CERC sees little evidence that copying from full-bandwidth, component analog outputs can even be considered a reasonable threat. Losses are inevitable in reformatting the image for digital recording. No products configured for such recording purpose have been announced. And if they do appear, copies from a down-res'd image and copies as converted from an HD image would not seem sufficiently (if at all) different to justify disappointing clear and legitimate consumer expectations as to viewing HD programming over cable. A far better approach would be to proceed with measures to apply copy protection, subject to reasonable encoding rules, by means of hidden data.

5. Limitations including "allowable" copy protection constraints should be defined by reasonable and balanced encoding rules.

Encoding rule protections for consumers are present in the compliance rules of the DTLA "adopter" license. As to this issue, the analogy between the DTLA and PHI licenses is clear and direct. The effect of failure to include encoding rules in the PHI license would extend beyond possible conflict with the DTLA result (where the two overlap). It would extend to "source" and "sink" interfaces beyond the DTLA realm. For example, a PHI-licensed device with a hard-drive recording function but no active DTCP interface could have a never-copy rule imposed on it for any and all programming. Similarly, in the event of a future means of protecting downstream interfaces other than 1394/DTCP, there would be no assurance of comparable encoding rules.

Neither CableLabs nor the Commission should be distracted by arguments that encoding rules cannot be included in the PHI license on the supposed basis that content providers, whose conduct the rules may affect, are not "parties" to the

license. The license clearly contemplates, and MPAA and its members have emphasized, that motion picture content providers are to be third party beneficiaries, and therefore key parties, to the license. Indeed, CableLabs has been candid in stating, in the supporting text for drafts of this license, that virtually all impetus for "compliance" and "robustness" rules has come from MPAA and its members. Simple equity requires that, as in the case of the DTCP license, a power to impose limitations must be accompanied by mutuality, in favor of device functionality and customary consumer conduct. In its declaratory ruling, the Commission emphasized that only "allowable" copy protection terms could be included in the (PHI) license.[48] The Digital Millennium Copyright Act[49] provides a contemporary model of the "allowable" reach of copy protection, as formulated by the Congress only two years ago. The DMCA imposes very limited equipment design obligations[50] with an equally clear statement that consumer electronics and information technology product manufacturers are not under any additional requirements in designing new devices other than to follow Section 1201(k).[51]

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[48] *Navigation Device Declaratory Ruling* ¶ 29.

[49] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[50] 17 U.S.C. § 1201(k).

[51] Section 1201(c)(3) of the DMCA provides:

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

The legislative history is equally compelling. Chairman Tauzin said:

> Members of my Subcommittee included an unambiguous no mandate provision out of concern that someone might try to use this bill as a basis for filing a lawsuit to stop legitimate new products from coming to market. It was our strong belief that product manufacturers should remain free to design and produce digital consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Had the bill been read to require that new digital products respond to any technological protection measure that any copyright owners chose to deploy, manufacturers would have been confronted with difficult, perhaps even impossible, design choices. They could have been forced to choose, for example,

Moreover, Section 1201(k) sets forth encoding restrictions that clearly describe the circumstances in which such copy control technologies do and do not apply.[52]

II. A Level Economic Playing Field Is Essential To Competitive Entry

Even if competitive entrants finally do obtain a level technical playing field, they face inequitable and pre-emptive economic hurdles. The Commission has asked what other factors are impeding or affecting the creation of a commercial navigation device market.[53] A level competitive playing field is, perhaps, *the* most important long-term consideration of all.

In Part I, CERC demonstrated that the cable industry has dramatically failed to live up to the clear expectations and responsibilities imposed on it by the Commission in this proceeding. The steps CERC advocates in Part II, addressing the cable industry's own distribution practices for navigation devices, provide the industry one last opportunity to create the conditions necessary for competition in the navigation device market. If the measures fail, the Commission will be fully justified in imposing regulatory measures pursuant to the Report & Order in this

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> between implementing one of two incompatible digital technological measures. It was the wrong thing to do for consumers and thus, we fixed the problem.

