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March 14, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

via Federal Express

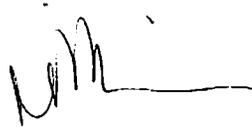
Re: San Bruno Cable; Reply (47 C.F.R. § 1204(a)(1), CS Docket 07-80)

Dear Ms. Dortch:

The City of San Bruno, California ("San Bruno Cable") hereby transmits an original and four copies of the above-referenced reply. We are also filing this reply in CS Docket 97-80.

We also include an additional copy of this filing and ask that you date-stamp and return it in the attached postage-paid envelope.

Sincerely,



Nicole E. Paolini-Subramanya

cc (via email): Heather Dixon
John Norton
Monica Desai
Steve Broeckaert
Brendan Murray
Andrew Long

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

In the Matter of:)
)
City of San Bruno d/b/a San Bruno Municipal) CS 97-80
Cable TV) CSR-7116-Z
Request for Waiver of)
47 C.F.R. § 76.1204(a)(1))

To: The Commission

Reply

I. Introduction

The City of San Bruno d/b/a San Bruno Municipal Cable TV ("the City") replies to the comments filed by the Consumer Electronics Association ("CEA") in this matter.¹ In its Comments, CEA acknowledges twice that the City has absolutely no ability to influence the commercial market for navigation devices.² In other words, CEA concedes that there is no reason to apply the integration ban to the City. Despite this acknowledgment, CEA opposes the City's Waiver Request³ by espousing internally inconsistent arguments and disregarding Commission rules and precedent. The

¹ *Comments of the Consumer Electronics Association on the City of San Bruno Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CS Docket No. 97-80, CSR-7116-Z (filed March 5, 2007) ("*Comments*").

² See *Comments* at 1 (smaller cable operators are "effectively at the mercy of the product decisions taken by the major MSOs and the unilateral dictates of entrenched vendors..."), and at 3 ("...granting a waiver to San Bruno or to all small operators similarly situated, would not change Motorola's unilateral refusal to offer a CableCARD-reliant version of the DCT-700.").

³ *In the Matter of City of San Bruno, d/b/a San Bruno Municipal Cable TV, Request for Waiver of 47 C.F.R. § 76.1204(a)(1)* (filed December 14, 2006) ("*Waiver Request*").

Commission should recognize CEA's Comments for what they are – a thinly-veiled attempt to enrich the \$155 billion consumer electronics industry⁴ at the price of smaller-market consumers.

Further, the City notes that CEA's Comments were the only comments filed in opposition to the City's Waiver Request in this matter. Other commenters strongly support the City's petition.⁵

We address each of CEA's major arguments below.

II. CEA's arguments are internally inconsistent, ignore Commission precedent, and should be disregarded by the Commission

CEA's arguments. "Delays in implementing Section 629 have undermined compliance with more and more of Congress's basic intention...of introducing open-market competition for devices."⁶

"...[G]ranting this waiver would...inflict direct competitive harm on competitive entrants, such as TiVo, as well as current and potential manufacturers of Digital Cable Ready televisions..."⁷

"CEA remains concerned that further delays in enforcement of § 76.1204(a)(1)...will undermine the objective of that rule...which is to create, at long last, a competitive market for cable navigation devices."⁸

"Waivers are not the way to get [to an all-digital cable network]. Rather, the answer lies in...empowering competitive entry into the navigation device

⁴ See *CEA Forecasts Consumer Electronics Revenue Will Surpass \$155 Billion in 2007*, viewed at http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11220 on March 12, 2007.

⁵ See *Comments of Motorola, Inc.*, CS Docket No. 97-80, CSR-7116-Z (filed March 5, 2007) and *Comments of the American Cable Association in Support of Requests for Waivers of 47 C.F.R. § 76.1204(a)(1)*, CS Docket No. 97-80, CSR-7116-Z (filed March 5, 2007).

⁶ *Comments* at 1.

⁷ *Comments* at 2.

