

**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
)	

**CONSUMER ELECTRONICS
INDUSTRY COMMENTS**

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TABLE OF CONTENTS

	Page
I. THE FCC WAS CORRECT IN PLANNING FOR COMMON RELIANCE ON A STANDARD SECURITY INTERFACE	3
A. Experience Teaches That Reliance Provides The Best Incentives	4
B. The “POD” (“CableCARD”) Is An Essential Element To Any “Level Playing Field”	5
II. ALTHOUGH GREAT PROGRESS HAS BEEN MADE, NOTHING HAS CHANGED SINCE APRIL 25, 2003 TO JUSTIFY MOVING THE COMMON RELIANCE DATE BACK BEYOND JULY 1, 2006	6
A. As Reported, the CE and Cable Parties Have Devoted Great Time And Attention To Testing Issues.....	6
B. The “Interactive” Discussions Are Proceeding Earnestly But Many Parties Must Be Consulted	7
C. Maintaining A Fixed Target For Common CableCARD Reliance Will Provide An Essential “Level Playing Field” Element	9
D. Advances In Technology Continue To Bring CableCARD Acquisition Costs Down, And To Increase Flexibility Of Implementation.	9
III. CONCLUSION – THERE IS NO SUBSTITUTE FOR COMPETITIVE INCENTIVE	10

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These Comments on the Commission’s Further Notice of Proposed Rulemaking of April 25, 2003¹ are provided jointly by the Consumer Electronics Association (“CEA”) and the Consumer Electronics Retailers Coalition (“CERC”). They represent the views of the consumer electronics manufacturing and retail industries and associations.

CEA (www.CE.org) is the principal trade association of the consumer electronics industry and the sponsor of the International Consumer Electronics Show. CEA represents more than 1,500 corporate members 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. Combined, CEA’s members account for more than \$100 billion in annual sales.

CERC (www.ceretailers.org) is an independent, incorporated public policy coalition of the major consumer electronics retailers and their associations. CERC members are on the front lines of the digital transition. As individual companies, they are in the position of assessing the

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, Order and Further Notice of Proposed Rulemaking (Rel. Apr. 25, 2003) (“Apr. 25, 2003 FNPRM”).

demand for new products, as well as marketing them. They have sought for more than a decade to be able to compete in providing products that connect directly to digital cable systems that are protected by conditional access technologies, and for the establishment of a “level playing field” that would give innovative, competitive products a fair chance to succeed in the marketplace.

Ever since the FCC required all navigation device providers ultimately to rely on a common security interface,² this issue has been an object of controversy between the consumer electronics and cable industries. CEA and CERC members were concerned that the MSO reliance date was set too far in the future to have the anticipated effect of making POD reliance commonplace, bringing volumes up, and costs down.³ The National Cable & Telecommunications Association (“NCTA”) and its suppliers have argued against the necessity of this requirement,⁴ challenged the FCC’s jurisdiction to enforce it, and still resist it. Despite progress, cooperation, and trust in other areas,⁵ each camp views this issue as governing future innovation: MSOs see products that avoid use of the common interface as a possible element of their own future innovation. CE manufacturers and retailers are concerned that future programming and service innovations that bypass the common interface and are *not* available in competitive products will keep them forever playing catch up, as they are now, in striving to achieve interactive capabilities that MSO-provided devices already enjoy. Worse yet, they are concerned that this “interface divide” could keep them struggling to establish any foothold in the market, as they are trying to do now with non-interactive, “Phase I” products. It is with these

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, Report and Order (Rel. June 24, 1998) (“1998 Report & Order”) ¶ 49.

³ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Petition for Reconsideration of the Consumer Electronics Manufacturers Association (“CEMA”) (Aug. 17, 1998) at 1-11; Circuit City Stores, Inc. Opposition to Petitions for Reconsideration (Sept. 23, 1998) at 2-15; Reply to Oppositions to the Petition for Reconsideration of CEMA (Oct. 5, 1998) at 3-7; *see generally* Reply of Circuit City Stores, Inc. to Comments on and Oppositions to Petitions for Reconsideration (Oct. 5, 1998); Letter from Robert S. Schwartz to Magalie R. Salas, Office of the Secretary, FCC (Mar. 4, 1999).

