

**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)	
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	PP Docket No. 00-67
)	

Consumer Electronics Industry Comments

**Joint Comments Of The
Consumer Electronics Association
And The
Consumer Electronics Retailers Coalition
In Response To Further Notice
Of Proposed Rulemaking**

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These Comments on the Commission’s Further Notice of Proposed Rulemaking of January 10, 2003¹ are provided jointly by the Consumer Electronics Association (CEA) and the Consumer Electronics Retailers Coalition (CERC). They represent the views of the consumer electronics manufacturing and retail industries and associations, and are specifically endorsed by the major television manufacturers and consumer electronics specialty retailers.

CEA is the principal trade association of the consumer electronics industry and the sponsor of the International Consumer Electronics Show. CEA represents more than 1,000 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. Combined, CEA's members account for more than \$85 billion in annual sales.

CERC is an incorporated public policy coalition representing the major consumer electronics retailers. Its members include Best Buy Co, Inc., Circuit City Stores, Inc., Good

¹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67, Further Notice of Proposed Rulemaking (Rel. January 10, 2003).*

Guys, Inc., The International Mass Retail Association, The National Retail Federation, The North American Retail Dealers Association, RadioShack Corporation, Sears, Roebuck & Co., Tweeter Home Entertainment Group, Inc., and Ultimate Electronics, Inc.

CEA and CERC have worked for more than a decade to achieve a competitive market for devices that attach to cable television systems, and to achieve compatibility among home network devices that can receive, store, and render programming and other services provided by Multichannel Video Programming Distributors. Until today, CEA and CERC have filed separately in these Dockets.² In response to the present FNPRM, CEA and CERC have joined forces to underscore the watershed significance of the December 19 “Plug & Play” agreement.³ Acceptance of this agreement and adoption of the recommended regulations that resolve a number of longstanding issues is vital not only to the entire consumer electronics industry, but also to its customers who have invested faithfully in the DTV transition generally, and in HDTV in particular. These early adopters and those waiting to join them deserve clear and decisive action.

I. The December 19 Agreement Confers Essential Consumer Benefits And Is Strongly In The Public Interest.

The fourteen television manufacturers that signed the December 19 letter to Chairman Powell that is the subject of this FNPRM comprise the Board of Directors of the CEA Video Division. Because implementation of this agreement must await Commission action, these CEA members have put important business plans at risk. They did so because they believe (1) in the strong public and competitive benefits that this agreement offers, (2) in the good faith of the cable television industry in making these conditional commitments, (3) in the authority and intention of the Commission to proceed with measures necessary to the DTV and HDTV transitions, and (4) in the strong case for early acceptance and approval.

A. CEA And CERC Have Endorsed Implementation of The ‘Plug & Play’ Agreement Without Reservation And Will Work Toward Its Implementation.

CEA facilitated the negotiation of the “Plug & Play” agreement and endorsed it in a separate letter to Chairman Powell, in which it said:

“The Consumer Electronics Association (CEA) supports and endorses the digital television (DTV) cable compatibility agreement filed today with the Federal Communications Commission (FCC). As signed by leading digital television manufacturers and major cable system operators, this historic agreement will

² On some occasions CEA and CERC have joined in larger pan-industry filings; on others they disagreed with each other on particular issues.

³ Letter to Chairman Powell and attachments, December 19, 2002, filed in these Dockets, from 14 digital television manufacturers and eight cable multisystem operators.

allow all Americans to receive high definition television (HDTV) over cable on a national basis without a set-top box.

“Our joint industry agreement enabling plug-and-play DTV over cable is a major victory for American consumers, and will significantly speed up the DTV transition and the return of broadcasters' analog spectrum.”

The same day, CERC issued a press release endorsing the Agreement without reservation. CERC said:

“The recommendations and commitments made today should, finally, pave the way for multi-purpose consumer electronics products that connect directly to digital cable systems, while assuring full support for the delivery of HDTV over cable to the four million HD-ready sets that consumers have bought to date.”

CERC praised the following attributes of the Plug & Play agreement:

- “It provides for a technology license for competitive devices that does not threaten consumer home viewing and recording rights.
- “It provides for very specific support, by cable operators, of “POD”-enabled devices, including HDTV receivers, that will work directly on virtually any cable system, without need of a set-top box.
- “It assures support for digital home network interfaces.
- “It does NOT allow home network interfaces to be turned off by remote control, and protects HDTV signals originating as broadcasts from ‘downresolution’.”⁴

B. CEA And CERC Are Confident That Implementation Of This Agreement Will Be Successful, And That It Will Promote Competition And Otherwise Be Of Direct Benefit To Consumers.

Over the past decade CERC and CEA have engaged the National Cable And Telecommunications Association (NCTA) and CableLabs on a variety of regulatory issues considered in these Dockets. The consumer electronics parties and their members have argued that at least some of the obligations and commitments contained in this agreement should have been accomplished under existing regulations. Nevertheless, CEA and CERC firmly believe that if the Commission enacts the jointly recommended regulations now before it, the cable industry will move quickly to embrace the benefits of diverse, vigorous, and competitive markets. The Chairman of CERC said in an “op ed” piece earlier this week:

⁴ *Consumer Electronics Retailers Praise Cable DTV Agreement*, CERC press release (Dec. 19, 2002) at www.ceretailers.org. CERC noted that it would support total elimination of “downresolution.”

“The December 19th “plug and play” agreement may reflect a real and welcome commitment by major cable operators to achieving such a vibrant, competitive device market. We believe these operators recognize that as they face increased competition for programming and mounting demands on their capital, the offer of secure cable access as a standard feature of consumer electronics devices is now strongly in their own interest.⁵

C. The Risk Of Inaction Is Greater Than That Of Mere Delay.

CEA and CERC are confident that the Commission will act expeditiously on the items before it. Should the Commission fail to do so, however, the risk to consumers served by their member companies is not limited to mere delay. The Commission has already ordered that after July 1, 2004, television receivers must contain ATSC tuners on a phased-in basis.⁶ It has been widely acknowledged that this Order would be of significantly more tangible benefit to consumers if digital cable tuners could also be built into these receivers on the same time schedule. This can be accomplished at relatively trivial cost and would serve 70% of the consuming public. This result cannot be achieved unless the Commission acts expeditiously to approve the Plug & Play agreement.

