000.

L. Attachment of Equipment

50. Section 76.1203 allows MVPDs to restrict the attachment of equipment to or use with their systems where electronic or physical harm would be caused by the attachment or operation of such

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[144] 47 C.F.R. § 76.1204.

[145] *Navigation Devices Order*, 13 FCC Rcd at 14826.

[146] *Id.*

[147] 47 C.F.R. § 76.1205.

[148] Time Warner Petition at 11.

[149] *Navigation Devices Order*, 13 FCC Rcd at 14822.

equipment.[150] Time Warner asks the Commission to declare that MVPDs are immune from liability to any third party where customer attachment of their own equipment causes harm to the network or to another user's equipment, or where such equipment interferes with the transmission or reception of the authorized services of another. Time Warner argues that MVPDs will not be in a position to disconnect offending equipment until after the harm has occurred, and thus must be insulated from liability to customers resulting from harmful attachments which they are powerless to prevent.[151]

51. We disagree with Time Warner that MVPDs are powerless to prevent harmful attachments to their networks. In the *Navigation Devices Order*, we recognized the importance of ensuring that a navigation device does not cause harm to the network to which it is attached.[152] Section 76.1203 contains provisions allowing MVPDs to protect network facilities.[153] Additionally, we stated that, if necessary, we would consider proposals for additional procedures to protect network facilities.[154] Time Warner has not, however, presented a proposal to protect network facilities based on experience or technical attributes but rather asks for blanket immunity from liability. With no evidence that the current protections are or will be insufficient, we decline to adopt Time Warner's proposal.

M. Theft of Service in the Context of Copy Protection Issues

52. Section 76.1209 states that "Nothing in this subpart shall be construed to authorize or justify any use, manufacture, or importation of equipment that would violate 47 U.S.C. § 553 or any other provision of law intended to preclude the unauthorized reception of multichannel video programming service."[155] Time Warner seeks clarification of the term "theft of service" as that term is referenced in Section 76.1209. It argues that the term should include any device that can be used to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders.[156] In

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[150]47 C.F.R. § 76.1203 states "A multichannel video programming distributor may restrict the attachment or use of navigation devices with its system in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices that assist or are intended or designed to assist in the unauthorized receipt of service. . . ."

[151]Time Warner Petition at 13.

[152]*Navigation Devices Order*, 13 FCC Rcd at 14789.

[153]Section 76.1203 allows MVPDs to restrict attachment to their systems of equipment that would cause electronic or physical harm. MVPD must publish and provide to subscribers standards and descriptions of devices that may not be used with, or attached to, its system because of the potential for harm. 47 C.F.R. § 76.1203.

[154]*Navigation Devices Order*, 13 FCC Rcd at 14790.

[155]47 C.F.R. § 76.1209.

[156]Time Warner Petition at 14.

opposition, parties argue that Time Warner's proposal is beyond the scope of this proceeding, requiring the FCC to police the unrelated issue of copy control.[157]

53. To the extent Time Warner is asking us to redefine more expansively what types of "use, manufacture, or importation" of equipment would violate Section 553 and other related provisions of the law, we believe that request is beyond the present scope and record of this proceeding.[158] Section 629 requires that the Commission not impede the legal rights of an MVPD to prevent theft of service.[159] Section 633 (47 U.S.C. §553) of the Act and other parallel laws of this type provide penalties for intercepting or receiving or assisting in intercepting or receiving any communications service offered over a cable system unless specifically authorized to do so.[160] Our intent is that Section 76.1209 be interpreted in a manner consistent with these prohibitions. We express no opinion here as to the scope of Section 633 or related theft of service provisions in the copy protection context.

