Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	CSR-7012-Z
Commercial Availability of Navigation Devices	)	

Comments of the Consumer Electronics Association On Request for Waiver of 47 C.F.R. § 76.1204(a)(1)

June 15, 2006

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In its June, 1998 Report and Order and the accompanying regulations, the Commission required that by January 1, 2005, cable operators also rely on whatever security and interface technology the operators would make available for the attachment of competitive entrant navigation devices.[1] Subsequently, and with the endorsement of consumer electronics manufacturers and retailers, the FCC amended its regulations to exclude analog converter boxes from this obligation, explicitly so as to allow the cable industry to concentrate on developing security interfaces and other technology to allow the attachment and operation of competitive digital devices.[2] The Commission has thereafter twice extended the cable industry's period for compliance, most recently to July 1, 2007. The Commission has now received an application for a waiver that is not time limited, is not in aid of new or transitional business models, and would apply to a vaguely defined range of devices across all multi-system operators. The Commission should not grant this application.

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[1] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, Report and Order (Rel. June 24, 1998).
[2] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, Order on Reconsideration (Rel. May 14, 1999).

I. Grant Of The Waiver Application Would Threaten National Support For CableCARD-Reliant Devices.

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

Yet, with the passage of each year in which common reliance was *not* enforced, the task has become more and more daunting, because any CableCARD-reliant devices – competitive or MSO – will be that much a smaller percentage of the installed base. Aided by the delays and flexibility the Commission has *already* afforded the cable industry, the installed base of embedded-security of devices has grown from a pool to a sea to an ocean. Now, Comcast's waiver application asks for a permanent exemption for many or most of its new devices, while the industry already plans to move to an entirely different security method. The Commission is therefore asked to be, again, complicit in commercially isolating CableCARD-reliant devices, at a time when such isolation could be fatal to their prospects.

A. It Is Not Clear How Many CableCARD Reliant Devices Would Actually Be Deployed In Every MSO System.

CEA interprets Section 76.1204(a)(1) as prohibiting an MSO, after July 1, 2007, from placing in service any integrated security device unless that device has already entered into service on a subscriber's premises.[3] In other words, nonconforming devices may *not* be stockpiled in inventory prior to the effective date and deployed afterwards, but devices already deployed in homes may be put back into service in other homes in the system. (It is not clear whether devices with embedded security that have been previously deployed could be deployed on other systems controlled by the MSO or even exchanged among systems). This, combined with the huge embedded base and the planned move to a software-based security technology, and perhaps to "Network DVR" devices,[4] may afford substantial scope to MSOs that may not wish to deploy CableCARD-reliant devices uniformly in all systems.

1. The Commission's regulations might be interpreted as allowing minimal or no CableCARD reliance in at least some systems.

As an initial matter, the Commission should confirm the interpretation of Section 76.1204(a)(1) as set forth above. The rule, in stating that no embedded security devices may be "placed into service" after July 1, 2007, *appears* to preclude stockpiling of products procured but not put into homes. In order to generate confidence in the effectiveness of 76.1204(a)(1), as it finally comes into force, the Commission should confirm this understanding, and that there will not be any exceptions to it.

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[3] "Commencing on July 1, 2007, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device." 47 C.F.R. § 76.1204(a)(1).

[4] K.C. Jones, *Cablevision Sues Hollywood For 'Betamax-Like' Rights*, InformationWeek, June 12, 2006, available at http://www.informationweek.com/shared/printableArticleSrc.jhtml?articleID=189400452.

2. The installed base of embedded security devices will still predominate.

Even with a clear regulation, 100 percent MSO compliance, no waivers for any purpose, and no planned move to software-based security or "network DVRs," the installed base of embedded security converters, now numbering over 50 million, will far outweigh the number of any MSO's CableCARD-reliant products for years to come.[5] If, in addition, the MSOs' CableCARD products do not predominate in the new installations, and are viewed by local operators as transitional products, they will be viewed by local operators as "specialty" items, much as competitive CableCARD-reliant products are today. This can make a huge difference in the operational status of the CableCARD-reliant products that are purchased at retail.

