

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

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

**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION**

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The National Cable Television Association (“NCTA”), by its attorneys, submits the following reply to the initial comments submitted in response to the Commission’s Further Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

The initial comments submitted by NCTA, individual cable operators, and other OpenCable participants (including several leading consumer electronics manufacturers) confirm the substantial commitment that the cable industry has made, and continues to make, to ensure compliance with the Commission’s commercial availability rules and to facilitate the development of new retail distribution channels for set-top boxes and other navigation devices.

¹ Further Notice of Proposed Rulemaking, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 00-341 (released September 18, 2000) (“Notice”).

Through the efforts of CableLabs and the OpenCable project, the industry has succeeded in taking the steps necessary to implement the rules adopted by the Commission in timely fashion. Indeed, the cable industry has gone beyond the requirements of the statute and the Commission's rules in an effort to enhance the portability and commercial appeal of OpenCable-compliant host devices.

Only two commenters take issue with the above conclusions. Specifically, the Consumer Electronics Retailers Coalition ("CERC") and the Consumer Electronics Association ("CEA") reiterate a number of unjustified assertions previously made in this proceeding and in other fora regarding the cable industry's compliance efforts and commitment to the OpenCable process, repeatedly alleging or implying that cable operators are attempting to forestall entry and foreclose competition in the manufacture and distribution of navigation devices. Such attacks present a distorted view of the marketplace, one that wholly ignores or mischaracterizes the strong economic incentives that are in fact driving the cable industry to support actively the development of new sources of supply and retail distribution channels for such devices.

As NCTA and other commenting parties have observed, the core business in which cable operators are engaged is the sale of services, not the sale or lease of navigation devices or other customer equipment. The reality is that the increasingly intense competitive pressure that cable operators confront in attempting to market their services in competition with DBS and other service providers gives the operators every incentive to maximize, rather than limit, the range of equipment options and distribution outlets for equipment that enables consumers to access their services. And this is not just theory. The record is replete with examples of MSO agreements and developing relationships with leading consumer electronics manufacturers and retailers that

clearly demonstrate the cable industry's commitment to OpenCable and to the development of new sources of retail distribution for digital set-top boxes and other navigation devices.

Indeed, to the extent there is an impediment slowing the development of this retail marketplace, the comments submitted by NCTA and other commenting parties, including manufacturers who have attempted unsuccessfully to sell host devices built to the OpenCable specifications to major retailers for sale to consumers, confirm that this impediment is the retailers' own desire to use the regulatory process to enhance the profits generated through their sale of navigation devices, e.g., by extracting a portion of cable operator service revenues.

CEA's claim that CableLabs' OpenCable initiative is a "closed process" is similarly at odds with marketplace realities. Indeed, this view is belied by the experiences of CEA's own members, such as Panasonic and Philips, as described in their own comments, which demonstrate that in fact the OpenCable process is open and inclusive.

The comments also make clear that acceleration of the ban on "integrated" navigation devices (i.e., those that incorporate embedded security), which only CERC and CEA support, would have a significant adverse impact on competition, innovation, system security, and consumer choice. Contrary to their assertions, acceleration of the ban is not necessary to create regulatory "incentives" to support OpenCable and/or the retail distribution of navigation devices in general. The recent agreements between cable MSOs, consumer electronics manufacturers, and retailers make it clear that cable operators have more than ample marketplace incentives to support the ongoing OpenCable initiative and the establishment of alternative sources of supply and retail distribution channels for navigation devices.

Given these incentives, the other draconian regulatory proposals advanced by CERC and CEA -- which include an indefinite ban on all cable operator provision of navigation devices, a

ban on operator leasing (but not the sale) of such devices, a ban on the use of equipment averaging by cable operators, compulsory licensing, and the imposition of other highly-intrusive regulatory requirements -- are also unnecessary. Adoption of these proposals, individually or in combination, would have a significant adverse effect on consumers, imposing substantial added costs on cable operators and subscribers and impeding the deployment of new advanced digital cable services.

Instead of accelerating the ban on integrated devices or imposing other onerous new regulatory requirements that would limit competition, innovation, and consumer choice, NCTA again urges the Commission to revisit its commercial availability rules, in light of the significant marketplace developments and other changes that have occurred since the rules were adopted, to ensure that consumers have a full range of navigation device options. The comments received from cable operators and other parties make it even clearer that the ban on integrated devices is no longer needed and that its elimination would yield significant benefits to consumers. The enormous resources invested by MSOs and equipment manufacturers (including both traditional cable equipment suppliers and new entrants) in OpenCable, the substantial progress already achieved by OpenCable (which has developed a strong technological foundation for the retail sale of navigation devices), and the recently-announced MSO agreements with leading consumer electronics manufacturers and retailers, clearly demonstrate the cable industry's commitment to the establishment of new retail distribution channels. In light of these developments and given the significant adverse impact that banning integrated devices would have on competition, innovation, consumer choice, and system security, NCTA reiterates its proposal that the Commission continue to allow consumers the option to obtain integrated devices from their cable operator, so long as the cable operator advises its customers that they have the right to obtain

navigation devices from other sources and continues to make OpenCable-compliant PODs available to subscribers upon request.

At a minimum, the Commission should make it clear that a cable operator may continue to provide integrated devices that are also available from retailers or other vendors not affiliated with the cable operator, so long as the operator continues to make PODs available to subscribers who request them. The Commission also should clarify that, where the integrated device contains an OpenCable-compliant POD slot and is available at unaffiliated retail outlets, the device will be deemed exempt and the ban will not apply.

II. THE OVERWHELMING MAJORITY OF COMMENTERS CONFIRM THE CABLE INDUSTRY’S SUBSTANTIAL, ONGOING COMMITMENT TO COMPLIANCE WITH THE COMMERCIAL AVAILABILITY RULES AND THE DEVELOPMENT OF RETAIL DISTRIBUTION CHANNELS FOR NAVIGATION DEVICES.

A. The Cable Industry Has More Than Satisfied Its Obligations Under the Commission’s Commercial Availability Rules.

In its initial comments, NCTA described in some detail the extensive effort undertaken by the cable industry, through CableLabs and the OpenCable project, to ensure industry compliance with the commercial availability rules.² The comments submitted by cable operators and other parties further describe the substantial resource commitment and significant contributions made by individual operators to the OpenCable initiative, in addition to their own individual compliance efforts. AT&T, for example, has indicated that it alone “committed ten engineers full-time to help develop the POD/host specifications, and has spent millions of dollars

² See Comments of the National Cable Television Association (“NCTA Comments”) at 2-3, 8-13.

in the OpenCable effort,” including annual recurring costs to upgrade cable headends and other facilities to make them compatible with OpenCable POD and host devices.³

As the comments submitted by NCTA and the semi-annual status reports filed pursuant to the Commission’s Report and Order demonstrate,⁴ all of the milestones specified in the OpenCable work plan adopted by the Commission as the framework for implementation of the digital separate security requirement were successfully achieved prior to the July 1, 2000 deadline specified in Section 76.1204 of the Commission’s rules.⁵ In particular, through the efforts of CableLabs and the OpenCable project, specifications for digital Point of Deployment modules (“PODs”) and host devices were developed and published in a timely manner.⁶ Thereafter, several manufacturers’ POD modules were successfully tested and verified for interoperability, so that they could be purchased by cable operators and be made available as of July 1, 2000 to customers who request them.⁷

³ Comments of AT&T Corp. (“AT&T Comments”) at 16. Many of the other organizations participating in OpenCable, which, as NCTA has noted, includes almost 400 participants representing a broad range of interests, have committed substantial resources and made significant contributions to the effort as well. Several of the consumer electronics manufacturers participating in OpenCable, for example, have described in detail their own commitment and contributions to the project in their comments to the Commission. See, e.g., Comments of Matsushita Electric Corporation of America/“Panasonic” (“Panasonic Comments”) at 2-4; Comments of Philips Electronics North America Corporation (“Philips Comments”) at 2; Comments of Motorola Inc. (“Motorola Comments”) at 5-6.

⁴ See NCTA Comments at 8-10 and sources cited therein.

⁵ 47 C.F.R. § 76.1204.

⁶ NCTA Comments at 9-10.

⁷ Id.

NCTA's comments also describe a variety of other ongoing OpenCable activities, including interoperability events, hardware/software development conferences, continued testing and review of POD and host devices, and the OpenCable "middleware" initiative.⁸ As NCTA has indicated, the middleware project involves the development of further extensions to the existing OpenCable specifications that will enhance the portability of OpenCable-compliant host devices.⁹ In initiating the development of middleware specifications, the cable industry and CableLabs clearly have gone beyond the requirements of the statute and the Commission's commercial availability rules.¹⁰ These specifications are currently being developed by a multi-vendor group, with input from a wide range of OpenCable participants.¹¹ The cable industry's continued support for this effort and other ongoing CableLabs' initiatives reflects the industry's strong economic incentives and commitment to the development of retail distribution channels that offer current and potential cable subscribers a broad range of attractive retail equipment options.¹²

⁸ Id. at 11-13.

