

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

AUG 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 304)	
of the Telecommunications)	
Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability)	
of Navigation Devices)	

**PETITION FOR RECONSIDERATION OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

Of Counsel:	George A. Hanover Vice President, Engineering
David A. Nall	Gary S. Klein Vice President, Government and Legal Affairs
Jonathan Jacob Nadler	
Squire, Sanders & Dempsey L.L.P.	
1201 Pennsylvania Avenue, N.W.	
Post Office Box 407	
Washington, D.C. 20044	2500 Wilson Boulevard
(202) 626-6600	Arlington, Virginia 22201
	(703) 907-7600

August 14, 1998

No. of Copies rec'd 0711
List ABCDE

SUMMARY

While the Consumer Electronics Manufacturers Association (“CEMA”) supports the many pro-competitive actions that the Commission has taken to implement Section 629 of the Communications Act, the Association seeks reconsideration of two critical aspects of the *Order*. First, the Commission should require cable systems and other non-competitive multi-channel video programming distributors (“MVPDs”) to cease providing navigation devices that bundle conditional access and non-security functions as of July 1, 2000 – rather than allowing them to continue to provide such equipment until 2005. Second, the Commission should direct the Cable Consumer Electronics Compatibility Advisory Group (“C³AG”), which consists of representatives of both cable system operators and consumer electronics manufacturers, to develop specifications that will allow the unbundling on security and non-security functionality. The Commission should not rely on Cable Television Laboratories, Inc. (“CableLabs”), a consortium consisting only of cable system operators.

Provision of Bundled Equipment Until 2005

Inconsistent with congressional intent. Allowing cable and other non-competitive MVPDs to continue to provide bundled equipment until 2005 would impede Congress’ effort to ensure that consumers realize the benefits of a competitive market for navigation devices. As the Commission correctly recognizes, additional manufacturers will enter the market only if the Commission’s rules create “an incentive for mass production of equipment.” The Commission’s decision, however, will deter new entry by giving cable system operators and other non-competitive MVPDs the incentive and ability to “lock up” the navigation devices market by 2005 by developing bundled offerings that cannot be replicated by independent manufacturers.

No adequate explanation. The Commission's justification for its decision to allow continued bundling – that it will “minimize the impact of [the competitive availability requirement] on manufacturers and MVPDs, allowing manufacturers sufficient time to respond to equipment modifications” – is entirely unconvincing. Allowing cable and other non-competitive MVPDs to continue to offer bundled equipment until 2005 will do nothing to “minimize the impact” of this obligation on the manufacturers. Manufacturers must begin to offer equipment that separates security and non-security functions on July 1, 2000. The only entities for whom delay will “minimize the impact” are cable operators and other non-competitive MVPDs, which will have an additional four-and-one-half years in which to leverage their economic power in the services market to limit competition in the equipment market.

Unlawful waiver. The Commission's action constitutes a “blanket waiver” that will allow all cable operators to avoid complying with the commercial availability requirement until 2005. The Commission, however, has not satisfied the waiver standard contained in Section 629(c). The record is devoid of evidence that a waiver of the commercial availability requirement is necessary to facilitate development or introduction of any new or improved service, technology, or product.

Inconsistent with agency precedent. Finally, the *Order* fails to discuss the most directly relevant precedent – the agency's *Computer II Order*, which required telecommunications common carriers to unbundle basic telecommunications service and customer premises equipment. The Commission has never allowed a carrier to bundle telecommunications service and CPE, provided it also offers an unbundled version of the service. The Commission should not allow cable or other non-competitive MVPDs to do so.

The Role of CableLabs

C³AG – rather than Cable Labs – plainly is the appropriate body to develop any standards needed to ensure commercial availability of navigation devices. Using an open process that allowed for the full participation of both the consumer electronics and cable industries, C³AG developed a proposed decoder interface standard. C³AG also has been heavily involved in the development of the National Renewable Security Standard, which is designed to lead to the adoption of a standard that will facilitate the separation of security and non-security functionality in the digital environment.

CableLabs, in contrast, is ill suited to the task of developing standards to facilitate commercial availability of navigation devices. CableLabs is a cable industry consortium – established, funded, and run by select members of the industry – that sets specifications for equipment purchased by cable MSOs of particular interests. Because it is not a standards-setting body, reliance on CableLabs does not satisfy the statutory requirement that the Commission consult with “industry standards-setting organizations.”

