

**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	)	PP Docket No. 00-67
Consumer Electronics Equipment	)	
	)	

Dated: August 24, 2007

To: The Commission

**COMMENTS OF PUBLIC KNOWLEDGE, *ET AL.***

Public Knowledge, Consumer Federation of America, Consumers Union, EDUCAUSE, Electronic Frontier Foundation, Free Press, Media Access Project, New America Foundation, and U.S. Public Interest Research Group, hereby submit these *Comments* in response to the Commission's *Third Further Notice of Proposed Rulemaking*<sup>1</sup> in the above-captioned proceedings.

**Introduction**

On June 11<sup>th</sup>, 2007, we filed a letter with the Commission asking it to initiate a rule-making on the Consumer Electronics Association's (CEA) November 7<sup>th</sup>, 2006 "Proposal for Bi-Directional Digital Cable Compatibility and Related Issues."<sup>2</sup> The Commission's *Third FNPRM*

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<sup>1</sup> Implementation of Section 304 of the Telecommunications Act of 1996, *Third Further Notice of Proposed Rulemaking*, 72 Fed. Reg. 40818 (2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-120A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-120A1.pdf).

<sup>2</sup> Letter from Brian Markwalter, Vice President, Technology and Standards, Consumer Electronics Association, et al., to Kevin J. Martin, Chairman, Federal Communications Commission, *attaching* Letter from Brian Markwalter, Vice President, Technology and Standards, Consumer Electronics Association, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 7, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-120A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-120A3.pdf) ("CEA Proposal").

submits that proposal for public comment, along with a competing proposal by the National Cable & Telecommunications Association (NCTA).<sup>3</sup> We continue to believe that the CEA proposal is superior to the cable industry proposal in that it is more likely to lead to competition, lower prices, and more diverse and superior products. In these *Comments*, we reiterate and expand on our previous remarks.

## **I. Basic Video Programming Should Be Available Without the Use of Proprietary OCAP Applications**

The CEA proposes an enhanced CableCARD approach that would allow for “basic interactive services”<sup>4</sup> to be provided by third-party hardware, without the use of the OpenCable Application Platform (OCAP). With qualifications, we support the CEA approach as being more beneficial to consumers.

Proprietary OCAP applications, which control the user interface, should not be required to access basic video services, as the cable industry proposes. 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.<sup>5</sup> 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

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<sup>3</sup> Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 30, 2005), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-120A6.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-120A6.pdf) (“Cable Industry Proposal,” “NCTA Proposal”).

<sup>4</sup> CEA Proposal at 5.

<sup>5</sup> An example of the kind of application the CEA proposal would make possible is a unified Video On Demand application. Such an application could list VOD offerings from the cable company alongside similar offerings accessed through the Internet. Customers would have easier access to a greater variety of programming, and would be able to compare prices more easily between different services. Under the cable industry proposal, however, the cable operator would provide the only means by which to access its own VOD offerings. The hardware manufacturer would be required to confine its offerings to a separate “mode,” and no application running in that separate mode would have access to cable offerings.

using a variety of hardware and software, and should not be limited to certain methods of presentation and particular proprietary applications.

## **II. Standards Should Be Developed By Accredited Standards Bodies**

Currently, OCAP and related technologies are produced by CableLabs, an entity funded and controlled by the cable industry.<sup>6</sup> The cable industry should not be in the position of writing the standards its competitors have to follow. Although CableLabs has a number of “participants” in its OCAP endeavor, it is our understanding that these participants have often merely expressed an interest in OCAP technology. Those participants who are going to create OCAP devices may have been faced with the choice of creating OCAP devices or no advanced cable devices at all. It is possible that the success Cable has had in garnering support for its technologies and proposals has been based as much on its tight control of its customer base as on the inherent attractiveness of its offerings. In any event, a technology that has garnered such opposition deserves close scrutiny.

Technology standards should be created by ANSI-accredited standards-setting bodies, not private coalitions and anti-competitive industry groups. All stakeholders, including consumer electronics companies, content providers, and consumer interest organizations should participate.

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<sup>6</sup> According to the CableLabs website,

To be a member of CableLabs, a company must be a cable television system operator (as defined by the Cable Act) located worldwide. A cable operator, as defined by the Cable Act, is a person or persons who provide(s) video programming using closed transmission paths and uses public rights-of-way. This definition does not include open video systems, MMDS (multichannel multipoint distribution systems), or DBS (direct broadcast satellite).

