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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: The Commission

**Answers Of
Consumer Electronics Retailers Coalition
To "Hoedown" Questions
Re Cable Industry's Draft
"POD Host Interface License Agreement" ("PHILA")**

Consumer Electronics Retailers Coalition

- Best Buy Co., Inc.
- Circuit City Stores, Inc.
- Good Guys, Inc.
- RadioShack Corporation
- Ultimate Electronics, Inc.
- International Mass Retail Association
- National Retail Federation
- North American Retail Dealers Association

June 6, 2002

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I. Introduction

On May 10, 2002, CERC was among the parties represented at a roundtable discussion ("Hoedown") with Media Bureau and other FCC staffers. Written questions were circulated to attendees in advance of this discussion. The subject was the public, March 22 draft of the cable industry "POD Host Interface License Agreement" ("PHILA"), which has been a subject of discussion in proceedings, in and related to this docket, since January, 2000. Failure or lack of good faith negotiation by the cable industry and its representatives as to this license has been identified by potential entrants as a major obstacle to accomplishing the objectives of the Report & Order in this Docket, and of the 1996 legislation that the Report & Order was meant to implement.

At the conclusion of the roundtable discussion, Media Bureau Chief Ken Ferree requested attendees to submit written answers to these questions, and to file them in this Docket. Below are the questions as received by CERC (in Times New Roman font) and CERC's answers.

II. CERC Answers To Hoedown Questions

PHILA HOEDOWN

10:00 - May 10, 2002 - 3rd Floor South Conference Room

POSSIBLE QUESTIONS

I. PROCESS ISSUES

- A. Has the issue of indemnification against 3rd party intellectual property infringement claims been resolved?**

CERC is not aware of the "resolution" of any PHILA issues, or of good faith negotiation in such respect. Despite having lifted the "NDA" under pressure from the Congress and the Commission, NCTA and CableLabs continue to negotiate with interested parties separately and in secret. This procedure seems calculated to resist efforts to identify and address policy-related issues, and to frustrate interested parties, such as CERC members, whose ability to enter the market depends on good faith negotiations leading to a resolution of issues.

- B. Does the PHILA non-disclosure agreement prevent a party from filing a complaint with the Commission regarding the terms of either of the PHILAs filed in the navigation devices proceeding?**

As CERC members are not manufacturers, they have not been eligible to view documents or engage in negotiations as to which the NDA is relevant. Based on familiarity with the public drafts, however, CERC believes that the entire course of conduct followed by NCTA and CableLabs does indeed negate any possible utility of filing a complaint about particular PHILA terms, for the following reasons:

(1) NCTA and CableLabs have not provided any information as to any concessions offered in particular negotiations with manufacturers over the past year. Thus, it is impossible to know whether any of the published terms represents their current negotiating stance.

(2) There is a great deal of inter-relation among the terms -- *e.g.*, terms as to certification, reliance on specifications, and compliance and robustness, as well as effective incorporation by reference of entire families of technical specifications, such as OCAP. Petitioning as to a single term, therefore, would seem effectively to involve challenging the entire agreement by petition. CERC believes that expedited, good faith, multilateral negotiations among the Hoedown attendees would likely produce an earlier result:

(a) a consensus version of PHILA, binding on MSO devices as well, and

(b) consensus support for amendments to present FCC regulations necessary to allow PHILA provisions to address MSO business objectives (see discussion in part C., below).

(3) Some terms -- e.g., Compliance Rules 2.3; 3.4.1 -- are ambiguous or simply poorly drafted. An FCC petition seems a poor substitute for good faith negotiation in establishing intention.

In prior filings, CERC members urged the Commission to set parameters limiting the scope of PHILA in accordance with FCC regulations, requiring NCTA/CableLabs to petition the Commission in order to extend PHILA's scope into additional areas of arguably legitimate MSO concern. The Commission declined to do so and instead invited petitions as to specific provisions. Imposition of the NDA, CableLabs/NCTA's failure to update the document to reflect any negotiations, the continued inter-relation of provisions, and the egregious passage of time have made the petition path seem long and unpromising compared to the urgent need to resolve PHILA. The Hoedown process now should lead to urgent, multilateral, good faith negotiations to resolve PHILA once and for all.

