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NEW YORK | WASHINGTON

September 24, 2009

BY FIRST CLASS MAIL

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CSR-8200-Z

Dear Ms. Dortch:

Enclosed is an original and four copies of the Opposition of the Consumer Electronics Association to the Electric Power Board of Chattanooga for Waiver of 47 C.F.R. § 76.1204(a)(1). This Opposition was also filed electronically in CS Docket No. 97-80.

Sincerely,

Robert S. Scwhartz

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FCC Mail Room

In the Matter of Electric Power Board of	)	
Chattanooga Petition for Clarification or	)	CSR-8200-Z
Waiver of 47 C.F.R. § 76.1204	)	CS Docket No. 97-80

Opposition of the
Consumer Electronics Association

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No. of Copies rec'd 0+4
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

Opposition of the
Consumer Electronics Association

The Consumer Electronics Association opposes the Petition of the Electric Power Board of Chattanooga ("EPB") for a waiver of the Commission's common reliance regulation, section 76.1204.[1] CEA also opposes any "clarification" that would deem EPB's proposed system – which EPB admits does *not* include a security interface that, like the CableCARD, is nationally portable – to be compliant with the Commission's rules. CEA opposes any waiver because, *inter alia,* the "limited time" for which the waiver is sought would end only *if and when* the Commission approves a national security interface as an alternative or successor to the CableCARD.

Unfortunately, this timeframe cannot be regarded as "limited" because the Commission has not established any means or timeframe for accomplishing this objective. During this unlimited period, consumers would be denied a choice of competitive retail CableCARD-based set-top boxes because the EPB systems do not support CableCARD devices. At least until the Commission has established a national security interface as an alternative or successor to the CableCARD, it should not be

[1] *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 Dkt. No. 97-80, Petition for Clarification or Waiver of 47 C.F.R. § 76.1204 (Aug. 26, 2009) ("EPB Petition").

undermining its own regulations, and objectives, by approving disparate, incompatible, non-compliant systems such as the one put forth for waiver by EPB. Under these circumstances, CEA urges the Commission to deny EPB's petition so as not to undermine the objectives of section 629 and the FCC's regulations and depriving consumers of a competitive market for video navigation devices.

A. Importance of Common Reliance And National Portability

Eleven years ago, the Commission announced 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.[2] That rule, known as common reliance, was delayed twice, most recently to July 1, 2007.[3] IPTV operators, like cable operators, have had ample notice of this requirement.

Common reliance is the means to achieve the goal set out by Congress in section 629 of the Telecommunications Act: to "assure the commercial availability" of video navigation devices from competitive retail sources.[4] The Commission has made clear that its goal is full compliance with Congress's mandate, and that incremental progress toward that goal does not eliminate the need for effective common reliance.[5]

With Congress's goal in mind, the Commission made clear that separation of security and navigation components is a necessary element of common reliance, but not the only element.[6] A downloadable security technology complies with the rules only "to

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[2] 47 C.F.R. § 76.1204(a)(1).
[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, Second Report and Order ¶ 3 (Mar. 17, 2005) (hereinafter "*2005 Deferral Order*").
[4] 47 U.S.C. § 549(a) (2006).
[5] *2005 Deferral Order* ¶ 28.
[6] *Id.*

the extent" that it "provides for common reliance."[7] A system that provides for common reliance must be nationally portable because a retail market for navigation devices will be severely limited if consumers cannot move their devices from one system to another. Geographic portability is the Commission's primary justification for its continued forbearance from applying the rule to DBS providers.[8]

A retail market for navigation devices cannot arise if operators use multiple, incompatible protocols for separable security. In seeking a deferral of the common reliance date to July 1, 2007, major cable MSOs signaled their intent to use "DCAS" downloadable security.[9] The Commission made its deferral in specific reliance on that intention. Yet, not only has the cable industry thus far failed to proffer a downloadable alternative to the CableCARD, it has often failed to adequately support CableCARDs themselves.[10] EPB would not offer CableCARDs, or any nationally standard successor, at all.

