

**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
)	

**REPLY COMMENTS OF THE
CONSUMER ELECTRONICS ASSOCIATION
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING**

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The Comments filed in this Third FNPRM¹ present the Commission with its clearest choice in implementing Section 629² since, in 1997 and 1998, it rejected General Instrument’s proposal that the Commission be satisfied with the second-sourcing at retail of local and proprietary set-top boxes.³ Ten years later, the call for the Commission, as a matter of public policy, to reject device innovation is heard again. This time it is stated most starkly in the Comments of Time Warner Cable Inc. (“Time Warner”), which ask the Commission to leave content transmitted over cable “unadulterated”⁴ by consumer choice and device innovation. The

¹ *Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Third Further Notice of Proposed Rulemaking (rel. June 29, 2007) (“FNPRM”).

² 47 U.S.C. § 549(a).

³ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ¶ 129 (rel. June 24, 1998) (“1998 Report and Order”).

⁴ *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 Time Warner Cable Inc. at 29 (Aug. 24, 2007) (“Time Warner Comments”).

Commission is now urged to rule out *any* element of consumer choice or competitive innovation that could “interpose”⁵ an element of consumer discretion in the receipt of cable services.

The National Cable & Telecommunications Association (“NCTA”) similarly points to the leased set-top box as the model for a complete and satisfactory implementation of Section 629, and sees no need for consumer discretion, device innovation, or service menus controlled by the *consumer* rather than by the cable operator:

“In short, an operator’s two-way set-top box has everything needed for the cable experience except the screen.”⁶

Despite the Commission’s clearly and obviously having modeled its regulations that govern licensing of competitive entrants⁷ on the successful telephone deregulation precedent, the NCTA continues in its rear-guard argument that device innovation has no place in this proceeding. NCTA argues that “Part 68 applied to devices connected to a highly stable interface. The electrical characteristics of the telephone loop had been essentially unchanged for an entire century”⁸ Consequently, nowhere in its voluminous filing does NCTA recognize, answer, or address the fact that the licenses its CableLabs consortium offers to potential competitors violate these regulations. NCTA and CableLabs have refused to negotiate with respect to the legality of these licenses, or as to licensing at all, since the discussions on a “two-way” framework began in January 2003.

⁵ *Id.*

⁶ *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 the NCTA at 16 n.28 (“NCTA Comments”).

⁷ 47 C.F.R. §§ 76.100 – 1205.

⁸ NCTA Comments at 9 n.16. NCTA and its members have resisted, and have continued to resist, standards-based proposals to bring more stability and reliability to their own systems, for the benefit of competitive entrants, which would to establish those systems as platforms for innovation as to both services and devices.

Similarly, in the 76-page NCTA Comments there is not a single new offer, objective, compromise, or commitment – technologically or legally – beyond what the NCTA filed in November of 2005. The Consumer Electronics Association (“CEA”) updated, narrowed, and focused its 2005 filing in November of 2006, and did so again in its Comments.⁹ NCTA, CableLabs, and their members – in the face of a plea for urgency and innovation in this Third FNPRM – once again warn the Commission to stand pat.

The choice now presented to the Commission, therefore, is stark. One model is that of deregulation, consumer sovereignty, and innovation from unexpected quarters. Telephone deregulation spawned new device attachment, leading to new software and service applications, leading to the Internet, leading to the World Wide Web. Proprietary set-top boxes lead to more proprietary set-top boxes. The vision presented by the cable industry in these comments is of consumer choice and device innovation *coming between* a consumer and the tiers of services for which consumers pay. This, despite the fact that nowhere has CEA proposed that cable operators be restricted from offering to rent to consumers any type of set-top box they wish, *if* consumers are not satisfied with the offerings of competitive entrants. Why deny this choice to consumers in advance?

One would think from the cable industry comments that CEA has sought to restrict the development and licensing of the OpenCable Platform (“OCAP”). To the contrary, it is CEA’s draft regulations, and not NCTA’s, that include metrics for the assured rollout and interoperability of, and reliance by cable operators on, OCAP. Most of these metrics were

⁹ *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 the CEA on Third FNPRM (Aug. 24, 2007) (“CEA Comments”). See Appendices A (draft regulations), B (draft model licenses), and C (specific enhancements to technical standards).

overlooked or rejected in the 2005 NCTA draft regulations and – despite the massive cable industry verbiage comparing OCAP to CEA’s DCR Plus proposal (“DCR+”) as if these were mutually exclusive alternatives – *still* are not offered anywhere in the cable industry filings.

The Commission does have a choice to be made in this Third FNPRM, but it is *not* a choice between OCAP and DCR+. The choice, rather, is whether the Commission will define away its obligation to the Congress, consumers, and competition by effectively doing nothing; or will enact regulations that enable real competition, and require the cable industry to respect regulations, as to licensing, that the Commission adopted a decade ago.

I. CEA’S PROPOSED SOLUTION FOR OFFERING COMPETITIVE CHOICE TO CONSUMERS IS NECESSARY AND ACHIEVABLE, AND BUILDS ON EXISTING “ONE-WAY” DIGITAL CABLE READY TECHNOLOGY; WHEREAS THE CABLE INDUSTRY MAKES NO NEW COMMITMENTS IN LIGHT OF THE DTV TRANSITION.

Rather than enhance or commit to rely on its own offers, the cable industry spends page after page offering novel (and at times self-contradictory) versions of history, and attacking straw men and parodies of CEA’s actual proposals. The Commission began this Third FNPRM by citing changed circumstances and the need for expedited focus. Yet the cable industry offers nothing new, additional, or binding. Nothing in the cable industry’s rendition of history, or in its narrow view of the future, should divert the Commission from moving forward by allowing competitive entrants to offer additional choices and innovations to consumers.

A. NCTA Rewrites History By Pretending That From 1993 Through 2003 CE Manufacturers Did Not Seek A “Two-Way” Solution, Or To Provide Consumers With The Guide Data For Which They Pay.

NCTA turns the truth on its head by claiming that the consumer electronics industry, before and at the time of the initial “Plug & Play” agreement, was not interested in a two-way solution, “[u]nder the CE industry’s mistaken assumption in 2002 that subscribers would not take

to video-on-demand.” NCTA pretends that in 2002 there were alternative ways to enter the market, but nevertheless, “. . . CE manufacturers designed UDCPs without video-on-demand or other interactive capabilities.”¹⁰

The record is crystal clear that manufacturers and retailers never at any time limited their objectives to one-way devices. In time they accepted such a limitation as “progress” only because the cable industry offered no practical alternative. Consumer electronics manufacturers and retailers sought, and were denied by cable, access to *all* features and function, including two-way functionality and guide data, even in advance of the Commission’s 1997 NPRM in Docket No. 97-80. This is a matter of record.

The quest for competitive entry did not begin in 1996 with the enactment of Section 629. Rather, Section 629 was enacted *because* of years of cable industry rejection of competitive entry. Nor was CS Docket No. 97-80 the first FCC docket on this subject. The Commission’s prior docket on competitive availability, CS Docket No. 93-7, is replete with pleas for FCC action, via separable security and common reliance, to achieve in competitive devices the ability to offer consumers *any and all* features offered in proprietary set-top boxes – and recitations of cable operator resistance to such objectives.¹¹ Even if NCTA’s and its members’ memories do not extend back to their early efforts to frustrate CE device access to two-way services, more recent events ought to be fresher. In the Commission’s First FNPRM in Docket No. 97-80 – the

¹⁰ NCTA Comments at 4.

¹¹ See, e.g., *Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, Opposition and Comments of the Consumer Electronics Retailers Coalition (“CERC”) at 5-6 (July 28, 1994); Reply of CERC at 2 (Aug. 10, 1994); Statement of CERC on Decoder Interface Issues (Feb. 8, 1995); *Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, Circuit City Stores, Inc., Comments on Notice of Proposed Rule Making at 2 (Jan. 25, 1994); Response of Circuit City Stores, Inc. To Petitions for Clarification and Further Reconsideration at 11 (July 5, 1996); *Compatibility Between Cable Systems and Consumer Electronics Equipment*, ET Docket No. 93-7, Opposition and Comments of the Consumer Electronics Group of the Electronic Industries Association (“EIA/CEG”) at 2 (July 28, 1994); Reply of the EIA/CEG (Aug. 10, 1994); Proposal of the EIA/CEG For a Decoder Interface Standard at 3-4 (Aug. 15, 1994).

