

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Electric Power Board of
Chattanooga Petition for Clarification or
Waiver of 47 C.F.R. § 76.1204

CSR-8200-Z

CS Docket No. 97-80

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**REPLY TO OPPOSITION TO PETITION
FOR CLARIFICATION OR WAIVER**

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The Chattanooga Electric Power Board (“EPB”) hereby replies to the Consumer Electronics Association (“CEA”) Opposition to EPB’s Petition for Clarification or Waiver of 47 C.F.R. § 76.1204 (“Petition”). The Petition requests that the Commission clarify that EPB is in compliance with, or, in the alternative, grant a limited waiver of the requirements in Section 76.1204. Only one party – CEA – filed an opposition to EPB’s Petition, and its arguments are not persuasive. EPB respectfully requests that the Petition be granted.

A. CEA Ignores the Two-Fold Purpose of Section 629 and Thus Downplays an Important Objective of the Act – Fostering MVPD Competition.

Congress enacted Section 629 of the Communications Act, 47 U.S.C. § 549, authorizing the Commission to adopt temporary rules for the purpose of spurring competition in the consumer market for navigation devices used in conjunction with multichannel video programming distributor (“MVPD”) services, in the belief that this would foster competition for MVPD services.¹ In other words, a competitive navigation device market was both a goal, and the means to achieve another goal – a competitive MVPD service market. Congress recognized that competition in the retail MVPD equipment market was not the singular goal of Section 629 in its sunset provision, which requires that regulations adopted pursuant to Section 629(a) “cease

¹ H.R. Rep. No. 104-204(1), at 112 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 80 (“Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution sources.”).

to apply” when the Commission determines that two distinct markets — “the market for the multichannel video programming distributors” and “the market for converter boxes, and interactive communications equipment, used in conjunction with that service”— are both “fully competitive.” 47 U.S.C. § 549(e). The Commission must also determine that “elimination of the regulations would promote competition and the public interest.”²

Congress’s desire to foster competition for MVPD services (not just the equipment needed to receive those services) is also evident in the Commission’s waiver authority in Section 629(c), which emphasizes the MVPD services market. The Commission may grant a waiver when “such waiver is necessary *to assist the development or introduction of a new or improved multichannel video programming or other service* offered over multichannel video programming systems, technology, or products.” 47 U.S.C. § 549(c) (emphasis added). The Commission also acknowledged this dual purpose in its initial Notice of Proposed Rulemaking: “Section 629 references both technologies and services, suggesting that concern ought be given to both technology and marketing issues in the waiver process.”³

CEA focuses its opposition to EPB’s Petition entirely on the alleged negative impacts that granting the Petition might have on the retail market for IPTV navigation devices, Opposition at 1-2, and does not address the positive impacts its grant would have on the MVPD market. IPTV services increase competition in the video programming market and offer “significant consumer benefits that weigh against” restrictions on their implementation.⁴

² S. Rep. No. 104-230, at 161 (1996) (Conf. Rep.) (“The agreement sunsets the regulations when the Commission determines the following: the market for the multichannel video programming distributors is competitive; the market for equipment used in conjunction with the services is competitive; and elimination of the regulations are in the public interest and would promote competition.”).

³ *In re Implementation of Section 304 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 97-53, 12 FCC Rcd. 5639, 5662 ¶ 48 (1997) (“*First NPRM*”).

⁴ See *Oceanic Time Warner Cable, et al.*, Order on Review, FCC 09-52, ¶ 13 (rel. Jun. 26, 2009) (addressing similar benefits associated with switched digital video technology).

Moreover, the Opposition appears to reflect a misunderstanding of how retail markets for new products and services develop. The Commission recognized early on that particularly for nascent technologies and services — and IPTV is nascent — it takes time to develop a retail market for equipment. In the *First NPRM*, the Commission stated:

It may be difficult to find retail vendors to sell equipment needed to receive or to navigate through a new service before the service proves itself in the market. . . . The waiver process appears to provide the statutory mechanism for recognizing these problems and for achieving the basic goals of Section 629 without creating obstacles to the introduction of new services and equipment.

