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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	)	

To: The Commission

Reply Comments Of
Consumer Electronics Retailers Coalition

Circuit City Stores, Inc.
RadioShack Corporation
Sears, Roebuck & Co.
International Mass Retail Association
National Retail Federation

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December 18, 2000

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To: The Commission

Reply Comments of the Consumer Electronics Retailers Coalition

The Consumer Electronics Retailers Coalition ("CERC")[1] respectfully submits its reply comments in response to the September 18, 2000 Further Notice of Proposed Rule Making ("FNPRM" or "Further Notice") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2]

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[1] CERC is comprised of major U.S. retailers of Consumer Electronics ("CE") and Information Technology ("IT") products: Circuit City Stores, Inc., of Richmond, Virginia; RadioShack (formerly Tandy) Corporation, of Fort Worth, Texas; and Sears, Roebuck & Co., of Chicago, Illinois. CERC also includes major retail trade associations, the International Mass Retail Association ("IMRA") and the National Retail Federation ("NRF"). CERC and its individual members have participated actively in the Commission dockets affecting cable devices including: ET Docket 93-7 and PP Docket 00-67, as to "cable compatibility," and CS Docket 97-80 implementing Section 304.

[2] *In the Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rulemaking and Declaratory Ruling* (Rel. Sept. 14, 2000)(the "*Navigation Device FNPRM*" or "*Navigation Device Declaratory Ruling*").

I. Introduction and Summary

CERC established in its Comments that there are three elements essential to specifications capable of supporting competitive commercial entry into the market for navigation devices:

- a standard, national means of digital video transmission;
- a standard, national security interface; and
- a means of empowering nationally distributed navigation products, including DTV receivers, VCRs, PCs, etc., to support the features and functions of different local cable systems.[3]

CERC demonstrated that the cable industry, having been granted by the Commission the responsibility for devising specifications to support devices that are competitive with the ones its members distribute, failed to provide, support, or license the necessary specifications on a timely basis, and continues to do so:

- OpenCable specifications were not available nearly in time to allow competitive entrant manufacturers to engage in the product design, specification, componentry, sourcing, testing, and distribution necessary to supply products to retailers by July 1, 2000.
- No timely effort was made to develop a licensing regime to allow competitive manufacturers to supply product to retailers.
- The specifications developed by OpenCable for competitive entrants were, and are, markedly inferior to those that the cable industry relies upon for its own products. This inferiority makes such products as may become available under present specifications non-salable.
- No effort has been made by cable industry members to support the marketing of any product that would rely on OpenCable retail specifications. To the contrary, industry members have openly subsidized the marketing of their own, superior products, that (whether or not equipped with a POD interface) rely entirely on proprietary specifications.

[3] CERC Comments at Section I; *see also* CEMA Navigation Device Comments at 8 (filed May 16, 1997); CERC Navigation Device Comments at Section II (filed May 16, 1997); Circuit City Navigation Device Comments at 5 (filed May 16, 1997); Tandy Navigation Device Comments at Section II.D (filed May 16, 1997); Zenith Navigation Device Comments at Section II (filed May 16, 1997).

- In combination, these cable industry acts and omissions have made retail entry, consistent with the requirements and expectations of the R&O, impossible by July 1, and only nominally possible thereafter.

- The only solution, consistent with the Congress's direction and the FCC regulations, is for the FCC to embrace a simple, clear, market-driven approach *that gives advantage neither to cable operators nor to competitive entrants.*

- The only option open to the FCC to assure equality of competitive opportunity is to require that, by a date certain, cable operators and competitive entrants should have available to them, and rely on, a common set of technical specifications that allow products of comparable quality to be offered by each. This date can and should be set at January 1, 2002.

- For competitive entry to be possible in more than theory, the Commission also needs to address the practices of cable operators in blocking entry by substantially subsidizing their own products (through analog box revenue) but not those of competitive entrants.

The Comments and filings of cable operators themselves contain acknowledgements and elaborations as to the points made above. Indeed, they show that CERC has understated the gravity of the case. The Comments of Charter, Comcast, AT&T, and others show that cable MSOs clearly intend to *widen* the performance gap between their own proprietary products, which rely on embedded security, and those products that must rely on OpenCable specifications, and cannot rely on embedded security. It is this intention to increase the advantage of proprietary products – rather than any purported cost or efficiency savings – that clearly is behind the requests to the Commission to lengthen the time period during which their own products should be allowed to rely on proprietary technologies that will never be available to products that must rely on OpenCable standards.

Moreover, in demonstrating why they need extended time to implement these exclusive, proprietary technologies, the filings of the cable operators refute

the claims, of NCTA and others, that the timeframes and procedures by which the OpenCable specifications have been developed and tested were adequate to have supported competitive entry by July 1, 2000, or even by today. *CERC urges the Commission to read these cable submissions carefully*, and to ask whether, according to the frame of reference and experience that they set forth, the OpenCable standard conceivably could have supported competitive entry, or demand for PODs, by July 1.