What has been lacking in the retail environment is any assurance that the installation of a CableCARD, and the operation of a CableCARD-reliant product, will be ***routine***. Ideally, it ought to be possible for a retailer that sells a product such as a DTV receiver or a DVR and sets it up in a consumer's home to *also* procure a CableCARD from the local MSO, and have it authorized on the cable system as part of the retailer's setup process of the product itself. A consumer buying a product on a "carry out" basis ought to be able to do the same thing. ***So long as CableCARD-reliant products are limited and specialty items, this is unlikely to be the rule.*** Absent having achieved this level of reliability, inclusion of the CableCARD slot can become a burden, rather than a selling feature, to the competitive manufacturer and to the retailer. This may help explain

[5] According to Kagan Research, LLC, as cited on NCTA's web site, there are 51,800,000 "premium cable units" already in place. http://www.ncta.com/ContentView.aspx?contentId=66.

why, according to published accounts, the percentage of DTV receiver models that are digital cable ready has declined sharply in 2006.[6]

3. MSOs claim the right to move to a particular version of software-based conditional access within a year.

Cable industry filings in Docket 97-80, as required by the Commission in its March 17, 2005 Second Report And Order,[7] make it crystal clear that the cable industry views CableCARDS as only an interim technology, and that it intends to transition to "downloadable" security, via a particular implementation ("DCAS"), involving a proprietary hardware chip, that the industry has already said *cannot* be deployed on the products supported by the "Phase I" FCC regulations issued in 2003.[8] There have also been strong concerns expressed as to whether the particular software security implementation as proposed by NCTA and CableLabs, which apparently[9] requires use of an embedded, proprietary chip, is actually "separate" security at all, and whether it will ever be supported in competitive products on a level playing field basis.[10]

Our strong and persistent concerns notwithstanding, for purposes of this proceeding CEA and its members must take the cable industry at its word, and anticipate that most MSOs do intend to move *all* of their products to some software-based security

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[6] *See, e.g.*, http://www.digitaltvdesignline.com/showArticle.jhtml?articleID=178601130.
[7] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report And Order, CS Docket No. 97-80, (Rel. Mar 17, 2005).
[8] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, NCTA *ex parte submission*, chart at 3 (Nov. 30, 2005).
[9] Much of the information about the proposed "DCAS" implementation of software security remains under NDA and, if available to CEA members, cannot be discussed among them or with the Commission. *See* the CEA concerns expressed in *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CEA Comments at 6 (Jan. 20, 2006).
[10] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of Dell Inc., Hewlett-Packard Company, Intel Corporation, and Sony Electronics Inc. at 8-10 (Jan. 20, 2006).

system as soon as they possibly can, starting in 2008. For competitive products, this appears to mean:

- Digital Cable Ready products, supported by regulations issued as recently as 2003, may again be "stranded," as most cable devices will work via either embedded security or a software-based successor thereto.
    - MSOs, if allowed to shift deployed products among systems, could concentrate their relatively few CableCARD products in some systems, leaving most of their systems based only on embedded security and downloadable security devices.
- If the Commission so allows, some or all competitive interactive devices would not be adequately supported by software-based conditional access, forcing these to rely on CableCARDS as well.[11] The lack of common reliance would be projected out into the future.

B. Grant Of The Waiver Application Would Perpetuate The Lack Of CableCARD Scale Economies, Putting Competitive-Entrant Products At A Further Disadvantage.

The consumer electronics industry, faced with cable industry complaints about unit costs of CableCARDS, has been waiting since 1997, when CableCARDS first were proposed to the Commission as a solution, for scale economies, and a manufacturing and support learning curve, to bring their price down and reliability up in accordance with Moore's Law -- upon which the Commission has relied heavily in other contexts.[12] This has never happened. The cost figures cited in the Comcast waiver application are akin to

[11] CEA's view is that such a failure to provide "level playing field" support for competitive products would be a violation of several Commission regulations, including Section 1204(a)(1). In particular, CEA and others have cited restrictive licensing provisions, in published licenses, as on their face violating Commission regulations. *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of CEA at 4-5 (Jan. 20, 2006) and *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of ATI Technologies, Inc., Dell Inc., Hewlett-Packard Company, and Intel Corporation, at 4-5 n.9, n.10 (Jan. 20, 2006). CEA believes that, at a minimum, *any* grant of a waiver, of *any* scope, should be conditioned on specific level playing field requirements with respect to licensing and technical implementation of any purported "downloadable security" regime. Otherwise, the problems and controversies that have made, at long last, the implementation of Section 1204(a)(1) necessary will persist indefinitely on into the future.

