

RECEIVED

OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

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

REPLY TO OPPOSITIONS TO THE PETITION FOR RECONSIDERATION OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

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

George A. Hanover  
Vice President,  
Engineering

Gary S. Klein  
Vice President,  
Government and Legal Affairs

2500 Wilson Boulevard  
Arlington, Virginia 22201  
(703) 907-7600

October 5, 1998

No. of Copies rec'd 019  
List ABCDE

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

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

**REPLY TO OPPOSITIONS TO THE PETITION FOR RECONSIDERATION OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association (“CEMA”) supports the many pro-competitive actions that the Commission has taken in this docket to implement Section 629 of the Communications Act. In its Petition for Reconsideration, however, CEMA asked the Commission to revise two critical aspects of its *Navigation Devices Order*.<sup>1</sup>

- First, CEMA called on the Commission to 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 (“bundled boxes”) as of July 1, 2000 – rather than allowing them to continue to provide such equipment until 2005.
- Second, CEMA requested that the Commission direct the Cable Consumer Electronics Compatibility Advisory Group (“C<sup>3</sup>AG”) to develop specifications that will allow the unbundling on security and non-security functionality, rather than relying on Cable Television Laboratories, Inc. (“CableLabs”).<sup>2</sup>

In these comments, CEMA replies to the opposition filed in response to its Petition for Reconsideration.

---

<sup>1</sup> 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) (“*Order*”).

<sup>2</sup> CEMA Petition for Reconsideration at 2-14 (“CEMA Petition”). CEMA filed its petition electronically on Friday, August 14, 1998. CEMA filed a paper copy of the petition on Monday, August 17.

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

In its Petition for Reconsideration, CEMA provided four separate reasons why the Commission should reconsider its decision to delay, until 2005, the ban on cable systems and other MVPDs with market power bundling security and non-security functions in a single device. The National Cable Television Association (“NCTA”) and General Instruments (“GI”) are the only commenters that even *attempt* to rebut CEMA’s arguments. For the most part, however, they simply reiterate their opposition to the Commission’s underlying decision to prohibit cable systems from providing bundled boxes.<sup>3</sup> CEMA has responded extensively to these arguments in its opposition to the Petitions for Reconsideration filed by NCTA, Time Warner Entertainment Company, and Telecommunications Industry Association; it will not repeat that analysis here.<sup>4</sup> To the extent that NCTA and GI address CEMA’s argument that the Commission’s prohibition should become effective in 2000, rather than 2005, their efforts fall short.

**Congressional intent.** CEMA’s Petition for Reconsideration demonstrated that 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.<sup>5</sup> As the Association explained, the Commission’s

---

<sup>3</sup> See, e.g., NCTA Comments on Petitions for Reconsideration at 5 (“NCTA Comments”) (“The Commission must recognize the compelling reasons why *any* prohibition on operator provision of set-top boxes is contrary to the statute and not in the public interest.” (emphasis in original)).

<sup>4</sup> CEMA Opposition to Petitions for Reconsideration at 2-17.

<sup>5</sup> The Wireless Cable Association International (“WCAI”) asserts that “CEMA’s argument necessarily is directed at wireless cable operators and other MVPDs who, though they indisputably lack market power, are in CEMA’s view ‘non-competitive’ solely because their set-top boxes [unlike DBS boxes] are not yet available through retail channels.” WCAI Opposition to Petitions for Reconsideration at 3 (“WCAI Opposition”). WCAI has read too much into CEMA’s Petition. The Association means just what it said: the Commission’s bundling prohibition should apply only to MVPDs that have market power. CEMA also believes, however, that the customers of MVPDs without market power should be able to exercise choice in the selection of navigation devices. Thus, CEMA would support an exception for MVPDs without market power to the requirement in the second sentence of Section 76.1204(a)(1) (the no-bundling rule), but believes that the first sentence of Section 76.1204(a)(1) (availability of

decision will enable cable systems to develop new bundled offerings that cannot be replicated by independent manufacturers. This, in turn, will enable cable system operators to “lock-up” the navigation devices market by 2005. The end-result will be to deter entry by competitive providers.<sup>6</sup>

NCTA and General Instruments attempt to prove that such “lock-up” will not occur. GI relies on an “economic analysis,” which it commissioned, that supposedly demonstrates that if “operators are required to offer a separate security-only boxes, they will have neither the incentive nor the ability to behave anti-competitively to prevent the development of a retail market for features boxes.”<sup>7</sup>

