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

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

Comments of the Consumer Electronics Association
In Response To Second Further Notice Of Proposed Rulemaking

February 13, 2004

Table of Contents

Page

I. Overview Of Questions Posed – Consumer Satisfaction Issues And Level Playing Field Issues……2

II. The DTV And HDTV Transitions Cannot Succeed If They Are Fundamentally Unfair To The Consumers Who Invest In Them……...3

A. The Triggering Of HDTV Downresolution Would Be Fundamentally Unfair To People Who Have Purchased HDTV Receivers In Good Faith……...3

1. HDTV downresolution is not useful either for copy protection or to control Internet redistribution……4

2. Most of the consumer purchase "behavior" that is sought to be influenced has already occurred……..4

3. The apparent intention behind downresolution is to drive consumers toward purchase of products that the MPAA would also like the chance to turn off unilaterally……...……5

4. Imposing HDTV downresolution on consumers would entail discrimination against early adopters……6

5. Early adopters will now have no opportunity to procure navigation devices immune from a "downres" response……7

B. The Commission Should Allow "Revocation" Of Consumer Products Only As To "Cloned," Lost Or Stolen "Certificates" And Otherwise Should Not Allow Lawfully Acquired Consumer Be Disabled Or Compromised Via "Revocation" Or "Retirement" Of Connectors Or Technologies.....8

1. The established licensing context for "revocation" is appropriately narrow.....8

2. Beyond device-specific certificate revocation, any action approved or contemplated by the FCC should be entirely forward-looking.....9

C. Pre-Sale Labeling Of Plug & Play Devices Would Not Give Consumers The Information They Need.....9

D. CEA Is Confident That 550 MHZ Systems Will Follow Plug & Play Obligations To Support Pods, But Implementation Must Be A High Priority For All.....10

III. The FCC Should Use Its Oversight Power To Assure A Level Playing Field For Competitive Entrants.....12

A. CEA Supports The Processes Agreed To With Cable Entities For Approvals With Respect To The DFAST Technology License Agreement.....13

B. The Approval Of New Outputs And "DRM" Regimes Should Occur According To Objective Principles.....13

1. CEA believes that the "Phase I" result – CableLabs initiative subject to FCC and other authorities' oversight, scrutiny and review -- is appropriate.....14

2. Future choices must be made in an objectively sustainable and competitively neutral manner.....14

3. A service provider must not be in the position of "gatekeeper" for competitive technologies, devices, or services.....15

IV. Conclusion.....15

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

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

Comments of the Consumer Electronics Association
In Response To Second Further Notice Of Proposed Rulemaking

The Consumer Electronics Association (CEA) respectfully submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking.[1] The Commission has raised important questions; the answers it selects will determine whether the DTV transition will please consumers and promote competition, or will frustrate consumers and stall competitive entry.

CEA represents more than 1,500 corporate members with total industry sales exceeding $100 billion, involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. It sponsors and produces the International Consumer Electronics Show.

---

[1] *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, FCC 03-225, Second Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) ("October 9 Report and Order").

Although CEA's members account for more than $80 billion in annual sales, it is only through FCC action that their products are finally eligible to attach to, and offer most of the services of, the digital cable systems that will serve 70% of our customers' households. It is now up to the Commission whether this competitive entry will be meaningful. If it is not, both consumers and competition will suffer from confusion, complexity, and inefficiency just when public policy demands competition, simplicity, and interoperability.

I. OVERVIEW OF QUESTIONS POSED – CONSUMER SATISFACTION ISSUES AND LEVEL PLAYING FIELD ISSUES

The Commission's concerns, as expressed in its SFNPRM questions, can be grouped in two major subject areas –

(1) ***fairness to consumers*** –

- FCC allowance of HDTV "downresolution"
- FCC allowance of product, technology, and interface revocation
- Additional pre-sale labeling obligations
- Obligations placed on 550 MHz cable systems

(2) ***level playing field*** –

- FCC determinations re standards for approval of new outputs
- FCC requirement of objective criteria for technological decision-making
- Who makes initial approval determinations

In a perfect market, ultimate fairness to consumers would depend solely on equal competitive opportunity. Competitive entry, however, is occurring in a top-down content licensing environment in which the regulatory framework can be used to deny consumers any control whatsoever over use of DTV devices in which they have very heavily invested. Therefore, the answers to the "fairness" questions are just as important as the answers to the "level playing field" questions.

