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VIA ELECTRONIC FILING

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

Re: Ex Parte Presentation, CS Docket No. 97-80, CSR-7131-Z

Dear Ms. Dortch:

Through this *ex parte* letter the Consumer Electronics Association (“CEA”) responds to the assertions of Beyond Broadband Technology, LLC (“BBT”) in its April 16 Reply Comments with respect to the “Emergency” petition of JetBroadband VA, LLC and JetBroadband WV, LLC (“Jet”), for a “deferral” of its obligation, originally ordered by the Commission almost 9 years ago, to comply with Section 76.1204(a)(1) of the Commission’s rules. In fact, the Jet petition is nothing less than yet another attempt, by an element of the cable industry, to nullify this key regulation, and with it the entire competitive regime as ordered by the Congress in Section 304 of the 1996 Telecommunications Act (Section 629 of the Communications Act).¹

Through a host of similar filings and technology announcements, the new strategy of the cable industry – having twice lost frontal court appeals² and having run out of

¹ 47 U.S.C. § 549.

² *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communs., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

Commission deadline extensions³ – to redefine and hence nullify Section 76.1204(a)(1)

now runs as follows:

- (1) Mildly re-engineer proprietary, non-nationally-portable set-top box and head-end technology to include a “downloadable” element, while maintaining reliance on a proprietary chip embedded in the box.
- (2) Wrap the technology in a non-disclosure agreement (“NDA”) so that the elements via which it remains embedded, proprietary, and non-portable cannot be reviewed with the FCC by other parties.
- (3) Leverage the public statements of consumer electronics and information technology parties, and of the Commission’s Media Bureau, that a true regime of common reliance based on downloadable security would be welcome and *potentially* compliant, into assertions that such proprietary systems *as implemented* actually fulfill Congress’s mandate to “assure” competitive availability of devices – despite the *acknowledged* fact that such an approach cannot possibly support a national or competitive market.
- (4) While some waiver applicants freely admit that such approaches do *not* constitute Common reliance, and advance this fact as a rationale for a *waiver*,⁴ BBT and Jet now take the opposite tack, and cite these very elements as grounds for a Commission finding that its regulation has been *satisfied*. Nothing could be further from the truth.

The BBT-Jet rationale entirely misses the point of common reliance, as first put forward to the Commission by the cable industry itself in 1997 – 1998. It was the cable

³ The January 1, 2005 compliance deadline set in 1998 has been twice extended by the Commission, first to July 1, 2006, and again to July 1, 2007. See discussion, *Commercial Availability of Navigation Devices*, Second Report And Order, CS Docket No. 97-80 ¶¶ 31-34 (rel. Mar. 17, 2005).

⁴ See, *Commercial Availability of Navigation Devices*, CS Docket 97-80, CSR-7182-Z, Local Internet Service Company, Petition for Waiver of Section 76.1204(a)(1) at 10-11 (Apr. 2, 2007) (“Local Internet Service Co.”); *Commercial Availability of Navigation Devices*, CS Docket 97-80, CSR-7147-Z, Dumont Telephone Co., Petition for Waiver of Section 76.1204(a)(1) 6-7 (Mar. 12, 2007) (“Dumont”). The same language appears in nine other waiver petitions dated March 1st through March 13th, 2007. See *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7177-Z, West Liberty Telephone Company, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 13, 2007) (“West Liberty”); CSR-7142-Z, Radcliffe Telephone Company, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 12, 2007); CSR-7146-Z, Farmers’ and Business Mens’ Telephone Company, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 12, 2007); CSR-7143-Z, South Slope Cooperative Telephone Company, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 9, 2007); CSR-7148-Z, Heart of Iowa Communications Cooperative, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 7, 2007); CSR-7140-Z, Winnebago Cooperative Telephone Association, Petition for Wavier of Section 76.1204(a)(1) at 6-7 (Mar. 5, 2007); CSR-7184-Z, Mahaska Communication Group, LLC, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 5, 2007); CSR-7149-Z, Kalona Cooperative Telephone Co., Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 1, 2007).

industry itself that came forward with the CableCARD as a nationally portable solution to the issue of separate, proprietary security systems that were obstacles to a competitive market in navigation devices. In filings by Time Warner Cable,⁵ Comcast,⁶ and NCTA,⁷ the cable industry agreed that, while the *Commission* should not formulate standards for national portability, such a national *security* standard was necessary and possible and should be proposed to the Commission by the private sector. For this purpose they advanced the “National Renewable Security Standard” (“NRSS”), and later promised⁸ to support and provide adequate supplies of “Pods” (later, CableCARDS), based on this nationally standard interface, to meet the key requirement of a *nationally portable interface* for locally provided modular security. It is this key concept, embraced by the cable industry a decade ago, that BBT-Jet would now have the Commission jettison and abandon.