II. The Commission Has Clear Jurisdiction Over Every Element Of The Package, And It Has Clear Mandates From The Congress That Support Enactment Of The Regulations On Which The Agreement Depends.

The Commission seeks comment on its jurisdiction to implement regulations and take the steps anticipated in the documents referred to in this FNPRM. Not only does the Commission clearly have such jurisdiction; it also has recognized, in each of these Dockets, congressional mandates for it to accomplish precisely the steps that the cable and consumer electronics parties now jointly recommend.

Actions taken to implement this “Plug & Play” solution will be a direct and necessary consequence of congressional mandates in 1992 and 1996, as the Commission has interpreted and implemented them for more than a decade. Each element of the agreement derives directly from these congressional mandates. Commission jurisdiction (as issuance of this FNPRM in two dockets reflects) is supported by separate but overlapping congressional mandates directed toward assuring consumer electronics and cable *compatibility* for television programming (Section 624A), and toward assuring *commercial availability* of navigation devices for *any* service from *any* Multichannel Video Programming Distributor, or “MVPD” (Section 629).

⁵ Bradbury Anderson, *A Big Step In The Right Direction*, TWICE Magazine, March 24, 2003.

⁶ *In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978 (Rel. Aug. 9, 2002) par. 40.

A. In Section 624A, Enacted In 1992, The Congress Instructed The Commission To Take Regulatory Steps To Assure Compatibility Between Cable Systems And Consumer Electronics Devices, Including The Promotion Of Commercial Availability Of Receivers And Other Devices.

The Commission's April 14, 2000 *Notice Of Proposed Rulemaking* in Docket No. 00-67, which pertained to the labeling of DTV receivers, recounted Congress's purpose in adding Section 624A to the Communications Act in 1992, and amending it in the 1996 Telecommunications Act:⁷

Congress and the Commission have both long been concerned with compatibility between cable systems and consumer electronics equipment such as television receivers. In 1992, Congress added Section 624A⁸ to the Communications Act of 1934, as amended ('Communications Act'), directing the Commission to report on 'means of assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable services' and then to 'issue such regulations as are necessary to assure such compatibility.' More specifically, Section 624A(b)(2)(A) directed the Commission to 'specify the technical requirements with which a television receiver or video cassette recorder must comply in order to be sold as 'cable compatible' or 'cable ready'.'⁹

In the rulemaking that followed, the Commission imposed certain standards and requirements for analog cable transmissions,¹⁰ and recognized the desirability of 'standards for cable digital transmissions.'¹¹ The Commission concluded that 'standards for cable digital transmissions are necessary to avoid future compatibility problems when cable systems use digital transmission methods, and to allow the mass production of economical consumer equipment that is compatible with cable digital services.'¹² Commenting parties expressed the opinion that industry standards could be developed by 1995, and we declined to adopt standards at that time.¹³ Since then industry representatives have engaged in numerous discussions on compatibility issues.¹⁴

⁷ *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, FCC 00-137, Notice of Proposed Rulemaking (Rel. Apr. 14, 2000) ("2000 Compatibility NPRM") par. 4, 5 (footnotes in original).

⁸ 47 U.S.C. § 544a.

⁹ 47 U.S.C. § 544a(c)(2)(A).

¹⁰ *See Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 9 FCC Rcd 1981(1994) ("Equipment Compatibility First Report and Order").

¹¹ *See* Equipment Compatibility First Report and Order at 2004.

¹² *Id.* at 2005.

¹³ *Id.* at 2004-5.

¹⁴ *See, e.g.*, Letter from Decker Anstrom, President and CEO, National Cable Television Association, and Gary Shapiro, President, Consumer Electronics Manufacturers Association to William Kennard, Chairman FCC (Oct. 30, 1998). *See also* par. 12 *infra*.

1. The Commission’s Mandate Under Section 624A Covers Standards To Support Design Of Television Receivers And Other Products, As Well As Compatibility Between Those Products And Cable Converter Boxes.

The Commission noted the broad scope of the mandate received from the Congress, and the authority with which the Commission was provided:¹⁵

Section 624A(d) instructs the Commission to review and modify its compatibility regulations ‘to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.’¹⁶ *Section 624A thus provides authority for the Commission to set cable transmission standards* so that cable subscribers will be able to enjoy the full benefits of both the programming available on cable systems and the functions available on the television receiver.¹⁷

The Commission referred to its previous actions pursuant to Section 624A and its *Notice of Proposed Rulemaking* issued in ET Docket No. 93-7, which represented its attempt, in an analog environment, to follow Congress’s instruction to promote the competitive availability of commercial devices. In its First Report And Order in Docket No. 93-7, the Commission observed that the ultimate iteration of “compatibility” would be through new generations of equipment that could be *independently connected* to cable systems, through the creation of new technical standards:

The new cable-consumer equipment compatibility regulations include measures that will assure improved compatibility between existing cable system and consumer TV equipment. *They also include provisions for achieving more effective compatibility through new consumer equipment.*¹⁸

2. The Commission Recognized Early On That Technical Standards, Recommended By Interested Parties, Are The Key To Both Compatibility And Commercial Availability.

The Commission also observed, in its First Report And Order in Docket 93-7:

¹⁵ 2000 Compatibility NPRM, par. 6 (footnotes in original, emphasis supplied).

¹⁶47 U.S.C. § 544a(d).

¹⁷See *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, 8 FCC Rcd 8495 (1993) (“Section 17 Notice”).

¹⁸ *In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, First Report and Order, 9 FCC Rcd 1981 (Rel. May 4, 1994) par. 4 (emphasis supplied) (“First Report and Order”).

As a policy matter, we also find that standards for cable digital transmissions are desirable. These standards will be needed to ensure that compatibility is maintained as new digital cable technologies are introduced. *** Opening these markets to competitive equipment providers will give product developers and manufacturers, as well as cable system operators, the ability and incentives to introduce new products and to respond to consumer demand. In return, consumers will have greater access to technology with new features and functions. *Most importantly, consumers will be assured that the equipment they buy will work with their cable system.*¹⁹

3. The Commission Has Maintained Its Ongoing Oversight Responsibility Under Section 624A, And Has Specifically Invited Joint Submissions Of The Precise Nature That Are The Subject Of This FNPRM.

