

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

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 03-172
Competition in the Market for the)	
Delivery of Video Programming)	

**Comments Of The
Consumer Electronics Retailers Coalition**

The Consumer Electronics Retailers Coalition (“CERC”) is pleased to submit comments in this annual Notice of Inquiry on competition in the market for delivery of video programming.¹ CERC agrees with the Commission’s decision, for this inquiry, to take a broad rather than marginal look at a marketplace that is dynamic in several directions. CERC is a non-profit, tax-exempt public interest corporation. Its membership includes Best Buy Co., Inc.; Circuit City Stores, Inc.; Good Guys, Inc.; RadioShack Corporation; Sears, Roebuck & Co.; Tweeter Home Entertainment Group, Inc.; Ultimate Electronics, Inc.; the International Mass Retail Association; the National Retail Federation; and the North American Retail Dealers Association.

A longstanding CERC objective has been the introduction of competitive devices into the market for customer premises equipment to receive digital cable audiovisual programming and related services. CERC worked with Members of Congress toward passage of Section 304 of the 1996 Telecommunications Act, and subsequently has participated in every Commission undertaking to implement that section (Section 629 of the Communications Act), as well as Section 624A, which was added in the 1992 Cable Act. Digital cable television has been the *only* major consumer service for which customer premises equipment must be provided by the service provider to receive the major services offered.

In paragraph 24, the NOI says, “[w]e seek comment on the availability and compatibility of customer premises equipment used to provide video programming and other services.” The Commission then poses a series of questions:

- ◆ “How many households have one or more devices (*i.e.*, analog and digital set-top boxes, cable modems, integrated receiver/decoders, navigation devices, or

¹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172 (Rel. July 30, 2003).

receivers that facilitate or differentiate video distributors' service offerings)? How many of these devices contain digital capability?"

CERC does not collect or pool marketing statistics, so can provide only qualitative rather than quantitative answers. It is well known that approximately 70% of our consumers are cable subscribers and more than 15% are DBS subscribers. We believe that, to date, cable operators have furnished consumers with 25 - 30 million digital "set-top boxes," none of which were designed for national retail distribution. While cable and DSL "modems" are available at retail, distribution of audiovisual program via "modem" has not yet become a significant competitor to MVPD distribution of programming through "set-top boxes."²

The continued presence in the marketplace of analog cable set-top boxes has served as a deterrent to the development and distribution of competitive digital set-top products. This is so because, as CERC has noted in many filings with the Commission,³ existing rules have been interpreted so as to allow cable operators, in setting rental prices, to pool the costs of (low cost) analog and (much higher cost) digital STBs, thereby subsidizing the consumer price of leased STBs. CERC has not objected to this practice, but has urged the Commission to clarify its regulations so as to afford the same degree of subsidy to competitively procured navigation device products.⁴

- ◆ "Further, we seek information on the retail availability of navigation devices to consumers.⁵ What are the obstacles to equipment manufacturers and others obtaining approval to attach devices to MVPD systems? To what extent, if any, do subscriber agreements attempt to limit the uses that may be made of subscriber premises equipment? What types of devices are available at retail and at what cost?⁶"

² Technically, some "set-top boxes" also contain a "modem." The reference here is to a cable "DOCSIS" or a DSL product designed to operate via TCP/IP over the Internet.

³ For a complete discussion of the "subsidy" issue, its impact on competition, and reference to earlier filings, see CERC *ex parte* filing of Nov. 6, 2001 in Docket No. 97-80, pp. 15 - 22.

⁴ *Id.*

⁵ [f.n. to text:] 'Under the Commission's navigation rules, video programming distributors (except DBS) were required to separate security functions from non-security functions by July 1, 2000, and make modular security components available by that date. See *Navigation Devices Order*, 13 FCC Rcd 14775. By July 1, 2006, MVPDs will no longer be allowed to offer conditional access and other functions in a single integrated device. See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order and Further Notice of Proposed Rulemaking, FCC 03-89 (rel. Apr. 25, 2003). See also 47 C.F.R. § 76.1204 (a)(1).'

⁶ [f.n. to text:] 'We asked for comment on the Memorandum of Understanding and the proposed Commission rules contained therein which was reached between consumer electronics and cable industries regarding compatibility of cable systems and DTV receivers and related consumer

Until yesterday, CERC's report on this topic was one of grim frustration. Although Commission regulations have declared a right to attach since mid-1998 and have required cable operators to support competitive devices since mid-2000, no nationally competitive products have been forthcoming, and *no* devices reliant on "PODs" (now known as CableCARDS™) have been available at retail. However, on December 19, 2002, consumer electronics manufacturers and cable operators filed the landmark "Plug & Play" package with the Commission, taking concrete steps -- as requested by the Commission -- to break this impasse. Yesterday, in Dockets 97-80 and 00-67, the Commission announced that it would be issuing a Report & Order and regulations implementing the major parts of the "Plug & Play" package.

As the text of the Report & Order and the regulations have not yet been released, CERC cannot at this time comment specifically on whether they will in fact produce the competition envisioned by the Plug & Play parties at the time of their filing and in subsequent submissions to the Commission. It has been CERC's position, as expressed jointly with the Consumer Electronics Association ("CEA") in comments and reply comments on the Plug & Play proceeding,⁷ that issuance of these regulations presents the last, best hope for competition, and that there appears to be no feasible alternative.