Reviewing these cable arguments and submissions, alone, should convince the Commission that the cable industry's main defense against CERC's case – that the number of PODs available by July 1 was sufficient to satisfy the (zero) retail demand for host devices – amounts to a shell game. The cable industry, according to its own standards for product development and introduction, simply failed to support competitive entry for host devices. Thus, it failed in its commitment to support the introduction of POD-reliant devices.

The buck must stop with the Commission. Steps to assure equal opportunity for competitors need to be implemented immediately. Perpetuating the distinctions between proprietary and competitive products would sound the death knell for the competition that the Congress has directed the FCC to assure.

II. FCC Filings of Both Cable Operators and Device Manufacturers Conclusively Demonstrate That, Irrespective Of Concerns Over Portability Or Interactivity, No Viable OpenCable-Reliant Product Was Or Could Have Been Offered To Any Retailer By July 1, 2000, Nor Could Any Be Offered Today.

In this proceeding and in contemporary filings, cable operators have had occasion to address the real-world testing and functionality requirements for operation of a navigation device on a cable network. In these filings, some

operators have shown remarkable candor in confirming that any device built to current OpenCable specifications and offered today could not have been adequately tested, would not be reliable in operation, and would be so inferior that customers would and should not want to buy it. These operators describe to the Commission the care in testing, and assurance of reliability, on which they insist before leasing their *own* devices to consumers. These descriptions are the strongest evidence yet that the cable industry has failed in its promise to provide OpenCable specifications to support the right to attach POD-reliant products. Hence, the industry's assertion that it has provided sufficient PODs to "meet demand" is hollow, because the industry has not met the obligation, placed on it by the Commission, to promulgate specifications to support the attachment of products that would create a demand for PODs.

A. Cable Industry Filings Confirm The Unsuitability And Inferiority Of Any Device That Could Be Designed To Rely On Present OpenCable Specifications.

When cable industry filings address specific engineering issues, and the real-world requirements for a navigation device to operate reliably and successfully on a cable system, they clearly illustrate why and how the industry has failed to support the "right to attach" products reliant on OpenCable standards. The cable industry comments in this proceeding are rife with such acknowledgements. For example, in comments attested to by an engineering executive, Charter says (emphasis added):

> [A]t this moment integrated set-top devices remain the most efficient vehicle for providing digital functionality to cable customers. For example, an integrated Explorer set-top device will process out of band signals, interactive program guides, and other functions with virtually no consumer intervention. As yet, there are no standards assuring inter-brand compatibility, security, or updates [for OpenCable devices] to embedded set-top operating systems, so that **processing, security,**

and obsolescence remain issues in a foreign host-foreign POD environment. This may be one reason that consumer electronics retailers have not yet ordered host devices.[4]

In a more recent filing addressed to labeling of "digital cable ready" devices, cable operators also take a dramatically different view of the suitability of any product that the present OpenCable specifications might support. Time Warner, on November 27, in petitioning for reconsideration of the FCC's labeling order, denounced the merchantibility of OpenCable-reliant devices, and said *it would be unfair to consumers to encourage their purchase.*[5] Discussing the FCC-approved label for a device that must rely on present OpenCable specifications, Time Warner said (underscore in original):

> The Digital Cable Ready 1 label is particularly misleading because those devices are not in fact fully cable-ready. To qualify for a label incorporating the term "cable ready," a CE device must fully support all services offered by a cable system. Devices bearing the ... label will <u>not</u> support all interactive or two-way services and therefore are not "cable ready." * * * At a very minimum, if the Commission insists on the use of "cable ready" in the label ... the label should be revised so that consumers will readily appreciate the limited functionality of this equipment.... The Commission should also reconsider including a disclaimer to ***warn consumers*** of the limited functionality of devices within this category.[6]
>
> Even devices qualifying for the label "Digital Cable Ready 2" are not truly "cable ready ...." If the Commission insists upon the use of "cable

[4] Charter Comments at 2. The context for this admission was Charter's plea to be left alone to concentrate on further enhancing the capabilities of proprietary devices in which specific features and functions are directly tied to embedded security, rather than having to divert its time and attention to supporting the operation of "foreign host-foreign POD" devices that would be unattractive to consumers. Charter echoed NCTA's report on "how the cable industry met the FCC's timetables for *segregating security functions from host devices*," and NCTA's citation to "the unresolved interest by retailers in obtaining a share of digital revenues...." Charter, however, refrained from claiming either that present PODs would reliably support host devices, or that any retailer could have or should have actually sold to any consumer the type of product Charter had just criticized in its comments.

[5] Time Warner Petition for Reconsideration of the Commission's Report & Order *In the Matter of Compatibility Between Cable and Consumer Electronics Equipment*, PP Docket No. 00-67 (filed Nov. 27, 2000) (the "Time Warner Petition").

[6] *Id.* at 3 and n.10 (emphasis added).