⁹ Id. at 13.

¹⁰ See NCTA Comments at 13, n.32 and sources cited therein (noting Commission ruling that host devices are not required to be portable); also see discussion at 13-15, infra.

¹¹ NCTA Comments at 13.

¹² Id. at 4, 27-30. Even CERC states that completion of the OpenCable middleware specification "would be a major step forward." See Comments of Consumer Electronics Retailers Coalition ("CERC Comments") at 15.

B. Complaints Raised by CERC and CEA Alone Regarding the OpenCable Specifications and Process Are Without Merit, and Reflect a Distorted, Self-Serving View of the Marketplace, the Commission’s Rules, and the Cable Industry’s Efforts to Facilitate Retail Distribution of Navigation Devices.

Only two commenters -- CERC and CEA -- question the cable industry’s compliance efforts, reiterating a variety of unjustified assertions previously raised in this proceeding and in other fora regarding the OpenCable specifications and process. In making these assertions, both CERC and CEA repeatedly allege or suggest that the industry’s performance reflects a calculated effort by the cable operators to “forestall” new entrants and “foreclose” competition in navigation device markets.¹³

These attacks are entirely without merit. They present a self-serving and distorted view of the marketplace, one that wholly ignores or mischaracterizes the strong economic incentives driving the cable industry to establish new retail distribution channels for navigation devices. These incentives are apparent from the recently announced arrangements between MSOs, consumer electronics manufacturers, and retailers described in Section II.B.2. below.

As NCTA and other commenting parties have observed, the reality is that the core business in which cable operators are engaged is the sale of an expanding array of services, not the sale or lease of navigation devices or other customer equipment.¹⁴ Given the increasingly

¹³ See, e.g., CERC Comments at 26 (alleging that “MSOs have forestalled competitive entry into navigation device markets”); Comments of the Consumer Electronics Association (“CEA Comments”) at iii (asserting that cable industry has adopted a “two-track” approach that “threatens to foreclose the market for navigation devices”).

¹⁴ NCTA Comments at 30; also see AT&T Comments at 8 (noting that “AT&T is not in the business of selling or leasing equipment; it is in the business of providing high-quality, diverse, and innovative services.”) (emphasis in original).

intense competition from DBS and other service providers,¹⁵ cable operators have every incentive to maximize, rather than limit, the range of equipment options and distribution outlets for set-top boxes and other navigation devices (e.g., cable modems) that enable existing or prospective customers to obtain their services.¹⁶ Any assessment of the cable industry's past, present, or likely future behavior that does not acknowledge this reality must be viewed as fundamentally flawed and unreliable as a basis for making sound public policy judgments.¹⁷

¹⁵ See NCTA Comments at 28-30; AT&T Comments at 5-7; Comments of Time Warner Cable ("Time Warner") at 6.

¹⁶ In fact, if CEA and CERC were correct and the cable industry's intent was to forestall competition in the navigation device market, it presumably also would have attempted to do so with cable modems. The fact that it has not done so, and that the DOCSIS process led by CableLabs has created uniform open standards and a retail market for cable modems significantly undercuts CEA and CERC's claims regarding the cable industry's nefarious motives with respect to set-top boxes. CERC's suggestion that the cable industry is treating set-top boxes differently from cable modems because "MSOs already 'own' the market for [set-top boxes], whereas they must rely on retail competition to help establish a cable market for broadband data modems," CERC Comments at 2, does not ring true. The cable industry is in the same market position with digital set-top boxes as it is with cable modems in that it must convince its existing customers and new consumers to subscribe to its new digital cable service offerings, just as it must convince them to subscribe to its new high-speed data offerings. It is no wonder then that neither CERC nor CEA addresses the cable modem issue again in their pleadings, because the success of the DOCSIS effort, and the fact that the OpenCable initiative is modeled after this effort, completely undermines CEA and CERC's baseless contention that cable operators are motivated to proceed in the opposite direction with respect to digital set-top boxes.

¹⁷ A good example of CERC's irresponsible overreaching is its statement that "[a]s MSOs announce more and more multi-purpose products, they have boasted that they are pre-empting competition." CERC Comments at 14 (citations omitted). As is evident from the very articles CERC cites in support of this proposition, the referenced statements (by a single MSO and its equipment supplier) addressed the cable industry's competition with DBS in the MVPD service marketplace, as opposed to competition with retailers in the equipment marketplace.

1. The OpenCable Process Is Working and Remains an Appropriate Vehicle for Ongoing Industry Efforts to Spur Development of a Retail Market.

a. The OpenCable Process is Open.

In its comments, CEA alleges that CableLabs' OpenCable initiative is a "closed process" and that manufacturers "have not been able to fully participate in the OpenCable process."¹⁸

CEA's wholly unsupported attacks on the openness and integrity of OpenCable are at odds both with the facts and, indeed, with CEA's own members' experiences as participants in OpenCable.

As NCTA's initial comments indicated, the process through which the OpenCable POD and host specifications were developed, reviewed, and refined was an open and inclusive process, with participation by a broad spectrum of interests, including a number of consumer electronics manufacturers.¹⁹ The list of OpenCable participants appended to NCTA's comments includes approximately 40 of CEA's members or affiliates thereof.²⁰

Moreover, the OpenCable specification development methodology is patterned after the cable industry's successful Data-Over-Cable Service Interface Specification (DOCSIS) cable modem process. This process involves a team of CableLabs technical staff working with representatives from member companies and suppliers from the consumer electronics, cable equipment, and computer industries who have signed non-disclosure agreements to develop interface specifications and core functional requirements.

¹⁸ CEA Comments at 6, 9.

¹⁹ NCTA Comments at 11.

²⁰ This number is based on a comparison of the OpenCable Participants List with the membership list posted on CEA's website.

In an effort to balance the need to ensure that standards are available in a timely manner with the desire to utilize the consensus-based approach reflected in the standards process employed by ANSI-accredited standards development organizations (SDOs), the OpenCable specification development process utilizes a voluntary system based on the principles of openness and timeliness that leads rapidly to consensus from cable system operators and vendors on the content of a specification. OpenCable’s Document Control Processes and Draft Specification Comment Process contain a number of features similar to those employed by ANSI-accredited SDOs (e.g., requiring early disclosure of intellectual property right claims by OpenCable participants), and have proven to be an effective means to facilitate industry consensus in an expeditious manner.²¹ Once this consensus is reached, the specification typically is then submitted to an ANSI-accredited SDO for consideration and adoption.

Given the opportunity that these procedures provide for review and comment by all participating vendors, as well as the submission of engineering change requests (“ECRs”), with respect to OpenCable specifications, CEA’s assertion that the specifications CableLabs has referred to SCTE “reflect the views only of the cable industry”²² is wholly without merit. Indeed, the experiences of CEA’s own members demonstrate that, contrary to CEA’s assertions, the OpenCable process is, in fact, open and inclusive. The comments filed by Panasonic, for example, state that “since the inception of the CableLabs ‘OpenCable’ process, Panasonic has

²¹ CableLabs also employs a formal change process and uses interoperability testing processes to help verify the performance of the various specifications and core functional requirements.

²² CEA Comments at 10.

supported and participated actively, regularly, and fully.”²³ The comments further note that “Panasonic was the first to demonstrate . . . a working prototype of the ‘POD security interface’” and is currently “participating in CableLabs-sponsored ‘interoperability testing’ sessions.”²⁴ Panasonic also states that it “has worked interactively with CableLabs staff” on the development of OpenCable specifications.²⁵ In addition to “providing comments and proposals in the OpenCable specification process itself,” Panasonic indicates that it has filed Engineering Change Requests (“ECRs”) based on its own internal test results, and has worked to ensure that technical issues arising in such testing and ECRs are “incorporated into the voluntary, SCTE-DVS standards-making process.”²⁶ Panasonic notes that “CableLabs staff has been entirely cooperative in this ongoing process.”²⁷

Similarly, another leading consumer electronics manufacturer and CEA member, Philips, states that it “has been actively involved in, and has significantly contributed to, the OpenCable/[SCTE] standardization process to develop the specifications relevant for OpenCable products.”²⁸ In particular, Philips notes that it “has provided proposals for specifications,

²³ Panasonic Comments at 2.

²⁴ Id.

²⁵ Id. at 3.

²⁶ Id.

²⁷ Id. (emphasis added).

²⁸ Philips Comments at 2.

submitted [ECRs], participated in a number of working groups, participated in the balloting of the SCTE documents and contributed to the OpenCable ‘Interoperability’ events.”²⁹

The comments by these CEA members confirm that not only is the OpenCable process designed to give all participants, including consumer electronic manufacturers, a meaningful opportunity to contribute to the specification development process and participate in other related activities (e.g., interoperability events and testing), but also that CEA members have indeed been afforded and taken full advantage of this opportunity. For these reasons, the Commission should reject the baseless comments of CEA to the contrary.

b. OpenCable Has Complied with the Commission’s Rules.