The specific problem addressed by the Congress in the 1992 Cable Act and Section 304 of the 1996 Telecommunications Act (Section 629 of the Communications Act) was the local and proprietary nature of thousands of cable systems, as obstacles to interoperability with TV receivers and VCRs, and as a barrier to the sale of integrated, competitive products. Yet neither Jet nor BBT has claimed that implementation of BBT will be even colorably national in scope, or even extend beyond these two local JetBroadband systems. Hence,

⁵ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of Time Warner Entertainment Company, L.P. (“Time Warner”) at 32-43 (May 16, 1997); Time Warner Reply Comments at 16-25 (June 23, 1997).

⁶ Letter from James R. Coltharp, Senior Director, Public Policy, Comcast Corporation to Magalie R. Salas, Office of the Secretary, FCC, Re: Navigation Devices CS Docket No. 97-80 (June 5, 1998).

⁷ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of the National Cable Television Association (“NCTA”) at 30-38 (June 23, 1997); NCTA Reply Comments at 20-25 (June 23, 1997).

⁸ Letter from Neal M. Goldberg to William F. Johnson, Deputy Chief, Cable Services Bureau, FCC Re: Navigation Devices CS Docket No. 97-80 (June 4, 1998) attaching letter from major MSOs to Decker Anstrom, President, NCTA (June 3, 1998).

BBT is relying on an entirely theoretical notion in asking the Commission to void a vital real-world obligation.

The reality speaks for itself. Jet is ordering proprietary boxes from BBT. With no assertion that BBT technology will be adopted at the head-ends of *any* major MSO, BBT does not and cannot claim that it would be practical to install the proprietary BBT chip in any generally available consumer electronics product, such as a DTV television receiver or a DVR. Nor can BBT claim that any license would be available from CableLabs for a CE manufacturer to build a limited-function, 2-way dedicated set-top box using BBT technology, *even* for a local market, because no such license for 2-way system functionality has been offered by CableLabs, BBT, JetBroadband, or anyone else.

In real world terms, therefore, grant of Jet's "emergency petition" would bring the Commission back to where it stood in 1996 when Congress passed Section 629: *no* assurance of competitive availability of navigation devices; a complete failure to implement the directive given to the FCC by the Congress. Thus, while BBT accuses CEA of a "collateral attack" on the Media Bureau's initial findings with respect to its technology, it is in fact BBT that is frontally attacking the Commission's mission, as instructed by the Congress and set forth in its regulations.

Further Research, Currently Impeded By Non-Disclosure Agreements, Is Necessary As To Whether Claims That Security Is "Separate" And "Downloadable" Are Based In Fact.

BBT's admission that its system would not be nationally portable unless adopted by all MSO head-ends – and that this is not going to happen – is enough to disqualify it from meeting the competitive availability goals as set forth by the Congress and the Commission. Even were the Commission willing to ignore this fact, however, the record is far from sufficient for the Commission to base any real-world action on *assertions* that this

technology provides for “separate” and “downloadable” security at all – and whether it is in fact any different than a single-chip, hard-wired implementation of set-top box security. There is nothing on the record to suggest that the BBT system is any different in these respects from competing systems, which *waiver* applicants more candidly admit to be non-compliant. Ten waiver requests on behalf of small cable systems make the following admission as to their technology:

“Widevine is a proprietary downloadable conditional access system However, Widevine’s DCAS does not appear to provide for common reliance as required by the Commission. . . . Widevine is a closed proprietary DCAS, and it cannot be used with set-top boxes that have not been configured with the appropriate chipsets or other hardware and software. A customer with a set-top box using a non-Widevine DCAS would not be able to use that device with Petitioner’s video system. Verizon has observed DCAS must be open, universally interoperable, and network-agnostic in order to meet the Commission’s common reliance requirement.”⁹

BBT, in n. 8 to its Reply Comments, cites the Nagravision system as “an example of such a truly downloadable design that has much flexibility.” Yet a cable operator whose *own* waiver application depends on the Nagravision system has admitted in its own filing, as a basis for seeking a waiver:

“The purpose of common reliance is to enable customers to purchase set-top boxes from retailers for use on any cable system. However, ***due to the proprietary nature of the Nagravision solution, the requirement for common reliance is not met.*** . . . Nagravision does not provide for common reliance because subscribers cannot purchase a CableCARD compatible device and use it with the Nagravision smartcard in order to access Petitioner's video system. . . . Because the Nagravision smartcard system is proprietary, Petitioner relies on Nagravision to provide both the set-top box and the smartcards for its video system. This arrangement does not satisfy the Commission's requirement for common reliance as set-top boxes used in Petitioner's video system are generally not interoperable with other systems, and vice versa.”¹⁰

⁹ West Liberty at 6; see *supra* n. 4.

