

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

OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 304)
of the Telecommunications)
Act of 1996)
)
Commercial Availability)
of Navigation Devices)

CS Docket No. 97-80

**REPLY OF CIRCUIT CITY STORES, INC. TO COMMENTS ON AND
OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

Dated: October 5, 1998

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Pursuant to Section 1.429 of the rules of the Federal Communications Commission ("FCC" or "Commission"), Circuit City Stores, Inc. ("Circuit City") respectfully submits this reply to the comments on and oppositions to the petitions for reconsideration of the Commission's Report and Order adopted in the above-captioned proceeding regarding the commercial availability of navigation devices.¹

As a vitally interested retailer of consumer electronics and computer products, Circuit City is greatly encouraged by the support shown across the spectrum of U.S. high technology industry for the Commission's R&O in this proceeding. The oppositions filed by Motorola, the Information Technology Industry Council ("ITI"), and the Association for Maximum Service Television ("MSTV") and their specific support for the Commission's regulations, show that the subject of this proceeding extends well beyond attracting competition from a particular sector of the marketplace. Rather, the Commission is opening a key technological gateway to our economy's strongest engines of competition and progress.

More specifically, the responses show that the Commission has arrived at Congress' intended balance between regulatory standard-setting and inattention. If the Commission had waited longer, and had not imposed responsibilities on private sector organizations able to open the cable monopoly,

¹ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report and Order* (Released June 24, 1998) (hereinafter "R&O").

Congress' mandate to *assure* competition in making and selling navigation devices would have slipped away, frustrated by a legacy of incompatible new systems. If the Commission had adopted a more regulatory approach, and itself had attempted to devise standards, it would now be facing objections from the information technology industry rather than receiving the firm support shown in these responses.

I. The Oppositions To Reconsideration Show That The Report & Order Is Well Founded.

Circuit City agrees with Motorola that "the Commission's Order properly balances the conflicting interests as expressed by comments received in the proceeding and reaches a decision which will promote competition in the provision of navigation devices, consistent with the letter and intent of Section 629 of the Communications Act of 1934. The Petitioners' requests for reconsideration, on the other hand, would frustrate the pro-competitive purposes of Section 629 and should be denied."² ITI, a major computer industry trade association, explains:

A grant of the Petitioners' request would undermine the purposes of Section 629, and would unnecessarily delay the day that consumer have competitive access to navigation devices. Contrary to the Petitioner's positions, the unbundling of security and non-security functions will not harm, but rather will advance, consumer welfare.³

In earlier stages of this proceeding, IT industry representatives cautioned the Commission not to take an overly regulatory approach or to itself engage in standard-setting. The unconditional support for the Commission's R&O, in this respect, shows that the Commission has struck the correct balance in the areas essential to carrying out the Congressional mandate:

- identifying national portability as the key to a competitive market;
- requiring the separation of conditional access functions, to open up other features and functions to competition; and
- requiring that the security interface, which makes portability and competition possible, be fully supported by the cable industry, in both its service offerings and in the products furnished by cable MVPDs.

² Opposition of Motorola to Petitions for Reconsideration at 1 (hereinafter "Motorola Opposition").

³ Opposition of the Information Technology industry Council to Petitions for Reconsideration at 5-6 (hereinafter "ITI Opposition").

During the early stages of this proceeding, neither these electronics industry commenters nor MSTV (which did not file) specifically endorsed the establishment of a national security interface to achieve these objectives. Now that these electronics, computer, and broadcasting interests have joined the representatives of the consumer electronics manufacturing and retail industries in so doing, the consensus backing for the Commission's specific approach is impressive and illustrates its soundness.

II. The Commission Has In No Way Overstepped Its Authority.

GI joins NCTA in arguing that the Commission must have overstepped its authority because nothing in Section 629 explicitly says that cable operators must separate the security from non-security functions in equipment that they themselves furnish to subscribers. The Congress, however, clearly did not seek to micromanage this market, either in its statutory mandate or in its provision for exceptions. It instructed the Commission to *assure* competitive availability, in its regulations, through the use of its powers to regulate devices and services. That is precisely what the Commission has done.⁴

Those arguing that the Commission has exceeded its authority would read the statutory mandate itself incredibly narrowly, yet read the provisions for exceptions implausibly broadly. Neither interpretation is justifiable. The statute steers clear of prescribing for the Commission precisely how it is to assure competitive availability. The only specific guidance it provides is the instruction to the Commission to consult with private sector standards-setting bodies. This is a clear indication that Congress intended for the Commission to facilitate competition with a *technological* solution, rather than the sort of do-nothing *paper* solution urged earlier in this proceeding by GI and others.⁵

⁴ Circuit City does, however, support the argument in CEEMA's reconsideration request urging the Commission to shorten the period in which all devices utilizing hardwired security must be phased out. As CEEMA argues, a date prior to the January 1, 2005 phase out deadline ordered by the Commission will result in a more rapid emergence of competition in the navigation devices market.

