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December 19, 2007

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

Re: Ex Parte Presentation, CS Docket No. 97-80, PP Docket 00-67

Dear Ms. Dortch:

CEA hereby files a response to the December 13 ex parte notice of News Corporation with respect to information submitted by News Corporation to Cristina Chou Pauzé, Legal Advisor to Commissioner Robert McDowell. The Consumer Electronics Association (“CEA”) and its members have long held the view that the “CABLECARD-Host Interface License Agreement” (“CHILA”) and the “Opencable Application Platform (OCAP) Implementer License Agreement” (“O-ILA”) have not complied and do not comply with the “Carterfone”-inspired, clear obligations that were adopted by the Commission and set forth in regulation in 1998. These requirements and obligations are set forth in FCC regulations at 47 C.F.R. §§ 76.1200 – 1205.

The filing in question¹ could be read to suggest that agreeing to the *only license available from the cable industry* for a particular product or purpose is tantamount to endorsing the legality of that license under FCC regulations, or supporting the licensed technology as the best or only approach to an objective. Neither assumption is supported by Commission precedent or industry practice. The Commission, in its September 18, 2000 Declaratory Ruling, specifically advised that one available procedure for potential licensees is to sign a license, even though it is believed not to comply with FCC regulations, while separately challenging its terms before the Commission.² This is exactly what occurred with respect to cable’s initial “PHILA” license, which was signed by many or most CEA member companies at the same time that CEA, on their behalf, challenged its legality in FCC filings and proposed an alternative to the Commission. This dispute was resolved only by the negotiation and submission to the Commission of a new model “DFAST” license in the 2002 “Plug & Play” inter-industry negotiations.

It should not be considered unusual that many or most consumer electronics companies signed the PHILA license, while believing it not to be rules-compliant, but built

¹ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Letter from Maureen A. O’Connell, Sr. V.P. Regulatory & Government Affairs, News Corp. to Marlene H. Dortch, Secretary, FCC, re Ex Parte Communication, CS Docket No. 97-80 (Dec. 13, 2007).

² *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling ¶ 29 (rel. Sept. 18, 2000).

products under the negotiated DFAST license instead. Until a negotiation or rulemaking succeeds in producing a rules-compliant license, manufacturers who wish to obtain necessary technological information to stay abreast of competitors may have little choice but to sign the *only license on offer*. While 47 C.F.R. § 1205 guarantees access to information that is necessary to competitive entrants, this regulation is one of those that the industry has violated in its restrictive approach to licensing. The cable industry's interpretation of Commission rules has left manufacturers little choice other than signing the license, which some have done, and pressing the Commission for relief, which CEA continues to do on its members' behalf.

In its September 18, 2000 Declaratory Ruling, the Commission said: "We believe . . . that such issues [claimed violations of §§ 76.1200 - 1205] are best resolved if specific concerns involving *finalized licenses* that implicate our navigation devices rules are presented to the Commission."³ This is exactly what CEA, on behalf of its members, has done in the present rulemaking. In CEA's August 24 Comments on the pending Notice of Proposed Rulemaking, CEA reminded the Commission of this history, and that rules-compliant licensing is a vitally necessary outcome to the present rulemaking (emphasis in original):

"In the years leading up to "Plug & Play I," CEA and some others complained that the "PHILA" license – the only one then offered by CableLabs-imposed restrictions and terms beyond the bounds of those permissible under 47 C.F.R. §§ 76.1200 – 1205. Nevertheless, in order to maintain the pace of product development believed essential for competitive reasons, several member companies felt constrained to sign the only license on offer. As a result of discussions with FCC staff, CEA addressed this problem by filing a "model PHILA" license, along with a memorandum explaining why CEA believed the model license would be compliant in areas in which PHILA was not. Rather than press or petition for a ruling, CEA then joined in negotiations with the cable industry that led to the Plug & Play I framework, including the DFAST license, which was based directly on CEA's model PHILA.

"A similar situation obtains today. CEA maintains its position that the extant CHILA and O-ILA licenses, the only two-way licenses offered by CableLabs, exert controls and limitations on licensees that extend well beyond those permissible under existing Commission regulations.⁴ There is no alternative for any company wishing to pursue the cable industry's favored technology.

³ *Id.*, emphasis supplied.