The Commission in its First Report & Order also noted the ongoing oversight responsibility and authority conferred by Section 624A:

Finally, Section 624(d) requires the Commission to review periodically and, if necessary, modify the regulations issued pursuant to this section in light of actions taken in response to the regulations *and to changes in cable systems, TV receivers, VCRs and related technology.*²⁰

In its September 15, 2000, Report & Order in Docket No. 00-67, the Commission, in the course of referring to Section 624(d), added:

By keeping this docket open and imposing these reporting requirements, we preserve the option *of incorporating into our rules the formal standards that we expect will result from continuing industry efforts* to implement the February 22, 2000 agreements and to develop specifications for a bidirectional direct connection digital television receiver.²¹

The December 19 “Plug & Play” package represents “Phase I” (‘Unidirectional’ Devices) of the package of “continuing industry efforts” to be “incorporated into” Commission rules pursuant, *inter alia*, to its jurisdiction and mandate under Section 624A. The letter to Chairman Powell and the parties’ “MOU” indicated that work on “Phase II” (‘Bidirectional’ Devices) would begin immediately, and this work is already under way.

¹⁹ *Id.* par. 5 (emphasis supplied).

²⁰ *Id.* par. 12 (emphasis supplied).

²¹ *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Report and Order, 15 FCC Rcd 17568 (Rel. Sept. 15, 2000) par. 21 (emphasis supplied).

In addition to producing standards for analog and digital security interfaces,²² the work in PP Docket 00-67, pursuant to the Section 624A mandate, includes another subject addressed by Plug & Play proposals -- the Commission's ongoing administration of labeling guidelines for digital television receivers. In explaining why it has retained jurisdiction and oversight in this area as well, the Commission said:

We know that the consumer electronics manufacturers are interested in building such a receiver, the retailers are interested in marketing such a receiver, and the cable industry has expressed its willingness to complete the specifications.²³ *We encourage the interested parties to work together to complete the relevant specifications promptly.*²⁴

B. In Section 629, Enacted In 1996, The Congress Instructed The Commission To Enact *Standards-Based* Regulations That Assure The Competitive Availability Of Navigation Devices From Manufacturers And Retailers Not Affiliated With MVPD Providers.

In 1996 the Congress added Section 629 to the Telecommunications Act, broadening the Commission's mandate, yet also making it more specific. This mandate covers devices necessary to receive *any* service from *any* MVPD. It requires the Commission, in its regulations, to *assure* the competitive commercial availability of "navigation devices." The first sentence of Section 629 reads:

The Commission shall, *in consultation with appropriate industry standard-setting organizations*, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel

²² While the analog "Decoder Interface" that was jointly devised pursuant to Docket 93-7 was superceded by work on digital interfaces, the technical work undertaken directly pursuant to Section 624A and ET Docket 93-7 laid the basis for "navigation device" standards activity subsequently pursued under the mandate of Section 629, discussed below. As the First Report and Order in ET Docket 93-7 recounts in detail, pursuant to Section 624A, the consumer electronics and cable industries cooperated in parallel activities involving a "Consumer Electronics Cable Compatibility Advisory Group" (referred to as the "CAG") and a Joint Engineering Committee (referred to as the "JEC"). It was the JEC subcommittee on a "National Renewable Security Standard" that developed the "NRSS-A" and "NRSS-B" specifications for a digital security interface and module, the direct progenitor of the "POD." It was in the process of the standardization of the NRSS work that copy protection elements, discussed below, were added.

²³ See Sony Reply Comments at 3, Circuit City Comments at 5-10, Status Report in CS Docket 97-80 at 10-11 (filed July 7, 2000 by NCTA et al.).

²⁴ Report and Order, PP Docket No. 00-67, FCC 00-342 (Sept. 15, 2000) par. 28 (footnote in original, emphasis supplied).

video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.²⁵

Early in the proceedings in Docket No. 97-80, some argued that an MVPD could fulfill its obligation simply by licensing a single “second source” manufacturer for its system-specific, proprietary converter boxes, and adding a single, additional distribution channel for these boxes.²⁶ Many parties answered that such an approach would not adhere to the Congress’s command that competition be achieved through new technical standards, nor would it lead to new generations and ranges of multi-function competitive devices, as the Congress had also clearly intended.²⁷ Subsequently, the cable industry itself came forward with an offer to devise technical standards, through CableLabs’ *OpenCable* initiative.²⁸ This offer was accepted by the Commission, subject to regulations defining and limiting the restraints that could be placed on any licensees.

1. In Its 1998 Report And Order The Commission Accepted CableLabs’ Offer To Devise Standards And Specifications, Including Those For A POD, To Support Competitive Navigation Devices.

In its Report & Order in Docket 97-80, the Commission resolved the standards issue by (1) declaring that a national security interface is essential; (2) requiring that cable operators support such an interface as a condition of their continued right to distribute digital cable converter boxes, and (3) explicitly accepting, relying upon, and maintaining oversight jurisdiction over the offer of eight cable MSOs to support CableLabs’ *OpenCable* initiative so as to meet the goals set forth by the Commission. Central to this oversight was administration of the security interface:

We think it important to establish parameters and to mandate that security be separated to ensure that navigation devices become commercially available expeditiously. We reiterate the consensus of several cable operators, as well as two equipment manufacturers, that the separation of security from non-security functions in the digital context is possible. *** As of July 1, 2000, therefore, MVPDs covered by Section 629 who wish to distribute devices using integrated

²⁵ 47 U.S.C. § 549 (emphasis added).

²⁶ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of General Instrument Corporation (May 16, 1997) at 9.

²⁷ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Reply Comments of the Navigation Device Competition Coalition (Members of the Coalition included: Business Software Alliance, Computer & Communications Industry Association, Computing Technology Industry Association, Consumer Electronics Manufacturers Association, Consumer Electronics Retailers Coalition, Home Recording Rights Coalition, Information Technology Industry Council, International Mass Retail Association, National Retail Federation, and North American Retail Dealers Association) (June 23, 1997); citing S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 181 (1996); H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112-13 (1995).