CERC and CEA also repeat a number of complaints, previously raised by them in other contexts, with regard to the cable industry’s compliance record, focusing in particular on the alleged deficiencies in the specifications developed by OpenCable and the lack of a final DFAST/PHI production license addressing copy protection and other issues.³⁰ In general, NCTA’s initial comments,³¹ together with the prior submissions cited therein, already address and refute the arguments advanced by CEA and CERC, and NCTA need not reiterate in detail points it has already made.

With regard to the alleged inadequacy of the OpenCable specifications, NCTA notes that both CERC and CEA continue to base their allegations on an obvious misreading of Section 629

²⁹ Id.

³⁰ See CERC Comments at 7-10; CEA Comments at 11-15, 27.

³¹ See NCTA Comments at 14-21.

and the Commission’s commercial availability rules, asserting or suggesting that the statute and/or the rules mandate complete nationwide portability when they clearly do not. For example, CERC takes issue with the notion that “[b]y July 1, 2000, it was not necessary to assure that commercial host devices are portable.”³² Elsewhere in its filing, CERC is more restrained, asserting that the Commission “expected navigation devices to be portable and nationally supported, but noted parenthetically that it did not have a specific expectation in this respect.”³³ For its part, CEA argues that Section 629 of the Communications Act³⁴ effectively mandates that navigation devices “must be portable across a national MVPD system nationwide” and therefore “[t]he Commission must require MSOs to meet that requirement.”³⁵ CEA then proceeds to assert that the OpenCable middleware initiative, which as NCTA has noted seeks to enhance the portability of OpenCable products, is “behind schedule,” based on the apparent assumption that cable operators currently are required to achieve complete nationwide portability.³⁶

However, as NCTA has previously noted, the Commission repeatedly has made it clear that there is no such portability requirement.³⁷ The Commission’s Report and Order unequivocally stated (in a paragraph that CERC conspicuously chose not to cite in its comments)

³² CERC Comments at 7.

³³ Id. at 4 (emphasis in original).

³⁴ 47 U.S.C. § 549.

³⁵ CEA Comments at 13.

³⁶ Id. at 15.

³⁷ NCTA Comments at 7, n.13 and 13, n.32.

that “we have not adopted specific rules to mandate portability or interoperability.”³⁸ In its Reconsideration Order, the Commission reaffirmed that it “did not mandate that navigation devices be portable or interoperable.”³⁹ Accordingly, the OpenCable middleware initiative, which is designed to enhance the portability of OpenCable-compliant navigation devices, serves as an example of the cable industry’s willingness to go beyond what the Commission’s rules actually require.

NCTA has already explained in detail why specific complaints by CERC and CEA alleging that the OpenCable specifications are late or incomplete, as well as allegations that they will not allow manufacturers to produce a set-top box comparable to those provided by cable operators, are without merit.⁴⁰ Other commenting parties have responded to and refuted these

³⁸ Report and Order, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, 13 FCC Rcd 14775, 14823 (¶ 126) (1998) (“Report and Order”) (emphasis added).

³⁹ Order on Reconsideration, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, 14 FCC Rcd 7596, 7619 (¶ 48) (1999) (“Reconsideration Order”) (emphasis added).

⁴⁰ See NCTA Comments at 19-21. With respect to the concerns raised by CEA (CEA Comments at 27) and Gemstar concerning the carriage by cable systems of another provider’s EPG data, which can be accessed using EPG modules located in TV sets or other equipment obtained at retail (see Gemstar Comments), NCTA notes that there is a pending proceeding initiated by Gemstar already addressing this issue. See Public Notice, Cable Services Bureau Action, In the Matter of Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission’s Must-Carry Rules, DA 00-670 (March 24, 2000). As NCTA indicated in its Opposition to Gemstar’s Petition for Special Relief, there is no valid basis under Section 629 or otherwise for the Commission to take action compelling cable operators to transmit Gemstar’s EPG data. See NCTA Opposition to Petition for Special Relief, filed in CSR 5528-Z (April 13, 2000).

allegations as well.⁴¹ The fact that several leading consumer electronics manufacturers who are members of CEA have now committed to produce navigation devices incorporating an OpenCable POD-host interface⁴² alone provides concrete marketplace evidence effectively refuting any contention that the OpenCable specifications can support only a “hobbled, useless product.”⁴³

With respect to the DFAST/PHI license issues raised by CERC and CEA,⁴⁴ as CERC itself has acknowledged, efforts to finalize the PHI license agreement were delayed due to a lack of a consensus between and among MPAA, DTLA, consumer electronics manufacturers, and the retailers themselves, and not to anything the cable industry has done.⁴⁵ In its initial comments, NCTA noted that CableLabs was prepared to submit a final PHI license agreement,

⁴¹ See, e.g., Motorola Comments at 5 (noting that host devices based on OpenCable specifications “can be designed to be capable of performing all of the non-security functions of [integrated] boxes used by cable operators today” and adding that as new interactive services such as video on demand become available, “manufacturers will be able to produce open-cable compliant devices for such services.”).

⁴² See discussion in Section II.B.2., infra, and NCTA Comments at 40, n.95.

⁴³ CERC Comments at 8.

⁴⁴ Id. at 20-25; CEA Comments at 27.

⁴⁵ See Written Testimony of John W. Froman, Executive Vice-President, Merchandising, Circuit City Stores, Inc., Before the House Commerce Committee, Subcommittee on Telecommunications, Trade and Consumer Protection, Hearing on the Future of the Interactive Television Services Marketplace (October 6, 2000) (“CERC Testimony”), at 3-4 (noting that “CableLabs faces an explicit threat, from the Motion Picture Association, that content would be withheld from cable systems unless this license were to include severe restrictions on the recording, and even the display, capabilities of consumer electronics and information technology products.”); also see NCTA Comments at 16-17 and sources cited therein.

notwithstanding the fact that non-cable parties had been unable to reach agreement on the copy protection terms of the license; however, at the request of MPAA, NCTA agreed to postpone its filing until no later than December 15, 2000.⁴⁶ Consistent with this commitment, CableLabs has now submitted the final PHI license agreement for inclusion in the record in this proceeding.⁴⁷

* * *

As the foregoing discussion demonstrates, the complaints raised by CERC and CEA with respect to the OpenCable initiative are at odds with the facts, as well as the applicable law, and indeed, in several respects, are inconsistent with the comments filed by companies that are both CEA members and suppliers to CERC's members. The reality is that the OpenCable process has worked and is continuing to serve as an appropriate, open, and productive vehicle for ongoing industry efforts to facilitate the development of a retail market for navigation devices in a

⁴⁶ NCTA Comments at 18; also see Letter from Fritz E. Attaway, Senior Vice President, Government Relations, Motion Picture Association of America, Inc. to Ms. Magalie R. Salas, Secretary, Federal Communications Commission, filed in CS Docket No. 97-80 (November 15, 2000); Letter from Neal M. Goldberg, General Counsel, NCTA to Magalie R. Salas, Secretary, Federal Communications Commission, filed in CS Docket No. 97-80 (December 4, 2000), appending copy of Letter from Dr. Richard R. Greene, President and Chief Executive Officer, CableLabs, to Magalie R. Salas, Secretary, Federal Communications Commission, filed in PP Docket No. 00-67 (November 17, 2000).

⁴⁷ Letter from Richard R. Green, Ph.D., to Magalie R. Salas, Secretary, Federal Communications Commission, filed in CS Docket No. 97-80, December 15, 2000. Since the final PHI license has now been submitted, the Commission should reject any claim by CEA or CERC that acceleration of the ban is necessary to force CableLabs to expedite its adoption. Clearly, cable operators should not be penalized, nor should manufacturers or retailers be rewarded, as a result of delays in finalizing the license arising from the inability of non-cable parties (including members of CEA and CERC) to reach agreement with MPAA on the copy protection provisions of the license.

manner consistent with the requirements of Section 629 and the Commission's commercial availability rules.

2. Recent Marketplace Developments Demonstrate the Cable Industry's Strong Economic Incentives and Commitment to Support Retail Distribution of Navigation Devices.

In its initial comments, NCTA described the powerful economic incentives driving cable operators -- who are engaged in increasingly intense competition with DBS and other service providers, many of whom already have a significant retail presence -- to establish new retail channels for the distribution of set-top boxes and other navigation devices that can be used to access the operators' digital cable services.⁴⁸ As NCTA observed, the effect of these incentives can be seen in AT&T Broadband's recently-announced agreements with several leading consumer electronics equipment manufacturers, which involve the production of advanced integrated digital set-top boxes that will be offered to consumers at retail,⁴⁹ as well as its recent agreement with a major retailer (Best Buy), which encompasses the marketing of AT&T digital cable and high-speed Internet services.⁵⁰

AT&T's own comments indicate that its agreements with Philips and Panasonic "specifically envision that these [advanced digital set-top] boxes will be made available for the retail market"⁵¹ and that these agreements "place no constraints on [the manufacturers'] ability to

⁴⁸ NCTA Comments at 28-30.