> ready" in the label for this category, the label should be revised or a disclaimer added *to signal to consumers that they will need a set-top box to take full advantage of cable systems' offerings.*[7]
>
> The Commission should repeal its "Digital Cable Ready 3" category because the specifications for these next generation devices have not yet been developed. The Commission established "Digital Cable Ready 3" criteria in anticipation of the cable and consumer electronics industries' development of integrated digital TV receivers *that include features normally found in a set-top box....* If integrated digital TV sets lack sufficient memory and upgradeability to allow cable operators to download new applications, consumers might soon find that their expensive new sets are obsolete.[8]
>
> Devices that do not include such "middleware" may be able to offer access to some, but not all, services offered by a cable system, necessitating connection to some sort of digital device or set-top box.[9]

These passages discuss, in the context of OpenCable-reliant DTV receivers, the very same OpenCable specifications that would have to be relied upon by any retail, OpenCable-reliant set-top box built today. In the context of arguments over labeling, Time Warner acknowledges that an OpenCable-reliant set-top box[10] should *not* be considered "cable ready." Time Warner emphasizes that any retail customer invited to buy such a [set-top box] should be warned that it would "not include features normally found in a set-top box." There could not be any clearer, or more authoritative testimony that such a product – even had it been adequately tested and supported – would not

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[7] *Id.* at n.9 (emphasis added). As the FCC labels pertain to integrated DTV receivers that would rely on the same OpenCable specifications on which OpenCable set-top boxes would rely, what Time Warner is saying is that consumers should be warned that real cable functionality is available only by means of a *proprietary* set-top box, and would not be available from any that would presently rely on a POD.

[8] *Id.* at 5-6 (emphasis added).

[9] *Id.* at 6.

[10] *I.e.*, the sort of product allegedly "offered" to retailers for resale by July 1, 2000.

provide what the cable industry considers to be "normal" functionality for a cable set-top box.[11]

B. Consumer Electronics Manufacturer Filings Confirm That OpenCable Specifications Do Not Yet Empower Them To Design Or Produce A Useful Or Reliable Product.

The Comments of consumer electronics manufacturers also confirm CERC's evidence that the cable industry has yet to provide support for a retailable product. Panasonic describes its ongoing cooperation with CableLabs as pursuing the present goal of "*more rapidly achieving* complete and precise 'build-to' standards for retail."[12] It describes as "ongoing" the testing that is "necessary for product viability in the retail market."[13] Panasonic notes that full testing is particularly important if retail sales are contemplated: "Once a product has been purchased by a consumer, it must work reliably under all anticipated circumstances; and such reliability can only be assured through adequate advance testing."

More specifically, Panasonic says that it expects to be (but has not yet become) the first consumer electronics manufacturer "to verify the operation of the POD-Host exchange," though it notes that "more needs to be done to ensure that the information about current and future programs actually carried on individual channels is available ...."[14]

The Comments cited above go to the inadequacy of the OpenCable

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[11] CERC accordingly requests that the Time Warner petition be included in the record of this proceeding.

[12] Panasonic Comments at 3 (emphasis added).

[13] *Id.*

[14] *Id.*

specification even for a "unilateral" product – as Charter notes, the interface is not fully tested, may not be reliable, and does not even provide adequate channel and program information to the consumer for passive viewing. Separately and additionally, Panasonic, with vast experience in the retail market, advises the Commission that *user interactivity* – not supported at all by present specifications – is "a competitive feature that Panasonic considers vital to retail viability."[15] Panasonic cites specific, necessary additions to OpenCable specifications that could support interactivity, and says: "Such a step now would be of great benefit both to consumers and cable operators, and certainly to the *objective* of enabling a vital retail market."[16]

Similarly, Philips describes the existing OpenCable specification as supporting *basic* functionality, so as to comprise "an important step forward in the Commission's goal of promoting consumer choice in these devices."[17] Philips notes that "the availability of EPG data will be needed in order to generate a complete and consistent EPG, which consumers will need in order to navigate efficiently through an ever-expanding universe of channels."[18] Thus, this manufacturer also has confirmed that, ***even with respect to passive, non-portable operation, falling far short of competition with current MSO offerings, the OpenCable specifications are not sufficiently developed to support reliable operation by consumers***.

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[15] *Id.* at 4. Panasonic goes on to note that many cable operators now provide video-on-demand service entirely through remote control operation, so that navigation devices incapable of such interactivity could not provide this feature under any circumstance.

[16] *Id.* (emphasis supplied). Panasonic later refers to its work with CableLabs toward the *goal* of offering system-independent products directly to retailers.

[17] Philips Comments at 3 (emphasis in original).

[18] *Id.* at 7.