GI’s analysis is simply implausible. Cable systems, which have long enjoyed a monopoly in both the services market and the equipment market, have *every incentive* to attempt to extend their monopoly into the emerging, potentially lucrative market for non-security devices. Cable system operators, moreover, plainly retain the ability to do so. For example, a cable system operator could set the price of security-only devices and bundled boxes at exactly the same level. Were it to do so, few consumers would be likely to obtain a security-only device from the cable operator and then make a second payment to an independent manufacturer to obtain non-security functionality – even if the competitively provided non-security features were significantly better than the “free” features provided by the cable operator.

NCTA and GI’s assertion that consumer electronics manufactures’ ability to integrate non-security functionality with their equipment will prevent cable systems from “locking up” the

---

security-only devices) should apply to MVPDs without market power, unless they conform to the requirements of Section 76.1204(a)(2) (devices operate throughout the continental U.S. and are available from unaffiliated vendors).

<sup>6</sup> CEMA Petition at 4-6.

<sup>7</sup> General Instrument Comments to Petitions for Reconsideration at 17 (“GI Comments”).

navigation devices market is equally unconvincing.<sup>8</sup> The simple fact is that *only* cable systems can offer devices that bundle security functionality that subscribers require to access cable programming with non-security functionality. As long as this is the case, cable systems will have an unfair – and, indeed, insurmountable – competitive advantage.<sup>9</sup>

**No adequate explanation.** In its Petition, CEMA also demonstrated that the Commission has failed to provide an adequate explanation for its decision to allow cable and other MVPDs with market power to continue to provide bundled boxes until 2005.<sup>10</sup> Rather, the Commission simply asserted that providing a 54-month “phase out” period will allow manufacturers “sufficient time to respond to equipment modifications.”<sup>11</sup> The Commission, however, did not explain why manufacturers – who will commence provision of unbundled devices on an optional basis as of July 1, 2000 – require additional time. Nor did the Commission attempt to assess the competitive impact of this approach.

No party has tried to fill the void in the Commission’s reasoning. Indeed, the only party to address this issue, NCTA, actually agrees that the Commission has not justified the January 1, 2005 date – although it proposes that the Commission remedy this defect by eliminating the unbundling prohibition altogether.<sup>12</sup>

---

<sup>8</sup> See NCTA Comments at 8; GI Comments at 18.

<sup>9</sup> See *Circuit City Stores Opposition to Petitions for Reconsideration* at 15 (“Circuit City Opposition”) (“Consumers may be less willing to purchase competitively available navigation devices that differ from the equipment offered by the MVPD. This . . . would make it difficult or impossible for unaffiliated vendors to establish a competitive market for navigation devices with separate security.”).

<sup>10</sup> CEMA Petition at 6.

<sup>11</sup> *Order* at ¶ 69.

<sup>12</sup> NCTA Comments at 9.

**Blanket waiver.** CEMA's Petition also demonstrated that the Commission's action constitutes a "blanket waiver" that will allow all cable operators to avoid complying with the commercial availability requirement until 2005. Grant of such a waiver, CEMA showed, is unlawful because the Commission has not satisfied the waiver standard contained in Section 629(c) – which provides that the agency may "waive a regulation adopted under subsection (a) [the commercial availability provision] for a limited time" if the agency concludes that this is necessary to facilitate development or introduction of any new or improved service, technology, or product.<sup>13</sup>

NCTA – which, again, is the only party to even address this issue – is reduced to splitting hairs. The Commission, we are informed, "did not conclude that the separation of security functions is *required* by the statute."<sup>14</sup> Rather, the agency "merely said that 'the separation of security will *significantly enhance* the commercial availability of equipment.'"<sup>15</sup> Whether Section 629(a) requires the Commission to prohibit bundling, or merely permits the Commission to do so, is irrelevant. The simple fact is that the Commission, acting pursuant to Section 629(a), has prohibited bundling – but has deferred implementation of this regulation for 54 months (which is hardly a "limited time") without demonstrating that such an industry-wide waiver is necessary to promote the deployment of new or improved services or equipment.

**Inconsistent with Commission precedent.** Finally, CEMA's reconsideration petition demonstrated that the *Navigation Devices Order* ignored, and is inconsistent with, the most directly relevant precedent – the agency's *Computer II Order*. As CEMA explained, the

---

<sup>13</sup> CEMA Petition at 7-9.