⁴⁹ Id. at 38, n.89 and sources cited therein.

⁵⁰ Id. at 39, n.90 and sources cited therein.

⁵¹ AT&T Comments at 8-9.

sell these devices to any and all retailers for their resale to consumers.⁵² Indeed, AT&T anticipates that “over time these devices will be increasingly sold to new and existing customers at retail, rather than leased directly from AT&T.”⁵³

AT&T goes on to confirm that the Philips and Panasonic digital set-top devices “are all ‘integrated devices’ in that they incorporate the same embedded conditional access technology used in the integrated set-tops that AT&T offers for lease to its customers,” and that the devices also will include a POD interface (“POD slot”) that “makes the devices portable to non-AT&T cable systems” and can be used “in the event the embedded security system is compromised.”⁵⁴ AT&T states that “going-forward all integrated digital set-top boxes it purchases for deployment on AT&T’s cable systems will be equipped with a POD interface.”⁵⁵

AT&T further indicates that its “retail strategy” includes “establishing relationships with leading national retailers, much like those that DBS has pursued.”⁵⁶ Describing its non-exclusive agreement with Best Buy as “the first of what AT&T expects will be many such alliances,” AT&T states that as part of this arrangement “Best Buy will promote -- initially for lease from

⁵² Id. at 9 (emphasis in original).

⁵³ Id.

⁵⁴ Id. at 9-10. As the record in this proceeding indicates, embedded security contained in integrated devices provides a superior method of preventing signal piracy than split or separate security systems. See NCTA Comments at 37, n. 86 and sources cited therein. However, in the event of a breach of the embedded security system, inclusion of the POD interface enables the cable operator to shift to a renewable separated security system without having to replace all of its integrated set-top boxes.

⁵⁵ Id. at 10, n.22.

⁵⁶ Id. at 12.

AT&T but eventually for sale directly from Best Buy -- digital cable set-top boxes to prospective customers.”⁵⁷ In addition, AT&T states that “[t]he two companies also plan to work together with consumer electronics manufacturers to encourage the creation of broadband digital appliances with new functions.”⁵⁸ AT&T also notes that it “is pursuing similar agreements with other retailers, including Circuit City,” and “has already initiated a number of retail marketing trials for its digital cable service and equipment in several locations” with Circuit City as well as Best Buy.⁵⁹ In an ongoing trial with Circuit City, AT&T indicates, Circuit City “sells directly to consumers Motorola’s DCT 2000 integrated set-top box for use on AT&T’s cable systems.”⁶⁰

Similarly, Time Warner notes that “[t]he intense competitive pressure from DBS and their retail partners only serves to increase the cable industry’s desire and support for the retail availability of cable converter equipment.”⁶¹ As Time Warner further observes, “[c]able operators fully understand that having cable equipment available to potential customers on retail showrooms, allowing retailers to promote this equipment on an equal footing with DBS equipment, is an important business objective.”⁶² Moreover, Cablevision notes that the advanced digital set-top boxes developed as a result of its agreement with Sony Corporation of America

⁵⁷ Id. at 12-13.

⁵⁸ Id. at 13.

⁵⁹ Id. at 14.

⁶⁰ Id.

⁶¹ Comments of Time Warner Cable (“Time Warner Comments”) at 6.

⁶² Id.

“include a separate security module so that the same devices can be sold in retail outlets,”⁶³ providing yet another indication of the industry’s ongoing commitment to retail distribution.

The fact that several major MSOs have contracted with leading consumer electronics manufacturers (and CEA members) such as Philips and Panasonic to produce in large quantities advanced digital navigation devices that include POD slots, designed to accommodate OpenCable-compliant POD modules, lays to rest CEA’s assertion that “[t]he OpenCable process is merely a distraction” to cable operators, which “plays no apparent role in the strategic planning of any major MSO. . . .”⁶⁴ More generally, the agreements and relationships described above between and among cable operators, consumer electronics manufacturers, and retailers demonstrate the cable industry’s strong incentives to support the development of new retail distribution channels for its services -- and for the equipment used to access those services -- as well as its commitment to OpenCable and the development of new sources of supply for navigation devices. In considering the need for changes in its commercial availability rules and policy, the Commission should, and indeed must, take into account these important marketplace developments, which clearly refute the baseless rhetoric and allegations of CEA and CERC.

3. The Principal Factor Impeding the Development of a Retail Market for Navigation Devices is the Retailers’ Desire to Manipulate the Regulatory Process to Improve Their Profit Margin at the Expense of Consumers.

As NCTA’s initial comments and the discussion in Section II.B.1 above demonstrate, allegations made by CERC and CEA with regard to the OpenCable process, the OpenCable

⁶³ Comments of Cablevision Corporation (“Cablevision Comments”) at 2.

⁶⁴ CEA Comments at 24.

specifications, and the PHI license are without merit.⁶⁵ Rather, as NCTA and others have observed, retailers' desire for improved profit margins is the primary reason why they have declined to make any commitment to purchase host devices for resale to subscribers, rejecting offers by several manufacturers who have expressed a willingness to sell digital set-top devices built to OpenCable specifications.⁶⁶

In this regard, Motorola notes that using OpenCable specifications it has designed and developed a "bi-directional interactive host set-top terminal" which it "expects will be formally certified as OpenCable compliant in the near future."⁶⁷ Motorola states that this device "is designed to provide viewers with the functionality that is presently available in approximately 90 percent of all cable systems nationwide," including the ability to "tune and descramble channels offering basic, premium and scheduled pay-per-view cable programming, and to download software written to its API and thereby support the provision of IPPV service as well as interactive electronic program guides."⁶⁸ However, while Motorola "has offered and remains willing to supply this set-top terminal to any retailer desiring to carry it," it has been unable, despite repeated attempts, to persuade retailers to order even a single unit.⁶⁹

⁶⁵ See discussion at 10-18, supra.

⁶⁶ Indeed, CERC's own comments effectively acknowledge this, asserting that unless the FCC takes "specific steps" to address economic issues, "retail entry may not be feasible." CERC Comments at 29.

⁶⁷ Motorola Comments at 7.

⁶⁸ Id.

⁶⁹ Id. at 7, 9-10.

According to Motorola, during its discussions with major retailers, the retailers indicated that they “needed a ‘business model’ that included revenues and profits greater than those available from the sale of stand-alone set-top boxes.”⁷⁰ It was Motorola’s understanding, based on its discussions with retailers, that the retailers were seeking to obtain arrangements involving the bundled sale of navigation devices and MVPD services.⁷¹ This understanding is consistent with a number of other reports referring to the desire on the part of major retailers to extract a share of cable operator programming service revenues in return for their provision of navigation devices to consumers.⁷²

As NCTA has observed, while cable operators and retailers are free to negotiate any financial arrangements that they find to be mutually beneficial, neither Section 629 nor the Commission’s commercial availability rules gives retailers any entitlement to receive a share of cable operator service revenues.⁷³ The Commission should not “reward” the major retailers’ calculated refusal to make any commitment to purchase and market cable set-top boxes built to OpenCable specifications by acceding to baseless requests for additional regulations of the sort proposed by CERC. Instead, the Commission should make it clear that, consistent with its usual

⁷⁰ Id. at 10.

⁷¹ Id.

⁷² See NCTA Comments at 23-24, n.60 and sources cited therein; also see “Pricing Quandary Slows Down Retail Set-Top’s Development,” Extra/Extra, Nov. 30, 2000, at 10 (noting that major consumer electronics retailers “want to follow the DBS and cell phone business model, where the product is subsidized and the retailers get a nice slice of the monthly revenue.”).

⁷³ NCTA Comments at 24-25.

practice, it will not intercede in private commercial disputes, but rather will allow cable operators, manufacturers, and retailers to establish, through private negotiation, the structure and terms of business arrangements for the retail sale of cable navigation devices to consumers.⁷⁴

III. THE DRACONIAN REGULATORY PROPOSALS ADVANCED BY CERC AND CEA ARE UNNECESSARY AND FUNDAMENTALLY ANTI-CONSUMER.

In their comments, CERC and CEA again urge the Commission to accelerate the current ban on cable operator provision of integrated navigation devices and to impose a number of onerous new regulatory obligations on cable operators, as a “remedy” for the cable industry’s alleged failure to comply with the commercial availability rules and as an “incentive” to come into compliance with the rules, as they construe them.

