

**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 REPLY COMMENTS**

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These Consumer Electronics Industry Reply Comments are addressed to the Commission’s Further Notice Of Proposed Rulemaking in Docket No. 97-80 of April 25, 2003, and the Comments filed thereon on February 19, 2004.¹

Ever since the Commission released its first Report & Order in its navigation device proceeding,² the Consumer Electronics Parties, the Consumer Electronics Association (CEA) and the Consumer Electronics Retailers Coalition (CERC), have been urging the Commission to advance the date, originally set at January 1, 2005, on which cable MSOs would be obliged to rely on the security interface that they and their agents had crafted for competitive entrants to the navigation device market. Cable interests and their CableCARD suppliers – who are also the incumbent suppliers of the devices with which the consumer electronics parties seek to compete – resisted such advancement, and ultimately pushed for outright repeal of this regulation. In the latest round, in Comments responding to the Commission’s April 25 FNPRM on the subject, the Consumer Electronics Parties argued that the only reason CableCARD suppliers lack confidence in their ability to supply these modules at reasonable prices and high volumes is that the MSO “reliance date” has never been allowed to move within the 18 – 24

¹ *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, Consumer Electronics Industry Comments at 11 (Feb. 19, 2004).

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) (“June 24, 1998 R & O”).

month procurement cycle for navigation device products.³ In these Comments, the Consumer Electronics Parties urged the Commission finally to allow this marketplace incentive to take effect. The National Cable & Telecommunications Association (“NCTA”), in its own filing,⁴ did not advance any persuasive reason why it should not.

I. NOTHING SIGNIFICANT HAS CHANGED SINCE 1998; THE CABLECARD WAS ENVISAGED AND DESIGNED FOR DIGITAL PRODUCTS; THE NEED FOR RELIANCE ON A COMMON INTERFACE PERSISTS.

NCTA would like at present to persuade the Commission that the POD (now, “CableCARD”) was an old solution to an old, analog problem, and that things have changed since this solution was formulated. The Consumer Electronics parties wish this were the case. Unfortunately, with respect to the need for a common security interface, little of consequence has changed since, in 1997 and 1998, NCTA, CableLabs, and several MSOs offered to supply PODs for digital cable systems.

A. The “POD” Interface Was Explicitly Designed For Digital, Not Analog, Systems.

NCTA’s present characterization of the CableCARD as a digital solution to an analog-era problem is at severe variance with what NCTA has consistently told and asked the Commission:

- When the 1998 Report & Order required common security interfaces for analog as well as digital cable programming services,⁵ the NCTA petitioned for reconsideration, arguing that *the security interface should be a digital-only issue*.⁶
- Private sector discussions led by CERC and CEA resulted in *consumer electronics and information technology parties* endorsing a modified version of the NCTA reconsideration petition and helped persuade the FCC to remove, subject to certain conditions, the mandatory obligation to provide a common security interface for analog programming, *to allow cable operators to concentrate on implementing the common*

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, Comments of Consumer Electronics Association and the Consumer Electronics Retailers Coalition (Feb. 19, 2004) (“Feb. 19, 2004 Comments of the Consumer Electronics Parties”).

⁴ *Id.*, Comments of NCTA (Feb. 19, 2004) (“Feb. 19, 2004 Comments of NCTA”).

⁵ June 24, 1998 R & O ¶ 49.

⁶ *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 Expedited Reconsideration at 7 (Aug. 14, 1998).

*security interface for digital programming.*⁷ The FCC granted this petition subject to these conditions.⁸

- After the Commission had granted this reconsideration petition,⁹ CableLabs stopped (or did not begin) work on any separate security interface for analog programming. NCTA and CableLabs had, with help from CE and IT interests, achieved their objective *that the POD be considered a 100% digital interface, for digital programming only.*

Hence, the NCTA argument, now, that the CableCARD is a solution aimed at an analog era problem is plainly contrary to the record in this proceeding and should be given no weight.

B. The NCTA “Retail Initiative” Makes MSO Reliance More, Not Less, Important.

The NCTA Comments are circumspect about re-opening old controversies pertaining to the 2001 “Retail Initiative For Integrated Boxes;” the Consumer Electronics Parties will do likewise.¹⁰ Nevertheless, there is no question that:

- The point of this initiative was to avoid rather than invite POD reliance by setting rules for those MSOs who might furnish non-POD-reliant products to retailers.
- To the extent successful, this initiative would have provided less, not more, reason for MSOs to plan products and services that rely on the security interface for competitive products.
- As NCTA suggests, it is difficult to ascribe any real-world effect to this initiative; retailers and cable operators have forged commercial ties on a relatively *ad hoc* basis.
- There is no record of MSOs having declared that the commercialization of integrated security techniques is open to competitive manufacturers and retailers on the same or on a similar basis as it is to cable MSOs and their suppliers.

