

**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)	
)	
Charter Communications, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1))	CSR- 7049-Z
)	

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

September 18, 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, at the initiative of consumer electronics (“CE”) and information technology (“IT”) 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

¹ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order (rel. June 24, 1998).

² *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order on Reconsideration (rel. May 14, 1999).

Seven years after the Commission exempted the cable industry from its analog security obligations, so it could concentrate on providing reliable and inexpensive digital security modules, and after the dismissal by the Court of Appeals of two suits against the Commission, the FCC now must deal with a slew of waiver requests seeking to impair the Commission from, as Congress directed, *assuring* competitive entry into the navigation device market.

I. CEA Incorporates By Reference Its Response To Comcast's Waiver Petition.

The instant request³ based on 47 C.F.R. § 76.1207 addresses, but seeks to broaden somewhat, the general class of devices that were the subject of the earlier petition filed by Comcast.⁴ In its June 15 Comments on that petition, CEA focused on several key points that apply equally to Charter's request:

- So long as CableCARD-reliant products remain limited and specialty items, they are unlikely to achieve the level of reliability that is necessary for their support and acceptance by consumers who otherwise would prefer them.
- Cost differentials cited by the cable industry are out of date, contravened in the record, and to the extent valid reflect the cable industry's thus-far successful forbearance of Moore's law, which applies to all other industry products.
- Cable operators should not be granted a waiver of one regulation while they remain out of compliance with others.
- No CableCARD waiver should be granted while the cable industry continues to refuse to offer *any* license for competitive entrants to produce CableCARD-reliant products that would be directly comparable and competitive with those for which the waiver is sought.
- The waiver requests fail to specify – indeed cannot publicly specify – that they are for a limited time.

³ Charter Communications, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7049-Z (filed Jul. 14, 2006) (the "request").

⁴ Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z (filed Apr. 19, 2006).

CEA hereby incorporates by reference its filing in this Docket as to CSR 7012-Z, in which these and other arguments are set forth.⁵

II. Charter’s Assertion That A Waiver Would Be Justified By Any “New Or Improved” Service Offering Is Entirely Without Support In The Request Or The Record And Is Contrary To Fact.

Charter’s request is wrapped in assertions of “new or improved service offerings” but fails to point to a single new or improved service that would be facilitated by the granting of this request. Charter then suggests, citing D.C. Circuit precedent, that a failure to grant a waiver in such circumstance could be considered “arbitrary.” This is precisely the argument, on a broader scale, that was made to the D.C. Circuit on this issue by Charter itself, and rejected by that Court in its August 18 decision.⁶

III. Charter’s Request Is Based On An Incorrect Assumption That The Devices For Which A Waiver Is Sought Represent The Only Avenue To Low Cost Navigation Devices.

Charter premises its request on two fundamental assertions: (1) that to assist consumers in replacing analog terrestrial broadcasts in 2009 it will be necessary to offer conditional access (“CA”) navigation devices, and (2) that CE and IT manufacturers have expressed no interest in offering directly comparable and competitive digital devices that do perform conditional access. Neither of these is correct.

A. Devices To Replace Analog Broadcast Services Need Not Perform Conditional Access At All.

⁵ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80; CSR-7012-Z, Consumer Electronics Association (“CEA”) Comments (June 15, 2006).

⁶ *Charter Communications, Inc v. Federal Communications Commission*, No. 05-1237, 2006 WL 2381041, at *6-7 (C.A.D.C. Aug. 18, 2006) (the “2006 Charter Appeal Dismissal”).

Charter assumes that consumers who choose to move from antenna reliance to subscribing to basic tier digital cable services will need a device that performs conditional access. This assumption, however, is contrary to FCC regulations.⁷ Alternatively, Charter may be implying that FCC regulations notwithstanding, cable operators and their vendors will simply *refuse* to provide non-CA devices on (subsidized) commercial terms comparable to those on which CA navigation devices are provided.⁸ Or, Charter may be recognizing that cable operators generally have not been complying with FCC regulations that require the carriage of “PSIP” information.⁹ Were the Commission to grant a waiver on the basis of such intentions or circumstances, it would be undermining its own regulations.

