

**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)	
)	
National Cable & Telecommunications Association Petition for Waiver of 47 C.F.R. § 76.1204(a)(1))	CSR-7056-Z
)	
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**Comments of the Consumer Electronics Association
on the National Cable & Telecommunications Association Petition
for Waiver of 47 C.F.R. § 76.1204(a)(1)**

November 30, 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 must themselves 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.

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).

The National Cable and Telecommunications Association (NCTA) now requests a blanket waiver for all cable operators, exempting them from any compliance with Section 76.1204(a)(1) of the Commission’s rules for at least another two years.³ The fundamental basis for this request is the expectation that conditional access techniques in the cable industry will, at some point in the future, move to a “DCAS” system whose deployment date is uncertain and which would require competitive device manufacturers to build in a proprietary chipset.⁴ If the Commission is to fulfill its statutory requirement to create a competitive market for navigation devices, this request must be denied.

I. NCTA Ignores The Core Purpose Of The Regulation From Which It Seeks A Waiver

The consumer electronics industry has been waiting since July 1, 2000 – the date set by the FCC for effective support of CableCARD-reliant devices – for an environment in which competitive entrant products could gain a fair foothold. The fact that a “Plug & Play” deal, supported by additional Commission regulations in 2003, was necessary is testament that the cable industry had not taken adequate steps to support these devices. That these devices, after finally being introduced in 2004, are *still* not receiving adequate support shows the necessity of an *effective* implementation of Section 76.1204(a)(1) of the Commission’s rules. Because the Commission’s decision to require common reliance was intended to create real, effective support for competitive CableCARD-reliant devices, the cable industry should not be permitted to delay common reliance yet again.⁵

³ NCTA’s Request for Waiver, CSR-7056-Z, CS Docket No. 97-80 (Aug. 16, 2006) (the “NCTA Request”).

⁴ *See, e.g.*, discussion of another waiver petitioner, Verizon’s Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1), CSR-7042-Z at 13 n.20 (July 10, 2006) (the “Verizon Request”).

⁵ As NCTA admits, granting its request would postpone common reliance for yet a third time.

NCTA's request completely ignores the purpose of the common reliance rule when it suggests that cable operators' legal obligation under the "plug and play" rules makes common reliance unnecessary.⁶ The Commission has already determined – NCTA's anecdotal illustrations of its "support for retail" notwithstanding – that neither the poor and inadequate support given to "plug and play," nor the offer of licenses that do not comply with existing regulations will satisfy the Commission's obligation, imposed by the Congress, to *assure* a competitive market for navigation devices.⁷

With the passage of each year in which common reliance is *not* enforced, adequate support for competitive devices becomes less and less likely, because any CableCARD-reliant devices – competitive or MSO – will be that much a smaller percentage of the installed base. Aided by the delays and flexibility the Commission has *already* afforded the cable industry, the installed base of integrated-security devices has grown from a pool to a sea to an ocean. Now, NCTA's waiver application asks for yet another multi-year delay, while the industry already plans to move to a new but still integrated conditional access system. The Commission is therefore asked to be, again, complicit in commercially isolating CableCARD-reliant devices, at a time when such isolation could be fatal to their prospects.

Even with a clear regulation, no waivers for any purpose, and no planned move to ostensibly "software-based" conditional access, the installed base of embedded security converters, now numbering over 50 million, will far outweigh the number of

⁶ See NCTA Request at 33.

⁷ CEA hereby incorporates by reference its Comments in response to the Charter and Verizon petitions for waiver. See CEA Comments, CSR-7049-Z, CS Docket No. 97-80 (Sep. 18, 2006) ("CEA Comments on Charter request"); CEA Comments, CSR-7042-Z, CS Docket No. 97-80 (Sep. 18, 2006) ("CEA Comments on Verizon request"). In its Charter comments, CEA argued that a waiver should not be available to petitioners who are out of compliance with other existing regulations for which no waiver is sought.

CableCARD-reliant products for years to come.⁸ If CableCARD-compatible products do not predominate in new installations, and are viewed by cable operators as transitional products, they will be relegated to “specialty” items. This can make a huge difference in the operational status of the CableCARD-reliant products that are purchased at retail.

