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July 2, 2001

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Chairman Powell:

I am writing on behalf of Cable Television Laboratories Inc. ("CableLabs") to respond to a letter the Consumer Electronics Association ("CEA") sent to you and other FCC Commissioners last month.[1] Although the CEA letter was apparently served on over a dozen FCC and industry representatives, it was not served on CableLabs despite the fact that the sole purpose of the CEA letter was to criticize provisions of CableLabs' POD-Host Interface License Agreement ("PHILA"). Now that it has come to my attention, I feel compelled to respond to the inaccurate claims made in the CEA letter.

At the outset, it should be made clear that the CEA letter merely repeats arguments that the consumer electronics industry has made before. The simple fact is that while a "majority of CEA members" appear to support some type of copy protection requirements,[2] CEA itself opposes reasonable copy protection requirements for cable set-top boxes – this despite the fact that the FCC has already found it is appropriate to include copy protection requirements in a manufacturing license to build such devices.[3] CEA is also opposed to reasonable certification requirements even though the Commission has indicated that CableLabs certification of

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1 Letter to Commissioner Susan Ness from Gary Shapiro, President and CEO, Consumer Electronics Association, May 7, 2001 ("CEA Letter"). The letter was addressed to former Commissioner Ness who had held a roundtable discussion on digital television on April 17, 2001.

2 *See* Letter from Gary Shapiro, President and CEO, CEA to FCC Chairman Michael Powell, May 10, 2001 ("[T]he majority of CEA members who manufacture digital products have endorsed the DTCP system.... We believe that a commonly-accepted copy protection system will be a major factor in promoting the rollout of digital television via cable and ensuring that content providers make high value content available to the cable industry.

3 *See* In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Further Notice of Proposed Rulemaking and Declaratory Ruling, CS Docket 97-80, FCC 00-341, released September 18, 2000 at ¶¶25-32.

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OpenCable-compliant products, patterned after the successful CableLabs cable modem ("DOCSIS") program, would be in the public interest.[4]

Putting aside CEA's general objections to copy protection and CableLabs certification of OpenCable compliant devices, I'd like to address the specific points raised in the CEA letter.

- The PHI license does *not* allow content providers to prevent time shifting.

CEA claims that the PHILA "contains no limitations on the ability of copyright owners to prevent non-commercial consumer copying of content. Thus, copyright owners could, at their sole discretion, elect to mark content so as to prohibit completely activities such as time shifting."[5] This statement demonstrates a complete lack of understanding about how copy control instructions will be activated when carried over a cable system. In fact, the copyright owners will have *no direct control* over setting the codes that control copying. These controls will be under the exclusive control of the cable operator. Indeed, the technology will permit the operator to afford subscribers more than one choice of copy protection setting. This will allow the subscriber to select which programs to view based on cost, convenience and recording options. Whether or not particular programming will be coded "copy once," "copy never," etc. will be a matter of negotiation between the cable operator and the content provider, with the operator having the final decision as to what level of copy protection it will afford certain content.[6]

There appears to be little debate that there must be some level of copy protection of digital content or else content providers will withhold high quality digital programming from distributors who do not have the ability to copy protect that material. You recognized as much in your May 1, 2001 letter to Congressman Edward Markey: "Without digital content, consumers are unlikely to purchase digital television equipment, regardless of how well it works. The lack of digital content may arise in part because of concerns about copy protection. Content providers are reluctant to transmit high value digital content in an unprotected environment because, unlike in the analog world, digital copies are perfect and easily reproduced."[7] The PHILA merely

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[4] *See* In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Report and Order, 13 FCC Rcd 14775, 14790, n.71 (1998).

[5] CEA Letter at 1-2.

[6] Of course, if the content provider does not agree with the cable operator's position with respect to the copy protection afforded particular programming, it need not agree to provide that programming to the operator.

[7] Letter from Michael K. Powell, Chairman, FCC, to the Honorable Edward J. Markey, Ranking Member, Subcommittee on Telecommunications and the Internet, House Committee on Energy and Commerce, May 1, 2001, at 8.