“Year 2000 Review” – in Comments filed November 15, 2000, a major CE manufacturer made this detailed and specific plea:

“[W]ith the continued cooperation of CableLabs and cable operators, it would be possible to support receipt of ‘guide’ information as to presently displayed programs, and as to future programming as well. The latter capability is key to enabling receipt of ‘Impulse Pay-Per-View’ (‘IPPV’) and full ‘Video on Demand’ (‘VOD’) services over retail, POD-enabled boxes – *a competitive feature that Panasonic considers vital to retail viability*. ... Therefore, Panasonic has submitted to CableLabs an Engineering Change Request (‘ECR’) on this subject. Importantly, a Motorola POD with IPPV capability has been scheduled for testing with hosts. Panasonic is deeply interested in the successful inclusion of VOD and IPPV capability in the POD and related host-device specifications *now*. And Panasonic believes that its prompt standardization will lead to manufacturers including such features that would be capable of working *now* on all cable systems.¹²

However, in the spring of 2001, CableLabs flatly *refused to certify* any CE device designed to take advantage of the two-way functionality of this “J2K Pod” to which this filing referred – the same CableCARD that the cable industry had claimed was made available to manufacturers in compliance with 47 C.F.R. § 76.1204. The same manufacturer reported in detail to the Commission on this denial, and on CableLabs’s insistence that it would consider supporting IPPV functionality, and providing EPG data, *only* in the context of OCAP middleware and in no other context, in an *ex parte* filing with the Commission in CS Docket No. 97-80 dated April 20, 2001. According to this *ex parte* filing:

“CableLabs has advised ... that it will not address testing of IPPV contained in the completed OpenCable™ POD-Host specification, until CableLabs completes its ongoing specification for ‘OCAPS application middleware.’ ... CableLabs had indicated that OCAPS middleware is required for testing IPPV due to the need for access to an EPG to make it work. Panasonic ... had indicated to CableLabs that [it] believes that basic IPPV functionality ..., which is included in the OpenCable™ POD-HOST specification and *already unofficially proven to work with a POD*, can be successfully implemented without access to an MSO-

¹² *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of Matsushita Electric Corporation of America/“Panasonic” at 4 (Nov. 15, 2000) (footnote omitted, emphasis supplied).

supplied EPG. [It] reported that it had urged CableLabs (and some cable operators) *not to defer any longer* implementation of IPPV while awaiting completion of the OCAPS middleware specification through the CableLabs process and its deployment in cable systems, *in as much as it would effectively stop ... development of an important feature which is key to consumer acceptance of a 'cable-ready' product.*"¹³

CEA began its testimony in an April 23, 2002 Senate Judiciary Committee hearing on cable industry practices and competition – just before the Plug & Play agreement negotiations began – with a specific reference to the CableLabs refusal documented above:

“Today, in the second quarter of 2002, there is no competitive entry on the horizon. The July 1, 2000 standards were late, inadequate, incomplete, and not sufficiently tested. Recently a competitor of ours did ask CableLabs to certify a prototype DTV receiver built to this specification, as subsequently modified and improved. But CableLabs refused to consider certification of such a product, because it does not incorporate newer specifications that are still under development and revision.”¹⁴

It is simply astonishing and disappointing that in filings replete with a discussion of the history of OpenCable, the NCTA and members who were represented at and participated in that public hearing would now attempt to persuade the Commission that it was the unilateral and blind choice of CE companies to proceed with only one-way products in 2002 – when, instead, that “choice” was compelled by CableLabs’s refusal to certify their products, and, consequently, manufacturers’ reluctance to bank on promises of OCAP support that, five years later, *still* have not come to fruition.

¹³ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Letter from Paul G. Schomburg, Manager, Government & Public Affairs, Matsushita Electric Corporation of America (Panasonic) to Magalie Salas, Secretary, FCC, attached memorandum at 3 (Apr. 20, 2001) (emphasis supplied).

¹⁴ *Dominance on the Ground: Cable Competition and the AT&T-Comcast Merger: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Business Rights, and Competition*, S. Hrg. 107-893 (2002) (statement of Robert A. Perry, V.P. Marketing, Mitsubishi Digital Electronics America, Inc.) available at Government Printing Office, Senate Judiciary Hearing Transcript http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:85889.wais; Perry Testimony at 1, available at http://judiciary.senate.gov/testimony.cfm?id=187&wit_id=439. Because the cable industry refused consumer electronics companies’ requests for progress on bidirectional devices, the CE companies had no real option but to accede to cable’s insistence to negotiate first only as to unidirectional device capabilities.

The refusal of cable operators and CableLabs to implement industry standards that *even then* were available and *had been tested* explains why manufacturers, faced with the Digital Transition, had little choice but to reach agreements for the functionality that NCTA and CableLabs *would* agree to support. In the absence at that time of any cable commitment for headend support of OCAP, and considering cable's consistent delays in OCAP implementation since 1998, the only available realistic option was reliance on one-way implementations, and, at least for some manufacturers, prospective reliance on OCAP promises sometime in the future.

The record is also replete with CE industry complaints that the only license for potential two-way operation offered by CableLabs did not conform to Commission regulations – culminating in CEA filing in September 2002 its own draft of a model “PHILA” license.¹⁵ CEA's model PHILA *did* assume and provide for two-way functionality.

The cable industry rewrite of history continues into the Plug & Play era, but here the cable operators' versions begin to contradict each other. According to NCTA, the unidirectional CableCARD products for which the industry *did* agree to offer rules-compliant licenses were a “failed experiment” and “. . . fated to become obsolete as anything but display devices within a few years.”¹⁶ According to Time Warner Cable, the CableCARD-reliant “UDCP” was a “debacle.”¹⁷ Yet Comcast brags that “[c]able customers today have the option of buying

¹⁵ *Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Letter from Michael Petricone, V.P. Technology Policy, CEA to W. Kenneth Ferree, Chief, Media Bureau, FCC Re: Written *Ex Parte* Presentation, attaching Alternative Non-Exclusive Pod-Host Interface License Agreement (Sept. 11, 2002).

¹⁶ NCTA Comments at 4.

¹⁷ Time Warner Comments at 20. Time Warner concludes that (apparently *all*) CE manufacturers should be *forced* to build cable-ready devices, irrespective of onerous terms or non-interoperable technology! *Id.* at 18 – 21. Yet Time Warner's own web sites are replete with evidence of denial of services to Digital Cable Ready products. *See, e.g.,* <http://www.timewarnercable.com/sandiego/products/cable/cablecard.html>. CEA and member companies have thoroughly documented the industry's failure to provide adequate support of CableCARD-reliant products via failures as to CableCARD technology and support. *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of the CEA on NCTA Downloadable Security Report (Jan. 20, 2006); *Commercial Availability of*

(continued...)

equipment at retail or leasing equipment ... and such retail and leased equipment is made by a much wider array of manufacturers. *** [O]ver 568 such devices have been certified or verified for use with CableCARDS in Comcast and other cable systems. As of May 31, 2007, Comcast had installed approximately 143,000 CableCARDS in digital cable-ready TVs and DVRs customers purchased at retail.”¹⁸

The simple truth is that, as is documented above, the cable industry has resisted every alternative or complement to OCAP since well before there *was* an OCAP. Yet, although touted from the beginning as *the* answer for competitive devices, OCAP was originally configured for *leased set-top boxes*. In other words, OCAP’s original design, configuration, and implementation did *not contemplate that a competitive, retail product would have any function other than acquiring and possibly displaying cable content*. (As NCTA still insists, a proprietary set-top box is all a consumer needs “except a screen.”) It was, finally, to take *some* measures to redress this calculated and exclusionary design history that the cable industry did agree to accommodate *some* competitive needs via the joint technical measures referred to in the NCTA Comments.¹⁹

The cable industry would have the Commission think, in the face of bitter experience, that the consumer electronics industry ignored two-way communications, woke up sometime in

Navigation Devices, CS Docket No. 97-80, Letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Notice of Ex Parte Presentation (Mar. 23, 2006); *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Letter from Robert S. Schwartz, Constantine Cannon, LLP, Counsel to CEA to Marlene Dortch, Sec. FCC Re: Notice of Ex Parte Presentation (Mar. 24, 2006); *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Letter from Julie M. Kearney, Sr. Dir. and Reg. Counsel, CEA to Marlene H. Dortch, Sec., FCC Re: Ex Parte Presentation (Aug. 7, 2006).

