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National Cable Television Association

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May 29, 1998

BY MESSENGER

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MAY 28 1998

EX PARTE

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: Ex Parte Presentations in CS Docket No. 97-80

Dear Ms. Salas:

On May 26, 1998, May 27, 1998 and May 28, 1998, Andy Scott, Director of Engineering of the National Cable Television Association ("NCTA"), representatives of NCTA member companies, and the undersigned had meetings with certain Legal Advisors in the offices of the FCC Chairman and Commissioners to discuss issues in the above-referenced docket dealing with the commercial availability of navigation devices.

On May 26, 1998, we had meetings with Jane Mago, Senior Legal Advisor in the Office of Commissioner Powell, and with Paul Misener, Senior Legal Advisor, and Helgi Walker, Legal Advisor, in the Office of Commissioner Harold Furchtgott-Roth. On May 27, 1998, we had meetings with Rick Chessen, Senior Legal Advisor to Commissioner Tristani and with Susan Fox, Senior Legal Advisor to Chairman Kennard and William Johnson, Deputy Chief of the Cable Services Bureau. On May 28, 1998, we met with Anita Wallgren, Legal Advisor to Commissioner Ness.

Finally, on May 28, 1998 Decker Anstrom, NCTA's President & CEO, other NCTA staff members and the undersigned met with Chairman William Kennard to discuss issues in the above-referenced proceeding.

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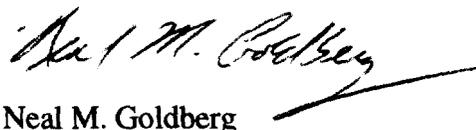
Ms. Magalie Roman Salas
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During our meetings we discussed NCTA's position on various issues raised in the proceeding on commercial availability of navigation devices. These discussions reflected the positions NCTA has taken in its previously-filed Comments and Reply Comments in the above-referenced proceeding. In addition, we subsequently distributed the attached documents to those with whom we met.

We are providing copies of those documents for inclusion in the docket in the above-referenced proceeding as well as sending a copy of this letter to those with whom we met and other interested persons.

If you have any questions, please contact the undersigned.

Sincerely,


Neal M. Goldberg

Attachments

cc: Chairman William Kennard
Susan Fox, Office of Chairman Kennard
Anita Wallgren, Office of Commissioner Ness
Jane Mago, Office of Commissioner Powell
Rick Chessen, Office of Commissioner Tristani
Paul Misener, Office of Commissioner Furchtgott-Roth
Helgi Walker, Office of Commissioner Furchtgott-Roth
William Johnson, Deputy Chief, Cable Services Bureau
Karen Kornbluh, Deputy Chief, Mass Media Bureau
Dale Hatfield, Chief, Office of Engineering and Technology
Robert S. Schwartz, Esq., Counsel to Circuit City Stores, Inc.

NAVIGATION DEVICES

NCTA KEY ISSUES

1. **Analog Boxes** -- Because of the greater risk to signal security inherent in analog delivery of signals and the complexity of achieving separation of security in the analog world, any rules requiring separation of security from non-security functions should not apply to analog boxes or "hybrid" boxes, i.e., those with analog and digital capabilities.
2. **Integrated Boxes** -- In addition to providing separate security modules that interface with non-security boxes available at retail, cable operators must have ability to provide boxes with embedded security to subscribers. A prohibition on the provision of such integrated boxes would be beyond the FCC's statutory mandate, inconsistent with previous FCC holdings and would not be in the public interest since the efficiencies of integrated boxes would be passed on to the consumer in the form of lower sale or lease prices. By encouraging subscribers to obtain advanced integrated boxes for lease from cable operators, cable operator provision of integrated boxes will both "prime the pump" for an eventual retail market for such devices and spur innovation of advanced services by cable operators who will have a base of advanced boxes able to accommodate those services. Prohibiting cable operator provision of such boxes, at least initially, will stifle such innovation. See attached talking points.
3. **Timing** -- If the FCC adopts rules mandating separation of security from non-security functions, it should not require the availability of the separate security module until at least 21 months after the OpenCable specifications for a separate security module are made publicly available and submitted to SCTE for adoption as U.S. standard.
4. **Anti-subsidy** -- No new rules need be adopted to enforce the anti-subsidy provisions of statute: equipment rate rules satisfy statute's requirements and systems not subject to regulation (either because they are subject to effective competition or because the LFA has forborne from regulating) will not be able to use "rate regulated services" to subsidize equipment as contemplated by statute.
5. **Third Party Access** -- FCC should not require cable systems to be configured to transmit a third party's program guides or other information since cable operators cannot be regulated as public utilities or common carriers and, in any event, such an action would be beyond the statutory mandate of the navigation devices provision.
6. **Portability** -- The statute does not require portability; it only mandates that the subscriber have the opportunity to obtain equipment to use with his or her system from someone other than his or her cable operator.
7. **Scope** -- As the statute mandates, any FCC rules implementing the statute must apply to all Multichannel Video Programming Systems, including DBS and MMDS.