¹⁰ *Dumont* at 6-7 (emphasis supplied).

BBT, for all its resentment at being characterized as designed for “small” systems (it cannot cite to adoption by any major MSO), cannot and does not deny that its own “solution” would have to be local, rather than national, in scope.

BBT also chides CEA for claiming that BBT’s system, like existing embedded security systems for which waivers are being sought, also appears to be based on a proprietary, embedded, chip, while CEA declines to sign an NDA to explore this issue. However, were CEA to sign such an NDA, it would be prohibited from discussing the BBT technology with the Commission, or even with its own members. BBT expects the Commission to follow up on an initial Media Bureau notice and observation¹¹ as if based on consequential real-world findings and orders. Yet, like CableLabs with its competing and apparently non-interoperable “DCAS” interface, BBT maintains an information vacuum by keeping details under NDA.

The Very Fact, Cited By BBT, Of A Potential Plethora Of Non-Interoperable Systems Demonstrates That BBT Does Not Offer A Nationally Standard Interface.

In addition to documenting, through citation to Nagravisision, that its own interface will not be a private sector nationally standard security interface, BBT goes on to refer to the announcement by Motorola – the dominant head-end and conditional access supplier to the cable industry – that it is working on its *own* flavor of its proprietary “MediaCipher” security system “in a downloadable form.” Thus, while still asserting that its own technology is not necessarily limited to “small” cable systems, BBT does apparently acknowledge that it will not be able to sweep Motorola

¹¹ BBT leans heavily on a Bureau Notice as to the potential compliance of downloadable security and its accompanying “note” of BBT’s development of a system. See Public Notice, “*Commission Reiterates That Downloadable Security Technology Satisfies the Commission’s Rules on Set-Top Boxes and Notes Beyond Broadband Technology’s Development of a Downloadable Security Solution*,” 22 FCC Rcd 244 (2007).

and Scientific Atlanta technology out of the nation's head-ends, and replace these dominant vendors everywhere with BBT.

Taken as a whole, including this BBT initiative and those of others in the cable industry on its behalf, what the Commission is now being told by the cable industry, including BBT and its allies, is that (1) all standard-setting needs to be centralized in CableLabs, to assure interoperability, compatibility, and efficiency, *but* (2) where it suits the cable industry to avoid effective device competition, standard-setting may be entirely *atomized and localized* so as to make it *impossible* for an entrant to field a competitive retail product, *or* to build a competitive platform into nationally distributed DTV television receivers, so as finally to eliminate the necessity of obtaining a specific converter box from the local operator.

This would bring us back to where the Congress started, in 1992 and 1996.

In successfully urging the Congress initially to address this issue fifteen years ago, Senator Leahy observed presciently:

The effort to create a user-friendly connection between cable systems and consumer electronics is more important now than ever before. New technologies that are beginning to come on line—such as digital compression, which packs more programs onto a single channel—will force more and more consumers to rent converter boxes and lose the full benefits of their televisions and VCR's. The time to insist on new standards that will create a consumer-friendly environment for years to come is now.¹²

In adding Section 629, the House Commerce Committee observed in its Report:

A competitive market in navigation devices and equipment will allow common circuitry to be built into a single box or, eventually into televisions, video recorders, etc.¹³

The Conference Report on the Telecommunications Act was explicit:

¹² Statement of Senator Leahy, 138 Cong. Rec. S583 (1992). The provision he advocated ultimately became Section 624A of the Communications Act, 47 U.S.C.544a (1992).

¹³ 47 U.S.C. § 549; H.R. Rep. No. 104-204 at 112 (1995).

One purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator. Thus, in implementing this section, the Commission should take cognizance of the current state of the marketplace and consider the results of private standards setting activities.¹⁴

For A Downloadable Security Interface, Or Any Other Security Interface, To Comply With FCC Regulations And The Plug & Play Agreement, It Must Comply With FCC Licensing Requirements As Well.

CEA hereby incorporates by reference its comments in response to the Comcast waiver request.¹⁵ There, CEA made clear that a true “level playing field,” such as to *assure* the circumstances for competitive entry, depends on mutually agreed specifications and, licensing and support provisions, as well as on a nationally standard interface. CEA observed that none of the waiver applicants had demonstrated that the industry had met these attributes, and that the licenses offered to date by CableLabs for two-way devices instead had demonstrated non-compliance. CEA noted:

“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.”¹⁶

¹⁴ 47 U.S.C. § 549; S. Conf. Rep. No. 104-230 at 181 (1996).

