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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Consumer Electronics Retailers Coalition

February 12, 2001

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

Re: Commercial Availability of Navigation Devices, CS Docket 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67

Dear Ms. Salas:

This is to notify the Office of the Secretary that the Consumer Electronics Retailers Coalition made a written *ex parte* presentation to Chairman Powell and the parties listed below. A copy of the written presentation is attached.

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

Sincerely,

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OFFICE OF THE SECRETARY

Consumer Electronics Retailers Coalition

February 12, 2001

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20544

Re: Commercial Availability of Navigation Devices, CS Docket 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67

Dear Chairman Powell:

In a February 6 letter to you, the cable industry, through its *CableLabs* consortium, made several assertions with respect to the license it has proffered to its potential competitors under section 304 of the 1996 Telecommunications Act. We, the members of the Consumer Electronics Retailers Coalition ("CERC"), are among the potential entrants to the market for competitive "navigation devices." Unfortunately, five years after Congress acted, and almost three years after the Commission issued regulations, we are no closer to competing with the monopoly that cable operators have enjoyed over the consumer market for such devices.

The Basic Obstacles To Market Entry By CERC Members.

The issues raised by the cable industry letter are important, because no manufacturer, unless it signs the "PHI" license, can enter and compete with the cable industry representatives who offer it. Initially, however, we must point out that this draft license, although a "showstopper" in its own right, is not the only, or the most fundamental, roadblock to competitive entry:

- Thus far, the cable industry, through CableLabs, has made available one (inadequate) set of specifications for competitive entrant devices, yet relied on entirely different, superior, and proprietary sets of specifications for MSO-provided devices. (By contrast, competitive DBS consumer device manufacturers and service providers who distribute their own consumer equipment rely on

the same family of specifications.) MSOs, in their own filings in the Commission's "Year 2000 Review," have said they intend to provide earlier, and superior, support for MSO-provided devices for years to come - even if specifications for competitive, OpenCable-reliant devices should become comparable. *If Ford could design and specify all GM cars without having to rely on the same set of specifications itself, would GM cars ever be the equal of Fords?*

- Thus far, cable MSOs have granted to themselves subsidies for distribution of digital navigation devices by "pooling" consumer charges with those for obsolete analog devices. They point out that the '96 Act allows them to do so. They have not offered to make this subsidy pool available, however, to the competitive entrants whose entry was to be enabled by section 304 of that Act. Could a retailer manage to offer a cellular phone for $389 when the *identical phone, and terms of service, are available from the service operator for $19.95?* Adherence to the cable industry's present discriminatory administration of its subsidy pool produces a comparable situation (except, as the cable industry has officially admitted, the "$389" product at present is grossly inferior to the "$19.95" product).

Unless these core issues are addressed in CS Docket 97-80's pending Year 2000 Review, settlement of the license issues discussed below will be unavailing. Conversely, however, unless the cable industry extends a license to competitive entrants that is both commercially reasonable and fair to consumers, entry can never occur. As in many cases of deregulation, *one cannot expect that the "market" will force an entrenched monopolist, with remaining official power over potential competitors, to offer fair terms of entry to those who would attempt to destroy his monopoly*. Thus it is necessary to finish the job of deregulation before competition can be expected to bloom.

Why FCC Rules Require A License.

Ideally, the FCC could simply have declared a "right to attach" competitive devices to cable systems. To assuage the valid security concerns of cable operators, however, it was necessary for the Commission to require a standard interface between security modules, to be provided directly to consumers by cable operators, and the navigation device itself, which ideally could be of open and competitive design, so long as it did not cause harm to the network. Rather than mandate specifications for this and other interfaces to support the operation of competitive products, the FCC accepted the cable industry offer to design and support necessary specifications through the CableLabs "OpenCable" project. But for emergent concerns over copy protection, this project might have supported the competitive right to attach without need for any license at all to competitive entrants.

Motion picture industry members, however, expressed concern that, as originally designed, the interface between the security module ("Point of Deployment Module," or "POD") and the navigation device (or "Host") would carry a compressed digital signal "in the clear," and thus could be vulnerable to recording in circumstances in which the content provider and the cable operator did not authorize consumer recording and wished to prevent it. Accordingly, with the cooperation of CERC members and consumer electronics manufacturers, a technical regime was agreed to that would provide a measure of signal scrambling and authentication across the interface for possible implementation for copy control purposes. This technology made use of a patented "DFAST" algorithm whose rights were owned by General Instrument (now Motorola) and were subsequently licensed to CableLabs. *It is only because it was found necessary to add this algorithm to the specification that prospective competitive entrants - in order to exercise their rights under section 304 of the '96 act and the FCC's regulations in CS Docket 97-80 - must be licensed by CableLabs at all.*

CERC members, as retailers, generally are not considered to be potential licensees under the license drafted by CableLabs. However, we cannot enter this market until some competitive entrant manufacturer has succeeded in becoming a licensee. Manufacturers, however, have expressed a number of fundamental objections to the proposed license, which we summarize below. Moreover, those representing potential entrants have expressed a number of concerns over process: *agreement to this license is a prerequisite to enjoying the benefits of deregulation as provided under the '96 Act and FCC regulations. Yet the Commission has not published a proposed final version of this license for public comment, as it did in the case of telephone Customer Premises Equipment deregulation and the RJ11 jack.*

Basic Concerns Over The Proposed PHI License.