B. Cable Operators Have Refused To License Comparable Competitive Devices.

Charter also asserts, incorrectly, that CE and IT manufacturers have not expressed an interest in selling CableCARD-reliant, CA navigation devices that are directly comparable to and competitive with the specific devices for which a waiver is sought. Contrary to Charter’s assertions, CE manufacturers have indeed expressed interest in selling directly competitive products that, like the ones for which the request is sought, do not rely on OCAP,¹⁰ yet (unlike Phase I Plug & Play products) have an upstream communications ability that allows them to access “switched digital” content,

⁷ See, 47 C.F.R. § 76.630(a).

⁸ See Part V, *infra*.

⁹ See, 47 C.F.R. § 76.640(b). CEA will provide information for the record in this respect.

¹⁰ The interest of CE and IT manufacturers in being licensed to manufacture products directly comparable to those at issue in this request should not be read, of course, as implying any lesser degree of interest in attaining reasonable license and specification terms as discussed in CEA’s November 30, 2005 filing in this

and to order Video On Demand and Pay Per View programming.¹¹ The devices for which a waiver is sought also have access to electronic program guide metadata, a feature that has not been offered under *any* license for a CE or IT product.

If so specified and licensed, CE and IT products would be directly competitive with the lower-cost “non-OCAP” navigation device products for which a waiver is sought (such as the Motorola DCT-700). To be competitive with leased boxes in this burgeoning and potentially profitable market, such products might also offer other media features and innovations to consumers such as home networking and recording.¹² These would be clear consumer benefits that would be forestalled by grant of a waiver under existing circumstances.

For such non-OCAP CE and IT products to exist, a license must be available for them, specifications must be developed on a cooperative basis, *and* there must be confidence that the separable CA module, whether a physical CableCARD or a software solution, will be reliable and supported. No such license or specification has ever been

Docket. CEA and its members believe that consumers should be given a wide range of choices in both products and services. *See, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CEA and the National Cable & Telecommunications Association Joint Status Report, Consumer Electronics Appendix to Joint Status Report to FCC (Nov. 30, 2005).

¹¹ *See, Commercial Availability of Navigation Devices*, CS Docket No. 97-80; Pioneer North America, Inc. *ex parte submissions* (Aug. 24, Aug. 25, Sept. 12, 2006) ; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 ; CSR-7012-Z, Sony Electronics Inc. *ex parte submissions* (Aug. 4, Aug. 11, 2006).

¹² Moreover, with CableCARD scale economies finally available in era of common reliance, it should not be assumed that entrants’ CableCARD-reliant products cannot be competitive with MSO-provided products.

offered by CableLabs or the cable industry, whose members all would receive the benefit of a grant of this request.¹³ This fact alone should be a basis for the denial of this request.

IV. Charter’s Own Failed Suit Against The FCC Should Weigh Against Rather Than In Favor Of Its Request.

Charter next suggests that the arguments made by its own and the Commission’s attorneys in Charter’s suit against the FCC should be construed as themselves providing some pretext for a waiver. The Court of Appeals however, on August 18, held that the FCC, in adhering to the enforcement of its regulation, properly exercised its discretion in carrying out the specific instruction of the Congress to *assure* the competitive availability of devices.¹⁴ The Court so held without a single reference to or discussion of whether or not any waiver would be granted – despite references to this issue in the oral arguments of counsel for both the FCC and the petitioners.

Obviously, as Charter notes, the FCC is obliged to give consideration to “meritorious” requests for a waiver. For the reasons we set forth, however, these requests cannot be considered meritorious. Moreover, “serious consideration” must include the discretion to decide that after eight years and two court appeals, it is time for this regulation to *take effect* before any consideration should be given to any waivers of it.

V. As The Purpose Of Section 629 Is To Assure Device Competition, The FCC Should Not Allow Existing MSO Vendors To Dictate Outcomes.

Among the core products for which Charter seeks a waiver is the Motorola DCT-700. Subsequent to Charter’s filing, on August 31, an *ex parte* filing was made in this Docket on behalf of the American Cable Association (ACA) and its member Armstrong

¹³ Such a license offering has been specifically requested of the cable industry and in filings to the FCC for at least six years -- *See, e.g., Commercial Availability of Navigation Devices*, CS Docket No. 97-80; Consumer Electronics Retailers Coalition Comments at 17-21 (Nov. 15, 2000).

¹⁴ 2006 Charter Appeal Dismissal, at *7.