SEC. 304. COMPETITIVE AVAILABILITY OF NAVIGATION DEVICES.

Part III of title VI is amended by inserting after section 628 (47 U.S.C. 548) the following new section:

"SEC. 629. COMPETITIVE AVAILABILITY OF NAVIGATION DEVICES.

"(a) COMMERCIAL CONSUMER AVAILABILITY OF EQUIPMENT USED TO ACCESS SERVICES PROVIDED BY MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS.—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 video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor. Such regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, 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.

"(b) PROTECTION OF SYSTEM SECURITY.—The Commission shall not prescribe regulations under subsection (a) which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.

"(c) WAIVER.—The Commission shall waive a regulation adopted under subsection (a) for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection, and such waiver shall be effective for all service providers and products in that category and for all providers of services and products.

"(d) AVOIDANCE OF REDUNDANT REGULATIONS.—

"(1) COMMERCIAL AVAILABILITY DETERMINATIONS.—Determinations made or regulations prescribed by the Commission with respect to commercial availability to consumers of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, before the date of enactment of the Telecommunications Act of 1996 shall fulfill the requirements of this section.

"(2) REGULATIONS.—Nothing in this section affects section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premises equipment used in connection with basic common carrier communications services.

"(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.

"(f) COMMISSION'S AUTHORITY.—Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."

NAVIGATION DEVICE PROCEEDING

MAJOR AREAS OF AGREEMENT BETWEEN NCTA AND CIRCUIT CITY

- **Goals of Proceeding:** Competition, consumer choices, respect for network security/ integrity.
- **Analog Embedded Base:** Rules should be prospective only, not affecting CPE “presently in distribution over a phase-out period” (i.e., its remaining useful life). However, Circuit City wants “newly manufactured” analog CPE to support the proposed security interface.
- **Security Concerns:** Security circuitry must be under exclusive control of system operator.
- **Network Concerns:** “Right to Attach” must be tempered by concern about harm to network.
- **Security Interface:** Rely on industry efforts (at least as first step) citing Decoder Interface, NRSS process.
- **Interoperability:** Rely on marketplace, not government standards.
- **“Hardware Transparent Applications Environment”:** Any commercially available CPE must permit MVPDs to deliver to customers their unique features and functions.
- **Program Guides:** FCC should not mandate that cable operators be required to provide access to and transmit any third-party program guide (position advanced by Starsight).

**OPENCABLE TIMELINE FOR
DIGITAL SEPARATE SECURITY EQUIPMENT**

FCC Navigation Device Order

June 1998

**OpenCable recommended specifications
for (1) digital separate security module and
(2) its interface with host box made publicly
available**

December 1998

**Separate digital security modules available
from cable operators**

September 2000*

* While not within control of cable operator, under this schedule, digital host devices for digital security modules should be able to be manufactured for retail availability by September 2000.