¹⁸ *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 Comcast Corporation at 8 (footnotes omitted) (Aug. 24, 2007) (“Comcast Comments”).

¹⁹ NCTA Comments at 16 – 18. If OCAP had been designed and configured to accommodate products other than cable-only set-top boxes, this project would not have been necessary.

2003 or thereafter, and decided to ask the cable industry for two-way interoperability and guide data, and that it is *too late now* to think of competitive alternatives. The truth is that since Congress first focused on competitive availability in 1992 there has not been a single year – including 2002 – in which the CE industry has *not* asked for these things. It is the cable industry that has stalled and offered *status quo* solutions – as it continues to do now.

B. NCTA Attacks CEA For Consistently And For More Than A Decade Proposing Industry-Standards Based Solutions, As Section 629 Clearly Contemplates.

NCTA, Comcast, and Time Warner all argue that telephone deregulation succeeded (and led to the Internet, *etc.*) because industry standards existed, yet the cable industry itself has resisted every movement toward standards – no matter how sensible or achievable – if those standards did not serve its members’ own proprietary goals. Adding insult to injury, NCTA notes that not *every* CE or IT product is governed by industry standards.²⁰ Yet the cable industry recognizes the benefits of standardization when it suits them, and indeed established the Society of Cable Telecommunications Engineers (SCTE) for that purpose. CEA’s proposals to move to industry standard approaches are not new, sudden, or irresponsible, and did not begin on November 7, 2006. CEA’s filing of November 30, 2005²¹ embraced proposals that were entirely standards-based – for CE and IT products, *as well* as for cable industry support, including of OCAP. These would be industry-standard approaches *today, if* NCTA and CableLabs had been willing to cooperate in their implementation.

²⁰ NCTA Comments at 41.

²¹ CEA, like the NCTA, provided a draft set of regulations, several of which depended on anticipated refinement of industry specifications and standards. *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Consumer Electronics Appendix to Joint Status Report to FCC (Nov. 30, 2005). In the Nov. 7, 2006 filing on which the Commission asks public comment, CEA provided more specific proposals, updates achievable in the near term, and specific appendices. *See* CEA Comments at 4 n.12.

The 2002 Plug & Play agreement, which major cable operators signed but which NCTA and Time Warner now deride as short-sighted because it was “one-way,” was based on normative standards as references. This was possible only because cable operators were willing to cooperate in establishing these references as industry standards – so long as the subject was *one-way* technology. They have not, and never have, been willing to cooperate on open industry standards for a two-way solution – despite years of CE industry requests and proposals.

When NCTA tries to persuade the Commission that DCR+ would take “years of standards body and intellectual property turmoil” it ignores its *own* industry’s prior standards-based activity, and the development work behind the “Appendix C” to the CEA Comments²² NCTA itself demonstrates, in its (non-documented) proposal for a USB-based switched digital “resolver,” that a solution may, in a compact timeframe, bridge different network technologies into a single common protocol over an open standard (USB). Moreover, NCTA’s approach of using operator-provided hardware to translate a standard protocol (albeit still unpublished) via a standard interface (USB) into network-specific protocols (SDV) is *identical in intent and approach* to DCR+, which entails use of operator-provided hardware (MCARD+) to translate a standard protocol (Appendix C) via a standard interface (SCTE 28, updated to include the capabilities MSOs are currently deploying) into network-specific protocols (SDV, IPPV, VOD). Only the cable industry’s reluctance to comply with Section 629 leaves the negotiations at an impasse. Of the other DCR+ elements, “IPPV” and “EPG” are already based on existing industry standards. The remaining “VOD” element is based on existing CableLabs metadata specifications.

²² NCTA Comments at 7.

C. The Cable Industry Attack On DCR+ Is Riddled With Errors, Mis-Statements, Misinformation, Distortions, Inaccuracies, And Misunderstandings, And Fails To Anticipate That CEA, Unlike NCTA, Has Updated Its Technical Proposals Since 2005 And 2006.

The cable industry slaughter of the straw men becomes serious as it moves on to attacking a parody of the actual proposal, for a DCR+ complement to OCAP, that CEA filed with the Commission on November 7, 2006. The attacks also fail to anticipate that CEA, unlike NCTA or the cable operators who filed comments, has documented its new elements so as to make them available for public comment.

1. The cable industry has been obliged to recognize most of the technology solutions proposed by CEA; what it resists is offering these solutions to consumers.

While cable industry comments paint CEA's November 7, 2006 proposal as novel, last-minute, and radical, in fact this proposal addresses needs also recognized by the cable industry and relies on technologies that are grounded in cable industry standards.

- After years of minimizing or ignoring CE industry concerns, NCTA itself has now admitted that its own "switched digital" practices serve to undermine the utility of Digital Cable Ready products. NCTA now touts a "Resolver" add-on approach to address this issue – but only for those UDCPs that have USB ports.²³
- As is documented above, impulse pay-per-view technology has been a part of cable industry standards for at least a decade. It has been purely and simply a business decision by the cable industry to deny the use of relevant industry standards to competitive entrant devices.
- There is nothing novel or mysterious about furnishing electronic program guide data, for which subscribers pay, to those subscribers who choose competitive devices. Again, it has been a business decision, covered by legal arguments, that stands in the way of accomplishing this.
- Nor is there anything radical, mysterious, or experimental about the means by which Video On Demand can and should be enabled for consumers who choose this functionality without investing or relying on the complexities of OCAP-

²³ NCTA Comments at 5, 32-33.

enabled devices. Appendix C, furnished in CEA's Comments and published at www.ce.org/publicpolicy, illustrates that all that is lacking is a business decision by the cable industry to adopt the necessary standards and to cooperate with competitive entrants.

2. The cable industry's resistance to offering EPG data to competitive entrant devices is based on business reluctance rather than on technical or legal necessity.

The elaborate and verbose obfuscation aimed at CEA's proposal for a DCR+ complement to OCAP takes full flower in the number of pages directed at persuading the Commission that competitive devices would or should not be able to take advantage of the guide data for which consumers pay. Cable interests also argue that cable operators might be precluded from furnishing such data in the first place. Neither notion bears up under examination and experience:

- The data itself, unlike presentation or use of the Guide, is not subject to intellectual property protection. This rule of law, once controversial, was settled more than 15 years ago by the U.S. Supreme Court in *Feist Publications Inc. v Rural Telephone Serv. Co.*, 499 U.S. 340 (1991).
- CE companies are experienced in licensing and implementing EPGs. Since 2002 they have been obliged to implement alternative guides in UDCPs because the cable industry has denied them access to guides and data. They simply need a reliable source of data for interactive services.
- The cable arguments prove too much – *if* the goal of competitive entrants were to present the cable operator's guide without a pixel's change in the operation or presentation to consumers, the concerns about cable agreements that lock competitive entrants out of licensing opportunities might be relevant considerations for the Commission (though not justifications for *further* discrimination against competitive entrants). However, CE and IT manufacturers have said they need access to *data*, not to replicate the cable-furnished guide, but so as to offer *competitive alternatives* that merely make use of the *guide data*. Whether they use the same licensed guide technology that cable operators use, or some other guide technology, will in the first instance be up to the manufacturer and the technology licensor.

Hence, as in the case of the cable industry's failure to license standardized impulse pay-per-view technology, and its heel-dragging about switched digital and video on demand, the cable industry is asking the Commission to add its *imprimatur* to an *exclusionary business decision*.

3. **Contrary to NCTA's claims, the DCR+ solution offers consumers the cable services that are available via "advanced" leased boxes today, *plus* many additional features that are unlikely ever to be available via proprietary set-top boxes or CE devices constrained by existing cable industry licenses.**

Contrary to the cable industry parody, DCR+ grants UDCPs all of the features current leased solutions have. There is nothing that even prototype OCAP devices have that is missing. More importantly, the competitive DCR+ products would include other innovations from the CE and IT industry above and beyond those supported or allowed via OCAP. For example, TiVo demonstrated at the 2007 International Consumer Electronics Show™ that a DCR+ TiVo would give the consumer digital cable, cable VOD, and cable SDV plus TiVo's more advanced EPG, full integration with ATSC signals, the ability to download content from the Internet, the ability to share content with other devices on the home network, and many more features that even some future mythical OCAP device may never have. Therefore "consumer-plus" is a good name for the DCR+ solution because it includes all of the same cable features as their current leased boxes PLUS all the consumer electronics product innovations above and beyond these.