⁵ Indeed, those commenting in this proceeding no longer challenge the Commission's basic determination that the key to addressing the task Congress set for the Commission is to establish a national security interface that will facilitate competition in non-security features and functions. The record, in fact, contains pledges of support for such an interface, from NCTA, major MSOs, and key suppliers to the industry. All remaining arguments that "Congress did not mandate portability," that Section 629's security exception should allow MSOs to retain integrated devices, etc., therefore, are makeweights.

The real remaining arguments are, first, that the Commission lacks the power to regulate devices offered by MSOs for any purpose or reason, and second, that by allowing MSOs to continue to offer converter boxes and other Navigation Devices so long as they refrain from subsidizing them through service offerings, the Congress somehow intended to immunize such devices from any action the Commission might take in this proceeding. These arguments were addressed in the Circuit City Response and have been demolished in other Responses as well.

CEMA correctly points out that Section 629 seeks not just market entry, but *competition*. More specifically, ITI shows that the Commission's Order is thoroughly consistent with the public interest as defined in legislative history:

As the Commission explained in the Order, its unbundling requirements will allow individual MVPDs to design equipment that meets their peculiar security needs 'while still facilitating portability and the development of the consumer equipment market.'

Moreover, as the Commission has noted, the unbundling requirements not only advance the purposes of Section 629, but they are consistent with the legislative histories of both Sections 629 and 624A. *** In short, the Commission has thoroughly articulated sound reasons, well supported by the record, for adopting the unbundling requirements, and none of the Petitions has made any showing that the Commission's reasoning or factual underpinnings are flawed.⁶

The Oppositions clearly demonstrate that the Commission's Order is well grounded in precedent, the factual record, the public interest, and the immediate goals of the Congress. The only argument left to be made is that the Congress in some manner indicated an intention to deprive the Commission of power in this particular instance. This argument CEMA specifically demolishes:

Any suggestion that Section 629(a) restricts the Commission's authority to order the unbundling of security and non-security functionality is doomed by Section 629(f). That provision states that 'nothing in this section shall be construed as . . . limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.' The Commission's authority over cable system provision of premises equipment

⁶ ITI Opposition at 5-6. Furthermore, as Tandy points out, "The[] petitioners have not demonstrated why the Commission's 7½ year phase-out period for integrated equipment is either unreasonable or inappropriate. Indeed, Tandy believes that [CEMA] has shown that a shorter phase-out period would better serve the public interest." Opposition of Tandy Corporation at 7 (hereinafter "Tandy Opposition").

is well established. Consistent with Section 629(f), Section 629(a) cannot be read to restrict that authority.⁷

Petitioners' remaining argument is that Congress, by affirming that MSOs themselves should be allowed to remain in the market for Navigation Devices, somehow departed from its approach of leaving specific measures to FCC regulations and instead meant to imply some silent mandate that, in the case of "converter boxes," hardwired security could never be interfered with for any reason.⁸ This argument turns the statutory clause, which was inserted as a *limitation* on the monopoly power of MSOs over the device market, entirely on its head.⁹

GI claims that Congress, by using the words "converter box" in this clause, must have intended that MSO "converter boxes," as opposed to Navigation Devices in general, must be allowed to retain hardwired security for all time! Yet Congress used the phrase "Navigation Device" only in the title for Section 629. In the legislative text itself, Congress used the phrase "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services ..." as a synonym for "Navigation Device" *both* in the first sentence of Section 629(a) *and* in the later clause limiting MSO ability to subsidize devices. Therefore, if GI is correct that the limiting clause somehow is meant to preserve hardwired security for all time, then, under its theory, Congress also intended, in the first sentence of Section 629(a), for retailers and other manufacturers not affiliated with cable MSOs to have the right to manufacture and distribute devices with hardwired security. Such an interpretation, of course, would be inconsistent with the requirement to consult with standards organizations (precisely to avoid such an outcome) and has been vigorously

⁷ Opposition of the Consumer Electronics Manufacturers Association to Petitions for Reconsideration at 6 (hereinafter "CEMA Opposition").

⁸ Comments of General Instrument Corporation in Response to Petitions for Reconsideration at 8-12 (hereinafter "GI Comments/Opposition"); Comments of NCTA On Petition for Reconsideration at 6 (hereinafter "NCTA Comments"); Comments of Ameritech New Media, Inc. on Petitions for Reconsideration at 6 (hereinafter "Ameritech Comments").