Even if the cable industry allows consumer electronics manufacturers to participate in the CableLabs process, there is no established procedure to ensure that manufacturers’ interests will receive full and fair consideration. Consequently, any specifications that CableLabs refers to an accredited standards-setting body are likely to reflect the views of the cable industry – which has long sought to thwart competition in the equipment market. The end result will be adoption of standards that favor the cable industry and its favored suppliers, to the detriment of consumers. The Commission should not allow this to occur.

TABLE OF CONTENTS

- I. The Commission Should Not Wait Until 2005 to Implement Fully Its Pro-Competitive Rules Requiring the Unbundling of Navigation Devices2
 - A. Allowing Continued Bundling Will Impede Congress’ Efforts to Assure Competitive Availability of Navigation Devices.....4
 - B. The Commission Has Failed to Provide an Adequate Justification for Allowing Continued Bundling.....6
 - C. Allowing Bundling Until 2005 Constitutes an Unlawful Waiver of the Competitive Availability Requirement7
 - D. The Commission’s Decision is Inconsistent with Agency Precedent.....9

- II. The Commission Should Direct the Cable Consumer Electronics Compatibility Advisory Group, Rather Than CableLabs, to Develop Any Standards Necessary to Allow for the Separation of Security and Non-Security Functionality 11
 - A. C³AG is the Appropriate Group to Lead the Standards Development Effort12
 - B. Giving CableLabs Responsibility for Developing Standards Would Impede the Creation of a Competitive Market for Navigation Devices13

- III. Conclusion14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

AUG 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 304)
of the Telecommunications)
Act of 1996) CS Docket No. 97-80
)
Commercial Availability)
of Navigation Devices)

**PETITION FOR RECONSIDERATION OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association (“CEMA”) hereby petitions for reconsideration of the Report and Order (“*Order*”) issued by the Commission in the above-captioned proceeding.¹ While CEMA supports the many pro-competitive actions that the Commission has taken to implement Section 629 of the Communications Act, the Association seeks reconsideration of two critical aspects of the *Order*.

First, the Commission should reconsider its decision to allow cable systems and other non-competitive multichannel video programming distributors (“MVPDs”) to continue to sell, lease, or provide navigation devices that bundle conditional access and non-security functions (“bundled equipment”) until January 1, 2005². Rather, the Commission should

¹ See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 98-116 (rel. June 24, 1998) [hereinafter “*Order*”]. A summary of the *Order* was published in the Federal Register on July 15, 1998. See 63 FR 38089-95 (July 15, 1998).

² The phrase “other non-competitive multichannel video programming distributors” does *not* include direct broadcast satellite (“DBS”) providers. As the Commission correctly recognized, application of the unbundling rules is not required in the DBS market because devices used in connection with DBS service currently “are available at retail and offer consumers a choice.” *Order* ¶64.

require these operators to cease offering new bundled equipment on July 1, 2000 – the day on which they are required to begin to make available equipment that provides only conditional access functions (“security-only equipment”). Second, the Commission should reconsider its decision to rely on Cable Television Laboratories, Inc. (“CableLabs”), a consortium consisting only of cable system operators, to develop specifications that will allow the unbundling on security and non-security functionality. Instead, the Commission should direct the Cable Consumer Electronics Compatibility Advisory Group (“C³AG”), which consists of representatives of both cable system operators and consumer electronics manufacturers, to develop the necessary specifications.

I. The Commission Should Not Wait Until 2005 to Implement Fully Its Pro-Competitive Rules Requiring the Unbundling of Navigation Devices.

Congress adopted Section 629 of the Communications Act in order to provide subscribers of cable and other non-competitive MVPDs with the benefits of a competitive equipment market. As Congress recognized, competition will lead to greater choice, increased innovation, and lower prices.³

In the *Order*, the Commission found that requiring cable operators and other non-competitive MVPDs to separate security and non-security functionality “will facilitate the development and commercial availability of navigation devices by permitting a larger measure of portability among them, increasing the market base and facilitating volume production and hence lower costs.”⁴ The Commission further concluded that “the continued ability [of these

³ See, e.g., H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995) (“[C]ompetition in the manufacturing and distribution of consumer electronics devices has always led to innovation, lower prices, and higher quality.”).