Competitive entrants and consumers have been held hostage to Cabellabs and NCTA intransigence for too long. MSO monopolies are prolonged by this abuse of power. If CableLabs and NCTA are not willing to engage in good faith multilateral negotiations, the Commission should:

(a) issue more explicit regulations enforcing the right to attach, PHILA notwithstanding,

(b) determine that particular elements of PHILA, as last provided to the Commission, are in violation of Commission regulations, and

(c) impose sanctions on MSOs if a PHILA agreement, along with a package of proposed amendments to FCC regulations, is not concluded by a date certain.

C. Does the PHILA violate any of the Commission's navigation devices rules?

CERC believes that no PHILA agreement can be consistent with the Right to Attach set forth in section 76.1201 unless and until its terms are effectively binding on MSOs as well as on licensees. Otherwise, ***the very act of signing PHILA would be to submit to a disadvantage, vis a vis MSO-distributed products, that is inconsistent with a right to attach.*** Accordingly, CERC asserts that PHILA is in violation of both 1201 and 1204 until the Commission has received satisfactory and binding assurances from MSOs in this respect. In their absence, the relief set forth in part (3) of the response to question I.B. should be granted.

The March 22 version offered to the FCC also more explicitly violates Commission rules. Section 76.1201 precludes MSOs from preventing attachment, except "where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist ... in the unauthorized receipt of service." Section 76.1204(c) more specifically prevents MSOs "by contract, agreement, patent, intellectual property right or otherwise" from "preclud[ing] the addition of features or functions to the equipment made available pursuant to this section" unless such features or functions are intended to defeat conditional access or gain unauthorized service.

The Hoedown discussion included several admissions by NCTA and CableLabs representatives that the PHILA provisions, and OCAP provisions mandated by PHILA, extend beyond the scope that is permissible without amendment to the existing FCC regulations:

(1) CableLabs/NCTA counsel defended PHILA's wholesale mandating and incorporation of technical specifications and applications as necessary to promote availability of particular future services to customers. FCC staff correctly pointed out that this justification does not seem related either to protecting the network from electronic harm, or to preventing unauthorized receipt of service. **While the objective may be justifiable, FCC regulations would have to be amended in order to allow it to be achieved through a mandate on licensed devices through PHILA.**

(2) The justifications asserted by CableLabs/NCTA counsel for insistence on "Selectable Output Control" went far beyond anything contemplated in the Commission's prior consideration of PHILA's appropriate scope. Even after it had been adduced that (a) the MPAA is no longer requesting such "protection" for content (hence, is unlikely to insist on it in licenses for leased cable products), and (b) no such provision exists in arguably comparable licenses for satellite products, CableLabs/NCTA counsel still insisted on a right to demand such provisions out of caution over future arrangements in arguably competitive services. In its September, 2000 preliminary determination, the FCC refrained from drawing a line as to what sort of controls related to copy protection might be considered as arguably within the "conditional access" sphere (leaving such a determination open to future proceedings). **Clearly, "unauthorized reception of service" cannot be stretched to cover future competitiveness with presently unknown services and media, not demanded by content providers.** If this CableLabs/NCTA goal is reasonable as a policy matter, it must be pursued via an amendment to existing FCC regulations, with which it is in clear conflict.

(3) Both subsections 1201 and 1204 clearly **do not include expectation of commercial advantage as a legitimate license condition.** CERC members have not been parties to negotiations over commercially unreasonable demands as to indemnification, IP grant-back, and other business terms of vital concern to manufacturers. However, the record established to date -- more than two years of "negotiations" without any appreciable progress, much of it under an indefensible NDA -- seems to support a finding of failure to negotiate in good faith. **In the spirit of prior telephone "CPE" deregulation, from which they were derived, sections 76.1201 and 1204 preclude MSOs and their agents from insisting on commercially unreasonable terms in a license necessary to implement competitors' "right to attach."**

D. How many certification processes are there? Does signing a PHILA agreement require a set-top to be OpenCable/OCAP certified?

