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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)
)
Commercial Availability of)
Navigation Devices)

CS Docket No. 97-80

**Consumer Electronics Retailers Coalition
Status Report
"J2K Plus 1"**

July 16, 2001

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In its June 11, 1998 Report & Order, the Commission granted the cable industry's request to assume responsibility for meeting a July 1, 2000 deadline for supporting the operation of independent, competitive devices on cable systems. More than a year has now elapsed since the passage of that deadline, and neither the technical nor the market conditions for viable entry yet exist. The Consumer Electronics Retailers Coalition¹ respectfully submits this Status Report, as an *ex parte* filing in this Docket pursuant to the Commission's "Year 2000 Review," marking this anniversary and urging the Commission to take further action in light

¹ CERC is comprised of major U.S. retailers of Consumer Electronics ("CE") and Information Technology ("IT") products and their associations: Best Buy Co., Inc., of Eden Prairie, Minnesota; Circuit City Stores, Inc., of Richmond, Virginia; RadioShack (formerly Tandy) Corporation, of Fort Worth, Texas; the International Mass Retail Association ("IMRA"), the North American Retail Dealers Association ("NARDA"); and the National Retail Federation ("NRF"). CERC has 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, intended to enforce Section 304, the "competitive availability" provision of the 1996 Telecommunications Act. CERC and its members were also active in persuading the Congress to pass Section 629. CERC has filed Reply Comments *In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*; ET Docket No. 93-7; Comments and Reply Comments *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80; Reply Comments *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67.

of the evident failure of steps taken thus far.

While CERC is not under any Commission mandate to make periodic reports, CERC believes that it is urgent to direct the Commission's attention to the repeated and ongoing failure of the existing regulations, as interpreted by NCTA, CableLabs, and cable MSOs thus far, to achieve the objectives intended by the Congress and the Commission.² CERC also notes that two of its members, Circuit City and RadioShack, on April 16, 2001, filed an *ex parte* letter with proposed amendments that would rectify the inability of these regulations to bring forth the results expected by the Congress.

I. Overview And Timeline

Even before the "DTV Transition" became a pressing public policy issue, it was recognized that the legally sanctioned monopoly of cable operators over all devices capable of receiving access-controlled cable programming was archaic, unnecessary, and anticompetitive, and resulted in redundancy and consumer frustration. In the 1992 Cable Act, the Congress included a provision, first suggested by Senator Leahy, urging the Commission, in its regulations, to *promote* the competitive availability of cable "converter boxes" and remote controls.³

In the 1996 Telecommunications Act, with the digital transition at hand, Congress took more specific steps. In Section 304 (now Section 629), first proposed by Reps. Bliley and Markey, the Congress instructed the Commission to *assure* the competitive commercial availability of "Navigation Devices," for any

² NCTA had been under obligation to file periodic status reports, but such obligation has expired -- the FCC had assumed that, by now, competitive entry would have been achieved. See Section II, below.

³ Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, 102 Stat. 1460 (1992). See Statement of Senator Leahy, 138 Cong. Rec. S 561 (Jan. 29, 1992).

MVPD program or service, from manufacturers and vendors not affiliated with an MVPD.⁴ In 1997, the Commission opened this Docket, and on June 11, 1998, issued its Report and Order, requiring cable operators, through CableLabs standards and specifications, to support the operation of competitive devices on MSO cable systems by July 1, 2000, and to phase out reliance on proprietary, integrated security (in favor of the "PODs" offered to support competitive devices) by January 1, 2005.⁵ A rough timeline of events to date follows:

1992	Cable Act instructs FCC to <i>promote</i> competitive availability of set-top boxes and remote controls.
1996	Section 304 of Telecommunications Act [Section 629] Instructs FCC to <i>assure</i> competitive availability of navigation devices from unaffiliated manufacturers and vendors. Section [623(a)(7)] establishes subsidy pool, interpreted as allowing analog box fees to subsidize digital navigation devices.
June, 1998	CSB Docket 97-80 R&O sets July 1, 2000 for cable industry support of competitive devices.
July 1, 2000	No useful support for competitive products, no competitive entry.
Sept., 2000	CSB launches Year 2000 review in Docket 97-80, questions why no competitive entry.
Dec., 2000	Comments and Replies in Year 2000 Review complete.
Dec., 2000	NCTA files POD-Host Interface License Agreement (PHILA) in Docket 97-80.
Jan. - May 2001	Many entities request PHILA be published for public comment.

