

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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| In the Matter of |) | |
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| National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1) |) | CSR-7056-Z |
| |) | CS Docket No. 97-80 |

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The National Cable & Telecommunications Association (“NCTA”) hereby replies to the Consumer Electronics Association (“CEA”) Opposition to NCTA’s Application For Review of the Media Bureau’s decision denying NCTA’s request for a temporary waiver of the integration ban until the deployment of downloadable security or December 31, 2009, whichever is earlier.¹ Only one party – CEA – filed an Opposition to NCTA’s Application for Review (“Application”). Its arguments are without merit.

As we demonstrated in the Application, the *NCTA Order* arbitrarily treats similarly-situated multichannel video programming distributors (“MVPDs”) differently, is in conflict with established law and Commission policy, is based on prejudicial procedural error and erroneous findings as to important and material questions of fact, and is based upon a misapplication by the Bureau of relevant waiver standards. The Bureau’s decision is also inconsistent with Commission policy – and its direction to the Bureau – that deferral of the integration ban would be entertained based on the feasibility and prospect of downloadable security if an applicant addressed a number of policy questions.² The Bureau ignored this specific Commission directive

¹ *National Cable & Telecommunications Association*, Memorandum Opinion and Order, CSR-7056-Z, CS Docket No. 97-80, DA 07-2920 (rel. June 29, 2007) (“*NCTA Order*”).

² *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, 6810, 6812-13, ¶¶ 32, 36 (2005) (“*2005 Integration Ban Order*”).

and NCTA's responses to that directive in denying NCTA's waiver request. CEA's Opposition has also ignored that fatal flaw in the Bureau's decision.

CEA (at 1) contends that "NCTA raises the same arguments that the Commission and Court of Appeals have repeatedly rejected." This certainly is not correct with respect to the main substantive argument NCTA made – that the Bureau's *NCTA Order* conflicts with established Commission policy set forth in the *2005 Integration Ban Order*.³

In that order, the Commission extended the effective date of the integration ban to July 1, 2007 to allow time to determine whether downloadable security is feasible, and held that "[i]f downloadable security proves feasible, but cannot be implemented by July 1, 2007, we will consider a further extension of the deadline."⁴ The Commission concluded that, "[a]s part of the Commission's consideration of any further extensions, we will consider the extent to which there has been progress towards making navigation devices commercially available, as required by Section 629, and whether any further extension would promote Congress' objectives."⁵ Specifically, the Commission said it would consider: (1) "whether the cable industry is meeting its current obligations to deploy and support CableCARDs"; (2) "progress toward deployment of multistream CableCARDs and towards a bidirectional agreement"; and (3) "whether any

³ NCTA also demonstrated that grant of its waiver was "necessary to assist" the development and introduction of new and improved services, as Section 629(c) requires. The Bureau rejected these showings on the theory that a waiver is not "necessary" to assist the development or introduction of any of these services because "a significant portion of cable subscribers already receive many of the services described in the [NCTA] waiver request" and a "number of those services have achieved success in the marketplace." *NCTA Order*, ¶ 26. NCTA recognizes that the Commission has since addressed a similar argument in its review of the Comcast waiver request. We believe that request was wrongly decided and that the Commission should take this opportunity to reverse that erroneous statutory construction. As we showed in our Application for Review, by reading the word "assist" out of the statutory waiver standard, the Bureau undermined its entire rationale. Application for Review at 22-25.

⁴ *2005 Integration Ban Order*, ¶ 36 (emphasis added).

⁵ *Id.*

downloadable security function developed as a result of such extension would provide for common reliance by cable-deployed and commercially available devices.”⁶

In the Application for Review, NCTA demonstrated that the Bureau essentially ignored all of these decisional criteria in denying NCTA’s waiver request. CEA devotes one paragraph (at 6) to this argument. First, it essentially blames cable for any lack of progress in the two-way discussions (by citing to comments *in another proceeding* which were filed *after* the Bureau’s *NCTA Order* was released and on which the Bureau obviously did not rely). Second, it claims cable has not provided “enough information” as to whether DCAS provides for “common reliance,” and concludes that, in any event, “these factors need only be ‘part’ of the Media Bureau’s decision-making.” But whatever material CEA now cites that might have bolstered the Media Bureau decision (much of which was not available to the Bureau), the fact is the Bureau ignored “established Commission policy” by failing to address fully the decisional criteria the Commission told it to address in acting on waiver requests based on the prospect of DCAS.

