

**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 ON PETITIONS FOR RECONSIDERATION

Microsoft Corporation (Microsoft), Hewlett-Packard Corporation (HP) and Apple Computer, Inc. (Apple) file these comments to address certain issues raised in the petitions for reconsideration of the Second Report and Order in the above-referenced proceeding (*Plug-and-Play Order*).¹ First, we encourage the Commission to develop a device self-certification program for Unidirectional Digital Cable Products. To the extent that the Commission determines that some mandatory third-party testing and certification of initial Unidirectional Digital Cable Products or decoder components (and cable-ready DTVs) remains necessary at this time, we have some concerns about the standards proposed by the National Cable and Telecommunications Association (NCTA) for a qualified testing facility. We propose modified and additional standards designed to ensure more fully the competency, transparency and

¹ To the extent that the reconsideration petitions raise issues that are also implicated in the pending Second Further Notice of Proposed Rulemaking (*Plug-and-Play Further Notice*), we incorporate the relevant portions of the IT Industry Commenters' comments thereon and urge the Commission to take into account the full record developed in response to the *Further Notice* in resolving the petitions for reconsideration. But see note 3, *infra*, noting some of the differences between the issues raised in the *Further Notice* and on reconsideration.

neutrality of authorized testing programs. Second, we object to DIRECTV's request that the Commission apply the encoding rules applicable to content delivered over multichannel video programming systems to all digital content distribution methods, including the Internet. In addition to raising significant jurisdictional questions, DIRECTV's proposal could undermine much of the promise afforded by the Internet and other digital content distribution technologies.

I. Any Unidirectional Digital Cable Product Testing Program Must Meet Minimum Standards of Technical Competency, Transparency and Neutrality.

We understand NCTA's need, as the nascent retail market for digital cable products is launched, for assurance that Unidirectional Digital Cable Products (and cable-ready DTVs) will properly tune and, where applicable, display cable services without threatening cable system security. Device manufacturers realize that it is in their own interest to confirm the proper functioning of their products before putting them into the market. However, we do not believe that this assurance necessarily must come from mandatory testing of Unidirectional Digital Cable Products conducted by an entity exclusively representing the cable industry. Indeed, entrusting Unidirectional Digital Cable Product testing to a program with a singular focus on the relatively narrow expertise and business interests of the cable industry could threaten the flexibility and functionality of devices, like PCs, that incorporate valuable features and functions unrelated to the display or distribution of cable content. Accordingly, we encourage the Commission to consider whether appropriate self-certification guidelines can be developed to enable manufacturers to test their own devices for compliance with the applicable test suite.² To the extent that the Commission believes that third-party testing remains necessary

² See the IT Industry Commenters' comments on the *Plug-and-Play Further Notice* for a discussion of the need for greater flexibility in developing and determining the test suite applicable to particular Unidirectional Digital Cable Products.

at this time, we propose alternative guidelines for entities that will be performing testing and certification of Unidirectional Digital Cable Products.³ These guidelines provide greater assurance than those proposed by NCTA that Unidirectional Digital Cable Products will be tested fully and fairly, according to objective and transparent criteria and procedures, in a manner that protects the interests of all the affected parties (including cable operators, consumers, content providers, technology developers and manufacturers).

As an initial matter, we encourage the Commission to examine whether the test suites developed for Unidirectional Digital Cable Products are or could be made sufficiently detailed so as to enable manufacturers to self-test and self-certify their Unidirectional Digital Cable Products as compliant with applicable technical requirements. The Commission permits device self-certification in other contexts, such as Part 15 unlicensed devices, and similar procedures may well be appropriate for Unidirectional Digital Cable Products. Indeed, the rules adopted by the Commission already contemplate that manufacturers will self-determine the compliance of all Unidirectional Digital Cable Products they produce after the first model. It may not even be necessary for that first model to be subject to mandatory third-party testing.

If the Commission determines that some third-party testing remains necessary, we ask the Commission to clarify that the first “device” certified need not be a full Unidirectional Digital Cable Product, but could be a device subsystem, providing Unidirectional Digital Cable Decoder functionality, that will be incorporated in a number of device models. Allowing testing

³ We note that the question of which entity should test and approve Unidirectional Digital Cable Product devices is distinct from the question of which entity should be responsible for reviewing and approving digital output and recording technologies for use in Unidirectional Digital Cable Products. Although principles of fairness and neutrality cut across both questions, there are different factors to be considered in evaluating each. We address the device testing question here; the technology approval question is addressed in the IT Industry Commenters’ comments on the *Plug-and-Play Further Notice*.

and certification of only the relevant portion of a Unidirectional Digital Cable Product could simplify the testing process and avoid some of the complexities that are possible when the device in which the decoder subsystem will be incorporated in a PC or similar open platform device including many features and functionalities unrelated to the receipt or display of cable programming. In addition, certifying the subsystem could help to expedite the DTV rollout and transition by creating flexibility for device manufacturers to assemble various configurations more rapidly to meet the evolving and increasingly diverse needs of consumers.

