

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

GERARD J. WALDRON
TEL 202.662.5360
FAX 202.778.5360
GWALDRON@COV.COM

August 27, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In re Implementation of Section 304 of the Telecommunications Act of 1996;*
Commercial Availability of Navigation Devices, CS Docket No. 97-80;
In re Compatibility Between Cable Systems and Consumer Electronics
Equipment, PP Docket No. 00-67
Ex Parte Communication

Dear Ms. Dortch:

This letter is to inform you that on August 26, 2003, Alex Curtis with Public Knowledge, Kenneth DeGraff of Consumers Union, Stacy Stern Albert with Hewlett-Packard, Paula Boyd of Microsoft Corporation and the undersigned, its counsel, met with Paul Gallant, Legal Advisor to Chairman Powell; and Anthony Dale, Legal Advisor to Commissioner Martin; and Messrs. Curtis and Waldron and Ms. Boyd met with Jordan Goldstein, Legal Advisor to Commissioner Copps, to express concern that the *Plug-and-Play Proposal* at issue in the above-captioned proceeding fails to take into account consumers' use of an entire category of highly (and increasingly) valued products such as personal computers (PCs) and other IT devices and that these devices should be included in the rules the Commission adopts affecting Digital Cable Ready devices. The parties emphasized the importance that consumers place on Digital Cable Ready labels when they make purchasing decisions, and why the Commission must ensure that PCs are included now in the Digital Cable Ready regime, and not after some period of years.

The parties reviewed the August 8, 2003 *ex parte* filing from Microsoft and H-P which sets forth specific and detailed changes that the Commission must make to (i) the compatibility rules, and (ii) the encoding rules. The parties also discussed the provisions in the DFAST License Agreement and urged the Commission to exercise the authority it first enunciated in the *Navigation Devices Declaratory Ruling* to review terms of license agreements that implicate the Commission's navigation devices rules and provide guidance consistent with these rules. Messrs. Curtis and DeGraff reiterated the position set forth in their *ex parte* letter of August 11, 2003, that Public Knowledge, Consumers Union and Center for Democracy and Technology are

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concerned at “the extent to which the Plug-and-Play proposal locks out the use of computers and computer technologies from interoperability with the cable-television system.”¹

The parties also discussed the following issues:

1. *Embedded in the CEA-NCTA negotiated Plug-and-Play proposal are numerous provisions that exclude PCs, and they all must be changed in order to enable PCs to be Digital Cable Ready.* As the August 8 *ex parte* filing sets forth in detail, the changes needed to recognize PCs in the rules are more extensive than just clarifying the definition of “unidirectional.” Both NCTA and CEA have stated that the negotiators did not intend to exclude PCs categorically from the *Plug-and-Play Proposal*.² But though the *Plug-and-Play Proposal* apparently was not intended to exclude PCs *per se*, the NCTA reply comments acknowledge that the compliance and robustness rules required of devices deploying PODs likely would have the effect of excluding many PCs. “[A POD-equipped] PC cannot have insecure interfaces or internal access points. Virtually every PC has a user accessible bus, which by its very nature is insecure. . . . [I]f [the presence of an internal bus is not to disqualify PCs as Digital Cable Ready devices], it must be demonstrated how an unencrypted bus can be made robust and tamper proof.”³ This comment, which reflects the mindset of those involved in the process, focuses on *where* and *how* content is distributed rather than on the paramount goal of protecting the security of *content* itself. It is true that PCs have an open internal architecture through which content and unrelated data must be able to move freely. But that architecture alone does not render PCs *per se* unable to protect the security of content. Indeed, the PC industry has developed technologies – which have proven effective in the marketplace – that protect the security of encrypted, copyrighted *content*, regardless of and independent of the connections (internal and external) or networks over which the content is distributed. For example, consumers today can download legally music and video over the Internet and enjoy DVDs on their computer. If the *Plug-and-Play Proposal* is to include PCs and other open-architecture technologies, its terms should be modified to reflect devices with open architectures and acknowledge alternate methods of content protection and allow acceptance of these dynamic content protection technologies.

Despite NCTA’s and CEA’s stated intention to include the PC, however, the *Plug-and-Play Proposal* in fact contains a number of elements that, if allowed to remain, could have the

¹ *Ex Parte* Letter from Public Knowledge, Consumers Union and Center for Democracy and Technology, PP Doc. No. 00-67 (Aug. 11, 2003).

² Reply Comments of the National Cable & Telecommunications Association (NCTA), CS Docket No. 97-80, PP Docket No. 00-67, at 30-31 (Apr. 28, 2003) (emphasis in original) (*NCTA Reply Comments*); Consumer Electronics Industry Reply Comments, CS Docket No. 97-80, PP Docket No. 00-67, at 7 (Apr. 28, 2003) (emphasis in original) (*CE Reply Comments*).

³ *NCTA Reply Comments* at 31.