N. "Cable Ready" Labeling

54. Time Warner asks that the Commission prohibit any digital navigation device from being labeled "cable ready" or "cable compatible" which does not meet OpenCable standards, in order to prevent consumer confusion.[161] Commenters seek denial of Time Warner's request, maintaining that it creates unnecessary regulation.[162] Circuit City argues that the market will govern the behavior of manufacturers interested in providing navigation devices.[163] We agree that market forces, assisted by labeling and consumer information requirements may be an effective means of ensuring equipment quality and avoiding consumer confusion. Section 624A(c)(2)(A) of the Communications Act addresses issues regarding identification of devices as "cable ready" and "cable compatible" relating to technical requirements for televisions and VCRs.[164] We are not, however, prepared at this time to incorporate the OpenCable specifications into this definition.[165]

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[157]Circuit City Comments at 23; CIG Comments at 3.

[158]Circuit City Comments at 23; CIG Comments at 3.

[159]47 U.S.C. § 549(b).

[160]*See* 47 U.S.C. § 553(a).

[161]Time Warner Petition at 10.

[162]Circuit City Comments at 22; MSTV Comments at 6.

[163]Circuit City Comments at 22.

[164]*See* 47 U.S.C. § 544a(c)(2)(A).

[165]Representatives of the consumer electronics and cable industries are working together to identify the components of a cable ready digital television. *See* Letter from Gary Shapiro, President, CEMA and Decker Anstrom, President and CEO, NCTA to William Kennard (April 16, 1999).

55. We note that OpenCable is a trademarked brand that allows CableLabs the ability to police the use of its brand to ensure that only equipment bearing the OpenCable logo has been certified as meeting the OpenCable specifications. We do not find broader requirements regarding equipment labeling to be appropriate at this stage of the market development of these devices. We recognize, however, that how these devices are labeled may in the future become an important element in whether the market for navigation devices functions in the open and competitive fashion that is intended by Section 629.

O. Equipment Availability Restrictions

56. In the *Navigation Devices Order*, we adopted Section 76.1202, which prohibits MVPDs from taking certain actions in order to prevent equipment from being made available to subscribers from unaffiliated retailers, manufacturers, or other vendors.[166] We also adopted Section 76.1204(c), which prohibits MVPDs from precluding the addition of extra features and functions in commercially available navigation devices.[167] These rules were enacted to ensure that equipment choices were made available to consumers. Time Warner maintains that Sections 76.1202 and 76.1204(c) should also be directed to consumer electronics manufacturers and retailers because these entities are in a better position than an MVPD to thwart the commercial availability of navigation devices and determine what features and functions will be offered as part of commercially available navigation devices. Time Warner argues that it is unfair to single out MVPDs for prohibitions and regulatory burdens.[168] In opposition, Circuit City and GI argue that there is no basis in the record to conclude that equipment manufacturers or retailers have any incentive to take steps to sell equipment that will not allow the delivery of MVPD services.[169] GI also argues that Time Warner has not identified a viable jurisdictional basis on which the Commission could adopt rules which directly regulate the commercial activities of equipment manufacturers.[170]

57. We are not persuaded at this time that Sections 76.1202 and 76.1204(c) should be applied to consumer electronics manufacturers and retailers. We do not believe it is necessary to take regulatory

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[166]"No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to § 76.1209." 47 C.F.R. § 76.1202.

[167]47 C.F.R. § 76.1204(c) state "No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service."

[168]Time Warner request that the rules should be rewritten to include a provision which "prohibits any navigation device manufacturer from taking any action or using any contract, agreement, patent right, intellectual property right to prevent or hinder the manufacturer or distribution of navigation devices that operate to receive all services and features offered by MVPD systems." Time Warner Petition at 11.

[169]Circuit City Comments at 22; GI Comments at 20.

[170]GI Comments at 20.

action which dictates the functionality of this equipment. To the contrary, we believe denying equipment manufacturers flexibility in their equipment design would discourage innovation in equipment and services. Manufacturers have stated that they are actively working to design, manufacture and sell digital cable set-top boxes to a variety of customers.[171] GI indicates interested parties are engaged in a significant level of voluntary licensing undertaken in response to consumer demand and other market forces.[172] Given these developments, we decline to impose the regulatory requirements requested by Time Warner.