CEA, the industry association for such manufacturers, has made the same point more directly. In its recent, periodic report to the Commission in CE-Cable Compatibility, CEA described the state of the OpenCable specification as follows (emphasis in original):

> Despite the claims by the cable industry of having deployed a "functioning" POD by the July 1, 2000 deadline established by the Commission's navigation devices rules, no functioning PODs or host device for the PODs can yet be designed. The device demonstrated by CableLabs was capable only of descrambling scrambled programming, and could not support any other features of the host device such as EPG. SCTE's DVS-295 and DVS-301 (the latter addresses copy protection protocols) are still many weeks away from the ballot process and months more away from consensus-seeking negative ballot resolution. This delay is significant because these standards will affect and require modifications to all the standards CEA has discussed above, as well as many of the standards referenced therein, and to the standards upon which the February 22 agreements were keyed. The upshot is that ***it is currently impossible to design a digital television receiver that will be compatible with cable systems utilizing the POD-Host interface***, because the parameters of that interface are not fully and finally determined.[19]

C. Comments By Cable Operators As To The Lead Times Necessary For Their Own Products Demonstrate That OpenCable Development And Testing Cannot Yet Support Operation of POD-Reliant Products On Any MSO System.

The best illustration of the level of commitment necessary to support operation of a navigation device on a cable network is found in the Comments of cable operators themselves. These Comments address the sort of testing MSOs require before they will *lease* newer generations of the present advanced set-top boxes to consumers.[20] CERC asks that the Commission apply this standard of care

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[19] CEA Written *Ex Parte* Presentation at 3, *In the Matter of Compatibility Between Cable and Consumer Electronics Equipment*, PP Docket No. 00-67 (filed Nov. 30, 2000). CERC requests that this CEA filing be included in the record of this proceeding.

[20] Manifestly, as pointed out by Panasonic, investment by a consumer in *ownership* of a network device requires an even higher level of confidence.

to determining whether OpenCable specifications and related testing and development of applications – aside from any considerations of portability or interactivity – would yet support the distribution of OpenCable-reliant devices for operation on cable networks.

Cox notes that its "experiences with VOD and iTV illustrate the long lead-time which is necessary for the development, testing and roll out of services."[21] Cox began efforts to introduce VOD in 1999.[22] Following a "lengthy developmental effort, which included significant testing of the technology and service ... and extensive field testing," Cox expects to roll out VOD in only one market by the end of the second quarter of 2001.[23] Interactive television services are taking even longer to perfect. Cox says that its "developmental process for services such as VOD and more complicated applications such as iTV require a good deal of time to conduct testing and re-testing"[24]

Cox goes on to point out that once a product has been developed, it can still take many more months before Cox can test the product with enough subscribers to identify a viable business model.[25] Based on Cox's Comments, it could take more than two years to develop and market-test a less "complicated" product like VOD before Cox would know whether it had a product worth introducing.[26]

> Indeed, equipment vendors and cable operators cannot be expected to invest time and resources in developing new services, regardless of the platform, without first gathering the information necessary to determine the application of business models to equipment that works. Cox must

[21] Cox Comments at 3.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 4.

[25] *Id.* at 6.

[26] *Id.*

> first be able to adequately test and roll out sufficient equipment to enable it to obtain the data necessary to make informed decisions as to the business models that it will use in this competitive marketplace.[27]

Comcast similarly observes that in all cases it must ensure that its offerings are stable, capable of growth, and capable of being technologically enhanced, and that "the process of ensuring that these goals are met is long and complex."[28] Like Cox, Comcast notes that "only through extensive field testing can it be ensured that newly developed platforms will have the necessary capacity to meet demand."[29] Moreover, Comcast Comments that even with well thought out product plans, many problems do not become evident until a product is tested in the field, and additional time and resources are devoted to resolving problems.[30] Applying this experience to the navigation device environment, Comcast says:

> [I]t has taken two years to achieve acceptable performance from the current "simple" digital video platforms that Comcast has deployed. In addition to the time necessary to deploy advanced services over existing platforms which interface with integrated navigation devices, deployment of advanced services using digital host/POD technology will itself require time and testing. *Comcast cannot simply "plug in" new elements such as separate digital hosts without degrading performance unless all necessary field testing processes are followed.*[31]

Comcast concludes by arguing that:

> [T]he development and deployment of new advanced services is a complicated process and follows a natural evolution. Prior to widespread deployment, new system components must undergo a series of laboratory tests and field trials, each of which may result in hardware and software modifications. Successful field trials allow small scale deployments to trial users. Further modifications and adjustments are inevitably required as new services are rolled out to larger user groups. In this manner, the procurement and delivery of new services over an

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[27] *Id.* at 6-7.

[28] Comcast Comments at 3.

[29] *Id.*

[30] *Id.* at 4.

[31] *Id.* at 5 (emphasis added).

entire customer base goes through several cycles of testing and refinement.[32]

The facts of record as to the date the OpenCable specification was made available to competitive manufacturers, the limited and insufficient amount of testing and development of supporting applications to date, and the gaps remaining, make clear that, *by cable industry standards*, a right to attach for OpenCable-reliant devices was not supported by July 1, 2000, nor has one been supported to date. The support of this right, through OpenCable specifications, was a task explicitly delegated to the industry by the FCC. Performance of this duty was a crucial obligation on which others interested in this proceeding have relied.

III. Retailers Cannot, And Should Not Be Expected To, Compete By Offering Nonfunctional, Unreliable And Inferior Products At Higher Prices.