12 FCC Rcd. at 5661 ¶ 47. As the Petition notes, there are now at least six different manufacturers producing more than a dozen different models of set-top boxes that are compatible with the Microsoft Mediaroom IP video services platform that EPB has selected, and EPB will permit and encourage customer use of any Mediaroom compatible equipment. Petition at 4 and Attachment A thereto. As discussed below, EPB believes that this is sufficient to meet the Commission’s common reliance standard. Logically, a retail market will develop as the bigger players — the equipment manufacturers, the technology developers, and the retailers — gauge consumer demand. But in order for this retail demand to develop, consumers must first gain exposure to such IPTV services through offerings like EPB’s.

The introduction of IPTV service offerings into the market is not only necessary to foster an eventual retail market for IPTV navigation devices, but it promotes the other important purpose of Section 629, the development of a fully competitive market for MVPD services.

B. CEA’s Proposed Approach to Regulation Would Stifle Innovation and Hinder the Development of Competition Among MVPDs to the Detriment of Consumers.

CEA opposes any order that would declare EPB to be in compliance with the rules or grant EPB a waiver, expressing concern that “me too” waivers would “surely follow”, and making the unsubstantiated assertion that there is a “growing volume of waiver petitions.” Opposition at 8, 10. CEA suggests that the Commission should proceed with a rulemaking “to

address conditional access in IPTV and other MVPD systems,” and essentially stop considering any more petitions for clarification or waiver until that rulemaking is concluded. *Id.* at 8. This approach would stifle innovation and hinder the development of competition among MVPDs.

CEA’s approach is premised on a concern for the consumer, but the concern appears to extend *only* to the realm of set top boxes.⁵ CEA does not acknowledge the consumer benefits that flow from the introduction of a new choice of MVPD services provider. In EPB’s view, as discussed in the previous section, a retail market in navigation devices for IPTV services cannot develop at this stage of IPTV deployment – IPTV is too new – but EPB’s service offering will aid, not hinder, the future development of a retail market in such devices.

Further, CEA’s approach is counter-productive to the broader goals of the Communications Act and the Commission’s broadband policy and would stifle innovation. In the *First NPRM*, the Commission recognized the critical importance of innovation:

Given the very high value placed on technical and service innovation, we believe that situations where there is a need for a waiver (as contrasted with a complete exemption) should be minimized and that when waivers are required and requested, it is consistent with the objectives of Section 629 that they should be looked on sympathetically and expansively to avoid unnecessary procedural obstacles to innovation. In this regard, Section 7 of the Communications Act is clear that it is the policy of the Act to “encourage the provision of new technologies and services to the public” and that those who oppose “a new technology or service proposed . . . shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”

12 FCC Rcd. at 5662 ¶ 48 (internal citations omitted). To illustrate the importance of the “technical and service innovation” mandates the Commission describes above, consider the choice the Commission would undoubtedly make if it had to choose between either encouraging the development of a retail market in IPTV navigation devices or encouraging the development of competition for MVPD services. Without question, consumers will derive more benefit from

⁵ See, e.g., Opposition at 1-2.

the introduction of innovative MVPD service offerings to compete with the incumbent cable provider. This is particularly true in the Chattanooga region where competition is very limited. Petition at 10. CEA fails to recognize the Commission's real goal: competition in all elements of the MVPD market, including services, network offerings, and consumer equipment. This competition can only flourish if companies have the freedom to innovate.

Moreover, in adopting Section 629, Congress was particularly concerned that "the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services." S. Rep. No. 104-230, at 181 (1996) (Conf. Rep.). EPB's IPTV service offering leverages the Smart Grid network that EPB is deploying to advance the important federal goals of the Energy Independence and Security Act of 2007, § 1307,⁶ and the recently enacted American Recovery and Reinvestment Act of 2009.⁷ In EPB's view, CEA is advocating a policy that runs directly opposite to Congress's intent in Section 629 and in its broader technological goals. Hence, the Commission should reject CEA's approach as it would be detrimental to consumers, inconsistent with the directives of Congress, and inconsistent with the broader public interest

C. CEA Ignores What the Commission Has Already Acknowledged – Different Solutions May Be Required for Different Technologies.

The Commission recognized early on (well prior to developments in downloadable security or IPTV technology) that establishing uniform regulations to achieve a retail market for navigation devices for the variety of MVPD services would be complex because of the different technologies involved and the varied models followed by MVPDs as to the ownership and commercial distribution of equipment. *First NPRM*, 12 FCC Rcd. at 5642 ¶ 5. The Commission had successfully introduced retail competition in the market for customer premises

⁶ 16 U.S.C. § 2621.