⁴ *Order* ¶ 49; see also *id.* at ¶ 61 (“The separation of security will . . . facilitate commercial availability of navigation devices by allowing manufacturers to provide a diverse array of equipment”); *id.* at ¶ 62 (“[F]ailing to

entities] to provide integrated equipment is likely to interfere with our statutory mandate of commercial availability.”⁵ Continued bundling, the Commission added, “is an obstacle to the functioning of a fully competitive market for navigation devices” because it “imped[es] consumers from switching to devices that become available through retail outlets.”⁶

While the Commission concluded that allowing the cable systems and other non-competitive MVPDs to continue to offer bundled equipment would impede the growth of a competitive market, the agency did not order them to cease providing bundled equipment at the earliest feasible time. The Commission concluded that, given expected progress in developing the necessary specifications, navigation devices that separate security and non-security functions can be deployed by July 1, 2000.⁷ However, the Commission ruled that these operators may continue to sell or lease “new” bundled equipment until January 1, 2005.⁸ Even after that date, the provider apparently may continue to provide bundled equipment if the equipment was “placed in service” prior to January 1, 2005.⁹

The Commission’s explanation for this decision was terse. “Allotting a phase out period,” the Commission stated, “will minimize the impact of this requirement on manufacturers and MVPDs, allowing manufacturers sufficient time to respond to equipment modifications.”¹⁰ The Commission then cited a handful of prior decisions regarding equipment

separate security elements may delay commercial availability, thereby limiting enhanced functionality and services.”).

⁵ *Id.* at ¶ 69.

⁶ *Id.*

⁷ *Id.* at ¶ 81

⁸ *Id.* at ¶ 69.

⁹ *Id.*

¹⁰ *Id.*

phase outs in unrelated markets,¹¹ while ignoring the most directly relevant precedent – the Commission’s *Computer II Order*, which required telecommunications carriers to unbundle basic telecommunications service and customers premises equipment (“CPE”).

The Commission should reconsider its decision to allow cable operators and other non-competitive MVPDs to continue to offer bundled equipment until 2005 (and beyond). As we now demonstrate, this decision: (1) will impede Congress’ effort to assure competitive availability of navigation devices; (2) has not been adequately justified; (3) constitutes a waiver of the statutory competitive availability requirement, in violation of Section 629(c) of the Comminations Act; and (4) is inconsistent with prior Commission precedent.

A. Allowing Continued Bundling Will Impede Congress’ Effort to Assure Competitive Availability of Navigation Devices.

The Commission should grant reconsideration because its decision is inconsistent with congressional intent. Section 629 seeks to ensure that consumers will realize the benefits of a competitive equipment market for navigation devices. This simply cannot occur if cable operators and other non-competitive MVPDs are allowed to continue to offer bundled equipment until 2005.

Today, the market for navigation devices is not competitive. For example, large cable system operators – which continue to enjoy significant market power – have established close relationships with a handful of preferred manufacturers. These operators purchase equipment – which bundles security and non-security features in a single box – from these suppliers, and then sell or lease the equipment to subscribers. The goal of Section 629 is to transform this market into one in which consumers are free to choose non-security equipment

¹¹ See *id.* at ¶ 69 nn. 167 & 168.

from a wide range of suppliers, which compete based on functionality, quality, and price. To achieve this goal, new manufacturers must enter the market.

In the *Order*, the Commission correctly recognizes that additional manufacturers will enter the navigation devices market only if the Commission's rules create "an incentive for mass production of equipment" by "increasing the market base," thereby "facilitating volume production and . . . lower costs."¹² Allowing cable system operators to continue to offer bundled equipment until 2005 would not create the necessary incentives. To the contrary, it would impede development of competition by deterring additional manufacturers from entering the market.

If cable system operators are allowed to continue to provide bundled boxes, they – and their favored vendors – will seek to "lock up" as much of the navigation devices market as possible by 2005. To do so, the cable operators will almost certainly inform their subscribers that they are the *only* provider able to offer a single box that provides both security and non-security functionality. Although there is no evidence that such equipment provides either technical benefits or economic efficiencies, many consumers are likely to acquire cable-provided equipment solely on this basis. In addition, the cable operators and their favored manufacturers can be expected to continue to engage in joint planning and development. This will enable the cable operators and their preferred manufacturers to develop offerings that cannot be replicated by independent manufacturers.

If cable system operators carry out this strategy, the potential market for non-cable-provided equipment is likely to be extremely limited. Unable to realize scale efficiencies, few new manufacturers are likely to enter the market. Those that do will find it difficult to

¹² *Order* ¶¶ 49 & 62.

make significant investments in innovation while offering products at prices that are attractive enough to allow them to “break-in” to the market. The end result will be the perpetuation of the existing non-competitive market. Such an outcome is the very opposite of the one that Congress intended when it enacted Section 629.