⁴ 47 U.S.C. § 549(a).

⁵ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Report & Order*, 13 FCC Rcd 14775 (Rel. June 24, 1998) (*Navigation Device R&O*); *Order on Reconsideration*, 14 FCC Rcd 7596 (Rel. May 14, 1999) (*Navigation Device Reconsideration Order*).

April 16, 2001 Circuit City / RadioShack propose detailed navigation device rule amendments addressing major entry barrier obstacles (other than PHILA) to competitive availability:

-- *technology* -- MSOs do not acknowledge any obligation under present FCC rules to provide support for implementation of OCAP standard in competitive STBs or DTV receivers.

-- *subsidy* -- MSOs do not acknowledge any obligation under present FCC rules to treat those subscribers who would obtain STB or DTV receiver through competitive channel equally with subscribers who lease box from MSO.

In its July 7, 2000 report to the Commission, the NCTA claimed, essentially, that by making some "POD" modules available to give theoretical support to competitive products, the cable industry had satisfied its responsibilities.⁶ It argued, further, that by July 1, 2000, a "competitive" product had been offered to retailers by one traditional cable industry supplier, but any retailers approached had made additional and unreasonable commercial demands in "turning down" such a product.⁷

In a reply filed August 2, 2000, CERC pointed out that, as of July 1, 2000, (1) no CableLabs standard had been ready in time to support design, manufacture, and testing of a standards-reliant device, (2) the standard finally available to manufacturers by July 1 could support only devices that were dramatically inferior to those already being leased by cable MSOs, and (3) only preliminary drafts of a license for such devices were available from CableLabs.⁸

⁶ National Cable Television Association Status Report (filed July 7, 2001) (NCTA Status Report).

⁷ *Id.* at 11-13.

⁸ Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report (filed Aug. 2, 2000) (CERC Status Report Reply).

In September 2000, the Commission issued the Notice of its pending Year 2000 Review.⁹ It asked all parties to address why there had been no competitive entry, and whether changes in Commission regulations were necessary and appropriate. The filing cycle in this proceeding was complete in December. On April 16, CERC members Circuit City and RadioShack filed, in this Docket, an *ex parte* letter containing specific proposals to make the Commission regulations effective in addressing the remaining barriers to competitive entry.¹⁰ These proposals addressed, concisely, issues over (1) the adequacy and effectiveness of CableLabs specifications in supporting competitive entry, and (2) market barriers to retail entry. This Report is offered in their support.

II. FCC Expectations For Competitive Entry

CERC does not share NCTA's belief that the Commission or the Congress should or will be satisfied with only nominal support for competitive entry. One need not argue as to whether the July 1, 2000 deadline was "met,"¹¹ to focus on the fact that the Commission does expect that the CableLabs standards, and MSO implementation of them, should support independent devices capable of competing with those leased by cable operators. In its Order on reconsideration, the Commission made this explicit:

In the cable context, we understand that the specifications being developed as part of the CableLabs\OpenCable project should enable a subscriber that purchases a navigation device manufactured according to the CableLabs

⁹ *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 "Year 2000 Review").

¹⁰ Letter from RadioShack and Circuit City to Chairman Powell, CS Docket No. 97-80 (filed Apr. 16, 2001) (the "Competitive Remedies Letter").