<sup>14</sup> NCTA Comments at 10 (emphasis added in NCTA Comments).

<sup>15</sup> *Id.* at 10 n.30 (quoting *Order* at ¶ 61) (emphasis in original).

*Computer II* rules impose an absolute prohibition on bundling. The Commission's commercial availability rules, in contrast, will allow MVPDs to continue to bundle for an extended period – provided they offer subscribers an “unbundled option.” The *Navigation Devices Order* neither acknowledged this inconsistency, nor attempted to explain why a different result is appropriate in the navigation devices market.<sup>16</sup>

NCTA first claims that the Commission's *Computer II Order* is irrelevant because that decision required the unbundling of telecommunications service and customer equipment, while the present proceeding involves “the unbundling of various components of equipment provided to subscribers.”<sup>17</sup> This is plainly incorrect. At the time it adopted the *Computer II* regime, the Commission recognized that local telecommunications service was not competitive, while the CPE market was potentially competitive.<sup>18</sup> The Commission therefore required telecommunications carriers to separate completely the provision of regulated telecommunications services from potentially competitive CPE. In the present proceeding, the line of demarcation is somewhat different: the market for cable services *and* the market for security devices are not competitive, while the market for non-security devices is potentially competitive. However, the basic principle – full separation between competitive and non-competitive offerings promotes competition – is fully applicable.

NCTA further asserts that, to the extent that *Computer II* is relevant, “application of that common carrier decision to cable operators would be barred by Section 621(c) of the Communications Act which flatly states that a ‘cable system shall not be subject to regulation as

---

<sup>16</sup> CEMA Petition at 9-10.

<sup>17</sup> NCTA Comments at 11.

<sup>18</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 438-47 (1980) (subsequent history omitted).

a common carrier or utility by reason of providing any cable service.”<sup>19</sup> Here, again, NCTA’s assertion cannot withstand scrutiny. As an initial matter, the term “common carrier regulation” is typically used to refer to entry, exit, and rate regulation. The Commission’s *Computer II* rules do not apply this type of regulation to CPE. To the contrary, the Commission adopted the unbundling requirement in order to *eliminate* the application of common carrier regulation to carrier-provided CPE.

NCTA’s argument, moreover, proves too much. The Commission’s *Carterfone* decision provides telephone customers with a “right to attach” CPE to the telephone network. Under NCTA’s approach, however, Section 621(c) bars the Commission from providing cable subscribers with a similar “right to attach” competitively provided navigation devices to a cable system because this would constitute imposition of common carrier regulation. This reasoning is plainly fallacious, both logically and as a matter of sound public policy.<sup>20</sup>

## **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.**

In its Petition for Reconsideration, CEMA demonstrated that the Cable Consumer Electronics Compatibility Advisory Group (“C<sup>3</sup>AG”) – rather than CableLabs – is the appropriate body to develop any standards needed to ensure commercial availability of navigation devices.<sup>21</sup> NCTA, Circuit City, and Echelon Corporation oppose CEMA’s request.

The problem with relying on CableLabs is obvious. As NCTA itself acknowledges, “CableLabs [serves] as representative of cable companies.”<sup>22</sup> As such, CableLabs will take

---

<sup>19</sup> NCTA Comments at 12 (quoting 47 U.S.C. § 541(c)).

<sup>20</sup> See Order at ¶¶ 28-32 (applying “the *Carterfone* principle” to navigation devices).

<sup>21</sup> CEMA Petition at 11-14.

<sup>22</sup> NCTA Comments at 15.

whatever actions it deems necessary to protect the cable industry's interests. Plainly, promoting competitive entry into the navigational devices market is not in the cable industry's interest. Neither NCTA nor Circuit City has provided a satisfactory solution to this problem.

NCTA first denies that there is any reason for concern. CableLabs, we are assured, will allow "participation" by consumer electronics manufacturers and others. This has not been the case up until now.<sup>23</sup> Moreover, even if representatives of the consumer electronics industries and other interested parties may "participate" in the CableLabs process, such participation will not include any authority to vote on proposed specification.<sup>24</sup> Thus, the specification adopted by CableLabs will represent the interests of the cable industry.

