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BY FEDEX

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

Re: CS Dkt. 97-80; CSR-7902-Z

Dear Ms. Dortch:

Enclosed is a hard copy of the Opposition of the Consumer Electronics Association to Evolution Broadband, LLC's Petition for Waiver of 47 C.F.R. § 76.1204(a)(1) electronically filed in CS Docket 97-80.

Sincerely,



Patricia O'Keefe

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

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) CSR-7902-Z
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**Opposition of the Consumer Electronics Association
to Evolution Broadband, LLC Petition for Waiver of 47 C.F.R. § 76.1204(a)(1)**

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**Opposition of the Consumer Electronics Association
to Evolution Broadband, LLC Petition for Waiver of 47 C.F.R. § 76.1204(a)(1)**

The Consumer Electronics Association opposes Evolution Broadband, LLC's petition for waiver of the Commission's common reliance rule.¹ This is not the time to be introducing new security technologies that are not disclosed or available to competitive entrants, and that cannot be implemented competitively on a nationally portable basis. For the Commission to grant this waiver request would be to set up a roadblock on the path to competition that, a dozen years ago, the Congress directed it to follow.

A decade ago, the Commission approved a nationwide separable security interface – the CableCARD – to permit competitive entrants to design and market devices on an equal footing with cable operators, as Congress intended and instructed in 1996.² Cable operators and consumer electronics manufacturers have already committed vast resources to implement the CableCARD interface. For cable operators now to deploy

¹ *In the Matter of Evolution Broadband, LLC*, CS Dkt. No. 97-80, CSR-7902-Z, Petition for Waiver of 47 C.F.R. § 76.1204(a)(1) (May 12, 2008) ("Petition"); *see* 47 C.F.R. § 76.1204(a)(1).

² 47 U.S.C. § 549(a) (ordering the Commission to "ensure the availability" of competitive multichannel video navigation devices at retail).

new one-way boxes with proprietary integrated security would be a great leap backwards for the Commission and for the goal of competitive availability. It would further undermine the 2002 Cable/CE Memorandum of Understanding on competitive one-way devices,³ which has already been weakened by the Commission's allowance of switched digital techniques and its toleration for five years of unenthusiastic, spotty, burdensome, and often ineffective support of CableCARD-reliant competitive devices by cable operators. Just as the era of common reliance has finally dawned, granting this petition would darken and chill the prospects for competition and for the flowering of the retail market for digital-cable-ready devices, as sought by Congress and the FCC. Such a step would not be consistent with Congress's intent or with the Commission's actions to date.

The Commission has only recently begun to require adherence to Section 76.1204(a)(1) of its rules, which require cable operators to rely on the same separable conditional access technology on which competitive entrants must rely. For both one-way and interactive cable services, that technology is the CableCARD. Cable operator support for one-way devices has *still* not reached the level of routine installation and reliable support. Were waivers to be considered now, such waivers would seriously undermine the competitive prospects for products available at retail which come from manufacturers independent of cable operators. This, in turn, will confine consumers' choices as to products, features and prices in digital-cable-ready products.

To the extent that the set-top boxes for which Evolution is seeking a waiver are nothing more than digital-to-analog converters for standard unencrypted MPEG-2 QAM

³ See Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC, CS Dkt. 97-80 (Dec. 19, 2002), *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* ("MOU").

cable transmissions, no waiver should be necessary. Therefore, the purpose of Evolution's petition appears to be to allow cable operators to use a conditional access technology that is *not* available, under any circumstances, to competitive entrants.⁴ The Commission is so far from having succeeded in its statutory obligation to *assure* competition in its regulations that the introduction of a new competition-eliminating conditional access technology should not be tolerated.

