

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

In the Matter of)	
)	
Qwest's Petition for an Extension of Its)	CSR-7185-Z
Waiver of the Set-Top Box Integration Ban,)	
47 C.F.R. § 76.1204(a)(1))	
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
_____)	

**Comments of the Consumer Electronics Association
on Qwest's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)**

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**Comments of the Consumer Electronics Association
on Qwest's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)**

The Consumer Electronics Association (“CEA”) respectfully submits these comments in response to the request by Qwest Communications International Inc. (the “Petitioner”) for an extension of its current waiver of Section 76.1204(a)(1) of the Federal Communications Commission’s (the “Commission’s”) rules.¹ Section 76.1204 requires in part that “[c]ommencing on July 1, 2007, no multichannel video programming distributor [(“MVPD”)] subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.”² This appears to be the only element of Section 76.1204 for which a waiver was explicitly applied for and granted.

¹ 47 C.F.R. § 76.1204(a)(1) (2007).

² *Id.*

This petition, like others pending before the Commission, does not merely seek an explicit waiver of the Commission's "common reliance" rule in Section 76.1204(a)(1). It also, essentially and effectively, asks the Commission to grant perpetual freedom from the core *Right To Attach* adopted as its response to Congress's instruction in Section 629, part of its 1996 amendment of the Communications Act. Any action by the Commission, in favor of Qwest or anyone else, that effectively nullifies the basic "Right To Attach" would repudiate the clear import and instruction of Section 629 to *assure*, in regulations, commercial, competitive availability of navigation devices.

The Commission in 1998 adopted §§ 76.1200 - 1205 to implement Section 629. It has extended the effective date of the "common reliance" requirement, originally effective January 1, 2005, twice.³ CEA does not believe the Commission, however, has received or entertained any petition for waiver of compliance with the basic *right to attach* declared in Sections 1201, 1202 and 1204, which became effective on July 1, 2001, a date never postponed or waived by the Commission:

§ 76.1201 Rights of subscribers to use or attach navigation devices.

No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service.

§ 76.1202 Availability of navigation devices.

No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent

³ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Order and Further Notice of Proposed Rulemaking ¶ 4 (rel. Apr. 25, 2003); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report & Order ¶ 31 (rel. Mar. 17, 2005).

navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to § 76.1209.

§ 76.1204 Availability of equipment performing conditional access or security functions.

(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.

With respect to its very high-speed digital subscriber line (“VDSL”) technology, Qwest, like several other “common reliance” petitioners, has not sought any waiver of the *first* sentence of Section 1204, asserted that it has complied, or offered any plan or roadmap with respect to compliance. Instead, Petitioner apparently has taken no action in favor of the attachment and functioning of competitively-sourced products whatsoever, and hence none toward “common reliance” on a security interface to support such products. As to the latter obligation, Qwest requested a waiver in February 2007.⁴ As to the former, core, obligation, there is no evidence in the record that Qwest has taken any action or initiative whatsoever.

The Commission’s Media Bureau granted a one-year waiver of “integration ban” compliance with the *second* sentence of Section 76.1204(a)(1), and (apparently in aid of the first sentence of Section 76.1204(a)(1)) instructed the Petitioner to “work to develop and deploy a separable security solution that will allow for interoperability between their systems and consumer electronics equipment” during that time.⁵ As Petitioner returns to

⁴ *Qwest’s Petition for Waivers of the Set-Top Box Integration Ban*, 47 C.F.R. § 1204(a)(1), CSR-7185-Z, (Feb. 9, 2007) (“First Qwest Petition”).

⁵ *In the Matter of Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80 Memorandum Opinion and Order ¶ 61 (rel. June. 29, 2007) (“Consolidated Order”).

the Commission to request yet another waiver, however, Petitioner does not provide any plan for a separable security solution, as requested by the Commission, that would finally bring it into compliance with the *first* sentence of Section 76.1204(a)(1).⁶

The navigation device rules implement Congress’s clear directive to “assure the commercial availability” of video navigation devices from sources other than the system operator.⁷ A competitive market for navigation devices depends (1) primarily, on a practical and useful Right To Attach, and (2) additionally and effectively, on common reliance. The Congress recognized in the very first sentence of Section 629, when it instructed the Commission to consult with standard-setting bodies in adopting its implementing regulations, that a practical and useful right to attach depends on industry standard technologies and interfaces. For a Right To Attach to be practical, devices must be interoperable among systems via a standard interface – as the CableCARD nominally (and CEA continues to hope, via common reliance, practically) provides. Operators such as Qwest should not be excused by the Commission from achieving this goal. Hence, the Commission should not grant any waiver that effectively would excuse Qwest from effectuating the Right To Attach..