Apparently, CableLabs and its MSO owners insist on certification before a POD will be furnished to a consumer or retailer, or to a manufacturer (other than for narrow testing purposes). Apparently certification is demanded as to features and functions that do not pertain to network harm or unauthorized service receipt. Therefore, it seems that CableLabs' certification practice, coupled with the MSOs'

denial of PODs based on this practice,

- (a) violates Commission regulations as discussed above, and
- (b) frustrates the Right to Attach.

PHILA also appears to require certification, so cumulatively denies the Right to Attach. However, **if MSOs did not deny PODs to uncertified devices, manufacturers would have the option of building and distributing products** to consumers, risking any lawsuit based on the IP offered under the PHILA license. (Defenses may be available to manufacturers in that circumstance, based on the IP, the statute, FCC regulations as to the permissible scope of licenses, the failure to negotiate in good faith, and antitrust considerations.) Therefore, the most proximate denial of the right to attach may be MSO refusal to provide PODs, based on the certification requirement.

- E. **Is there any reason for a cable operator to require additional testing from an OpenCable certified piece of equipment before it authorizes the box to receive service?**

In CERC's view, such additional testing would be antithetical to the Right to Attach. CERC is very concerned over reports such further testing or certification is being required with respect DOCSIS-certified modems. CableLabs/NCTA have pointed to DOCSIS as evidence of their intentions and good faith with respect to navigation devices.

II. COPY PROTECTION

A. Encoding Rules –

- 1. **Should cable and satellite be operating under similar rules? Have manufacturers signed licensing agreements with satellite operators that contain copy protection standards that they oppose in the context of the PHILA?**

CERC members do not have access to any such agreements. It was clarified at the Hoedown, however, that satellite agreements do **not** provide any precedent for Selectable Output Control as to digital interfaces, or for "downresolution" of analog outputs. (They provide for a potential denial of service through the component analog interface, which has never been implemented.) At the Hoedown, CERC pointed out that particular satellite agreements should **not**, in any event, be taken as a baseline for "copy protection" purposes:

(1) Satellite operators, as new entrants bidding for content, had little negotiating leverage compared to cable operators;

(2) Satellite business models have changed over time, and associated agreements are likely to change as well;

(3) Initially, CableLabs/NCTA justified impositions related to copy protection on the basis that they were demanded by content providers as a condition of

providing content. The Hoedown discussion revealed that CableLabs/NCTA now demands power, only tangentially related to copy protection, even where such power is **not** a requirement of MPAA or its members. Therefore, neither the satellite model, nor MSO agreements pertaining to licensed products, is relevant to the actual CableLabs/NCTA objective: maintaining complete discretionary control over manufacturer design choices, and consumer usage, through PHILA. Using PHILA to attain such power clearly violates FCC regulations.

Astonishingly, the CableLabs/NCTA representatives came to this roundtable discussion unable to say ***whether the cable MSOs that are now rolling out HD-capable set-top boxes have incorporated Selectable Output Control or downresolution capability in those products.***

2. **Could the affected industries live with the 5C encoding rules as a general policy? What about 5C encoding rules as a baseline that could be overridden for specific non-broadcast content with robust notice and customer express consent?**

The 5C "encoding rules" as to copy protection appear to reflect a multi-industry consensus acceptable to all, including the MPAA. It seems outrageous that after two years CableLabs/NCTA has not found a drafting approach that includes them.

- B. **Down resolution – Is there an alternative to down resolution to address the analog hole issue?**

In CERC's view, "downresolution" should not be considered acceptable as an approach to concerns over further distribution or redistribution of component video analog signals. Reasons are:

- (1) the primary and proximate consequence of downresolution is denial of **viewing** privileges that were paid for by the consumer;
- (2) if the same denial does not occur equally as to MSO-leased products, then downresolution represents an effective denial of the Right to Attach, in violation of the Commission regulations cited above;
- (3) it would be inconsistent with congressional and FCC policy as to the DTV Transition to punish early adopters of HDTV displays by failing to ensure that high-resolution outputs are available for all content;
- (4) MPAA and its members have never offered to pay for provision of converters to early adopter consumers. The provision of non-downres'd outputs only on leased boxes would violate the Right to Attach. Accordingly, there can be no justification for PHILA's "downres" provisions as presently constituted.