¹¹ See NCTA Status Report and CERC Status Report Reply.

specifications to be able to use that device on any MSO's system anywhere in the United States that operates consistent with those specifications.¹²

In response to concerns of consumer electronics manufacturers and retailers that by the time such entry might be viable, the market might be foreclosed in favor of leased proprietary devices, the Commission, in the same order, took what now appears to be a too-rosy view:

We do not believe that MVPDs will be able to use the transition period to establish a monopoly in the equipment market. The requirement that MVPDs provide separated security devices beginning on July 1, 2000 allows manufacturers to offer equipment in markets to which MVPDs had been able to restrict access. The separated security requirement also ensures that manufacturers will be able to offer consumers equipment choices during the phase-out. In addition, as we made clear in the original Order, in the year 2000, once non-integrated equipment is available, the Commission will assess the state of the market to determine whether the designated time frame is appropriate and will review the mechanics of the phase-out of integrated boxes. In the course of that assessment, we will seriously consider whether acceleration of the phase-out date would be appropriate. In particular, if the commercial market in navigation devices is not developing as expected, one option that we would review would be moving the date from the year 2005 to 2003.¹³

In 1999, the Commission clearly hoped and expected that this independent entry of "non-integrated equipment" would occur through reliance on CableLabs standards:

We expect that the standards developed through the OpenCable process will be sufficient (e.g., specific enough) for manufacturers and designers unaffiliated with MVPDs to build devices that can be sold through national retail distribution. We will continue to monitor the OpenCable project to ensure that the standards are specific enough and that a wide

¹² Order on Reconsideration, May 14, 1999, ¶ 48 ("Reconsideration Order"). The Commission, in the same paragraph, commented: "In the *Navigation Devices Order*, we stated that the Commission has not adopted specific rules that mandate portability or interoperability, although we noted that portability and interoperability increase the likelihood of subscribers obtaining navigation equipment by purchasing it. The Commission further stated that "[w]e are relying on the relevant industries to make progress towards achieving portability and interoperability, and in other areas. If they do not, or if the effort is unduly delayed, it will be necessary for the Commission to consider whether further action is necessary."

¹³ *Id.* ¶ 33.

range of interests continue to have an opportunity to participate in the project.¹⁴

III. CableLabs Progress, Leading to OCAP Specification.

Even had the initial CableLabs specifications for competitive entrants been available far enough in advance of July 1, 2000, any product built with reference to them could not possibly have been competitive with an MSO-provided set-top box. The Commission need not take retailers' word for this. In a related docket as to labeling of "cable ready" DTV receivers, Time Warner Cable had this to say as to any product that would rely on that CableLabs specification:

[T]hose 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 not 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.¹⁵

More promising for supporting competitive entry, but as yet unrealized, is CableLabs' "OpenCable Access Platform" ("OCAP") specification. It relies on a "middleware" application layer in navigation devices that, independent of the operating system, can receive instructions and applications from a cable headend to conform the device to operate on particular systems. As is indicated in the appended description from the CableLabs OpenCable web site, this specification is still under

¹⁴ *Id.* ¶ 41.

¹⁵ Petition for Reconsideration of Time Warner Cable (filed Nov. 27, 2000) ("Time Warner Petition") of *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Report & Order (Rel. Sept. 15, 2000). See also Petition for Reconsideration of National Cable Television Association (filed Nov. 27, 2000) ("NCTA Petition") at 3 and n.10, and Charter Year 2000 Review Comments at 4. It is these very devices that NCTA still attacks retailers for

development and available, in draft form, only by means of non-disclosure agreement. It has been slated for publication as an "interim" specification.¹⁶

Based on all information available to those CERC members who have received information under NDA, it appears that, *if fully supported by cable MSOs at their headends*, the OCAP specifications would supply all of the interactive and portable functionality that, as Time Warner noted, was so conspicuously missing from the earlier "J2K" CableLabs specification. CERC member experience to date, however, has indicated that, based on present trends, circumstances, and plans, this may not occur for years, if ever.

IV. Apparent Lack Of MSO Commitment To Supporting Operation Of OCAP Specification In Devices.

The OCAP "middleware" specification is of no use to competitive entrant products unless OCAP middleware is given full and equal support by cable MSOs at their headends.¹⁷ Unfortunately, there are several serious indications that such will be not the case. Again, the FCC need not rely on retailer impressions or assertions -- the evidence has been supplied by CableLabs and the MSOs themselves.