Cable. This filing disclosed that Motorola has *already made* the decision as to whether this product will be CableCARD-enabled. As reported by Armstrong and ACA:

“Motorola will not offer a CableCARD-enable[d] DCT-700. Last week, Motorola informed us that unless the DCT-700 receives a CableCard waiver, our only option will be the DCH 100, costing about \$190, with a much larger form factor.”¹⁵

There is no better evidence of the necessity for the Commission to finally allow Section 76.1204(a)(1) to take full effect. This regulation, as the Court of Appeals noted, is aimed directly at assuring support of competitive entry. That the MSOs’ dominant vendor can establish a *fait accompli* for the FCC perfectly illustrates the non-competitive condition of the device market that the Congress instructed the Commission to open to competition. As reviewed by the Commission on March 17, 2005, and discussed by the Court of Appeals on August 18, 2006, the record shows that the FCC should not degrade the impact of this important regulation now that it is finally poised to become effective. Nor should the FCC accept cost comparisons based on unilateral dictates of the very suppliers whose dominance would be challenged by competitive entry.

VI. Charter Is Incorrect In Asserting That Denial Is Unnecessary To Securing The Benefits Of Common Reliance.

Charter cites the lack of competitive entry to date – the very circumstance that Section 629, and § 76.1204(a)(1) were designed to address – as a reason for granting a waiver from this rule. If it were the case, as Charter asserts, that there has been no interest by CE and IT manufacturers in building directly comparable and competitive

¹⁵ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 ; CSR-7012-Z, American Cable Association *ex parte submission* (Aug. 31, 2006).

products, this position might be other than circular. But, as the record reflects, such is not the case.¹⁶

As Charter itself notes, any waiver granted would work to the benefit of all cable MSOs. But it has been the cable industry itself that has continually refused to license CE and IT manufacturers to make *any* non-OCAP product with interactive features comparable to those of the DCT-700 and the other non-OCAP products listed in Charter's request.¹⁷ Moreover, televisions are not, as Charter implies, the only CE products.¹⁸ CE industry requests for a license and specification for comparable non-OCAP products, with functions and guide data making them directly competitive with the DCT-700, were made and denied by the cable industry from at least the time Section 76.1204(a)(1) was promulgated.¹⁹ Yet, despite the "Phase I" Plug & Play negotiations and the "two-way" negotiations, at no time has such a specification or license been offered.

Charter's additional assertion that "[R]etailers have been unwilling to market low-cost cable set-top boxes directly to consumers" is based on a blatantly self-serving comment from six years ago, by the cable industry's dominant vendor, that was refuted in the record strongly and in detail.²⁰ This and other filings at the time were, simply put,

¹⁶ See *ex parte submissions*, *supra* note 11.

¹⁷ Whether or not Charter is to blame for this decision, as Charter itself notes, all cable operators would receive the benefit of any waiver granted to Charter.

¹⁸ E.g., TiVo is entering production with new models heavily reliant on CableCARDS. See CNET Product Review, http://reviews.cnet.com/TiVo_Series3_HD_DVR/4505-6474_7-32065631-5.html?tag=nav.

¹⁹ See *supra*, n. 11.

²⁰ "NCTA has attempted to shift responsibility for its industry's failure by pointing to lack of retailer 'orders' for OpenCable-reliant devices. NCTA claims that the lack of 'orders' reflects a 'strategic' choice by every retailer in the country rather than the lack or unsuitability of potentially available products. The

attempts by the cable industry and its suppliers to persuade the Commission that MSOs and their vendors had complied with § 76.1204(a)(1)'s first obligation: to support CableCARD-reliant devices by July 1, 2000. That this requirement had not been fulfilled was confirmed four years later when, in early 2004, CableCARDS were not even ready *then* for the first certification wave for Digital Cable Ready televisions.

Charter also overlooks the fundamental point of the regulation from which it seeks a waiver. As Charter itself admits, even 100% CableCARD reliance by new navigation devices will affect a relatively small percentage of Charter's customer base.

As Charter notes:

“Whether or not this waiver is granted, the vast majority of Charter customers will not use CableCARD-enabled set-top boxes in 2007. First, the majority of Charter customers do not use any set-top box Second, the rule applies only to new boxes placed into service, and does not require Charter to replace boxes already in the field.”²¹