THE FCC SHOULD NOT PROHIBIT CABLE OPERATORS FROM PROVIDING INTEGRATED SET TOP BOXES

1. Section 629 Does Not Authorize the FCC to Prohibit Cable System Provision of Integrated Boxes:

- Section 629 only requires that CPE that does not jeopardize security must be made “commercially available.” It does not require that the cable operator must separate out security from non-security functions in CPE it makes available to subscribers.
- Congress contemplated operator provision of integrated boxes in Section 629 by providing explicitly that FCC rules “shall not prohibit” cable operators from providing boxes as long as charges are separately stated and not subsidized by service revenues.
- In adopting the navigation devices provision, Congress cautioned the FCC “to avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”
- The equipment averaging provision of the same statute was adopted to facilitate “the introduction of new technology,” presumably by fostering the introduction of advanced equipment such as new digital set top boxes.
- The Commission has already concluded that it is in the public interest to permit operator provision of integrated boxes in an environment where non-security boxes are made commercially available – a conclusion binding on the Commission in this proceeding. Section 629(d) requires that “[d]eterminations made or regulations prescribed by the Commission with respect to commercial availability to consumers of [navigation devices]” prior to the 1996 Act “shall fulfill the requirements of [Section 629].” In the equipment compatibility rulemaking the Commission concluded that “we see no reason to preclude cable operators from also incorporating signal access control functions in multi-function component devices that connect to the Decoder Interface connection.” 11 FCC Rcd 4121, 4127(1996)(March 1996 decision clarifying pre-1996 Act determination.)

2. It is in the public interest to permit operators to provide integrated boxes.

- The Commission’s determination in the Equipment Compatibility Rulemaking that it is in the public interest to permit operators to provide integrated boxes in an environment where non-security boxes are available at retail is equally applicable in this proceeding.
- While cable operators agree that separation of security from non-security functions is one way to address the retail availability issue, virtually no-one disputes the fact that security is enhanced when it is embedded in integrated boxes; Given this fact and the statutory directive that the FCC rules not jeopardize signal security, the Commission should not prohibit operators from providing integrated boxes to provide enhanced security.
- In the near term at least, the market for advanced set tops will be limited as cable systems roll out features and functions. By encouraging subscribers to obtain advanced integrated boxes for lease from cable operators, cable operator provision of integrated boxes will both “prime the pump” for an eventual retail

market for such devices and spur innovation of advanced services by cable operators who will have a base of advanced boxes able to accommodate those services. Prohibiting cable operator provision of such boxes, at least initially, will stifle such innovation.

- Any economies generated by the integration of security and non-security functions in one box should redound to the benefit of consumers. Therefore, cable operator provision of integrated boxes will benefit cost-conscious consumers who cannot afford to purchase boxes at retail (while obtaining the security module from the operator) to the extent the operator's monthly lease of such boxes is a more economical choice for the consumer. In this way, consumer resistance to the purchase of advanced equipment may be overcome to the benefit of consumers, the cable industry and the consumer electronics industry.
- Consumers who are not technologically sophisticated will also benefit from operator provision of integrated boxes because they need not overcome concerns about purchasing unnecessary equipment and can exchange such a leased box for one with more features as technology develops and/or systems are upgraded and they will not be saddled with "obsolete" boxes that cannot provide them with the full benefits of their cable systems.
- Technologically sophisticated consumers could also benefit from operator provision of integrated boxes since they could lease operator-supplied boxes until the retail market brings forth a feature-rich box to their liking, at which time they could return the leased box and purchase the retail box with no cost for the return (unlike the case if they had purchased the box).
- Consumers should not be forced to bear the burden of having the substantial investment made by cable operators in serviceable integrated boxes made obsolete by regulatory fiat.
- To take advantage of their own economies of scale and scope, retailers such as Circuit City envision integrating the non-security functions and the host interface for separate security modules into all types of consumer electronics equipment such as television sets, VCRs, DVD players, etc. Since retailers want no part of embedded security themselves, it would be inconsistent for the FCC to prohibit cable operators from providing an integrated box to take advantage of whatever economies the operators can derive from such integration.
- As long as consumers are made aware of the option to acquire non-security boxes at retail, cable operator provision of integrated boxes will not impede the retail availability of set-top boxes since features-only boxes available at retail may offer (1) features that are not available through integrated boxes, (2) improved implementation of these features, and (3) the same features at lower cost.
- Cable operators will not be competing in the market for sales of set-top boxes; rather they will be leasing those boxes as long as consumers demand such an option. Indeed, since cable operators will derive most of their revenues from the services they provide to consumers, they will want the demand for such services to be as high as possible. In large part, the demand for services will be a function of how many consumers have the option to obtain equipment to receive those services. Limiting the choices of the equipment to receive such services or raising the prices for such equipment, is not in the interest of the cable operator. In any event, cable operators will not have the incentive or the ability to act anti-competitively to prevent the development of a retail market for features boxes as long as operators also offer security-only modules by a date certain and provide interface information so compatible features-only boxes may be built. See Besen and Gale analysis, attached to GI May 16, 1997 Comments at 17-19.