NCTA has attempted to shift responsibility for its industry's failure by pointing to lack of retailer "orders" for OpenCable-reliant devices. NCTA claims that the lack of "orders" reflects a "strategic" choice by every retailer in the country rather than the lack or unsuitability of potentially available products. The record is clear, however, that it is the cable industry that has taken *pro forma* steps only.

A. NCTA's Insistence That Valid "Offers" Were Made To Retailers Prior To July 1, 2000, Cannot Withstand Scrutiny.

Two days before the July 1, 2000 deadline for support of competitive availability, one manufacturer – cable industry supplier Scientific Atlanta – claimed to have become "licensed" under the POD-Host Interface ("PHI," formerly "DFAST") license. Yet, as the Commission is aware, no purportedly "final" version of this

[32] *Id.*

license existed until December 15. Moreover, the "offer" claimed by NCTA to be made to retailers did not even come from the "licensed" supplier.[33]

From the filings of CE manufacturers who are also cable industry suppliers and of CEA, it is clear that any OpenCable-reliant product that could have been offered by July 1, 2000, could not have been safely and reliably purchased by a consumer at any price – irrespective of whether it also provided portable or interactive operation competitive with MSO-provided, leased products.[34]

B. Cable Industry Filings Acknowledge The Subsidization MSO-Leased Products, As Well As the Inferiority Of The Specifications Made Available To Competitive Entrants.

NCTA and other cable commenters acknowledge that they subsidize distribution of their own leased products through higher charges on consumers who lease analog boxes. They claim that, even if used to block competitive entry, such subsidies would be legal, would benefit consumers, and would have no negative impact on navigation device competition. NCTA's position would effectively read Section 304 (now Section 629) out of the Communications Act.

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[33] According to Comments, such an "offer" came from the other entrenched supplier to the cable industry, Motorola. It might be argued that Motorola assumed that as the DFAST patent holder, it would be "licensed" irrespective of CableLabs exclusive licensing authority. However, as the controversy over the terms of this license has dragged on, Motorola has made crystal clear that it is not the licensor and does not wish to be associated with the terms on which the MPAA (via CableLabs) has insisted. Motorola has emphasized this point by insisting that CableLabs change the name of the license, to disassociate the terms from its own "DFAST" patent.

[34] In this respect, the Commission should focus on the important distinction between OpenCable-reliant products, and OpenCable "compliant" products. It is the former category that relies on OpenCable specifications, through the POD-Host interface, to serve the consumer. It is this category of product that Charter, Panasonic, Philips, CEA, and CERC members have attested to be insufficiently tested, reliable, or functional to offer for sale to consumers. By contrast, these manufacturers and others have been given huge orders for products that are said to be nominally "compliant" with OpenCable specifications, but which will *rely*, for their operation, on embedded security. The presence of the POD-Host interface on such a product guarantees the consumer nothing and does not make the product retailable. Nor does it fulfill the Commission's mandate for such a product to *accept* a POD if the product cannot usefully *rely* on the POD for operation. For provision of PODs to be relevant, POD operation must be relevant as well.

NCTA begins by noting that the Congress explicitly authorized equipment averaging.[35] It says that the Congress adopted the equipment averaging provision in order to promote broadband technologies and to control the rates subscribers pay for new technology.[36] However, the authorization for rate averaging authority in Section 623 does not extend to destruction of Section 629. Nor does it mean that relief under Section 629 for failure to support a competitive right to attach cannot address cable industry leasing practices.[37]

The Congress ordered the Commission to assure the commercial availability of navigation devices.[38] CERC has provided ample evidence that the current equipment rate averaging scheme relied on by cable operators is actually promoting the industry's ongoing monopoly control over navigation devices.[39] It also is impeding advanced services deployment, thus conflicting with the legislative history relied on by NCTA.

The 1996 Act was intended to foster competition. The cable industry's equipment subsidies do not remain "legal" if they are implemented so as to foreclose entry pursuant to Section 629, or if they sustain monopoly control over broadband services through cable system bundling arrangements that preclude subscribers from accessing alternative Internet service providers, require subscribers to pay for services they do not need or intend to use, and limit

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[35] NCTA Comments at 22.

[36] *Id.*

[37] To the contrary, as CERC's Comments pointed out, FCC regulations and the Report and Order specifically contemplate such relief.

[38] 47 U.S.C. § 549.

[39] CERC Comments at Section II.

consumer use of features and functions embedded in consumer electronics and information technology.[40]

NCTA argues that there is no evidence that less affluent customers are subsidizing equipment used by more affluent customers.[41] Yet NCTA and its members have not affirmatively refuted the concerns raised by retailers that analog customers are paying equipment and service charges that include costs associated with digital service deployment. In fact, NCTA's acknowledgement that the cable industry relies on "legal" equipment subsidies seems an admission that analog subscribers do bear such a burden. If, in the Commission's judgment, the record remains unclear on this point, the MSOs should provide complete and certified data demonstrating the impact of equipment subsidies on various types of subscribers, in accordance with the Commission's long held principle of requiring the party that controls the information to provide evidence that its practices comport with the law and are in the public interest.