IV. PROCEDURAL MATTERS

58. Supplemental Final Regulatory Flexibility Analysis. A Supplemental Final Regulatory Flexibility Analysis, required by Section 603 of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), is contained in Appendix C.

59. Paperwork Reduction Act of 1995 Analysis. The requirements adopted in this Order on Reconsideration have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified information collection requirements on the public.

V. ORDERING CLAUSES

60. IT IS ORDERED that the Petitions for Reconsideration filed by the parties listed in Appendix B ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DENIED.

61. IT IS FURTHER ORDERED that, pursuant to authority found in Section 4(i), 303(r) and 629 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 303(r) and 549, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix A.

62. IT IS FURTHER ORDERED that the rules as amended in Appendix A shall become effective thirty days after publication in the Federal Register.

[171] *See* Matsushita Electric Corporation of America *ex parte* presentation (Dec. 15, 1998).

[172] GI Comments at 23.

63. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division shall send a copy of this *Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[173]

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[173]Pub. L. No. 96-354, 94 Stat.1164, 5 U.S.C. §§ 601 *et seq.* (1981).

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 is amended to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1204 is amended by adding paragraph (f) to read as follows:

* * * * *

(f) Subsections (a)(1), (b), and (c) shall not apply to the provision of any navigation device that:

(1) employs conditional access mechanisms only to access analog video programming;

(2) is capable only of providing access to analog video programming offered over a multichannel video programming distribution system; and

(3) does not provide access to any digital transmission of multichannel video programming or any other digital service through any receiving, decoding, conditional access, or other function, including any conversion of digital programming or service to an analog format.

APPENDIX B

LIST OF SUBMISSIONS

PETITIONS FOR RECONSIDERATION
Consumer Electronics Manufacturers Association (CEMA)
National Cable Television Association (NCTA)
Telecommunication Industry Association (TIA)
Time Warner Entertainment Company L.P. (TW)
Wireless Cable Association International, Inc. (WCA)

OPPOSITIONS TO PETITIONS FOR RECONSIDERATION
Ameritech New Media, Inc. (Ameritech)
Association for Maximum Service Television, Inc. (MSTV)
Circuit City Stores, Inc. (Circuit City)
Computer Industry Group (CIG)
Consumer Electronics Manufactures Association (CEMA)
DIRECTV, Inc. (DirecTV)
Echelon Corporation (Echelon)
General Instruments Corporation (GI)
Information Technology Industry Counsel (ITIC)
Motorola, Inc. (Motorola)
National Cable Television Association (NCTA)
PrimeStar, Inc. (PrimeStar)
Tandy Corporation (Tandy)
Wireless Cable Association International, Inc. (WCA)

REPLIES TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION
Circuit City Stores, Inc. (Circuit City)
Consumer Electronics Manufactures Association (CEMA)
Echelon Corporation (Echelon)
National Cable Television Association (NCTA)

APPENDIX C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the Notice of Proposed Rule Making ("*NPRM*") in this proceeding.[2] The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Based on the comments in response to the *NPRM*, the Commission included a Final Regulatory Flexibility Analysis ("FRFA") in the *Navigation Devices Order*.[3] While no petitioners seeking reconsideration of the *Navigation Devices Order* raised issues directly related to the FRFA, the Commission is amending the rules in a manner that may affect small entities. Accordingly, this Supplemental Regulatory Flexibility Analysis ("Supplemental FRFA") addresses those amendments and conforms to the RFA.[4]

A. Need for Action and Objectives of the Rules

The 1996 Act added a new Section 629 to the Communications Act of 1934, as amended, that requires the Commission to develop rules to assure competitive availability of navigation devices used in conjunction with multichannel video programming distributors ("MVPD").[5] The statutory objective of Section 629 is assure that navigation devices used by consumers to access a particular MVPD's programming are available to consumers from manufactures, retailers and other vendors not affiliated with that MVPD. The Commission adopted the *Navigation Devices Order* in this proceeding on June 11, 1998, promulgating rules to implement this mandate. The current *Order on Reconsideration* clarifies and refines these rules.

