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October 30, 2007

EX PARTE, VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Commercial Availability of Navigation Devices
CS Docket No. 97-80.

Dear Ms. Dortch:

On October 29, 2007, Joel Wiginton, Vice President and Senior Counsel, and Jim Morgan, Director and Counsel, of Sony Electronics Inc. ("Sony") met with Michelle Carey, Senior Legal Advisor to FCC Chairman Martin, regarding the Third Further Notice of Proposed Rulemaking in the proceeding specified above. In this meeting, Sony made the following points:

Congress Did Not Intend for the Commission to Abdicate its Regulatory Authority to Cable

A fundamental aspect of the National Cable & Telecommunications Association ("NCTA") Proposal would require the Commission to abdicate its statutory responsibility to implement Section 629 of the Communications Act of 1934 and to transfer that authority to a cable-industry controlled entity, CableLabs, with no oversight or checks-and-balances to ensure protection of the public interest. A true effectuation of Congressional intent demands a much more substantial role for the Commission. Indeed, Congress did not mean to pass a law to open up a closed market for cable navigation devices that is almost wholly-dominated by the cable industry, only to have the Commission cede control and oversight over that market to that same industry.

Consumers Deserve More Than Cable's One-Size-Fits-All Proposal

For more than a decade, NCTA and its member companies (collectively "Cable") have fought to block implementation of the Commission's plug-and-play rules and to maintain Cable's complete control over the content of, and process by which consumers access, cable services. Today, Cable still seeks to use its commanding position in the marketplace to postpone or eliminate the consumer benefits envisioned by Congress when it enacted Section 629.

Cable's "response" to Congress's Section 629 mandate – the so-called "Open Cable Application Platform" ("OCAP") – is a one-size-fits-all/take-it-or-leave-it solution that is designed to further entrench Cable's market power by all but foreclosing competition and innovation. As proposed, this largely unproven technology disenfranchises consumers by continuing to allow Cable to dictate the "look and feel" and many of the features and functions of *consumer-owned* plug-and-play devices as well as "what, where, and when" consumers can enjoy their legitimately obtained cable content.

Cable's Criticism of the CEA Proposal is a Red Herring

Cable's criticisms of the proposal advanced by the Consumer Electronics Association ("CEA") are not related to specifics of the proposal but, rather, are based on the fact that the CEA Proposal would not give Cable complete control over all consumer-owned plug-and-play devices.

Briefly outlined, building upon the Cable-created CableCARD and associated specifications that are deployed in the digital cable-ready ("DCR") marketplace today, CEA put forth a complimentary alternative to OCAP, an alternative that would afford consumers the choice of an OCAP-enabled product *or* a lower priced product with access to the most popular interactive services: Video-On-Demand, Pay-Per-View, and an independent Electronic Program Guide. The "DCR+" solution advanced by CEA can be implemented before the DTV transition, utilizes marketplace-proven technology, is based on Cable-designed specifications, and most importantly, would afford manufacturers the ability to respond to the needs of consumers by developing innovative navigation devices, creating new consumer-friendly features, and reducing prices.

Cable Confuses Consumer Choice with Consumer Confusion

Cable argues that a market that provides consumers with options that differ in any way from its one-size-fits-all OCAP solution, a solution that mandates that *all* consumers accept and pay for *all* Cable services, whether they want them or not, will "disappoint, confuse, and frustrate" consumers. Cable's argument ignores the obvious fact that consumers choose products based on the different features and functions of competing products everyday. To employ an example from the consumer electronics market, a consumer is completely capable of deciding -- even though both products perform similar but differing functions -- to purchase a high definition Blu-Ray player for her family room and a standard DVD player for her bedroom. Indeed, contrary to Cable's contention, consumers embrace such choices; they do not fear them.

Cable Innovation Does Not Require Complete
Cable Control Over All Consumer-Owned Products

Cable argues that the CEA Proposal denies Cable its right to innovate, because Cable would not be able to display any and all of its services on all *consumer-owned* products now and in perpetuity. Nowhere in federal regulations is Cable given such a right. Consumers, and not Cable, should decide what features, functions, and services they want in the plug-and-play products they have purchased. Moreover, the CEA Proposal does not impede the ability of Cable to innovate their wholly-controlled proprietary set-top boxes and their development of OCAP-enabled devices.

Cable Asserts No Valid Legal Arguments Against the CEA Proposal

The legal and constitutional arguments presented by Cable in their Comments and Reply Comments are attenuated and are often asserted without citation. Indeed, many of the purported statutory violations have been asserted by Cable before and have twice been rejected by the D.C. Court of Appeals. For example, Cable claims again that, despite the plain language of Section 629, the Commission lacks jurisdiction to promulgate plug-and-play rules. The D.C. Circuit has rejected this argument *twice* – as recently as *last* year. Cable also claims again that the Commission must issue rules that apply across the board to all multi-channel video programming distributors. The D.C. Circuit also rejected this argument *twice* – as recently as *last* year – finding that Cable's market dominance justifies focusing the plug-and-play rules on Cable.

Any Plug-and-Play Rules Issued By the Commission
Should Realize Five Fundamental Open Access Principles

Sony has consistently advocated that whatever solution the Commission adopts with respect to two-way, plug-and-play devices, such decision should be guided by the following five principles:

1. **Safeguard Consumer Choice and Competition:** The rules must require that any licensing regime employed to effectuate plug-and-play prohibits Cable from using the terms of a license to limit or control the features and functions that can be included in consumer-owned devices. In addition, Cable must provide the same consumer-paid-for navigation data to consumer-owned devices that it provides to its proprietary set-top boxes.

2. **Protect the Consumer's Investment:** The rules must require Cable to support consumer-owned plug-and play devices in the marketplace for a reasonable period of time.

3. **Establish Fair and Open Technical Standards:** As noted above, Congress did not intend to delegate regulatory authority over plug-and-play to CableLabs. Accordingly, the rules must require that the underlying licensing terms, standards,

and the content protection outputs that affect consumer-owned devices are established and changed in a fair and open manner, not unilaterally by Cable.

4. **Require a Level Playing Field:** Consumers should not be punished for making a technology choice. The rules, therefore, must require "common reliance": Cable must be required to use the same underlying technology and technological infrastructure on a substantial percentage of their proprietary set-top boxes as consumer-owed devices. The level playing field established through common reliance would produce the measure of certainty necessary to create a competitive market and drive the development of new products, features, and services for consumers.

5. **Remove Barriers to Innovation:** The rules must ensure that certification and testing are used to protect consumers, not to manipulate market outcomes. Therefore, the rules must establish a fair and reasonable "self-certification" mechanism and must prescribe that the applicable compliance and compatibility tests employ objective standards developed by all interested parties and that such tests are administered in an equitable manner.

This letter is provided pursuant to Section 1.1206 of the Commission's rules. A copy of this letter has been delivered by e-mail to Ms. Carey.

Please direct any questions regarding this notice to the undersigned.

Respectfully submitted,

/s/ Jim Morgan

Jim Morgan
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Government and Industry Affairs
Sony Electronics Inc.

cc: (via electronic mail)
Michelle Carey