The NOI, in par. 23, inquires about interactive devices and services. The Commission also asks, in par. 30, "What percentage of existing equipment is compatible with the OpenCable standards? What developments have taken place in the last year relating to the POD-Host Interface, or PHI license that affect the deployment of navigation devices or their availability at retail stores?" The Plug & Play agreement provides for a "Phase II," to result in products that are fully interactive with virtually any cable headend.⁸ CERC views implementation of Phase II as equally important as the "Phase I" addressed by the Commission yesterday. Ultimately, a fully competitive market requires:

- (1) Ability of competitive devices to deliver the features and functions offered by devices provided by the service provider, and

electronics equipment. *See Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd 518 (2003).')

⁷ *See*, Joint Comments Of The Consumer Electronics Association And The Consumer Electronics Retailers Coalition In Response To Further Notice Of Proposed Rulemaking [Dockets Nos. 97-80 and 00-67], March 28, 2003; and Joint Reply Comments, April 28, 2003.

⁸ The "Phase I" regulations proposed to the Commission address products that may be interactive in any respect *except* as to the cable headend. Thus, while they receive most cable services, they would not be able to order, *e.g.*, "video on demand."

(2) Conversely (as has been achieved in the markets for telephones), full and exclusive reliance, by devices leased or sold by the service provider, on whatever specifications are made available to competitive manufacturers. Otherwise, it is unlikely that a truly “level playing field” will ever be achieved.

Although there has been evolution in the “PHILA” license, and development of some retail products thereunder, equality of competitive devices with “MSO” devices is not yet in store. Nor, to CERC’s present knowledge, has any “PHILA” device yet reached retail display.⁹

- ◆ “How do changes in consumer premises equipment design, function, and availability affect consumer choice and competition between firms in the video programming market? To what extent are MVPDs offering consumer equipment personal video recorder (“PVR”) capabilities? How is access to PVRs priced, and how does the availability of PVRs affect competition?”

It has long been CERC’s view that direct interoperability between competitive products and MVPD systems is essential to consumer choice. Thus far, however, product integration has been possible only in products offered by service providers, and not in competitive products. Consumer welfare demands that this change.

The ability of MVPD service providers to offer products designed for *their own* networks ought not to convey any advantage -- and certainly not any monopoly -- as to the *home* network. Yet, unless Phase I and Phase II of the “Plug & Play” initiative are fully successful and rigorously implemented, this is precisely the competition-limiting outcome toward which the market is headed.

Already, “PVR” technology, popularized in standalone products, is growing faster when integrated into network access devices. Yet, until product can be built pursuant to the DFAST license as submitted to the Commission on December 19, this facility might be unavailable in any

⁹ Some have been announced for delivery in 2003, but the standards-based “Plug & Play” regulations, as published for comment, do not require specific MSO compliance re CableCARD™ devices until July, 2004. See, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Further Notice of Proposed Rulemaking (Rel. January 10, 2003). Some characteristics of “PHILA” devices were noted in the separate comments of Commissioner Abernathy at the Commission’s September 10, 2003 meeting, as published on the FCC web site.

navigation device products of competitive entrants.¹⁰ This is also the case with respect to the integration of recorders with removable media.¹¹ CERC is also concerned at the possibility of cable operators offering home network products designed to rely on proprietary rather than competitive navigation devices.

Manufacturers' signing the DFAST license will be an important step in redressing this competitive imbalance. Expedient agreement and tendering of a "Phase II" package, and a license for fully competitive products, is the next vital step. ***The ultimate goal should simply be removal of any competitive advantage for the products that are available only from or through the service provider.***

As the Commission notes, one key element of the FCC's regulatory regime has been the requirement that new cable operator-provided devices, like competitive devices, rely on CableCARDs™ by July 1, 2006.¹² This is one of several factors, pertaining to the CableCARD,™ on which a fully competitive market will rely. Others are:

- ◆ The *cost to consumers* of a CableCARD.™ In CERC's view, a CableCARD,™ which is necessary to receive all or most classes of digital service, functions as a part of the network, just as buried "tier" filters long have done in analog cable networks. ***Charging consumers to exercise their "right to attach," declared by the Commission, would be comparable to charging telephone subscribers for using competitive rather than service provider-issued telephones.***
- ◆ Equity in administering subsidies. ***Denying a subsidy, recognized by the Commission, to competitively procured devices is tantamount to a charge on the consumer's right to attach.***
- ◆ Commission oversight of MSO conversion to all-digital networks. While such conversion would offer bandwidth efficiencies and potential cost savings, it could pose obstacles to *both* the 2006 DTV conversion (by reducing service to legacy analog receivers) and to the national policy in favor of competition, as set forth in Section 629.

¹⁰ DFAST license Compliance Rules as published in FNPRM, *id.* Compare PHILA Compliance Rules as published on OpenCable web site, http://www.opencable.com/downloads/PHILA_080103.pdf.

¹¹ *Id.*

¹² This date was moved back by the Commission from January 1, 2005. See, *Order And Further Notice Of Proposed Rulemaking*, CS Docket No. 97-80 (Rel. April 25, 2003),

Any plan to serve consumer analog TVs through massive distribution of digital converters should be overseen by the Commission, and administered so as to foster, rather than eliminate, competition.

* * *

In summary, the Commission's recent leadership and action provides hope that the competitive goals set by the Congress in 1992 and in 1996 may in time be approached, but little competitive fulfillment has occurred in the marketplace to date. The Commission needs to exercise close oversight to assure that these goals will be achieved, and to make clear that areas it will *not* address are left to the market, so that remaining competitive issues are clearly subject to marketplace rules and therefore to judicial scrutiny, if necessary. CERC will continue to participate in the dockets pertaining to these issues, and to call competitive issues to the attention of the Commission.

Respectfully submitted,

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Dated: September 11, 2003