Finally, NCTA suggests that the Commission should ignore the equipment subsidy concerns because retailers had ample opportunity to participate in a "lengthy" Commission rulemaking implementing Section 623's equipment subsidy provision.[42] The Commission implemented Section 623(a)(7) in a rulemaking that

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[40] *See, e.g., FCC Sees Growth In Advanced Services, Wireless Deployment*, Warren's Cable Regulation Monitor (Aug. 14, 2000); Statement of Rep. John Dingell, Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee On Broadband Technologies (May 25, 2000) (saying "A recent FCC report shows that the cable modem currently has a significant advantage in terms of market penetration. While it is still without question a nascent market ... the fact is that the cable companies now command more than a 90 percent share of residential broadband market.").

[41] NCTA Comments at 22-23.

[42] NCTA Comments at n.55.

lasted less than three months.[43] Seven parties submitted comments or reply comments and the complete docket consists of 15 documents, two of which are the Commission's own notice and order. This proceeding was concluded about a year before the Commission even issued its NPRM with respect to Section 629. It could not be foreseen, at that time, that cable operators would implement rights gained therein in a discriminatory manner so as to frustrate the objectives of a proceeding that would not commence for another year.

IV. The Cable Industry Alone Bears The Responsibility For Failure To Support The Right To Attach OpenCable-Reliant Navigation Devices.

No efforts to shift the blame onto retailers, or arguments over the necessity of portable and interoperable functionality,[44] should be allowed to distract the Commission from conclusively demonstrated fact: that the cable industry avoided direct regulation by accepting certain responsibilities from the FCC, and failed to meet those responsibilities. It is retailers – some of whom supported this delegation of responsibility to the cable industry – who have suffered most from noncompliance.[45]

A. No Viable OpenCable-Reliant Product Has Yet Been Offered To Any Retailer.

Irrespective of whether, as CERC argues, any specification for salable OpenCable-reliant products must support interactivity or portability, or whether

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[43] *In the Matter of the Implementation of Section 301(j) of the Telecommunications Act of 1996, Aggregation of Equipment Costs By Cable Operators*, CS Docket No. 96-57. The NPRM was released March 20, 1996 and the Report & Order was released June 7, 1996.

[44] The necessity of portable and interactive functionality, however, has also been demonstrated in this proceeding. CERC believes that failure to provide such functionality *also* makes the OpenCable specifications deficient.

[45] While this failure has harmed consumer electronics manufacturers, their Comments disclose that manufacturers have received substantial and lucrative offers to supply proprietary products directly to MSOs, for leased distribution.

CableLabs *should* have made some useful license available to support competitive entry by July 1, the facts adduced in this proceeding demonstrate conclusively that the cable industry has failed to support retail entry at even the most nominal, non-portable, non-interactive level. Simply publishing a tardy, incomplete, untested, unreliable specification does not constitute support for retail entry. Nor does manufacturing a shoebox full of PODs to meet a "demand" that has been suppressed by lack of a viable or complete specification.

To enter this marketplace successfully, CERC members do require commercial availability of OpenCable-reliant products that are feature- and price-competitive with leased MSO devices. This, however, is a separate issue. The first issue that is resolved by the evidence offered in this proceeding is that the cable industry failed in the most minimally defined responsibility to provide support for the attachment of competitive devices to cable networks. This failure should be the occasion of relief, as requested in the main CERC Comments. The second, further, issue is whether the cable industry should support equal competitive opportunity for entrants, through specifications, applications, and otherwise. The answer to this question is also yes. Relief for the industry's failures to date provides an additional basis for assuring prompt and effective action to fulfill Congress's intent.

B. The Cable Industry Could And Should Have Offered A Timely License To Support Competitive Entrants.

As part of the effort to shift blame to retailers, NCTA argues that CERC member Circuit City is really to blame for CableLabs' failure to offer a timely license, because Circuit City first raised issues with the Commission as to whether

the license would comply with FCC regulations. This argument is baseless on several grounds.

First, the initial NCTA/CableLabs reaction to Circuit City's Comments was to *speed up*, rather than slow down, negotiations over the "DFAST" (now "PHI") license. Prior to the January 28 forum in which the Circuit City Comments were made, negotiations had been sporadic and moribund. NCTA and CableLabs reacted to the raising of this issue, however, by scheduling another round of negotiations with manufacturers and other interested parties.

Second, after the FCC decided to solicit comments on issues related to the license, CableLabs again viewed the FCC involvement as an occasion to revive, rather than suspend, license negotiations. It was only after these discussions reached deadlock, over MPAA demands, that CableLabs indicated it might simply wait for "guidance" from the FCC.

Third, it was neither necessary nor advisable for CableLabs to suspend negotiations. In the event, the FCC did not resolve all issues raised by Circuit City or CERC – it ruled that *allowable* copy protection provisions would be consistent with its regulations. This result was, in fact, consistent with the CERC position that the FCC needed to consider *which* copy control-related provisions would be acceptable in the license.[46] Three months *after* the FCC Declaratory Ruling, CableLabs finally has filed a purportedly "final" license, having held only two conference calls since that ruling – neither of which addressed the most controversial "compliance" issues discussed by the Commission.