⁹ If Congress had been silent on the question, surely MSOs would not be suggesting today that, failing the inclusion of such a clause, Congress intended to exclude them from the market. To the contrary, they would be arguing that, in the absence of any such limitation, Congress must have wanted to perpetuate the *status quo* insofar as MSO devices are concerned. Now they argue that because Congress placed one limitation in the provision, it must have intended to deprive the Commission of any authority over them. This flies in the face of the statute and legislative history, as discussed above.

resisted by fellow petitioner NCTA throughout this proceeding.¹⁰

III. The Commission's Action Is Not Inconsistent With Any "Prior Determination," Nor Is It Contrary to Any Other Provision of the Act.

The last-ditch legal attack against the R&O is that the FCC is constrained from phasing out hardwired devices by a "prior determination" in another docket, and that Section 624A should be construed to prevent the Commission from engaging in analog "standard setting" in this proceeding. Each of these arguments was fully addressed in filings in response to the NPRM in this proceeding.

Petitioners themselves undercut any factual predicate for this claim. Only one petitioner opposed to the phaseout – Time Warner – suggests that the Decoder Interface is in any way relevant (and then, only as a solution to be applied by others than MSOs). The others are at pains to demonstrate that the Decoder Interface is *not* a "suitable basis" for any solution in this proceeding.¹¹ Indeed, GI cites NCTA's petition to show that "[t]he decoder interface was designed to work with set-back devices connected to new cable-ready TVs, not with set-top devices connected to all TVs, both old and new."¹² So, these petitioners argue, a ruling on the subject of set-back devices is completely irrelevant when the Commission is considering implementing it in the real world, but is also a "prior determination" that bars the Commission from taking any alternative action! In any event, as CEMA points out, the assumption that the "determination" occurred prior to enactment of Section 629 is incorrect.¹³

Echelon Corporation devotes much of its Comments to setting up the straw man that the Commission, in fact, did somehow adopt the Decoder Interface as a standard, and then knocking it down by arguing that Section 624A of the Act prevents the Commission from doing so. The

¹⁰ Additionally, NCTA points to a *post hoc, ex parte* letter from a Senator not involved in drafting the provisions in question, that questions the Commission's authority to phase out hardwired devices. As Tandy points out in its Response, however, "subsequent legislative history" is afforded little weight. Tandy Opposition at 7-8. Furthermore, to the extent such communications are considered to be of legal relevance, the record contains *ex parte* Congressional communications from the primary drafter of Section 629 explicitly to the contrary.

¹¹ GI Comments/Opposition at 4.

¹² NCTA Petition for Expedited Reconsideration at 10-11, n.25.

¹³ CEMA Opposition at 9 & n.37. CEMA also notes, as Circuit City did, that this provision was addressed to avoiding having settled proceedings, such as telephone CPE unbundling, re-opened and immediately "sunset."

Commission has correctly concluded that the legislative history of both Section 629 and Section 624A makes it unarguably clear that nothing in Section 624A can prevent the Commission from taking an action it finds necessary under Section 629.¹⁴ As ITI points out, however, the Commission did *not* set any standards, and, more specifically, it did *not* in any way adopt or mandate use of the Decoder Interface:

[T]he Commission did not *prescribe* any standard, including the decoder interface, for use to separate conditional access from other functions. On the contrary, it expressly left to industry groups the task of establishing necessary standards. The Commission cited the decoder interface only as evidence that industry is capable of resolving any technical issues relating to the separation of security and non-security components of analog devices.¹⁵

Circuit City, of course, has not advocated that the Commission order implementation of the Decoder Interface in this proceeding. We do not believe, however, that it would be appropriate to “reconsider” an action the Commission has not, in fact, taken.

IV. It Is Vital That The Commission Require A Real Solution to Obstacles Posed By Analog Security in Hybrid Systems.

Circuit City has not joined the other respondents who generally support the Commission’s Order in arguing for application to analog-only systems. It is crucial to understand, however, that Circuit City views the issue of *hybrid systems* – where some content is provided in scrambled analog form and not replicated on the digital tier – as one of the most important potential impediments to competition in digital devices. GI, in its Comments, recognizes that such problems will exist.¹⁶

Circuit City wishes to make it absolutely clear that its support for addressing analog security only in hybrid systems depends upon a positive, technological cure for this problem. For customers who require analog descrambling to receive any available MVPD service, the Commission’s requirement must be no different, and no less rigorous, than in the case of digital devices: separation

¹⁴ Echelon claims that this legislative history was in some way superceded by the Conference Report. It was not. Both Section 629 and Section 624A originated in the House Commerce Committee; neither was changed in conference in any way remotely material to the question of phaseout or analog coverage.