[12] *See, In the Matter of the Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, MM Docket No. 00-39, FCC 02-230, (Rel. Aug. 9, 2002), ¶ 11; *cf., Consumer Electronics Association v. FCC*, 347 F.3d 291, 301, 303 (D.C. Cir. 2003).

the figures that the cable industry has cited *for a decade* -- despite evidence from Intel and SCM[13] that successive series of integrations *should* have brought costs way down and reliability way up.

Now, via this waiver application, the cable industry again seeks to dodge the benefits of Moore's Law. The application suggests that even a limited number of CableCARD-reliant *MSO* products should be sufficient to assure that local MSOs will lend their support. Even if this were so,[14] volume does matter. A waiver that cuts down deployment, along with a move away from CableCARDS within a year, would severely cut into the scale economies and manufacturing and support efficiencies that otherwise would be expected. The benefits of these efficiencies are long overdue – especially since, it appears, some and perhaps most *competitive* products will have to rely on CableCARDS indefinitely. Supporting CableCARDS *only* in competitive products has been shown to be inefficient and unrealistic. Now that the Commission finally has recognized this, the Commission should not undercut the positive effects of the cure.

C. Grant Of The Waiver Application Would Compound The Support Problems Being Experienced By CableCARD-Reliant Devices.

CEA and member companies have amply documented the support failures by cable operators, local franchises, and in some cases cable vendors.[15] These existing issues, and new issues posed by deviations from current practices that are already planned by cable operators, further support denial of this waiver application.

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[13] *See e.g.*, Consumer Electronics Industry comments at 3-4 (Feb. 19, 2004); Consumer Electronics Industry reply comments at 4 (Mar. 10, 2004); *Ex parte* submission of CERC Re Retention of POD Reliance 3-4 (Mar. 20, 2003) noting Declaration of Jack W. Chaney (Mar. 4, 2003), Declaration of Colas Overkott (Mar. 4, 2003); CEA *ex parte* submission at 2-3 (Nov. 23, 2004); Intel Corp. *ex parte* submission (Nov. 17, 2004).

[14] See Part C, below.

[15] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CEA *ex parte submissions* (Mar. 23 and 24, 2006).

In addition to the reasons cited elsewhere in these comments, this waiver application should be denied because, in the absence of addressing present and clearly foreseeable problems, granting it would allow cable operators to focus on supporting a narrow class of their own devices for a limited time, rather than on the necessary, broadly-based support for CableCARDS in general that would be the hallmark of true common reliance. The Commission should not give consideration to any waiver application that does not address, positively, constructively, and concretely, the existing and projected problems that have been identified.

1. The application does not purport to address the additional problems likely to arise from the divergence in implementation, already planned by cable operators, between the CableCARDS and support measures necessary to support the already-fielded competitive "UDCP" products, and the devices that cable operators will be deploying.

Known and foreseeable problems would be aggravated by grant of the waiver. For example, Cable operators plan to deploy "multi-stream" ("M") CableCARDS exclusively for their own devices, while specifications for all CE devices still – *despite repeated requests by CE manufacturers for expedition* -- call for use of "single-stream" ("S") cards exclusively.[16] Moreover, just as the "common reliance" era finally is dawning, Cable operators are beginning to interpose *another* differentiation, at the expense of Plug & Play products, by moving programming to "switched digital" channels that *cannot be tuned by the "unidirectional" competitive devices.*

Cable MSOs have been aware of the July 1, 2007 date for almost 15 months, but have not come forward, either to CE manufacturers or to the Commission, with solutions

[16] As the Commission has noted, in response to such requests, cable operators replied that provisioning of unidirectional devices for M-cards has not been a resource priority because no MSO-provided device would need to rely on such a specification. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices,* Second Report And Order, CS Docket No. 97-80, ¶ 21, n.87 (Rel. Mar. 17, 2005).

to these obstacles to common reliance that could ameliorate the problems that grant of any waiver would aggravate.

2. The Commission should reject the waiver application because of the MSOs' failure to address present and foreseeable problems caused by new divergences from common reliance.