4. The cable industry criticisms re DCR+ are based on misunderstandings or misinterpretations, many of which should be eliminated via CEA's Appendix C.

Several elements of the attacks on the DCR+ system may be based on good-faith misunderstandings or misreadings, which Appendix C should dispel.

- **“Significant changes to cable systems operations,” “massive reengineering,” “staggering cost.”**²⁴ DCR+ does require conversion from network-specific methods to a common network-agnostic interface at the CableCARD or CPE level. This does not necessarily require significant changes to the cable system, only to the device that makes it common. That this is feasible is demonstrated by NCTA itself, with respect to the “Resolver” – a small device that translates the network-specific vagaries of SDV into a common protocol for UDCPs, which NCTA says can be quickly produced and implemented. If this can be accomplished for switched digital video without any additional changes to the cable system, despite its network-specific translation requirements, then the other elements of DCR+ should also be considered straightforward and implementable.
- **Delivery of cable services consumers expect to receive.**²⁵ While cable commenters claim that, like the UDCPs that cable operators have failed to support adequately, DCR+ products will fail to deliver *some* future services, so will appeal only to a “tiny fraction” of the population, cable has *refused* to support regulations that would assure that the same or worse would not happen with respect to *purchased OCAP-reliant devices*. Without any commitment that all cable operators will support OCAP, and with operators resisting any requirement for *common reliance and backward compatibility*, it may be that the owner of a DCR+ device will have much greater assurance of receiving the services in which he or she is interested than would the owner of a poorly supported OCAP-reliant device. Yet DCR+ features *also* facilitate the integration of non-cable services and features. *That* is the nature of the cable industry’s true objection.
- **“Parental Controls.”**²⁶ Cable’s criticism appears to be purely a distortion. DCR+ devices can support parental controls, privacy profiles, and reminders supported by existing UDCPs. By contrast, it is not clear that OCAP devices will integrate features that UDCPs can support, such as internet download, advanced PVR features, advanced parental controls, and Internet and cell-phone based recording management from any network (not just the network controlled by the MSO).

²⁴ NCTA Comments at 35.

²⁵ *Id.* at 36.

²⁶ *Id.*

- **Harm to network.**²⁷ DCR+ uses the CableCARD for communication over the upstream channel, as has been defined in the OpenCable specifications from the start. The point of the network-specific protocol conversion of DCR+ is that the CE device does *not* have to “know” the specifics of the network communication path – only the CableCARD does. Therefore, DCR+ offers at least the same protections since its based on the same OpenCable technology. The DCR+ host makes requests to the CableCARD for upstream communication and the CableCARD does the network-specific communications over that channel. Therefore the network is only subject to harm by the operator’s own CableCARD, which presumably has been tested prior to deployment.
- **“Major redesign.”**²⁸ Again, the switched digital solution already underway refutes this. A simple device in the home will be able to translate network-specifics to a common protocol without any changes to the existing network.
- **Out-Of-Band Signaling.**²⁹ Cable comments reflect a core misunderstanding that ought to be corrected by review of Appendix C of the CEA Comments. These confirm that “DSG” must be used as the “OOB” technology – not the older legacy ones. (In fact it is OpenCable that appears out of date in still requiring all three “OOB” technologies, whereas DCR+ matches current industry practice.)
- **Video On Demand.**³⁰ Similarly, Appendix C to the CEA Comments should clear up any misunderstanding and concern. The specification does not require a “carousel” or any particular network technology for getting VOD information. Instead it specifies a “folder-subfolder” system as is in use today. Nor is it necessary to “invent” any protocol; it is already defined. It just needs to be translated within the CableCARD. Therefore, the cable operator can control the folder structure of its VOD offering. This allows it to observe requirements as to folder structure in any contracts with content providers. Nor do any programming data or program descriptions need to be revised. As is explained in Appendix C, the host asks the CableCARD for the data and descriptions, and the CableCARD returns the information. So the operator is free to use the existing data – just delivered over a common interface via the CableCARD.
- **“VOD Protocols.”**³¹ This criticism is based on speculation now shown to be baseless. As detailed in Appendix C, the core of VOD is abstracted into a simple, small set of “APIs.” The operators remain free to use proprietary protocols on its

²⁷ *Id.* at 38.

²⁸ *Id.* at 39.

²⁹ *Id.* at 46.

³⁰ *Id.*

³¹ *Id.* at 48.

network: The CableCARD will translate those to the APIs in Appendix C. These APIs also allow for the protocol translator to observe and protect the operator's business models.

- **“Yet-to-be standardized.”**³² In the DCR+ proposal, EPG data is delivered in the well accepted and well understood standard SCTE 65, with which cable operators are very familiar. The operators deliver data in the SCTE 65 format today. There is nothing ‘yet to be standardized.’
- **“New Impulse Pay-Per-View (IPPV)”**³³ The cable industry, in its SCTE 28 standard, *removed* effective support for IPPV that already existed in the predecessor standard. Whereas cable operators de-standardized such support as a business decision, DCR+ would simply re-instate support for this existing standard. DCR+ does not require any more “real time communication” than existing advanced STBs already support. (Even the oldest, *e.g.*, DCT 2000, set-top boxes are capable of the communication needed for IPPV – therefore this should be no trouble at all for a CableCARD and a DSG based DCR+.) Cable operators should also be aware that the same IPPV resource does support cancellation – this specification has existed for about 10 years.
- **“New M-card.”**³⁴ DCR+ implementation has the CableCARD interface perform a translation from network-specific protocols to a common protocol. This does not require that all the work be done in the Card. If the Card simply passes the requests up the network to some servers in the headend, this would not require any significant increase in CableCARD processing power or memory. The operator has a choice of placing the translation in the CableCARD or the network, whichever is more efficient. Neither is forced on them. The DCR+ proposal is simply an extension of existing CableCARD protocols. If today's CableCARDS are based on the first cards shown by the operators in July 2001, then by Moore's law they should easily fit the proposed extensions and be cheaper to boot.
- **“Common set of APIs.”**³⁵ OCAP itself has no “APIs” for EPG, SDV, VOD or any other ‘advanced’ service like Start Over. In that case as well, operators will have to translate network differences into a common language for all of their OCAP devices. DCR+ requires only that a core subset of these be translated in the CableCARD. The application need not be resident in the CableCARD. With translation protocols, the application will be run in the host device itself.

³² *Id.* at 49.

³³ *Id.* at 50.

³⁴ *Id.* at 51.

³⁵ *Id.* at 52.

D. All That Is Necessary To Meet The Goals Of The Commission And The Needs Of Consumers Is A Business Choice By The Cable Industry To Facilitate Competitive Entry.

The cable industry arguments add up to a joint reluctance, among cable operators, to facilitate competitive entry via *complements* to OCAP that give consumers a greater array of choices, and manufacturers additional platforms for innovation. Yet the industry offers neither a shred of evidence nor argument that OCAP could have been ready any earlier than is currently, and only approximately, projected by the industry – or indeed that versions of OCAP offered to CE manufacturers will *ever* be relied upon in devices furnished by cable operators themselves. While NCTA, Time Warner, and Comcast in various ways castigate the CE industry for reliance on unidirectional solutions, *for the last decade their headends have not been prepared to support any two-way solution for competitive entrants*. It is in this light that the arguments that cable operators make now as to the purported inadvisability or difficulty of competitive complements to OCAP need to be viewed. They are reflections of exclusionary business decisions, rather than of technical impediments.

E. NCTA And CableLabs Have Not Provided Any New Technical Or Legal Solutions, Or Rules-Compliant Approaches To Licensing, Since Their November, 2005 Filing.

The *status quo* nature of the cable industry approach to the DTV Transition and to this Third FNPRM is reflected by the fact that, with the sole exception of the “Resolver” module to prevent the slow strangulation of *some* UDCPs, not a single innovation or concession, or even discussion of CEA’s longstanding complaints about the industry’s violations of Commission rules re licensing, is offered. By contrast, CEA, in appendices to its Comments, has provided documented solutions as to every issue that it has raised.

1. CEA has provided a comprehensive set of regulations grounded in the present set of circumstances and consumer needs cited by the commission; NCTA has not.