⁸ *Comments* at 3.

marketplace...via the cable industry...providing specifications and licensing for a range of competitive navigation devices.”⁹

Response. These arguments are totally irrelevant to the City’s Waiver Request. As CEA itself admits, smaller cable operators like the City are “effectively at the mercy of the product decisions taken by the major MSOs and the unilateral dictates of entrenched vendors,” and “granting a waiver to San Bruno or to all small operators similarly situated, would not change Motorola’s unilateral refusal to offer a CableCARD-reliant version of the DCT-700.”¹⁰ In other words, CEA itself concedes that (1) granting the City’s waiver request will have absolutely no adverse effect on the competitive market for navigation devices, and (2) denying the request will not facilitate competitive entry.

CEA’s argument. The City’s decision to offer integrated set-top boxes to consumers at no charge violates Section 629(a)’s prohibition on subsidization.¹¹

Response. CEA’s objection to the City providing free DCT-700s to smaller-market consumers reveals CEA’s motivation in filing its Comments – to extract as much money from consumers as possible. In any event, CEA’s argument is incorrect.

First, the Commission has found that the subsidization ban in 47 U.S.C. § 549(a) is applicable only to cable operators that are rate-regulated under the Cable Act.¹² The

⁹ *Comments* at 4.

¹⁰ *Comments* at 1 and 3.

¹¹ *Comments* at 2.

¹² See *Navigation Devices Order* at ¶ 90 (“We interpret Section 629(a) in this context as reflecting congressional intent that DBS providers and cable systems that are subject to effective competition, because they are not subject to rate regulation provisions of Section 623, were not a class of providers to which the anti-subsidy rules were directed.”) (emphasis added).

City of San Bruno, a local government, is not subject to the rate regulation provisions of the Cable Act, and is therefore not subject to the subsidization ban in Section 549(a).¹³ Second, the Commission has found that integrated set-top boxes such as the DCT-700 do not fall within the list of devices in the second sentence of Section 549(a) to which the subsidization ban applies. That sentence applies only to non-integrated devices.¹⁴ Third, because the DCT-700s will be given to every subscriber, the harm to which the subsidization ban is addressed does not exist. Subsidization only causes harm where consumers who do not receive a non-regulated service subsidize the cost of that service for others through the rates that they pay for regulated services. Here, all of the City's customers will be receiving the free DCT-700s, so no one is subsidizing his or her neighbor's service. There is simply no consumer harm.

CEA's argument. "The nominal limitation of the San Bruno waiver request to two years stands unrelated to any goal under Section 629 – nothing whatsoever is cited as occurring in two years time that would bring this...system closer to compliance with Congress's objectives."¹⁵

Response. The express goal of the statute underlying the integration ban is to "assure the commercial availability" of navigation devices.¹⁶ As CEA itself admits,

¹³ See 47 U.S.C. § 543(a)(1) ("...No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.").

¹⁴ See *General Instrument Corporation v. Federal Communications Commission*, 213 F.3d 724, 730, citing *In the Matter of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Report and Order*, 12 FCC Rcd. 14,775 (1998) ("*Navigation Devices Order*").

¹⁵ *Comments* at 2.

¹⁶ 47 U.S.C. § 549(a).

denying the City's Waiver Request will do absolutely nothing to further this objective.¹⁷ Conversely, as described in the City's waiver request, granting the Waiver Request will further the digital transition, which is an express goal of the Telecommunications Act.

Further, the City's Waiver Request clearly explains why the City requires a two-year waiver. With a two-year waiver, it can deploy two DCT-700s to every subscriber, which will allow the City to convert its network to all-digital within one to two years. Without the waiver, the City cannot afford to transition to an all-digital network for years.¹⁸

CEA's argument. "No reference is made in the petition...to advertise and promote the availability of CableCARDS to subscribers who own or are considering buying Digital Cable Ready products..."¹⁹

Response. Here, CEA invents its own criteria for a set-top box waiver request. No Commission rule or order requires a petitioner for a waiver to make such a showing. Nor is there any need for the City to make such a showing. As required by Section 76.640 of the Commission's rules, the City gives convenient access to CableCARDS to any requesting subscriber.