⁴ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Reply Comments of NCTA (Feb. 20, 2003) at 35-41; Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 13, 2003); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of NCTA (Mar. 28, 2003).

⁵ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Further Notice of Proposed Rulemaking (Rel. Jan. 10, 2003).

considerations in mind that the FCC requested periodic status reports, and then these public comments.⁶

I. THE FCC WAS CORRECT IN PLANNING FOR COMMON RELIANCE ON A STANDARD SECURITY INTERFACE.

In its first Report & Order the Commission, based on an 18 – 24 month procurement cycle after the June 1998 release date, chose July 1, 2000 as the date on which MSOs were required to provide PODs to support competitive entrant products. It chose January 1, 2005 as the date on which new MSO-provided devices must also rely on the common security interface and on PODs. In support of its choice of the 2005 date, the Commission said:

“We agree with those commenters who note that integration [of the security interface] is an obstacle to the functioning of a fully competitive market for navigation devices We anticipate that subscribers who obtain their boxes from their MVPD will obtain the security module at the same time, and will not notice a functional difference between integrated and non-integrated boxes. In the year 2000, once separate security modules are available, we will assess the state of the market to determine whether [the 2005] time frame is appropriate and we will review the mechanics of the phase out of integrated boxes.”⁷

In its May, 1999 Order On Reconsideration, the Commission responded to MSO and supplier objections based on POD cost by pointing out that widespread use and volume production would bring prices down for everyone:

“Allowing MVPDs the advantage of being the only entity offering bundled boxes could adversely affect the development of this equipment market. *** We agree that cost savings in bundled equipment have not been specified and are in any event ***likely to be offset by the manufacturing savings an open, competitive market offers***. For example, the *Navigation Devices Order* notes that the ***requirement to separate security should lead to lower equipment costs by increasing portability, which increases the market base and facilitates volume production***.”⁸

⁶ Apr. 25, 2003 FNPRM.

⁷ 1998 Report & Order ¶ 69.

⁸ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order on Reconsideration (Rel. May 14, 1999) (“1999 Order on Reconsideration”) ¶ 30 (emphasis added).

The Commission in subsequent proceedings⁹ has cited the positive effects of widespread use and volume production in spurring innovation and bringing down prices, and reasonably expected it to occur with respect to PODs and navigation devices. However, these advantages have not yet been achieved in the United States ***because the MSO POD-reliance date is still not within the 18 – 24 month procurement cycle cited by the Commission.*** Anticipating this problem due to the gap between 2001, when a trickle of entrants might need PODs, and 2005, when MSOs themselves would use them, CEA and CERC members on reconsideration urged the Commission to move the MSO reliance date up to 2000. The FCC responded:

“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. *** [O]nce 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.***”¹⁰

A. Experience Teaches That Reliance Provides The Best Incentives.

Without re-visiting old controversies, CEA and CERC believe that the following observations, in 2004, are sound:

- The FCC was correct in citing widespread use, volume production, and wide reliance as necessary to bring down product costs and spur innovation, competition, and quality.
- The FCC hoped, but did not trust, that a mandate to supply PODs for use by the products of *others* would be sufficient to produce these beneficial results.

⁹ The Commission subsequently applied the same economic analysis in its “dual tuner” order. *In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, Second Report and Order and Second Memorandum and Order (Rel. Aug. 9, 2002).

¹⁰ 1999 Order on Reconsideration ¶ 33 (emphasis added).

- The FCC recognized that the MSO POD reliance date was clearly related to support for PODs and development of the market for navigation devices.
- But in the absence of any such acceleration or reliance, in 2003 cable industry suppliers were still describing to the Commission the costs of first-generation products,¹¹ whereas producers for other world markets were quoting advanced generation products at a fraction of the price.¹²

For reasons that are controversial but essentially irrelevant today, the market for the navigation devices on which the MSOs themselves rely bloomed; whereas development of both PODs and POD-reliant products stagnated until the recent “Plug & Play” breakthrough. The Commission’s reason for not moving the 2005 reliance date closer to the POD introduction date – “We do not believe that MVPDs will be able to use the transition period to establish a monopoly in the equipment market” – turned out to be false optimism. *Without the added element of reliance by the MSOs themselves, POD testing and development in the United States crept rather than blazed.*