Though NCTA, Comcast, and Time Warner spend pages touting the history and advantages of OCAP, their Comments are devoid of any new commitments to *rely* on this technology in their own devices. While NCTA and Time Warner also devote pages to blasting the CE industry for being naïve enough to rely on one-way devices, they avoid mentioning the CE industry's real mistake – that of relying on a technology (CableCARDs) controlled by an industry fighting tooth and nail to avoid relying on it themselves. Based on these Comments, major cable operators, their consortium, and their trade association now invite the CE and IT industries to make a commitment to rely *solely* on OCAP to deliver bidirectional services – yet they, themselves, make no such commitment. Cable operators continue to deploy non-OCAP advanced set-top boxes with a range of “low end” to “high end” features, and presumably will do so into the future. They have never offered, as they ask the CE industry to do, to rely *exclusively* on *any* version of OCAP. Nor will they promise to implement for their own devices' use a version of OCAP that is relied upon by CE and IT entrants.

From the cable industry comments, one would think that CEA's November 30, 2005, November 7, 2006, and August 24, 2007 filings had to have been solely about DCR+, with no or little attention to OCAP. A look at Appendix A of the CEA Comments demonstrates that this is far from the truth. In its draft regulations, CEA focuses equal attention on these two technologies, as *complements* that offer innovators and consumers a wider range of media, services, and devices. Among the areas, pertaining to OCAP, addressed in the draft CEA regulations that have been ignored in the cable industry filings are:

- CEA provides for a wider deployment of OCAP than does NCTA³⁶
- CEA provides for support of OCAP versions that enable more advanced and interoperable features of CE devices.³⁷
- CEA provides for common reliance.³⁸
- CEA provides for backward compatibility.³⁹
- CEA provides a path for downloading software repairs.⁴⁰
- CEA provides for adequate testing of applications.⁴¹

CEA provides similar documentation, as to labeling obligations on manufacturers and support obligations on cable operators, with respect to its DCR+ proposal. CEA is willing to work with the Commission, and with the cable industry, to achieve a comprehensive two-way framework that satisfies the goals of the Commission in this Third FNPRM, and the needs of consumers.

2. Since the outset of the “two-way” negotiations in January, 2003, NCTA, CableLabs, and their members have refused to discuss a rules-compliant approach to licensing.

As CEA was obliged to do in order to achieve a rules-compliant “one-way” framework, CEA has provided the Commission with draft model licenses that specifically rectify the areas in which the licenses presently on offer transgress 47 C.F.R. 76.1200-1205. As in the case of

³⁶ *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 the CEA on Third FNPRM Appendix A, CEA’s Proposed Draft Amendments to Regulations at 12-13, § 76.641(d)(5) (Aug. 24, 2007).

³⁷ *Id.*

³⁸ *Id.* at § 76.641 (d)(5)(v).

³⁹ *Id.* at § 76.641 (d)(6).

⁴⁰ *Id.* at 13-14, § 76.641(f).

⁴¹ *Id.* at 13, § 76.641 (e).

CEA's draft regulations, these licenses are focused equally – in fact, more – on the OCAP environment. Specific areas that are addressed and corrected in these model licenses are:

- Only one license is required to manufacture both interactive and unidirectional digital cable products, and the unidirectional DFAST license specifically includes the right to manufacture products that function with “switched digital” systems.
- No limits are imposed on the number of prototypes, prototype Licensed Components, or test tools that can be made under the licenses.
- Licensees are granted a meaningful right to object to major changes to Compliance Rules and Robustness Rules that would materially limit the capabilities of commercially-available digital cable products or materially increase product cost or complexity.
- Digital cable products are required to be manufactured in compliance with the Specifications, Compliance Rules and Robustness Rules, without certification.
- The vague and limitless requirement that the licensee provide warranties against any sort of “harm to the *service*,” which on its face baldly over-reaches the specific terms of 47 C.F.R. § 76.1204(c) (as well as §§ 1201, 1202, and 1203) have been deleted, as they should have been the first time an objection was raised.
- Each license provides for alternative means for approval of digital output protection technologies, including approval by CableLabs (with a right to appeal denials to the Commission); a four-studio approval process; and, approval by the Digital Living Network Alliance (an inter-industry group developing voluntary guidelines for audiovisual home network interoperability, with substantial representation from all affected industries, including cable system operators and motion picture studios).

3. Nothing in any of the cable industry filings provides any assurance that through its present course the industry can meet either the Commission's near-term goals or the long-term needs of consumers for choices in devices and media.

One significant gap in the MSO's planned deployment of OCAP technology is their own Compliance Test Program (CTP). A major investigation of the CableLabs CTP found that the testing program which has been under development for many years, in advance of operators' OCAP roll-out, only tests between 20-25% of OCAP functionality. Cable's test regime tests for correctness on less than one quarter of OCAP. Even certification – passing the existing CTP –

gives no assurance that a specific OCAP middleware implementation, or OCAP application, will function correctly.

Moreover, although OCAP promises, in theory, “write once, run anywhere” portability of interactive cable applications, in practice the situation is more complex. Just as digital cable-ready devices must be tested to ensure they comply with the OCAP requirements, so also must the cable operators’ OCAP applications which are downloaded over the cable plant be tested thoroughly and certified to run properly on OCAP-reliant digital cable-ready devices.

Both applications and devices must be tested for the system to work reliably. NCTA’s proposals to the FCC still omit application testing – perhaps taking for granted that cable operators will test OCAP applications thoroughly with their *own* OCAP set-top boxes. However, this is not enough; it lacks vital assurances that cable applications will also work properly on competitive entrant, retail OCAP-reliant products.

To reduce the marketplace disadvantage that would result from such a lack of parity, CEA proposed in its draft regulation Section 76.641(e) that cable operators’ applications (*e.g.*, program guides) be certified before they may be carried on cable systems, and that interactive applications that are bound to specific content (*e.g.*, viewer voting applications for reality shows) be self-certified by the application developer. The assertions of NCTA and cable operators as to support for OCAP-reliant products in the Digital Transition, incomplete as they are, appear not to take such application testing considerations into account.

Because the interoperability of downloaded OCAP applications with a wide variety of retail devices is not certain (absent exhaustive testing of every application with every device, which is impracticable), it is especially important, *inter alia*, that CE manufacturers have the alternative of DCR+ available.

II. INDEPENDENT COMMENTERS RECOGNIZE BOTH THE NECESSITY OF COMPETITIVE CHOICE AND THE IMPORTANCE AND FEASIBILITY OF CEA'S PROPOSAL.

Independent commenters have been eloquent as to why the Commission needs to require support for alternatives or complements to OCAP. Public Knowledge, the Consumer Federation of America, Consumers Union, EDUCAUSE, the Electronic Frontier Foundation, Free Press, Media Access Project, New America Foundation, and U.S. Public Interest Research Group succinctly stated the consumer interest in competition:

“Consumers would benefit if electronics manufacturers were permitted to build fully integrated devices that combine cable services with services from elsewhere, such as the Internet. Control of the user interface should be in the hands of the device manufacturer and the consumer, and not dictated by the cable operator. Cable customers have the right to access the programming they have subscribed to using a variety of hardware and software, and should not be limited to certain methods of presentation and particular proprietary applications.”⁴²

The Computer and Communications Industry Association (CCIA) said that it is up to the FCC, and to the cable industry, to assure that consumers are not “left hostage to the status quo:”

“The FCC must secure cable industry support for specifications and product licenses that give consumers choices as to their own variety of interactive digital features, cost options and opportunities for more efficient home networking. Introduction of competition in the market for telephone equipment in the 1980s unleashed a smorgasbord of new devices including touch tone phones, cordless phones, fax machines, phones with voice mail capability and computer modems to connect PCs to information service providers (ISPs). All these new retail

⁴² *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 Public Knowledge, the Consumer Federation of America, Consumers Union, EDUCAUSE, the Electronic Frontier Foundation, Free Press, Media Access Project, New America Foundation, and U.S. Public Interest Research Group at 2-3 (Aug. 24, 2007).

equipment options stimulated network usage without compromising telephone network operation.”⁴³

CCIA went on to explain:

“Without innovative commercial hardware solutions, households face a tangle of separate devices for accessing video programming, video games and other two-way applications. Consumers should be able to choose unitary equipment that integrates all the capability they need or desire for home networking. A range of features can be built into television receivers and other multipurpose hardware. Of course, cable operators will continue to be able to offer customers the option of leasing their proprietary digital equipment. Our point is simply that the Commission should not allow the cable industry to be the sole arbiter of the adequacy of support for the products that compete with its own products. The proposal put forward by the Consumer Electronics Association (CEA) in November of last year would accomplish this goal. Further, CEA’s plan would boost the transition to digital TV by increasing both consumer awareness of the additional capabilities of digital TV sets, and their overall market penetration.”⁴⁴

III. THE COMMENTS AFFIRM CEA’S POSITION THAT A NATIONAL SEPARATE SECURITY INTERFACE IS VITAL TO COMPETITIVE ENTRY.

Nothing in the Comments received by the Commission supports the notion, advanced by some waiver applicants and petitioners, that a patchwork quilt of “downloadable” security technologies, each requiring *unique hardware support*, would possibly comply with Commission regulations or expectations, or could support a competitive national market. Similarly, those who have raised the notion of substituting “set-back boxes” for set-top boxes have failed to document their ideas for public comment, or to demonstrate why or how this would meet Congress’s and the Commission’s expectation of achieving competition through technical standards that support true device interoperability.