However, as NCTA’s initial comments and the discussion in Section II above demonstrate, the cable industry has fully satisfied the obligations imposed on it under the Commission’s rules, and indeed has gone beyond the requirements of the rules in an effort to lend further support, through the OpenCable initiative and otherwise, to the development of a retail market for navigation devices. Thus, there is no “default” for the Commission to remedy and no need to impose additional regulations in order to create regulatory incentives for compliance. In fact, as shown, the cable industry has more than ample marketplace incentives to

⁷⁴ See Motorola Comments at 11, n.16 (citing Listener’s Guild Inc. v. FCC, 813 F.2d 465, 469 (D.C. Cir. 1987)). See also In re Application of GTE Corp., Transferor & Bell Atlantic Corp., Transferee, Memorandum Opinion & Order, CC Docket No. 98-184, FCC 00-221, ¶ 390 n.874 (rel. June 16, 2000) (noting that the “Commission has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes”).

support the establishment of retail distribution channels for equipment used to access its services on commercially reasonable terms.

Accordingly, the draconian proposals advanced by CERC and CEA -- which include acceleration of the ban on integrated devices, an indefinite ban on all cable operator provision of navigation devices, a ban on operator leasing (but not the sale) of such devices, a ban on the use of equipment averaging by cable operators, compulsory licensing, and the imposition of other highly-intrusive regulatory requirements -- are entirely unwarranted and unnecessary. Moreover, adoption of these proposals, individually or in combination, would have a significant adverse effect on consumers, imposing substantial added costs on cable operators and subscribers and impeding the deployment of new advanced digital cable services.

A. As the Overwhelming Majority of Commenters Show, Acceleration of the Ban on Integrated Devices Would Have a Substantial Adverse Impact on Consumers, and Is Not Necessary Given the Cable Industry's Strong Economic Incentives and Commitment to Support Retail Distribution.

CERC argues that the cable industry needs an additional incentive to support ongoing OpenCable efforts (e.g., the middleware initiative) and that in order to provide this incentive the ban on integrated devices should be moved up to January 1, 2002.⁷⁵ CEA also urges the Commission to take action to create “proper incentives for cable to expedite the deployment of navigation devices based on open standards,” and should therefore accelerate the ban.⁷⁶

However, as NCTA has shown above, these arguments are premised on the incorrect assumption that the cable industry has not fulfilled its obligations under the Commission's

⁷⁵ See CERC Comments at 15.

⁷⁶ CEA Comments at 6, 8.

commercial availability rules. Moreover, these arguments completely ignore the increasingly strong economic incentives that cable operators have to encourage the development of new retail distribution channels and suppliers of navigation devices, as well as the marketplace developments described in Section II.B.2. above, which reflect cable operators acting on these incentives. The fact that major MSOs already have entered into agreements with several of CEA's principal members providing for the manufacture of millions of advanced digital set-top devices, many of which will include an OpenCable POD-host interface, demonstrates, in a very concrete way, the cable industry's commitment to retail distribution of such devices and to the OpenCable process. These agreements also refute CEA's contention that allowing cable operators to continue to offer integrated equipment "would not create the necessary incentives" for new suppliers to enter the navigation device market.⁷⁷

In light of the foregoing, there is no need for the Commission to take regulatory action accelerating the ban on integrated devices in order to achieve objectives that the marketplace itself is already facilitating. Moreover, as the comments filed by NCTA and others demonstrate, acceleration of the ban would reduce competition, innovation, and consumer choice.⁷⁸

Such action would force consumers to forego even sooner the opportunity to select equipment that may be more cost effective and better suited to meet their particular needs. Several commenters have noted the potential cost advantages and other benefits that integrated

⁷⁷ CEA Comments at 20.

⁷⁸ See NCTA Comments at 30-35.

devices offer to consumers.⁷⁹ These potential advantages and benefits also have been recognized by the D.C. Circuit and by Commissioner Powell in earlier phases of this proceeding. As the D.C. Circuit recognized:

Consumers might [choose] not to purchase retail devices for perfectly sensible economic reasons -- because, for instance, there are efficiency gains captured in the manufacture of an integrated box that lead it to cost less than the combined cost of a separate security module and a retail device, or because consumers view as too high the transaction cost of seeking a separate ancillary device at retail.⁸⁰

Similarly, Commissioner Powell has expressed his concern that the ban on integrated devices “denies a cost-effective choice for consumers.”⁸¹ Indeed, CEA itself acknowledges the “convenience” and “attractiveness” of the integrated set-top boxes offered by cable operators,⁸² but proposes to sacrifice these consumer benefits in order to advance the commercial interests of its members.

In addition, acceleration of the ban would cause significant disruption to current cable operator equipment procurement and deployment plans, which could force cable operators to curtail or delay their rollout of new advanced digital cable services.⁸³ The comments submitted

⁷⁹ See, e.g., AT&T Comments at 26-27; Time Warner Comments at 13-14; Motorola Comments at 14-17; TIA Comments at 2-3.

⁸⁰ See, e.g., General Instrument Corp. v. FCC, 213 F. 3d 724, 731 (D.C. Cir. 2000).

⁸¹ Report and Order at 14848 (Powell Statement); Statement of Commissioner Michael K. Powell Dissenting in Part, Reconsideration Order at 7632 (“Powell Reconsideration Statement”) (noting that it is “contrary to good public policy to remove from the market a potentially cost-effective choice for consumers.”).

⁸² CEA Comments at 21.

⁸³ CEA’s assertion that cable operators have been “stockpiling” integrated devices is wholly without merit. CEA Comments at 17. There is no evidence that cable operators are
(footnote continued ...)

by individual MSOs describe the adverse impact that acceleration of the phase-out would have on their own deployment plans. Cablevision notes, for example, that acceleration of the ban “would cause significant disruption to Cablevision’s equipment procurement and deployment plans” and “could also likely deter others that wish to move to advanced digital set-top boxes.”⁸⁴ Similarly, Time Warner notes that acceleration of the ban “would only exacerbate the already critical shortage of digital set-tops, thereby delaying the availability of advanced digital cable services to consumers.”⁸⁵ AT&T reports that “[a]ccelerating the ban would significantly disrupt AT&T’s equipment design, procurement, and deployment plans, and inevitably slow the delivery of new digital services to consumers.”⁸⁶

(... footnote continued)

engaging in this practice or that the cable industry is seeking to “lock up” the navigation devices market by 2005. *Id.* at 18. The digital cable set-top deployment projections cited by CEA merely reflect cable industry efforts to respond to consumer demand for such services, in competition with DBS and other service providers. *See* NCTA Comments at 28-29; also *see* “Digital Set-Tops to generate \$21B,” *Multichannel News Online* <<http://www.multichannelnews.com/daily/29d.shtml>> (December 13, 2000) (noting that DBS accounted for 76 percent of all digital boxes deployed worldwide by the end of last year). Moreover, these projections do not indicate whether or to what extent some of the set-top devices to be deployed will have embedded security, separated security, or some combination thereof (*i.e.*, integrated devices with POD slots), nor do they indicate whether or to what extent such devices will be made available at retail. *See* NCTA Comments at n. 83.

⁸⁴ Cablevision Comments at 3.

⁸⁵ Time Warner Comments at 15.

⁸⁶ AT&T Comments at 28. In particular, AT&T indicates that it “is pursuing a design philosophy for integrated advanced digital boxes based on the 2005 date,” which contemplates that “by 2005, all equipment vendors, including those operating under existing supply contracts, will provide POD-equipped boxes to AT&T....” *Id.* *See also* Comments of Charter Communications at 3.

Non-cable parties also have described the disruptive impact which acceleration of the ban on integrated devices would have on their businesses, and have opposed any such action. In their comments, Diva and WorldGate emphasize that accelerating the ban on integrated devices would harm their companies and impede innovation.⁸⁷ In addition, Philips, a leading member of CEA, indicates that it does not support acceleration, noting that:

Today, the cable industry is in the midst of a transformation. This transformation involves not only a transition from analog to digital transmission technology, but also the introduction of new and interactive services, unheard of under the ‘traditional television’ model, that will fundamentally alter the way in which consumers interact with and utilize their television. The introduction and development of new interactive services, and, in particular, the fact that providers of these services still are in the earliest stages of building viable business models, requires that work on technical specifications be undertaken in a very careful manner.⁸⁸

Philips goes on to state that “[f]or this reason, Philips it believes the Commission’s 2005 deadline for the complete phase-out of devices with integrated security remains appropriate at this time.”⁸⁹

Accordingly, contrary to CERC’s suggestion that there is “no reason” for the Commission not to accelerate the ban,⁹⁰ there are in fact a number of persuasive reasons why such action is not in the public interest. Indeed, none of the commenting consumer electronics manufacturers

⁸⁷ See Diva Comments at 1-3; WorldGate Comments at 1-3.

⁸⁸ Philips Comments at 8.

⁸⁹ Id.

⁹⁰ CERC Comments at 17.

who are members of CEA indicated support for acceleration of the ban in their comments.⁹¹ For all of the reasons described herein and in its initial comments, NCTA respectfully urges the Commission to reject CERC and CEA's request to accelerate the ban on cable operator provision of integrated devices.