Statement of Representative W.J. Tauzin, Cong. Rec. E2144 (daily ed. Oct 13, 1998). Senator Ashcroft noted that:

> I had been very concerned that S. 2037 could be interpreted as a mandate on product manufacturers to design products so as to affirmatively respond to or accommodate technological protection measures that copyright owners might use to deny access to or the copying of their works. To address this potential problem, I authored an amendment providing that nothing in the bill required that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure. The amendment reflected my belief that product manufacturers should remain free to design and produce the best, most advanced consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Creative engineers--not risk-averse lawyers--should be principally responsible for product design.

Statement of Senator John Ashcroft, Cong. Rec. S11887-88 (daily ed. Oct. 8, 1998).

[52] *Id.* § 1201(k)(2).

[53] *Navigation Device FNPRM* ¶ 13.

proceeding, necessary as a remedy for industry failure, as described in Part I, to provide any meaningful support for competitive entry by July 1, 2000.

A. The FCC Must End Subsidies Imposed On Consumers That Forestall Competitive Entry

It has become increasingly clear that MSOs have forestalled competitive entry into navigation device markets by means in addition to the technical and licensing failures set forth in Part I. They are also forestalling entry by loading costs onto their non-digital customers, to subsidize the MSO roll-out of digital devices.

1. Consumer charges to lease analog boxes have been increasing when they should be decreasing.

A significant portion of the base of deployed converter boxes consists of analog boxes whose costs have been fully recovered by the cable companies. These boxes continue to be leased to subscribers long past the date when their book value has been reduced to zero. It seems reasonable to expect that as these analog boxes are recycled and redeployed to subscribers, and fewer analog boxes are ordered to replenish inventory in the face of declining demand, subscribers should be enjoying lower analog equipment lease rates. But the opposite seems to be occurring. Subscribers are still leasing analog equipment at rates that have generally increased.[54]

For example, as of August 15, 2000, 727 cable communities provided the FCC with data concerning equipment rate changes between July 1, 1999 and July 1,

[54] *See, e.g., In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, *Report on Cable Industry Prices*, Table 5 (rel June 15, 2000)(showing an average equipment rate increase of 4.7%). The raw data submitted as of August 15, 2000 for next year's report shows a similar trend.

2000.[55] The raw data show that changes were in the *upward* direction, from a few cents to a few dollars.[56] Similarly, the rates for nonaddressable analog converters have also increased.[57] ***The logical and apparent explanation for these analog equipment rate increases is that cable companies are recovering digital equipment costs from subscribers who do not subscribe to digital services.***[58]

2. Rates for rental of digital boxes reflect an obvious subsidy.

To the best of CERC's knowledge, the average cost of an analog cable box is approximately $100. Many of these boxes have been fully depreciated, and analog boxes are being returned to inventory as digital customers are signed up. The average cost of a new digital box is at least $400. Yet subscribers in some systems are being charged the same or comparable rates for digital and analog boxes.[59] Clearly analog customers are bearing much of the cost of the rollout of digital navigation devices.

3. Subsidies forestalling competitive entry cannot be allowed until the sunset provisions of Section 304 have been complied with.

When Congress adopted Section 304, it included sunset provisions that clearly define what constitutes commercial availability of navigation devices.

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[55] CERC is relying on raw data provided by the Cable Services Bureau on August 28, 2000.

[56] August 15, 2000 Cable Rate Survey Data showing increases from $0.03 to $3.95 per month. For all systems reporting a rate change, the average change reflected an rate increase of $0.35 per month.

[57] August 15, 2000 Cable Rate Survey Data showing increases from $0.02 to $2.94 per month.

[58] CERC believes it is wrong for any consumer to pay for services or equipment that they do not receive. Thus, consumers that use analog boxes but do not subscribe to digital services should not pay an equipment lease rate that includes any digital component. This is particularly true when the subscriber is in a cable system market that does not offer digital services.

[59] *See* August 15, 2000 Cable Rate Survey Data responses for Module E, field E3a versus E3c.

Section 304(e) says:

> (e) SUNSET- 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.[60]

This provision requires the Commission to take steps to correct cable industry practices that interfere with achieving the goals of Section 304. Thus, even where a cable system is able to demonstrate that it is subject to effective competition pursuant to Section 623, the Commission still has responsibility and jurisdiction to impose obligations on the cable industry or any individual operator in order to fulfill the specific requirements of Section 304.