The best alternative would, in fact, be to provide copy protection to these analog signals, governed by the "5C" encoding rules, rather than turning them off or degrading their quality. As was discussed in the Hoedown, effective enforcement would require legislation, mandating content marking through hidden or ancillary data. CERC estimated that enactment and enforcement of such a provision would likely take three years (MPAA said five).

CERC's position is that no downresolution provision should be acceptable in the context of viewer reliance for purposes of display.¹ In the event that the FCC does accept any such provision as consistent with its regulations, such provision should require that downresolution: (1) as in other PHILA requirements, apply to all navigation devices, including those distributed by MSOs, (2) be triggered separately, and only by a content provider on a content by content basis, (3) be permissible only when "downres" of the program has been noted in all published and electronic program guides, and at the outset of the program, (4) be allowed only as to content that is also encoded "no copy" or "copy no more," and (5) be subject to a three year sunset, after which an encoding rule would not allow the triggering of downres'ng unless further approval is gained from the Commission. The latter provision would allow a determination as to whether such a gross imposition on consumer viewing is necessary.

- C. **DVI Outputs - Is DVI spec something CE manufacturers can build-to, or does a decision need to be made between DVI and HDMI? If a choice needs to be made, how and when will it happen?**

CERC members are not aware of any problem in this respect.

- D. **Selectable Output Controls**

1. **Should specific PHILA/OCAP limitations regarding selectable output controls be established such as only an interface that has been compromised may be disabled?**

It should not be acceptable to disable an entire *interface* in millions of consumer devices under any circumstance. Copy protection systems are adopted by consensus in the expectation that at some point they will be compromised. Part of the design is to limit the consequence of the compromise. As CERC argued at the Hoedown, interfaces that are limited in capacity by such measures are marketed to consumers on the basis that they are approved by content providers, so will be supported with content. It is neither fair nor necessary to punish consumers by turning off support for products purchased with this understanding.

Real-world experience has shown that "compromise" of a protection system is relative. The early "compromise" of DVD's "CSS" protection has done nothing to lessen the profitability to the motion picture industry of this format, or its support.

¹ As CERC has commented previously in this Docket: In the case of PHILA, but not in the case of "5C," downresolution is likely to deny a consumer's right to view a signal in high resolution over the *only* possible interface available for the receiver he or she has already purchased. The issue in the PHILA context is markedly different from (but thus far often confused with) the similar question, in the 5C context, of control over an *additional*, non-1394 output from a DTCP-enabled set-top hooked up to a (future) 1394 and DTCP-enabled receiver. In the 5C case, it may be assumed that the consumer owns, or will have the option of acquiring, a DTV receiver with a 1394, DTCP-protected interface. In such case the consumer would not lose his or her only path to viewing HDTV programming over cable. However, in the case of PHILA, the consumer who already owns a legacy HD or HD-Ready receiver, with only component analog inputs, has no other way to view HD programming over cable.

Moreover, technologies such as DTCP provide for revocation of particular "cloned" devices. And, as CERC pointed out, MSOs retain the power to deny conditional access to particular customers. Attempting to use PHILA to gain greater, discretionary, security is, like other examples discussed herein, an abuse of PHILA that is contrary to FCC regulations.

2. **Do cable operators or the studios have any interest in selectable output controls beyond a security breach?**

According to CableLabs/NCTA counsel at the Hoedown, they assert such an interest: competitive stance vis a vis future distribution technologies. As we note above, this is not an interest protectable by PHILA in any manner consistent with present FCC regulations.

3. **How likely is it that the next generation set-top box will have two different digital outputs, a 1394 and a DVI?**

As this may be a competitive decision based on ordering practices of particular CERC members, it would not be appropriate for CERC to comment as to the "next generation" of product. We note, however, that DVI has some cost advantages as to display but is uni-directional and not recordable. Hence, future external digital recording products would likely rely on 1394 or other interfaces. Semiconductors have been described to the CPTWG that offer both 1394 and DVI economically as outputs of a single chip.