²⁸ As we note above, the specifications brought forward by the cable industry were based on the earlier work undertaken in its Joint Engineering Committee with CEA, pursuant to the earlier mandate of Section 624A.

security may do so only if they also make available the security modules separately.²⁹

As indicated above, the choice of the July 1, 2000 effective date is premised on expedition of the progress toward the statutory goals involved that is being made by the cable industry *through the CableLabs/OpenCable project*. *** Thus we are hereby requiring the eight multiple system operators that are involved in CableLabs, and who filed the representations reflected above regarding the purchase of digital security modules, to advise the Commission semiannually ... as to the progress of their efforts and the efforts of CableLabs.... The information should advise the Commission of the status of any standards or certification process and any anticipated dates for approval. Any changes in the schedule should be reported promptly.³⁰

2. The Motion Picture Association Of America And Its Members Requested That POD Technical Standards Provide For Copy Protection Encryption And Authentication. The Result Was To Require That Host Devices Be Licensed.

Progress in specifying and standardizing the OpenCable specifications moved in parallel with other events in the worlds of technical standards and copy protection. Members of the Motion Picture Association of America approached both CableLabs and the standards organizations working on the relevant security interface, to complain that, as originally conceived, the interface would allow for a digitally compressed stream of audiovisual program to pass across the interface “in the clear” (not subject to authentication or encryption). In other multi-industry technical contexts related to copy protection (DVD, digital transmission generally), rules for “compliance and robustness” were emerging that would require, in such case, that such a stream should be subject to encryption and authentication.

Members of both CEA and CERC responded proactively and in good faith these requests. (The initial meeting directed to an OpenCable solution was organized by a CERC member.) As a result of meetings associated with the OpenCable project and with standards bodies, CEA and CERC members took the initiative in putting forth a technical plan to accomplish the MPAA objective. At one such meeting, Motorola offered a patented technology deemed suitable for the purpose. It offered to license this “DFAST” patent, and associated know-how, exclusively to CableLabs as a fulcrum of the technical solution sought by MPAA members.

The import of this decision, taken to accommodate the concerns of the motion picture community, was that the “host” devices -- originally conceived as relatively generic in nature -- would now have to be *licensed by CableLabs* -- the organization, owned by the MSOs, that had been delegated by the Commission the task of devising a specification for use by competitive

²⁹ Report & Order, par. 62.

³⁰ *Id.* par. 81 (emphasis supplied).

entrants pursuant to Section 629. This development was duly reported to the Commission in the semiannual reports it had required as a part of its continued oversight jurisdiction. Except for this development, *springing from concerns over copy protection*, no license from the cable industry would have been necessary for competitive manufacturers to make devices that accept POD modules. Thus, *the Commission’s “right to attach,” declared in its MVPD navigation device rules, became subject to copy protection considerations.*

3. All Licenses Offered by CableLabs To Competitive Entrants Have Included Copy Protection Obligations As Part Of The “Compliance And Robustness Rules.” The Commission Has Ruled That Such Obligations May Be Classified Under FCC Regulations As In Support Of Cable Operator Conditional Access Concerns.

When CableLabs offered a license for the DFAST technology to potential navigation device constructors, the license contained several provisions that consumer electronics manufacturers believed violated the Commission’s regulations. These regulations, issued with the 1998 Report & Order, limited restrictions on licensees to those in aid of protecting the network from harm, or protecting the conditional access rights of MSOs.³¹ The Commission asked for public comment on the challenges to the license provision.³² Several commenters, including CEA and members of CERC, argued that “copy protection” was not a species of “conditional access.” They said that while copy protection restrictions may be appropriate in such a license, the FCC would have to revise its regulations to add a new category of admissible constraints under the “copy protection” rubric to account for this.

CERC and CEA members argued that the Commission should define in its regulations the extent to which restrictions on consumers, arising from the Commission’s delegation of standards-adoption and licensing power to CableLabs, would be acceptable under the Congressional mandate.³³ Motion picture industry commenters argued to the Commission that copy protection is an integral part of conditional access, and that a *uniform approach* to copy protection was essential for the orderly licensing of content for MVPD distribution.³⁴

³¹ The forms and titles of license offered have evolved over time. On September 11, 2002, CEA filed in Docket No. 97-80 a summary of the provisions of the last published “PHILA,” that CEA deemed inconsistent with FCC regulations, and a model license that in CEA’s view would be consistent with those FCC regulations.

³² *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Proposed Rulemaking (Rel. Apr. 14, 2000) par. 20.

³³ Letter from Robert S. Schwartz to Magalie R. Salas, Federal Communications Commission, CS Docket No. 97-80 (Feb. 2, 2000); PP Docket No. 00-67; Comments of the Consumer Electronics Association (May 24, 2000) at 14-18; *In the Matter of Compatibility Between Cable Systems Consumer Electronics Equipment*, PP Docket No. 00-67, Comments of Circuit City Stores, Inc. (May 24, 2000) at 18.

³⁴ Letter from Fritz E. Attaway to Magalie R. Salas, PP Docket No. 00-67; CS Docket No. 97-80 (September 6, 2000): “Either devices will respond to copy management instructions, or they won’t. *If they won’t, they cannot receive high value, copy protected content.*” (Emphasis supplied.)