CERC understands that Section 623 allows cable companies to use certain forms of rate averaging to account for equipment costs. However, this authority is not unfettered. As part of the Commission's responsibility for assuring the commercial availability of navigation devices, it may not leave unaddressed any behavior that has the effect of preventing Section 304 from being fulfilled. Such is the case when analog subscribers are made to bear the cost of digital equipment.

The analog subsidy distorts[61] digital equipment rates in a manner that interferes with the Congress's goal that "the market for converter boxes, and interactive communications equipment, used in conjunction with [cable service] is

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[60] 47 U.S.C. § 549(e).

[61] Ken Klaer, Scientific-Atlanta Vice President of Marketing and Business Development, has said publicly, "If the consumer can buy a box for $400 or rent one for $5 or $6 per month, why would they buy it?" Monica Hogan, *Hardware Vendors Gear Up for Retail*, Multichannel News (May 1, 2000).

fully competitive."[62] Consequently, the Commission has a duty to rectify this problem, along with the industry's failure to support competitors' right to attach.

The market for converter boxes and other interactive communications equipment cannot become fully competitive so long as cable companies can offer set-top boxes at prices that do not reflect their true cost. If navigation devices are to be leased, rates should reflect costs. Furthermore, analog and hybrid lease rates should not include any part of the costs associated with digital boxes.

B. Unless the FCC Takes Specific Steps, Retail Entry May Not Be Feasible

Unlike cable MSOs, new entrants do not have access to monopoly rents and regulatory rate methodologies that would allow them to fund a "perpetual loss leader" by selling equipment below cost for any extended period of time. New entrants also lack the ability to offset retail equipment prices by bundling navigation devices with cable service offerings. The artificially supported distribution of digital set-top boxes is also likely to chill the economic integration of navigation device functionality into standard consumer electronics products, where – as Congress recognized in enacting Section 304 – the real consumer benefits and efficiencies lie.

As the U.S. Court of Appeals aptly noted, "the FCC was directed to take steps to make converter boxes (and other navigation devices) commercially available from sources other than cable operators."[63] So long as cable companies can use equipment subsidies derived from their historic position as entrenched monopolies and control the development and release of technical specifications necessary to support commercial navigation device portability, new entrants will be discouraged

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[62] 47 U.S.C. § 549(e)(2).

[63] *General Instrument Corp. v. FCC*, 213 F.3d 724, 727 (D.C. Cir. 2000).

from offering navigation devices in the first instance, thereby making the fulfillment of the Congress's intention an impossibility.

If the Commission is to recognize some right to subsidize digital navigation devices as consistent with Section 304, that Section requires, at the very least, that the subsidy be equally available, in fact as well as theory, to MSOs and competitive entrants alike. If the Commission does not recognize such a right to a subsidy, then present cable industry practices are in violation of Section 304 and themselves are occasion for sanction and other appropriate relief.

1. Unless retail entry is enabled, MSO-provided boxes will foreclose 80% of cable homes by 2005.

The cable industry's failure to support competition by July 1, 2000, is of much more than passing significance. If not remedied immediately by the Commission, industry non-compliance may buy the time necessary to foreclose meaningful new entry.

The cable industry is deploying digital equipment at astonishing rates.[64] Charter Communications is expected to have deployed over 1 million digital set-top boxes by year end.[65] Time Warner reportedly had 889,000 digital subscribers as of June 30, 2000 and expects that 45 percent of its basic subscriber based will be digital by 2003.[66] AT&T is expected to have up to 3.3 million digital subscribers by the end of 2000.[67] These are just a few of the many cable systems operating in the United States that are experiencing tremendous digital service penetration rates.

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[64] *See* Comcast Ad, Wash. Post, at A39 (Nov. 14, 2000) (attached as Exhibit A).

[65] Matt Stump, *Allen's MSO Takes Digital Lead*, Multichannel News (Oct. 16, 2000).

[66] Jeff Baumgartner, *Time Warner Taps Pioneer for Aggressive Box Rollout*, Multichannel News (Aug. 7, 2000).

[67] Jeff Baumgartner, *AT&T Books Philips Order, Breaks Digital-Box Ranks*, Multichannel News (Aug. 21, 2000).

With this kind of growth, NCTA projects that digital subscribership will reach 42.1 million by 2006.[68] Industry analysts agree, saying that digital subscribers will reach 33.2 million by 2003,[69] with 90% of the nation's cable TV homes having access to digital cable by 2005.[70]

The Commission has a narrow window to preserve opportunities for competitive entry. As these companies' plans demonstrate, cable system operators intend to substantially increase digital service deployment in the next two to four years. Based on these data, an estimate of 80% market penetration by MSO-provided boxes seems conservative.