CableLabs Overview: Membership, <http://www.cablelabs.com/about/overview/Membership.html> (last visited Jul. 11. 2007).

### **III. The Commission Should Maintain the "Encoding Rules" and Consider Expanding Limits on Content Protection Technologies**

The cable industry proposal includes “the authorization to use selectable output controls (SOC)[.]”<sup>7</sup> The Commission should reject this attempt to unfairly limit consumers' rights and instead maintain the ban on SOC established in the *Second Report and Order*. The same objections to SOC raised in 2003 remain salient today and the ban on its use should remain intact. Using SOC, content providers could unilaterally dictate on a program-by-program basis the displays, home recording devices, personal networking tools, and other devices that consumers can use. In this way, SOC threatens to create a maze of incompatibility, stifle consumer choice in television devices, and frustrate lawful uses of received programming.<sup>8</sup>

The “unauthorized” uses that content protection technologies like SOC prevent are not necessarily illegal ones. The chief effect that content protection technologies have is to prevent consumers from making lawful use of the content they have purchased, which forces consumers to buy the same content over and over again.<sup>9</sup> Though they can effectively impair consumers’ rights, content protection technologies are ineffective at preventing widespread copyright infringement. Furthermore, absent an express delegation of power, the Commission lacks jurisdiction to mandate that technological protection measures be adopted, and therefore should not write into regulation any requirement to deploy these content protection technologies.

Rather than weakening protections for consumers by allowing or mandating that consumer-unfriendly technologies like SOC technologies be adopted, the Commission should consider adopting further “encoding rules” that protect consumers’ rights to make lawful use of

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<sup>7</sup> NCTA Proposal at 13.

<sup>8</sup> See The Home Recording Rights Coalition Comments, in CS Docket No. 97-80 and PP Docket No. 00-67 at 7-10, (filed March 28, 2003).

<sup>9</sup> For instance, even if you already own a DVD copy of a movie, you must buy another copy from Apple’s iTunes store if you wish to watch the movie on an iPod. If you have purchased a song encumbered by DRM from an online store, it is difficult or impossible to use an excerpt of that song as a cell phone ring tone.

the content they have purchased. It is for copyright law, not “content protection” technologies approved by the Commission, to decide what consumer activities are or are not permitted after legitimate reception. Only if the Commission weighs in with appropriate encoding rules can consumers be confident that the free market will continue to provide the kinds of innovative technologies that have fueled the digital revolution.

#### **IV. An All-MVPD Solution Would Be Beneficial to Consumers**

The benefits of competitive third-party hardware and diversity of service offerings that the CEA proposal for two-way compatibility would bring to the cable market, can also be shared by the entire MVPD market. Changes in the competitive landscape no longer justify a regulatory disparity between cable and DBS services. Additionally, wireline video providers are generally large incumbent telephone companies that do not require more favorable regulatory treatment than that received by the cable operators. Accordingly, we believe that the regulatory regime should move toward treating all MVPD providers alike.

The technologies and standards that ultimately come to unify all MVPD providers should be developed by an ANSI-accredited standards-setting body with full participation from all stakeholders. In the short term, however, the move toward an all-MVPD solution should not delay the advent of a truly competitive market for two-way devices in the cable market.

#### **V. Disclosure Requirements Would Help Educate Consumers**

In a more competitive marketplace, there may be consumer confusion as to what cable services are compatible with a particular piece of equipment. We therefore support requirements that consumer electronics companies fully and conspicuously disclose to consumers in industry-standard nomenclature what services their devices can and cannot access.

## Conclusion

The Commission should ensure that any rules it promulgates promote competition and benefit consumers. Although not perfect, the CEA proposal is better for consumers than the cable industry proposal.

Respectfully Submitted,

PUBLIC KNOWLEDGE  
CONSUMER FEDERATION OF AMERICA  
CONSUMERS UNION  
EDUCAUSE  
ELECTRONIC FRONTIER FOUNDATION  
FREE PRESS  
MEDIA ACCESS PROJECT  
NEW AMERICA FOUNDATION  
U.S. PUBLIC INTEREST RESEARCH GROUP

BY: /s/

Alexander Curtis, Director of Policy  
John Bergmayer, Law Clerk  
PUBLIC KNOWLEDGE  
1875 Connecticut Ave. NW  
Suite 650  
Washington, D.C. 20009  
(202) 518-0020

Derek Slater, Activism Coordinator  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco CA 94110-1914  
(415) 436-9333

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