In its Declaratory Ruling of September, 2000, the Commission ruled that copy protection *may* be considered a species of conditional access, but the appropriateness of particular copy protection outcomes could be ruled upon by the Commission (and hence the need for any enhancement of regulations ascertained) only when it is presented with specific license provisions. The Commission said:

Some measure of anti-copying encryption is, we believe, consistent with the intent of the rules In this regard, the record indicates that content providers are seeking copy protection licensing terms that limit consumers to making a single copy of some high quality digital content, that is not otherwise subject to additional restrictions (such as is the case with pay-per-view or video-on-demand programming).³⁵ ***

While our ruling herein clarifies that the inclusion of some amount of copy protection within a host device does not automatically violate the separation requirement of the navigation devices rules, we do not intend this declaratory ruling to signal that any terms or technology associated with such licenses and designated as necessary for copy protection purposes are consistent with our rules. We believe, however, that *such issues are best resolved if specific concerns involving finalized licenses that implicate our navigation devices rules are presented to the Commission.*³⁶ *** Should additional evidence indicate that content providers are *requiring disparate measures of copy protection from different industry segments, the Commission will take appropriate action.*³⁷

With the December 19 Agreement, the consumer electronics and cable parties, including those that govern CableLabs, have *“presented to the Commission” a “finalized license” instrument*, in a form they agree comports with existing Commission rules, plus complementary regulations that would implement the balanced approach, on a pan-industry basis, that the Commission has sought. In other words, they have done together exactly what the Commission prescribed when it determined how it would exercise oversight in the context of its regulations and the licensing power delegated to CableLabs and major MSOs by the Commission in the Report & Order.³⁸

³⁵ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd 18199 (Rel. Sept. 15, 2000) (“Declaratory Ruling”) par. 28. Footnote 67, inserted at this point, says: “In this regard, we note that MPAA has stated that the 5C technology will not be used to prohibit most home recording. Home recording of retransmitted broadcast programs and single copies of basic and extended basic programs and pay television will not be inhibited by [5C]. Home recording of pay-per-view and video-on-demand will be subject to the copyright owner’s permission. MPAA Reply at 8.”

³⁶ *Id.* par. 29 (emphasis supplied).

³⁷ *Id.* par. 31 (emphasis supplied).

³⁸ Although eight MSOs signed the letter referred to in the Report & Order and eight MSOs signed the December 19 letter, over time there have been changes due to merger, acquisition, etc.

4. The December 19 Agreement Achieves Balanced Copy Protection Outcomes As A Subset Of Conditional Access, Pursuant To The Commission's Declaratory Ruling.

The Commission noted with approval, in footnote 67, MPAA's statement that "5C" copy protection is one acceptable example of technology providing for a balanced regime, in which, except for certain transmissions of an essential "on demand" nature, consumers would be assured of an ability to make at least a first generation copy of any audiovisual transmission. The Commission observed that, according to comments received, "*consumers have certain settled expectations regarding home copying of both broadcast and cable programming.*"³⁹ The Commission went on to say:

Based on the record in this proceeding, no evidence has been presented that the evolving copy protection licenses and technology discussed herein would preclude reasonable home recording of such content. It should be noted, however, that our ruling is not based on this aspect of the record; we cite such evidence simply to rebut the notion that our ruling will lead to inevitable restrictions on consumers' ability to copy digital material.⁴⁰

So long as the basic nature of the proffered license continued to be "evolving," it would be difficult to present to the Commission particular provisions for review, pursuant to the process invited by the Commission in par. 29 of its Declaratory Ruling. Accordingly, the parties to the December 19 agreement, heeding the Commission's hope and plea to work out remaining standardization issues, have presented to the Commission a proposed standard form of license, *plus* draft "Encoding Rules" that provide the balanced, pan-industry application, and assurance of consumer expectations that have been cited by the Commission as key factors. In their December 19 letter to Chairman Powell, the parties noted that these Encoding Rules are derived from two sources: (1) the "5C" license as cited by the Commission (and the MPAA) in footnote 67 of the Declaratory Ruling, and (2) Section 1201(k) of the Digital Millennium Copyright Act ("DMCA").

These Encoding Rules are essential to any solution that meets the parameters discussed by the Commission in its Declaratory Ruling. In industry "Hoedown" roundtable Commission staff discussions subsequent to that Ruling, CEA and CERC argued that a license would be incomplete and unbalanced unless it contained such integral encoding rules.⁴¹ NCTA and CableLabs responded that (1) they have no basic objection to providing such assurance to consumers, but, as the Commission had noted in the Declaratory Ruling, it would be unfair to have different rules for different industry segments or different industries that offer or compete

³⁹ Declaratory Ruling, par. 28.

⁴⁰ *Id.*

⁴¹ Consumer Electronics Retailers Coalition, Answer Of The Consumer Electronics Retailers Coalition To Hoedown Questions Re Cable Industry's Draft 'POD Host-Interface License Agreement' ('PHILA'), C.S. Docket No. 97-80, June 6, 2002.

for the same programming (DBS and cable), and (2) there was no way, within the four corners of a license agreement itself, to provide the necessary protections on an enforceable basis.⁴²

In response to these cable industry concerns, representatives of CEA and CERC suggested in the same roundtable discussion that the only way to break the impasse over a balanced copyright regime, consistent with the Declaratory Ruling and FCC regulations governing licenses, was via an industry-to-industry discussion of the “DFAST” license and the related Encoding Rules, overseen if necessary by the Commission.⁴³ The staff encouraged the parties to pursue this course. Subsequently, discussion of a model DFAST license, and draft Encoding Rule regulations, was added to the agenda of the ongoing “Plug & Play” negotiations between the CEA and cable parties.

5. The Public Interest Requires That Impositions On Consumers Stemming From A Congressional Mandate Be Subject To Review And Calibration By The Agency Overseeing The Mandate.

By its actions and statements reviewed above, the Commission explicitly has accepted a responsibility to assure in its regulations, pertaining to a Multichannel Video Programming Distributor’s protection of its conditional access rights via license, that if the license addresses copy protection, (1) it must achieve a balanced outcome for consumers, and (2) equal results should obtain across different MVPDs carrying or competing for the same programming. These are the outcomes that have been achieved in the Plug & Play agreement. Any other outcome would interpret a federal mandate as requiring the FCC to authorize and oversee the licensing of manufacturers -- and the placing of restrictions on consumer uses -- specifically in aid of copy protection outcomes, but *not any calibration or modulation of those restrictions in the same oversight proceeding*.

On the two occasions in which the Congress has imposed mandates relating to copy protection, it has insisted on such calibration. On each occasion, the Congress explicitly recognized that the public interest requires a balanced result, and that any limitation on settled consumer expectations *resulting from a federal mandate* requires some corresponding limitation on the specific technological power given to content providers to control the outcomes in consumer homes.