At a minimum, any waiver application that would address the *additional* obstacles now appearing in the path of true common reliance should have included commitments to take the following steps, as binding on any MSO to which the benefits of even a temporary and minimal waiver would accrue. The MSOs have failed in their obligation to ensure that CableCARD support remains, and will remain, affirmative and consistent in the face of technological change. The following is a by no means exhaustive list of specific failures, or the absence of undertakings, that currently have, or will have, the effect of undermining the viability of unidirectional competitive devices:

1. Expeditious approval and submission to the FCC of specifications for M-card reliance in multi-tuner competitive Phase I Plug & Play products.

2. Expeditious provisioning of CableCARDS so as to allow new competitive Phase I unidirectional products to operate on "switched digital" channels via a dedicated upstream signaling system, with formulation of host specifications and certification of products on a similarly expedited basis.

3. Once M-Cards of MSO vendors are certified, an "interoperability event," funded by the cable industry, to assure that the "M-cards" will work reliability with CE Phase I Plug & Play products.

4. A unified M-card/S-card provisioning system, including cable operator testing of all CableCARDs prior to installation.

5. Maintenance at every MSO headend of a Phase I unidirectional product that relies on "S-cards," and one that relies on M-cards, by a date set by the Commission, configured to give early warning of issues cause by MSO device reliance exclusively on M-cards.

6. A standard "troubleshooting procedure," integral to local MSO training procedures, including RF measurements and verification of out-of-band ("OOB") data throughput.

7. A serious, non-adversarial process for identifying and curing existing systemic problems, so as to make CableCARD setup so easy and routine that retail installers, and consumers following simple instructions, can and will do it.

These efforts should have been, and/or should be, an integral part of the cable industry's follow-through on its commitment to support Phase I products, made to the CE industry and the Commission in 2003, in the first place. Section 76.1204(a)(1) was adopted by the Commission in 1998, and reaffirmed in 2005, in order to give tangible competitive alternatives to consumers. The delay in its implementation, and the changes in cable industry practices over time, threaten to make the achievement of tangible results less and less likely. Accordingly, the Commission should address these and other practices as a predicate to consideration of any waiver request.

II. Cable Operators Should Be In Compliance With All Of The Existing Sections 76.1200 – 1205 Regulations Before A Waiver Is Considered As To Any Of Them.

It is axiomatic that one who applies for a waiver should otherwise be in compliance with the regulations that are *not* the subject of the waiver application. Put another way, a waiver application should include a request for relief as to *all* the provisions with respect to which the applicant expects not to be in compliance. It has long been CEA's position, as set forth in its November 30, 2005 Appendix to the joint status report and its January 20, 2006 comments on the software security license and disclosures, that the cable industry is not in compliance with the licensing and related obligations and limitations set forth in Sections 76.1200 – 1205.[17] Moreover, as is noted

[17] Section 76.1201 precludes system operators from preventing the "attachment or use" of competitive navigation devices "to or with" their systems except in cases where they would cause "electronic or

above, the failure to date to provide adequate support to CableCARD-reliant devices also should have been addressed in any waiver application dealing with regulations covering the same devices.

While Comcast, alone, cannot be held responsible for these practices and shortcomings, Commission rules provide that all other cable MSOs – in other words, the entire industry – would receive the benefit of any relief afforded to Comcast. Hence, it is CEA's position that no waiver application should be granted unless it has been accompanied by appropriate representations as to bringing industry licensing and support practices into compliance with Commission regulations.

A. CHILA, The OCAP Implementers License Agreement, And The DCAS License Do Not Comport With FCC Regulations.

In the "Phase I" Plug & Play negotiations, the cable industry negotiated with the consumer electronics industry a model DFAST license agreement that addressed the concerns of CEA and others that the previously published "OpenCable" license agreements did not comport with the Commission's regulations as set forth in Sections 76.1200 - 1205. More than three years later, however, the published licenses for "Phase II" devices that would be interactive with cable headends remain facially violative of Commission regulations. Indeed, these published agreements have *new* requirements, that violate Commission regulations, that were not found in the pre-Phase I licenses.

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physical harm" thereto or may assist in "unauthorized receipt of service." Section 76.1203 says that system operators' technical standards "shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service." Section 76.1204(c) precludes system operators, by contract or license, from blocking the addition of features or functions that are not "designed, intended or function to defeat the conditional access controls … or to provide unauthorized access to service." Section 76.1205 affirmatively requires that "[t]echnical information concerning interface parameters that are needed to permit navigation devices to operate … shall be provided by the system operator upon request in a timely manner."

