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August 27, 2008

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation and Response to Comments,
CS Docket No. 97-80, CSR-7902-Z

Dear Ms. Dortch:

On August 22, 2008, the undersigned had a telephone conversation with Rick Chessen, Legal Advisor to Commissioner Capps. The subject was the Consumer Electronics Association's (CEA's) response to comments filed by Cable One, Inc., in the above-captioned proceeding. This letter describes the substance of that conversation and expands on CEA's position.

It is CEA's understanding that Cable One has not filed a petition for waiver or any other formal request for action. Both Cable One's letter dated June 16th in the above-captioned docket and its subsequent *ex parte* filings on July 24, 29, and 31 concern the petition by Evolution Broadband, LLC ("Evolution").¹ The Evolution petition seeks a nationwide exemption from Section 76.1204(a)(1) of the Commission's rules, which would allow any cable operator to deploy Evolution's security-integrated, nonportable cable set-top boxes to any or all U.S. cable subscribers with no further showing of need. CEA strongly opposes Evolution's request and has stated its reasons in this docket.²

Cable One's comments, although filed in support of the Evolution request, range far beyond the scope of that request. Cable One is apparently asking the Commission to "update" its rules to allow cable operators to deploy high-definition set-top boxes with integrated security in perpetuity. Cable One's comments have no bearing on the Evolution request, which describes a set-top box *without* high-definition capability.³ Because Cable One's comments do not pertain to

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) ("Evolution Request").

² *In the Matter of Evolution Broadband, LLC*, CS Dkt. No. 97-80, CSR-7902-Z, Opposition of the Consumer Electronics Association to Evolution Broadband, LLC Petition for Waiver of 47 C.F.R. § 76.1204(a)(1) (June 16, 2008).

³ Evolution Request, Exhibit 1 (device specifications).

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the Evolution request, and Cable One has not filed a petition of its own, Cable One's request is not properly before the Commission.

In addition, Cable One's request is based on a hypothetical, nonexistent product. Cable One has asked the Commission "to grant waivers for low-cost, limited functionality HD-capable settops,"⁴ but Cable One cites *no such set-tops* currently available and *no such waivers* pending. A request based on a hypothetical product is not a waiver request but rather a petition to amend the Commission's rules. As such, the Commission need not give any consideration to Cable One's informal request in its current posture, and should not consider such a sweeping change in policy without an opportunity to hear from all affected parties, with adequate notice.

Conversely and for similar reasons, the Commission has not granted and should not grant waivers based on representations from manufacturers that are not tied to commitments by cable operators, to achieve real-world support for competitive devices. As the Evolution / Cable One scenario shows, such independent waiver or *ex parte* filings allow service providers and manufacturers each to seek dispensations from the Commission without any corresponding obligation to achieve real benefits for consumers under the Commission's navigation device regulations.

Throughout the flood of waiver requests that the Media Bureau has received from 2006 to the present, the Bureau and the Commission have prudently refrained from granting waivers for particular set-top boxes that would apply to all cable operators without further inquiry into an operator's unique circumstances. In its 2005 order⁵ deferring the effective date of the common reliance rule,⁶ the Commission stated that it would at some future date "consider whether low-cost, limited capability boxes should be subject to the integration ban," and in the interim, would "entertain" waiver requests on that basis.⁷ The 2005 order did not create a general exemption to the common reliance rule nor promise to create one in the future.⁸ Beginning in late 2006, the Commission and the Bureau announced and repeatedly reaffirmed a policy that a cable operator's continued rollout of digital service – a "speculative" contribution to the digital transition with no firm commitments or extenuating circumstances – is not sufficient to justify a waiver of the common reliance rule.⁹

⁴ *E.g.*, *In the Matter of Evolution Broadband, LLC*, CS Dkt. No. 97-80, CSR-7902-Z, Notice of Ex Parte Presentation by Cable One, Inc. to Chairman Martin, et al., attachment at 10 (July 24, 2008) ("Cable One ex parte").