4. **Are the OCAP specifications regarding selectable output control and down resolution similar to the licensing requirements for DBS boxes?**

No. See CERC answer to questions I.C and II.A.

III. OCAP ("OPENCABLE APPLICATION PLATFORM" OR MIDDLEWARE)

- A. **Status of development - Is OCAP close to completion? What is the timetable for completion? What is the timetable for operator implementation? Will OCAP support be "turnkey" or will it be phased in through operator support of specific modules?**

Answers to this question should be provided on an MSO-by-MSO basis. CERC believes that such answers would confirm its position that the only way to assure manufacturers and consumers that OCAP will be supported fully and competently will be to require that MSO-distributed devices rely on it to the same extent and for the same purposes that competitive entrant devices must.

- B. **Have applications developers (i.e. software vendors) expressed a willingness to design products that will run on OCAP? Would any developer take issue with converting their program into the OCAP format? Have any started the task of porting their applications to OCAP? Do any operators require that applications be written to OCAP?**

See answer to A.

- C. CERC complains that OCAP contains a “monitor” application that restricts or disallows functions or features resident in the device – Given that the Commission’s rules prohibit MVPDs from precluding the addition of features or functions in the boxes (76.1204(c)) why is this requirement in the specification?

CERC notes that its information in this regard is based on manufacturer information and concerns. Consistent with CERC's discussion in response to question I.C., CERC sees no conceivable justification under existing FCC regulations for mandating this application in PHILA. As was noted by FCC staff, the justification given by CableLabs/NCTA counsel at the Hoedown did not pertain either to protecting the network from harm or to preventing unauthorized use. Rather, it pertained to MSO business models and objectives in selling services to consumers. MSOs should have to support and justify such concerns through affirmative petition to the Commission to amend its navigation device regulations. ***A condition of the grant of any such amendment (if appropriate) should be that technology to which conformance is mandated by PHILA or by certification requirements be required equally for the performance of MSO-leased devices.***

- D. IPPV – There area has been covered in previous hoedowns, but CERCs latest ex parte maintains that it cannot be done under the existing specification – Is OCAP implementation required for IPPV?

CERC's understanding is that, effectively, this is the case. Apparently CableLabs will certify a strict "J2K" device, but not one that has been improved so as to perform IPPV, unless such device is also OCAP-compliant. The purpose here is manifestly related to MSO business models, not network security or unauthorized receipt of service. Hence, even apart from PHILA, CableLabs' refusal, as an agent for MSOs, to certify non-OCAP IPPV products, coupled with MSO insistence on certification, is itself in violation of sections 1201 and 1204(c), irrespective of PHILA. The PHILA violation, in requiring certification as to all CableLabs specifications, is cumulative.

Conclusion

CERC believes that it is intolerable for incumbent monopolists to continue to use an "NDA" process, and resistance to good faith negotiation in compliance with Commission Regulations, to stave off competitive entry. CERC urges the Commission to promote multilateral negotiations leading to a prompt and fair resolution of outstanding issues, culminating in (1) amendment of Commission regulations to allow recognition in PHILA of reasonable cable industry business objectives, that at present are beyond the scope of such a license, and (2) assurance that such a license governs products distributed by cable MSOs, as well as those by competitive entrants, so as not to burden the Right to Attach declared by section 76.1201 of the regulations promulgated in this Docket.

Respectfully submitted,

Consumer Electronics Retailers Coalition

Best Buy Co., Inc.

Circuit City Stores, Inc.

Good Guys, Inc.

RadioShack Corporation

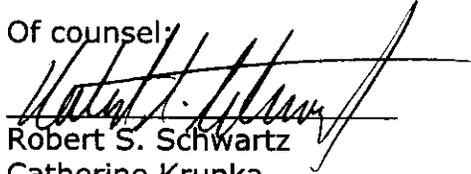
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June 6, 2002

Certificate of Service

I, Janet Davis, a secretary with the law firm of McDermott, Will & Emery, hereby certify that true copies of the foregoing Answers Of Consumer Electronics Retailers Coalition To "Hoedown" Questions Re Cable Industry's Draft "POD Host Interface License Agreement" ("PHILA"), was served by Federal Express or ECES on June 6, 2002, to the persons listed below.

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