

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

In the Matter of )  
 ) CS Docket No. 97-80  
 )  
National Cable & Telecommunications ) CSR-7056-Z  
Association's Request for Waiver )  
of 47 C.F.R. § 76.1204(a)(1) )  
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**Opposition of the Consumer Electronics Association  
To NCTA's Application for Review**

September 14, 2007

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The National Cable and Telecommunications Association (NCTA) has asked the Commission yet again to push implementation of the common reliance rule, 47 C.F.R. Sec. 76.1204(a)(1), off into a mythical future. In asking the Commission to overturn the Media Bureau's denial of a waiver for *all* cable operators, NCTA raises the *same* arguments that the Commission and the Court of Appeals have repeatedly rejected. Most recently, the Commission rejected a more limited application for review by Comcast on the same grounds.<sup>1</sup> There is no reason why the result of NCTA's latest dilatory plea should be any different. Not one of NCTA's jabs at the Media Bureau's decision is legally persuasive, and none changes the fact that Congress's mandate for a competitive market in navigation devices remains unfulfilled, and will not be advanced by further delay. NCTA's repetitive arguments serve no purpose except delay, and waste the Commission's resources. The Consumer Electronics Association (CEA) urges the

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<sup>1</sup> *In the Matter of Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7012-Z, CS Docket No. 97-80, Memorandum Opinion and Order at 2 ¶ 1 (Sep. 4, 2007) ("Comcast Order").

Commission to deny NCTA’s application for review and affirm the decision of the Media Bureau.

**A. NCTA’s Argument as to Non-Cable MVPDs Has Been Rejected by the Court of Appeals.**

No statute, rule, or “Commission policy” prevents the Commission from addressing the lack of competition in navigation devices incrementally. The Commission, as an administrative body, has the flexibility to interpret and implement legislative instructions on an incremental basis. NCTA itself, and its members, argued for this principle before the U.S. Supreme Court, and the Court agreed.<sup>2</sup> But as to Section 629, in almost every year since 1996, NCTA has argued that the Commission must apply its device competition rules to all MVPDs at once, or not at all. The Court of Appeals for the D.C. Circuit affirmed the Commission’s rejection of this argument, ruling unequivocally that the Commission’s separate treatment of non-cable MVPDs did *not* invalidate the device competition rules applied to cable.<sup>3</sup>

Considering NCTA’s history of seeking to nullify the common reliance rule by perpetual extension of the deadline, it is not surprising that NCTA would attempt to raise the thoroughly rejected “all or nothing” argument yet again. In its Application for Review, NCTA once again contends that “disparate treatment” of MVPDs using different technologies calls for a reversal of the Media Bureau’s decision.<sup>4</sup> This is no more true today than it was in 1997, 1998, 2000, 2005, or 2006. Applying the Commission’s long-

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<sup>2</sup> *NCTA v. Brand X Internet Servs., Inc.*, 545 U.S. 967 (2005).

<sup>3</sup> *Charter Communications., Inc. v. FCC*, 460 F.3d 31, 43-44 (D.C. Cir. 2006).

<sup>4</sup> *In the Matter of National Cable & Telecommunications Association’s Request for Waiver of 47 C.F.R. Sec. 76.1204(a)(1)*, CSR-7056-Z, CS Docket No. 97-80, Application for Review at 2 (July 30, 2007) (“NCTA Application for Review”).

held approach to implementing Section 629, an approach confirmed by the Court of Appeals, is no error.

Even if the Commission had some rule forbidding an incremental approach (and it does not), there is no evidence of any disparate impact on cable. NCTA conceded before the Court of Appeals last year that there is “no quantitative evidence” that the rules promulgated under Section 629 put the cable industry at any disadvantage.<sup>5</sup> NCTA’s Application for Review provides no such evidence. This, too, makes the Media Bureau’s conclusions entirely rational and consistent with Commission policy.

