

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

In the Matter of)
)
Implementation of Section 304 of the) CS Docket No. 97-80
Telecommunications Act of 1996)
)
Commercial Availability of Navigation Devices)

**Comments of the Consumer Electronics Association
On NCTA Downloadable Security Report**

January 20, 2006

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In its June, 1998 Report and Order and the accompanying regulations, the Commission required that by January 1, 2005, cable operators also rely on whatever security and interface technology the operators would make available for the attachment of competitive entrant navigation devices.¹ Subsequently, and with the endorsement of consumer electronics manufacturers and retailers, the FCC amended its regulations to exclude analog converter boxes from this obligation, explicitly so as to allow the cable industry to concentrate on developing security interfaces and other technology to allow the attachment and operation of competitive digital devices.² The Commission has thereafter twice extended the cable industry’s period for compliance, most recently to July 1, 2007. In the Second Report and Order granting the last extension, the Commission required the “cable industry” to file a report by December 1, 2005, stating whether it could meet this timetable via the downloadable security regime that had been cited to the Commission, by the cable industry, as providing a rationale for further extension, and to provide draft licensing terms.³ It invited other interested parties to comment within 30 days on such report, which was furnished on behalf of the cable industry by the National Cable & Telecommunications Association (“NCTA”) on November 30, 2005.⁴ These are the comments of the Consumer Electronics Association (“CEA”) on behalf of the consumer electronics industry.

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, Report and Order (Rel. June 24, 1998).

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, Order on Reconsideration (Rel. May 14, 1999).

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, Second Report and Order (Rel. Mar. 17, 2005) (“Second Report and Order”) ¶ 32.

⁴ Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, Neal M. Goldberg, General Counsel, William A. Check, Ph.D., Senior Vice President, Science & Technology, Andy Scott, Senior Director, Engineering, NCTA; Paul Glist, Cole, Raywid & Braverman, L.L.P. to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Nov. 30, 2005), hereinafter (“NCTA Report”).

Time Frame

In opposing any extension of the deadline for Common Reliance on the basis of the promise of downloadable security, CEA pointed out that there was no indication that such a solution would be ready, for competitive entrants or indeed for cable operators themselves, by July 1, 2007.⁵ The projected schedule contained in the NCTA Report shows that this was an understatement. Even though the cable industry has made “rapid” progress on the technology and set of specifications it refers to as “DCAS,” NCTA reports that “a downloadable security function will not be ‘achieved and implemented’ by July 1, 2007.” Rather, NCTA predicts “national deployment [of DCAS] by July 1, 2008.”⁶

Even this NCTA prediction falls far short of a commitment, representation, or demonstration that competitive entrant devices, or indeed *any* devices, will be able to operate on cable systems by July of 2008 by relying on DCAS. Given its experience with what NCTA has argued constitutes “compliance” with previous deadlines, starting with the July 1, 2000 deadline to “support” the operation of competitive navigation devices⁷ through the level of compliance with the specific obligations to support CableCARD-reliant devices as of July 1, 2004,⁸ and given reports received of apparent failures to comply with specific regulations to render support to the IEEE 1394 interface, CEA and its members have learned to examine such predictions skeptically. The FCC also should not assume that a vague prediction of “national deployment” will meet the expectations set out in the Second Report and Order. In any event, NCTA acknowledges that its prediction, even if taken at face value, does *not* provide for *any* downloadable security before July 1, 2008, and in fact NCTA gives no specific assurance of Common Reliance as to *any* date.

CableCARD Experience

In the Second Report and Order, the Commission emphasized the importance of cable operator support of those CableCARD-reliant devices that have been fielded. The NCTA filing claims that this experience has been positive based on 80,000 CableCARDs having been placed with consumers. Unfortunately, however, the record is sad and

⁵ Letter from Julie M. Kearney, Senior Director, Regulatory Affairs, CEA to Marlene H. Dortch, Office of the Secretary, FCC, Re: *Ex Parte* Communications in CS Docket No. 97-80 (Nov. 23, 2004) at 3.

⁶ NCTA Report at 4-5.

⁷ Standard and reliable CableCARDs were not ready by the date in 2003 slated for the start of certification of “Phase I” unidirectional navigation devices, and were *still* not ready in reliable form by the postponed date.

