

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

In the Matter of)	
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	
)	
)	
Cable One, Inc.)	CSR-8080-Z
Request for Waiver of)	
47 C.F.R. § 76.1204(a)(1))	

**Comments of the Consumer Electronics Association
on the Cable One, Inc. Request for Waiver
of 47 C.F.R. § 76.1204(a)(1)**

November 28, 2008

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**Comments of the Consumer Electronics Association
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The Consumer Electronics Association (“CEA”) respectfully submits these comments in opposition to Cable One, Inc.’s (“Cable One”) Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (the “Request”). A waiver on Cable One’s terms would allow cable operators to deploy advanced set-top boxes, using conditional access technology that is not available to competitive entrants, in perpetuity. Granting this request would constitute a major shift in Commission policy that is not justified by the impending broadcast digital transition, by cable operators’ self-directed transition to digital, or by any particular circumstances unique to Cable One. As the Request does not satisfy any of the Commission’s previous rationales for granting waivers, and would continue the barriers to competition that Section 76.1204 was intended to remedy, the Commission should deny Cable One’s Request.

A. Cable One’s Request Fails to Satisfy Section 629(c), Explain Why a Waiver is Necessary, Distinguish Contrary Precedent, and Demonstrate Public Interest in Waiver.

Cable One’s Request does not satisfy the waiver criteria of Section 629(c) of the Telecommunications Act of 1996.¹ The Commission and the Media Bureau have long maintained, and the Court of Appeals has affirmed,² that mere “increased availability” of an existing service, high-definition programming, does not necessitate a waiver. Cable One acknowledges that long-standing interpretation.³ Additionally, Cable One appears to be requesting a permanent waiver, which is not permitted under Section 629(c).

Regarding the “2005 Deferral Order,”⁴ the Commission and the Bureau have not granted waivers based solely on a cable device’s “low-cost, limited capability” status. As the Court of Appeals affirmed this year, the Commission made no promise to grant waivers as to such boxes. In addition, Cable One’s own Request illustrates that circumstances have changed significantly since the 2005 Order. That Order suggested a need for incentives to encourage a rapid transition to digital. Cable One notes that “nearly every cable network is offered (or shortly will be offered) in HD” and that its subscribers “demand” HD service.⁵ Given that demand, it is difficult to understand why Cable One or any similarly situated operator requires additional incentives to transition to all-digital.

To the extent the Media Bureau based its prior waivers on a cable operator’s all-digital transition in conjunction with the February 17, 2009 digital broadcast transition, as

¹ 47 U.S.C. § 549(c).

² *Comcast Corp. v. FCC*, 526 F.3d 763, 766-67 (2005).

³ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, In the Matter of Cable One, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*; CSR-7012-Z, at 7-8 (Oct. 31, 2008) (the “Request”).

⁴ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, ¶ 37 (2005) (“2005 Deferral Order”).

⁵ Request at 4.

in the *BendBroadband* decision,⁶ that rationale does not apply to Cable One, which will not transition before that date. In addition, the Commission has a sound basis for excluding high-definition devices from the “limited-functionality” waivers it has granted: those waivers are *transitional* expedients granted in the context of the digital transition. As CEA has expressed previously in this docket, for the long term, there is absolutely no reason to sacrifice a freely competitive navigation device marketplace (including a competitive market for lower-functionality devices, which has until very recently been foreclosed) to promote digital MVPD service which is inevitable in any case. A *permanent* waiver cannot be justified by a digital transition which, whenever it occurs, will be a one-time event.

An evaluation of the public interest under the Commission’s general waiver standard also militates against Cable One’s Request. To the extent Cable One wishes to provide high-definition content, it can do so without a waiver, through standard unencrypted MPEG-2 QAM cable transmissions or through a nationally portable, competitively neutral conditional access interface (either the CableCARD or another technology that is equally portable and available to competitive entrants). As its Request makes clear, Cable One is not merely seeking to expand its high-definition offerings, but rather “to provide customers with enhanced programming selection options”⁷ – apparently referring to conditional access programming. Giving operators like Cable One permission to deploy high-definition devices using proprietary conditional access to the majority of their customers who receive only basic service will perpetuate the lack of

⁶ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; In the Matter of Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CS Docket No. 97-80, CSR-7057-Z (Jan. 10, 2007).

⁷ Request at 6 n.12.

effective support for competitive devices that prompted the Commission's device competition rules.

B. Cable One's Request Undermines Congressional Intent, Commission Policy, the Existing Market for Competitive One-Way Devices, and the Nascent Market for Two-Way Devices.

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 1996.⁸ Cable operators and consumer electronics manufacturers have already committed vast resources to implement the CableCARD interface. For cable operators like Cable One now to deploy new set-top 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,⁹ 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.

Cable One's promise "to continue to support CableCARDS"¹⁰ is not a new commitment – Cable One is already required to deploy and support CableCARDS for each subscriber who requests one. The premise of Section 76.1204(a)(1) of the Commission's rules is that a promise of support is not and has not been sufficient to

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

⁹ 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").

¹⁰ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, In the Matter of Cable One, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*; CSR-7012-Z, at 7-8 (Oct. 31, 2008) (the "Request").

ensure competition in navigation devices. The Commission has concluded that common reliance on uniformly available conditional access technology creates a *market incentive* for adequate support which is much more effective than a mere promise.

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

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.¹¹ This monopolistic status quo will continue if cable operators can continue to rely on a noncompliant security protocol provided to the majority of their subscribers.

¹¹ 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).

C. Cable One's Request Invites All Cable Operators to Ignore the Commission's Regulations.

CEA notes that Cable One has not stated any extenuating circumstances in support of a waiver that are unique to Cable One. On the contrary, its request is stated on behalf of "cable systems" generally.¹² Cable One does not state that either it or its customers face any unusual financial circumstances. A waiver on Cable One's terms would presumably apply to all cable operators, and would therefore be a wholesale revision of the Commission's rule rather than a limited waiver for special circumstances.

D. Conclusion

There is no reason to perpetuate barriers to competition in navigation devices for the sake of cable's digital transition. As Congress intended, Commission policy should promote both the provision of digital television and competition in consumer devices.

The Commission should deny Cable One's request.

Respectfully submitted,

/s/James Hedlund

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¹² Request at 1.

CERTIFICATE OF SERVICE

I do hereby certify that on November 28, 2008 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on the Cable One, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail on the following:

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