B. The Commission Has Failed to Provide an Adequate Justification for Allowing Continued Bundling.

While the Commission has provided a compelling explanation of the benefits of a competitive market for navigation devices, and the need to require unbundling in order to achieve this goal, the *Order* provides almost no explanation for the decision to allow cable operators to continue to offer bundled equipment until 2005. What little justification the Commission provides, moreover, is entirely unconvincing.

Perhaps the most significant aspect of the Commission’s *Order* is what it does *not* say. The *Order* does not say that the Commission is going to allow continued bundling in order to protect network security. Nor does the *Order* say that the Commission is going to allow continued bundling in order to promote the deployment of new or improved services. And there is no suggestion that the Commission believes that allowing continued bundling will promote innovation, avoid disruption of service, increase user choice, or otherwise benefit consumers. Rather, the Commission has advanced a single justification for its action: “Allotting a phase out period will minimize the impact of [the competitive availability requirement] on manufacturers and MVPDs, allowing manufacturers sufficient time to respond to equipment modifications.”¹³

Manufacturers have not asked for a 54-month “phase out” period for cable operator-provided bundled equipment. Manufacturers must begin to offer equipment that

separates security and non-security functions on July 1, 2000. Allowing cable and other non-competitive MVPDs to continue to offer bundled equipment until January 1, 2005 will do nothing to “minimize the impact” of this obligation on the manufacturers. The only entities for whom delay will “minimize the impact” are cable operators and other non-compliance MVPDs their favored equipment providers. The Commission’s decision ensures that they will have additional four-and-one-half years in which to leverage their economic power in the service market to limit competition in the equipment market. Assisting cable operators and other non-competitive MVPDs in delaying the advent of equipment competition plainly does not constitute an acceptable justification for the Commission’s actions.

C. Allowing Continued Bundling Until 2005 Constitutes an Unlawful Waiver of the Competitive Availability Requirement.

The Commission’s decision to allow continued bundling of navigation devices until January 1, 2005 also exceeds the agency’s statutory authority. In effect, the Commission has granted a “blanket waiver” of the statutory commercial availability requirement without complying with the express waiver provisions contained in Section 629(c) of the Communications Act.¹⁴

The requirement of Section 629(a) is unambiguous: the Commission’s regulations must “assure the commercial availability” of navigation devices.¹⁵ Based on the record compiled in this proceeding, the Commission has concluded that the only means to fully achieve the commercial availability of navigation devices is to prohibit cable systems and other

¹³ *Id.* at ¶69.

¹⁴ CEMA raised the waiver issue in an *ex parte* filing, which the Association submitted on June 4, 1998. Although the *Order* cites the CEMA filing, *see Order* ¶ 68, the Commission made no attempt to address the merits of CEMA’s argument.

¹⁵ 47 U.S.C. § 629(a).

non-competitive MVPDs from offering equipment that bundles security and non-security functionality.¹⁶ Given that finding, Section 629 provides only two bases on which the Commission can allow continued bundling of navigation devices. First, Section 629(b) directs the Commission not to adopt any regulation that would “jeopardize security” of the programming carried over MVPD systems.¹⁷ Second, Section 629(c) allows the Commission to “waive a regulation” designed to promote competitive availability of navigation devices “for a limited time upon an appropriate showing by a provider . . . that such waiver is necessary to assist the development or introduction of a new or improved . . . service . . . technology, or products.”¹⁸ The Commission’s decision cannot be justified under either provision.

The Commission plainly has not acted under Section 629(b). To the contrary, the Commission has determined that by July 1, 2000, it will be possible to deploy equipment that separates security and non-security functionality in a manner that is fully consistent with the operators’ legitimate security concerns.¹⁹

The Commission’s action can only be viewed a “blanket waiver” that will allow cable operators and other non-competitive MVPDs to avoid complying with the commercial availability requirement until 2005. The Commission, however, has not satisfied the waiver standard contained in Section 629(c). The record is devoid of evidence that a waiver of the commercial availability requirement is necessary to facilitate development or introduction of any new or improved service, technology, or product. Moreover, even if the record supported this conclusion, the waiver period is excessively long. The duration of the waiver – fifty-four

¹⁶ *Order* ¶ 69.

¹⁷ 47 U.S.C. § 629(b).

¹⁸ *Id.* at § 629(c).

¹⁹ *Order* ¶¶ 75-81.

months – plainly does not constitute a “limited time.” This defect, standing alone, requires grant of CEMA’s petition.