Accordingly, it seems a stretch to argue that this Initiative signified any change since 1998 that would justify the repeal of the Commission regulation. If anything, it demonstrates that an earlier effective date for the Commission regulation was necessary, so as to move MSOs *toward* rather than *away* from the support of CableCARD-reliant devices.

⁷ Letter from Robert S. Schwartz to Magalie R. Salas, Office of the Secretary, FCC, CS Docket No. 97-80 (Mar. 4, 1999).

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 ¶ 13 (Rel. May 14, 1999).

⁹ *Id.*

¹⁰ For spirited discussions on this point, *see* Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (June 4, 2002); Letter from Robert S. Schwartz to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Aug. 1, 2002).

C. MSO Suppliers' CableCARD Costs and Development Stages Remain Essentially Where They Were In 1998 Due To Lack Of MSO Reliance.

The NCTA citation to the cost estimates it forwarded a year ago also shows that not enough has changed since 1998.¹¹ As the Consumer Electronics Parties argued in their February 19 Comments, the submissions from the MSOs' vendors were indicative of first-generation product development, whereas the overseas-based provider cited by the Consumer Electronics Parties was working on third and fourth generation products, and quoting cost figures that were a small fraction of those of the MSOs' vendors.¹²

There was no change in the domestic POD learning curve since 1997 because it was irrelevant to MSO procurement practices.¹³ Meanwhile, the learning curve for MSO-procured devices with embedded security proceeded apace. Therefore, it is simply incorrect for the NCTA to isolate and cite "integrated" vs. "separate" costs without reference to (1) the learning curve and volume effects of MSOs having chosen not to rely on CableCARDS themselves, (2) the beneficial effects of competition, for the "MSO" and "competitive" markets alike, once all entrants are given the opportunity to offer products with the common security interface, (3) the opportunity that use of CableCARDS opens for the use of newer and less expensive headend encryption,¹⁴ (4) savings from the ability to physically renew the descrambler and authentication circuitry, and (5) the beneficial effects on competition when competitive devices are available for the newest and most innovative MSO services – which, without a CableCARD reliance requirement, are likely to be introduced or offered only via non-CableCARD devices that lock out competition and thus retard innovation.

Therefore, it is not at all clear, and should not be taken as established for the record, that there will be any net increase in consumer costs as a result of MSOs relying on CableCARDS in

¹¹ *E.g.*, Letter from Neal M. Goldberg to W. Kenneth Ferree, Chief, Media Bureau, FCC, CS Docket No. 97-80 (Jan. 7, 2003).

¹² *E.g.*, 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).

¹³ The Consumer Electronics Parties noted in their February 19, 2004 Comments, p. 4, n. 9, that the FCC previously has given decisive weight to learning curve considerations.

¹⁴ *See* Consumer Electronics Industry Comments at 10.

their new devices. Nor is it yet clear whether MSOs will hinder early CableCARD acceptance by attempting to load the early costs on early adopters, or whether the Commission would allow this practice.¹⁵

II. NCTA’S ARGUMENTS RE DBS ILLUSTRATE WHY IT IS NECESSARY FOR ALL NAVIGATION DEVICES TO RELY ON CABLECARDS, IF CE AND IT MANUFACTURERS ARE TO HAVE A FAIR CHANCE TO ENTER AND COMPETE.

The NCTA argument based on the purported superior flexibility of DBS systems also tends to document why competitive CE and IT entrants need for MSOs to rely on CableCARDS if these entrants are to achieve and maintain competitive parity. This is especially the case in the “Phase II,” interactive context that the NCTA comments discuss.¹⁶

A. In Other Contexts, NCTA Cites DBS Security Experience As Negative.

First, it seems ironic that NCTA would make a positive reference, here,¹⁷ to DBS security experience and options, because in other contexts NCTA and its vendors have cited DBS systems, and their approach to conditional access, as *less* secure.¹⁸ In fact, DBS systems are different from *both* integrated MSO systems and CableCARD systems. In a DBS system, “authentication” is performed on the removable “smartcard,” whereas decryption remains integrated in the set-top-box. This arrangement has subjected DBS providers to particular challenges: it has been shown insufficient to physically renew only the “smartcard,” yet the descrambler chip cannot be renewed without remanufacturing the entire product.

The CableCARD interface was designed to be, and is, superior to DBS interfaces in terms of security, because both the descrambler circuitry and the authentication circuitry are on a card that can be made both highly secure and physically renewable. It is difficult to see what competitive or comparative advantage DBS providers would have or retain over cable providers

¹⁵ *Id.* at 9-10; see *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, Comments of the Consumer Electronics Retailers Coalition at 5 (Sept. 11, 2003).