⁴ CHILA stands for "CABLECARD-Host Interface License Agreement"; O-ILA stands for "Opencable Application Platform (OCAP) Implementer License Agreement". The panoply of CableLabs licenses necessary to get a product on the market may be downloaded from CableLabs' OpenCable Website, <http://www.opencable.com/documents/>.

“In addition, the CHILA and O-ILA licenses as commended to the Commission in that filing place inappropriate and onerous burdens on competitive entrants. They would limit the licensee’s ability to innovate by maintaining an environment that stifles a licensee in a number of ways, including requiring vague warranties against “harm to the service,” whereas FCC rules only allow protection of the network against electronic harm or theft of service (including, under some circumstances, copy protection). Compliance Rules that enforce permissible limitations also over-reach. Moreover, a licensee is not able to place a product on the market immediately. The CableLabs bi-directional licenses subject the licensee to a certification requirement that is at the sole discretion of CableLabs. A licensee’s product can be denied market access without any recourse or ability to bypass such a process.⁵ A licensee has no reasonable or just venue to participate in or challenge changes implemented by CableLabs to the Compliance Rules or Robustness Rules, or to challenge a refusal to adopt additional output protection technologies. These and other provisions that overstep Commission regulations are addressed in CEA’s Appendices B-2 and B-3 to these Comments.

“The NCTA November 30, 2005 filing on which the Commission asks comment refers extensively to and relies on, as integral to NCTA’s proposed framework, these CHILA and O-ILA licenses.⁶ Accordingly, as an essential element of its comments in response to this FNPRM, CEA submits for public scrutiny, in Appendix B, its own model licenses that would implement the framework resulting from this FNPRM and would correct these and other provisions that over-reach existing Commission regulations that were adopted to protect licensees from just such abuse. ***Without a “level playing field” license that complies with Commission regulations, all other efforts in aid of competitive entry, and thus in implementation of Congress’s instruction to the Commission, must fail.***”

As Appendices to its August 24 Comments, CEA filed with the Commission rules-compliant versions of these licenses as Appendix B. As Appendix A CEA filed draft amendments to regulations, that would oblige cable operators to lend specific support to OCAP and to competitive OCAP products, including some elements of common reliance. These amendments are also necessary to “assure,” as Section 629 requires, a level playing field for competitive entry.

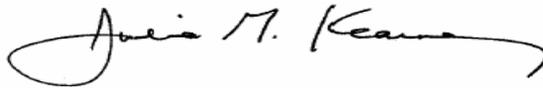
⁵ CHILA § 5, Testing and Certification (June 4, 2007) at CableLabs’ OpenCable Website, <http://www.opencable.com/CHILA.pdf>.

⁶ Almost contemporaneously, NCTA filed a “DCAS” license as well. *See Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA to Marlene H. Dortch, Secretary, FCC, Re: CS Docket No. 97-80: Report of the NCTA on Downloadable Security (Nov. 30, 2005). CEA and its members have been critical of the CableLabs approach to DCAS and, as CEA noted in its November 30, 2005 Appendix, major elements of DCAS technology are under “NDA” (and remain so today) and not available for review with the Commission. Hence, CEA has not submitted model text as to this license. ***

CEA has noted throughout the current rulemaking that its members seek the competitive opportunity to deploy products, including OCAP-reliant products, that offer consumers real choices as to devices as well as programming. This is possible only in an environment in which device design freedom is not hindered by a licensing straightjacket. The Commission recognized this in 1998 when it adopted 47 C.F.R. §§ 76.1200 – 1205. The Commission and the cable industry recognized this in 2003 when the DFAST license was made part of the “one-way” framework. The Commission needs to recognize the importance of license compliance with its existing rules as it concludes this rulemaking. Since concluding the first “Plug & Play” framework in 2003, the cable industry has declined to negotiate with CEA and its members on the subject of a model license for “two-way” devices (as it did for “one-way” devices), or, independently, to conform the existing “two-way” licenses to Commission regulations.

This letter is submitted pursuant to Section 1.1206(b)(2) of the Commission’s rules to provide notice of an oral *ex-parte* presentation in the above referenced matter. Copies of the letter and the attachments are being sent by electronic mail to Ms. Pauzé...

Respectfully submitted,



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cc: Cristina Chou Pauzé