**B. NCTA Once Again Claims “DCAS” Is Right Around The Corner, As It Was in 2005 and 2006.**

In 2003, the Commission extended the deadline for complying with common reliance based on NCTA’s argument that a one-way plug-and-play agreement would create sufficient competition in the navigation device market. In 2005, the Commission extended the deadline again, in order to “to determine whether it is possible to develop and deploy a downloadable security function.”<sup>6</sup> At that time, NCTA assured the Commission that it was “working to develop a downloadable security solution.”<sup>7</sup> Seventeen months later, in August 2006, NCTA declared that its “DCAS” system was “just one or two years” away.<sup>8</sup> Another year has passed. NCTA has now abandoned even its 2006 assessment. Now, says NCTA, “no one could say for certain when DCAS will be fully deployed.”<sup>9</sup> Moreover, as CEA noted in its September 10 Reply Comments

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<sup>5</sup> *Charter Communications, Inc.*, 460 F.3d at 43.

<sup>6</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order at 3 ¶ 2 (Mar. 17, 2005) (“2005 Deferral Order”).

<sup>7</sup> *Id.* at 12 ¶ 23.

<sup>8</sup> *In the Matter of National Cable & Telecommunications Association’s Request for Waiver of 47 C.F.R. Sec. 76.1204(a)(1)*, CSR-7056-Z, CS Docket No. 97-80, Request for Waiver at 4 (August 16, 2006) (“NCTA Request for Waiver”).

<sup>9</sup> NCTA Application for Review at 13.

filed in CS Docket 97-80 and in Docket 00-67,<sup>10</sup> DCAS barely receives any mention at all in the more than 100 pages filed cumulatively by NCTA, Time Warner Cable, and Comcast.

The Commission has already recognized and wisely rejected the cable industry's tactic: nullification of the Commission's rule by perpetual delay. The Media Bureau eloquently described Commission policy:

We do not believe, however, that NCTA should be able to shield itself from the clear directives in the Commission's rules implementing Section 629 by continuing to assert that a better approach is on the ever-expanding horizon.<sup>11</sup>

The Media Bureau's assessment is consistent with the full Commission's policy as announced in the order denying Comcast's petition for review: in light of multiple extensions of the deadline with little progress towards a competitive device market, a "heavy burden" of presumption against further delays is appropriate.<sup>12</sup> Whether "DCAS" is one, two, or five years away, or will never be more than the promise of a rosy future, the Commission has already concluded that common reliance on the CableCARD is possible and beneficial today.

Asking for an extension with an arbitrary end date at the end of 2009 does not make "DCAS" any less of a moving target. The end of 2009 is well beyond the broadcast DTV transition and at least a year beyond the "just one or two years" announced in NCTA's waiver petition.

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<sup>10</sup> *Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Reply Comments of The Consumer Electronics Association at 25-26 (Sep.10, 2007) ("CEA Two-Way Reply Comments").

<sup>11</sup> *In the Matter of National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. Sec. 76.1204(a)(1)*, CSR-7056-Z, CS Docket No. 97-80, Memorandum Opinion and Order at 10 ¶ 24 (June 29, 2007).

<sup>12</sup> Comcast Order at 3-4 ¶ 4.

“DCAS,” in any case, remains a mystery to all but the small number of entities who have entered nondisclosure agreements with CableLabs. The Commission, and the consumer electronics industry, have no way to evaluate whether the proposed DCAS is true separable security, and whether it is otherwise suitable for nationwide use. Even if DCAS were imminent, it may be a step backwards from the CableCARD in terms of fostering competitive availability – without further information from NCTA or CableLabs, we have no way of knowing. Thus, an extension of the common reliance deadline will lead to two more years of the status quo with *no* guarantee of even the most basic preconditions for a competitive market come 2010.