[46] Procedurally, CERC argued that this determination would require an amendment to FCC regulations, but substantively the result is the same – the FCC has reserved the power to determine, once a "final" license has been submitted, which copy-protection provisions are "allowable."

Clearly, what has vexed CableLabs in attempting to devise a license has been an inability to steer a path between the demands of the MPAA and the needs of manufacturers and consumers. From the outset, CERC and others have urged that, faced with this difficult problem, CableLabs should have made available an interim license that allowed production for distribution. Instead, CableLabs made available only an interim license that allowed production for *testing*. CERC submits that the real reason CableLabs went only this far is that it knew that *the OpenCable specifications as yet will support only prototype products suitable for testing, and not any product suitable for production*.[47]

The purportedly "final" license filed by CableLabs actually broadens the discrimination against OpenCable-reliant devices. Its "compliance rules" would require, for any product built to OpenCable-reliant specifications, *fixed down-resolution* of high-definition component analog outputs, irrespective of the nature of the programming or the wishes of the content provider. By contrast, currently distributed MSO-provided set-top boxes that are high-definition capable *do* provide high definition content to component analog outputs, and *will continue* to provide the high definition content irrespective of any "downres" trigger or token provided by a content provider. This gross disparity is another nail in the coffin of potential salability of any device that would rely on the present OpenCable specification. It also makes a mockery of the rationale offered for imposing copy control obligations on OpenCable-reliant devices through the PHI license: equality of treatment with MSO-provided devices. This license should now be published for public comment.

[47] *See* Panasonic Comments at 2-4; Philips Comments at 3-4.

V. Proposals To Prolong Reliance On Embedded Security Should Be Considered Only If They Support An Entirely Level Playing Field For Competitive Entry.

The issue for retailers, who must depend on independent manufacture for competitive entry, is not, and has never been, whether MSO-provided devices are allowed to rely on "embedded" security. The issue is, rather, whether the competitive devices offered by retailers will be capable of offering features and functions comparable to those available in the devices distributed by the MSOs themselves. In determining that MSO reliance on embedded security must be phased out, the Commission in 1998 recognized that, so long as the existing providers could continue to write separate specifications for competitive entrants, these entrants would never fully catch up. Thus, the phase-out of embedded security was seen by the Commission as a means to a vital competitive end, and the FCC's right to make this determination was confirmed by the court of appeals.

The FCC should not lose sight, at this critical time, of the fact that the phase-out of embedded security was one means toward the larger goal of equal competitive opportunity for commercial entrants. Specifications providing for the separation of security were the most conspicuous, but certainly not the only, specification necessary for the OpenCable project to empower competition without endangering MSO security. Now, AT&T has come forward and asserted that an alternative path is available, if *all device providers* are allowed (by all MSOs) to rely on embedded security.

CERC sees significant, and very apparently fatal, problems with switching to such an approach at this late date. These are discussed below. The AT&T position does, however, highlight the single most vital consideration for the FCC at this

pivotal time – that the issue before the Commission is one of *reliance on equally useful specifications by cable providers and competitive entrants* – not the specific means to achieving this end.

A. The Basis For The Entire OpenCable Project, And For FCC Delegation of Responsibility To MSOs, Was Commitment To Support Host Devices That Are POD-Reliant.

Because MSOs generally do not want to lose control over security applications, and need to reserve the right to renew them, a foundation of the OpenCable project has been the separation of security circuitry and applications from the other, "host" device features and functions. The essence of the OpenCable project, therefore, must be to allow OpenCable POD-reliant products to perform on cable networks in a manner competitive with non-reliant products.

It was to assure equality of performance, and non-discrimination against competitive products, that the FCC determined that a phase-out of reliance on integrated security was necessary by 2005. The proposals by AT&T to scrap this requirement, and by others to delay it, therefore represent nothing less than a petition to the Commission to change the entire basis for the navigation device report and order.

There is nothing in the record that provides any support for such a change. To the contrary, thus far, POD-reliant devices have not even achieved a minimal level of functionality, while non-POD-reliant devices are entering third generations of sophistication. POD-reliant devices are as yet untested, unreliable, unlicensed, non-portable, and non-interactive, whereas non-POD-reliant devices are all of these things. There is no evidence that the disparity between devices salable by retailers and those available to MSOs would be reduced by, instead, declaring that all

devices should be non-POD-reliant: There is no evidence that all MSOs would support independent and competitive manufacture of devices containing their proprietary security technology. Nor is there any evidence that such non-POD-reliant devices could work on more than a single MSO's system or systems. Such a change, therefore, apparently would consign competitive devices to permanent inferiority. It is for this reason – rather than on account of whether security is "integrated" or "separate" – that CERC opposes any such shift in approach.

B. It Has Become Transparent That Requests For Continued Reliance On Embedded Security Are Based On A Desire To Maintain Superiority Of Proprietary Devices Over OpenCable-Reliant Devices.