⁷ Pub. L. No. 111-5, 123 Stat. 115, 138 (Feb. 17, 2009).

equipment (“CPE”) used for telephone services, and many of Section 629’s Congressional sponsors had in mind this “telephone industry” competition model when they adopted Section 629 to encourage retail competition for navigation devices used for MVPD services.⁸ However, the Commission recognized “technical, marketplace, and regulatory differences between the telephone facilities and MVPD facilities . . . preclude a literal translation of this [telephone CPE] model into the MVPD context that is governed by Section 629.” *Id.* at 5644 ¶ 10.

The Commission identified three important differences between telephone and MVPD networks and services that made the latter equipment market more complex to regulate: (i) “security issues relating to the intellectual property distributed” (ii) “significant concerns about signal security, as well as the potential for harmful interference both to over-the-air services and to the network itself”; and (iii) substantial differences in design among MVPD networks (as compared to the more uniform telephone network) resulting in a comparative lack of technical standards across applicable MVPD networks. *Id.* As a result, the Commission recognized that applying the “telephone model” to the MVPD equipment marketplace would “require an extended consideration of a number of complex technical and economic issues relating to the markets involved.” *Id.* at 5645 ¶ 11. The Commission adopted this position in its first order implementing Section 629.⁹

Recognizing this technological complexity and the differences in the development of MVPD service markets, the Commission has resisted blindly imposing the same rules on all MVPD technologies. For example, the Commission decided to exempt DBS from the rules in recognition of important technological, and marketplace differences:

⁸ *First NPRM*, 12 FCC Rcd. at 5643 ¶ 8.

⁹ *In re Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd. 14775, 14780 ¶ 12 (1998) (“1998 Order”).

We are reluctant to implement a rule that could disrupt an evolving market that is already offering consumers the benefits that derive from competition. In the DBS environment, there are three service providers and at least ten equipment manufacturers competing to provide programming and equipment to consumers. The equipment is available at retail stores. The result, over a relatively short time frame, has been lower equipment prices, enhanced options and features. Requiring DBS providers to separate security would serve a limited purpose and disrupt technical and investment structures that arose in a competitive environment.

Additionally, DBS service providers are relatively new entrants in the MVPD service marketplace, particularly when compared to incumbent cable operators. Total DBS subscribership constitutes only 8% of the MVPD market, as compared to 87% of the MVPD market for cable. With DBS equipment available in retail stores, and with DBS possessing substantial incentive to pursue additional market share through additional services and improved equipment, we do not think that requiring DBS service providers to separate security elements will serve the goal of enhanced competition in either the service or equipment markets. We note that in many instances, the Commission refrains from imposing regulations on new entrants.

Id. at 14800-01 ¶¶ 64-65 (citations omitted). In 2005, the Commission confirmed that “the distinctions that led the Commission to differentiate between DBS and other MVPDs in 1998 remain valid.”¹⁰

CEA appears to acknowledge that Section 76.1204 was developed eleven years ago as “a rule under which *cable operators* would be required to rely on the same separable security technology as competitive device makers in the retail market.” Opposition at 2 (citation omitted; emphasis added). And CEA also admits that it has “no specific knowledge of the technology in question” in EPB’s Petition. *Id.* at 4 n.13. Yet CEA hyperbolically claims that granting EPB’s waiver request would “eviscerate the regulation.” *Id.* at 8. Because Section 76.1204 was developed in a different technological and market context, it is perfectly appropriate for EPB to seek clarification or waiver regarding its applicability in this new and very different context. As indicated in the Petition (at 3), the Mediaroom-enabled set top box does not perform “conditional

¹⁰ *In re Implementation of Section 304 of the Telecommunications Act of 1996*, FCC 05-76, 20 FCC Rcd. 6794, 6814 ¶ 38 (2005) (“2005 Deferral Order”).

access functions” – its security function is to identify itself and then the server determines which services the set-top box is authorized to receive. Thus, it would be perfectly consistent with past practice for the Commission to treat this very different technology differently. There is no risk of “evisceration” of Section 76.1204: EPB is introducing a novel and competing service offering with significant differences in technology, treatment of security issues, and the state of its navigation device marketplace, as compared to the traditional technologies for which the rule was developed.