⁸ Customers of CEA member manufacturers *still* experience widespread and repeated system authorization, billing, and even technical failures when trying to authorize and operate CableCARD reliant devices on many cable systems, *despite* the representations made by NCTA and its members, and the FCC’s emphasis on performance, in these respects, in its Second Report and Order.

disappointing, and validates the Commission's observation⁹ in the Second Report and Order that only Common Reliance will produce real equality of support:

- The 80,000 CableCARDS have been provided for a total of about 3.8 million TV receivers capable of relying on CableCARDS – barely 2 percent.
- There is ample evidence, some of which has already been supplied to the Commission,¹⁰ that reasons for the low CableCARD penetration include:
 - An *acknowledged* refusal by cable operators to promote their use.
 - The software and firmware support systems provided by local MSO systems and their national vendors were technologically deficient and/or unreliable, 4.5 years *after* the July 1, 2000 date mandated by the Commission for support of navigation devices.¹¹
 - Because CableCARDS were, and remain, relatively rare on cable systems, the “back end” channel authorization and billing systems of several local cable operators belonging to the most prominent MSOs were not, and have not been, adapted to support ordering and installation in CableCARD homes.

⁹ Second Report and Order ¶¶ 2, 30, 34.

¹⁰ Letter from Lawrence R. Sidman, Counsel for Thomson Inc. to Marlene H. Dortch, Office of the Secretary, FCC, Re: *Ex parte* communication in CS Docket No. 97-80 (Oct. 28, 2004); Letter from Julie M. Kearney, Senior Director, Regulatory Affairs, CEA to Marlene H. Dortch, Office of the Secretary, FCC, Re: *Ex Parte* Communications in CS Docket 97-80 (Nov. 23, 2004); Letter from Robert S. Schwartz, Counsel for CEA, to Marlene H. Dortch, Office of the Secretary, FCC, Re: *Ex Parte* Communications in CS Docket 97-80 (Aug. 12, 2005). *See also* Letters from Julie M. Kearney, Senior Director, Regulatory Affairs, CEA to Marlene H. Dortch, Office of the Secretary, FCC (Feb. 24, Oct. 6, Oct. 13, Dec. 16, Dec. 17, 2004); Letter from Julie M. Kearney, Senior Director, Regulatory Affairs, CEA to Jonathan Cody, Legal Advisor, Office of Chairman Michael K. Powell, FCC (Jan. 18, 2005); Letter from Henry Goldberg, Attorney for TiVo Inc. to Marlene H. Dortch, Office of the Secretary, FCC (Mar. 3, 2004); Letter from Robert S. Schwartz, Counsel for CEA, to Marlene H. Dortch, Office of the Secretary, FCC (Dec. 1, 2004); Letter from Matthew P. Zinn, Vice President, General Counsel & Chief Privacy Officer, TiVo Inc. to Jonathan Cody, Legal Advisor, Office of Chairman Michael Powell, FCC (Jan. 18, 2005); Letter from Shane V. Robison, Executive Vice President and Chief Strategy and Technology Officer, Hewlett Packard Company to Michael K. Powell, Chairman, FCC (Feb. 17, 2005); Letter from representatives of the consumer electronics and information technology industries to Michael K. Powell, Chairman, FCC (Feb. 18, 2005); Letter from Neeraj Srivastava, Director, Client Architecture & Technology, Dell Inc., Dan Orr, Director, Strategic Business Development, Office of Corporate Strategy and Technology, Hewlett Packard Company; Jeffrey T. Lawrence, Director, Content Policy, Intel Corporation to Marlene H. Dortch, Office of the Secretary, FCC (March 7, 2005); Letter from John M. Burgett, Counsel for Sharp Electronics Corporation to Marlene H. Dortch, Office of the Secretary, FCC (Mar. 8, 2005); Letter from John Godfrey, Vice President, Government & Industry Affairs, Pioneer North America, Inc. to Marlene H. Dortch, Office of the Secretary, FCC (Mar. 10, 2005); Letter from Craig K. Tanner, Vice President, Cable Business Development, Sharp Laboratories of America, Inc. to Marlene H. Dortch, Office of the Secretary, FCC (Mar. 14, 2005); Letter from Jim Morgan, Director and Counsel, Government & Industry Affairs, Pioneer North America, Inc. to Marlene H. Dortch, Office of the Secretary, FCC (Mar. 15, 2005).

¹¹ There were also some upgrades necessary to particular TV models (some owing to non-standard test conditions at CableLabs), but irrespective of these it is clear that many MSO systems launched their CableCARD support efforts with firmware, software, and systems support that would not support full and proper operation of any CableCARDS or TV that relied on CableCARDS.

Therefore, even where there are *no* technical issues, customers still cannot receive the channels to which they have subscribed. CE manufacturer field representatives have seen this time and again, even in MSO systems to which they have previously reported these generic problems.