B. The Commission Also Should Reject Proposals by CERC and CEA for Other Onerous New Regulations That Would Impose Unwarranted and Burdensome Restrictions, As Well As Significant Added Costs, On Cable Operators and Subscribers, and Deprive Consumers of Innovative Services.

As the discussion above indicates, the strong marketplace incentives that are driving cable operators to support the development of new equipment suppliers and distribution channels are more than sufficient to ensure that cable operators continue to maintain their commitment to the OpenCable process and efforts to develop a retail market for cable navigation devices without the imposition of additional regulations of the sort proposed by CERC and CEA. Each of the proposed restrictions and requirements is both unnecessary and imposes burdens that would have a significant adverse impact on consumers.

1. Ban on MSO Participation in the Navigation Device Market.

Proceeding on the basis of its false assumption that "the cable industry has definitively not complied with the responsibilities that it accepted in this proceeding," CERC suggests that "[t]he sanction for such conduct, laid out by the Commission in this proceeding, is to bar the MSOs from the navigation device market, until they have fully supported competitors' right to

⁹¹ Neither Panasonic nor Philips supported acceleration of the January 1, 2005 date in their comments; also see Motorola Comments at 12, 17-18 (opposing acceleration of the ban).

attach.”⁹² The only citation CERC provides for this asserted Commission authority⁹³ is to Paragraph 62 of the Report and Order, wherein the Commission adopted the separated security requirement, stating that “[a]s of July 1, 2000... MVPDs covered by Section 629 who wish to distribute devices using integrated security may do so only if they also make available the security modules separately.”⁹⁴

However, as NCTA’s comments and the discussion at Section II.A. above illustrate, through the efforts of CableLabs and the OpenCable project, cable operators did in fact meet the July 1, 2000 deadline for having POD modules available to customers who request them.⁹⁵ Accordingly, the portion of the Commission’s Report and Order cited by CERC provides no basis whatsoever for imposing a ban on all cable operator provision of navigation devices. Moreover, the statute clearly precludes it.⁹⁶ Since the cable industry has fully satisfied its obligations under the Commission’s rules, there is no reason to even consider CERC’s extreme

⁹² CERC Comments at 5 (emphasis added).

⁹³ Id. at 12, n.37.

⁹⁴ Report and Order at 14800 (¶ 62).

⁹⁵ See NCTA Comments at 2, 9-10.

⁹⁶ See 47 U.S.C. § 549(a) (stating that the Commission’s “regulations shall not prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers”). In fact, elsewhere in its comments, CERC contradicts its own position, stating that Section 304 of the 1996 Act “requires that MSOs retain the right to distribute navigation devices.” CERC Comments at 37.

remedy, which obviously would impose a significant burden on cable operators and deprive their subscribers of new and innovative services.

Similarly, CERC's proposal for a complete "prohibition on leasing [but not sale] of navigation devices by cable companies to consumers," in the event the operator does not choose "voluntarily" to "make navigation devices available for consumers solely through sale,"⁹⁷ is blatantly anti-consumer. This proposal would deprive cable subscribers of a more affordable alternative to the purchase of a set-top box or other navigation device, in order to allow retailers of such equipment to realize greater sales volume and profits.

2. Ban on Equipment Averaging.

CERC's proposal to ban cable operator use of the equipment averaging authority granted by Congress in the 1996 Act⁹⁸ is likewise anti-consumer. CERC alleges that the Commission's equipment averaging rules unfairly allow cable operators to "subsidize" their provision of advanced digital set-top boxes. As NCTA's initial comments demonstrate, however, this argument amounts to yet another cynical attempt on the part of CERC to manipulate the regulatory process in an effort to improve its members profit margins at the expense of consumers.⁹⁹

⁹⁷ Id. at 35-36.

⁹⁸ Id. at 36.

⁹⁹ NCTA Comments at 21-23. In its comments, CERC also alleges that "[a] review of the August 15, 2000 survey responses to the Commission's request for cable service and equipment rate information" reveals "many instances" in which cable operators, including some that are not subject to effective competition, have unlawfully bundled their equipment charges with programming charges, and complains that despite these alleged violations of the Commission's rules, "no enforcement action has been taken."
(footnote continued ...)

It is beyond dispute that the practice of aggregating the costs of customer equipment into broad categories (e.g., “converter boxes”) to develop an averaged rate for all devices falling into this category was explicitly authorized by Congress, in Section 301(j) of the 1996 Act,¹⁰⁰ at the same time that it adopted the commercial availability provisions contained in Section 304 of the

(... footnote continued)

CERC Comments at 32. These allegations, which are not confirmed by the documents which CERC cites, reflect a self-serving attempt to use incomplete and inaccurate information to secure unwarranted regulatory relief that advances the commercial interests of CERC’s members at the expense of consumers.

As an initial matter, the most recent Cable Rate Survey data available from the FCC is the 1999 Cable Price Survey released by the Commission on June 15, 2000. See Report on Cable Industry Prices, In re Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment, 15 FCC Rcd. 10,927 (2000). A review of the survey data, which does not identify the individual respondents, shows that of the 725 useable responses, only 38 -- or 5.2% -- are from cable systems which indicated that they were not subject to effective competition and reported no prices for equipment. Moreover, the survey data indicates that the systems in this subset served an average of 1370 subscribers. The small size of the systems could easily explain these systems’ responses, in a manner consistent with the Commission’s rules.

Under the Commission’s rules, a cable system whose service rates have been deregulated pursuant to the 1996 Act or that meets the definition of a small system established in the Small System Order and complies with certain conditions does not need to unbundle its equipment rates from its programming rates. See 47 C.F.R. § 76.990; In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report & Order, 14 FCC Rcd 5296, 5332 (¶ 82) (1999) (deregulating the rates of all “small operators with only one tier of service subject to regulation as of December 31, 1994”); In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report & Order & Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7416 (¶ 15) (1995) (“Small System Order”) (noting that qualifying small systems “are not required to . . . unbundle equipment and installation charges from programming service charges.”)(emphasis added). Accordingly, it is clear that CERC’s allegations cannot be sustained on the basis of the survey data cited by CERC in its comments.

¹⁰⁰ This provision of the 1996 Act was incorporated in Section 623(a)(7) of the Communications Act, as codified at 47 U.S.C. § 543(a)(7).

1996 Act. The legislative history of the 1996 Act, described in NCTA's initial comments, makes it clear that in utilizing the Commission's equipment averaging rules to reduce the cost of digital set-top boxes and thereby facilitate the roll-out of advanced digital cable services, cable operators are doing precisely what Congress had in mind when it adopted this provision.¹⁰¹

CERC suggests that the commercial availability provisions of the 1996 Act must be construed to ban the equipment averaging provisions from being employed in the manner which Congress intended, at least until such time as the "sunset" criteria contained in Section 304(e) of the 1996 Act has been satisfied.¹⁰² Such a reading of the statute would effectively negate the equipment averaging provisions of the 1996 Act and thereby thwart the will of Congress.¹⁰³ This

¹⁰¹ See NCTA Comments at 22-23. CERC suggests in its comments that a subscriber whose converter box has been fully depreciated should not pay any lease charges. CERC Comments at 26-27. Such a suggestion, however, betrays a fundamental misunderstanding as to how the Commission's equipment rate regulation rules actually work. See 47 C.F.R. § 76.923. Under the Commission's rules (even those in existence before the equipment averaging provision was enacted), cable operators are permitted to aggregate all of their costs within each of the categories of equipment offered for lease by the operator, in order to establish a single lease rate for all devices that fall within that category. (It should be noted that the equipment averaging provision of the 1996 Act merely changed this rule to allow cable operators to broaden the categories of customer equipment, so that, for example, an operator could include digital and analog converter boxes in the same category.) See generally FCC Form 1205, Schedule C; also see 47 C.F.R. § 76.923(c)(1). This approach makes perfect sense, because otherwise operators would be confronted with calculating a myriad of lease rates depending on various unique characteristics of each individual device (such as cost, remaining useful life, maintenance fees, etc.), which would be both administratively inefficient and confusing to consumers.

¹⁰² See CERC Comments at 27-29.

¹⁰³ Under CERC's proposed reading of the statute, the equipment averaging authority granted by Congress in the 1996 Act could not be employed at the very time and for the very purpose in which Congress intended it to be utilized, *i.e.*, to facilitate the rollout of advanced digital cable services, which is now well under way.

clearly cannot be what Congress had in mind when it simultaneously adopted these two statutory provisions. Such an interpretation clearly would violate “the familiar principle of statutory interpretation which requires construction ‘so that no provision is rendered inoperative or superfluous, void or insignificant.’”¹⁰⁴

Moreover, from a public policy perspective, while CERC attempts to characterize its position as seeking to prevent the imposition of added costs on consumers, the recommendations it offers to address this issue (*i.e.*, a “voluntary” or involuntary regulatory ban on “all subsidies of digital navigation devices by other devices or revenue streams”)¹⁰⁵ -- like its proposed cable leasing ban -- would have the effect of raising prices to consumers for digital equipment, a result which is “plainly contrary to the policy adopted by Congress in the 1996 Act.”¹⁰⁶ CERC’s suggestion that the Commission could if it chose merely require that any subsidy “be equally available, in fact as well as theory, to MSOs and competitive entrants alike”¹⁰⁷ further

¹⁰⁴ C.F. Communications Corp. v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997) (quoting Mail Order Ass’n of Am. v. United States Postal Serv., 986 F.2d 509, 515 (D.C. Cir. 1993)); see also Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana, 472 U.S. 237, 250 (1985) (rejecting literal interpretation of statutory provision that would “nullify the effect” of another section of the same statute); 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 (6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.”) (emphasis added).