D. The Commission’s Decision is Inconsistent with Agency Precedent

Finally, the Commission should reconsider its decision to allow continued bundling of navigation devices until 2005 because it is inconsistent with prior agency practice. The *Order* fails to discuss the most directly relevant precedent – the agency’s *Computer II Order*, which required telecommunications common carriers to unbundle basic telecommunications service and customer premises equipment. Instead, the *Order* cites four tangentially related decisions for the general proposition that “[t]he Commission, in other contexts, has provided for the phase out of equipment.”²⁰ None of these decisions, however, adopted a transition approach comparable to the one that the Commission established in the present matter.

The Computer II Order. As the Commission has recognized, in adopting Section 629, Congress sought to extend the agency’s highly successful, pro-competitive “telephone industry model to cable and other MVPDs.”²¹ Yet, the phase out proposed in Commission’s current *Order* differs fundamentally from the approach that the agency took in the telephone CPE market.

Historically, telecommunications carriers – much like today’s cable system operators – provided premises-based equipment to their subscribers as part of their regulated

²⁰ *Order* ¶ 69 nn.167 & 168.

²¹ See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5643 (1997); see also National Communication Infrastructure, Hearing Before the Subcommittee on Telecommunications and Finance, 103 Cong. 2d Sess. 353 (1994) (statement of Chairman Markey) (“[T]here are regulations governing the telephone industry that require the unbundling of customer premises equipment. . . . The cable industry does not have such unbundling rules today. . . . [W]e need to . . . us[e] the telephone company model for customer premises equipment.”).

offering. In the *Computer II Final Order*, adopted in 1980, the Commission gave all carriers approximately two years to cease this practice. After that time, carriers remained free to provide CPE. However, they were required to fully separate the provision of regulated transmission service from the provision of premises equipment.²² The Commission has never held that a carrier may bundle telecommunications service and CPE, provided it also offers an unbundled version of the service. As the Commission recognized, doing so would allow the carrier to use its economic power in the telecommunications market to impede competition in the CPE market.²³ In a similar manner, the Commission should not allow cable operators and other non-competitive MVPDs to bundle security functionality (which they may, in effect, provide as part of their regulated service offering) with navigation devices.

Other equipment phase out decisions. While ignoring the *Computer II* decision, the *Order* cites four other decision in which the Commission adopted new requirements governing a type of equipment, and established a transition plan to facilitate implementation. None of these decisions, however, adopted a transition mechanism comparable to the one that the Commission has established in the present matter.

In two of these decisions, the Commission allowed for the continued use of existing non-compliant equipment, but required that, after a transition period, no *new* non-compliant equipment be sold.²⁴ In the other two decisions, the Commission ordered that the use

²² See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 447-49 (1980) ("*Computer II Final Order*"), *on recon.* 84 F.C.C.2d 50, 53 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); see also 47 C.F.R. § 64.702(e) ("[T]he carrier provision of customer premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from the provision of common carrier communications and not offered services on a tariffed basis.").

²³ See *Computer II Final Order*, 84 F.C.C. 2d at 446-47.

²⁴ *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Rules Governing Them*, 10 FCC Rcd 10076, 10098-101 (1995) (adopting type acceptance rules applicable to equipment

of *existing* non-compliant equipment be ended as soon as compliant equipment became available.²⁵ In the present case, in contrast, the Commission has allowed for the continued use of existing non-compliant equipment *and* has allowed operators to sell or lease new non-compliant equipment manufactured long after compliant equipment becomes available. There can be no justification for this approach.

II. The Commission Should Direct the Cable Consumer Electronics Compatibility Advisory Group, Rather than CableLabs, to Develop Any Standards Necessary to Allow for the Separation of Security and Non-Security Functionality.

Section 629 provides that the Commission, “in consultation with appropriate industry standard-setting organizations,” is to adopt regulations that will assure commercial availability of navigation devices.²⁶ The Commission has correctly concluded that private industry is in a far better position than is a government regulatory agency to undertake the task of developing any necessary standards.²⁷ The Commission’s *Order*, however, does not mention the one entity best suited to lead the effort to develop these standards: the Cable Consumer Electronics Compatibility Advisory Group (“C³AG”). Instead, the *Order* repeatedly states that

manufactured one year and ten years after the date of the order); *Maritime Services Rules (Part 80) to Restrict Frequency Selection Capability of VHF Transmitters to Maritime Frequencies*, Report and Order, 4 FCC Rcd 5680, 5681 (1989) (prohibiting the manufacturer of non-compliant equipment one year after the release of the order and prohibiting the sale of non-compliant equipment two years after the release of the order). The Commission adopted the same approach in the *Part 68* docket, which established standards governing CPE designed to prevent harm to the telecommunications network. See *Interstate and Foreign Message Toll Service*, 56 F.C.C. 2d 593 (1975).