CableLabs, on the web page reproduced in the Appendix, disclaims any obligation to produce, develop, or support OCAP arising from Section 629 or the

"refusing" to order when, allegedly, nominally made available by an incumbent industry supplier just prior to July 1, 2000.

¹⁶ See Appendix. According to CableLabs, interim status means that it is public and available for development, but not considered final. In public presentations and on its web page, CableLabs had predicted that OCAP would be published, in interim status, by the end of June, 2001. www.opencable.com/OCAP.html. CERC does not agree with CableLabs' assertion that development of the OCAP standard was *not* a cable industry responsibility under the Report & Order in this Docket. See, e.g., Reconsideration Order, quoted above.

¹⁷ It allows competitive devices to work on a variety of different cable systems by downloading configuration information and applications from the headend, much as a web browser does from a web site. As in the case of a web site, if the information or applications are not furnished by the site, the best browser in the world is useless for that particular site. If an OCAP-reliant device encounters such an MSO system, it cannot function.

Report & Order in this Docket. CableLabs further warns that, even though OCAP offers full functionality for user devices, cable MSOs may choose not to rely on it in the devices they lease to subscribers.

The force and potential gravity of the latter assertion was brought home to retailers by the MSO filings in the ongoing Year 2000 Review in this Docket. Comcast, for example, made a plea for the FCC to leave it alone, and let it focus on its own proprietary "middleware" solution, *to the exclusion of support for the operation of competitive devices*:

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 [i.e., support OCAP as well as proprietary middleware linked to embedded security]*. 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.¹⁸

CERC is concerned that existing FCC rules do not make sufficiently clear that inherent in the *right to attach* is an obligation to *support the operation* of those attached devices that meet CableLabs specifications. This proposition ought to be self evident in any good faith proceeding. Yet, the cable industry has asserted the contrary, through (1) CableLabs' assertion that it has no obligation under FCC rules re OCAP, even though OCAP will be licensed to competitive entrants who rely on the Report & Order, and (2) MSOs' plea to the Commission to be relieved of any obligation to support OCAP. Without some FCC clarification of this seemingly

obvious point, the 1996 legislation, the 1998 Report & Order, and all FCC activity since can be considered meaningless and futile.

V. MSO Intent To Discriminate Against Those Subscribers Who Would Choose Competitive Devices.

Cable operators interpret Section 623(a)(7) of the Communications Act, which was added along with Section 629 in 1996, as allowing them to average the costs of digital and analog leased devices in calculating their lease rates (which are subject to an 11% return cap). This pooling allows MSOs to calculate consumer lease prices that bear little or no relationship to the actual cost or present value of the equipment. For example, the Comcast Alexandria, VA rate sheet attached to the April 16 Circuit City/RadioShack letter indicates that the monthly lease price for analog and digital conditional access navigation devices is \$3.77 in each case, whereas the consumer replacement charges for these devices are \$300 and \$800 respectively.¹⁹

In essence, this system enables an MSO, if it wishes, to charge a bit more to each of a large number of analog device lease customers, without exceeding the 11% return cap, and to apply this subsidy to a much smaller number of digital customers -- to achieve lease rates that are far below MSO cost.²⁰ MSOs, through NCTA, however, have asserted that *they are under no obligation to offer the same "pool" benefits to their subscribers who would choose competitive equipment.*²¹

¹⁸ Comcast Comments at 4-5 (footnote omitted, emphasis and bracketed note added). *See also* Comments of Charter at 3-4, AT&T at 23, 28-29.

¹⁹ Competitive Remedies Letter attachment.

²⁰ Thus, the MSO can in each case charge a price that bears no relationship to cost, but on average still not run afoul of the return cap.

²¹ Letter from Neal M. Goldberg to Commissioner Ness, CS Docket No. 97-80, (filed May 16, 2001) ("Goldberg Letter").