II. THE DTV AND HDTV TRANSITIONS CANNOT SUCCEED IF THEY ARE FUNDAMENTALLY UNFAIR TO THE CONSUMERS WHO INVEST IN THEM.

These transitions will command public respect, and continued investment, only if:

- People who make major investments in DTV and HDTV products are treated fairly
- People who consider investing in those products can expect them to work predictably

A. The Triggering Of HDTV Downresolution Would Be Fundamentally Unfair To People Who Have Purchased HDTV Receivers In Good Faith.

In arguing for HDTV "downresolution" and in reviving its plea for "Selectable Output Control,"[2] MPAA and others make a case that is fundamentally contemptuous and dismissive of the consuming public:

- *Downresolution,* though not useful against copy protection or Internet redistribution, should be implemented to affect consumer purchasing behavior.
- The primary "behavior" to be "affected" would be that of consumers who have *already* made their purchases and can do nothing about them.
- To the extent downresolution is at all relevant to future purchases, the MPAA's stated intention is to drive consumers toward purchasing products with "secure" digital interfaces.
- However, MPAA and others also want, through SOC and revocation, to be able without warning to *turn off those interfaces as well.*
- The result would be discrimination against well-intentioned consumers and massive consumer confusion and dissatisfaction.

---

[2] *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, Petition for Reconsideration of the Motion Picture Association of America, Inc. ("MPAA") at 2-4 (Dec. 29, 2003).

There is something seriously wrong with this picture. The Commission would be making a tragic mistake were it to buy into such flawed logic and anti-consumer intentions.

1. HDTV downresolution is not useful either for copy protection or to control Internet redistribution.

There is no scintilla of evidence in the record to suggest that HDTV downresolution either controls home recording or keeps content from the Internet. Indeed, it is established, without contradiction, that by halving the numbers of vertical and horizontal pixels, downresolution eliminates 3/4 of the signal bandwidth, thereby *facilitating* both recording and redistribution. Therefore, its real purpose is to exert indirect influence over consumer purchasing behavior.

2. Most of the consumer purchase "behavior" that is sought to be influenced has already occurred.

According to information provided for the record in this Docket by the Home Recording Rights Coalition (HRRC) in September, 2003,[3] approximately 5 million (now, 6 million) households have already purchased "HDTV-ready" receivers whose ability to receive HDTV signals from MVPDs depends *solely* on the component analog interfaces that would be subject to downresolution. Of receivers *currently* on the market, however, about 2/3 (now about 3/4[4]) also had a secure digital interface. And, as per the requirements of the regulations in this Docket, in the future, *100%* of all HD-capable Unidirectional Digital Cable Products will have to have DVI or HDMI interfaces, and 100% of all cable set-top boxes will have to have secure digital 1394 interfaces.

Therefore, it seems obvious that the "consumer behavior" at which HDTV downresolution is targeted has, primarily, already occurred. *Downresolution's*

---

[3] Letter from Schwartz to Dortch of Sept. 3, 2003, Re*: Ex Parte Communication,* CS Docket No. 97-80, *Commercial Availability of Navigation Devices;* PP Docket No. 00-67, *Compatibility Between Cable Systems and Consumer Electronics Equipment.*

[4] Current CEA market research indicates that approximately 3/4 of the HDTV displays now on the market have digital interfaces.

primary effect will be to punish consumers for making an early investment in HDTV displays at a time when only the "wrong" interface was available.

