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August 24, 2000

VIA ECFS

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

Re: *Ex Parte* Presentations; In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment; PP Docket No. 00-67; 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 August 23, 2000, W. Stephen Cannon, Senior Vice President and General Counsel and Miles Circo, Chief Technical Officer of Circuit City Stores, Inc., accompanied by Robert S. Schwartz of McDermott, Will & Emery, made oral and written *ex parte* presentations to Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth, William J. Friedman IV, Senior Legal Advisor to Commissioner Tristani, Karen Edwards Onyeije, Legal Advisor to Chairman Kennard, and Commissioner Ness and her Senior Legal Advisor, Mark Schneider. The purpose of the presentations was to review and explain the points made in Circuit City's filings in the above Dockets. A copy of the written presentation is attached to this notice.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter and the written presentation is being provided to your office. A copy of this notice has been delivered to the parties listed above.

Very truly yours,

/s/ Robert S. Schwartz

Robert S. Schwartz

cc: William J. Friedman IV
Commissioner Susan Ness
Karen Edwards Onyeije
Mark Schneider
Helgi Walker

DFAST License Issues

Procedure

- Cable Industry was required to be ready to support competitive entry by July 1, 2000 and was aware of this date since June, 1998.
- Production license has never been available in other than draft form and never formally submitted to the Commission.
- NCTA and CableLabs have provided varying information as to whether any company has "signed" the draft license. Although claims of several signees have been made, as of yesterday claim is **one**, which CableLabs refuses to identify.
- The last general circulation of a DFAST draft occurred in mid-May, and no conference calls with interested parties have been held since late May. However, at least one potential licensee has received a subsequent draft dated July 17.
- In implementing Part 68, the FCC required (1) submission of license and specifications by AT&T for publication and comment, (2) consensus acceptance by interested parties, and (3) a *standard* instrument for all parties.
- CableLabs, however, apparently is awaiting abstract approval of the FCC, without any requirement of achieving consensus of interested parties or a standard instrument.
- Although CableLabs has made available an interim license allowing production of test samples, it has not allowed production of devices capable of meeting July 1 deadline.
- Once a license is finalized, it is customary to recognize a grace period for implementation of new technical constraints. In the absence of such a grace period, competitive entry would be further delayed.

DFAST License Issues

Substance

Harm To Network Or Theft Of Service

- The R&O language clearly limits license prohibitions or conditions to those necessary to prevent "harm to the network" or "theft of service." Technically, it recognizes the need for support of technologies such as POD re-encryption, V-Chip, etc.
- Circuit City has never argued that copy control or other technologies should never be recognized in the DFAST license; only that to the extent they are accompanied by license prohibitions or conditions, modification to the FCC regulations would be necessary.
- For the FCC simply to declare that any prohibitions or conditions related to copy control are within the existing regulations, as "conditional access" and hence aimed at protecting against "theft of service," would do violence to law, equity and precedent in a number of ways:
 - copyright proprietor rights would be recognized as extending to control over *all* home recording, despite the statutory fair use doctrine recognized by the Supreme Court in the case of home recording.
 - unfettered control by cable operators would be extended legally to *all* downstream connections, including those governed by other licenses (e.g., DTCP, DBS provisions, IP applicable to other home devices).
 - FCC Part 68 precedent recognizing need for a consensus including major interested parties, and a standard license instrument, would be ignored.
- It is open to the FCC to modify its regulations so as to acknowledge a need for provisions related to copy control or other ancillary technologies. However, in so doing, it should not employ its processes to upset public policy or to give copyright proprietors more leverage over users, and their devices, than they would otherwise enjoy through the law or the market:
 - The only provision of the DMCA that mandates adherence to particular technologies for copy control purposes includes "encoding rules" defining when such technologies can be triggered.
 - The DTCP license under negotiation between the "5C" companies and the MPAA similarly recognizes specific encoding rules.

- Existing licenses between motion picture interests and cable distributors are not standard and are subject to periodic renegotiation. Any FCC recognition of the relevance of copy control technology to the DFAST license should not serve as an anticompetitive device to facilitate the imposition of common terms or restrictions on manufacturers, retailers, or consumers.