- As a result, it has been difficult for consumer electronics manufacturers and retailers to market the CableCARD feature to consumers with any confidence that this feature will enhance, rather than detract from, customer satisfaction with the product. It remains a much safer course to market a “monitor” and to urge the customer to obtain a set-top box – even where a customer would be content only with the entertainment offerings supported by a CableCARD.

These experiences have occurred in the face of ongoing, inter-industry, good faith efforts to isolate, fix, and avoid the technical and authorization support issues. They are proof positive of the Commission’s observation made in 1998, and confirmed in the Second Report and Order, that Common Reliance is the best way to assure adequate support of the “Phase I” devices that consumers, in reliance on FCC product support and labeling regulations, should be able to buy with confidence.

The Commission should be aware that apparently *even if* a successful Common Reliance regime is achieved through downloadable security software, this will *not* result in any improvement for Phase I, Unidirectional Digital Cable Products because par. 1.11 of the DCAS license refers to interactive (Diffie-Hellman) security techniques *and* because it is required that a DCAS licensee execute both the CHILA and OpenCable Application Platform Implementer License Agreement (“O-ILA”), both of which are irrelevant to “UDCP” devices. This implies that these devices – which have the potential to become increasingly valuable to consumers as the FCC’s “Tuner Mandate” takes effect in smaller-sized TVs, for which bidirectional capability is less important – *cannot* take advantage of downloadable security, so still will have to rely on CableCARDS. Yet if NCTA has its way, and the Common Reliance deadline is negated or further extended, these products will *never* get the benefits, identified by the Commission, of Common Reliance.

License

The DCAS license filed with the Commission on November 30 was not available for inspection by most TV manufacturers. It was developed subject to non-disclosure agreement and was *not* made available for discussion as part of the bi-directional inter-industry discussions being overseen by the Commission in this docket. Therefore, it should not be surprising that it *departs* from the inter-industry approach, submitted to the Commission as part of a framework, that was worked out for the “DFAST” license in this process. Indeed it borrows *both* from the “CHILA” license *and* from the O-ILA so as to include provisions that are not only at odds with the DFAST framework, but are *also*, on their face, contrary to Sections 76.1201 – 1205 of Commission regulations. The ways in which this DCAS license depart from the DFAST framework are:

- Technical references to proprietary specifications that can be altered on a unilateral basis by CableLabs or NGNA LLC, rather than to versions of due process industry standards.
- Unilateral change and technology and interface approval processes, for both the license and the Compliance / Robustness rules, that do not require negotiations with licensees or provide for appeal to the Commission.¹²
- A required *warranty* by the manufacturer that the product, *in addition* to not posing “harm to network” or “theft of service” problems (the only two limitations allowed on licensees by Sections 76.1201- 1205) would *also* not pose any “harm to the service” -- an undefined, open-ended term -- of any cable operator.
- A plenary right of the operator to deny service to any product or class of product, on grounds that may unilaterally be formulated and determined by the cable operator.

Moreover, the license (1) cross-references and requires adherence to *other* licenses as to which the NCTA and its members have not yet been willing to negotiate in the bi-lateral framework negotiations, as they did in Phase I, and (2) refers to an unidentified “Trusted Authority” with apparently plenary power over the function of *all* navigation devices. There can be no assurance of colorably fair treatment of competitive entrants, much less Common Reliance, until the cable industry has been more forthcoming about its final positions; it offers complete information about who will purport to exercise control of licensed navigation devices; and it can justify how such plenary control is consistent with existing FCC regulations.

Specifications

In the bilateral negotiations, a reason given by the cable side for not yet discussing a framework for licensing has been that it is necessary to make further determinations as to *specifications*, *first*, as a *basis* for negotiations on license provisions. With respect to DCAS, however, NCTA seems to argue that the reverse process should be accepted by the Commission as sufficient: the posting of a license with *no* prior discussion or even *availability* of the relevant specifications. The Commission should not accept this approach as adequate or sufficient for its purposes with respect to Common Reliance.

¹² In its Appendix to the Joint Status Report, also filed on November 30, 2005, NCTA in a footnote did indicate some willingness to consider, with respect *only* to the issue of new interface approval, some process of appeal to the FCC. Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, Neal M. Goldberg, General Counsel, William A. Check, Ph.D., Senior Vice President, Science & Technology, Andy Scott, Senior Director, Engineering, NCTA; Paul Glist, Cole, Raywid & Braverman, L.L.P. to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 (Nov. 30, 2005) at 15 n.34.

