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February 2, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**VIA MESSENGER**

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

**Re: *Ex Parte* Presentation; In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices: CS Docket No. 97-80**

Dear Ms. Salas:

This is to notify the Office of the Secretary that on January 31, 2000, Alan McCollough, President of Circuit City Stores, Inc., accompanied by Robert S. Schwartz of McDermott, Will & Emery, made an oral *ex parte* presentation to Commissioner Susan Ness, advisers David Goodfriend and Mark Schneider, Chief Technologist David Farber, and Robert Pepper, Dale Hatfield and Amy Nathan of OPP. During the presentation, Mr. McCollough expressed concerns with respect to the draft "DFAST" license proposed by CableLabs for application to competitive Navigation Devices under the Report & Order in this Docket.

The essence of Mr. McCollough's presentation was that, as drafted, the license would contravene the separation, required by the Report & Order, between conditional access technology, to be isolated in POD modules and controlled by MVPDs, and competitive host devices, to be available for ownership by consumers according to competitive market principles. This license would disregard this separation by imposing a number of conditions and burdens on the host Navigation Device that are inconsistent with consumer ownership, and hence business investment in retail distribution.

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This letter also notifies the Office of the Secretary that on February 2, 2000, Circuit City made a written *ex parte* presentation to Commission attendees at the same meeting, specifically supporting the points made during the oral presentation. The oral and written presentation are relevant to the Commission's oversight ensuring industry compliance with its Navigation Device rules. A copy of the written presentation is enclosed with this letter.

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

Very truly yours,

Robert S. Schwartz

Enclosure

cc: Susan Ness
David Goodfriend
Mark Schneider
David Farber
Robert Pepper
Dale Hatfield
Amy Nathan

WDC99 210317-1.038074.0011

*Circuit City Stores*
*February 2, 2000*

Circuit City Concerns As To
CableLabs "DFAST" License Agreement

The purpose of Section 629 of the Communications Act, the regulations issued pursuant to CS Docket 97-80, and the OpenCable project, has been to create the preconditions for a fully competitive market in Navigation Devices. To this end, the Commission ordered the further development of a system that would put conditional access and security circuitry into "POD" modules distributed and controlled by MSOs, and would thus allow free and competitive commerce in Navigation Devices as standard, certified CE and IT products.

The current draft of the "DFAST" license circulated by CableLabs, however, would condition product certification, and the "right to attach," on a number of requirements that are not relevant to any proximate interest in security or conditional access. The license would also require a degree of post-sale control of competitive, host devices that would be unacceptable to consumers. Specifically, this license would:

(1) impose a number of obligations on the competitive *host device* that properly should pertain only to the POD Module in which the conditional access obligations, according to Commission regulation, must reside, and

(2) impose obligations pertaining to undefined "copy control" concepts and technologies, whether or not involving the licensed POD interface, rather than to security or conditional access.

All such provisions do not appear to conform section 76.1204(c) of Commission regulations, which limits requirements imposed on licensed products to those necessary to guard against threats to system security and conditional access.* Accordingly, the Commission would need to consider whether and, if so, under what circumstances, it would grant approval to a license that would, as does the DFAST draft, venture beyond these subjects.

Navigation devices should receive licenses from DTLA, to enable use of 5C technology, and from CableLabs, to enable use of the POD interface for purposes of signal security and conditional access. Neither license should be a vehicle for resolving other public policy issues.

Provisions of Particular Concern

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* **"No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service."**

Provisions that appear to go beyond the appropriate scope of any such license, as set forth by the Commission, are set forth below.

**2.2(b). End User License Agreement.** Consumers would "not be granted title" to any device as to software or firmware licensed by CableLabs. In other words, a consumer would not actually own any host device certified by CableLabs, even though CableLabs never built the device or contributed to its value. Moreover, devices would be licensed only for "personal, noncommercial purposes." Thus, businesses, corner taverns, and schools and universities, though eligible for cable service through MSO devices, would not be eligible to obtain any OpenCable product. (Consequently, after January 1, 2005, they would not be eligible for cable service at all.)

**7.2. Immediate Termination of License.** All licenses, including the "consumer" license in 2.2(b), can be terminated immediately in the sole discretion of CableLabs. This would defeat any incentive of manufacturers or retailers to invest in, or consumers to buy, any OpenCable licensed product.

**7.6 Termination of Service Through Withdrawal of POD.** Service to any consumer-owned host device may be terminated at any time, by withdrawal of the POD module, based on a unilateral determination that security or copy management in *the host* has been "compromised. Thus -- even if 8.2(c)(v), which would allow recall and destruction of "host" devices, is explained as a typographical error, the effect of this provision is the same -- cable service to a host device, bought and paid for by the consumer, can be terminated according to some unspecified *copy protection* concern.

**8.2 Design Requirements Re 'Unauthorized Copying.'** This section imposes several design and function obligations that are related only to storage capacity and interfaces of devices, and compliance with rules against "unauthorized copying."** Among the conditions that would be imposed on host devices, and which would be a bar to product certification at the discretion of CableLabs:

- 8.2(c)(i) No circuit or software that:

  (1) "enables unauthorized copying"

  (3) "permits ... storage in violation of copy control instructions ...."

** This is *not* the equivalent of theft of, or conditional access to, the signal. The Navigation Device Report and Order requires that all *conditional access* circuitry reside in the POD, not the host, but these provisions would apply to *both* the POD and the host. Indeed, the distinction between "conditional access" and "copy management" is recognized in the body of the DFAST license itself (e.g., 7.6). Moreover, as the Supreme Court expressly held in *Sony Corp. v. Universal City Studios,* "unauthorized" copying may otherwise be permissible by law.

- 8.2(c)(ii) Must "maintain control of content copies consistent with copy control instructions embedded in digital signals." This would apply to all interfaces of the licensed product, whether or not such signals ever passed across the POD interface which is purported to be licensed.

- 8.2(c)(v) Would allow CableLabs unilaterally to require licensee to cause the "recall ... return or destruction of 'Host Devices' that have left Licensees' direct possession ...." [Subsequently this provision has been explained as meant to apply instead to PODs. But sections 7.2 and 7.6, each of which would accomplish the same thing, have not been withdrawn.]

- 8.2(c)(vi) Would require "all host devices ... that have inherent recording *or output capability* will detect and respond appropriately to copy control instructions." License and certification would be denied or lost if the host had a cable or noncable input and a cable or noncable output as to which undefined "copy control instructions" were not "detected" and responded to "appropriately."

**Exhibit A. Certification Criteria.** The right to attach notwithstanding, certification may be withheld as to any consumer electronics, IT, or other device that does not, in CableLabs' sole judgment, comply with provisions such as those set forth above.

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