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requires that copy protection mechanisms be included in devices sold at retail so that they will have the capability to respond to copy protection restrictions agreed upon by the operator and the content provider.

In your letter to Congressman Markey you also observed that "[c]opy protection and licensing are almost entirely outside the Commission's control." While this is undoubtedly true, the Commission would not need to involve itself in these issues even if it had jurisdiction since the market will correct any of the problems of the sort concerning CEA. Cable operators are in the business of marketing and selling programming to consumers. If an operator places too many restrictions on the copying of the programming he delivers, he will lose customers. It is in the operator's interest to impose the least restrictive copying requirements consistent with his ability to obtain programming from content providers.

- The PHI license does not unreasonably limit retail manufacturer design.

On this point, CEA argues that the PHILA "requires compliance with various unnamed specifications beyond the PHI specification. As a result, retail manufacturers may be required to add features and functions beyond those necessary for the PHI license itself. Conversely, manufacturers may be precluded from adding competitive features/functions such as personal video recorders to their products."[8]

CEA is wrong on both counts. First, while the PHILA does include a requirement that any devices manufactured pursuant to the PHI license must meet OpenCable specifications, those specifications – in conjunction with CableLabs' certification program – will ensure that retail devices will not cause harm to the network or jeopardize signal security and are fully interoperable with all cable systems and POD modules. Further, Exhibit A, the Certification Criteria, names the various OpenCable specifications to which a manufacturer might build, the Unidirectional Set Top Box, the Unidirectional terminals, the Bi-directional Set-Top Box, the Bi-directional Terminal, or the Bi-directional Set-Top Box with DOCSIS.

CEA is wrong on its second point as well. Neither the PHILA nor the OpenCable specifications preclude manufacturers from adding competitive features/functions such as personal video recorders to their products. No such "limitation" can be found in the PHILA. To the contrary, Section 4.2 of the PHILA states that, subject to some reasonable conditions,[9] "Nothing in this Agreement shall preclude Licensee from including in a Host Device additional features or

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[8] CEA Letter at 2.

[9] Such additional features/functions may not (1) cause physical harm to the network or disruption of service; (2) impair or impede the delivery of services offered over the cable system; or (3) impede the legal rights of the cable operator to prevent theft of service; and (4) the Host Device must meet all applicable compliance and

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functionalities not specified in the OpenCable HOST-POD Specifications or the applicable Core Functional Requirements...." Moreover, Section 3.4 of the Compliance Rules found in Exhibit C to the PHILA, specifically permits inclusion of personal video recorders in devices manufactured pursuant to the PHILA and, indeed, permits greater copying and storage than does the comparable PVR provision in the current draft of the 5C license agreement.

- OpenCable certification procedures are neither onerous nor potentially biased against "competitive" manufacturers.

Taking issue with the concept of CableLabs certification of host devices, the CEA letter contends that such certification "allows members of CableLabs to determine unilaterally whether and when products built *by their competitors* can be introduced."[10] Nothing could be further from the truth.

First, the CableLabs Certification Board consists solely of cable operator members. *There are no manufacturer board members*. And, as NCTA has said in a related context, "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."[11]

In fact, the Certification Board has its own conflict of interest policy which requires Certification Board members to disclose any financial interest either they or the member companies have in any manufacturer which has applied or which may apply for OpenCable certification, and, in the case of such a conflict, the Board member must abstain from voting on any decision involving such manufacturer. Finally, all decisions of the OpenCable certification Board are based on objective, verifiable criteria consistently applied to all manufacturers.

The DOCSIS Certification Board for cable modems and cable modem termination systems works the same way and is a model of success. DOCSIS products are supplied by Scientific-Atlanta or Motorola – traditional suppliers of equipment to the cable industry – as well as other vendors, but the first modems to be certified were made by manufacturers other than S-A or Motorola. The

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robustness rules and must be otherwise certified as compliant with the OpenCable certification requirements in Exhibit A to the PHILA.

[10] CEA Letter at 2 (emphasis added).

[11] Reply Comments of the National Cable Television Association, CS Docket No. 97-80, filed December 18, 2000, at 2.