Numerous CableCARD-reliant products exist in the marketplace or are under development.⁹ There are already millions of CE products in the hands of consumers that can be used directly on a cable system if adequately supported by CableCARDS. While noting that its members make CableCARDS available to their subscribers, NCTA makes no claim and presents no data or evidence that the CableCARD integration is adequately supported or that, in the absence of common reliance, these products will work in the future. Granting NCTA’s waiver would therefore directly undermine the purpose of the common reliance regulation.

II. DCAS Is Not Imminent And Does Not Promote Competitive Devices.

NCTA attempts to justify its waiver request as giving the cable industry still more time to develop “DCAS” as an alternative to CableCARDS.¹⁰ DCAS, as Verizon and major personal computer manufacturers have argued, is controversial, indefinite as to implementation, and highly uncertain as to suitability for common reliance.¹¹ What’s

⁸ According to Kagan Research, LLC, as cited on NCTA’s web site, there are 50,400,000 “premium cable units” already in place. <http://www.ncta.com/ContentView.aspx?contentId=66> (accessed Nov. 29, 2006).

⁹ *E.g.*, TiVo has now launched a new model heavily reliant on CableCARDS. *See* CNET Product Review, http://reviews.cnet.com/TiVo_Series3_HD_DVR/4505-6474_7-32065631-5.html?tag=nav (accessed Nov. 29, 2006).

¹⁰ NCTA Request at 9-11.

¹¹ Verizon Request at 5, 26-32; Comments of Dell, Inc, Hewlett-Packard Co., Intel Corp., and Sony Electronics Inc., on the Cable Report on Downloadable Security, DA 05-3237, CS Docket No. 97-80 (Jan. 20, 2006) (the “Computer Comments”); *cf.* Erratum to Comments of the Computer Companies, CS Docket No. 97-80 (January 23, 2006); Notice of Ex Parte Presentation, CS Docket No. 97-80, PP Docket No. 00-67 (notice of presentation by representatives of Sony Electronics and Intel to staff of Chairman Martin and Commissioner Copps, filed by Seth D. Greenstein, March 17, 2006).

more, the record strongly suggests that DCAS will *not* be implemented by the end of 2009. Without an acceptable alternative to CableCARD reliance, NCTA's waiver request devolves into yet another attempt to delay cable operators' common reliance obligations.

A. DCAS As Presented To The FCC Is Not A Suitable Alternative to CableCARDS.

The record in this Docket is replete with observations, based on the only publicly available descriptions of DCAS, that it is a poor and uncertain basis for common reliance. In addition to the comments of several CE and IT companies,¹² even waiver petitioner Verizon agrees that the DCAS specification is fatally lacking in transparency and interoperability. Verizon, which itself wants to move to a form of downloadable conditional access, says that DCAS is a “proprietary, closed proposal”¹³ which requires competitors to install a proprietary chipset.¹⁴ As Dell, Hewlett-Packard, Intel, and Sony Electronics point out, this so-called “software-based” system apparently requires *hardware* to be added to a device at manufacture – exactly the scenario that the FCC's physical separation requirements, as implemented in the CableCARD, were intended to eliminate.¹⁵ The Commission should not consider any waivers based on downloadable conditional access unless and until it has made a determination that such a system is technically viable *and* itself would comply with the regulations from which a waiver is now sought. There is not even a consensus among waiver proponents on this score.

Moreover, licenses currently offered for DCAS facially violate the Commission's regulations. The DCAS License Agreement requires licensees to agree to warranties that

¹² Computer Comments at 1-2.

¹³ Verizon Request at 29.

¹⁴ Verizon Request at 31.