²⁵ See *Administration of the North American Numbering Plan Carrier Identification Codes*, 12 FCC Rcd 8024, 8040 (1997) (requiring the phase out of existing non-compliant equipment after eight months because “the transition should end as soon as practicable”); *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd 1786, 1844-46 (1994) (requiring the phase out of existing non-compliant equipment after nineteen month in order to promote “rapid” deployment of compliant equipment while “allow[ing] manufacturers ample opportunity to obtain FCC type acceptance and certification for their new equipment and to produce enough units to supply 13,000 broadcast stations and over 10,000 cable systems”).

²⁶ 47 U.S.C. § 629(a).

²⁷ See *Order* ¶ 72.

the cable industry consortium, CableLabs, will play the leading role in this process.²⁸ The Commission should reconsider this decision.

A. C³AG is the Appropriate Group to Lead the Standards Development Effort

C³AG plainly is the appropriate body to develop any standards needed to ensure commercial availability of navigation devices. C³AG was established as a direct outgrowth of the 1992 Cable Act. Section 17 of the Act seeks to ensure that consumers will be able to use competitively provided consumer electronic equipment (such as television receivers and videocassette recorders) in conjunction with their cable service. Congress directed the Commission to develop regulations necessary to implement this provision.²⁹ Pursuant to this directive, the Commission asked CEMA (then known as the Electronics Industry Association/Consumer Electronics Group) and the National Cable Television Association (“NCTA”) to form an advisory group that would represent both industries. The two associations jointly established the C³AG.³⁰

The Advisory Group has proven effective. Using an open process that allowed for the full participation of both the consumer electronics and cable industries, C³AG developed a proposed decoder interface standard. The proposed standard was then forwarded to the

²⁸ See, e.g., Order ¶ 14 (CableLabs is seeking “to develop key interface specifications to foster interoperability among digital navigation devices manufactured by multiple vendors.”); *id.* at ¶ 76 (“A process is underway at CableLabs that should lead to standardization, design, and production of . . . security modules and permit the design, production, and distribution of the associated navigation devices for retail sale.”); *id.* at ¶ 81 (The establishment of July 1, 2000 date for deployment of unbundled equipment “is premised on expedition of the progress towards the statutory goals that . . . is being made by the cable industry through the CableLabs/OpenCable project.”); *id.* at ¶ 117 (The work being performed by CableLabs “provide[s] the most immediate opportunity for a degree of standardization . . . [that will allow] equipment to be readily sold through retail outlets.”); *id.* at ¶ 125 (“[M]uch of our view that market forces [will lead to the adoption of standards] stems from the work of CableLabs . . .”).

²⁹ 47 U.S.C. § 624A.

³⁰ See *Implementation of Section 17 of the Cable Television Consumer and Protection Act of 1992*, 9 FCC Rcd 1981 (1994).

Electronics Industry Association (“EIA”), which is the relevant accredited standards setting body. EIA, in turn, adopted the Advisory Group’s recommendation as an official standard, EIA-105.³¹

C³AG has been heavily involved in the development of the National Renewable Security Standard (“NRSS”). This process is designed to lead to the adoption of a standard that will facilitate the separation of security and non-security functionality in the digital environment. Because of its proven history of success, its open procedures, and its representation of both affected industry sectors, C³AG plainly is the appropriate body to take the lead in developing a proposed standard, which can be submitted to EIA for approval.

B. Giving CableLabs Responsibility for Developing Standards Would Impede the Creation of a Competitive Market for Navigation Devices.

In contrast to C³AG, CableLabs is ill suited to the task of developing standards to facilitate commercial availability of navigation devices. CableLabs is not a standards-setting body. Thus, reliance on CableLabs does not satisfy the statutory requirement that the Commission consult with “industry standards-setting organizations.” Rather, CableLabs is a cable industry consortium – established, funded, and run by select members of the industry – that sets specification for equipment purchased by cable MSOs. CableLabs plainly does not represent the interest of all affected industries. Indeed, as the Commission has recognized, “no entities outside the cable industry are currently participating” in CableLabs’ efforts.³²

Recognizing the critical shortcoming of the CableLabs process, the *Order* directs CableLabs to “provide an opportunity for a range of interests to participate” in its specification-setting process. The Commission further threatens to “reevaluate [its] reliance” on the cable

³¹ See *Order* ¶ 52.