Accordingly, if the Commission decides to extend Petitioner’s waiver yet again, it should do so in a way that will *not* lead to a perpetuation and proliferation of mutually incompatible and non-portable conditional access technologies. The Commission should also require, of Qwest and any other system operator, that a workable roadmap for expeditious support of nationally portable competitive devices must be part and parcel of any waiver application. The Commission should also take enforcement action against

⁶ Qwest’s Petition for an Extension of Its Waiver of the Set-Top Box Integration Ban 47 C.F.R. § 76.1204(a)(1), CSR-7185-Z (June 9, 2008) (“Second Qwest Petition”).

⁷ 47 U.S.C. § 549(a).

any cable operator that simply ignores its obligations under the *first* sentence of Section 76.1204(a)(1) and neither complies with nor seeks any waiver from the July 1, 2001 obligation to provide a separate security system that effectively can support competitive entrants via a nationally standard interface.

Based on CEA's current understanding and Petitioner's claims, Petitioner's video delivery technologies, i.e., VDSL and fiber-to-the-home broadband passive optical network ("FTTH-BPON"), are not widely deployed.⁸ According to Petitioner, VDSL represents "an extremely small segment of the video delivery market," and VDSL "is being eclipsed by the IPTV delivery platform."⁹ Further, Petitioner claims that no compliant set-top boxes currently exist for its VDSL platform.¹⁰

The Commission granted the Petitioner a one-year waiver through July 1, 2008 for the purpose of allowing it "to develop and deploy a separable security solution that will allow for interoperability between their systems and consumer electronics equipment."¹¹ Petitioner asserts that it has done so with respect to its FTTH-BPON platform, but not with respect to its VDSL platform,¹² as to which the Petitioner does not describe any progress toward compliance with Section 76.1204(a)(1) and appears to offer no plan to come into compliance in the future.¹³ Further, in its previous waiver petition,

⁸ Second Qwest Petition at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Consolidated Order ¶ 61.

¹² Second Qwest Petition at 5 n.8.

¹³ Petitioner suggests that compliance with Section 76.1204 might be satisfied through "downloadable conditional access." Second Qwest Petition at 6. However, the Commission has never stated in any rulemaking context that any downloadable conditional access system would fully satisfy the "common reliance" requirement or the Right To Attach. *See generally* FCC 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 Downloadable Security Solution*, CS Dkt. No. 9780, DA 07-51 (Jan. 10, 2007). CEA's position on this subject was recently reiterated in an *ex parte* letter, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability*

Petitioner put forth a plan, albeit vague, to migrate away from its VDSL platform.¹⁴ The fact that Petitioner excludes any mention of a migration plan in its current Petition and states that its VDSL navigation device vendor currently has no plans to develop compliant navigation devices strongly implies that Petitioner will continue to request waivers indefinitely into the future.¹⁵ Thus, CEA is concerned that waivers to small operators, with no requirement of a roadmap or a national interface, cumulatively will allow the vendors to these operators to avoid competition by perpetuating multiple incompatible video delivery platforms. Multiple, incompatible conditional access technologies will stifle the development of a competitive navigation device market – the very goal whose achievement the Congress instructed the Commission, in 1996, to *assure* in its regulations.

To prevent this scenario, the Commission should make explicit that any waivers for Petitioner’s VDSL platform, or for any other operator using similar technologies, will be conditioned on the determined and rapid development of a compatible conditional access technology via a nationally standard security interface that demonstrably can support effective competitive entry. Absent demonstrated progress towards such a technology, petitioners should at least provide a roadmap against which progress can and will be measured, or waivers should not be extended. Otherwise, the petitioner and its vendors will have no incentive to work toward a standard, nationally portable interface, no matter the underlying technology platform or market share, and petitioners, assured of

of Navigation Devices, CS Dkt. No. 97-80, letter from Robert S. Schwartz, Counsel to CEA to Marlene Dortch, Secretary, FCC, Notice of Ex Parte Presentation (June 20, 2008).

¹⁴ First Qwest Petition at 2.

¹⁵ Second Qwest Petition at 7.

a perpetual waiver, will have no incentive to require vendors to comply with the Commission's rules.

Respectfully submitted,

/s/Michael Petricone

Of counsel
Robert S. Schwartz
Mitchell L. Stoltz
Constantine Cannon LLP
1627 Eye Street, N.W.
10th Floor

Michael Petricone
Senior Vice President, Government Affairs
Consumer Electronics Association
1919 S. Eads Street
Arlington, VA 222012

Washington, D.C. 20006
Tel: (202) 204-3508

Tel: (703) 907-7544

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CERTIFICATE OF SERVICE

I do hereby certify that on July 10, 2008 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on Qwest's Request for Waiver of 47 C.F.R. § 76.1204(a) to be served via first-class mail on the following:

Craig J. Brown
Tiffany West Smink
Qwest Communications International Inc.
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005
Tel: (303) 383-6619
Email: craig.brown@qwest.com
tiffany.smink@qwest.com

/s/ LaClaudia Dyson
LaClaudia Dyson