B. Summary of Significant Issues Regarding FRFA Raised in Petitions for Reconsideration

No parties address the FRFA in their petitions for reconsideration, or any subsequent filings.

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[1]*See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq*,. has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[2]*Implementation of Section 304 of the Telecommunications Act of 1996 - Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Notice of Proposed Rule Making*, 12 FCC Rcd 5639, Appendix A (1997) ("*NPRM*").

[3]*Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report and Order*, 13 FCC Rcd 14775, Appendix C (1998) ("*Navigation Devices Order*").

[4]*See* 5 U.S.C. § 604.

[5]47 U.S.C. § 549.

C. *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules here adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[7] Under the Small Business Act, a small business concern is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the SBA.[8]

As noted, a FRFA was incorporated into the *Navigation Devices Order*. In that analysis, the Commission described in detail the various small business entities that may be affected by these rules.[9] Those entities consist of cable systems, multipoint multichannel distribution systems, direct broadcast satellites, home satellite dish, satellite master antenna television, local multipoint distribution systems, small manufacturers, electronic equipment manufacturers, computer manufacturers, and small retailers. In this present *Order on Reconsideration*, we address petitions for reconsideration filed in response to the *Navigation Devices Order*. In this Supplemental FRFA, we incorporate by reference the description and estimate of the number of small entities from the FRFA in this proceeding.[10]

D. *Description of Reporting, Recordkeeping and Other Compliance Requirements*

The rules adopted in the *Navigation Devices Order* require MVPDs to make available upon request technical information concerning interface parameters. The Commission believes, however, that this requirement would not necessitate any additional professional, engineering, or customer service skills beyond those already utilized in the ordinary course of business by MVPDs. The rules adopted on reconsideration do not affect this requirement.

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[6] 5 U.S.C. § 601(6).

[7] 5 U.S.C. § 601(3) (1980) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

[8] *Small Business Act*, 15 U.S.C. § 632.

[9] *Report and Order*, 13 FCC Rcd at 14836-41.

[10] *See* "Description and Estimate of the Number of Small Entities to Which Rules Apply," *Report and Order*, 13 FCC Rcd at 14836-41.

E. Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered

In the *Navigation Devices Order*, we stated our belief that our rules, implemented to assure commercial availability of navigation devices, would have the result of opening up to small retailers the market to sell or lease navigation devices to MVPD subscribers.[11] Our rules also consider situations and offer relief where the commercial availability of navigation devices performing conditional access functions could adversely impact an MVPD. An MVPD is not subject to the rules requiring the commercial availability of navigation devices if: (1) it is not reasonably feasible to separate conditional access functions from other functions; or (2) it is not reasonably feasible to prevent the unauthorized reception of service by subscribers using navigation devices obtained from other sources. In the *Order on Reconsideration*, an additional subpart of a rule is adopted to defer the requirement that an MVPD offer equipment that incorporates only the conditional access functions of device if a navigation device (1) employs conditional access mechanisms only to access analog video programming; (2) is capable only of providing access to analog video programming offered over a multichannel video programming distribution system; and (3) does not provide access to any digital transmission of multichannel video programming or any other digital service through any receiving, decoding, conditional access, or other function, including any conversion of digital programming or service to an analog format.[12] The deferral of analog boxes at this time is to allow the market participants to focus on digital devices.

F. Report to Congress

The Commission will send a copy of the *Order on Reconsideration*, including this Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[13] In addition, the Commission will send a copy of this *Order on Reconsideration*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order on Reconsideration* and this Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[14]

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[11] *Report and Order*, 13 FCC Rcd at 14842.

[12] *See* 47 C.F.R. § 76.1204.

[13] 5 U.S.C. § 801(a)(1)(A).