⁴³ *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 the Computer & Communications Industry Association (“CCIA”) at 3 (Aug. 24, 2007).

⁴⁴ *Id.* at 3-4.

A. No Justification Has Been Offered And No Details Provided As To Prospective Integrated Security Approaches, Whether Hard-Wired Or “Downloadable,” That Cannot Support A Competitive Market.

The Commission asked for public comment on CEA and NCTA proposals in order to build a record that would be sufficient for decisive action. Accordingly, CEA provided three detailed Appendices to its initial Comments, so as to afford public commenters an opportunity to discuss them in this Reply round. NCTA, Time Warner, Comcast, and other proponents of integrating security with specific hardware (whether hard-wired or down-loaded) have provided nothing new or tangible to explain or justify such approaches.

Despite the prominence given to what CableLabs and NCTA refer to as “DCAS” in the filings leading up to the 2005 “Deferral Order,”⁴⁵ there is barely any reference to or elaboration on “DCAS,” or the CableLabs “DCAS License,” in any of the cable industry comments. Moreover, to the extent “DCAS” remains a live subject or proposal, details remain barricaded behind non-disclosure agreements such that even those CEA members who are aware of technical details cannot legally discuss them with either CEA or the FCC.⁴⁶

Similarly, despite the Commission’s having specifically quoted from and asked comment on a June 2007 NCTA letter that raised a “set-back box” proposal, neither the NCTA nor any other cable operator has provided a shred of detail, system, or technical elaboration on that vague idea. CEA commented in detail on the elements of such an approach – including a national

⁴⁵ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd 6794 ¶ 36 (rel. Mar. 17, 2005) (“2005 Deferral Order”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

⁴⁶ A similar NDA approach prevented CEA from discussing even the PHILA license in 2001-2002 until pressure from congressional leaders and the FCC caused the NCTA and CableLabs to share the license text with the Congress and the FCC and then finally to release it publicly.

separable security interface – that might make it suitable as a pan-MVPD solution.⁴⁷

Unfortunately, the cable commenters have not provided the Commission (or CEA) anything further with which to work.

B. Assertions That Any National Interface Must Be Based On Secrecy And Non-Disclosure Agreements That Stifle Competition And Interoperability Are Transparently False.

NCTA and others have asserted that a secure national conditional access interface must be based on a secret specification. This assertion contradicts a bedrock principle of electronic systems security. A robustly secure system does not depend on total secrecy to maintain its security – especially at the protocol level. Only “core secrets” such as key data need remain secrets. *See* Bruce Schneier, *Secrets & Lies: Digital Security in a Networked World* 343-44 (2d ed. 2004). The protocol used by current CableCARDs was developed through an open, ANSI-accredited process with multi-industry input and public scrutiny. It is available on the Internet as a 78-page specification, with only the *keys* held secret and subject to nondisclosure agreement.⁴⁸ Even the protocol used by automated teller machines to process financial transactions is based on an open federal standard, the triple-DES encryption algorithm. Again, only the keys need be or indeed should be kept secret to ensure the security of financial transactions.

Assertions that a national conditional access protocol for two-way cable devices cannot be developed through an open, participatory process are transparently false. Locking up security protocols behind nondisclosure agreements effectively multiplies opportunities for proprietary control of protocols by a single industry – the very control that has suppressed a competitive market in navigation devices for eleven years after Congress called for a solution. A protocol

⁴⁷ CEA Comments at 16-20.

⁴⁸ ANSI/SCTE 41: POD Copy Protection System, *available at* <http://www.scte.org/documents/pdf/ANSISCTE412004.pdf>.

that cannot be discussed between manufacturers, or with the Commission, is a protocol that can easily be crafted to benefit incumbents. As secrecy does not improve security, the Commission should view all calls for a secret conditional access protocol as further attempts to maintain the status quo.

C. Proposals For Redundant “Set-Back Boxes” Provided Entirely By Cable Operators And Which Do Not Support Competitive Features Hark Back To General Instrument’s 1997 Proposal That The Commission Rejected In 1998.

It appears – in the absence of any elaboration by cable operators – that the cable industry’s solution for pan-MVPD approaches boils down to (a) proprietary set-top boxes that supply “everything needed ... except the screen,” and (b) dumb displays, with only video-display inputs. As CEA noted in its Comments,⁴⁹ such an approach was urged on the Commission in 1997 and 1998 by General Instrument. The Commission noted this proposal in its 1998 First Report & Order, but chose instead to comply with Congress’s direction to find solutions that enable innovation and competition, along the *Carterfone* lines. Nothing in the Comments of the cable industry or any other commenter provides any basis for the Commission to change course and abandon its determination to fulfill the congressional direction.

IV. PROPOSALS BY OTHER MEDIA REPRESENTATIVES ARE MORE CONSISTENT WITH CEA’S PROPOSALS THAN WITH NCTA’S.

The record remains devoid of any enthusiasm for OCAP or “DCAS” among other MVPDs interested in this proceeding. Nor, as we note above, has the NCTA or any other cable operator provided any detail about an alternative “set-back,” “gateway,” or “modular” solution on which other MVPDs would be able to file Reply Comments. By contrast, other wired MVPDs, and a relevant standards organization, confirm that CEA’s approach of extending the

⁴⁹ CEA Comments at 16-17 and n.27.

known CableCARD functionalities that are based on national standards is viable and has the potential of leading to solutions that work for more than one type of MVPD, although accomplishments in this area may need to proceed on a more extended timetable.

A. NCTA's Primary Stance As To DBS And Telco Media Is To Threaten The Commission With Legal Action That Has Twice Been Dismissed By The Court Of Appeals Rather Than To Propose Any Constructive Solution.

Having twice sued the Commission in the Court of Appeals and having twice lost,⁵⁰ the NCTA, Time Warner, and Comcast once again try to turn Section 629 on its head by claiming once again that the FCC's implementation of an express instruction by the Congress would somehow exceed the Commission's discretion and authority. In so doing, these cable operators again reach back for arguments from 1997 and 1998 which were rightly rejected at the time.

NCTA, as it did in 1997 and 1998, cites language from Section 624A⁵¹ of the Communications Act, pertaining to Congress's earlier attention to cable compatibility in its 1992 Cable Act. As other commenters pointed out at the time, this language quoted at page 70 of the NCTA comments was added in 1996 at the same time, by the same Committee, as Section 629, with legislative history that made this language directly and entirely subservient to *any* action necessary to achieve the goals of Section 629. The Commission specifically and correctly dealt with this issue in its 1998 First Report & Order, as necessary to its determination that it had the power to order cable operators to provide separate security modules – a determination that the cable industry has never questioned or opposed:

“[T]he House Report specifically indicates that the amendments to Section 624A were ‘not intended to restrict the Commission’s authority to promote the

⁵⁰ *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communs., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

⁵¹ 47 U.S.C. § 544A.

competitive availability of converter boxes, interactive communications devices, and other customer premises equipment as required by [Section 629].”⁵²

NCTA, as cable operators did in 1998 and 2005, then broadens its attack by claiming once again that the FCC would be abusing its discretion were it to follow Congress’s direction to “assure” competitive entry in its regulations. Time Warner again charges that the Commission is not empowered to “pick and choose” among MVPDs.⁵³ Such arguments were rejected only last year by the Court of Appeals for the D.C. Circuit.⁵⁴ Moreover, the U.S. Supreme Court, in a case argued by Time Warner’s General Counsel, in 2005 agreed with the cable industry that the FCC does, indeed, have the power and discretion to implement acts of Congress on an incremental basis among MVPDs.⁵⁵

B. ATIS Confirms That A CableCARD-Enhancement Solution Is Under Development.

The Alliance for Telecommunications Industry Solutions (ATIS), an ANSI-accredited standards development organization, is in an open and nondiscriminatory fashion developing both an extension to the existing CableCARD standard that would support advanced bidirectional services on a bidirectional IP network, by building on the existing CableCARD system.⁵⁶ Such a system is planned for completion by July 2008. As a second phase, also in an open forum, ATIS is developing a downloadable conditional access system as an alternative to the cable industry’s DCAS.