¹⁶ Feb. 19, 2004 Comments of NCTA at 11-14.

¹⁷ *Id.*

¹⁸ *E.g.*, *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, Petition for Reconsideration or Clarification of NCTA at 8 (Dec. 29, 2003).

owing to any superior “flexibility” with respect to security. Certainly there is no evidence in the record that points in any such direction.

B. The Real “Flexibility” Sought By NCTA Is For MSO Services That Would Not Allow CE and IT Devices A Chance To Remain Competitive.

Since actual DBS security practice seems more, rather than less, constraining, the real thrust of the NCTA comparison to DBS can only be a desire to have “flexibility” to adopt new services and new means of delivery *without having to worry about supporting competitive device suppliers*, as NCTA apparently believes to be the case with DBS. This is precisely what the Consumer Electronics Parties are concerned about, particularly with respect to “Phase II.”

From the early days of their conversion to digital systems, cable MSOs have given priority to meeting the immediate needs of their own services, as implemented on their own devices. On the subject of supporting competitive interactive devices and national portability, this priority was candidly admitted – even advocated – in the round of FCC filings during the Commission’s “Year 2000 Review” of the implementation of Section 629.¹⁹ As the Consumer Electronics Parties observed in their February 19, 2004 Comments, this setting of priorities is natural and understandable in light of the present marketplace incentives.²⁰ Without the spur of a common reliance date, these incentives are simply not geared for cable MSOs to give equal weight to the products of competitive entrants when planning new services. It was to provide such an incentive that the Commission, in 1998²¹ and on reconsideration in 1999,²² maintained the “reliance” date. Nothing has changed to make this incentive any less necessary.

C. If DBS Providers No Longer Support Competitive Devices Or Seek A Competitive Advantage Based On An Ability To Discriminate, The Commission Has Jurisdiction To Deal With Any Such Issue.

NCTA does not supply for the record any example or scenario via which DBS providers can or will extend such superior control over their systems’ devices, with respect to security or anything else, that they will be able to steal a competitive march on cable MSOs. If NCTA were

¹⁹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of Comcast Cable Communications, Inc. at 3-5 (Nov. 15, 2000), and Comments of Charter Communications, Inc. in Response to Further Notice of Proposed Rulemaking at 2 (Nov. 15, 2000), as referenced in the Reply Comments of Consumer Electronics Retailers Coalition at 5-13 (Dec. 18, 2000).

²⁰ Consumer Electronics Industry Comments at 9.

²¹ June 24, 1998 R & O ¶ 69.

²² Order on Reconsideration ¶ 30.

aware of any such scenario, it could be addressed under Section 629, which, the Commission has confirmed, applies to all devices necessary to receive any MVPD services.²³ The Commission gave DBS a “pass” on the security interface issue in 1998 based on the record evidence at that time.²⁴ For now, however, the record is bare of any factual basis on which DBS intentions should be considered, one way or the other.

III. THE EVENTS CITED BY NCTA AS JUSTIFYING THE MOVE OF THE COMMON RELIANCE DATE TO JULY 2006 HAVE ALREADY OCCURRED; NO JUSTIFICATION EXISTS FOR ANY FURTHER POSTPONEMENT.

In its *ex parte* filings cited by the Commission in its April 25 Report & Order and FNPRM, the NCTA advanced the need to develop multistream PODs as a reason why the 2005 date needed to be pushed back, before the 18 – 24 month product development window was entered.²⁵ This activity has been successfully concluded. The NCTA has not cited any other ongoing developmental activity that would justify any further delay in, or scrapping of, this date. There is no justification in the record for any further postponement.

IV. CONCLUSION – THE RECORD SUPPORTS RETENTION OF THE COMMON RELIANCE DATE RATHER THAN ITS ELIMINATION OR FURTHER POSTPONEMENT.

The Consumer Electronics Parties do not share NCTA’s interpretation of events. CEA and CERC believe that now, with some competitive entry at hand and a great deal more just over the horizon, is the time that the marketplace incentives provided for by the Commission in its 1998 Report & Order need finally to take effect. The cable industry has had seven years -- more than ample time -- to plan for this day. The Commission should not retreat any further.

²³ *Id.* at ¶¶ 7-22; *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, Second Report & Order and Second Further Notice of Proposed Rulemaking ¶¶ 45-46 (Rel. Oct. 9, 2003); June 24, 1998 R & O ¶¶ 19-27.

²⁴ June 24, 1998 R & O ¶ 64.

²⁵ *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 ¶ 3 n.9 (Rel. Apr. 25, 2003).

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