In the Audio Home Recording Act of 1992 (“AHRA”), the Congress prescribed a “Serial Copy Management System,” and left it to the Secretary of Commerce to adopt any additional

⁴² Letter to W. Kenneth Ferree from Richard R. Green, Cable Television Laboratories, Inc. and William A. Check, National Cable & Telecommunications Association, Re: *Commercial Availability of Navigation Devices*, CS Docket No. 97-80; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, June 6, 2002. The only remedy available to the licensee would have to have been drastic and equally difficult to implement. See model CEA model DFAST license as filed with the Commission in Docket No. 97-80, September 11, 2002.

⁴³ Such a procedure had already been suggested by Rep. Boucher in a July 25, 2002 letter to Chairman Powell.

“system certified ... as prohibiting unauthorized serial copying”⁴⁴ and to establish a procedure to verify conformance.⁴⁵ The AHRA included an “encoding” provision, which prohibited the encoding of inaccurate information so as to frustrate consumers’ serial copying rights.⁴⁶ In this case, the limitation of the mandate to the prevention of *serial* copying was an inherent calibration of the new power given to content providers.

In section 1201(k) of the Digital Millennium Copyright Act of 1998 (“DMCA”), the Congress adopted a mandate for certain analog video recorders to respond to defined “Macrovision” technologies, subject to explicit “Encoding Rules” limiting the circumstances in which the technologies, to which conformance was mandated, could be applied.⁴⁷ In the Plug & Play agreement, the parties noted in their letter to Chairman Powell that the draft Encoding Rule regulations are modeled on Section 1201(k), and on the “5C” encoding rules cited by the MPAA and by the Commission in footnote 67 of its Declaratory Ruling.⁴⁸

Where a copy protection regime stems entirely from private sector initiative, CEA and CERC would hope that consumers’ settled expectations would also be respected -- but this may be defended as essentially a marketplace judgment. Where, however (1) the license is a direct and necessary result of the Commission’s implementation of congressional mandates and recognition of copy protection needs, and (2) powers to license entrants have been delegated to an interested private party, the public interest requires that the exercise of the Commission’s jurisdiction include the assurance of a fair result for licensees, and a balanced result for consumers. This is the outcome achieved by the cable/consumer electronics recommendations that are the subject of this FNPRM.

III. Early Approval And Implementation Of The “Plug & Play” Package Is Critical To The DTV and HDTV Transitions.

In its June, 1998 Report & Order and its May, 1999 Order On Reconsideration in Docket No. 97-80, the Commission anticipated that a fully competitive market in navigation devices, including DTV and HDTV receivers and recorders, would be established in the year 2000.⁴⁹ When this did not occur, the Commission, on September 15, 2000, adopted a *Further Notice of*

⁴⁴ Audio Home Recording Act of 1992, Pub. L. 102-563, 17 U.S.C. 1001 *et seq.* § 1002(a)(3).

⁴⁵ *Id.* § 1002(b). Although the AHRA’s legislative history referred to a Technical Reference Document (“TRD”), the TRD was not included in the legislation or referred to in the legislative text.

⁴⁶ *Id.* § 1002 (d).

⁴⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 28601 (1998), 17 U.S. C. § 1201(k).

⁴⁸ The outcomes under the “1201(k)” and “5C” encoding rules are not identical; under 1201(k), cable or satellite programming at the level of “basic cable” may not be encoded for copy protection purposes, whereas (pursuant to a subsequent request by motion picture interests) the “5C” encoding rules allow encoding of such programming against serial copying. The Plug & Play parties followed the more recent “5C” outcome in this respect. Recognizing that what is considered a “balanced” outcome may be subject to dynamic change, the draft Encoding Rules in the Plug & Play agreement provide for the Commission, by response to petition or through adjudication of complaints, to make limited further adjustments in the balance, and outlines regulatory proceedings for an expeditious determination of such issues.

⁴⁹ 13 FCC Rcd 14806 (1998); 14 FCC 7611-12 (1999).

Proposed Rule Making and Declaratory Ruling, in which it (1) asked for comments as to why a competitive market in navigation devices had not yet been established, and (2) as is discussed above, declared that a measure of copy protection may be considered a licensable restraint under Section 629, as a subcategory of conditional access.⁵⁰ More recently, the Commission has expressed concern over the pace of the HDTV transition, and the level of effort made by various industries to hasten this transition. In particular, Chairman Powell called on these and other industries directly to step forward with concrete steps.⁵¹

The December 19 “Plug and Play” agreement represents an integral and cohesive joint response by the cable and consumer electronics industries. It provides for a license regime that the cable industry and the consumer electronics manufacturing and retail industries agree is consistent with the Commission’s regulations and ruling with respect to impositions on licensees. A necessary part of this regime is the Encoding Rules that provide limitations on the potential reach of copy protection-based constraints. The agreement also defines a way for the Commission to rule on potential changes in the license’s “Compliance and Robustness” rules, which also calibrate the nature and impact of the copy protection regime imposed on the licensee. It gives the Commission a role in determining whether particular changes are necessary or admissible, in the event the parties cannot agree.

The solution that the parties have presented finally provides a workable vehicle to implement the Commission’s statement, in its September 2000 Declaratory Ruling, that disputes over particular license provisions should be “presented to the Commission.”⁵² More fundamentally, it spells out, in the form of a proposed regulation, specific technical undertakings by cable operators, and labeling obligations by manufacturers, that will assure that commercial navigation devices can be made, sold, and used by consumers with confidence.

The keystone to all of these accomplishments, however, is FCC enactment of the regulations on which these outcomes depend. Without FCC implementation, these parties and the Commission would be back to where they all started: the parties unable to agree on a satisfactory way forward, the Commission in search of a solution, and the public deprived of the benefits of the competition that the Congress mandated in 1992, and again in 1996. The biggest loser would be the public, because the HDTV transition would be deprived of the shot in the arm that this agreement is poised to administer: a new generation of HDTV receivers ready for immediate and direct connection to digital cable systems.

⁵⁰ 15 FCC Rcd 18210-11 (2000).

⁵¹ Letters from Chairman Michael K. Powell to Senator Ernest F. Hollings and Representative W.J. “Billy” Tauzin (Apr. 4, 2002) at www.fcc.gov/dtv.

