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**MCDERMOTT, WILL & EMERY**

June 2, 1998

EX PARTE OR LATE FILED

**VIA MESSENGER**

Ms. Magalie R. Salas  
Federal Communications Commission  
Office of the Secretary  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

**RECEIVED**

JUN 2 - 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Notice of Oral and Written Ex Parte Presentation;  
Docket No. 97-80**

Dear Ms. Salas:

This is to notify the Office of the Secretary that on June 2, 1998, W. Stephen Cannon, Senior Vice President and General Counsel, accompanied by Robert S. Schwartz, an attorney with the law firm of McDermott, Will & Emery, met with Susan Fox, Senior Legal Advisor to Chairman Kennard and Commissioner Ness and Anita Wallgren, Advisor to Commissioner Ness. In the course of the meeting, they provided a written ex parte document, a copy of which is enclosed with this notice.

In accordance with the Section 1.1206 of the Federal Communications Commission rules, this original and one copy are provided to your office. A copy of this notice has been hand-delivered to Susan Fox and the office of Commissioner Ness.

Very truly yours,

*Robert S. Schwartz /cmk*  
Robert S. Schwartz

Enclosure

cc: Susan Fox  
Office of Commissioner Ness

Office of the Secretary  
FEDERAL COMMUNICATIONS COMMISSION

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## Commercially Available Navigation Devices: Facilitating Consumer Choice

The underlying objectives of Section 629 of the Telecommunications Act of 1996 are to achieve technological and marketplace competition for MVPD customer premises equipment; to achieve this competition through technical standards that allow navigation functionality to be built into consumer electronics and computer products available nationally in the open marketplace, and for the Commission to rely on the private sector standards process to produce the necessary technical standards to allow the same piece of equipment to be used to access MVPD services within the same service class throughout the United States.

The plain language of Section 629 and its legislative history clearly reflect these objectives. Section 629 states that the "Commission shall, *in consultation with appropriate industry standard-setting organizations*, adopt regulations to assure the commercial availability ... of ... equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems." The Conference Report associated with this section confirms Congress's intent. Specifically, the report states that the "Commission is directed to consult with private standard-setting organizations such as IEEE, DAVIC ..., MPEG, ANSI and other appropriate bodies" to ensure the commercial availability of navigation devices. H.R. Rep. No. 104-458, at 181 (1996).

The reference to embracing new technological standards would be empty and meaningless if, as some parties in the Navigation Device proceeding have suggested, Section 629's mandate could be satisfied by a requirement that the "boxes" chosen by MVPDs for their own distribution to customers also be made available for nominally "independent" distribution to consumers. Nor would such a token level of "availability" comport with Congress's expectation that navigation capability would be expanded from just converter boxes to TVs, computers and VCRs available as *national* commodities through a variety of outlets. The Commerce Committee made this point when it stated that "the transition to competition in network navigation devices and other customer premises equipment is an important *national* goal.... A competitive market in navigation devices and equipment will allow common circuitry to be built into a single box, or eventually into televisions, video recorders, etc." H.R. Rep. No. 104-204, at 112 (1995, emphasis added).

Therefore, it cannot be nearly enough that a cable operator's "converter box," with its locality-driven embedded conditional access "secrets," be made available through a select number of production and distribution channels. Commercial availability of navigation devices requires that the devices are nationally portable and functional throughout a class of service, that navigation features and functions are built into staple consumer electronics and computer products, that the devices can be supplied through any distribution channel demanded by the consumer and by any manufacturer interested in producing the device, and that the *consumer* is the arbiter of product features available in the marketplace.

The most effective way for the Commission to assure the commercial availability of navigation devices is by embracing private sector standard-setting to enable the result specifically sought by the Congress. The essential specification is that for a standard

security interface that enables national portability. For such an interface to be adequately supported in fact, as well as in theory, navigation devices supplied to subscribers by the MVPD must *also* embrace the separation of navigation and security functionality that is necessary to support competition from others. Subscriber access to an MVPD's services through such devices must be activated through the same security mechanism. Without these requirements, there will never exist the level of unified interest, commitment and demand necessary to ensure the production and support of commercially available and nationally portable navigation devices.

It is wholly within the FCC's authority to direct MVPDs to comply with industry standards, design and performance goals, or some combination of both that will allow consumers to use any conforming navigation device to access an MVPD's services, regardless of how the navigation device was secured. A failure by the FCC to exercise this authority will preserve the status quo – navigation devices that are available only from the MVPD and that function only on specific MVPD systems – a result that will be in direct conflict with the explicit language and intent of Section 629. The Commission can avoid this result. It need not create navigation device and security standards; it must only require in its rules that MVPDs adopt standards that will promote consumer choice.

FCC precedent illustrates that the agency can and has promulgated rules based on industry standards, even when those standards are not yet final, and that it can regulate the marketing or importation of equipment as a means for bringing about a desired result. In addition to the examples provided by Circuit City and the Consumer Electronics Retail Coalition in their comments and reply comments, the following precedent supports reliance by the FCC on industry standards and equipment rules to provide for the commercial availability of navigation devices.

**In the Matter of Telephone Number Portability (CC Docket No. 95-116)**

As part of its First Report and Order in the number portability proceeding, the FCC directed the North American Numbering Council ("NANC") to make recommendations on a national number portability architecture and technical specifications. The NANC, in turn, formed a working group of industry representatives to consider technical and operational standards. As a result of the working group's findings, the NANC recommended uniform number portability standards, which were largely adopted by the FCC. Adoption of CableLabs' OpenCable™ standard or other industry standards as a means for establishing a uniform security interface in navigation devices and for separating security functionality out of such devices comports with the FCC's approach in its number portability proceeding.

**In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them (PR Docket No. 92-235) (the "Refarming Proceeding")**

In an effort to promote the efficient use of spectrum and to make additional spectrum

available for technologies operating in frequency bands below 800 MHz, the FCC established rules that limit the ability of manufacturers to secure FCC equipment authorization for transmitting equipment that does not comply with new narrowband channel allocations. A similar approach should be adopted for ensuring that Cable System Terminal Devices may not be marketed if they contain embedded security functionality or lack a standard security interface.

**In the Matter of Access to Telecommunications Equipment and Services by Persons with Disabilities (CC Docket No. 87-124)**

In the rules governing the manufacture and deployment of hearing aid compatible ("HAC") telephones, the FCC relied on a combination of standards for establishing compliance measurements, including those still under development by the Telecommunications Industry Association. In addition, the FCC established that manufacturers and importers of telephones to be used in the United States must meet the HAC standards by a set deadline. Finally, the FCC implemented rules that require businesses to ensure that workplace telephones are compliant with HAC by established deadlines. The combination of industry standards and manufacturing and deployment deadlines adopted in the HAC proceeding demonstrates that a similar approach is possible in the navigation device proceeding.

**In the Matter of Implementation of the Communications Assistance for Law Enforcement Act ("CALEA") (CC Docket No. 97-213)**

In order to implement CALEA, the FCC deferred to the Telecommunications Industry Association to set technical standards. In response, TIA released an interim industry standard that set forth the technical parameters for telecommunications carrier compliance with CALEA. While the CALEA proceedings are ongoing and are the subject of great debate, the FCC demonstrated a willingness to rely on an outside entity to establish technical standards. The FCC should place a similar reliance on CableLabs and other industry bodies to develop standards related to navigation devices, including those standards governing a uniform security interface.

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While only a sampling from recent FCC proceedings, these examples, both individually and in combination, demonstrate that the FCC will not be deviating from its precedent if it embraces a truly effective rule in this proceeding.