B. EPB's Proposed Interface Is Neither Standard Nor Nationally Portable

EPB notes that its proposed technology is "agnostic among the alternative customer premises equipment attached to the network, provided the equipment is certified by Microsoft as compatible with Mediaroom."[11] However, EPB does not claim that the technology for which a waiver is sought, no matter how "downloadable," offers a

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[7] *Id.* ¶ 27.
[8] *Id.* ¶ 38.
[9] *In the Matter of Nat'l Cable & Telecom. Ass'n Request for Waiver of* 47 C.F.R. § 76.1204(a)(1), CSR-7056-Z, CS Docket No. 97-80, Request for Waiver at 9 (Aug. 16, 2006). "[I]t is also now clear that the cable industry is strongly committed to the earliest possible development and implementation of its downloadable security solution, the Downloadable Conditional Access System . . . .").
[10] *See, e.g.,* http://news.cnet.com/8301-13506_3-10357724-17.html.
[11] EPB Petition at 4.

nationally portable security standard comparable to the CableCARD, now or in the future. Rather, EPB says only that its "network" – *not* the technology for which a waiver is sought – is *compatible* with some future standard:

> In addition, EPB's network and IPTV technology is compatible with *future migration* of security functions to any commonly used interface or interface that conforms to appropriate technical standards promulgated by a national standards organization when those become available for IPTV networks.[12]

In other words, whatever the benefits of the technology referred to in this Petition,[13] EPB does *not* represent that it affords common reliance adequate to support competitive products, as Commission regulations require. All EPB says is that its system relies on separate security functions and that, generically, EPB plans an IPTV system capable of upgrade in the future.

EPB also has not defined the "limited time" for which a waiver, as an alternative to a "clarification" of compliance, would be sought. Rather, EPB is candid that it seeks a waiver grant:

> ...until such time that Section 76.1204-compliant IPTV navigation devices, standards and/or interfaces are available and EPB is afforded the opportunity to migrate its system to available devices, standards and/or interfaces to render its IPTV system fully compliant after reasonable time to permit recovery of its capital investment.[14]

EPB cannot point to any particular technology, including its own, that will be fully compliant with section 76.1204. Moreover, EPB cannot point to any FCC proceeding

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[12] *Id.* (emphasis added)

[13] CEA has no specific knowledge of the technology in question and, as CEA has made clear in other filings related to common reliance waivers, CEA is not criticizing the underlying technology or its potential utility as a component of a future standard. *See, e.g., In the Matter of Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7078-Z, CS Dkt. No. 97-80, Application For Review at 9-10 (Feb. 17, 2009) ("Application For Review").

[14] EPB Petition at 5.

aimed at achieving this end. Accordingly, the Commission should conclude that the waiver is *not* being sought for a "limited time." The Petition should be denied on this basis alone.[15]

C. EPB Provides No Basis For The Commission To Declare Compliance With § 76.1204(a)(1) or (a)(2), or § 76.1204(b)

In its effort to avail itself of the section 76.1204(a)(1) requirement that it has already admitted it cannot meet, EPB refers to some non-decisional, non-regulatory Bureau observations made at a time when there was still hope that "downloadable" security would be a magic bullet for achieving a security interface that serves proprietary and competitive devices equally well.[16] Petitioner cannot point to any regulation or Commission or Bureau action finding a downloadable conditional access system to be compliant. There is good reason: CEA has demonstrated on several occasions that while some element of a technology may be "downloadable," the necessary hardware platform that would receive and enable the download is *not* itself downloadable. If the host device is not engineered initially to receive the separable security element, the device will *never* be able to function on a system using the referenced "separate" and "downloadable" technology.[17] In its Application for Review, CEA reviewed these considerations specifically as they have been presented to the Commission in earlier matters:

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[15] *See In the Matter of Comcast Corp. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7012-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 20 (Jan. 10, 2009) (in denying Comcast's request for waiver the Commission noted that "Comcast failed to request a waiver 'for a limited time,' as required by Section 629(c)").

[16] EPB Petition at 6 n.11.