B. The “POD” (“CableCARD”) Is An Essential Element To Any “Level Playing Field”

Although there has been substantial progress since December 2002, the reliance on a common security interface is a keystone for continued progress in the future. As several Commissioners have noted, “Phase I” of the Plug & Play agreement aims at providing, in competitive products, program and information delivery functions that existing MSO-provided devices have surpassed for several years. Although it is a major breakthrough to be able to plug consumer electronics products directly into digital cable systems and thus obtain *most* of the programming, *every way in which a competitive product must differ from MSO-provided*

¹¹ Letter from Neal M. Goldberg, General Counsel, NCTA, to W. Kenneth Ferree, Chief, Media Bureau, FCC, and Declarations of Kevin S. Wirick and William E. Wall, CS Docket No. 97-80 (Jan. 7, 2003); Letters from Neal M. Goldberg to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 6, 2003, Mar. 10, 2003, Mar. 13, 2003, Mar. 14, 2003, Mar. 24, 2003 and Mar. 25, 2003).

¹² Letter from Robert S. Schwartz to Marlene H. Dortch, Office of the Secretary, FCC, and Declaration of Jack W. Chaney, CS Docket No. 97-80 (Aug. 15, 2002); Letter from Robert S. Schwartz to Marlene H. Dortch, Office of the Secretary, FCC, and Declarations of Colas Overkott and Jack W. Chaney, CS Docket No. 97-80 (Mar. 4, 2003); Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 18, 2003); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Ex Parte* Filing of CERC Re Retention of POD Reliance (Mar. 20, 2003); Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 25, 2003).

products retards competition. Only by reaching *equality* of the functions and services delivered can the Phase II, interactive framework finally achieve competitive parity and success.¹³ The Commission recognized this fact when, in its April 25, 2003 FNPRM, it required 90-day reports on Phase II progress as a prelude to revisiting the common security interface issue.¹⁴

II. ALTHOUGH GREAT PROGRESS HAS BEEN MADE, NOTHING HAS CHANGED SINCE APRIL 25, 2003 TO JUSTIFY MOVING THE COMMON RELIANCE DATE BACK BEYOND JULY 1, 2006.

CEA has been pleased to report significant progress on Phase II, but has not been able to report any development or factor that would obviate the need for future reliance on a common security interface.

A. As Reported, the CE and Cable Parties Have Devoted Great Time And Attention To Testing Issues.

As both CEA and NCTA noted in their January 2004 reports, much of the time that the cable and CE parties had hoped to devote to Phase II discussions had to be allocated instead to discussion of test suite and other Phase I implementation issues, as well as – once the Phase I framework was published for comment – to communications with other interested parties, and with the Commission itself.¹⁵ Despite the occasional controversies re testing that were noted in the January CEA report, the parties proceeded constructively, and succeeded in resolving their differences by the time testing of “Phase I” products at CableLabs began this week.

One lesson from the test development discussions, and the trials of test equipment and devices, including PODs, is that with the best of intentions the “learning curve” is inescapable. There is simply no substitute for doing a task under circumstances where success is essential. Repetition, volume, and reliance breed innovation and success. In other contexts, cable operators have argued that network integrity is essential for their business, whereas navigation

¹³ 47 U.S.C. § 549. Section 629 requires FCC regulations to assure competitive commercial availability of devices to receive *any* service offered by an MVPD, even though it might not be an MVPD service.

¹⁴ Apr. 25, 2003 FNPRM ¶ 5.