¹⁰⁵ CERC Comments at 35-36.

¹⁰⁶ NCTA Comments at 23.

¹⁰⁷ CERC Comments at 30.

demonstrates that CERC's solicitude for consumers is mere window dressing, designed to obscure its effort to secure higher profit margins for retailers in the set-top box business.

3. Separate Subsidiary and Other Intrusive Regulatory Requirements.

CERC's proposals also include "separate subsidiary" requirements "comparable to those historically imposed on monopoly telecommunications providers," which would apply to all cable operator sales of navigation devices, unless the operator agreed to CERC's "voluntary" compliance terms.¹⁰⁸ These requirements would entail Computer II-style structural separation (i.e. "maximum separation") rules, including separate accounting books, officers, personnel, equipment, offices, etc.¹⁰⁹ The cable company and its equipment affiliate also would be subject to non-discriminatory information-sharing requirements with respect to consumer information and technical data.¹¹⁰ Similarly, CEA proposes onerous new regulatory requirements, based on the rules adopted in the Computer III proceeding for network channel terminating equipment ("NCTE"), which would restrict cable operator deployment of any new services "for which open standards have not been created for compatible navigation devices."¹¹¹

Regulatory proposals of this nature are highly intrusive and their implementation necessarily would enmesh the Commission in micromanagement of all facets of the cable operator's service and equipment business, which would impose significant administrative

¹⁰⁸ Id. at 37-38.

¹⁰⁹ Id. at 38.

¹¹⁰ Id.

¹¹¹ CEA Comments at 25.

burdens and added costs on cable operators, the Commission, and ultimately cable subscribers. Moreover, as the Commission previously has acknowledged, “telephone networks do not provide a proper analogy to the issues in [the navigation device] proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.”¹¹²

CEA misleadingly cites, as support for its proposal to adopt new regulations similar to the telco NCTE rules, the Commission’s prior statement that “[t]he competitive market for consumer equipment in the telephone context provides the model of a market we have sought to emulate in this proceeding.”¹¹³ CEA also conveniently omits the next paragraph in which the Commission qualifies the appropriateness of the telephone CPE model. As the Commission recognized:

The parallel to the telephone has its limitations. When customer ownership of telephone CPE became available, the telephone network was effectively a national monopoly. Well developed technical standards existed throughout an almost ubiquitous network. CPE compatible with the telephone network was part of this environment. In contrast, cable networks do not reflect universal attributes, and have substantially different designs. . . . Additionally, as Section 629 recognizes, preventing interference to other network users and maintaining the integrity of the system signal is of greater concern for video delivery systems than for telephone systems.¹¹⁴

Elsewhere in its Report and Order, the Commission again noted that there are “many differences” between the telephone network and market and the video programming network and

¹¹² Report and Order at 14,789 (¶ 39).

¹¹³ CEMA Comments at 25, quoting Report and Order at 14,780 (¶ 11) (emphasis added).

¹¹⁴ Report and Order at 14,780 (¶ 12).

market.¹¹⁵ For example, the “architectures of the telephone and cable networks are fundamentally different,” in that the “telephone network functions as a national and international system that requires a high degree of stability, coordination, and planning,” whereas there is no national cable network.¹¹⁶ Instead, cable networks are comprised of over 10,000 different systems¹¹⁷ in which cable subscribers of each system “share the capacity of the coaxial cable infrastructure potentially making it more vulnerable to interference or other forms of degradation caused by the actions of individual subscribers’ equipment.”¹¹⁸ The lack of technical uniformity and standardization between and among cable systems in particular would make imposition of CEA’s proposal a significantly greater burden on cable operators than that imposed on telcos under the NCTE rule.¹¹⁹

¹¹⁵ Id. at 14,822 (¶ 122).

¹¹⁶ Id.

¹¹⁷ See Warren Communications News, Television and Cable Fact Book, Vol. 68, at F-1 (2000).

¹¹⁸ Report and Order at 14,822 (¶ 122).

¹¹⁹ Because DBS systems are national networks that are technically uniform across the country, retail distribution of customer equipment was also a more straightforward proposition for DBS operators than it is for the highly fragmented and technically diverse cable industry. In contrast, adoption of a rule of the sort proposed by CEA, requiring cable operators to get waivers before deploying any “new services” after January 1, 2002 for which “open standards” have not been created, would effectively prevent or significantly delay the rollout of advanced digital services to cable subscribers. Given the technical diversity of cable networks and the current, highly dynamic state of the industry, the imposition of constraints of this nature on new cable operator digital service offerings clearly would have a substantial, adverse impact on intermodal service competition, innovation, and the ability of consumers to realize the benefits arising from the rapid deployment of advanced digital services over cable networks.

It is precisely these “many differences” that make adoption of rules similar to telephone CPE regulations inappropriate in the cable equipment context. Indeed, in its Report and Order, the Commission specifically rejected the suggestion that MVPDs that produce and sell CPE should do so through a separate subsidiary, noting that “[u]nlike the ... telephone context, [MVPDs] are not significantly vertically integrated with manufacturers of CPE or navigation devices.”¹²⁰ There is no reason to reach a different conclusion now, particularly given the increasingly strong economic incentives of cable operators to facilitate, rather than restrict, new distribution channels for cable navigation devices.

4. Compulsory Licensing.

Finally, CEA’s proposal to impose compulsory licensing requirements on cable operators and “prescribe standard licensing agreements”¹²¹ is also both unnecessary and inappropriate. CEA has made no showing whatsoever that voluntary licensing arrangements are not readily available. Given the increasing pressure on cable operators to develop multiple sources of supply and channels of distribution, operators have strong incentives to enter into such arrangements or, where proprietary rights are held by the operator’s supplier, to ensure that the supplier is willing to license its technology.¹²² Relying on voluntary licensing also preserves the

¹²⁰ Report and Order, at 14,815 (¶ 99).

¹²¹ CEA Comments at 14.

¹²² See e.g., AT&T Comments at 11 (noting that AT&T “has worked with Motorola to ensure that Motorola will license critical DES encryption and other core security technologies to Philips, Panasonic, and future consumer electronics vendors to ensure that such equipment vendors will be able easily to produce and make available for retail distribution full-function, integrated set-top boxes that work seamlessly on AT&T’s systems.”) (emphasis in original).

incentives for innovation and attendant consumer benefits that underlie the intellectual property laws, and avoids the significant constitutional, administrative, and jurisdictional issues raised by such a proposal,¹²³ which seeks to address a problem that simply does not exist.

CEA's calls for compulsory licensing and related suggestions for more intrusive governmental involvement in the design and architecture of cable networks and equipment connected thereto -- in order to ensure the commoditized nature of cable set-top boxes, at the expense of competition, innovation, and consumer choice -- clearly would impose substantial burdens, particularly given the technical diversity of cable networks. Moreover, such proposals are squarely at odds with CEA's vigilant opposition to Commission intrusion into the design of equipment manufactured by CEA's members.

In this regard, CEA has urged the Commission to reject proposals that it mandate DTV receiver standards, noting that "[o]n multiple occasions the Commission consistently and correctly has held that competitive market forces will ensure that DTV receivers perform adequately, and that television manufacturers are in the best position to ensure that their products meet and exceed consumer expectations."¹²⁴ Similarly, CEA recently indicated its strong opposition to the imposition of government-mandated DTV reception capability on all TV receivers over 13" by 2003, stating that "it is essential that consumers retain their ability to buy televisions with a wide range of capabilities at a variety of price points, and not be required by

¹²³ See Comments of General Instrument Corporation, filed in CS Docket No. 97-80 (May 16, 1997) at 100-109.

¹²⁴ See CEMA [now CEA] Comments in CS Docket 98-120 (Oct. 13, 1988) at 25-26; also see CEMA Reply Comments in CS Docket 98-120 (Dec. 22, 1998) at 7.

the government to pay for advanced capabilities that they do not yet need or want.”¹²⁵ Finally, CEA has observed that “mandatory receiver performance standards would be unwise because their most likely effect would be to dampen the competitive incentive to improve receivers and thereby limit consumer choice.”¹²⁶ The Commission should reject CEA’s attempt to impose constraints on cable operators that would have similar adverse effects on consumers.