[17] Application For Review at 10. See also, e.g., *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7131-Z, Letter from Julie M. Kearney, Sr. Dir. and Regulatory Counsel, CEA to Marlene Dortch, Sec. FCC, Re: Ex Parte Presentation, CS Docket No. 97-80, CSR-7131-Z (Apr. 24, 2006); *In the Matter of*

> The chipsets and firmware necessary for navigation devices to implement 'downloadable' security are not themselves 'downloadable.' Rather, the electronic interface for each system would have to be separately engineered and built into the hardware and software of any television or other navigation device. If there can be any number of such downloadable systems – indeed, if more than one – any advantage of separable security would be lost, as there would still be no common security interface. The navigation devices would be no more, and perhaps less, nationally portable than are present integrated-security set-top boxes. And, as in the case of present set-top boxes, a different and perhaps incompatible license would be required from each system vendor. Thus, despite all of its efforts to assure competitive navigation devices via separable security, a national patchwork of different 'downloadable' systems would put the Commission back where it started a decade ago – with individual, proprietary security solutions posing a fundamental obstacle to competitive entry.[18]

EPB's novel argument that its technology, which it admits does *not* provide a nationally standard interface, complies with section 76.1204(a)(2), fails for the same reason. Just like a *proprietary, integrated* set-top box as deployed by cable operators prior to July 1, 2007, the technology cited by EPB can "operate throughout the continental United States" and, in theory, *could* be available from *some* unaffiliated "retail outlets and other vendors throughout the United States ...." But if this were the test, cable operators would never have been required by the Commission to supply CableCARDs *at all.*[19]

Evolution Broadband, LLC Petition for Waiver of 47 C. F. R. § 76.1204(a)(1), CS Docket 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) (Jun. 16, 2008).

[18] Application for Review at 13, quoting *Commercial Availability of Navigation Devices,* CS Docket No. 97-80, CSR-7218-Z-CSR-7222-Z, CSR-7227-Z, Comments of the CEA on Six Requests for Waiver of 47 C.F.R. § 76.1204(a)(1) at 3 (July 5, 2007). "Indeed, if each cable operator were to use a different 'downloadable' technology, then it is difficult if not impossible to see how a competitive entrant could create any business model except selling devices directly to cable operators for lease to consumers."

[19] Prior to the adoption of the 1998 regulations in Docket No. 97-80, some cable operators and navigation device manufactures did argue that the FCC rules should state

The Petitioner further states that the content is protected using Digital Rights Management ("DRM") rather than traditional conditional access and that the customer premises equipment has only a "limited" function of accepting a certificate. This is a distinction without a difference. All conditional access or DRM systems are functionally similar: the content is encrypted with a key, those keys are then encrypted and delivered *conditionally* to the boxes depending on their service level. The older systems *broadcast* keys to all boxes and the box or CableCARD then determines to which keys the box is entitled. Newer IPTV systems such as Mediaroom deliver the encrypted keys *only* to the boxes that are entitled to them. Whether the key extraction is done in the box or in the headend does not matter so far as a common standard or national deployment is concerned. Either way, it is the details of how keys are encrypted and delivered that is proprietary to the particular system – making such boxes no different from a competitive retail standpoint than proprietary integrated boxes.

EPB breaks new ground by seeking comfort in section 76.1204(b), which actually clarifies that compliance *cannot* be achieved through proprietary products. Rather, subsection (b) states that, to be compliant with (a)(1), the equipment "shall be designed to connect to and function with other navigation devices available through the use of a commonly used interface or an interface that conforms to appropriate technical standards promulgated by a national standards organization." Since cable set-top devices certainly were "commonly used" in 1998, this requirement obviously means that, whether through a *de facto* or a *de jure* standard, to be compliant a navigation device must "be designed to

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that compliance would be achieved if integrated security, proprietary set-top boxes were available from second source manufacturers and independent retailers. The existence of section 1204 itself, and the CableCARD obligation, refute this argument.

connect to and function with other navigation devices" so that competitively sourced devices can function on the same systems as proprietary ones. EPB admits that the technology which it seeks to have declared compliant cannot accomplish this on a nationally standardized basis. Hence, it is not compliant with section 76.1204.

