

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

In the Matter of)	
)	
Bernard Telephone Company Inc.)	CS Docket No. 97-80
)	
Request for Waiver of Section 76.1204(a)(1))	CSR-7192-Z
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	
_____)	

**Comments of the Consumer Electronics Association
on Bernard Telephone Company Inc. Petition for Waiver
of 47 C.F.R. § 76.1204(a)(1)**

May 24, 2007

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The Consumer Electronics Association (“CEA”) submits these comments in response to the petition for waiver of Section 76.1204(a)(1) of the Commission’s rules by Bernard Telephone Company Inc. (“Bernard”).¹ Bernard’s request is essentially identical to the recently filed requests of nine other Iowa MSOs (the “Iowa Petitioners”). CEA hereby incorporates its comments in response to the Iowa Petitioners’ requests.² The Commission should deny Bernard’s request on the same grounds as the other Iowa Petitioners.

¹ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7192-Z, Bernard Telephone Company Inc. Petition for Waiver of Section 76.1204(a)(1) of the Commission’s Rules (Apr. 5, 2007) (“Bernard Request”).

² *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Comments of the Consumer Electronics Association on Requests for Waiver Filed by Nine Iowa Cable Operators (May 3, 2007).

Bernard, as with the other Iowa Petitioners, would prefer to continue deploying conditional access technology which, by Bernard's own admission, ". . . does not satisfy the common reliance requirement in the FCC's rules."³ Bernard acknowledges that conditional access systems which are ". . . generally not interoperable with other systems"⁴ do not comply with the Commission's rules, even if they happen to have a downloadable component.

Bernard's acknowledgments, while admirable in their candor, do not go far enough in addressing what requirements the Commission is being asked to waive or overlook. First, as the petition admits at 6, Bernard's system does not actually provide conditional access fully on a separate module, *at all*. Thus, it does not appear to comply with the *first* sentence of Section 76.1204(a)(1), which became effective for all MVPDs *on July 1, 2000*:

(a)(1) A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices.

Bernard and other waiver applicants similarly situated do not aver either that they have sought any waiver of *this* basic obligation on all MVPDs, which the "common reliance" sentence of Section 1204(a)(1) exists to support, or that, like the DBS industry, they have sought and received forbearance, as to this obligation, from the Commission.⁵

Second, Bernard's application purports to satisfy the "limited time" requirement by extending the compliance date to December 31, 2009, but gives no hint as to what

³ Bernard Request at 6.

⁴ Bernard Request at 7.

⁵ Other "Iowa Petitioners" continue to insist that the DBS industry received a waiver. A plain reading of the 1998 Report & Order shows this not to be the case. *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ¶¶ 64-66 (Rel. June 24, 1998). A key difference is that waivers must be sought and granted for a limited time, whereas forbearance is at the discretion of the Commission.

change in circumstances, or in the need for a waiver, Bernard expects to occur by that time. Therefore, this request appears to CEA to be a request for an indefinite waiver, periodically renewed. Such a grant would involve the Commission in circumventing its own requirements.

To the extent Bernard expects some “DCAS” solution to have emerged by the end of 2009, this time limitation, without much, much more, is clearly insufficient. As CEA explained in its *ex parte* letter of April 24, 2007, any conditional access technology to be used by MSOs must have, *inter alia*, a national interface so that compatible retail products can be marketed and moved anywhere, 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 compliance with all other relevant regulations.⁶ The CableCARD, if adequately supported, is the only conditional access technology with all of these attributes, and the only technology that can “assure the commercial availability” of competitive navigation devices today. If MSOs are allowed to deploy a multitude of incompatible, proprietary technologies, we will be no closer to fulfilling Congress’s Section 629 mandate for competition in navigation devices than we were in 1998.

Other Iowa Petitioners resorted to claiming that “other viable solutions” besides the CableCARD are available and comply with the Commission’s rules.⁷ Yet Bernard and the other petitioners identify no such solutions, and candidly admit that the systems they have installed do *not* comply and are not a basis for common reliance.⁸

⁶ *Ex parte* letter from Julie M. Kearney to Marlene Dortch, Office of the Secretary, FCC, CS Docket No. 97-80, CSR-7131-Z, re “Emergency” petition of JetBroadband (Apr. 24, 2007) at 8-9.

⁷ *In the Matter of Requests for Waiver of Section 76.1204(a)(1)*, Joint Reply Comments of the Iowa Petitioners at 11 (May 14, 2007).

⁸ Bernard Request at 6; *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); CSR-7147-Z, Dumont Telephone Co., Petition for Waiver of Section 76.1204(a)(1) at 6-7 (Mar. 12, 2007);

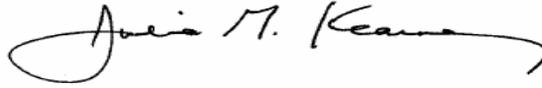
What the Commission again is faced with here is the buck being passed in an industry in which major MVPDs and their vendors simply have ignored the Commission's regulations, and now seek the Commission's blessing for ignoring additional regulations. Whereas some in the industry might have bet, improvidently, that the FCC would keep postponing the common reliance obligation or would routinely grant waivers, there was never any legal challenge, petition for reconsideration, or request for a waiver as to the obligation to provide entirely separate conditional access modules by *July 1, 2000*. If vendors who serve MVPDs have chosen to ignore this regulation and are outside the Commission's ability to impose sanction, the Commission's only recourse is to enforce the regulation against the vendors' MVPD customers.

Accordingly, CEA does not see any avenue for a waiver for Bernard or similarly situated petitioners under Section 629. The Commission, via Media Bureau determinations, has consistently maintained rigor as to those requirements. To the extent the Commission may find any special circumstances under its more general rules, or may make a *de minimis* determination, it should bear in mind that too many or too liberal exceptions would serve to ratify the nullification of FCC regulations by larger MSOs and their vendors. Hence, the Commission should do so only in the larger context of addressing the need for a competitive, national, interoperable navigation device market, and to the extent it grants any waivers, even on *de minimis* grounds, should impose

CSR-7177-Z, West Liberty Telephone Company, Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 13, 2007); 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 Co., 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-7149-Z, Kalona Cooperative Telephone Co., Petition for Waiver of Section 76.1204(a)(1) at 5-7 (Mar. 1, 2007).

forward-looking obligations to assure compliance and the achievement of a national competitive market in “2-way” navigation devices, rather than perpetual future renewal.

Respectfully submitted,



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