⁵ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, CS Dkt. No. 97-80, 20 FCC Rcd 6794 (rel. Mar. 17, 2005) ("2005 Order").

⁶ 74 C.F.R. § 76.1204(a)(1).

⁷ 2005 Order at ¶ 27.

⁸ *Comcast Corp. v. FCC*, 526 F.3d 763, 768 (D.C. Cir. 2008).

⁹ *See, e.g.*, *In the Matter of Armstrong Utilities, Inc., et al.*, CS Dkt. No. 97-80, CSR-7112-Z, Memorandum Opinion and Order ¶ 54 (June 29, 2007) ("Armstrong Order"); *In the Matter of Comcast Corporation Request for Waiver of*

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The Commission has also consistently maintained that transitory cost savings, without some individualized showing of financial hardship, do not make a waiver “necessary” under Section 629(c) of the Telecommunications Act.¹⁰ These principles apply to Cable One’s hypothetical “limited-functionality” high-definition box just as they apply to the Motorola DCT-700 box for which Comcast unsuccessfully sought a nationwide waiver. Even if Cable One had actually raised an issue for the Commission’s consideration – and it has not – Cable One offers no new evidence or new public interest arguments that the Commission has not already considered and rejected.¹¹

In the 1996 Telecommunications Act, Congress instructed the Commission to promote the conversion to digital television *and* to ensure a competitive retail market for video navigation devices. The public interest, as defined by these two Congressionally mandated goals, favors holding to the policy of refusing general, nationwide waivers for integrated navigation devices. Although the Evolution request and Cable One’s filings mention rural subscribers, neither purports to limit its request to rural operators, or smaller operators in general. The waivers sought would be available to all cable operators, large and small. At the same time, although Cable One suggests that the hypothetical high definition set-top box for which it claims to seek a waiver “uses open standards,”¹² there is no way to verify this claim for a device that does not exist. An anticipatory waiver – in reality, an amendment to the underlying rule – would in fact allow cable operators to return to the proprietary conditional access protocols that present an insurmountable obstacle for competitive entrants.

In summary, the Commission and the Bureau should give no consideration to Cable One’s non-proposal. Should the Commission decide to act, it should reject Cable One’s suggestion for the same reasons that it rejected Comcast’s and NCTA’s requests for industry-wide waivers.

This letter is submitted pursuant to Section 1.1206(b)(2) of the Commission’s rules to provide notice of an oral *ex parte* presentation in the above-referenced matter. Copies of the

Section 76.1204(a)(1) of the Commission’s Rules, CS Dkt. No. 97-80, CSR-7012-Z, Memorandum Opinion and Order ¶¶ 4, 9 (July 20, 2007) (“Comcast Order”).

¹⁰ *Armstrong Order* ¶ 45 (“[T]hese services already are utilized by many of Petitioners’ cable subscribers and the waiver could hardly be ‘necessary’ for the ‘development or introduction’ of these services, as they already exist.”); *Comcast Corp.*, 526 F.3d at 766 (“We think the FCC’s explanation of why a waiver was not ‘necessary to assist the development or introduction’ of new or improved video services was quite reasonable.”); *see* 47 U.S.C. § 549(c).

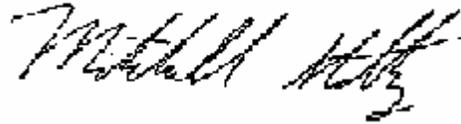
¹¹ *See Comcast Order* ¶ 4; *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (holding that a waiver petitioner bears a heavy burden to demonstrate that his arguments are substantially different from those that have been carefully considered in a rulemaking proceeding).

¹² Cable One *ex parte*, attachment at 11.

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letter and the attachments are being sent by electronic mail to the meeting participant identified above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mitchell Stoltz". The signature is written in a cursive, slightly slanted style.

Mitchell L. Stoltz
Constantine Cannon LLP
Counsel to CEA

cc: Rick Chessen