Finally, we encourage the Commission to clarify that, where third-party testing and certification remains mandatory, any entity employing a process meeting specific standards of technical competency, transparency and neutrality will be eligible to test and certify Unidirectional Digital Cable Products. The Commission should establish a procedure for authorizing testing programs that satisfy the applicable standards, which should be sufficiently broad that they encompass entities other than CableLabs. Not only will the availability of multiple testing facilities promote fairness and efficiency in the testing process, but it will mitigate the risk of testing bottle-necks, particularly as manufacturers push to get devices into the marketplace for the winter holidays and other major retail periods. To expedite the DTV transition, the Commission should seek to foster an environment that facilitates the introduction of a growing number of products in various configurations from an increasing number of companies. Relying on a single testing facility to certify each manufacturer's complete products could significantly impede the introduction of new products from new manufacturers.

To the extent the Commission maintains a third-party testing requirement, we recommend that the Commission adopt standards for Unidirectional Digital Cable Product testing programs addressing technical competency, transparency and neutrality. With respect to

competency, we agree with NCTA that a testing program must possess or have access to the headends and other equipment necessary to test fully all the elements of a Unidirectional Digital Cable Product required for proper functionality and security. Testing also must be conducted according to transparent procedures and processes that allow the manufacturer (1) to understand, before choosing a testing program and submitting a product for testing, how, by whom, and according to what time frame the testing and certification will be performed and (2) to participate meaningfully in the testing process (so that the manufacturer can (i) understand and respond to questions that will help the testing entity develop a thorough understanding of the product and (ii) remedy as quickly as possible any problems the product has in satisfying the applicable test suite). Finally, the testing program must guarantee neutrality in the testing process and certification decisions. Guaranteeing neutrality means that the testing procedures and certification decisions must not be controlled by any single affected industry. NCTA contends that manufacturers should not be involved in testing because they have too much stake in the outcome.⁴ But a testing program controlled by the cable industry is problematic as well. The singular focus of such a program on the relatively narrow expertise and business interests of the cable industry could threaten the flexibility and functionality of devices, like PCs, that perform valuable functions unrelated to the receipt of cable service.

Instead, we urge the Commission to put in place a framework that allows multiple entities to become certifiers and outlines the necessary measures a testing program must take to guarantee neutrality in testing procedures and certification decisions. This will ensure that new

⁴ See Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, CC Docket No. 97-80, PP Docket No. 00-67, at 13 (Dec. 29, 2003) (“[T]he party performing the testing should not be employed by, or affiliated with, manufacturers of products of the type being tested.”).

entrants will know both what they need to do to obtain certification of digital cable ready products and the time frames within which they will need to plan for product introductions and marketing. This approach will further the Commission's goal of promoting a vibrant competitive market for a diverse array of digital cable products.

The CableLabs Unidirectional Digital Cable Product testing program, while apparently the only program in the country currently possessing the necessary technical competency to test Unidirectional Digital Cable Products, does not meet our proposed standards for transparency and neutrality. Testing occurs in scheduled "certification waves" during which manufacturers submit devices for testing by CableLabs technical personnel. Certification waves take place on the schedule set by CableLabs, and there is virtually no manufacturer participation in the testing itself. This exclusion of manufacturers from the official testing process inevitably affects the manufacturers' ability to understand the reasons for a device's failure to achieve certification and could prevent the manufacturer from correcting problems during testing (as opposed to in a subsequent certification wave). Even more significantly, the "independent verification panel" responsible for making all final decisions concerning certification of Unidirectional Digital Cable Products consists solely of representatives of CableLabs' member cable system operators. This single-industry panel simply cannot be expected to weigh adequately all the relevant interests and issues.⁵

Because CableLabs is the only facility currently technically capable of testing Unidirectional Digital Cable Products, of which we do not want to see any further delay in

⁵ CEA also has highlighted a number of lingering issues in its efforts to work with CableLabs to develop acceptable testing procedures for Unidirectional Digital Cable Products. *See* Consumer Electronics Association Status Report, CS Docket No. 97-80, at 2 n.2 (Jan, 21, 2004).

deployment, we are not asking the Commission to address the problems in the CableLabs Unidirectional Digital Cable Product testing program by declaring the program unqualified to continue testing. Instead, we are asking the Commission either to permit self-certification of Unidirectional Digital Cable Products or to order CableLabs to modify its testing program to bring it into compliance with the transparency and neutrality standards proposed herein.