2. The combined technical, legal, and economic barriers to competitive entry cannot be overcome unless the FCC addresses each of the obstacles.

The combination of inferior specifications, no production license and a disparate pricing framework has formed a barrier to competitive entry that thus far has proved impenetrable. It is no wonder that consumer electronics manufacturers, vendors to CERC members in all other respects, have chosen to pursue the contracts for multi-million unit orders that MSOs have put in front of them. Unless the Commission shows it is serious about implementing the law, opportunities for entry by retailers will be more theoretical than real.

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[68] NCTA *Cable Television Industry Overview 2000*, citing Paul Kagan Associates Inc., *Cable TV Financial Datebook*, 1999 p. 10.

[69] T.P. Long, *Telecommunications Equipment/Networking: Cable Equipment Market*, Merrill Lynch Capital Markets (July 14, 1999).

[70] Jim McConville, *Let the Tiers Flow: MSOs Try Good-Better-Best Approach to Selling Digital Cable, Electronic Media* (Sept. 18, 2000).

C. The FCC Can and Must Take Steps to Level the Playing Field.

CERC has demonstrated that cable industry accounting practices are a critical barrier to the formation of a retail navigation device market. Section 304 requires the Commission to take appropriate steps to eliminate this barrier. In addition to preventing cable companies from subsidizing digital equipment rates with analog and hybrid rates, the FCC must modify other accounting and distribution practices that have a chilling affect on the navigation device market.

1. The FCC should prevent cable entities from using service revenue subsidies to preclude competitive entry.

Section 304(a) allows cable operators to offer navigation devices "if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service."[71] In its Navigation Device Report & Order, the Commission interpreted this provision as applying only to cable companies not subject to effective competition.[72] The FCC needs to revisit this position in light of new evidence.

A review of the August 15, 2000 survey responses to the Commission's request for cable service and equipment rate information discloses many instances of equipment charges bundled with programming charges.[73] Several of these submissions were by operators who said they do not face effective competition.[74] Yet no enforcement action has been taken.

Moreover, the distinction in favor of MSOs facing "effective competition" should be scrapped. The Commission originally drew this regulatory distinction

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[71] 47 U.S.C. § 549(a).

[72] *Navigation Device R&O* ¶ 98.

[73] August 15, 2000 Cable Rate Survey Data responses to Module E, Line E3.

[74] August 15, 2000 Cable Rate Survey Data responses to Module D, Lines D1a-D2b.

based on a theory that "subsidies by entities lacking market power present little risk of consumer harm and to impose restrictions would create market distortions."[75] The Commission went on to say that its anti-subsidy rules would "ensure that consumers benefit from choices in the marketplace [stemming from] several sources for equipment."[76] These positions rely explicitly on an assumption, proved incorrect to date, that MSOs actually would support "an emerging marketplace for [competitive entrants'] navigation devices."[77] This position may have made sense in 1998, when the FCC was entitled to rely on cable industry promises that it would do everything necessary to encourage competition. It makes no sense now.

Therefore, while FCC policy proceeds on the false assumption of competitive entry, the real-world cable operators use their pricing practices to forestall any such entry. The result is the opposite of what Congress and the Commission expected.

The Commission should recognize that the "effective competition" test does not address navigation device competition. It merely addresses whether *some* consumers have a choice of service providers. As we have seen, so long as MSOs have remaining customers as to whom they face little or no service competition, they can subsidize navigation devices for their other customers, forestalling competitive entry. The sunset provisions of Section 304 anticipate and guard against such conduct. It would defeat the purposes of Section 304 for the

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[75] *Navigation Device R&O* ¶ 92.

[76] *Id.* ¶ 95.

[77] *Id.* ¶ 97.