Non-Transmission Of Signals To Outputs

- Provisions in the draft DFAST license Compliance Rules go beyond addressing copy protection technologies; they limit transmission of signals for purposes of authorized viewing in circumstances where no copy protection technology is available.
- Approval of such viewing limitations so as to prevent transmission of HDTV signals to consumers is contrary to Federal policy as to HDTV and is unfair to consumers who have purchased receivers (all receivers, to date) as to which the only available path for receiving HDTV transmissions is the very outputs to which HDTV signals, according to the draft license, may not be sent.
- In the case of such outputs, on which consumers rely but are not presently subject to copy protection technologies, the case for an 18-24 month grace period as to imposition of any bar to HDTV transmission is particularly strong. It would give consumers owning such sets the opportunity to obtain Navigation Devices capable of HDTV supplying signals to them.
- If any bar on HDTV transmission, where copy protection technology is not available, is to be approved, the FCC should require that it be lifted when copy protection for the signal (in accordance with encoding rules) has become available.

Copy Protection And VCR Limitations

- The draft DFAST license compliance rules state (3.5) that in the absence of an amendment yet to be provided, no copies may be made except as provided under section 3.2 (buffers) or 3.4.1 (temporary recording). Hence, according to the present draft, no VCR-type product could be POD-enabled, contrary to the clear expectations of the R&O.
- While facilities for "no copy" and "one generation" states are described, there is *no limitation as to when these states may be employed*. Hence, a no-copy state could always be specified. This is contrary to the policy expressed by the last sentence of the compliance rules, Section 1201(k) of the DMCA, and the Betamax case.
- The subject of copy protection has been under negotiation for several years and involves other private sector licenses. Hence, the most the FCC should do in recognizing a right for the DFAST license to impose copy protection obligations should be -- as in the case of Part 68 specifications -- to recognize a specific consensus among interested parties.
- In the absence of a consensus, the FCC should require that the draft DFAST license be published and subject to comment by interested parties, as occurred in Part 68. It should then choose among alternative arguments, rather than allow piecemeal, secretive licensing and favoritism.
- With the July 1 date having passed and no single and complete instrument available to manufacturers, the FCC should require that the present interim "evaluation" license be convertible to a production license until such time as a non-draft license can be submitted to the FCC and supported by consensus.

	MSO Provided STB	Open Cable Uni-directional STB/Integrated TV	Open Cable Bi-directional STB/Integrated TV	Open Cable Bi-directional with middleware STB/Integrated TV
STATUS				
Specifications	N/A	complete	complete (note 1)	Hardware complete Middleware/APIs under development
Availability for purchase by retailer or consumer	No	No	No	No

FUNCTIONALITIES

Tune a channel	Yes	Yes	Yes	Yes
De-scramble a channel	Yes (note 2)	Yes (note 3)	Yes (note 3)	Yes (note 3)
Impulse PPV by consumer calling MSO by phone	Yes	Yes	Yes	Yes
Impulse PPV using remote control	Yes	No	No (note 4)	Yes (note 5)
VOD with pause/skip forward/skip back (VCR like)	Yes	No	No (note 4)	Yes (note 5)
Interactive shopping/ordering using remote control	Yes	No	No (note 4)	Yes (note 5)
Retailable - reasonable consumer proposition	No (note 6)	Yes	No (note 7)	Yes (note 8)

- note 1** Specification does not provide software specifications to implement any consumer bi-directional functions.
- note 2** May only de-scramble content specific to that MSO.
- note 3** Requires MSO provided POD to de-scramble.
- note 4** Requires MSO specific software application embedded in STB or TV. No specifications provided by Open Cable.
- note 5** Requires download of Open Cable compatible software application by MSO. Waiting for Open Cable specifications for middleware and APIs.
- note 6** Embedded security, MSO embedded applications, no portability beyond local MSO.
- note 7** Currently no consumer benefit or feature versus the uni-directional device but more costly.
- note 8** Assuming all MSOs support down loading of Open Cable Compliant applications. (Portability)