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net effect of excluding PCs and PC-related technologies from participating in the market for unidirectional digital cable devices. To promote investment and innovation and avoid pre-selecting the technologies that will succeed in the digital age, we ask the Commission to remedy this oversight by modifying the *Plug-and-Play Proposal* in the following respects:

- Revise the proposed regulations to ensure that PCs and other open-architecture consumer IT devices are not foreclosed by the proposed definitions, content protection scheme, certification process, or licensing terms, from being developed and marketed as Digital Cable Ready devices; and
- Ensure that the compliance and robustness rules in the DFAST License (which is required to deploy the POD/CableCARD needed to receive encrypted digital cable programming) allow for diverse and flexible network connections and content protection techniques, including digital rights management (DRM) technologies that protect content wherever it travels by embedding and associating the appropriate usage rights policy with the content, independent of the underlying network technologies through which it may pass.

These modifications – explained in detail in Appendices A and B of the August 8 *ex parte* filing – will promote investment and innovation and help to ensure that consumers are able to embrace fully technologies that hold tremendous potential to drive the transition to digital television.

2. *The Commission should exercise the authority it retained in the Navigation Devices Declaratory Ruling to review terms of licensing agreements.* As the signatories note in their reply comments on the *Plug-and-Play Proposal*, only the proposed technical regulations and encoding rules have been submitted for FCC approval.⁴ The MOU itself and the DFAST License Agreement are private commercial agreements. However, the Commission concluded in its September 18, 2000 *Declaratory Ruling* in the *Navigation Devices* proceeding that the terms of the POD license (*i.e.*, the DFAST License Agreement) are subject to Commission oversight to ensure that they do not run afoul of the *Navigation Devices* rules requiring that security features be separated from navigation devices and prohibiting cable operators from using contracts or intellectual property rights to preclude the retail availability of navigation devices that do not perform conditional access or security functions. *See* 47 C.F.R. §§ 76.1202, 76.1204 (2002). In the *Declaratory Ruling*, the Commission acknowledged that the *Navigation Devices* rules attempt to strike a balance between the competing goals of “(1) . . . assur[ing] the commercial availability of navigation devices; and (2) . . . adequately safeguard[ing] the cable operators’

⁴ *See, e.g., NCTA Reply Comments at 28.; CE Reply Comments at 16-17.*

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signal security.”⁵ Keeping these two goals in mind, the Commission concluded that “[s]ome measure of anti-copying encryption is, we believe, consistent with the intent of the rules, notwithstanding that the rules would otherwise require that all conditional access controls take place in the security control module.”⁶ However, the Commission made clear that cable operators’ ability to include copy protection provisions in the license accompanying the security control module (POD) was not unlimited: “we do not intend this declaratory ruling to signal that any terms or technology associated with such licenses and designated as necessary for copy protection purposes are consistent with our rules.”⁷ The Commission invited interested parties to submit concerns about the scope of copy protection rules in “finalized licenses that implicate our navigation devices rules” to the Commission.⁸

As the August 8 *ex parte* filing explained, Microsoft and H-P are now taking up that invitation, because the “model” agreement is plain evidence of the terms that the industry expects to use in the actual agreements. The filing recommend changes to the related DFAST License Agreement that will need to be signed by anyone seeking to manufacture a Digital Cable Ready device. Specifically, the encoding and compatibility rules, License Agreement and other proposals should be modified to permit more general-purpose product architectures, such as PCs, and a range of networking and content protection technologies now in common use across the Internet and within other networks. As described in the filing, these technologies can be included without undermining the security of digital content delivered over cable because the technologies themselves employ sophisticated, flexible security techniques. These techniques enable the secure flow of copyrighted content through and across a diverse array of devices and connections.

3. *Including PCs will promote the DTV transition.* Confining the *Plug-and-Play Proposal* to a very limited group of devices and networking protocol – ostensibly (but unnecessarily) to ensure the security of high-value digital content – takes away an essential element – technological innovation – on which the success of the DTV transition depends. That element of the transition need not and cannot wait until the industries have settled on a “bi-directional” plug-and-play standard. The digital transition should not be subject to further delay. Moreover, in today’s rapidly-evolving marketplace, products should be allowed to compete on equal terms and consumers should not be denied the opportunity to take advantage of new

⁵ *In re 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 No. 97-80, 15 FCC Rcd 18199, 18210-11 (2000).

⁶ *Id.*

⁷ *Id.* at 18211.

⁸ *Id.*

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technologies by having their choice limited in the near term solely to the technologies called out by the current *Plug-and-Play Proposal*.

* * * * *

If you have any questions, please contact the undersigned.

Sincerely,



Gerard J. Waldron

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Mr. Paul Gallant
Ms. Stacy Robinson
Mr. Jordan Goldstein
Mr. Daniel Gonzalez
Ms. Catherine Crutcher Bohigian
Ms. Johanna Mikes
Mr. Steve Broeckaert
Mr. Rick Chesson
Mr. Patrick Donovan
Ms. Alison Greenwald
Mr. William Johnson
Mr. Mike Lance
Mr. Jonathan Levy
Ms. Jane Mago
Ms. Maureen McLaughlin
Ms. Susan Mort
Ms. Mary Beth Murphy
Mr. Mike Perko
Mr. Alan Stillwell