The rationale expressed by the House Commerce Committee in 1996 (the same Committee that originated Section 629) was that such a pool was permissible to *assist the distribution and acceptance of digital devices in a transitional period*.²² It makes no sense to suppose that the Congress, on the one hand, chose to allow this subsidy to speed consumer acceptance of digital devices, yet, on the other, intended that it be received only by those subscribers who choose *not* to acquire the very competitive devices whose availability was being mandated in the same Act. Yet, this is the interpretation on which the NCTA relies.

So, even if a suitable specification were by now available for implementation by manufacturers, and even if there were some assurance that it would be fully supported at cable headends, retailers would still be faced with ordering products that must compete against subsidized leased devices. Under these circumstances, retailers would be at an enormous disadvantage, relative to cable MSOs, in seeking products that would be salable to consumers. CERC does *not* propose that a subsidy be paid to retailers. Indeed, retailers need not be involved in the subsidy at all. CERC proposes that MSOs which choose to subsidize digital boxes pay that same subsidy to all of their digital subscribers, regardless of where these subscribers obtain their navigation device.²³

NCTA has rather cavalierly suggested that retailers can try to make up for the discrimination against their customers by embracing new means of product

²² See H.R. Rep. 204, 104th Cong., 1st Sess. at 107-108.

²³ Despite continued attempts at caricature by NCTA (*e.g.*, Goldberg Letter), it should be clear by now that the subject is equal treatment of cable subscribers choosing competitive devices, and not marketing payments to retailers, which should remain discretionary with cable operators. See Section VIII, below.

integration.²⁴ This would, first, leave the basic "set-top box" market entirely to MSOs, solely as a consequence of federally acknowledged discrimination. Second, MSOs themselves are entering the market for multi-purpose devices. They and their traditional suppliers have shown "set-top" devices that include virtually every consumer electronics functionality that is available in competitive products. So product integration, rather than offering an escape from the subsidy advantage, may only extend the MSO monopoly beyond the set top box and deeper into the market for multifunction consumer electronics devices like integrated televisions and A/V receivers.²⁵ To address this profound, senseless, and officially sanctioned inequity, the regulation revisions discussed in Section VIII were offered on April 16.

VI. No Reasonable And Complete License Is Yet Available To Manufacturers of Competitive Products.

The issue of the CableLabs "Pod Host Interface License" ("PHILA") has been addressed in writing by several organizations and members of Congress. Though issues as to its propriety and consequence were first raised by retailers, it is of concern equally to manufacturers and other groups. As it does not bear on the need for the regulation amendments to which this report is addressed, it is sufficient here to note that issues pertaining to this license must be resolved before competitive products can become available.

²⁴ Goldberg Letter.

²⁵ Motorola, for example, at the recent NCTA Convention, showed a new multifunction device that combines set top navigation with conventional consumer electronics capabilities -- a 3 disk DVD player, and a 5 channel home theater system. The current version of this device does not contain a POD slot, and thus would likely be provided only by MSOs. Even if POD reliant, the device would not be fully portable unless it also relied on the OCAP specification -- so a retail consumer, asked to pay its \$800 - \$900 price, would have no assurance that it would work from any other location.

VII. Regulation Amendment To Address Equal Support For OCAP Specification.

As is argued in Section IV above, it makes no sense for the Commission to declare an obligation for MSOs to support a "right to attach," but to allow them to decline to support the *operation of* attached devices that comply with the CableLabs specifications designed for this purpose. In their April 16 *ex parte* filing, Circuit City and RadioShack proposed a simple, market-driven clarification of FCC regulations to address this contradiction:

76.1204(a)(1) ... Commencing on January 1, 2002, any multichannel video programming distributor subject to this section, or affiliate thereof, shall place in service for sale, lease, or use only such new navigation devices as rely, for their operation, solely on whatever OpenCable specifications and licensing terms, to implement services, features, applications, and conditional access support, as are required by the distributor with respect to the licensing, manufacture, certification, attachment or use of navigation devices provided by unaffiliated manufacturers or vendors pursuant to Section 76.1201.