Having established that even under the best of circumstances only a small percentage of Charter customers can be expected to be CableCARD-reliant in 2007, Charter nevertheless urges the Commission to cut this percentage *further*, by granting this request. Yet, the Commission has already found in its Second Report & Order that problems with CableCARD support are widespread and that common reliance appears to

record is clear, however, that it is the cable industry that has taken *pro forma* steps only. *** Two days before the July 1, 2000 deadline for support of competitive availability, one manufacturer – cable industry supplier Scientific Atlanta – claimed to have become ‘licensed’ under the POD-Host Interface (‘PHI,’ formerly ‘DFAST’) license. Yet, as the Commission is aware, no purportedly ‘final’ version of this license existed until December 15. Moreover, the ‘offer’ claimed by NCTA to be made to retailers did not even come from the ‘licensed’ supplier. *** From the filings of CE manufacturers who are also cable industry suppliers and of CEA, it is clear that any OpenCable-reliant product that could have been offered by July 1, 2000, could not have been safely and reliably purchased by a consumer at any price – irrespective of whether it also provided portable or interactive operation competitive with MSO-provided, leased products.” *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Consumer Electronics Retailers Coalition Reply Comments at 13-14 (Dec. 18, 2000) (headings and footnotes omitted).

²¹ Request at 9.

hold the solution to these problems. Accordingly, the relatively small number of households to be impacted in 2007 should not be further reduced through the grant of this request.

VII. Charter Relies On Cost Statistics That Are Outdated And Have Been Refuted, And Ignores The Dynamic, Recognized By The FCC And The Court of Appeals, Of Economies Of Scale.

In Part V of its request, Charter cites 4-year-old cost assertions that were authoritatively refuted at the time²² and that, as noted by the Court of Appeals, were rejected by the Commission in its Second Report & Order.²³ Even if valid, such figures would reflect only the 8-year insulation of CableCARDS from the workings of Moore's Law. As the Court of Appeals stressed, the FCC is entitled to consider the dynamic effects of time and volume on costs, and has done so in this case. There is nothing presented in this request that provides a basis for revisiting the FCC's determination on this score.

Moreover, as CEA notes above, leased cable set-top boxes are not the only solution to serving new cable subscribers who may emerge as a result of the DTV Transition. First, *if* cable operators would carry PSIP information accurately, as Commission rules require, competitive non-CA products (requiring no descrambler at all) could be available by 2009 to convert the unencrypted basic tier transmissions for output

²² *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Consumer Electronics Retailers Coalition Comments at 6-18 (Nov. 15, 2000); Consumer Electronics Retailers Coalition *ex parte* submission (Mar. 21, 2002) (cover letter incorrectly dated year 2001); Consumer Electronics Retailers Coalition Reply Comments (Aug. 1, 2002); Consumer Electronics Retailers Coalition *ex parte* submission Retention of POD Reliance 3-4, Attachment (Declaration of Jack W. Chaney, Declaration of Colas Overkott) (March 20, 2003). Consumer Electronics Industry Comments at 3-4 (Feb. 19, 2004); Consumer Electronics Industry Reply Comments at 4 (Mar. 10, 2004); CEA *ex parte* submission at 2-3 (Nov. 23, 2004); Intel Corp. *ex parte* submission (Nov. 17, 2004); See *Commercial Availability of Navigation Devices*, Second Report And Order, CS Docket No. 97-80 ¶ 24 (rel. Mar. 17, 2005).

²³ Charter Appeal Dismissal, at *7-8.

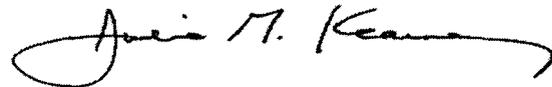
to analog-only TVs – even after cable operators stop carrying analog signals to the home. Second, if specifications and a license were offered, products that are directly comparable to leased set-top boxes could be supplied by commercial entrants. The viability of such competitive products would, in part, depend on the long-expected economies of scale in reducing the cost of CableCARDS, and on a quantum leap in the reliability of CableCARD support by cable operators. Common reliance is necessary to accomplish both of these objectives.

Finally, as it did in the Court of Appeals, Charter cites the press of competition from other services. As the Court noted in dismissing this argument, neither Charter nor any other cable entity has ever filed a petition with the Commission so as to create a record on this subject that would support the sort of scrutiny that Charter has requested with respect to this request.

VIII. Conclusion.

For the reasons stated above, this request should be denied.

Respectfully submitted,



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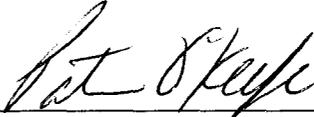
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CERTIFICATE OF SERVICE

I do hereby certify that on September 18, 2006 I caused a true and correct copy of the foregoing COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION ON CHARTER COMMUNICATIONS, INC. 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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