Concerns expressed by consumer electronics manufacturers over the terms of the PHI license as last proposed go well beyond the copyright-related issues discussed in the cable industry letter. They include:

- *Over-breadth.* The proposed license purports to specify features and functions of products having nothing to do with conditional access, harm to the network, or (even) copyright. This raises basic competitive issues.

- *Over-reaching.* In several areas, the license goes well beyond commercial norms for similar agreements, so as to constitute, commercially, a contract of adhesion. The potential licensees have no negotiating leverage, because *in order to enter this market pursuant to an act of Congress and FCC regulations, the potential licensee must sign.*

- *Discrimination against entrants.* CableLabs takes the position that, since it is owned by cable operators, it cannot enforce any license terms against MSOs as to devices they directly distribute. It is not clear that MSO-provided devices will be governed by this license, and to the extent they are, several terms are potentially discriminatory in their favor.

It was precisely out of concern for such potential abuse, and discrimination against competitive entrants, that the Commission gave careful scrutiny to, and sought public comment as to, the license and specification for the RJ11 jack. Indeed, *had entrenched monopolists been able to limit and control telephone-based competition through an overly broad and adhesive license, the competitive history leading to the Internet may have developed very differently.*

Copyright-Related Concerns Over PHI License.

The cable industry recognizes, initially, that in PP Docket No. 00-67 the Commission stated that *some measure* of copy protection was consistent with the FCC regulations that limit impositions on licensees to those protecting against theft of service or harm to the network. Later, however, the letter supposes that the Commission has already ruled that *all* requirements purportedly in aid of copy protection must therefore be acceptable. This is demonstrably not the case.

To clarify positions, neither CERC nor any of its members has ever argued that *no* specification or license provision in aid of copy protection should be allowed. Rather, we have said that if such impositions are to be imposed on potential entrants in order for them to exercise rights granted by Congress, these terms should be subject to public scrutiny, as there is no competitive alternative to achieve entry. CERC argued that Commission rules should be revised to deal with this issue. The Commission, instead, in the Declaratory Order referred to in the cable industry letter, said that existing rules *could* countenance such restrictions, but only to the extent they are "allowable," and that the FCC was not in its order approving any particular restriction. On December 15, the cable industry submitted a purportedly "final" version of the license. This is where things stand.

CERC's concern here is over potential surprise and disappointment of consumers – not only potential consumers of navigation devices and home recorders, but also those who have already purchased *digital televisions* that would be disabled in the name of copy protection. Rather than lay out all concerns here, however, we confine ourselves to what appear to be clear mis-statements in the cable industry letter:

- That the PHI license concerns only digital technology. If this were the case, there would be far fewer problems with it. One provision would require that *component analog* outputs to *viewing devices* be shut off in aid of purported copy protection concerns. These are the *only* high resolution inputs to "HD-ready" and "DTV-ready" receivers now on the market, and are expected to be the only such available inputs for at least another year and probably longer.

- That only an optional capability to shut off or degrade signals is in issue. In fact, the license provides that devices built to current OpenCable specifications *must* automatically shut off or degrade an image in response to a particular copy control signal. For such devices, there is no independent triggering of down-resolution – if copy prevention is asserted, the device *must* degrade the image for viewing or, if it cannot do so, go dark – even if the content provider has chosen *not* to mark the signal for image constraint!

- That other services impose similar restrictions, and but for such restrictions, content providers would collectively discriminate against competitive entrants. This has been a highly selective, bootstrap argument of content providers, and one of potential antitrust concern. For example, HD-capable navigation devices provided by the MSOs themselves do not at present have the same dark-screen or degraded image facility attributed to some DBS receivers, or the one required by the PHI license provision discussed immediately above. And DBS receivers contain some technologies related to copying that have *never been triggered* and may never be triggered. Having achieved *some* potential for particular results in particular cable or DBS licenses – even if never activated – content providers have now asked the Commission for flat, unbridled authority to impose, unilaterally, broad impositions on competitive entrants.

- That the Commission has approved the copy control-related (or any other) provisions of the PHI license. As is noted above, the Commission specifically said that it has *not* approved any particular provision. Nor has the Commission yet published, for public comment, the version submitted to it on December 15.

In summary, *if adherence to copy control measures is to be a price of admission for exercise of rights granted by the Congress and enforced by the Commission, the same degree of balance present in copyright and related laws should govern these license terms.* Such balance is clearly lacking in the PHI license at present.

* * *

It seems clear, Mr. Chairman, that in the digital era, unless the 5-decade monopoly on cable navigation devices is finally broken, the advanced and interactive functionality promised by the digital revolution will not be available in competitive devices. This is the opposite of what the Congress had in mind when it enacted section 304. We would look forward to meeting with you to explain our concerns in greater detail.

Sincerely,

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