D. The Commission Should Decline To Rewrite Its Rules By Waiver

A grant of EPB's waiver request would eviscerate the regulation. *Any* system as to which (1) a security element can be downloaded to a proprietary platform, and (2) standardization might be possible in the future, for future products, using some *different, standard* technology, would qualify for a waiver. The Commission should not consider taking any such step without first initiating and concluding a rulemaking proceeding that results in a nationwide, portable downloadable conditional access system that can serve as a successor to the CableCARD. EPB's concluding suggestion that the policy objectives of section 76.1204 would not be undermined by a waiver because of its small service territory ignores the precedent such a waiver would set and the "me too" waivers that would surely follow – all to the detriment of the retail market for set-top boxes and consumers that wish to have an alternative to operator-supplied equipment.

CEA, like EPB, supports the development of a common, nationwide standard for conditional access that will encompass all MVPDs. The solution, however, is not to retreat from the common reliance rule, but rather to seek ways to apply it more consistently. Rather than dismantle its competition rules through ever-broader waivers, the Commission should initiate a rulemaking to gather evidence of whether and how an all-MVPD solution might be achieved.

In response to a similar IPTV-based petition[20] earlier this year, CEA made the following proposal:

> CEA believes that rather than creating a patchwork of regulation through individual waiver applications, the Commission should issue a Notice of Proposed Rulemaking with the goal of clarifying Sections 76.640 and 76.1204 of its Rules so as to assure compliance with Congress's mandate. In the Telecommunications Act of 1996, Congress ordered the Commission, in its regulations, to "assure the commercial availability" of video navigation devices from competitive manufacturer and retail sources other than the MVPDs themselves. This mandate was not limited to traditional digital cable systems based on QAM. The rationale behind Section 76.1204 -- that competitive availability will not be possible without common reliance on a standard, separable, nationally portable security technology – applies equally to other types of MVPDs, including IPTV systems. With such systems becoming more widespread, the time is ripe for the Commission to direct the affected industries toward a common standard covering all MVPDs.
>
> Accordingly, the Commission should proceed forthwith with a Notice of Proposed Rulemaking as discussed by CEA and Nagravision USA, Inc. with respect to CEA's appeal of the Media Bureau's Cablevision waiver extension order,[21] and postpone action on individual waiver requests such as LUS's until after new rules have been issued.

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[20] *In the Matter of Petition of Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System, for Waiver of Section 76.1204(a) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CSR-8152-Z, CS Docket No. 97-80, Comments of the CEA on Lafayette Utilities System Petition for Waiver at 1-2 (Mar. 25, 2009).

[21] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, CSR-7078-Z, letters from Adam Goldberg, Nagravision USA, Inc. to Marlene H. Dortch, Secretary, FCC Re: Notice of *Ex Parte* Presentation, CSR-7078-Z, CS Docket No. 97-80 (May 5, Apr. 30, 2009); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97- 80, letters from James W. Hedlund, Vice President, Regulatory Affairs, CEA to Marlene H. Dortch, Secretary, FCC Re: Notice of *ex parte* presentation in: MB Docket No. 97-80 (Apr. 16, 2009, Apr. 9, 2009 (four separate letters)).

In light of the growing volume of waiver petitions that ask the Commission to reinterpret rather than enforce its regulations adopted pursuant to section 629 of the Act, the Commission should proceed with a Notice of Proposed Rulemaking to address conditional access in IPTV and other MVPD systems, CEA urges the Bureau not to consider granting any more petitions similar to EPB's, particularly those that are not, in fact, time-limited.

Conclusion

For the reasons stated above, the Commission should deny EPB's Petition.

Respectfully submitted,

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Dated: September 24, 2009

CERTIFICATE OF SERVICE

I do hereby certify that on September 24, 2009 I caused a true and correct copy of the foregoing Opposition of the Consumer Electronics Association to the Petition of the Electric Power Board of Chattanooga Petition for Clarification or Waiver of 47 C.F.R. § 76.1204 to be served via first-class mail on the following:

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/s/ Patricia O'Keefe
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