To the extent "downresolution" is justified as punishing such consumers for the sins of the manufacturers who sold them these products, this criticism also misses the mark. MPAA let a full year elapse before even *commenting* on the first drafts of the "5C" protection licenses for the "1394" digital interface. The "DVI" and "HDMI" interfaces were devised, licensed, and implemented by the IT and CE communities, not the MPAA or its members.

The notion that early adopters will not be able to tell the difference between HDTV and "downres'd" programs is anecdotal, false, unsupported in the record, and counter to everyday experience. Consumers who purchase HD-ready receivers and who purchase HDTV programming are entitled to receive the full capabilities delivered with their purchases – whether or not the programs and the displays reach the full theoretical capabilities of each specification. Moreover, some of the *most* expensive and sophisticated HDTV-ready products are "flat panel" displays, many of which are only now being equipped with secure digital interfaces.

3. The apparent intention behind downresolution is to drive consumers toward purchase of products that the MPAA would also like the chance to turn off unilaterally.

The corrosive mindset behind applying "downresolution" to the output of MVPD navigation devices that feed consumer HDTV displays should be taken and appreciated as a whole. Elsewhere in these Dockets, the MPAA and others have argued that the FCC should impose a new technical mandate that navigation devices come equipped with a program-by-program, no-notice self-destruct button called "Selectable Output Control" (SOC).[5] Thus, having "driven" consumers toward purchasing the "secure" digital interfaces that are already mandated by the FCC's labeling regulations, MPAA wants the freedom, without any corresponding responsibility, to *turn off these secure digital interfaces at will.* The FCC should not

[5] MPAA at 3.

be complicit in this one-two punch to consumers of "downres" / SOC. Neither imposition can be justified on its own. Taken together, they betray an intention to control consumer use of products bought in good faith. This would simply be a wrong turn for the DTV transition and for the FCC's credibility with the public at large.

4. Imposing HDTV downresolution on consumers would entail discrimination against early adopters.

HDTV downresolution is relevant *only* to those consumers who own HD displays that (1) cannot receive a MVPD signal via a direct connection (*e.g.*, direct to digital cable via a CableCARD) and (2) for their connection to a set-top receiving device, must rely on the "component video analog interface" (*e.g.*, "Y, Pb, Pr," "VGA," "RGB," or those that use a "VGA" 15-pin connector). This includes *most* of the households who have bought HDTV receivers to date. Unfortunately for these pioneers, in a few years (because secure digital interfaces will be standard equipment) they will be in the minority. The Commission should understand that by allowing HDTV downresolution, the FCC will not be treating all consumers equally – it will be putting at a disadvantage only those who first responded positively to the Congress's and the Commission's promotion of DTV and HDTV.[6]

Similarly, the content provider or distributor who triggers downresolution will be imposing on a minority of the customer base, and will be correspondingly less concerned about any consumer backlash. Simply put, those consumers who bought early, and in many cases paid the most, will be the ones who are punished, and will find themselves a vocal minority when they complain. These are the consumers who most need and deserve FCC protection.

[6] It should be noted additionally that, though now widely deployed, digital interfaces are not yet fully tested for interoperability; a series of "plugfests" is ongoing and likely will extend for several years. So, even those consumers owning displays that *do* have these interfaces may find that in some circumstances or with the interoperation of some products, they may have to rely on their display's component analog input, and a non-downres'd signal from a navigation device, in order to receive the HDTV programming for which they have paid.

5. Early adopters will now have no opportunity to procure navigation devices immune from a "downres" response.

Despite the efforts of some participants in this proceeding to interpret "Encoding Rules" as mandates for the imposition of any technology whose use is not explicitly prohibited,[7] this is not the case. There is no requirement in law or regulation that a restrictive technology be must applied in products simply because its triggering is *not prohibited* by some Encoding Rule. So, even though downresolution on content other than free over-broadcasts is not prohibited at present, there is no legal or regulatory requirement that navigation devices must implement it. So, it ought to have been possible for products to be offered on the market that do not respond to downresolution triggers. This would have been useful for, and fair to, consumers owning legacy displays, who could obtain non-downres'd content from such devices. Unfortunately, this last consumer lifeline was cut.