A. A Waiver Under Section 629(c) Would Contradict Commission Precedent and the *Comcast v. FCC* Decision.

The Commission has not identified *any* waiver requests to date that are “necessary to assist the development or introduction” of a new or improved video service. In fact, the Commission decided, and the Court of Appeals has agreed, that merely allowing cable operators another platform for converting subscribers to basic digital service – a service they already offer – does *not* justify a waiver under Section 629(c) of the Telecommunications Act.⁵ The Court of Appeals for the District of Columbia Circuit recently affirmed the Commission's factual finding that cable's digital transition is proceeding apace and that cable operators have numerous incentives to accelerate that transition. The court also upheld the Commission's policy judgment that basic digital service is *not* a “new or improved” service under Section 629(c). Therefore, the Commission is not required to grant a waiver for Evolution's set-top boxes.

In addition, Evolution's request does not comport with the requirements of Section 629, and should not be considered under the Commission's general waiver

⁴ Evolution has not shown that the “Conax security” used by its set-top boxes is available to competitive entrants or nationally portable and scalable to cable systems nationwide, as would be required under Commission rules.

⁵ *Comcast Corp. v. FCC*, No. 07-1445, 2008 WL 2065800, at *3 (D.C. Cir. May 16, 2008) (“We think the FCC's explanation of why a waiver was not ‘necessary’ ... was quite reasonable. Comcast currently offers digital video programming in all of its markets”).

authority, because it is only nominally time-limited. Though Evolution purports to limit its request to three years,⁶ the plain and obvious intent is to continue asking for waivers indefinitely:

- First, Evolution does not state what event will or even *might* occur in three years that would obviate the need for a continued waiver. The digital broadcast transition, which Evolution cites as its only substantive justification, is less than one year away. Yet Evolution asks to use a technology apparently unavailable to competitive entrants in the years beyond the end of that transition, and does not even suggest any path that would lead to competitive entry. Nor does it suggest any licensing terms, compliant with Commission regulations, that might support such entry.
- Second, Evolution requests a waiver for “any successor models,”⁷ suggesting that it intends to continue building noncompliant devices indefinitely. The Commission and the courts have correctly interpreted Section 629(c) as a deviation from the general rule of encouraging competitive entry, to be interpreted narrowly to avoid undermining the rule’s Congressionally mandated goal. Similarly, the Commission should read the “limited time” requirement strictly by refusing waivers that continue beyond any valid or even purported justification.

B. Competition, Not a Renewed Monopoly, Will Ease the Digital TV Transition.

The Commission’s policy of common reliance for cable navigation devices is based on the sound conclusion that competition, not monopoly, will get more Americans prepared for the broadcast digital transition in February 2009. The coupon-eligible converter box program, even though time-limited, has attracted more than 80 competitive entrants, many of them sporting brands that previously were not widely known. A new technology may tap into the potential for competitive devices to be offered to cable customers in cable’s digital transition – *if* it is available to and useful for competitive entrants, and *if* a license that comports with Commission rules is available to those entrants.

⁶ Petition at 3.

⁷ Petition at 5.

Congress and the Commission have recognized that creating and preserving the minimum conditions that are necessary for competitive entry -- namely, common reliance on a nationally scalable and portable conditional access protocol -- will allow market competition and the price-reducing effects of Moore's Law to put digital-to-analog converters in the hands of all who need them. Cable operators have kept CableCARD-compliant navigation devices a niche product by failing to support them adequately -- a fact well documented in this docket.⁸ This monopolistic status quo will continue through February 17, 2009 and beyond if cable operators can continue to rely on a noncompliant security protocol.

The Commission has never categorically exempted "low-cost" boxes from the common reliance rule.⁹ As the Court of Appeals recently affirmed, the Commission made no promise to repeal the rule as to such boxes. Thus, the waiver process is not an avenue for seeking a general repeal of the rule that will be available to even the largest and most financially sound cable operators. Evolution's request is categorically different from truly time-limited requests by small or financially distressed cable operators. A nationwide waiver to Evolution will undermine common reliance in a way that the Media Bureau's prior geographically limited and time-limited waivers will not. Evolution itself noted that the factors under which the Media Bureau granted limited waivers to some

⁸ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. 97-80; CSR-7012-Z, Comments of the CEA on [Comcast] Request for Waiver of 47 C.F.R. § 76.1204(a)(1) at 4-8, 13 (June 15, 2006).