³² *Id.* at ¶ 14 n.20.

consortium if its specification-setting process “excludes the participation of particular interests.”³³ This is simply not sufficient.

Even if the cable industry allows consumer electronics manufacturers to participate in the CableLabs process, there is no established procedure to ensure that manufacturers’ interests will receive full and fair consideration. As a result, any specifications that CableLabs refers to an accredited standards setting body are likely to reflect the views of the cable industry – which has long sought to thwart competition in the equipment market. The fact that “entities outside the membership of CableLabs will be able to participate in the eventual standards setting process”³⁴ does not cure this defect. At that point, it will be too late for the consumer electronics industry to have a meaningful impact on the final standard. The end result will be adoption of standards that favor the cable industry and its favored suppliers, to the detriment of consumers.³⁵ The Commission should not allow this to occur.

III. Conclusion

For the foregoing reasons, the Commission should grant reconsideration of the Report and Order to the extent that it held that: (1) cable and other non-competitive MVPDs

³³ *Id.* at ¶ 125.

³⁴ *Id.* at ¶ 14.

³⁵ There is concrete evidence that the CableLabs process is not likely to lead to the adoption of standards that ensure commercial availability of navigation devices. The cable industry has advocated adoption of standards based on IEEE 1394 as a means to facilitate competitive availability of navigation devices. IEEE 1394 is a high-speed “bus,” which has recently gained attention in connection with the Commission’s “digital must carry” docket. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 FCC Rcd 10540 (1995). CEMA supports the efforts to being made in connection with IEEE 1394, and has committed to creating an audio/visual component companion standard by November 1, 1998. Establishment of this standard may be a welcome development, particularly in the near-term, for the delivery of digital broadcast transmissions through set-top boxes supplied by cable operators. CEMA, however, does not that believe that adoption of this standard will be sufficient to ensure competitive availability of navigation devices. What is required instead are full interoperability standards that will mirror the work done by C³AG in the “cable-ready” environment.

may continue to offer equipment that bundles security and non-security functionality until January 1, 2005; and (2) CableLabs is to play the leading role in developing specifications necessary to ensure competitive availability of navigation devices. Rather, the Commission should order cable operators and other non-competitive MVPDs to cease providing new navigation devices that bundle security and non-security functionality effective July 1, 2000. The Commission also should direct the Cable Consumer Electronic Compatibility Advisory Group to develop proposed standards to ensure commercial availability of navigation devices.

Respectfully submitted,

CONSUMER ELECTRONICS
MANUFACTURERS ASSOCIATION

By: George A. Hanover *GH*
George A. Hanover
Vice President
Engineering

By: GARY Klein *GK*
Gary Klein
Vice President
Government and Legal Affairs
2500 Wilson Boulevard
Arlington, VA 22201
(703) 907-7600

Of Counsel:

David A. Nall
Jonathan Jacob Nadler
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Post Office Box 407
Washington, D.C. 20044
(202) 626-6600

August 14, 1998

CERTIFICATE OF SERVICE

I, Barbara E. Fitzpatrick, hereby certify that copies of the foregoing document were mailed this 14th day of August, 1998, by United States First Class Mail, postage prepaid, to the following:

Magalie Roman Salas, Secretary*
Federal Communication Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554*

Benjamin Griffin
Robert A. Galbreath
Reed, Smith, Shaw & McClay
1301 K Street, N.W.
Suite 1100-East Tower
Washington, D.C. 20005

Jonathan D. Blake
Kurt A. Wimmer
Erin M. Egan
Covington & Burling
1201 Pennsylvania Avenue N.W.
Washington, DC 20004-7566

Marlin D. Ard
Sarah R. Thomas
Pacific Bell Video Services
140 New Montgomery Street
Room 1522 A
San Francisco, CA 94105

Gregg P. Skall
Pepper & Corarzzini, L.L.P.
1776 K Street NW
Suite 200
Washington, DC 20006

Margaret E Garber
1275 Pennsylvania Avenue, NW
Washington, DC 20004

James F. Rogers
James H. Barker
Nandam M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue NW
Suite 1300
Washington, DC 20004-2505

Debra H. Morris
George D. Callard
Attorneys for:
Ameritech New Media, Inc.
300 S. Riverside Plaza
Suite 1800 North
Chicago, IL 60606

Marvin Rosenberg
David Vaughan
Holland & Knight, L.L.P.
Suite 400
2100 Pennsylvania Avenue, NW
Washington, DC 20037-3202

Robert S. Schwartz
Joni Lupovitz
McDermott, Will & Emory
600 13th Street, N.W.
Washington, D.C. 20005

Richard L. Sharp, Chairman & CEO
W. Steven Cannon, Sr. VP and
General Counsel
Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233

*Hand Delivered.