CEA is unable to comment on the DCAS specifications because CEA, and most of its members, *have not seen* the DCAS specifications. As we understand it:

- Most consumer electronics companies have not seen these specifications because to do so the company must sign an NDA with a single cable operator, Comcast (not with CableLabs), and must, sight unseen, agree to certain intellectual property grantback provisions in so doing.
- Even those companies that have agreed to this NDA would be prohibited from commenting on these specifications to the Commission or anywhere else in public.
- While NCTA, the cable industry trade association, makes assurances to the Commission about the specifications, CEA, the consumer electronics association involved in this process, has not seen the specification and cannot discuss it.
- CEA and member companies have been informed that the specifications will not be available for public inspection or discussion until *the middle of 2006* at the earliest.

To the extent that the DCAS specification should be considered relevant to any FCC determination or to any plan for competitive entry, it would appear that the cable parties are in violation of Section 76.1205, which requires that “[t]echnical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems shall be provided by the system operator upon request in a timely manner.” This has not been done.

It appears, rather, that the cable industry has not reached a point in which there can be any public discussion of the factors set forth in the Commission’s Second Report and Order that are vital to any further Commission determination on the subject of downloadable security or Common Reliance. Accordingly, the cable industry has not enabled the Commission to even consider whether there would be grounds for any change in the requirement for Common Reliance as of July 1, 2007, as FCC regulations currently require.

If, at some future point, the cable industry discloses enough of its DCAS specifications to enable public comment, as envisaged by the Commission in its Second Report and Order, CEA and its member companies will participate in such a discussion.¹³ Pending such an occurrence, it is simply impossible for CEA, or any member company, to fulfill the process step that the Commission required to occur within 30 days of the filing of a DCAS license. In the interim, Common Reliance by cable operators on CableCARD technology by July 1, 2007 will ensure that CableCARD technology will be supported and that remaining technical, operations, and customer support problems

¹³ One of the things that is not clear is whether it will be sufficient for such disclosures to come only from CableLabs, or from NGNA LLC as well, and who it is who will make such determinations.

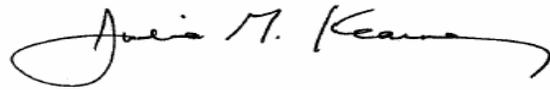
hampering UDCR products – for which CableCARD technology is the only available choice -- will be ironed out.

Conclusion

NCTA and its members can't have it both ways: Either its DCAS proposal is fully spelled out and ready for a public airing of *all* factors necessary for the Commission to make an evaluation based on public comments, or it isn't. The evidence that it isn't is overwhelming. The CEA and its Working Group, in continued and otherwise constructive communication and negotiation with NCTA and *its* Working Group, thus far lacks sufficient information in *every* relevant area. The areas in which the NCTA or the various rights holders as to this technology must put more information on the public record include:

- The publishable specifications (*i.e.*, except for the necessarily secret cryptographic elements);
- Identities of *all* the responsible parties who will hold veto power over the use of licensed products;
- *All* factors pertaining to whether there will be Common Reliance and when;
- Whether and when CableLabs and the other rights holders whose identity is disclosed or hinted at in the NCTA report will discuss the DCAS license and the license agreements cross-referenced by DCAS in the context of the bi-lateral negotiations referred to in the Commission's Second Report and Order and in the February 24 *ex parte* cited by the Commission;
- The meaning of the terms used in the "timetable" portion of the NCTA report; and
- Whether the NCTA is now asserting that the limited representations it has made as to occurrences by July 1, 2008 are sufficient to justify a further request for extension or negation of the crucial July 1, 2007 Common Reliance obligation with respect to CableCARDS, or whether NCTA instead is relying on its court appeal of the Commission's Second Report and Order.

Respectfully submitted,



Of counsel:

Robert S. Schwartz
Constantine Cannon, P.C.
1627 I Street, N.W.
Washington, D.C. 20006
202 204-3508

Michael D. Petricone, Esq.
Vice President, Technology Policy
Julie M. Kearney, Esq.
Senior Director and Regulatory Counsel
CONSUMER ELECTRONICS ASSOCIATION
2500 Wilson Boulevard
Arlington, VA 22201
Tel: (703) 907-7644

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cc: Donna Gregg
Bill Johnson
Deborah Klein
Natalie Roisman
Mary Beth Murphy
John Wong
Alison Greenwald
Tom Horan
Steve Broeckaert
Mike Lance
John Gabrysch
Sarah Mahmood
Jeff Neumann
Alan Stillwell
Heather Dixon
Jordan Goldstein
Andrew Long
Rudy Brioché