The requests for delay or abandonment of the 2005 date are generally addressed to questions of cost-savings and efficiency. Study of the particular Comments of cable operators, however, indicates that a more serious dynamic is at work. Cable MSOs have also been clear in stating that they are now designing *more sophisticated applications to work with current platforms that rely on proprietary middleware and embedded security*, and do not wish to slow down these efforts to work on equivalent and parallel support for POD-reliant devices.

Comcast, for example, indicates that, while OpenCable is still working on a "middleware" solution for OpenCable-reliant devices, Comcast is already far down the road in implementing its own proprietary "middleware" solution that is *linked to platforms that rely on proprietary security*. Comcast asks the FCC to focus only on its proprietary solution, to the exclusion of the competitive one:

> In order to keep pace with competition, Comcast must not only deliver advanced services to its customers but also lay the foundation for new service capabilities and functionalities. To this end, Comcast is currently implementing 'middleware' software that increases the functionality of

> existing boxes by facilitating commands between new end user applications and existing set-top boxes. However, while applications written to interface with this middleware software will operate on any set-top box using it, the middleware itself must be adapted to specific devices. As such, efforts to implement middleware and associated applications across Comcast's customer base will also be delayed if it is forced to divert resources to developing new platforms for host devices sooner rather than later. The time and resources of both operators and equipment vendors are simply not available to accomplish all of these tasks simultaneously if the current time frame to ban the deployment of integrated devices is advanced.[48]

The request by MSOs, if granted, would widen the performance gap between proprietary MSO-provided devices and POD-reliant devices. The prospect that the capabilities of these two types of devices will continue to diverge is the best argument for advancing, to 2002, the 2005 date for reliance by all participants on POD-based and portable navigation device technology. It is not as if MSOs merely intend to support applications equally through POD-reliant and non-POD-reliant circuitry, and simply wish to gain efficiencies by keeping open the option of security integration. Rather, the case presented is that a *functional advantage for non-POD-reliant circuitry* has been obtained. The FCC is now being asked by cable operators to institutionalize this discrimination against POD-reliant devices by not moving up the 2005 date, or by abolishing forever any notion of competitive equality. No clearer argument in favor of moving this date to 2002, as the only means for achieving Congress's goal of open competition, could be imagined.

[48] Comcast Comments at 4-5 (footnote omitted).

C. Even If Supported By MSOs, Retail Distribution Of Embedded Security Devices Would Be Feasible Only If Such Devices Did Not Rely On Proprietary Elements Of The Embedded Security – Which Would Be Inconsistent With The Clear Intent Of Cable Operators.

The proposals to allow all navigation devices to rely on embedded security, yet contain a POD interface, rely on paradoxical logic. If there is no performance advantage, over POD-reliant circuitry, it would be costly and inefficient for all navigation devices to have to support *both* the POD interface *and* embedded security. If there *is* a performance advantage for products with integrated security, this advantage would be lost whenever the consumer found it necessary to rely on the POD interface (*e.g.*, when the consumer moved to another system). Advocates of such a change in the FCC's approach cannot have it both ways – either integrated security confers a competitive advantage, or it is wasteful to have it in products that also can rely on PODs.

Clearly, then, the intent behind this proposal is to favor the performance of proprietary-reliant devices at the expense of POD-reliant devices. This result would mean that POD-reliant circuitry would never catch up with proprietary circuitry in terms of features and functions. To attain comparability, therefore, retailed navigation devices would have to rely on proprietary integrated security. If feasible, this would require a commitment of all MSOs to make their proprietary technology available to all manufacturers, and their devices available to retailers. Even such a commitment, however, would not attain feasibility because such products would work optimally only on that MSO's particular system, and would have to be inferior (*i.e.*, POD-reliant) on others. It was to solve such problems that OpenCable was designed, and accepted by the FCC, in the first place.

VI. Conclusion

The Comments in this proceeding, by the cable industry as well as by CERC and the potential manufacturers of navigation devices, provide overwhelming support for these propositions:

- The cable industry has not, in fact, met its obligations to the FCC to support the right to attach competitive navigation devices that was declared by the Commission.

- The *only* available remedy is to achieve equal competitive opportunity for MSO and competitive devices, through common specifications and an end to all remnants of discrimination against competitive entrant devices.

- If the Commission waits until 2005 to achieve equal competitive opportunity through POD-reliance, the market for navigation devices will have been effectively pre-empted and the performance gap between proprietary-reliant and POD-reliant devices will continue to widen.

- If supported by MSO testing, development, and applications, the POD-reliant "middleware" specification can provide a basis for equal competitive opportunity. Cable Comments make clear, however, that unless the FCC moves up the 2005 date to 2002, MSO resources and priorities will be devoted to increasing the superiority of proprietary-reliant devices rather than supporting POD-reliant systems that provide equal competitive opportunity.

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Certificate of Service

I, Catherine Krupka, hereby certify that true copies of the foregoing Comments of the Consumer Electronics Retailers Coalition were served by hand on December 18, 2000, to the persons listed below.

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