As originally presented to the Commission for reference, the DFAST Technology License Agreement for Unidirectional Digital Cable Products (DFAST) did *not* define any technology for triggering HDTV downresolution, nor did it require any such response, in products, to downresolution triggers. However, after the Commission left the "downres" door ajar in its Report & Order and issued this SFNPRM question, CableLabs unilaterally revised the offered license so as to define a trigger and to require a response, and made this requirement effective *immediately*.[8] It is CEA's understanding that other MVPD devices also were to receive software downloads or modifications so as to respond to downres triggers. At this stroke, *if*

---

[7] *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, Joint Petition for Reconsideration of The National Music Publishers' Association, The American Society of Composers, Authors and Publishers, The Songwriters Guild of America and Broadcast Music, Inc. (Dec. 29, 2003); Joint Petition for Reconsideration of Broadcast Music, Inc. and The American Society of Composers, Authors and Publishers (Dec. 24, 2003); and MPAA.

[8] The version of DFAST without the "downres" response was published with the FCC's FNPRM released January 10, 2003. The FCC's discussion of downres in the October 9 Report and Order is at par 64. The DFAST Technology License Agreement as actually offered to manufacturers can be found at www.CableLabs.com/UDCP. Once the CableLabs intention to require a trigger response as a condition of the license being offered was clear, CEA member manufacturers actually proposed the technical definition of the trigger, on the assumption that a consumer grace period would be allowed for its implementation. This illustrates the dangers of manufacturers' cooperating in the definition of "triggers" in the absence of Encoding Rule protection.

the FCC allows the use of the downres trigger, the last chance for early adopters to receive non-broadcast HDTV over cable and satellite, by procuring a UDCP navigation device, will have likely disappeared.[9] The choice before the FCC is now clear and stark – it can allow the use of downres triggers, and break faith with its early adopter consumers, or it can choose not to do so.

B. The Commission Should Allow "Revocation" Of Consumer Products Only As To "Cloned," Lost Or Stolen "Certificates" And Otherwise Should Not Allow Lawfully Acquired Consumer Devices To Be Disabled Or Compromised Via "Revocation" Or "Retirement" Of Connectors Or Technologies.

The Commission has discussed the possible "retirement" of technologies or interfaces and/or the "revocation" of connectors, and has asked for comment on the circumstances in which the FCC should undertake or tolerate such actions. The Commission should allow such conduct only where it is fair to consumers.

1. The established licensing context for "revocation" is appropriately narrow.

Multi-industry licenses, appropriately, do not provide for the same scope of "revocation" of products in the field as the Commission suggests in inviting comment. Rather, both the DFAST and other license agreements provide for "revocation" of keys relied on by products that are in consumer hands only in the case of misconduct *pertaining to the certificate of the device in question*. Thus, where a particular device's unique "certificate" has been "cloned" so as to no longer be unique to that device, or where it has been stolen, intercepted, or otherwise "lost," these license agreements allow revocation of that particular certificate. This narrow interpretation of "revocation" as "certificate revocation" is appropriate because the result is severe: the inability of the device to receive content from other licensed devices. If applied more broadly – to entire model lines or production runs – the result would be the peremptory disabling of the function in question. In the context

[9] In a panel at the 2004 International Consumer Electronics Show, the Chairman and CEO of Time Warner Cable said, in answer to a question about use of downresolution: "I think you will find all the studios will get behind the idea *and will insist on it*." (Transcript from commercial Compact Disc recording, emphasis added.)

of an interface, it could mean that the device – *e.g.*, a display – could become unable to receive content, where the consumer owning the device has lawfully acquired both the content and the device, and has done nothing that is even arguably wrong.

2. Beyond device-specific certificate revocation, any action approved or contemplated by the FCC should be entirely forward-looking.