**C. Section 629(c) Still Requires Necessity – And a Definite Boundary.**

The full Commission has ruled that the waiver standard of Section 629(c) means what it says: waivers will be granted under that standard only when “necessary to assist the development of a new or improved . . . service.” In the Comcast Order, the Commission affirmed the Media Bureau’s interpretation of the statutory language:

[W]hile it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(c).<sup>13</sup>

NCTA is attempting to make the exception swallow the rule simply by emphasizing the words “to assist.” But NCTA cannot read the necessity requirement out of the statute. The Commission has applied a more logical construction to the statute by denying a waiver under Section 629 for a cable system where digital service is already

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<sup>13</sup> Comcast Order at 6 ¶ 9.

widely available.<sup>14</sup> The Commission concluded that Comcast, which has “significantly more than ‘some’ existing digital services,”<sup>15</sup> was not entitled to a waiver under Section 629(c). Obviously, many cable operators, including the five largest, have significant digital penetration. This makes a waiver as to the *entire* cable industry even less appropriate.

**D. The 2005 Deferral Order Excluded Waivers for Advanced Devices And Does Not Contemplate Perpetual Deferrals.**

The 2005 *Deferral Order* set out criteria which would be “part of the Commission’s consideration of any further extensions.”<sup>16</sup> These included progress towards an agreement on two-way devices, and “whether any downloadable security function developed as a result of such extension would provide for common reliance by cable-deployed and commercially available devices.”<sup>17</sup>

CEA’s Comments in the Third Further Notice of Proposed Rulemaking on two-way navigation devices amply illustrate how the cable industry’s intransigence has stymied progress towards an agreement.<sup>18</sup> As discussed above, neither NCTA nor CableLabs has provided enough information for the Commission or the public to know whether “DCAS” can provide for common reliance. These facts obviously weigh against the granting of a further extension. But more importantly, these factors need only be “part” of the Media Bureau’s decisionmaking. Nothing in the 2005 *Deferral Order* compels the Media Bureau to grant a further industry-wide extension simply because NCTA has once again invoked the “prospect of downloadable security.” Nor does the

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<sup>14</sup> Comcast Order at 7 ¶ 10.

<sup>15</sup> *Id.*

<sup>16</sup> 2005 Deferral Order at 20 ¶ 36.

<sup>17</sup> *Id.*

<sup>18</sup> CEA Two-Way Reply Comments at 2-4.

Order require the Media Bureau to make specific findings on each of the factors that might go into a decision on additional extensions. The overarching Commission policy is to facilitate competitive availability by enforcing the common reliance rule, and the Media Bureau's decision is consistent with that policy.

In any event, the Commission has just rejected the Comcast Application for Review on the grounds that the products in question were "advanced" set-top boxes, rather than basic ones of more immediate relevance to affording a new avenue of solution to the DTV Transition.<sup>19</sup> The same is true of the products for which NCTA seeks a waiver, so the same result should apply.

### **Conclusion**

CEA applauds the Commission for holding its ground against unjustified further extensions of the common reliance deadline. Common reliance is now beginning to fulfill the goal that the Commission intended: increased cable operator support for a single national conditional access technology. NCTA is attempting to discredit the consistent – indeed, inevitable – conclusions of the Media Bureau by repeating the same arguments it has made for the past ten years. Says NCTA, "the Commission has deferred the effective date of the [common reliance rule] only twice,"<sup>20</sup> so why not a third time? The Commission has already answered NCTA's question in its 2005 *Deferral Order* and the *Comcast Order*. When repeated extensions of time bring us no closer to the goal of competitive availability, and "DCAS," which has not yet been shown to be a feasible platform for common reliance, remains perpetually "just one or two years" away, and

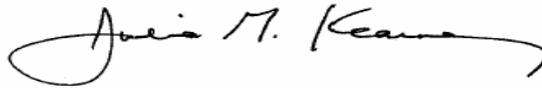
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<sup>19</sup> Comcast Order at 8-11 ¶¶ 12-15.

<sup>20</sup> NCTA Application for Review at 13.

NCTA raises no arguments not already rejected by the Commission and the Court of Appeals, the conclusion of the Media Bureau must be affirmed.

Respectfully submitted,

A handwritten signature in black ink, reading "Julie M. Kearney". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

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## CERTIFICATE OF SERVICE

I do hereby certify that on September 14, 2007 I caused a true and correct copy of the foregoing Objection to NCTA's Application for Review to be served via first-class mail on the following:

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