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

Re: Ex Parte Submission In Support Of Petition For Reconsideration, CSR-7902-Z,
CS Docket No. 97-80

Dear Ms. Dortch:

The Consumer Electronics Association (“CEA”) hereby submits this *ex parte* comment in support of the Petition For Reconsideration filed in the above-referenced dockets by Public Knowledge *et al.*¹ CEA urges the Commission to Reconsider and/or clarify its Memorandum Opinion and Order (“MO&O”), and supports the Petition filed by these public interest and consumer organizations (“PK *et al.*”), based on the following considerations:

- The Commission acted under its general waiver authority, rather than pursuant to the specific provisions of Section 629.² Accordingly, the Commission has an obligation to *balance* the objectives of Section 629, and the strong congressional mandate that it imposes on the Commission, against other policy objectives. As is discussed below, the MO&O fails to seek or achieve a sufficient balance, but (as is stressed by PK *et al.*) offers this MO&O as a template for issuing further waivers, to other parties, with little or no consideration or public notice and comment.
- One consideration that should be weighed by the Commission is whether the device in question (1) can and will operate without encryption or other obstacles to being provided on the open market on a nationally portable basis – in which case the specifications should be readily available to competitive entrants under Section 76.1205, and no waiver under Section 76.1204(a)(1) should be necessary, or (2) if relying on encryption, can economically deploy a CableCARD, also obviating the need for a waiver. ***At a minimum, any waiver application should include a certification as to (1) why the specification for the device cannot be made available to competitive entrants, and (2) specifically, why the device cannot support a***

¹ *In the Matter of Evolution Broadband, LLC's Request 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, CSR-7902-Z, CS Docket No. 97-80, Petition for Reconsideration of Public Knowledge, Free Press, Media Access Project, New America Foundation, Open Technology Institute, and U.S. PIRG, (filed Jun. 29, 2009).*

² MO&O at par. 10.

CableCARD (since it is assumed that the MSO using the device will be providing such cards to consumers and using them in devices they themselves furnish).

These certifications should be backed by specific technical facts and cost figures.

- While referring³ to the obligation of cable MSOs to continue to offer, use, deploy, and support CableCARDS, for more advanced devices, under Section 76.1204(a)(1), the MO&O fails entirely to tie this obligation to the blanket waivers being granted. Hence, even though the waivers are effective immediately, the associated obligations of other parties are left to possible hit-or-miss enforcement actions, which are not subject to notice and comment by vitally interested parties.
- As a general matter, the Commission should make and apply policy, in enforcing Section 629, through regulations and standards – *not* a cocktail of waiver and enforcement proceedings.
- The Commission should also tread carefully before issuing waivers on behalf of *device manufacturers*, where the actual circumstances of deployment, and compliance with navigation device rules, will be up to the MSOs, to whose conduct Sections 76.1201 – 1205 are addressed.
- More specifically, if proceeding by waiver, the Commission should *assure* that its assumptions about compliance are accurate, by making its waivers *conditional* on MSO deployment, support of, and common reliance on CableCARDS, in any and every MSO system in which the subject devices are deployed. ***If this obligation is violated by an MSO, the device waiver should be revoked.*** Otherwise, the recipient of the waiver is free of any responsibility for actual compliance. This requirement also addresses the PK *et al.* point that the waivers fail to guard against device enhancements, by other parties, that are contrary to the terms of the waiver.

CEA believes that, now that the DTV Transition is in most respects concluded, the Commission needs to rationalize its navigation device policies and regulations through rulemakings focused on conditional access and support of competitive products – rather than continuing via a patchwork of waiver and enforcement proceedings, many or most of which do not offer any, or adequate, opportunities for public comment or policy consideration.

The need for the Commission to act through regulation, as anticipated by the Congress, rather than through *dictum* contained in *ad hoc* waivers, is exemplified by the subsequent conduct of Evolution itself. Before the virtual ink was virtually dry on the Commission's MO&O answer to CEA that it was granting a waiver *only* for standard definition but not HDTV⁴ products, Evolution filed its waiver for HD products as well.⁵

³ MO&O pars. 12 & 14.

⁴ *Id.* par. 14: "The fact that this is a waiver of the integration ban only and it is limited to apply only to the most basic of devices – one-way, *non-HD*, non-DVR devices – ensures that cable operators who choose to deploy the Subject Boxes will not frustrate this purpose because cable operators who choose to deploy the Subject Boxes are still required to support the national CableCARD standard in all other devices that they deploy." (emph. supplied)

⁵ Filed July 31, 2009.

Obviously the Commission, in proceeding via waivers and enforcement actions, has not laid down a sufficiently clear and firm policy that has gained the respect of waiver applicants such as Evolution. If the Commission is to move back to reasoned, orderly, and publicly noticed and commented determinations about navigation devices, its broad waiver determination, and the invitation for “rubber stamp” waivers made in the Evolution MO&O, need to be reconsidered.

Respectfully submitted,

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