With respect to any "revocation" more broad-scale than that described above, the Commission asks, "should revoked connectors or content protection technologies be eliminated on a going-forward basis, while preserving their functionality for existing devices?" Yes – *the Commission should neither take nor tolerate action that would cancel or compromise the utility of an interface or technology, for products in consumers' hands, that is part of a regime that the Commission has heretofore approved.* The reason is simple – it would be impossible to explain to innocent consumers why they should seek and rely upon "secure" technologies if others will have the discretion, through "Selectable Output Control," "revocation," "retirement," or some other euphemism, to disable the consumer's lawful product on the basis of "insecurity."

In the event that any forward-looking action does, in time, become reasonable and appropriate, the Commission should assure that there is an adequate "grace" or "phase-out" period for production of the devices or technologies in question. This will give manufacturers an opportunity to keep their devices in conformance through the transition, and will give consumers who still rely on the technologies in question an opportunity to procure products on which their "legacy" devices rely.

C. Pre-Sale Labeling Of Plug & Play Devices Would Not Give Consumers The Information They Need.

The Commission asks whether, in addition to the "DCR" logo, and the post-sale (*e.g.*, product manual, manufacturer web site) information required by its regulations, it should impose some additional "pre-sale" labeling obligations. CEA believes this would be counter-productive.

As in the case of the introduction of any innovative product or technology, there will be consumer education efforts undertaken individually by manufacturers and retailers, and on an industry-wide basis as well. In the particular case of "Plug & Play" navigation devices, CEA and NCTA have agreed in principle that there should be a multi-industry consumer education campaign, involving retailers and others, reflecting the new ways in which these industries' products and services will be converging.[10] CEA believes it is more productive for companies and industries to provide this information on a dynamic basis, according to marketplace feedback, than via static regulations. Indeed, the combination of dynamic efforts and fixed labels could serve to confuse rather than enlighten consumers.

By July 1, cable MSOs nationwide will be ready to support CableCARD products. FCC action in this proceeding was taken with the expectation that logo-bearing DCR products would be entering the market on a broad scale by this time or shortly thereafter. These events ought to, and CEA believes will, be the occasion for consumer education campaigns on several levels, and for media coverage and attention. Three major industries have an interest in avoiding consumer disappointment, product returns, or service calls. Their joint efforts should be sufficient and well focused, so as to make any static pre-sale labeling requirements unnecessary, and potentially confusing to consumers.

D. CEA Is Confident That 550 MHz Systems Will Follow Plug & Play Obligations, But Implementation Must Be A High Priority For All.

The Commission asks whether the July 1 MSO obligations, referred to above, which apply to "750 MHz" systems, ought to apply to 550 MHz systems as well. The breadth and quality of cable industry support for "Plug & Play" products at the headend is vitally important to the marketing and acceptance of these products, which are vital to the success of the DTV transition itself. Most CE manufacturers are not direct marketers; to sell products they must attract orders from retailers, well in advance of the projected dates for arrival in stores. In order for retailers to invest in

[10] Under separate cover CEA will provide for the record a DVD it produced jointly with Comcast as

these relatively expensive products, they must have a marketing plan. In order to market the "Digital Cable Ready" feature, the retailer must have confidence that the mandated product support will be fully effective when the consumer activates the product.[11]

There have been enough false starts on the road to "Plug & Play" that another cannot be afforded now. The issue of possible disappointment of and confusion of consumers who reside in areas served by "550 MHz" digital systems is potentially very real, if not anticipated and addressed by the affected industries. The best solution, of course, is the implementation of the same MSO practices on these systems as are required on the "750 MHz" systems. Where this is not possible, the multi-industry process needs to avoid consumer confusion while, at the same time, *not casting unnecessary doubt on the ability of most digital cable systems to give the full support of UDCP products that FCC regulations require.*

From inter-industry discussions leading up to the Plug & Play recommendations, CEA members understand that the 550 MHz digital systems carry the same potential for compliance as 750 MHz systems, and that it is the intention of cable system operators to bring commercial systems into the same level of compliance. They also intend to upgrade many or most of these systems to 750 MHz – they have advised that 85% of systems have already achieved this -- which would make the issue moot. The cable industry has also supported a "GoToBroadband" project which, CEA hopes, will be adding comprehensive information on the schedules according to which local cable systems will be fully supportive of the operation of Plug & Play products.