[14] *See* 5 U.S.C. § 604(b).

Separate Statement
of
Commissioner Susan Ness

Re: Commercial Availability of Navigation Devices Order on Reconsideration

Since our Report and Order just eleven months ago, "set top boxes" have become Page One news. Today, in ruling on five petitions for reconsideration, the Commission has again recognized how important navigation devices will be in the digital age. Digital set top devices are likely to be the gateway between digital bitstreams and new applications that may reside in the intelligent appliances of the future. These devices not only will control television service, but are likely to be the customer's gateway to the Internet and the world of electronic commerce. Thus, the directive of Section 629 of the Communications Act that our rules enable the commercial availability of these devices has potential consequences well beyond the provision of multichannel video.

I write separately to highlight my concern over a potential loophole that remains. As of January 1, 2005, our rule prohibits MVPDs from placing in service new navigation devices that have security integrated with other features. But our rule apparently would allow an MVPD to stockpile integrated devices even after separated security modules become widely available, and to deploy unlimited numbers of integrated devices on the eve of the phase-out deadline.

In our Report and Order, we scheduled a review of several issues in the year 2000, after separate security modules will be available. That review will include an evaluation and forecast whether the continued deployment by MVPDs of integrated devices beyond January 1, 2005 will impede commercial availability. The six year transition we established in the Report and Order is intended to allow MVPDs to draw down their inventories of integrated devices. MVPDs should not use this transition period to increase inventories of integrated devices once separate security modules are widely available. It is important that we monitor this issue in our review to ensure that manipulation of inventory does not undermine the implementation of Section 629.

I commend the cable industry for being ahead of schedule in its development of standards for the separate security module. I encourage all interested parties to review the progress reports filed with us. Those reports should be available, if they are not already, on the Commission's website at www.fcc.gov.

STATEMENT OF
COMMISSIONER MICHAEL K. POWELL
DISSENTING IN PART

Re: Commercial Availability of Navigation Devices, CS Docket No. 97-80

Although I support most aspects of this decision on reconsideration of our Report and Order on Commercial Availability of Navigational Devices, I dissent from Section B of this decision. I continue to disagree with the assumption that this agency must prevent multichannel video providers (MVPDs) from offering set-top boxes that integrate security with other functions in a set-top box (as opposed to a separable "point of deployment" or "POD" element) in order to "assure commercial availability" of set-top boxes.

As I explained in my dissent to the Report and Order, I do not find this level of market engineering necessary to fulfill the goal of Section 629 nor do I find it to be sound public policy. I will not repeat the discussion in my prior statement, but only note the following:

- Section 629 did not direct the FCC to incent consumers to go out to buy set-top boxes. The mission here was to make sure that boxes were available and that consumers had a choice. We accomplished that objective by ensuring that manufacturers have the ability to produce boxes that can be easily used with the video system, much as phones can easily be used with the existing network. It goes well beyond the statutory objective to decide that government's role is not merely to assure availability but also success for manufacturers and retailers.

- The decision to prohibit integrated boxes may deter innovation. The record of this proceeding shows that potential competitors to incumbent cable providers have been developing integrated boxes with unique functionalities as a way of competing. It is contrary to Section 629 and to good public policy to inhibit this development.

- It is also contrary to good public policy to remove from the market one potentially cost-effective choice for consumers. It would be more practical to allow operators to deploy integrated boxes that may well be less costly and provide greater security for the system. The benefits of allowing operators to use such equipment would redound to consumers, giving them more equipment options at potentially lower prices.

- Finally, I note that the ban is likely to skew present business decisions of operators about when they should buy new set-top boxes, how many they should buy and what plans they should make for deploying digital technology. MVPDs, particularly smaller systems and other non-exempt operators such as wireless cable operators, will be forced to make these decisions so as to avoid the potential for stranded investment, not on the basis of what might be best for their customers. I see no reason to put these operators in such an untenable position.

For all these reasons, I respectfully dissent from this portion of the decision.