⁵² Declaratory Ruling, par. 29. Without such a mechanism, a licensee would have to sign a license containing provisions that it believes to be contrary to FCC rules in order to challenge a provision before the FCC. As many provisions are inter-related, the effect would be for individual licensees essentially to ask the Commission to re-negotiate the license. The parties have avoided this outcome, yet achieved the element of Commission review declared available by the Commission, by agreeing to the provisions of the license itself in the context of FCC regulations, but making certain issues pertaining to *changes* appealable to the Commission.

IV. The Draft Encoding Rule Regulations Protect Vital Consumer Interests And Must Protect Early Adopter Consumers.

In addition to endorsing the concept and necessity of the jointly recommended encoding rules, CERC and CEA endorse their substance, as well. The recommended regulation is based on more than a decade of private and public sector negotiation and consideration, yet leaves room for development and public input.

A. The Draft Encoding Rules Follow The Blueprint And Policy Established By The Congress In Section 1201(k) Of The Digital Millennium Copyright Act.

As is shown above, the Encoding Rules are derived from those adopted by the Congress in the Digital Millennium Copyright Act. Additionally, they reflect (1) subsequent private sector negotiations involving all of the motion picture companies, and (2) more particular adaptations to protect the particular legitimate expectations of consumers receiving programming via digital and HDTV MVPD transmissions. They also account for the incentive of MVPD distributors to innovate.

Encoding Rules are, by definition, compromises, and may be aimed at moving targets. They cannot represent copyright law determinations of fair use, which must be done on a case-by-case basis according to particular facts and circumstances. They are, rather, calibrations of, and limitations on, what would otherwise be an entirely one-sided power enjoyed by the content provider or the content distributor. It would be entirely unfair to licensees, and to consumers, for official restraints to be imposed in the name of copy protection, but no countervailing limitation to be officially recognized.

Even to the extent Encoding Rules recognize the reasonable and customary expectations of consumers, this is a stable yet slowly moving target as technologies change. Hence, under any Encoding Rule regime, and under any license's Compliance Rules, there is likely to be some "change process." Again, the reasonable objective here is to avoid leaving the ultimate determination in the hands of one party only, with no recourse by the other. In the recommended Encoding Rules, there are mechanisms for trials and negotiations, but the ultimate authority over changes in the limitations resides with the Commission. This is so because the Commission also has the responsibility for administration over the DTV transition, the navigation device rules, and the licenses and contractual agreements under which copy control-based limitations may be imposed in the first place.

While the recommended Encoding Rules provide for initiative by MVPDs to petition to change the Encoding Rules applicable to defined business models, and to apply new rules, subject to complaint resolution, for undefined business models, they also provide for public comment and a determination in light of reasonable and customary consumer expectations, in every case except for "bona fide trials." The Commission's experience in receiving and resolving issues based on public comment also make it the logical and necessary place to resolve

disputes over the use of federally mandated content provider or content distributor power over licensees and consumers.

It should be clear that the Encoding Rules are not constraints or regulations governing devices; nor are they regulations addressing contractual relationships. They are, simply, limitations on outcomes that can be pursued via the power to place conditions on the federally mandated right to attach. Just as the license Compliance Rules, governing and limiting the design of consumer products, are not a limitation on the freedom of licensees to choose appropriate suppliers, the Encoding Rules do not address the freedom of contract of content suppliers or distributors. They merely calibrate and limit the outcomes that may be imposed on consumers through the exercise of power under a federally mandated license.

Since the late 1980s, and especially in the digital era, policy makers have called upon the private sector to take the initiative in negotiating reasonable outcomes, with respect to copy protection, and then to seek their application in the relevant regulatory spheres. The consumer electronics industry has been willing to negotiate as to recommended technical measures since 1989, but *only* to the extent these tools are balanced and limited by reasonable Encoding Rules. The history of these Encoding Rules, and the private sector balance and public sector scrutiny they reflect, is traced above in Part II.B.

B. The Draft's Resolution of the "Selectable Output Control" Issue Is Essential To Protect Consumers And The Public Interest.

One technology that the cable and consumer electronics industries agreed should *not* be available to content providers or distributors as a species of conditional access or broadcast regulation is "Selectable Output Control." Hence, the Encoding Rules provide that this technique may not be imposed on consumers, and do not provide for any change or review of this outcome.

Simply, Selectable Output Control is the remote selection, by the content provider or distributor, of the home interfaces that are to be active, and which ones are to be shut down, *on a program by program basis*. It is fundamentally unfair to consumers because it means that, even though they have acquired devices with apparently compatible interfaces, and rely upon these interfaces for the delivery of programming, the utility of the interface can be cut off without any consumer warning or input, so can never be relied upon for *viewing*, and well as *recording*, programs.

The only practical use for Selectable Output Control (instead of other available technical means to address security) is to discourage consumers from relying on an interface that supports home networking and home recording. If the person residing at 210 Oak Street buys products connected by a non-recordable interface, he or she would have little reason to fear that Selectable Output Control would be triggered, on a particular program, to sever the electrical connection between, *e.g.*, the set-top box and the display. If the person at 212 Oak Street acquires an identical box and display, but connected by an interface that supports recording, that connection

may be cut off at the whim⁵³ of the content provider or distributor. Thus, in accepting a license that provides for Selectable Output Control, the licensee is putting at risk any consumer who would rely on an interface that might *subsequently* be disfavored by the content provider.

Upwards of four million consumers have purchased HDTV receivers that rely, for HDTV content, on “component video” interfaces that content providers do not consider “secure” for copy protection purposes. Others will be offered a choice of receivers with secure digital interfaces, of which some support home recording and some do not. To allow the use of Selectable Output Control in MVPD transmissions would be to grant absolute control over consumer choice and experience to the content provider or distributor, irrespective of whatever Encoding Rules may otherwise apply to the programming. It would mean that even those consumers who do not own a recorder would be at risk of having the viewing screen go dark on an unpredictable, program by program basis. In response to statements of congressional concern, the Motion Picture Association of America has advised a congressional committee that it will *not* seek the imposition of Selectable Output Control in MVPD or other venues.⁵⁴

As was noted in Part II, representatives of the cable industry have also said they are willing to have this weapon unavailable for use against consumers, but *only* if it is also unavailable to DBS MVPDs. Otherwise, as the Commission has noted, there would be an imbalance in which content providers may offer programming only to the industry, or industry segment, which is willing to accept this practice. CEA and CERC are appreciative that the cable industry has recognized that this practice is not an appropriate species of conditional access.