It was on the basis of such cooperative industry discussions and initiatives that CEA members recommended that the formal regulatory mandate for compliance

---

part of a multi-industry consumer education effort.

[11] Depending on whether MSOs make arrangements with local retailers, the mating of the CableCARD to the "host," and the reporting of data to the MSO could occur through a transaction performed by the retailer and its "setup" crew; by the MSO's Customer Service Representative; or by the consumer herself.

by July 1 be set at the level of 750 MHz systems, and CEA stands by that recommendation. Through its discussions with cable providers, and the joint presentations to the Commission in which it has been involved, CEA is confident that the cable industry's commitment to equip 750 MHz systems, as represented by its support for this regulation, will extend to 550 MHz systems in due course, or that most of these will be upgraded in due course, without the necessity of any further regulatory undertaking. Success, however, is vital for the "rollout" of these watershed products and failure is not an option. Therefore, the Commission should do all it can to understand any issues and problems, and, through its own oversight and communications to the public, to provide any assistance necessary to overcome them.

III. THE FCC SHOULD USE ITS OVERSIGHT POWER TO ASSURE A LEVEL PLAYING FIELD FOR COMPETITIVE ENTRANTS.

Congress's purpose in enacting Section 629 of the Communications Act, appropriately cited by the Commission as a source of its *Plug & Play* jurisdiction, was to enable and encourage competition in the marketplace for devices capable of attachment to MVPD systems, and that are capable of providing to consumers *any* service offered by an MVPD.[12] The FCC has asked a series of important questions about maintaining a "level playing field" in the areas touched by Section 629 – not just in the devices, but in the programming, services, and ancillary services that are involved. CEA believes that while every "level playing field" issue is important, the FCC should keep uppermost in its contemplation the one that spurred the congressional action and attention in the first place: a level playing field in the introduction of innovative, diverse, and presently unknowable future competitive devices.

[12] 47 U.S.C. § 549. (Section 629 was adopted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104.)

A. CEA Supports The Processes Agreed To With Cable Entities For Approvals With Respect To The DFAST Technology License Agreement.

CEA believes that the balance between FCC supervision and oversight and private sector initiative reflected in the DFAST is appropriate. It is a matter of record that DFAST exists because CEA and others expressed concerns over unilateral discretion afforded to CableLabs in its "PHILA" license based on the same intellectual property. CEA and its members worked long and hard, through multilateral negotiations encouraged by the Commission and members of Congress, to achieve a standards-based license with reasonable change management, Compliance, and Robustness rules.

While CEA and its members expressed disappointment over the substance and unilateral nature a subsequent change made by CableLabs before the DFAST license was offered for signature, now that the license is publicly available, it provides for change processes that are subject to FCC review.[13] The Commission has stated at several places in its Report and Order and other determinations[14] that it will exercise *both* oversight and review in order to assure fairness to licensees, and that it will continue to entertain specific petitions on the subject of whether the terms of the license fit the regulatory regime.[15] In any such case, and through its oversight, the Commission should solicit and respect the views of all potential competitors, and should be an advocate of competition itself.

B. The Approval Of New Outputs And "DRM" Regimes Should Occur According To Objective Principles.

With respect to the broader issue of the selection of technological regimes beyond those procedural choices already agreed to in DFAST, the FCC asks, here and

---

[13] *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, Status Report of the Consumer Electronics Association (Oct. 23, 2003).

[14] October 9 Report and Order, ¶¶ 75-79; *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 00-67, Further Notice of Proposed Rule Making and Declaratory Ruling, (Rel. Sept. 18, 2000).