Commission, against the weight of evidence to date, to continue instead to rely upon the ineffective standard in Section 623.[78]

It is also apparent that the wireless and DBS industry models on which the Commission relied for its regulatory position on equipment and service bundling have not yet evolved in the cable industry. The Commission originally believed, as was the case with cellular and DBS, that service and equipment bundling by cable systems facing competition would expand consumer choice, reduce equipment and service prices, and help develop competition.[79] It also believed that competition from other equipment providers would chill below-cost pricing because a cable company subject to effective competition would no longer be able to rely on monopoly profits.[80] However, because there is no competitive market for navigation devices, and there is no competition for many cable customers, there is no basis for allowing any cable company to bundle equipment and services unchecked.[81]

Lastly, the Commission initially noted that "the ability to have the Section 304 requirements sunset will be an incentive for MVPDs to achieve retail availability

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[78] The Commission recognized as much when it rejected pleas that Section 304 cease to apply when a cable company receives an effective competition determination. *Navigation Device R&O* ¶ 113.

[79] *Navigation Device R&O* ¶ 87-89.

[80] *Navigation Device R&O* ¶ 87.

[81] The DBS and wireless market models are also problematic when applied to cable because, unlike cable, DBS and cellular began as new entrants fighting to compete with the established cable industry and wireline telecommunications providers. Therefore, bundling made some sense as a way of helping these entities gain a competitive foothold against embedded monopolies. In addition, each of these industries began with more than one player in the market, so some degree of competition existed from the very beginning of the service. This is contrary to the circumstances surrounding the navigation device market. The Commission gave regulatory relief to the incumbent on the mistaken belief that the incumbent would help new entrants compete. The last three years demonstrates that new entrants cannot compete and the incumbent has been made all the more strong by the Commission's generous trust.

of navigation devices."[82] But, so long as the cable industry is benefiting from a lack of competition, it has no incentive to see Section 304 fulfilled. Currently, without the benefit of any sunset, the cable industry is building up its integrated device inventory, it is upgrading its networks and subsidizing its digital equipment on the backs of subscribers that have few other alternatives, and it is creating a subscriber base that is using cable-leased set-top boxes with features and functions that no other entity can provide.

These conditions require that the Commission take positive steps at this time to ensure the development of a competitive market for navigation devices. At the same time, CERC is reluctant to urge that the Commission adopt an overly regulatory approach unless no other option will be effective. The Commission should allow cable operators to choose in the first instance which regulatory model will apply to them. If they do not choose, or if they fail to implement a less intrusive model faithfully, then the Commission as a last resort should impose regulation adequate to ensure a level playing field.

Under CERC's proposal, a cable operator may choose voluntarily to unbundle navigation devices from cable service and eliminate all subsidies of digital navigation devices by other devices or revenue streams, and to make navigation devices available for consumers solely through sale at prices that reflect acquisition costs and reasonable margin. Alternatively, the cable operator could choose to adopt distribution programs similar to those in the wireless and DBS industries,

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[82] The Commission itself noted that "the ability to have the Section 304 requirements sunset will be an incentive for MVPDs to achieve retail availability of navigation devices." *Navigation Device R&O* ¶ 109.

which would enable retailers to offer navigation devices to consumers on the same terms that are available to consumers who obtain such devices from the MVPD.

Should a cable system fail to adopt and faithfully carry out the voluntary approach outlined above, then the Commission should impose a regulatory solution that includes a prohibition on navigation device subsidies of any kind, a prohibition on leasing of navigation devices by cable companies to consumers, and a separate affiliate requirement for all cable company sales of navigation devices.

2. If cable entities do not level the playing field voluntarily they should not be allowed to lease boxes until Section 304 has sunset.

If the cable industry does not take steps voluntarily to level the playing field, the Commission should prohibit the leasing of navigation devices by cable companies. The Commission and the courts recognized and addressed this problem in the telecommunications context. It may be necessary for the Commission to take similar steps in the cable market.

Historically, the Commission has restricted CPE/telecommunications service bundling out of a concern that dominant carriers could use such bundling in anticompetitive ways.[83] For example, a monopoly carrier could require customers that wanted to subscribe to long-distance service to also lease telephone equipment. The Commission has recognized that not only would such customers be forced to buy a product they do not want, but other companies trying to sell CPE could be unfairly deprived of customers. Finally, the agency acknowledged that

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[83] *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, *Final Decision*, 77 FCC 2d 384 (1980) (Computer II Final Decision); *Memorandum Opinion and Order on Reconsideration*, 84 FCC 2d 50 (1980); *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512 (1981), aff'd sub nom., *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