¹⁵ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7012-Z, Comments of the Consumer Electronics Association on Request for Waiver of 47 C.F. R. § 76.1204(a)(1) (June 15, 2006).

¹⁶ *Id.* at 6 n.11.

CEA, in its opposition to the Comcast request for a waiver, went on to describe at length the violations of Commission rules in the CableLabs licenses that are on offer for “two-way” devices, and pointed out that CableLabs has *refused* to license two-way devices that would be directly competitive with the low-budget, non-OCAP boxes which are now described in the BBT petition as well.

As the Commission now deals with a veritable avalanche¹⁷ of local system requests for waivers or for, essentially, a declaration of compliance as is sought here by BBT, the Commission should clarify that, *in addition* to being truly and essentially “downloadable,” a representation as to a “downloadable” security system should prove compliance with the following attributes – *all* of which are provided for in the current CableCARD regime via the DFAST license as filed with the Commission in a regime approved in October 2003:

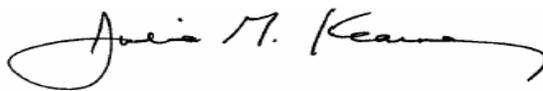
- (1) a national interface so that a DTV television receiver or competitive product can be nationally marketed and moved by the consumer from one local system to another,

¹⁷ The following “Special Relief and Show Cause Petitions” were all noticed by the Commission on April 13, 2007: *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7177-Z, West Liberty Telephone Company, Petition for Waiver of Section 76.1204(a)(1) (Mar. 13, 2007); CSR-7142-Z, Radcliffe Telephone Company, Petition for Waiver of Section 76.1204(a)(1) (Mar. 12, 2007); CSR-7146-Z, Farmers’ and Business Mens’ Telephone Company, Petition for Waiver of Section 76.1204(a)(1) (Mar. 12, 2007); CSR-7143-Z, South Slope Cooperative Telephone Company, Petition for Waiver of Section 76.1204(a)(1) (Mar. 9, 2007); CSR-7148-Z, Heart of Iowa Communications Cooperative, Petition for Waiver of Section 76.1204(a)(1) (Mar. 7, 2007); CSR-7140-Z, Winnebago Cooperative Telephone Association, Petition for Waiver of Section 76.1204(a)(1) (Mar. 5, 2007); CSR-7184-Z, Mahaska Communication Group, LLC, Petition for Waiver of Section 76.1204(a)(1) (Mar. 5, 2007); CSR-7149-Z, Kalona Cooperative Telephone Co., Petition for Waiver of Section 76.1204(a)(1) (Mar. 1, 2007); CSR-7182-Z, Local Internet Service Company, Petition for Waiver of Section 76.1204(a)(1) (Apr. 2, 2007); CSR-7147-Z, Dumont Telephone Co., Petition for Waiver of Section 76.1204(a)(1) (Mar. 12, 2007); CSR-7178-Z, CenturyTel, Inc., Request for Waiver of Section 76.1204(a)(1) (Mar. 9, 2007); CSR-7185-Z, Qwest’s, Petition for Waivers of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1) (Feb. 9, 2007); CSR-7183-Z, En-Touch Systems, Inc., Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (Mar. 28, 2007); CSR-7176-Z, CTC Video Services, LLC, Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (Mar. 22, 2007); CSR-7141-Z, City of Tacoma, Emergency Petition for Waiver of 47 C.F.R. § 76.1204(a)(1) (Mar. 1, 2007); CSR-7139-Z, WideOpen West Finance, LLC’s, Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (Feb. 28, 2007); and CSR-7144-Z, CSR-7145-Z, Cable & Communications Corporation and Mid-Rivers Telephone Cooperative, Inc., Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (Mar. 12, 2007).

- (2) manufacturer input into the specification and any planned changes, and review prior to final adoption,
- (3) reasonable host device implementation specifications and support for competitive home networks,
- (4) self-certification of implementation,
- (5) support of competitive home networks,
- (6) true renewability to the software, including updates to the host end of the interface via firmware,
- (7) licensing terms that comport with FCC regulations limiting MSO control over devices to assurance against theft of service and harm to the cable network, and
- (8) compliance with all other FCC regulations pertaining to cable systems and competitive availability of devices.

These attributes are far from radical – as noted, all of them are met by the existing CableCARD, *if* adequately supported under any reasonable interpretation of the existing DFAST license for CableCARD technology. ***The Commission should insist that any successor to the CableCARD meet these same requirements.***

Respectfully submitted,



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Dated: April 24, 2007

CERTIFICATE OF SERVICE

I do hereby certify that on April 24, 2007 I caused a true and correct copy of the foregoing ex parte letter of the Consumer Electronics Association on the JetBroadband VA, LLC and JetBroadband WV, LLC Petition for Deferral of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail on the following:

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