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fact that S-A and Motorola have traditionally supplied equipment to the cable industry has not diminished the number of new vendors successfully participating in that process (over thirty different manufacturers have had over 130 cable modem products certified).

CEA next claims that: "the procedures for certification do not establish any time frames within which certification must be completed, are inconsistent with the NCTA/CEA negotiated agreement (which would have required joint testing for interoperability rather than CableLabs certification), and would require certification of the entire product rather than just the POD-Host interface." CEA's concerns are not well taken.

First, as to the time frame question, Exhibit A to the PHILA – "CableLabs' Certification Criteria for Host Devices and POD Modules" – makes explicit reference to the OpenCable Certification Wave Guidelines posted on CableLabs' website. These Guidelines clearly state: "The process takes six weeks to complete which includes a week of dry run interoperability testing, four weeks of audit testing and a week to analyze and summarize the results for review by the review board. The six-week processes are referred to as 'Certification Waves.'" The Certification Wave Guidelines are very detailed and clearly defines the ground rules for vendors as well as the Certification Board's responsibilities. This document is located in the confidential part of CableLabs' website and is available to all parties that have signed the OpenCable Non-Disclosure Agreement.

Second, although CableLabs was not a party to the NCTA-CEA February 22, 2000 technical agreement, even a quick reading of the agreement demonstrates that CableLabs certification of OpenCable-compliant devices is *not* inconsistent with that agreement. The agreement itself includes no reference to "joint testing for interoperability." Rather, that language appears in the transmittal letter to then-Chairman Kennard in which NCTA and CEA state that, among other things, they "also plan to jointly test interoperability between cable systems and consumer receivers."[12] That statement is hardly inconsistent with requiring CableLabs certification. In fact, interoperability tests were conducted for the development of DOCSIS product, and were followed by certification. Similar interoperability tests occurred in the development of the POD-Host Interface specifications but no one thought they were substitutes for eventual CableLabs certification. In the February, 2000 Agreement, NCTA certainly did not intend to pre-empt CableLabs certification of OpenCable-compliant devices by agreeing to the same type of joint interoperability testing of such devices as had occurred with products built to the DOCSIS specification and as was then occurring with devices incorporating the POD-Host Interface specification.

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[12] Letter from Robert Sachs, President and CEO, NCTA, and Gary Shapiro, President and CEO, CEA, to William E. Kennard, Chairman, FCC, February 22, 2000.

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Third, the PHILA requires that a product which is built pursuant to that license must meet the OpenCable specifications. The primary reasons why certification of a Host device is required are (1) to prevent harm to the network; (2) to prevent harm to the POD; (3) to ensure copy protection functionality; (4) to ensure equivalent set-top box performance; (5) to ensure interoperability with other vendors' products; and (6) to specify minimum functionality. All of these efforts will redound to the benefit of the consumer who can be assured that his or her OpenCable compliant navigation device will deliver the cable services he or she expects without, among other things, causing harm to the network. It is therefore imperative that the entire device – not simply the POD-Host Interface – be certified.

- The PHILA "Non-assert" Provisions are not unreasonable.

CEA concedes that "non-assert" provisions are commonly found in copy protection license agreements but claims that those in the PHILA "are drafted so broadly that they could require manufacturers to give up unlimited intellectual property rights."[13] This claim is incorrect. Section 8.5 of the PHILA – "Convenant of Non-Suit" – is written very narrowly, contrary to CEA's claim. This Section limits the scope of the non-assert provision to encompass only the POD-Host Interface and the actual DFAST technology which is the subject of the PHILA. Further, the definition of technology in the POD-Host specifications specifically excludes "any third party proprietary technology referenced in or required by the ... specifications...." That is, manufacturers who sign the PHILA are only promising not to sue other manufacturers for building products with the POD-Host interface that appear to infringe on the first manufacturer's Essential Patent Claims. The definition of "Essential Patent Claim" is limited to patents that read on the DFAST technology. The bottom line is that the only intellectual property rights that the PHILA requires manufacturers to "give-up" is IPR related directly to the DFAST technology that is the subject of the PHILA.