"consumers who do not use carrier-provided CPE might find themselves subsidizing consumers who do use carrier-provided equipment, and that independent CPE vendors might be forced to compete against below-cost, tariffed CPE because part of the CPE costs would be recovered through regulated tariffed service rates."[84] Consequently, the Commission has long concluded that bundling by carriers with monopoly control could restrict customer choice and retard the development of a competitive CPE market.[85]

As we have demonstrated above, the same circumstances now exist in the cable industry. The mere threat of such an outcome was enough to cause the FCC to regulate monopoly telecommunications carrier equipment offerings. CERC urges the Commission to recognize that the situation with cable industry control over set-top boxes is equally, if not more, dire than that seen in the telecommunications market, because competitive equipment providers are actually being prevented from entering the navigation device market and consumers lack any real choice. Thus, in the absence of voluntary action by the cable industry, the FCC must eliminate this problem by prohibiting the cable industry from leasing set-top boxes until Section 304 sunsets.

3. If a voluntary solution fails, the Commission should require that MSOs that sell boxes should do so through separate affiliates.

Competitive equality, as mandated by Section 304, requires that MSOs retain the right to distribute navigation devices. CERC believes that, if the cable industry does not come into voluntary compliance, cable industry equipment offerings

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[84] *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, *Report & Order*, 7 FCC Rcd 4028 ¶ 2 (1992).

[85] *Id.*

should be subject to structural safeguards comparable to those historically imposed on monopoly telecommunications providers.

Under such circumstances, a cable company would be allowed to sell navigation devices only through a separate corporate entity.[86] The separate corporation would maintain its own accounting books, have separate officers, employ its own personnel, and not use any of the cable company's computer equipment, databases or data processing services; and the two companies would be housed in separate offices.[87]

The new company would have its own marketing, operations, service, installation and maintenance personnel. In addition, the cable company would not advertise on behalf of the new equipment company or in any other way promote its business. Any business arrangements between the two entities would be the result of arm's length negotiations and be reduced to writing.

The cable company and its equipment affiliate would also be prohibited from sharing consumer or competitive information unless this same information is made available to all other equipment vendors. For example, the cable company may not share subscriber information with the equipment affiliate to help the equipment affiliate target potential customers unless competitors have access to the same information on comparable terms. Similarly, the cable company would not exchange technical data, such as network and service specifications, upgrades or research and development plans and results, unless competitors have access to the same information on comparable terms.

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[86] *See* 47 C.F.R § 64.702 *et seq*. and its predecessor rules.

[87] *See* 47 C.F.R. § 64.702(c)(2).

As in the case of telecommunications carriers, such safeguards need not be permanent. Once a competitive market exists, as defined by the sunset provisions in Section 304(e), the Commission should follow precedent by evaluating whether any or all of the safeguards can be eliminated.

III. Conclusion

The issues raised by the FCC in this FNPRM highlight the general frustration, to date, of the goals established by the Congress in Section 304 and pursued by the Commission in CS Docket 97-80. Despite four years of work by the FCC, the goals of competition and consumer choice are yet unrealized. The Commission has the responsibility and the authority to turn the tide to create a competitive technical, legal, and economic "level playing field" by taking immediate steps to allow competitors to enter the device market free of unlawful and unfair constraints, to require cable operators to rely on the same enabling technologies that they make available to competitive entrants to the device market, and – if either of these steps is going to be meaningful – dismantle the competitive barriers to entry that MSOs have already erected, through their practices with respect to subsidies.

If it is to accomplish the goal mandated by the Congress, the Commission needs to give equal weight to the specification and subsidization issues CERC has raised. These issues are clearly within the Commission's jurisdiction with respect to both oversight of ongoing conduct, and structural remedy for non-compliance with regulations, and the Report and Order, to date.

Moving up the date for full technical equality for competitive entrants is a step the Commission has considered several times before, but has belayed pending further review and evidence. These returns are now in. As a remedy for MSO

non-compliance, the Commission has reserved the power entirely to prohibit further MSO distribution of navigation devices. The steps CERC requests and advocates in this filing are less intrusive and less drastic exercises of the same power.

Respectfully submitted,

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November 15, 2000

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I, Janet Davis, hereby certify that true copies of the foregoing Comments of the Consumer Electronics Retailers Coalition were served by hand on November 15, 2000, to the persons listed below.

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