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March 6, 2008

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

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

Dear Ms. Dortch:

This letter is to notify you that on March 5, 2008, Gary Shapiro, President and CEO, Brian Markwalter, Vice President, Technology and Standards, and the undersigned, all of the Consumer Electronics Association ("CEA"), met with Chairman Kevin Martin, Michelle Carey, Senior Legal Advisor to Chairman Martin, and Monica Desai, Chief of the Media Bureau. During this meeting, we discussed CEA's continued opposition to the failure of CableLabs to offer to the consumer electronics industry licenses that comply with the FCC regulations at 47 C.F.R. §§ 76.1200 – 1205.

Commission regulations recognize CableLabs's legitimate interest to protect through its licenses against electronic harm to its network and theft of service. CableLabs persists, over the objection of consumer electronics companies, in leveraging its licenses to promote broader commercial interests of the cable industry unrelated to harm to the network or theft of service. For these reasons, CEA filed with its Comments to the Third Further Notice of Proposed Rulemaking proposed license agreements that incorporated the essential elements of the CableLabs agreements that complied with Commission regulations, and excised those provisions that impermissibly extend protections to commercial aspects of their services.

Specifically, in August 2007, CEA submitted to the Commission three alternative license agreements:

(1) a version of the DFAST agreement for manufacturers of unidirectional digital cable products, that would also enable the UDCP to handle channels delivered to the consumer through "switched digital" cable services;

(2) revisions to the "CABLECARD-Host Interface License Agreement" ("CHILA") for manufacture of both unidirectional and bidirectional digital cable products; and,

(3) revisions to the "Opencable Application Platform (OCAP) Implementer License Agreement" ("O-ILA").

With respect to the CEA-revised DFAST agreement, the current DFAST agreement applies to unidirectional digital cable services. As the cable industry turns to "switched digital" technology as a means to conserve bandwidth, consumers with CableCARDs (or purchased retail receivers that are not supported by switched digital systems) will lose access to channels they already have paid for. Because certain aspects of switched digital technology require communication between a digital cable product and the head-end along a return path, these products require bidirectional communication simply to provide consumers with the same basic capabilities they had come to expect from their existing UDCP products. However, this minimal bidirectional communication capability would technically take these products outside the scope of the current DFAST license (although the products otherwise do not enable additional bidirectional or interactive cable services). CEA believes that there is no need for any manufacturer to take a license under CHILA merely to provide consumers the same experience they currently obtain from their UDCPs. Therefore, CEA proposed a revised DFAST license that amended the definition of a UDCP so as to encompass also UDCPs that could receive channels through switched digital services.

CEA's most significant proposed revisions to CHILA and O-ILA removed from the CableLabs licenses two types of provisions that fall outside the scope permitted by Commission regulations. First, CEA deleted those CableLabs license provisions that are intended to promote access to their commercial services (but not harm to the network or theft of service). For example, CEA excised from the Warranties section (¶ 3.1) of the O-ILA the requirement that each licensee represent that its products would deliver "all services provided by the Cable Operator to the Certified OpenCable Device in the same manner that such services are delivered by equivalent Cable Operator devices to the cable customer… ." Read literally, this provision required every O-ILA licensee not only to accommodate "all services provided by the Cable Operator" but to do so "in the same manner" as the Cable Operator devices – ostensibly precluding manufacturer improvements even such basic features as the user interface, electronic program guide, and recording capabilities. From CEA's perspective, any manufacturer should be free to implement some, but not all, cable services in a compliant product, and to present these services in a manner that the manufacturer believes best for its consumers. As written, however, O-ILA stifles open competition and consumer choice, assuring that no competitive manufactured product available at retail can ever be better than a cable-supplied product.

Second, CEA proposed to remove the iron-clad requirement of certification by CableLabs. The CableLabs certification process vests too much control over consumer electronics manufacturers' competitive products in the hands of an industry representative that historically opposed the very existence of competition. The certification requirement creates a bottleneck for the introduction of new products, and the inevitable delays in time to market harm both consumer and competitor interests. None of this is necessary. Consumer electronics manufacturers are well accustomed to

manufacturing products in compliance with technical standards, and to ensuring standards compliance through non-mandatory processes such as interoperability plug-fests. These competitors have every incentive to market fully functional products that comply with technical standards. Indeed, the more significant problem facing consumer electronics manufacturers has been the lack of common reliance, and the failure of cable systems to comply with the OpenCable standards.

What CEA proposed in its August 2007 submission essentially mirrors the industry's efforts in 2002 to create a DFAST license as an alternative to the cable-offered POD-Host Interface License Agreement ("PHILA"). Many or most CEA members signed cable's initial "PHILA" license – having no other choice to obtain necessary technological information by which to ultimately compete in the market for cable products -- at the same time that CEA, on their behalf, challenged its legality in FCC filings and proposed an alternative to the Commission. While 47 C.F.R. § 1205 guarantees access to information that is necessary to competitive entrants, this regulation is one of those that the cable 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 unacceptable license terms, which some have done, and pressing the Commission for relief, which CEA continues to do on its members' behalf. 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. Several companies are licensed under both DFAST and PHILA; and the Commission should not assume that merely because companies have signed PHILA they are in fact producing products under PHILA rather than DFAST.

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."[1] 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,

[1] *Id*, emphasis supplied.

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.[2] There is no alternative for any company wishing to pursue the cable industry's favored technology.

"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 warrantees 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.[3] 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

[2] 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/.

[3] CHILA § 5, Testing and Certification (June 4, 2007) at CableLabs' OpenCable Website, http://www.opencable.com//CHILA.pdf.

> proposed framework, these CHILA and O-ILA licenses.[4] 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.***"

For these reasons, CEA filed with the Commission rules-compliant versions of these licenses as Appendix B to its August 24, 2007 filing. 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.

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. Given the cable industry's refusal to resolve directly the concerns of the consumer electronics industry over the CHILA and O-ILA licenses, a decision by the Commission remains crucial to a fair and competitive market for digital cable products. CEA therefore requests that the Commission remedy the violations by CableLabs of the Commission regulations, and approve the amended license agreements as proposed by CEA.

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[4] 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 did not submit model text as to this license.

This letter is being provided to your office in accordance with Section 1.1206 of the Federal Communications Commission rules. A copy of this letter has been delivered by e-mail to the meeting participants.

Respectfully submitted,

/s/ Julie M. Kearney

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