[15] Id. ¶ 79.

in the "Broadcast Flag" docket, for opinions on how "objective" those decisions should be. CEA adheres to the concepts it advanced in the *Flag* docket.

1. CEA believes that the "Phase I" result -- CableLabs initiative subject to FCC and other authorities' oversight, scrutiny and review -- is appropriate.

With the exception of the unilateral change pertaining to HDTV downresolution that was made to DFAST before it was offered to manufacturers, CEA sees no need to revisit the balance achieved in "Phase I." As to DFAST and this "downres" issue, CEA believes that the FCC should make clear, here and now, that (a) the use of "downres" triggers will not be permitted, and (b) such triggers have no conceivable application to any UDCP device, in any circumstance.[16] CEA is confident that since the FCC's interim treatment of downres in its October 9 Report & Order was the occasion for this DFAST change, it can be reversed once the interim allowance is reversed.

2. Future choices must be made in an objectively sustainable and competitively neutral manner.

On this question drawn from the Broadcast Flag docket,[17] CEA agrees with the stance taken there in the initial comments of the Home Recording Rights Coalition:[18]

- Technical Criteria. Technical levels of protection should be specified so that any technology company that wishes to compete in the marketplace need only meet clear, well-defined and neutral[19] criteria. As the [House Energy & Commerce Committee] staff draft observed, the criteria should be set only "high enough" to achieve the stated goals … without unnecessarily burdening product design, manufacture or performance; or stifling innovation into new technologies.

---

[16] UDCP devices are not capable of initiating any request for Video On Demand or Impulse Pay Per View – the sorts of programming as to which the purported justifications for "downres" have been offered.

[17] *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, (2002).

[18] *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of the Home Recording Rights Coalition at 7-8 (Dec. 6, 2002).

[19] *Id.* at 7 n.8. "The extent to which neutral criteria must also be considered "objective" is a highly charged issue among technologists and others. Some take the position that criteria cannot be entirely neutral without taking account of subjective ('marketplace') factors such as the willingness of content providers to rely on a technology for protection. Others argue that any determination that takes any account of such factors cannot be objective."

- Self-Certification. HRRC agreed with the [staff] draft's reliance on manufacturer self-certification, rather than adding some *approval* step before products can be offered on the open market. Self-certification under "objective" technical criteria should help ensure that new technologies will reach the market without undue delay.

This position seems to resemble the interim procedure adopted by the Commission in the *Flag* proceeding. Experience in that interim process may teach whether anything other than "self certification, subject to challenge" is necessary.

3. A service provider must not be in the position of "gatekeeper" for competitive technologies, devices, or services.

The Commission has asked, more specifically, whether particular content owners or distributors should be given "gatekeeper" status for the introduction of competitive technologies, devices, and services. CEA's long experience in supporting its members' attempts at competitive entry in various contexts supports the following points:

- With respect to "Phase I," the balance as set forth in DFAST has been appropriate.
- "Gatekeeper" power, however, can be claimed through ancillary activities for which there is only one provider; such accretion must be resisted, in FCC rules and in practice.
- Content providers and distributors are not disinterested parties, and in proposals to the FCC, content providers have sought unilateral power to impose grossly unfair outcomes on owners of lawful devices. This demonstrates that they should not be afforded the sole power to make determinations about technologies, interfaces, or products.

IV. CONCLUSION

CEA appreciates and relies on the FCC's continued interest in and oversight of the implementation of Sections 624 and 629 of the Communications Act. At this critical juncture, the Commission should give its top priority to preserving the value of the investments that consumers are now making in the digital transition, and to creating a level playing field for the competitive devices whose market entry and interoperability were the specific targets and goals of these congressional enactments.

CEA members are making and risking very substantial investments, and asking their customers to do the same, based on these priorities.

Respectfully submitted,

Michael D. Petricone

Michael D. Petricone
Vice President, Technology Policy
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201
703 907-7544

Of counsel:

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
202 756-8081

Dated: February 13, 2004