¹⁵ Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Office of the Secretary, FCC, Re: Status Report of NCTA, CS Docket No. 97-80 (Jan. 21, 2004); Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, Re: CEA Status Report, CS Docket No. 97-80 (Jan. 21, 2004).

devices are mere brand extensions for CE manufacturers.¹⁶ While CE manufacturers and retailers would take issue with this apportionment of commercial risk, the underlying argument applies to PODs as well: *if the common security interface and its components are regarded by MSO networks as essential, they will be developed with commensurate scope, scale, creativity and investment. If they are not regarded by MSOs and their suppliers as essential to their own businesses, they cannot possibly benefit from a comparable learning and investment curve.*

B. The “Interactive” Discussions Are Proceeding Earnestly But Many Parties Must Be Consulted.

Achieving true headend interactivity in Phase II devices while satisfying the concerns of many more interested parties is daunting, but it is an opportunity to which consumer electronics manufacturers and retailers have looked forward for decades. Several industries are out to achieve or preserve “level playing fields” *vis a vis* rivals. It is here that the consumer electronics and information technology industries are trying to “level” the playing field at the conference table while they are still trying to *enter* it in the test laboratory and in the marketplace. *The consumer electronics parties see a common security interface as a necessary element to competitive parity with MSO-provided devices.*

After the 1998 Report & Order and the 1999 Order On Reconsideration, CERC and its members, confident in the beneficial effect of the common security interface once this requirement is brought within the 18 – 24 month procurement cycle, argued that the Commission should require similar parity in *other* elements of the navigation device technical standards, because a single failed essential element could doom competitive entry. CERC argued, in a 2002 *ex parte* letter,¹⁷ that a chain is only as strong as its weakest link – that MSO reliance on “OCAP” middleware, in addition to reliance on the common security interface, was essential to assuring adequate development and support for the tools on which competitive products would

¹⁶ *In re Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of NCTA (Feb. 13, 2004); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of NCTA (Feb. 13, 2004) (“Feb. 13, 2004 NCTA Comments”).

¹⁷ Letter from Robert S. Schwartz to William F. Caton, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 21, 2002). This letter is indexed by the FCC’s “ECFS” software at its proper date, but due to a typographical error on its cover page was cited at n.10 of the FCC’s April 25 FNPRM as dated March 21, 2001. The correct date of this letter is March 21, 2002; CERC regrets the error.

rely. It is ironic that, now that the CE and Cable industries seem to be moving toward common reliance on “middleware” to achieve true national portability of devices, the previously solid common security interface “link” is in jeopardy.

CEA and its members have also always regarded the common security interface as essential to hitting the moving target of MSO-device functionality. Already, in Phase I, CEA has had to comment on FCC concerns over whether consumers will be adequately informed that CEA members’ newest, highest value-added (and in many cases most expensive) products cannot perform certain functions that far cheaper MSO-provided devices have performed for years. CEA is concerned that breaking the common security interface link would require that an apology and consumer caution attach to every new DTV and HDTV multipurpose device or display product: *caution; certain cable system functions have been designed to work only on cable-operator-supplied devices*. This would pertain not to “legacy” CE devices, but to state of the art, cutting edge, interactive, Phase II devices – *if* the Commission revokes or further postpones the effect of its regulation that competitive and MSO-provided devices share a common security interface.

By way of example, even when POD production reaches sufficient volume to drive down costs and spur other manufacturing and packaging innovations, POD design itself cannot remain static without consigning POD-reliant devices to backwater status. PODs may need to be offered to deal with multiple streams and different connection formats for physical and electronic connections. Completely new services will be deployed on cable systems in the future that will have to interoperate with PODs – at least, not conflict with PODs – or else POD-equipped devices will be unable to receive them. Every such innovation will require intensive work on design, development, testing, and “debugging.” If such attention is apportioned to the POD by companies not planning to rely on PODs in their own products or on PODs to carry their own programming or services, this work cannot possibly receive the necessary resources or priority. Even more seriously, if the work is to be done only as an *emulation* of work that is first planned

and developed in a context *other* than the common security interface, it cannot possibly be timely, and the odds are against device functionality ever being equivalent.¹⁸

C. Maintaining A Fixed Target For Common CableCARD Reliance Will Provide An Essential “Level Playing Field” Element.

CE industry confidence in a future in which local cable operators could still base their future plans on devices with proprietary security was not heightened by NCTA Reply comments in the Broadcast Flag proceeding. The FCC interpreted these comments as envisioning the use of a proprietary “gateway” device in order to run home networks via proprietary headend source encryption.¹⁹ This proposal, which would leverage embedded security to restrict home network competition, moves the CE industry’s concern over separate, non-equal security interfaces out of any realm of projection, and well into the present tense. This idea seems but one example of the ways in which *business incentives offered by non-common security regimes would be pursued by local cable operators*. The FCC can regulate competitive conditions and regulations, but it cannot change human and business nature. If business incentives dictate exploiting unique security, cable operators will do so – not necessarily to avoid competition, but nevertheless at the expense of competitive device entry. This is precisely the circumstance that the Congress sought to change in enacting Section 629.