⁵² 1998 Report and Order ¶ 72. Moreover, this language is entirely consistent with cable operator support of private sector standards and specifications, as laid out in CEA Appendix C, just as it is with respect to existing § 76.640. NCTA, for all its bluster, does not claim otherwise.

⁵³ Time Warner comments at 10.

⁵⁴ *Charter Communications, Inc.*, 460 F.3d at 42-43.

⁵⁵ *NCTA v. Brand X Internet Servs., Inc.*, 125 S. Ct. 2688 (2005). The Court agreed with the cable industry’s argument that the Commission has the right, without interference from the courts, to interpret and implement legislative instructions on an incremental basis.

⁵⁶ ATIS comments at 4.

Both ATIS solutions are designed to provide consumers the freedom to choose retail equipment they wish to attach to a network and service, as well as to yield a competitive landscape to service providers – allowing service providers to choose from several competitive suppliers.⁵⁷

In acting on this Further Notice, the Commission should adopt rules that allow deployment and development of products using this yet-to-be-defined standard without additional rulemaking (beyond the instant one) and without imposing additional delay on bidirectional products on traditional cable networks.

C. Verizon Confirms That OCAP Is Not Feasible For Non-Cable Wired Media Whereas CableCARD-Enhancement Approaches Such As CEA’s Are.

Verizon, a network operator deploying a non-traditional hybrid QAM and IP network, does not find OCAP necessary for basic interactive services: “... [Verizon] agrees with CEA that OCAP middleware should not be a prerequisite for basic interactive services.”⁵⁸ In fact, Verizon goes even further – indicating that OCAP plays no role in its planned network, explaining that “Verizon opposes any standard that requires the use of OCAP.”⁵⁹

As a service provider and network operator, Verizon encounters many of the same issues that, cable operators suggest, OCAP solves (including portability of applications across many devices in a heterogeneous environment, and operator control of the consumers’ viewing experience – the “service”). Thus Verizon’s opposition to the OCAP requirements is telling. By contrast, CEA’s DCR+ proposal seems entirely consistent with Verizon’s plan for its service. Furthermore, Verizon’s comments in favor of building upon existing standards (rather than

⁵⁷ ATIS comments at 6.

⁵⁸ Verizon comments at 13.

⁵⁹ Verizon comments at 13.

developing and deploying new ones) bolster CEA's proposal to enhance the existing CableCARD devices with DCR+.⁶⁰

V. COMMENTS AS TO HOME NETWORKING DEMONSTRATE THE NEED FOR STANDARDS-BASED APPROACHES NOT DOMINATED, DICTATED, OR CONTROLLED BY THE CABLE INDUSTRY.

CEA agrees with the several comments commending the Commission's positive role in stimulating standards for innovative networking technologies that are moving from the drawing board into consumer homes.⁶¹ In its November 7, 2006 proposal, CEA urged that the Commission should permit retail devices to support the standard home networking outputs that have been approved by the Digital Living Network Alliance ("DLNA"), and should require that cable providers offer consumers, upon request, a fully capable digital set-top box that exposes its services to a DLNA network. Both of these components remain essential so as to ensure the equivalence necessary to a competitive market, and to address other open issues in CS Docket No. 97-80.

As the comments note, products that follow voluntary inter-industry guidelines already are available in Japan and the United States and can route cable content seamlessly throughout the home. These comments demonstrate that inter-industry guidelines and standards will flourish in an environment in which one industry is not permitted to dominate all others. These guidelines came into being, and will become significant forces in the consumer market, primarily because the Commission determined that cable control terminates at the security gateway to the home, and that the cable industry should not be able to dictate any particular interface or

⁶⁰ Verizon comments at 6.

⁶¹ See Comments of the Home Networking Proponents, the High Definition Audio/Video Networking Alliance and the 1394 Trade Association.

business model for home networking. Unlike CableLabs, an organization of the cable industry and for the cable industry, these inter-industry groups invite meaningful participation from all affected industries. Notably, the comments observed that their respective guidelines were created in consultation with and with the active participation of major motion picture studios and cable system operators. These open, inclusive efforts successfully produced viable, implementable home networking protocols that already are being embodied in consumer products. By contrast, the closed CableLabs processes that the cable commenters support have produced no tangible home networking solutions, no paths to interoperability, and no new consumer products.

Moreover, voluntary inter-industry guidelines comply fully with Commission requirements to avoid harm to the cable network and theft of cable service. The roadblocks that cable companies often use to obstruct competition – quality of service, protection of content – are being addressed by these cooperative inter-industry efforts. Specifications created by inter-industry organizations can realize exacting requirements for quality of service because their members from the CE community have decades of experience meeting consumer demand for reliable high-performance products. The transmission link protection technologies supported by these guidelines also have been approved by CableLabs, in part because these open inter-industry organizations consulted extensively with content owners so as to support only technologies that would meet the reasonable content protection requirements of the affected industries.

These inter-industry guidelines likely would never have been developed for cable content without Commission regulations limiting the intrusion of cable systems on technologies within the home. CEA therefore believes that in any review of the current regulations, or any further regulation promulgated pursuant to the Third FNPRM, the Commission should maintain the

boundary between the cable gateway and the home network so as to protect against harm to the cable network or theft of cable service. Further, the Commission should adopt CEA's proposal to require cable operators to offer DLNA-compliant products and to enable construction of DLNA-compliant gateways bridging to the home network, so as to promote free competition and innovation for home networking standards and products.

VI. AFTER FOUR YEARS' EXPERIENCE NO CASE HAS BEEN MADE FOR ANY CHANGE IN THE COMMISSION'S "ENCODING RULE" REGULATIONS.

In its Second Report and Order,⁶² after weighing the arguments of content owners, service operators, device manufacturers, and public interest organizations, the Commission determined to adopt the Encoding Rules jointly proposed to the Commission by CEA and the Cable industry. At that time the Commission noted, "We believe that the draft encoding rules proposed to the Commission are an essential component of the MOU that will assure the commercial availability of navigation devices and strike a measured balance between the rights of content owners and the home viewing expectations of consumers."⁶³ These issues, the Commission observed, directly implicate vital public interests concerns: the rights of consumers with respect to content they have legally acquired for a limited use.⁶⁴ Thus, the Commission adopted balanced encoding rules with respect to consumer home recording of broadcast and "copy one generation" subscription content, and enabled "copy never" encoding for defined business models of video on demand and pay-per-view transmissions.⁶⁵ Selectable Output

⁶² *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 and Order and Second Further Notice of Proposed Rulemaking (Oct. 9, 2003) ("Second Report and Order").

⁶³ *Id.* at ¶ 47.

⁶⁴ *Id.* ¶ 51.

⁶⁵ 47 C.F.R. § 1904.

Control, which would cause consumers' displays to "go dark" as to lawfully acquired content, was banned entirely.⁶⁶

The Commission justified its regulations by describing the ham-fisted and exclusionary nature of these tools, which would potentially disenfranchise millions of early adopters of high-definition television displays yet present no demonstrable countervailing benefits.⁶⁷ There is absolutely nothing in the record that would or could justify a decision to revisit these Encoding Rules at this time.

A. CEA And Its Members Were Obligated To Spend The First Year Of "Two-Way" Negotiations Discussing MPAA Priorities, Producing Several Constructive Undertakings But No Evidence Of Any Need To Change The Encoding Rule Regulations.

Most of the first two years of the CEA-Cable negotiations over "Two-Way" digital cable products was consumed with discussions, led by MPAA representatives, of new business models and services that might justify invoking such additional content protection tools. Yet, neither those discussions nor the comments submitted to the Commission in this proceeding have documented any actual harm or palpable threat to the vitality of cable service or the content industry from the Commission's regulations. Those discussions yielded several constructive undertakings but, without evidence of need or bankable promises of new service offerings, went on hiatus without conclusion. Over the nearly four years since the Commission first promulgated its regulations, no evidence of harm, or need to change the regulations, has appeared.

⁶⁶ See 47 C.F.R. § 76.1903.