¹⁵ Computer Comments at 8.

their products will not “harm” the cable “service,” without any limitation to physical or electronic harm, or the unauthorized receipt of service. The license also provides that competitive devices may be disconnected from the network at any time, for any reason, in the cable operator’s discretion. These provisions appear to be a violation of Section 76.1202 of FCC rules, which precludes system operator-imposed restrictions on “navigation devices that do not perform conditional access or security functions” In addition, NCTA has proposed to tie implementation of DCAS exclusively to OCAP, while MSOs would retain the right to maintain in the field millions of set-top boxes with integrated security and without OCAP.¹⁶ Yet neither MSOs nor NCTA have offered to change licenses and technical specifications so as to permit on their systems non-OCAP *competitive* products that work interactively with cable headends.

Much of the information about the DCAS proposal remains under nondisclosure agreement and, if available to CEA members, cannot be discussed among them or with the Commission. This secrecy makes future support for DCAS even more speculative and uncertain than for the CableCARD. For these reasons, DCAS is not a substitute for the CableCARD as a means of separating conditional access.

B. DCAS Is Not Likely To Be Deployed In the Near Future

Because DCAS is controversial and many of its details secret, the time needed for a rollout of DCAS is anyone’s guess. NCTA asserts, without support, that DCAS cannot be deployed by July 1, 2007, but will nonetheless be ready for market in a “short time,” so short that CableCARDS can now be considered “interim.”¹⁷ The Commission should

¹⁶ See discussion, Verizon Request at 31 (quoting Letter from Daniel L. Brenner, NCTA, to Marlene Dortch, Secretary, FCC, at 9 (Nov. 30, 2005) (on file with FCC in CS Docket No. 97-80)).

¹⁷ NCTA Request at 7. Ironically, NCTA nonetheless acknowledges that the cable industry still has an “economic incentive” to support CableCARDS, its waiver request notwithstanding. NCTA Request at 33.

view NCTA's warning that "much remains to be done"¹⁸ to implement DCAS in light of the cable industry's repeated efforts to delay common reliance.

III. NCTA's Arguments As To A Chilling Effect On The Introduction Of Additional Services Are Conclusory And Unsupported.

NCTA has not pointed, and cannot point, to a single technical obstacle posed by CableCARD reliance to the introduction of any new or unique cable service. Nowhere in the description of upcoming video and data services is any technical factor cited that would pose any obstacle to CableCARD reliance. NCTA's argument is, instead, the "diversion of resources" argument, which the cable industry has used to justify delay and insulate CableCARDS from the operation of Moore's Law, since 1998.¹⁹

IV. NCTA's Citations To CableCARD Cost Figures Are Unsupported And Contradicted In The Record.

NCTA cites its own calculations, made *four years ago*, in defense of its waiver request.²⁰ As CEA recently explained in a letter to the Commission,²¹ not only are NCTA's calculations of the cost of CableCARD-reliant devices grossly overinflated, they completely ignore the effects of competition, technological progress, and economies of scale. It strains reason for NCTA to argue that the supposedly high costs of compliance justify a waiver when one of the fundamental purposes of the common reliance rule is to bring those costs down through competition. Likewise, NCTA's 2002 cost figures are misleading because they reflect the cable industry's (at that time) four-year effort to

¹⁸ NCTA Request at 11.

¹⁹ See, e.g., CEA Comments on Charter request.

²⁰ NCTA Request at 7 n.16.

²¹ Letter from Gary Shapiro, President and CEO, CEA, to The Honorable Kevin J. Martin, Chairman, FCC, et al (Nov. 20, 2006) (responding to NCTA's letter to the Commission of October 31, 2006) (on file with FCC in CS Docket No. 97-80).

prevent economies of scale in the CableCARD market. In contrast, the price of 802.11 PCMCIA wireless cards, a technology similar to CableCARDS, have dropped more than 90 percent since 1999 due to increased competition and consumer adoption.

CEA estimates the initial manufacturing costs required to add CableCARD compatibility to be approximately \$10-\$15 per device. Amortizing over the life of the device suggests an additional monthly cost of less than \$1.25 – not \$2 to \$3 per month as NCTA states in its request. Again, any price differential should be driven toward zero as competition empowers consumers with market-driven choice.

V. The “Diversions of Resources” Argument Made By NCTA Is No Different And No More Valid Than The Same Argument NCTA Has Made Since 1998.