D. Advances In Technology Continue To Bring CableCARD Acquisition Costs Down, And To Increase Flexibility Of Implementation.

The *ex parte* filings made by CERC, CEA and SCM Microsystems in the first quarter of 2003 demonstrated what efficiencies and cost productions can be wrought, and in fact have already been achieved, by investment and volume production.²⁰ These filings also demonstrate

¹⁸ For example, “Mac” users who have tried PC emulator software have never seen it approach PC performance, functionality, or timeliness.

¹⁹ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Reply Comments of NCTA (Feb. 20, 2003) at 4-7; *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rulemaking (Rel. Nov. 4, 2003) (“Broadcast Flag Order”) ¶ 59. CEA and CERC hereby incorporate by reference the concerns expressed in their respective February 13, 2004 Comments addressed to such a home architecture.

²⁰ Letter from Robert S. Schwartz to Marlene H. Dortch, Office of the Secretary, FCC, and Declaration of Jack W. Chaney, CS Docket No. 97-80 (Aug. 15, 2002); Letter from Robert S. Schwartz to Marlene H. Dortch, Office of the Secretary, FCC, and Declarations of Colas Overkott and Jack W. Chaney, CS Docket No. 97-80 (Mar. 4, 2003); Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80

(continued...)

that the single factor most resistant to cost reduction was the licensing cost for conditional access security, which could vary from zero to \$20 per unit. Thus, if only one conditional access scheme can be used per system, the system's use of legacy devices requiring expensive CA could impose unnecessary costs on PODs.

The use of PODs, however, provides the flexibility for MSOs to avoid embedded licensing costs that pertain to devices already in the field. According to press reports, tests of the Sony "Passage" technology have demonstrated that more affordable (but no less effective) conditional access technologies can be run on systems that also support legacy CA devices.²¹ Thus, new PODs would not be obliged to use old, expensive CA. This will allow their costs to fully reflect the learning curve and mass production efficiencies demonstrated, for example, in the SCM filing. The benefit here is multifold:

- As the Commission foresaw in 1999, PODs' volume production and innovation will lead to dramatic price reductions, making the cost of POD reliance less of a factor than the competitive efficiencies that will be gained via such reliance.
- Reliance on PODs by the MSO devices will push costs further down and innovation and reliability up.
- As MSOs seek new ways to innovate in their services, PODs and interfaces will develop accordingly. If insulated from such innovations, POD technology will become a bottleneck, and limiting factor, on the development of competitive products -- renewing calls for more intrusive FCC regulation.

III. CONCLUSION – THERE IS NO SUBSTITUTE FOR COMPETITIVE INCENTIVE.

The Commission had it right in 1998 and 1999 – it is better to give MSOs a business incentive to support a technology by ensuring that they must rely upon it in their own devices

(Mar. 18, 2003); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Ex Parte* Filing of CERC Re Retention of POD Reliance (Mar. 20, 2003); Letter from Michael D. Petricone, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 25, 2003).

²¹ Matt Stump, *Sony Passes Comcast Test*, Multichannel News, Feb. 9, 2004; *Comcast Is Second MSO To License Sony 'Passage' Platform*, NCTA Cable 2003 Daily, June 10, 2003. See, e.g., http://www.cedmagazine.com/ncta03/NCTA_two.pdf.

than to attempt to keep the technology available and functional through regulation. The only flaw in the Commission's plan was that the FCC set the date on which these incentives would kick in too far into the future – well outside the 18 – 24 month product development cycle -- so the date failed to provide the necessary incentives. As July 1, 2006 approaches, the Commission should not repeat its mistake.

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