IV. INSTEAD OF ACCELERATING THE BAN ON INTEGRATED DEVICES OR IMPOSING OTHER NEW ONEROUS REQUIREMENTS THAT SERVE TO LIMIT CONSUMER CHOICE, THE COMMISSION SHOULD REVISIT ITS RULES AND ELIMINATE THE BAN, SO THAT CABLE SUBSCRIBERS HAVE A FULL RANGE OF EQUIPMENT OPTIONS.

In an effort to ensure that consumers have a full range of navigation device options, NCTA has urged the Commission to revisit its commercial availability rules, in light of the significant marketplace developments and other changes that have occurred since the rules were adopted.¹²⁷ NCTA specifically noted that the substantial progress already achieved by OpenCable, which has developed a solid technological foundation for the retail sale of navigation devices (and continues to enhance this foundation through middleware and other efforts), together with recently-announced MSO agreements with consumer electronics manufacturers and retailers, clearly demonstrate the cable industry’s strong commitment to the

¹²⁵ Letter from Gary Shapiro, President and CEO, Consumer Electronics Association, to William E. Kennard, Chairman, Federal Communications Commission, filed on November 14, 2000).

¹²⁶ CEA Comments, filed in MM Docket No. 00-39 (May 17, 2000), at 12-16. CEA Reply Comments, filed in MM Docket No. 00-39 (June 16, 2000), at 3-12 (noting that “market forces provide the best incentive to create receiver and converter designs most in demand by consumers.”).

¹²⁷ NCTA Comments at 4, 35-41.

establishment of new retail distribution channels.¹²⁸ The powerful marketplace incentives arising from the increasingly intense competition between cable and DBS serve to reinforce the cable industry's strong commitment to OpenCable, thereby alleviating substantially the concerns that led the Commission to impose the current ban on integrated devices, which were at best speculative even then.¹²⁹ In light of these developments and given the significant adverse impact of banning such devices on competition, innovation, consumer choice, and system security, NCTA urged the Commission to eliminate the ban and allow consumers the option of obtaining integrated devices from their cable operator after January 1, 2005.¹³⁰

The comments received from cable operators and other parties make it even clearer that the ban is no longer needed and that its elimination and/or clarification would yield significant benefits to consumers. As the discussion in Section II.B.2. indicates, several of the commenting MSOs provided information describing their agreements with consumer electronics manufacturers and/or retailers, which reflect the industry's increasingly strong incentives and willingness to support the establishment of new retail channels of distribution.¹³¹

¹²⁸ Id. at 36.

¹²⁹ Id.

¹³⁰ Id. at 4, 38, Under NCTA's proposal, the cable operator's ability to provide integrated devices after January 1, 2005 would be conditioned on the operator's agreement (1) to advise its customers that they have the option to obtain navigation devices from retailers or other vendors unaffiliated with the operator, and (2) to continue to make PODs available for use by subscribers who choose to obtain OpenCable-compliant host devices at retail. Id.

¹³¹ See discussion at 18-21, supra.

In addition, several commenters provided information and observations addressing the cost implications of the ban for consumers and the potential efficiencies and other benefits that would be realized if the ban was eliminated. For example, AT&T urged that the integrated device ban be eliminated and, among other things, indicated that “a POD/host combination is approximately \$75 to \$90 more expensive than an integrated device performing the same functions.”¹³² In its comments, TIA also urged the Commission to remove the ban, noting that “its implementation will only reduce, rather than expand consumer choice and the security of cable networks.”¹³³

Moreover, NCTA and a number of other commentors expressed a desire to see the Commission at a minimum clarify its rules, as they apply to continued cable operator provision of integrated navigation devices that also are made available at retail. In this regard, NCTA and others urged that operators be allowed to provide such devices, even after January 1, 2005, if they are available at retail and the operator continues to make PODs available to consumers who choose to obtain OpenCable compliant host devices at retail.¹³⁴ As NCTA has indicated, the fact

¹³² AT&T Comments at 19 (noting that “the POD currently costs approximately \$78 and the POD interface costs \$10-15, for a total cost of between \$88 and \$93.”); also see Time Warner Comments at 16-18; Motorola Comments at 12-17, 19-20.

¹³³ TIA Comments at 1-4; also see Time Warner Comments at 18 (in order to ensure a full range of navigation device options, “[c]onsumers should continue to have the option of obtaining integrated devices from their cable operator after January 1, 2005, assuming cable operators’ continued compliance with the other aspects of the Commission’s navigation device rules.”).

¹³⁴ See NCTA Comments at 38-40; AT&T Comments at 18-21; Motorola Comments at 14.

that such devices are available at retail eliminates the alleged integration advantage cited by the Commission as the rationale for adopting the ban on integrated devices.¹³⁵

¹³⁵ NCTA Comments at 39-40. Moreover, as NCTA indicated in its initial comments, where integrated devices include embedded security as well as a POD-host interface (i.e., a POD slot) and are available from an MSO and independent retailers, the Commission should clarify that such nationally portable devices are not subject to the integration ban. Id. at 40-41; also see AT&T Comments at 22-24.

V. CONCLUSION

For reasons described herein and in the initial comments submitted by NCTA and other commenting parties, the Commission should not accelerate the ban on cable operator provision of integrated navigation devices and should reject the other self-serving regulatory proposals advanced only by CERC and CEA, which would reduce competition, innovation, and consumer choice, and preclude or significantly delay the deployment of advanced digital services to cable subscribers. Instead, the Commission should take immediate action to ensure that the navigation device rules operate to expand the equipment options available to MVPD subscribers, by revising and/or clarifying its rules in the manner described above.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
<u>I. INTRODUCTION AND SUMMARY</u>	1
<u>II. THE OVERWHELMING MAJORITY OF COMMENTERS CONFIRM THE CABLE INDUSTRY’S SUBSTANTIAL, ONGOING COMMITMENT TO COMPLIANCE WITH THE COMMERCIAL AVAILABILITY RULES AND THE DEVELOPMENT OF RETAIL DISTRIBUTION CHANNELS FOR NAVIGATION DEVICES.</u>	5
<u>A. The Cable Industry Has More Than Satisfied Its Obligations Under the Commission’s Commercial Availability Rules.</u>	5
<u>B. Complaints Raised by CERC and CEA Alone Regarding the OpenCable Specifications and Process Are Without Merit, and Reflect a Distorted, Self-Serving View of the Marketplace, the Commission’s Rules, and the Cable Industry’s Efforts to Facilitate Retail Distribution of Navigation Devices.</u>	8
<u>1. The OpenCable Process Is Working and Remains an Appropriate Vehicle for Ongoing Industry Efforts to Spur Development of a Retail Market.</u>	10
<u>a. The OpenCable Process is Open.</u>	10
<u>b. OpenCable Has Complied with the Commission’s Rules.</u>	13
<u>2. Recent Marketplace Developments Demonstrate the Cable Industry’s Strong Economic Incentives and Commitment to Support Retail Distribution of Navigation Devices.</u>	18
<u>3. The Principal Factor Impeding the Development of a Retail Market for Navigation Devices is the Retailers’ Desire to Manipulate the Regulatory Process to Improve Their Profit Margin at the Expense of Consumers.</u>	21
<u>III. THE DRACONIAN REGULATORY PROPOSALS ADVANCED BY CERC AND CEA ARE UNNECESSARY AND FUNDAMENTALLY ANTI-CONSUMER.</u>	24

Table of Contents
(continued)

	<u>Page</u>
<u>A.</u> <u>As the Overwhelming Majority of Commenters Show, Acceleration of the Ban on Integrated Devices Would Have a Substantial Adverse Impact on Consumers, and Is Not Necessary Given the Cable Industry’s Strong Economic Incentives and Commitment to Support Retail Distribution.</u>	25
<u>B.</u> <u>The Commission Also Should Reject Proposals by CERC and CEA for Other Onerous New Regulations That Would Impose Unwarranted and Burdensome Restrictions, As Well As Significant Added Costs, On Cable Operators and Subscribers, and Deprive Consumers of Innovative Services.</u>	30
1. <u>Ban on MSO Participation in the Navigation Device Market.</u>	30
2. <u>Ban on Equipment Averaging.</u>	32
3. <u>Separate Subsidiary and Other Intrusive Regulatory Requirements.</u>	36
4. <u>Compulsory Licensing.</u>	39
<u>IV.</u> <u>INSTEAD OF ACCELERATING THE BAN ON INTEGRATED DEVICES OR IMPOSING OTHER NEW ONEROUS REQUIREMENTS THAT SERVE TO LIMIT CONSUMER CHOICE, THE COMMISSION SHOULD REVISIT ITS RULES AND ELIMINATE THE BAN, SO THAT CABLE SUBSCRIBERS HAVE A FULL RANGE OF EQUIPMENT OPTIONS.</u>	41
<u>V.</u> <u>CONCLUSION</u>	45