CEA's argument. Motorola has "unilateral[ly] refus[ed]" to offer a CableCARD-reliant version of the DCT-700.

Response. Motorola has not offered a CableCARD-reliant version of the DCT-700 because it cannot. As Motorola and others have explained in many filings in this docket, the DCT-700 is a very limited-function device. For this reason, it has a very

¹⁷ See note 2, *supra*.

¹⁸ *Waiver Request* at 1-4.

¹⁹ *Comments* at 2.

small chassis that is already occupied by the electronics within and Motorola cannot fit a CableCARD slot in the device.²⁰ Neither CEA nor enforcement of the integration ban can change a basic property of matter – two objects cannot occupy the same space at the same time.

CEA's arguments. "Smaller systems, such as...San Bruno, appeal for relief based on considerations other than those behind Section 629."²¹

"Cable operators of any size should not be entitled to a waiver under 47 U.S.C. § 549(c) merely on a claim that such a waiver will help to accelerate the operator's ongoing transition to digital service. The statute calls for a waiver 'upon an appropriate showing...that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service...'"²²

Response. The City's Waiver Request not only shows why it is entitled to a waiver under Section 76.1207 of the Commission's rules,²³ it also shows that the waiver will allow it to convert to an all-digital network, which the Commission has found to be good cause for the grant of a waiver under Section 76.7, the general waiver provision of

²⁰ See, e.g., *Comments of Motorola, Inc.*, CS Docket No. 97-80, CSR-7116-Z (filed March 5, 2007) at 4.

²¹ *Comments* at 3.

²² *Comments* at 3-4.

²³ The City's digital penetration rate is only 25%, much lower than the penetration rate enjoyed by larger MSOs. See *Waiver Request* at 3. In other words, this is not the same situation that the Commission described in its order addressing Comcast's waiver request. See *In the Matter of Comcast Corporation, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Memorandum Opinion and Order*, 2007 WL 80479 (2007) at ¶ 18 ("[A]s Comcast points out in its Waiver Request, 45.6 percent of its subscribers already are digital cable subscribers. Thus, a significant portion of Comcast's subscribers already receive many of the services described in the Waiver Request..."). In this case, granting the Waiver Request will clearly "assist development or introduction of a new or improved multichannel video programming...service" because it will raise the City's digital penetration rate from 25% to 100%.

the Commission's rules.²⁴ CEA may not like the fact that the general waiver provision in Section 76.7 exists, or that the Commission has found that conversion to an all-digital network is good cause for a waiver of the integration ban under Section 76.7, but the provision does exist, and conversion to an all-digital network is good cause for a waiver of the ban.²⁵

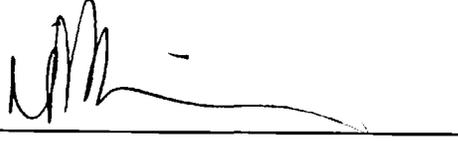
III. Conclusion

CEA's comments rely on internally inconsistent arguments and ignore Commission precedent like the *BendBroadband Order*. All other parties filing comments in response to the City's Waiver Request have strongly supported the Waiver Request. The Commission should recognize CEA's comments for what they are – an attempt to transfer money from the pockets of smaller-market consumers to the behemoth consumer electronics industry. The City has shown good cause for the grant of its Waiver Request, and respectfully requests that the Commission grant the requested waiver.

²⁴ See *In the Matter of Bend Cable Communications, LLC d/b/a BendBroadband, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Memorandum Opinion and Order*, 2007 WL 80477 (2007) ("*BendBroadband Order*") at ¶ 21.

²⁵ *Id.*

Respectfully submitted,



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March 14, 2007

CERTIFICATE OF SERVICE

I, Megan Petrusis, paralegal with the law firm of Cinnamon Mueller, certify that a true and correct copy of the Reply of the City of San Bruno was served on the following individuals by first class mail on March 14, 2007:

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