CEA observed in its November 30, 2005 Appendix to the joint CE-Cable status report that "[t]he licenses offered by CableLabs impose potential constraints on competitive features and functions that go well beyond protecting against electronic harm to the network or theft of cable services. At present, any potential entrant must choose between signing on to this technology and these agreements, or forgoing access to the cable television market …." Since then, the picture has only worsened --

- The OCAP Implementers License Agreement ("O-ILA") and the DCAS License Agreement require licensees to agree to warranties that their products will not "harm" the cable "service," without any limitation to physical or electronic harm, or to the unauthorized receipt of service. These agreements also provide that competitive devices may be disconnected from the network at any time, for any reason, in the cable operator's discretion. Licensees under the CableCARD Host Implementers License Agreement ("CHILA") must also be licensed under the O-ILA Agreement.

- Whereas the DFAST License Agreement refers to industry standard technologies, there is no reference in the CHILA or DCAS license to other than proprietary specifications that may be altered unilaterally by CableLabs.

- Whereas the DFAST License Agreement requires CableLabs to give reasonable and timely consideration to proposals to support additional output and recording technologies, and provides for recourse to the Commission in the event that licensees believe CableLabs has unreasonably refused, CHILA and DCAS provide no such rights.

- The CHILA and DCAS Compliance and Robustness Rules are (without explanation) significantly more restrictive than those in DFAST, and even more restrictive than those of the pre-DFAST "PHILA" license. CEA and particular manufacturers have expressed concern over whether downstream home networking products, that are *not* subject to any license, will be afforded access to content from licensed devices on a level playing field basis.[18]

[18] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Consumer Electronics Appendix to Joint Status Report to FCC at 6 n.5 (Nov. 30, 2005); Comments of ATI Technologies, Inc., Dell Inc., Hewlett-Packard Company, and Intel Corporation, at 15 n.18 (Jan. 20, 2006). Any such restriction would appear to be a violation of Section 76.1202, which precludes system operator-imposed restrictions on "navigation devices that do not perform conditional access or security functions …."

- The DCAS technology that is subject to the license agreement remains almost fully under non-disclosure agreement, notwithstanding the requirements of Section 76.1205.

B. No License Whatsoever Has Been Offered For Products Directly Competitive With Those For Which The Waiver Is Sought.

The products that are the subject of the Comcast waiver application are products that have been publicly described as *not* implementing OCAP middleware. As has been noted above, however, the only licenses available for bi-directional competitive entrant consumer electronics products *require* the licensee also to sign the OCAP Implementers License Agreement, *and* CableLabs specifications for any such product require the implementation of OCAP middleware. In other words, Comcast, on behalf of the cable industry, is requesting a waiver from the Commission on behalf of product categories that the industry has declined to allow to be attached to their systems *at all* if built by competitive entrants.

While the Commission has not ruled on the degree of interoperability that must be supported in competitive entrant products, it should take into account, when in receipt of a waiver application filed on behalf of all cable operators, whether the cable industry has taken any steps to support the operation of products from independent manufacturers and vendors that are competitive with the products for which a waiver is sought.

III. The Waiver Application Fails To Specify A Limited Time.

Commission regulations are clear that any waiver application should be for a limited time only.[19] The Comcast application fails to specify any such time. While the application does anticipate a move to downloadable software security generally, it is not clear that the products to be covered by this waiver will be among those moving to

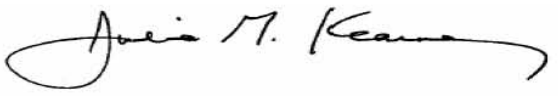
[19] 47 C.F.R. §1207.

software security operation. Nor, as CEA discusses above, is it at all clear the software security solution proposed by cable will be evaluated by the Commission as satisfying the requirements of Section 76.1204(a)(1) and other applicable regulations as discussed in Part II, above. Unless amended the application should be denied for this reason alone.

IV. Conclusion.

For the foregoing reasons, the Comcast waiver application should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on June 15, 2006, I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Associations On Request for Waiver of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail, on the following:

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