¹⁵ ITI Opposition at 9.

¹⁶ GI Comments/Opposition at 6. GI claims that the concerns are “limited” and outweighed by other considerations.

of the security circuitry from other features and functions. This is the entire basis of Circuit City's endorsement of a narrower scope with respect to analog.¹⁷ Separation of security circuitry should be considered the general rule: non-application in analog-only contexts should be considered the exception. If, instead, there were a choice between application of the separation requirement to *all* navigation devices and some "fix" to hybrid systems that does not involve separation of analog security circuitry, Circuit City would side with its fellow respondents and choose the former.¹⁸

V. The Responsibility For Meeting the Commission's Deadlines Must Remain With The Cable Industry.

While Circuit City has applauded the cable industry for establishing the OpenCable project and has complimented those in the industry who seem committed to its goals, our insistence that OpenCable, not C3AG, remain responsible for meeting FCC deadlines is not based on sentiment or favoritism over CEMA and C3AG.¹⁹ Circuit City's judgment is based, instead, on (1) the formation of C3AG for a different and more limited purpose; (2) that C3AG would have to be greatly expanded to address Navigation Devices generally; (3) that C3AG can be subject to impasses for which no one entity can be held responsible; (4) that the Commission expects to hold someone in the private sector *accountable* for compliance with its Order, based on *ex parte* representations; and (5) that those representations did not, and could not have, come from the entire C3AG, but from OpenCable alone.

NCTA, in its Comments, admits that it expects to be held accountable for the promises and assurances that the Commission relied upon in foregoing other, potentially more regulatory, alternatives. It warns that should the Commission shift responsibility from CableLabs to C3AG, "the timetable submitted to the Commission by NCTA and the commitments made by MSOs and manufacturers to support that timetable would no longer be effective. Without control over the

¹⁷ Any multi-device solution is no solution at all. The Commission's sorry experience with A/B switches shows that consumers would view an additional, analog, set-top box as an impediment.

¹⁸ As Circuit City indicated in its Opposition, it does not regard the Decoder Interface as the appropriate solution. Rather, pursuant to representations made to Commission staff, the OpenCable project should be obliged to provide analog descrambling functionality on PODs as necessary to avoid analog scrambling posing any obstacle to competitive availability of OpenCable-compliant devices from sellers who are not MSOs.

¹⁹ Indeed, Circuit City has been generally allied with CEMA, which represents important vendors to Circuit City, throughout the effort to achieve enactment of Section 629 and in most filings with the Commission.

process. CableLabs, NCTA, MSOs, and manufacturers could not vouch for achieving the desired result by July, 2000.”²⁰ While Circuit City would expect NCTA, its members, and its suppliers to be held accountable at least for their own actions and efforts to comply with the Commission’s orders under any and all circumstances, NCTA’s point is well taken if NCTA and its members are to face Commission sanctions for failure to comply with regulations, they ought to retain overall responsibility for such compliance.

Finally, Circuit City is sympathetic to concerns voiced by CEMA and others, that OpenCable might not exercise this responsibility fairly or in ways that most fully comport with the Commission’s intention. In such cases, it is the responsibility of others to bring these issues to the attention of OpenCable executives and, if necessary, to the Commission in its promised oversight capacity. Indeed, Circuit City—which often has been excluded from C3AG votes and “C4AG” (smaller group) meetings because it is neither a TV/VCR manufacturer nor a cable industry participant—will, despite its support for OpenCable responsibility, feel free to lodge complaints whenever necessary and appropriate.

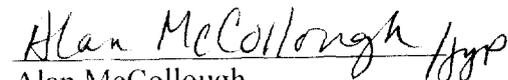
²⁰ NCTA Comments at 17.

VI. Conclusion

For each of the foregoing reasons, except as indicated in Circuit City's Opposition, the petitions for reconsideration should be rejected by the Commission.

Respectfully submitted,

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Dated: October 5, 1998

CERTIFICATE OF SERVICE

I, Cecilia Gornak, do hereby certify that on this 5th day of October, 1998, I caused the foregoing "Reply of Circuit City Stores, Inc. to Comments on and Oppositions to Petitions for Reconsideration" to be served via hand delivery to the following:

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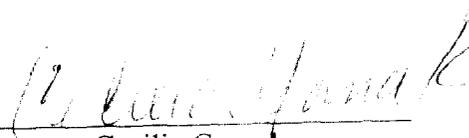
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