**PORTABILITY IS NOT MANDATED BY THE STATUTE NOR SHOULD THE
COMMISSION REQUIRE IT AT THIS STAGE**

1. Portability is not mandated by the statute

- The statute only calls for the “commercial availability” of set-top boxes and the legislative history says purpose is to “help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box ... from a cable system or network operator.” That purpose can be achieved without a national portability requirement.
- Requiring portability across all cable systems which have different transmission, modulation, bandwidth, security technologies, system architectures and other characteristics would emesh the Commission in standards-setting contrary to the statutory mandate that the Commission rely on “industry standards-setting organizations” and that it “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”

2. A portability requirement would involve the Commission in standards setting with all of the adverse consequences that entails

- As the Commission itself recognized in the NPRM, “requiring portability ... at this time could impede the development and marketing of devices that are intended to work with one specific MVPD and restrict consumer choice to excessively costly units.”
- Such government-mandated standards would freeze technology in place and chill innovation as manufacturers will be reluctant to build new and improved products if the product deviates from the standard or risks being non-compliant.
- At a minimum, there is a risk of establishing a premature standard based on unproven technology; at worst, a government-imposed standard will reduce the incentive to develop a superior one. Under any circumstances, with a government-imposed standard, regulatory processes will impede modifications of the standard or the introduction of new technologies by incumbents who benefit from the codified standard.
- These and other reasons dictated the Commission’s decisions not to impose technical standards in the context of DBS, MMDS, PCS and DARS, and should do so again in this proceeding.

3. Portability is not necessary to achieve a vibrant retail market

- Many, if not most major retailers, have sophisticated marketing systems that can pinpoint the needs of consumers in particular markets where their stores are located. For example, Circuit City is able to supply its stores in specific locations across the country with products, such as particular cellular phones, usable in that particular area. There is no reason why a similar approach cannot be taken with respect to set-tops which are compatible with particular systems across the country.
- Indeed, there are significant consumer benefits associated with diversified set-tops customized to particular systems, whereas mandated portability across systems could increase the costs of set-tops to all consumers, and limit the development of new features.
- The DBS and PCS markets are flourishing even though the equipment purchased for use with one provider may not be used to access the services of another provider if the subscriber moves to a different location or merely wants to change providers without moving

4. Premising a call for portability on the telephone model ignores the differences between the telephone and a cable circumstances.

- Telephone standardization and "portability" was possible because essential technical standards had already been established by the nationwide monopoly.
- Unlike the case with attachments to a cable network, there are few, if any, security issues relating to intellectual property distributed when a customer attaches CPE to the telephone network.
- There is little potential for interference with other network users when a customer attaches faulty CPE to the telephone network – the harm will be to only one line, whereas a defective device attached to a cable network, particularly when used to transmit upstream, could harm the entire network. In this way, the cable situation is analogous to the party line telephone context for which the FCC adopted special rules exempting such lines from certain post-Carterfone requirements.
- Unlike the case with the telephone network, the cable operator is responsible for ensuring that its network causes no harm from signal leakage and other possible consequences of faulty CPE and relevant government agencies (e.g., the FAA) rely on cable operators to monitor these matters.

- Telephone and cable architectures are radically different since the telephone instrument itself does not grant consumers access to the service being sold by the telephone company – owning a telephone set does not allow consumers to take advantage of a service to which they do not subscribe. By contrast, cable companies must protect their services at the consumer's home, since the signals of all programming services are present at all times throughout a cable television system's distribution system.
5. In any event, industry efforts are underway to promote national portability and any Commission requirements are likely to retard, rather than advance, the effectuation of national portability.