Andre J. LaChance
1830 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Stuart E. Overby, Assistant Director
Spectrum Planning
Motorola, Inc.
1350 I Street N.W.
Suite 400
Washington, DC 20005

Aaron I. Fleischman
Arthur H. Harding
Howard S. Shapiro
Craig A. Gilley
Fleischman & Walsh, L.L.P.
1400 16th Street N.W.
Suite 600
Washington, DC 20036

Bill Loughrey
Director of Government Affairs
Corporate Communications Dept
Scientific-Atlanta, Inc.
One Technology Parkway, South
Norcross, GA 30092-2967

Grant E. Seiffert
Director of Government
Telecommunications Industry Association
1201 Pennsylvania Avenue NW
Suite 315
Washington, DC 20004-2401

Glenn B. Manishin
Blumenfeld & Cohen
1615 M Street NW
Suite 700
Washington, DC 20036

Becca Gould
VP Public Policy J.D. Marple
Manager, Legislative Policy
Business Software Alliance
1150 18th Street NW, Suite 700
Washington, DC 20036

Daniel Brenner
Neal M. Goldberg
Loretta P. Polk
1724 Massachusetts Avenue NW
Washington, D.C. 20036
Counsel for The National Cable Television
Assoc,

Philip L. Verveer
Francis M. Buono
Willke, Farr & Gallegher
Three Lafayette Center
1155 21st Street NW
Suite 600
Washington, DC 20036-3384

David G. Frolio
David G. Richards
1133 21st NW
Suite 900
Washington, DC 20036
Attorneys for:
Bell South Corporation

Kevin DiLallo
Levine, Blaszak, Block & Boothby, LLP
1300 Connecticut Avenue NW
Suite 500
Washington, DC 20036

Bruce Hahn, Director of Public Policy
Computer Technology Industry Assoc
6776 Littlefalls Road
Arlington, VA 22213

John I. Taylor, VP Public Affairs
VP Public Affairs Zenith Electronics Corp.
1000 N. Milwaukee Avenue
Glenview, IL 60025

Brenda L. Fox
Gregory L. Cannon
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
Attorneys for U.S. West, Inc.

John M. Boehm
811 South 13th Street
Lincoln, NE 68508
Attorney for Commercial Engineering

Glenn B. Manishin
Elsa P. W. Kiely
Frank V. Paganelli
Blumenfeld & Cohen – Technology Law
Group
1615 M Street, N.W.
Suite 700
Washington, D.C. 20036

John W. Pettit
Richard J. Arsenault
Drinker, Biddle & Reath LLP
901 15th Street, N.W.
Washington, D.C. 20005

Edward Schor
Anne Lucey
Viacom, Inc.
1515 Broadway
New York, NY 10036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 Eye Street, N.W.
Suite 701
Washington, D.C. 20006

Allen P. Bierman
Sales and Marketing Manager
Broadband Products
Belden Wire and Cable Company
P.O. Box 1980
Richmond, IN 47375-1980

Michael R. Gardner
William J. Gildea, III
Harvey Kellman
The Law Offices of Michael R. Gardner, P.C.
1150 Connecticut Avenue, N.W.
Suite 710
Washington, D.C. 20036

John D. Heubusch
Vice President, Government Affairs
Gateway 2000, Inc.
707 D Street, N.W.
Washington, D.C. 20004

Fiona J. Branton
Director, Government Relations and
Regulatory Counsel
Information Technology Industry Counsel
1250 Eye Street, N.W.
Suite 200
Washington, D.C. 20005

Erwin G. Krasnow
Michael D. Berg
Leo R. Fitzsimon
John S. Tritak
Vernon, Liipfert, Bernhard, McPherson
& Hand

Erwin G. Krasnow
Michael D. Berg
Leo R. Fitzsimon
John S. Tritak
Vernen, Liipfert, Bernhard, McPherson
& Hand
Suite 700
901 15th Street, N.W.
Washington, D.C. 20005

Michael H. Hammer
Todd G. Hartman
Willke, Farr & Gallagher
Three Lafayette Center
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20036

Sam Antar
Vice President, Law and Regulation
ABC, Inc.
77 West 66th Street
New York, NY 10023

David R. Pahl
Michael J. Pierce
ESPN, Inc.
ESPN Plaza
Bristol, CT 06010-7454


Barbara E. Fitzpatrick