C. The Commission Should Reach A Similar Result Banning The Use Of “Downresolution” On MVPD Services.

The Encoding Rules reach a similar result for the practice of “downresolution” as applied to programs originating as free, over-air terrestrial broadcasts, but are silent as to whether it should be allowed for other content.⁵⁵ In the view of CERC and CEA, equity to consumers requires that this practice be classified and treated in the same way as Selectable Output Control.

“Downresolution” relies on ancillary or embedded, program-by-program electronic triggers similar to those for Selectable Output Control. The trigger instructs the output of the affected device to halve the horizontal and the vertical resolution of HDTV pictures, resulting in a picture from which *three quarters* of the pixels have been eliminated. Downresolution is a

⁵³ Electronically, the set-top box would be responding to a code, ancillary to or embedded in the program material, telling it to turn off that interface.

⁵⁴ Letter to Hon. Billy Tauzin, March 20, 2002. As quoted in Mr. Attaway’s September 6, 2002 letter to Mr. Ferree: ‘MPAA and its member companies are not seeking in the 5C license or in the OpenCable PHILA context the ability to turn off the 1394/5C digital interconnect in favor of a DVI/HDCP interconnect through a selectable output control mechanism.’

⁵⁵ The December 19 letter to Chairman Powell states that the silence should not be taken to indicate approval, but rather that the issue should be for the Commission to resolve. The parties also understood that each is free to advise the Commission separately on this issue.

crude weapon indeed, as it applies equally to downstream viewing as well as recording, and appears to be useless in stopping Internet redistribution of HDTV signals, because such signals are likely to be further compressed, anyway, for this purpose.

Downresolution has been required, in contexts *other than* the initial reception and transmission for viewing HDTV signals, in license agreements where the component analog output is a secondary port that could be used, *e.g.*, to feed an HDTV recorder with a compatible input.⁵⁶ If employed, however, on the initial link between a set-top-box and an HDTV display, the effect is primary, and devastating, to the consumer: it denies to the consumer the HDTV viewing experience for which he or she has paid the MVPD.

Since “downresolution” applies only to HD-quality “component video” outputs, and since digital interfaces are entering the market, one might facetiously propose ignoring its impact on the first 4 - 6 million HDTV purchasers, on the assumption that the larger, future market will remain unaffected. For the HDTV pioneer adopters, however, this imposition would be permanent. The consumer electronics industry cannot accept such a breach of faith with its best customers, those who have accepted the invitation of the Congress and the Commission and become early investors in HDTV. Neither should the Commission.

V. The Commission’s Jurisdiction Clearly Extends To All Services Of All Multichannel Video Programming Distributors.

As is noted above, the cable industry, the motion picture industry, and the Commission itself have said that it would be unfair and unacceptable for copy protection-related regulatory outcomes to apply differently to different industry segments or industries that compete for the same programming. Therefore, they have all expressed the need for a “level playing field” in this respect. Fortunately the Congress established a level playing field for *all* services of *all* MVPDs when it enacted Section 629.⁵⁷ This was affirmed by the Commission in its 1998 Report & Order and the Reconsideration Order.

The Commission ruled that (1) DBS providers clearly are covered by Section 629, (2) the Commission has jurisdiction over DBS providers with respect to Section 629, (3) no rules addressing DBS providers and the provision of separated security were necessary because DBS systems were already supporting competitive providers of nationally portable devices at retail, but (4) the Commission, in its oversight of Congress’s mandate, could not exclude DBS providers from obligations other than the “separation of security” obligation.

⁵⁶ The “5C” license makes such provision for downresolution, once the signal has already entered the secure system and, presumably, is available for full resolution viewing over the “5C” interface.

⁵⁷ Moreover, Sections 1, 4(i), and 303(r) provide the FCC with authority over matters reasonably ancillary to the implementation of other provisions of the Act. See 47 U.S.C. §§ 151, 154(i), 303(r). Thus, to implement compatibility requirements in a universal manner that encompasses both DBS and cable systems, the FCC can rely not only on Section 629, but also its authority to implement regulations reasonably ancillary to its jurisdiction under Section 624A.

The Commission said:

[T]he rules we adopt here will be applied to MVPDs as defined by Section 602(13). *** [W]e believe that Section 629 requires that the Commission apply the commercial availability requirements to all multichannel video programming systems.⁵⁸

We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems.⁵⁹

We believe, however, that differences in the marketplace for DBS equipment, where devices are available at retail and offer consumers a choice, as compared to equipment for other NVPD services, particularly cable operators, provide justification for not applying the rule requiring separation of security functions to DBS service.⁶⁰ *** Our rule provides that when an MVPD supports navigation devices that are portable throughout the continental United States, and are available from retail outlets and other vendors, the requirement for separation of functions is not applicable.

We ...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.⁶¹

The Commission’s Orders and Declaratory Ruling, taken together, make it crystal clear that (1) the Commission intends, and the public interest requires, that the same copy protection outcomes apply with respect to all industries and industry segments of MVPDs, as defined in Section 602(13), (2) DBS providers have not been exempted from this determination, and (3) there is a rationale identified by the Commission for exempting DBS providers only from the “separation of security” element of the Commission’s navigation device rules, and from no other element of them.

⁵⁸ Report & Order, par. 21.

⁵⁹ *Id.* par. 22.

⁶⁰ *Id.* par. 64.

⁶¹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 99-95, Order on Reconsideration (Rel. May 14, 1999) par. 37.

VI. Conclusion.

This FNPRM represents an historic opportunity for the Commission to move the DTV and HDTV transitions over the crest of the long hill that they have faced. It is now up to the Commission whether these enterprises crest the hill and gather speed, or roll back down. The representatives of the consumer electronics industry are united in urging the Commission to act expeditiously to approve and enact, on the bases we discuss, the matters presented in this FNPRM.

Respectfully submitted,

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Dated: March 28, 2003