Since it cannot cite any reason that is actually related to a “new service” or a technical impediment, NCTA repeats the same “diversion of resources” argument that it has made since 1998. There is nothing in the record to indicate that a waiver should be considered on this basis alone. Indeed, to do so would directly contravene the purpose of both the governing statute and the regulation in question. In particular, NCTA cannot argue persuasively that its members lack the knowledge or resources to deploy CableCARD-reliant products in the timeframe set forth by the regulation, *or* that any diverted resources would have been in any sense relevant to a new competitive benefit. Any resource commitments made by NCTA members in the past three years were made with full understanding of their common reliance obligations. This is not sufficient grounds for consideration of a waiver.

VI. Arguments Based On the “DTV Transition” Are A Red Herring.

NCTA seeks to wrap itself in the “DTV Transition” mantle to justify its resistance to offering consumers the very competitive choices that would facilitate this transition. Its argument²² seems to be based on the notion that consumers who for the last 50 years have resisted subscribing to cable or satellite TV will suddenly, as February 17, 2009 approaches, embrace cable to the extent of subscribing to *tiers* of expensive programming services such as can only be offered by a fully interactive digital set-top box and *not*, for example, by a DTV receiver equipped with a CableCARD or by simply subscribing to basic cable services as they will continue to be offered through the time that this waiver would be effective. (There is no indication that the simulcast transmission of DTV broadcasts via analog techniques, for the benefit of such customers, will end any time soon.) Once the day of all-digital cable services *does* approach, the Commission’s objective should be to have the competitive market ready to supply “Plug & Play” products that match both the cable service and the consumer’s needs and wants – just as analog TVs have long done for existing subscribers to basic and enhanced basic cable services.

As waiver applicants have noted, given the right to choose, the majority of cable subscribers may reject the option of renting a set-top box from their local operator, and instead rely on competitive consumer electronics products which do not require a set-top box.²³ It is this element of consumer choice that the NCTA, via its waiver requests and its refusal to license competitive products comparable to all those for which a waiver is sought, is asking the Commission to snuff out in the name of the Digital Transition.

²² NCTA Request at 16-19.

²³ See CEA Comments on Charter request at 10 (quoting Charter’s statement that “the majority of Charter customers do not use any set-top box, period”).

VII. NCTA Incorrectly Points To The FCC's Forbearance As To DBS As A Precedent With Respect To Waivers.

NCTA asserts, or at least would like the Commission to declare, that the Commission established a precedent by affording a *waiver* for DBS services. This is simply incorrect. The FCC has made no waiver determinations as to DBS, and made no specific determination, re DBS, as to the second sentence of Section 76.1204(a)(1). Rather, the FCC made an initial decision to *forbear* in addressing DBS in *all* of its regulations that impose technical obligations on MVPD systems.

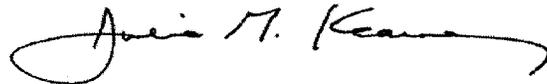
The FCC determination re DBS was based on a finding of substantial compliance, not on any application to waive or avoid obligations.²⁴ As the Court of Appeals noted on August 18, 2006, no other MVPD has petitioned the FCC to revisit its determination of forbearance as to DBS. The FCC's forbearance as to DBS thus has no precedential effect as to NCTA's waiver request.

²⁴ 1998 Report and Order at ¶¶ 64-66; 1999 Reconsideration Order at ¶¶ 36-37.

CONCLUSION

For the foregoing reasons, NCTA's waiver request should not be granted by the Commission.

Respectfully submitted,



Of counsel

Robert S. Schwartz
Mitchell L. Stoltz*
Constantine Cannon, P.C.
1627 Eye Street, N.W.
Washington, D.C. 20006
(202) 204-3508

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

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*Bar admission pending.

CERTIFICATE OF SERVICE

I do hereby certify that on November 30, 2006 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on NCTA's Request for Waiver of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail, on the following:

William A. Check, Ph.D.
Andy Scott
Daniel L. Bremer
Neal M. Goldberg
National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W., Suite 100
Washington, DC 20001



Patricia O'Keefe