⁶⁷ "We also recognize consumers' expectations that their digital televisions and other equipment will work to their full capabilities, and the potential harm to the DTV transition if those expectations are frustrated. In particular, we are concerned that selectable output control would harm those 'early adopters' whose DTV equipment only has component analog inputs for high definition display, placing these consumers at risk of being completely shut off from the high-definition content they expect to receive." Second Report and Order ¶ 60.

Ignoring any requirement to show harm or need, the comments of the MPAA and various cable representatives resurrect the same arguments the MPAA made in 2002-2003 to suggest that the Commission is out of step with commercial reality. Once again they ask the Commission, without any supporting evidence, to entrust them with the right and sole discretion to trigger tools that will deny consumers the right to view high definition displays of content for which the consumer has paid. Absent compelling proof that the Commission's Encoding Rules substantially prejudice the paramount interests of consumers, or portend greater harm to content owners and cable operators than to paid cable subscribers, there is no reason for the Commission to revisit the reasoning or the decisions it reached in 2003.

B. Arguments Advanced For Selectable Output Control Ignore Consumer Sovereignty And Are Unpersuasive Legally.

As the Commission noted, millions of early-adopter consumers purchased television displays that receive high definition content from a cable service only through high definition analog inputs. Consumers rely on these analog inputs to this day; some because their sets were manufactured before widespread adoption of HDMI, others because they found no readily-available cable service support for the 1394 inputs on their televisions. These consumers nevertheless pay for monthly cable services, including pay-per-view, as do all other cable customers, and are entitled to the reasonable expectation that the services they enjoy today will be available to them tomorrow.

Selectable output control – the ability to prevent cable programming from going out one or more outputs of a digital cable product – upends these reasonable consumer expectations, and causes high definition presentations to go black. While MPAA and cable interests again contend that selectable output control would stimulate new business services such as early release of motion picture content, we've seen this movie before. Evidence of harm to the content industry

that is worth the admitted and unavoidable harm to consumers is simply lacking. Nor are these commenters willing to limit their attack on SOC solely to these analog inputs – they would apply it to *protected digital inputs* as well – the MPAA comments specifically ask the Commission to “allow for the use of SOC functionality for *all* content that passes through bidirectional devices.”⁶⁸ The sum and substance of the MPAA comments appears to be no more than that they disagreed with the Commission’s decision then, and still do now.

C. Similarly, Downresolution And Redistribution Control Should Remain Subject To Commission Encoding Rules, Not Unfettered Content Owner Discretion.

As with selectable output control, the MPAA seeks to lift existing Commission restraints on the application of downresolution of high definition analog signals, and to apply redistribution control to otherwise unprotected signals (not Controlled Content). Again, the Commission should reject these requests.

The Commission observed that downresolution devalues consumer investment in high definition television in much the same way as selectable output control. (“As in the case of selectable output control, we are concerned that consumer expectations regarding the functionality of their digital cable ready televisions and related products would be frustrated by the use of down-resolution by MVPDs.”)⁶⁹ Although CEA then and now acknowledges that certain content protection technology licenses (specifically, licenses to DTCP) permit downresolution in devices *downstream* from the digital cable product, those licenses do not

⁶⁸ *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 the Motion Picture Association of America, Inc. *et. al.* at 9 (emphasis added) (Aug. 24, 2007) (“MPAA Comments”). Ironically, these same parties contend that the Commission lacks jurisdiction to impose other encoding rules, yet ask the Commission to grant them selectable output control as a solution to the “analog hole” – an area which Congress has considered, but as to which Congress has not as yet determined the need for or advisability of legislation. *Id.* at 8.

⁶⁹ Second Report and Order, ¶ 64 at 29.

require downresolution in two circumstances pertinent to this proceeding. First, downresolution is not permitted to be applied under those licenses to content that is not Controlled Content. Second, content output using DTCP is not permitted to be downresolved in downstream devices unless such downresolution was required in the upstream digital cable product. Thus, downresolution of cable-delivered content has never occurred even in those licenses that otherwise would permit it. Accordingly, the Commission properly precluded downresolution of terrestrial broadcast programming and, as it considered the appropriate downresolution rule for other tiers of content, required content owners to notify the Commission before applying downresolution. To CEA's knowledge, no such notices have been filed.

CEA remains opposed to downresolution as anticonsumer and unnecessary for content owners. Consumers are still learning to appreciate the full value of high definition television. Purchasers of high definition televisions with only high definition analog outputs understood that value, and were willing to invest as early adopters. If the Commission regulations permit the content industry to effectively punish early adopters, it will become increasingly difficult to convince them or others to invest in the new technology. Particularly where neither MPAA nor cable comments have cited any instance since 2003 of actual harm to content owner interests, there is no reason to begin applying downresolution now. Any potential for harm will diminish naturally through attrition as over the next few years as consumers begin replacing their early analog high definition sets with bigger and more sophisticated digital receivers.

The Commission should not enact any regulations relating to redistribution control. For Controlled Content from cable systems, such regulation is unnecessary. Effective redistribution control already exists by virtue of the approved digital output protection and recording technologies. Each of those technologies inherently contains Controlled Content to the home

and personal network, and prevents redistribution. Applying redistribution control to content that is not Controlled Content would create, in effect, a “back-door” Broadcast Flag – without any consideration or concern whatsoever for the public interest. Decisions involving content delivered by broadcast over the public’s airways should not be vested solely in the hands of self-interested content owners. Such decisions must be made by a legislative or regulatory body that also considers the paramount interests of the public and the concerns of consumer electronics manufacturers. Given the current posture of the Commission’s prior well-intentioned Broadcast Flag regulations, the Commission should take no action at this time. Various bills allowing redistribution control to be applied to broadcast content have been presented to Congress in the past, and, like proposals pertaining to the “analog hole,” have not been passed. Under prevailing circumstances, where Congress has refused to act, the Commission should not step forward again to fill the void – and most certainly should not permit content owners to fill that void without any restraint, regulatory supervision, or right of appeal.

D. The Commission Should Not Assume The Power To Grant Exemptions From The Digital Millennium Copyright Act.

A brief filing from ASCAP and BMI, seeking permission to circumvent any content protections applied to cable content, deserves a brief response. The Commission should reject their request, primarily for two reasons.

First, these performing rights organizations have provided the Commission no rational basis to consider, much less to grant, their request. They effectively ask the Commission to reduce their costs of doing business by relieving them by regulation of paying for the same licenses for which consumers directly or indirectly pay. They submit no evidence that they have sought or been refused any necessary licenses, or that the costs of such licenses are prohibitively expensive. In fact, they do not even describe precisely why they need to circumvent such

technologies, or what technologies they might need to circumvent. The total lack of facts supporting their request provides more than enough cause to deny it.

Second, it appears these organizations seek an exemption because circumvention of these content protection technologies is prohibited by section 1201 of the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201. CEA recalls all too well the strong support of ASCAP and BMI for that law, and their insistence that consumers should not be able to circumvent content protection technologies even to exercise their rights of fair use over content they have lawfully acquired and for which they have fully paid. It would be unfair and ironic if these organizations now were to receive a regulatory exemption from DMCA governance to save a few dollars in operating costs, when they helped inflict under that statute a far greater social cost on consumers.

VII. CONCLUSION.

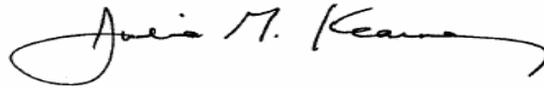
CEA could not express the need for expedited action by the Commission, to enable real competition and innovation, any more concisely than did Commissioner Copps in the Commission's Order, re Plug & Play waivers, released on September 4:

Anyone who doubts the importance of replacing vertical integration with device openness need only look at the effects of the FCC's 1968 *Carterfone* decision, which freed consumers from the obligation to lease AT&T's black rotary phone. This reform unleashed a flood of less expensive phones and paved the way for innovations like the fax and answering machine. Indeed, it is no exaggeration to say that *Carterfone*—by enabling third-party manufacturers to develop and sell dial-up modems—played a critical role in bringing the Internet to American homes.⁷⁰

⁷⁰ *In the Matter of Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Application for Review, Memorandum Opinion And Order, CSR 7012-Z, CS Docket 97-80, Statement of Commissioner Michael J. Copps (rel. Sept. 4, 2007).*

It is up to the Commission, now, finally to fulfill Congress's clear intention that the much greater bandwidth controlled by MVPDs, and by cable operators in particular, also be subject to innovation and competition.

Respectfully submitted,



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