Circuit City takes a different tack. The retailer recognizes the cable industry's incentive to limit competitive availability of navigation devices. Nonetheless, it supports the Commission's decision to assign responsibility to CableLabs to develop the specifications necessary to allow commercial availability because it believes that this will enable the Commission to hold the cable industry "accountable" for the success or failure of the effort.<sup>25</sup> To overcome CableLab's institutional bias, Circuit City would have the Commission require the cable group to "accommodate [the] views of interested parties to the extent they serve competition and the public interest, even when those views may lead to results that are contrary to the interests of its members."<sup>26</sup> NCTA adds that any perceived shortcoming in the cable-

---

<sup>23</sup> See, e.g., Ameritech New Media Comments at 9 ("[S]everal alternative MVPDs have been denied . . . the opportunity to participate in the standards setting process . . . ."); WCAI Opposition at 7 ("[C]ertain alternative MVPDS . . . have been excluded from CableLabs' 'OpenCable' project . . . .").

<sup>24</sup> See NCTA Comments at 15.

<sup>25</sup> Circuit City Opposition at 20.

<sup>26</sup> *Id.* at 21.

industry-developed specification can be resolved when CableLabs' specifications are reviewed by an accredited standards-setting body.<sup>27</sup>

The approach advanced by NCTA and Circuit City is simply unrealistic. As the Association for Maximum Service Television perceptively observed:

Although CableLabs works with other industries to develop interoperable specifications, its cable industry members have ultimate control over what specifications are presented to accredited standard-setting bodies. It is the CableLabs membership – namely the largest MSOs – that determines draft standards . . . . This membership takes into account cable's interest in maintaining control over set-top boxes and other navigation devices like electronic program guides. . . . By the time the standards recommended by OpenCable are referred to an accredited standard-setting body that is truly open, the momentum for approving the OpenCable standards with minimal or no change may be overwhelming.”<sup>28</sup>

In contrast to CableLabs, C<sup>3</sup>AG allows for the full participation of both the consumer electronics and cable industries. C<sup>3</sup>AG has proven effective. Using an open process that allowed for the full participation of both industries, the Advisory Group developed a proposed decoder interface standard.<sup>29</sup>

Echelon, which has long opposed efforts to develop a decoder interface standard, seeks to use this proceeding to renew its attacks on C<sup>3</sup>AG. Most of its assertions do not warrant serious consideration. For example, the fact that C<sup>3</sup>AG was initially adopted to establish standards necessary to implement cable-consumer electronics equipment compatibility does not render it “an inappropriate organization to set industry standards for the commercial availability of navigation devices.”<sup>30</sup> As the Commission has recognized, however, C<sup>3</sup>AG's work is directly

---

<sup>27</sup> *See id.*

<sup>28</sup> Association for Maximum Service Television Comments on Petitions for Reconsideration at 4-5.

<sup>29</sup> CEMA stands ready to adopt appropriate measure to expand C<sup>3</sup>AG to include representatives of other affected industries.

<sup>30</sup> Echelon Corporation Comments on Petitions for Reconsideration at 19 (“Echelon Comments”).

relevant to achieving commercial availability of navigation devices.<sup>31</sup> Nor is it relevant that C<sup>3</sup>AG is “not an accredited standards-setting body” and was not listed in the Conference Committee’s explanatory statement regarding Section 629.<sup>32</sup> Precisely the same can be said about CableLabs.

There also is no merit to Echelon’s assertion that “C3AG’s processes do not comply with well-settled . . . requirements for openness, balance and fairness in [the] development of voluntary industry standards.”<sup>33</sup> Echelon made the identical arguments in numerous *ex parte* presentations in the *Cable Compatibility* docket. They are no more persuasive now than they were then.

### CONCLUSION

For the foregoing reasons, the Commission should grant CEMA’s Petition for Reconsideration.

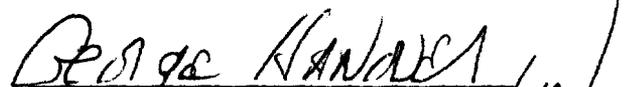
Respectfully submitted,

CONSUMER ELECTRONICS  
MANUFACTURERS ASSOCIATION

*Of Counsel:*

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

By:

  
George A. Hanover  
Vice President  
Engineering

By:

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

October 5, 1998

---

<sup>31</sup> Order at ¶¶ 71-73.

<sup>32</sup> Echelon Comments at 19-20.