CERC and its members have considered alternatives requiring "equal" support for the operation of competitive devices. The problems with such an approach, however, are (1) it is subjective in operation, (2) it is highly regulatory, relying on complaints, investigations, adjudications, appeals, etc., (3) it locks the Commission into perpetual and intrusive oversight, (4) there is no incentive, other than fear of regulation, for MSOs to strive for true equality, and (5) it runs counter to the expressions by MSOs themselves, quoted above, that they prefer to work on implementing one "middleware" system at a time. It seems far simpler to embrace a single, market-driven incentive: if, as advertised, the OCAP specifications are good enough to support the future needs of consumers who choose competitive devices, they should be considered good enough to support those subscribers who

choose leased devices as well. In such case, the MSO *incentives* will all be to assure the support and effectiveness of, and consumer satisfaction with, the operation of the OCAP specification. In all other cases, incentives would run to the contrary.

VIII. Regulation Amendment To Address Discrimination Against Subscribers Choosing Competitive Devices.

In their April 16 *ex parte* filing, Circuit City and RadioShack also proposed a simple, market-driven clarification of FCC regulations to address discrimination against cable subscribers who choose competitive products:²⁶

76.1206 Equipment sale or lease charge subsidy prohibition.

(a)(1) Multichannel video programming distributors offering navigation devices subject to the provisions of Section 76.923 for sale or lease directly to subscribers [shall adhere to the standards reflected therein relating to rates for equipment and installation and shall separately state the charges to consumers for such services and equipment] **shall not use any service revenues to subsidize the sale or lease prices or rates of these navigation devices until the regulations adopted under this subpart cease to apply as determined in accordance with Section 76.1208.**

(2) Effective January 1, 2002, a Multichannel video programming distributor offering navigation devices subject to the provisions of subsection 76.923 may elect to pool the costs of devices covered by subsection 76.1204(a)(1) with the costs of all other navigation devices provided by the MVPD if it:

(A) maintains on its publicly accessible web site and files with the Commission and the applicable franchise authority a report disclosing:

(i) the price or prices for each navigation device offered by such multichannel video programming distributor;

(ii) the amount of any subsidy reflected in the price for each such navigation device, and

²⁶ Existing regulation language in regular type; new matter in bold.

(iii) the methodology by which such subsidy was calculated; and

(B) provides to subscribers the same subsidy for navigation devices purchased or leased from unaffiliated vendors as that reflected in the price for navigation devices provided by such multi-channel video programming distributor.

This provision simply requires that *if* a cable MSO chooses to offer "leased box" subscribers the advantage of the "pooling subsidy" pursuant to the 1996 Act, it should, in the calculation of that subsidy, include subscribers who have purchased competitive devices, and then apportion the benefits to their "lease" and "competitive" subscribers alike. This simply effectuates the promotion of digital products, to both competitive and captive customers, that Congress clearly expected when addressing Sections 623 and 629 in the 1996 Act.

In response to this proposal, NCTA has continued to avoid the issue of equity among different classes of subscribers, and continues to respond as if the proposal provided for payments to retailers, instead. NCTA's other main objection has been that a *single FCC form* would have to be revised.²⁷ CERC submits that such form revision, and appropriate accounting steps, are not too high a price for finally implementing what the Congress ordered in 1996: regulations that assure the competitive commercial availability of navigation devices.

The MSO digital subsidy, combined with disparate technical capabilities of MSO and retailer specifications, promises to establish a classic and highly effective predation cycle. In the antitrust context predation occurs where a monopolist reduces price to preclude entry by others into the market and then, because of the existence of barriers to entry, is able to raise or maintain prices in the future.

²⁷ Goldberg letter.

Today MSOs are providing digital cable boxes at below-cost prices, funded by their analog subscribers, which will preclude competitive entry in the short run. MSOs will then move prices toward costs as the subsidy is eliminated, but still not face competitive entry because they will remain in control of the specifications according to which new entrants must enter.