Specifically, the Commission should require CableLabs:

- to publish detailed testing procedures and make them available to all manufacturers considering submitting a product for testing as a Unidirectional Digital Cable Product;
- to allow manufacturers to participate in testing or, at a minimum, to provide manufacturers with a detailed report of their test results specifying the reasons the device passed or failed the tests;
- to reconstitute the independent verification panel to include representatives from all stakeholders. Panel members can be required to adhere to written agreements to protect confidentiality and to avoid conflicts of interest. Participation of representatives encompassing multiple interests should further prevent manufacturers from making unfair decisions favoring their own products or disfavoring competitors' products; and
- to establish a mechanism through which manufacturers and other interested parties may seek Commission review of CableLabs' device certification decisions.

These requirements are necessary in the short term, in the absence of a self-certification program, to ensure the fairness of the Unidirectional Digital Cable Product testing program. At such time as the Commission permits device self-certification or additional entities emerge with the necessary technical resources and qualifications to test Unidirectional Digital Cable Products (and manufacturers thus have alternatives to submitting products to CableLabs), the Commission may revisit the question of whether it remains necessary to continue to impose these or similar requirements on what would then be an available, but not mandatory, CableLabs Unidirectional Digital Cable Product testing program.

II. The Encoding Rules Should Not be Applied to Digital Content Distribution Methods Other than Multichannel Video Programming Systems.

In its Petition for Reconsideration, DIRECTV asks the Commission to apply the encoding rules adopted in the *Plug-and-Play Order* to “all digital content distribution methods, including the Internet (whether via cable modem, DSL or other mechanism) and digital recorded media such as DVDs.”⁶ In addition to raising significant jurisdictional questions, we do not believe that this proposal would serve the best interests of consumers or the economy as a whole.

The Commission has jurisdiction over “all interstate and foreign communication by wire or radio.” 47 U.S.C. § 152. This clearly does not include the regulation of recorded DVDs. The Commission has also never before held that its jurisdiction over wire communications extends to permit regulation of content delivered over the Internet.⁷ None of the issues at stake in this proceeding justifies so extending the Commission’s jurisdiction here. The Commission’s stated goals are to advance the DTV transition and implement Section 629 of the Communications Act, which requires the Commission to adopt rules to promote the commercial availability of navigation devices used to access services offered over multichannel video programming systems. There is no indication, and DIRECTV does not argue, that

⁶ Petition for Reconsideration of DIRECTV, Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 5 (Dec. 29, 2003).

⁷ See, e.g., Statement of Chairman Powell, *Petition for Declaratory Ruling* (pulver.com), WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004) (“[R]egulation of Internet applications . . . is not only inconsistent with the network architecture of the Internet, but also with Congress’s directive to ensure the Internet remains free of unwarranted federal or state regulation.”); *id.* (“Our ruling formalizes the Commission’s policy of ‘non-regulation’ of the Internet and, in so doing, preserves the Internet as a free and open platform for innovation.”); *Reno v. ACLU*, 521 U.S. 844, 867 (1997) (noting that the Internet does not have the indicia of broadcasting that makes it amenable to content regulation); Jason Oxman, FCC OPP, *The FCC and the Unregulation of the Internet*, (July 1999) (“Even though there are calls from numerous sources for the FCC to regulate the Internet, the Commission has a thirty-year tradition of encouraging its open and unregulated growth.”).

applying encoding rules to all content distributed over the Internet and to recorded DVDs will do anything to advance these goals.

More importantly, granting DIRECTV's request could undermine some of the very features of the Internet that have made it a significant driver of economic development in recent years and that, more importantly, provide great promise for the future. Among the most promising features of the Internet and other digital content distribution technologies is the potential for the emergence over time of diverse business models that will increase consumer choice, enhance the digital media experience and promote economic growth. A blanket rule limiting the distribution and control of content over the Internet would stifle the development of those business models without offering any benefits related to the goals of this proceeding.

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In accordance with the foregoing, we urge the Commission to develop a device self-certification program or, in the alternative, to adopt requirements for third-party Unidirectional Digital Cable Product testing programs that will assure their competency, transparency and neutrality and promote the development of a marketplace with multiple qualified certifiers. We also recommend that the Commission reject DIRECTV's proposal to apply encoding rules to all digital content distribution methods, including over the Internet.

Respectfully submitted,



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