NCTA also argued that, by denying NCTA’s waiver request, granting requests for similarly-situated MVPDs (including numerous telephone company competitors to NCTA’s

⁶ *Id.* CEA’s conception of “common reliance” is ever-changing to suit its own purposes. In opposing every single integration ban waiver request, CEA has cried, Chicken Little-like, that the sky would fall if any breach in the “common reliance” wall were allowed; in CEA’s view, “common reliance” would only be satisfied if 100% of cable-supplied set-top boxes were required to have separate security. Yet, curiously, the rules it proposes in the two-way plug and play proceeding for its DCR+ device are premised on the assumption that the goals of “common reliance” (misguided though they may be) can be achieved where only 20% of cable set-top boxes rely on technology in common with CE devices. On that basis, *we urge the Commission to limit any further enforcement of the integration ban to 20% of a particular cable operator’s new set-top boxes.*

Moreover, as we showed in NCTA’s September 24, 2007 CableCARD report in this docket, whatever the benefits of “common reliance,” they have been achieved already since cable operators – in just three months – have deployed more than twice as many operator-supplied set-top boxes with CableCARDs (over 650,000), than the total number of CableCARDs requested by customers for use in retail devices since those devices were first verified just over 3 years ago. Indeed, CE manufacturers themselves appear to have abandoned “common reliance” since they are building an ever-decreasing number of CableCARD-enabled DTV sets. *See* Eric A. Taub, *A CableCARD That Hasn’t Been Able to Kill the Set-Top Box*, NEW YORK TIMES, Section C, Col. 3, p.3, July 3, 2006 (noting that 80% fewer CableCARD-enabled television models were available in 2006 than in 2005 and noting that one of the problems with such devices was their inability to receive cable’s two-way services).

members), and maintaining that DBS is still exempt from the ban, the Bureau acted in an arbitrary and capricious manner and in conflict with the statute and established Commission policy. CEA claims (at 2) that “NCTA once again contends that ‘disparate treatment’ of MVPDs using different technologies calls for reversal of the Media Bureau’s decision [but] [t]his is no more true today than it was in 1997, 1998, 2000, 2005, or 2006.” CEA cites caselaw where courts have held that the FCC has “flexibility” to implement Congressional mandates on an “incremental basis.” But CEA’s own pleading proves that the FCC’s approach is hardly “incremental.” Rather, it is stagnant.⁷

An incremental approach would require at least some movement,⁸ but as the CEA pleading so forcefully demonstrates, the FCC has totally ignored NCTA’s entreaties for comparable treatment with other MVPDs for over a decade. Sensing some weakness in its own argument, CEA argues (at 3) that, even if an “incremental” approach were not permitted, NCTA had shown no disparate impact on cable. This, of course, is ludicrous. NCTA has repeatedly demonstrated such an impact, emphasizing that the integration ban would amount to a \$600 million annual tax on cable operators that is not being imposed on DBS or telco video providers using IP or hybrid QAM/IP technologies. We also showed that, in the competitive MVPD market, cable operators could not pass those costs on to their customers since, if they did, those customers have a variety of video options.

⁷ An incremental approach is not permissible when the result is unreasonable delay or significant prejudice to a competitor. *See e.g., Louisiana Pub. Sev. Comm’n v. FERC*, 482 F. 3d 510, 520-21 (D.C. Cir 2007) (citations omitted); *Nader v. FCC*, 520 F.2d 182, 296-307 (D.C. Cir. 1975)(ten-year delay unreasonable in light of harm to competitors and consumers).

⁸ An “increment” is defined as “an increase, esp. in quantity or value,” “something gained or added,” “one of a series of regular consecutive additions.” WEBSTER’S NEW COLLEGIATE DICTIONARY, 1980 ed. at 578.

Finally, CEA argues (at 3-4) that, because NCTA could not guarantee a date by which time DCAS would be available, the Bureau was correct to deny its waiver. But the Commission had contemplated the possibility that cable operators could not provide a date certain for DCAS deployment. For that reason, it established the issues a waiver applicant had to address to justify a further extension of the integration ban premised on the prospect of DCAS deployment beyond July 1, 2007. NCTA addressed all of those issues, but the Bureau ignored those Commission-mandated responses. Moreover, NCTA sought a waiver until downloadable security was deployed or until December 31, 2009, *whichever is earlier*. CEA (at 4) contends that providing such a deadline does not affect the timing for DCAS. While that is correct, it is irrelevant. By including an outside date for the waiver to terminate, NCTA was responding to the statutory requirement that waivers be “for a limited time” and sought to provide assurance that, even if deployment of DCAS was delayed, the waiver would expire by a date certain.⁹

For these reasons, the Commission should grant NCTA’s Application for Review.

Respectfully submitted,

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October 9, 2007

⁹ In refusing to credit NCTA’s estimate for timing of DCAS deployment, the Bureau also relied on the erroneous conclusion that a downloadable security solution that satisfies the integration ban already existed and Commission statements that technology from Beyond Broadband Technology (“BBT”) “will be available in time to comply with our July 1, 2007 ban on integrated security devices.” *NCTA Order* ¶ 22 and n.74 (*citing* FCC January 10, 2007 *Public Notice*). But, as we showed, and as the Bureau itself has subsequently noted, the BBT solution was not available by July 1, 2007, and there is no indication when, or if, it will ever be ready. *See* Letter from Monica Desai, Chief, Media Bureau, to Nicole Paolini-Subramanya, JetBroadband, CSR-7131-Z, July 23, 2007 (deferring enforcement of integration ban because of unavailability of BBT downloadable security solution).

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that, on October 9, 2007, copies of the attached Reply to Opposition to Application for Review were served via first class mail, on the following:

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