D. CEA’s Attempts To Introduce Requirements That Are Not in the Rules Should Not Be Heeded.

Having narrowly construed the purpose of Section 629 and its waiver process, and having ignored the broader consumer interests and the reality that different technologies may require different solutions, CEA attempts to measure EPB’s Petition against requirements – national portability, non-proprietary products and calendar-based time limits on waivers – that are not even in the rules. These arguments should also be rejected. To the extent Section 76.1204 applies to EPB’s IPTV technology, EPB has fully complied with its requirements.

CEA makes much of the fact that EPB has not said that its security technology is a “nationally portable security standard.” Opposition at 2-4. That statement is both untrue and introduces a requirement that is not part of the rule. As EPB stated, “EPB believes that the Microsoft Mediaroom license/certification system can be licensed anywhere within the continental United States.” Petition at 7. To EPB’s knowledge, the Cisco boxes that EPB uses are portable to any IPTV system with Mediaroom anywhere in the nation, and the same can be said that any Mediaroom-certified set top boxes are portable to the EPB network. But this is

beside the point, because the Commission has said repeatedly that Section 76.1204(b) does not mandate national portability.¹¹

CEA also misstates EPB's position when it says, "EPB does *not* represent that it affords common reliance adequate to support competitive products." Opposition at 4. This is incorrect. EPB's network relies on Microsoft Mediaroom middleware and multiple navigation devices are commercially available that have been certified as compliant with Microsoft Mediaroom. Because the Microsoft middleware will operate on multiple devices that are commercially available, EPB believes it is properly classified as a commonly used interface. Petition at 7-8. The Commission has acknowledged that a navigation device does not need to be used by substantially every service provider in the country in order to be "commonly used."¹²

CEA further suggests that one cannot comply with Section 76.1204(b) by using proprietary products. Opposition at 7-8. Again, the rule does not require non-proprietary products. Instead, it requires a "commonly used interface," which the Commission has defined in terms of "availability." *2005 Deferral Order*, 20 FCC Rcd. 6794 at ¶ 30 n.136 (2005). Because the proprietary security products EPB uses (Microsoft's Mediaroom security technology) are "available to manufacturers of commercially available devices," EPB is in compliance with Section 76.1204.

Finally, CEA seems to suggest a waiver can only be time-limited if it has a specific end date fixed with reference to the calendar. But a waiver may be time limited without reference to the calendar. What EPB seeks is tantamount to a sunset provision on its waiver. The waiver

¹¹ See *1998 Order*, 13 FCC Rcd. at 14823 ¶ 126 ("A significant example of our reliance on market forces to establish specific standards is shown in that we have not adopted specific rules to mandate portability or interoperability."); *In re Implementation of Section 304 of the Telecommunications Act of 1996*, FCC 99-95, 14 FCC Rcd. 7596, 7619 ¶ 48 (1999) ("The Commission did not mandate that navigation devices be portable or interoperable. In this regard, Section 76.1204(b) does not address portability or interoperability.")

¹² See, e.g., 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," DA 07-51 (Jan. 10, 2007).

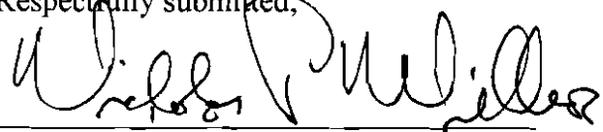
would end upon the occurrence of the triggering event – when a national standard has been developed for conditional access interfaces, or when the Commission has defined criteria for compliance with the common interface requirement and vendors have developed products in accordance with such national standard or criteria. In this way the waiver is limited in time – quite unlike a permanent waiver that would be unaffected by future developments. It would serve no purpose and create greater cost and uncertainty for EPB to put a date certain in the waiver because any date would be arbitrary and EPB has no control over the triggering events. But the absence of a calendar reference does not make the waiver permanent or unlimited.

E. Conclusion

For these reasons, the Commission should grant the Petition.

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Respectfully submitted,



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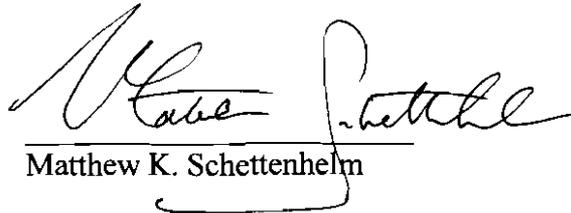
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CERTIFICATE OF SERVICE

I do hereby certify that on October 7, 2009, I caused a true and correct copy of the foregoing Reply to Opposition to Petition for Clarification or Waiver to be served via first-class mail on the following:

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