⁹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Second Report & Order ¶ 37 (Mar. 17, 2005) (stating "we will also consider" whether to categorically exempt "low-cost, limited capability boxes" and offering to "entertain" waiver requests).

smaller operators are “not applicable” to Evolution.¹⁰ This alone is a strong reason to deny the petition, not to grant it.

C. New One-Way Devices Without Competitive Availability Or Common Reliance Will Undermine the One-Way MOU and Erase The Past Year’s Competitive Progress.

To grant Evolution a *nationwide* waiver to sell set-top boxes using security technology that is not available to competitive entrants would remove cable operators’ incentive to support CableCARD-compliant devices. Granting Evolution’s waiver would harm the public interest as expressed in numerous Commission and court precedents.

It is now beyond question that the common reliance rule gives cable operators a market incentive, as well as a regulatory incentive, to adequately support competitive devices. The Commission’s 1998 rulemaking recognized that a rule requiring operators to support the security protocol used by competitive entrants would *not* be sufficient.¹¹ In 2007, the Commission reiterated that “[u]ntil and unless MVPDs subject to the integration ban actually begin relying upon the same separated security solution made available to consumer electronics manufacturers ...the objective of Section 629 will not be achieved.”¹² The Commission has maintained this policy continuously, and the Court of Appeals has affirmed it for yet a third time this year.

Contrary to Evolution’s assertion, it is far from “obvious”¹³ that the installed base of CableCARD-compliant devices is now large enough to ensure that cable operators have a market incentive to support all such devices adequately. What is obvious is that,

¹⁰ Petition at 9 n.22.

¹¹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order ¶¶ 47-81 (rel. June 24, 1998).

¹² *In the Matter of Comcast Corp. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; CSR-7012-Z; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. 97-80, Memorandum Opinion and Order ¶ 4 (rel. Sept. 4, 2007).

¹³ Petition at 10 n.25.

given the option of deploying set-top boxes without common reliance to the 35 million cable customers who do not subscribe to two-way services – nearly half of all customers – cable operators will do so, rather than support competitive CableCARD-reliant devices. If this waiver is granted, we would expect support for CableCARDs, still nascent after four years, to suffer immediately.

There is no justification for a one-way device waiver when a competitive solution exists. There is no justification for the introduction of a new, *proprietary* security technology as the era of common reliance has just begun. There is no justification for a Media Bureau or Commission ruling based on the DTV Transition when it has been amply demonstrated that a market-based approach, which encourages rather than locks out competitive entry, will attract new entrants and be embraced by consumers seeking a choice in products, features and prices.

D. The Evolution Petition Is Defective In That It Does Not Adequately Describe The “Successor” Products For Which A Waiver Is Also Sought And Is Not Made On Behalf Of Any Cable Operator.

The Evolution petition describes the product in question as doing “little more” than convert digital programs for analog viewing. This description is insufficient to assess, among other things, whether this product or successors will have attributes that are denied to competitive products made under the DFAST license that was part of the 2002 “Plug & Play” agreement, whether such products could be manufactured by DFAST licensees, and if not, why not.

The Evolution petition also does not contain any discussion or forward-looking proposal by a single cable operator. Thus, the Commission is being asked to give *carte blanche* blessing and an essentially permanent waiver without a single obligation or

statement of intention on the part of any cable operator as to actual use, deployment, licensing or support of competitive devices. Since the Commission has tied its consideration of waiver applications to new *services*, this omission makes this petition defective on its face. Moreover, it denies the Commission any context for weighing the clear subtraction from competition which this proposed waiver would bring against any public policy benefit for considering it.

For this and the other reasons stated above, we urge the Commission to reject Evolution's petition for waiver.

Respectfully submitted,

/s/ Brian Markwalter

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Dated: June 16, 2008

CERTIFICATE OF SERVICE

I do hereby certify that on June 16, 2008 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on Evolution Broadband, LLC Petition for Waiver of 47 C.F.R. § 76.1204(a) to be served via first-class mail on the following:

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/s/ LaClaudia Dyson
LaClaudia Dyson