<sup>33</sup> *Id.*

**CERTIFICATE OF SERVICE**

I , Benigno E. Bartolome, Jr., hereby certify that a copy of the foregoing "Reply To Oppositions To The Petition For Reconsideration Of The Consumer Electronics Manufacturers Association" was served this 5th day of October 1998 by hand delivery upon the following:

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

International Transcription Service  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Deborah Lathen, Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 918  
Washington, D.C. 20554

William Johnson, Deputy Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 918  
Washington, D.C. 20554

Barbara Esbin, Associate Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 918  
Washington, D.C. 20554

Meryl Icove, Associate Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 918  
Washington, D.C. 20554

Certificate of Service  
October 5, 1998

John Wong, Chief  
Engineering & Technical Services Division  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 201  
Washington, D.C. 20554

Michael Lance  
Engineering & Technical Services Division  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 201  
Washington, D.C. 20554

Thomas Horan  
Consumer Protection & Competition Div.  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 700  
Washington, D.C. 20554

Ben Golant  
Consumer Protection & Competition Div.  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Suite 700  
Washington, D.C. 20554

Dale Hatfield, Chief  
Office of Engineering & Technology  
2000 M Street, N.W., Suite 480  
Washington, D.C. 20554

Bruce Franca, Deputy Chief  
Office of Engineering & Technology  
2000 M Street, N.W., Suite 480  
Washington, D.C. 20554

R. Alan Stillwell  
Office of Engineering & Technology  
2000 M Street, N.W., Suite 480  
Washington, D.C. 20554

Certificate of Service  
October 5, 1998

and by United States first-class postage prepaid upon the following:

Aaron I. Fleischman  
Arthur Harding  
Howard Shapiro  
Fleischman and Walsh, L.L.P.  
Suite 600  
1400 Sixteenth Street, NW  
Washington, DC 20037

Daniel L. Brenner  
Neal M. Goldberg  
Loretta P. Polk  
National Cable Television Association, Inc.  
1724 Massachusetts Avenue, NW  
Washington, DC 20036

Paul J. Sinderbrand, Esq.  
Robert D. Primosch, Esq.  
Wilkinson, Barker, Knauer & Quinn, LLP  
Suite 700  
2300 N Street, NW  
Washington, DC 20037

Matthew J. Flanigan, President  
Telecommunications Industry Association  
Suite 350  
1300 Pennsylvania Avenue, NW  
Washington, DC 20004

Philip L. Verveer  
John L. McGrew  
Francis M. Buono  
Willkie Farr & Gallagher  
Suite 600  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20036-3384

Certificate of Service  
October 5, 1998

James M. Burger  
Peter C. Cassat  
Dow, Lohnes & Albertson, PLLC  
Suite 800  
1200 New Hampshire Avenue, NW  
Washington, DC 20036-6802

John F. Lyons, Director  
Regulatory and Legal Policy  
Motorola, Inc.  
1350 I Street, NW  
Washington, DC 20005

Jonathan D. Blake  
Ellen P. Goodman  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
Washington, DC 20007

John W. Pettit  
Richard J. Arsenault  
Drinker Biddle & Reath LLP  
Suite 900  
901 Fifteenth Street, NW  
Washington, DC 20005

Glenn B. Manishin  
Elise P.W. Kiely  
Blumenfeld & Cohen – Technology Law Group  
1615 M Street, NW, Suite 700  
Washington, DC 20036

Christopher Heimann  
Ameritech New Media, Inc.  
Suite 1020  
1401 H Street, NW  
Washington, DC 20005

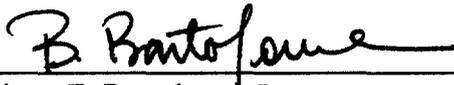
Certificate of Service  
October 5, 1998

Robert Galbreath  
Reed, Smith, Shaw & McClay LLP  
1301 K Street, NW  
Suite 1100 – East Tower  
Washington, DC 20005

Gary M. Epstein  
James H. Barker  
Johanna Mikes  
Latham & Watkins  
1001 Pennsylvania Ave., N.W., Suite 1300  
Washington, D.C. 20004

Kevin DiLallo  
Levine, Blaszak, Block & Boothby, LLP  
2001 L St., N.W., Suite 900  
Washington, D.C. 20036

Robert S. Schwartz  
Catherine Krupka  
McDermott, Will & Emery  
600 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20005

  
\_\_\_\_\_  
Benigno E. Bartolome, Jr.

DATED: October 5, 1998