- CEA's Concerns About the Change Process Are Addressed in the PHILA

CEA argues that the PHILA does not provide clear guidelines on whether licensees may participate in the Change process. Perhaps the PHILA might have been more clear in Section 3.3 of the Agreement. That section says that manufacturers can participate in any changes to the test plans, interoperability testing, compliance rules, robustness rules and certification criteria. However, it does not explicitly say that licensees may participate in any changes to the POD-Host specifications.

However, Section 3.4 says: "Licensee may participate in the OpenCable Change Process." This is the standard Engineering Change Request ("ECR"), Order ("ECO") and Notice ("ECN")

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[13] CEA Letter at 3.

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process, and is included in the PHILA as Exhibit E. The language in Section 3.3 discussed above was intended to explicitly state that *in addition to* participating in the OpenCable Change Process for the specifications, a licensee can *also* participate in changes to the test plans, interoperability testing, compliance rules, robustness rules and certification criteria.

In addition, Section 3.5 of the PHILA provides: "Licensee acknowledges that CableLabs, with input from Cable Operators, *Licensee*, other CableLabs Technology Licensees *and other manufacturers participating in the OpenCable Change Process* and video programming providers that provide copyrighted works for transmissions to Host Devices and the copyright owners of such work, may make material changes that constitute a new version of the OpenCable Host-POD Specifications. Such material changes may include, by way of example and not of limitation, any changes that would require new technical features not included in previous versions, or would materially increase the cost or complexity of Host Devices or POD Modules. *No such material change shall become effective until all interested parties described above shall have had an opportunity to review and comment on such material change.* If any such material changes are made, CableLabs shall also revise the Certification Criteria to reflect such changes. Such revision shall become effective after eighteen months' notice."[14]

These provisions make clear that manufacturers can and will be intimately involved in the change process.

- Changes Must Be Backward Compatible

CEA expresses a concern about the lack of a requirement to make any changes backward compatible. In fact, all CableLabs specifications to date have been designed to be fully backward compatible with previous versions. It is the intention of the CableLabs specifications to ensure backward compatibility.

On this point, it is important to reiterate that Licensees are allowed to participate in the change process for specifications. (*See* Sections 3.4 and 3.5 of the PHILA.) Engineering change requests ("ECRs") are reviewed by a working group made up of vendors, cable operators and CableLabs staff. If manufacturers are participating, they can help ensure that changes do not create backward compatibility problems with products that they have already fielded. Any manufacturer building or deploying OpenCable products is encouraged to participate in the ECR hardware working group to ensure that any backward compatibility issues are fully considered when changes are proposed.

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[14] Section 3.5 (emphasis added).

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Mr. Chairman, as is evident, licensing and manufacturing decisions involving new technologies are complex, difficult and prone to misunderstanding. However, those are not reasons to make the situation more complex, difficult and prone to misunderstanding by opening up the negotiation process to any and all through a public comment requirement as CEA suggests. Indeed, we believe CEA agrees that negotiations over particular provisions of the PHILA should be limited to parties with a sincere interest in its provisions and that is why its members and other interested parties have signed the required Non-Disclosure Agreement in order to participate in negotiations over the terms of the PHILA. Opening that license agreement up for public comment can only create delay and the deployment of devices built pursuant to the PHILA.

We think you have struck the correct balance in observing that copy protection licensing issues are generally beyond the FCC's jurisdiction and we invite CEA and its member companies to contact me or other CableLabs representatives with their concerns rather than trying to involve the FCC in a matter more appropriate for commercial negotiations.

If you have any questions about this matter, please do not hesitate to contact me or my staff.

Sincerely,

Richard R. Green, Ph.D.
President and Chief Executive Officer

cc: Secretary (for inclusion in CS Docket No. 97-80 and PP Docket No. 00-67)
Commissioner Gloria Tristani
Commissioner Kathleen Abernathy
Commissioner Michael Coops
Commissioner Kevin Martin
Susan Eid, Legal Advisor to Chairman Powell
Kenneth Ferree, Chief, Cable Services Bureau
William Johnson, Deputy Chief, Cable Services Bureau
Deborah Klein, Division Chief, Consumer Protection & Competition Division
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