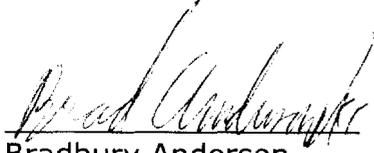
CERC's proposal addresses both these problems. First, by requiring MSOs to make any subsidy available to all digital cable consumers, the impact of the subsidy as a barrier to entry, whatever its level, is neutralized. Competition between MSO-provided navigation devices and those provided by retailers can then take place, at least in economic terms, without the need for active regulatory intervention. Second, by requiring MSOs to rely on the specifications they make available to potential entrants, the arbitrary technological advantage derived solely from the MSO's historic monopoly position will be neutralized as well. Competition between MSO-provided devices and those provided by retailers can then take place based on actual product design and innovation, without the need for ongoing regulatory activity. Only a proposal that addresses both phases of the predation cycle can neutralize the monopoly-based advantages that have insulated MSOs from effective entry into the navigation device market.

IX. Conclusion

CERC urges the Commission, five years after Congress passed legislation, and one year after its first deadline for compliance, to adopt the amendments to its regulations discussed herein. CERC and its members pledge to work with Commission staff to resolve any outstanding issues that may stand in the way of real consumer choice with respect to navigation devices.

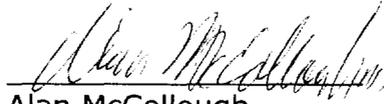
Respectfully submitted,

**CONSUMER ELECTRONICS RETAILERS
COALITION**



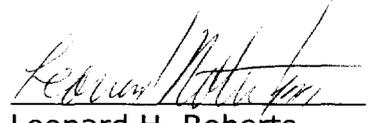
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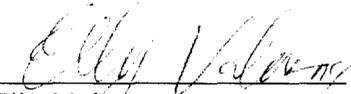
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APPENDIX

From CableLabs Web Site (www.OpenCable.com/OCAP.html):

OpenCable Applications Platform (OCAP)

What is OCAP?

The OpenCable Applications Platform specification is a so-called middleware software layer. OCAP is intended to enable the developers of interactive television services and applications to design such products so that they will run successfully on any cable television system in North America, independent of set-top or television receiver hardware or operating system software choices.

What does OCAP do?

OCAP enables manufacturers and retail distributors of set-tops, television receivers or other devices to build and sell attractive and capable devices to consumers that will support all services delivered by cable operators to devices currently available to consumers via lease from cable operators.

This specification will be a requirement for retail devices intended to connect to cable. Cable operators may support equivalent services using boxes they specify and purchase and then lease to consumers. OCAP will not be a requirement for those devices, although some MSOs may choose to incorporate OCAP even in leased set-top boxes.

This spec is not a requirement of FCC rules implementing portions of the 1996 Telecommunications Act. However, it does further the Commission's goal of increasing consumer choice of equipment.

Where is the OCAP spec?

The first Working Draft of the OCAP spec was released in January 2001, and followed the well-established CableLabs procedure by which common cable industry technology platforms have been developed for many years now. Vendors who signed the OpenCable Non-Disclosure Agreement were then invited to submit detailed comments and critiques of the draft. The authoring team, which includes software developers and cable industry representatives, then reviewed and reconciled the comments.

The spec is set for release as an Interim Specification in June 2001, and will be available to the general public. The spec may then be forwarded to standards development organizations.

Release of the draft specification early in 2001 allowed middleware developers and equipment manufacturers to begin building products to the spec. CableLabs is now supporting interoperability events wherein CableLabs' state of the art digital cable headends and facilities are made available to assist product development. This process serves to validate the written specification, identify areas that need to be amended based on real world implementation, generally reduce the time to market for such product, and improves the expected performance and reliability of such products.

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Certificate of Service

I, Janet Davis, a secretary with the law firm of McDermott, Will & Emery, hereby certify that true copies of the foregoing Consumer Electronics Retailers Coalition Status Report was served by hand on July 16, 2001, to the persons listed below.

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