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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Evolution Broadband, LLC's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-7902-Z, CS Dkt. No. 97-80.*

Dear Ms. Dortch:

NCTA responds herein to the letter filed by Public Knowledge in the above-captioned proceedings on December 8, 2009.¹ NCTA and others have pointed out the substantial flaws in Public Knowledge *et al.*'s petition for reconsideration of the *Evolution Broadband Waiver Order*.² The latest Public Knowledge filing is equally flawed and does not change the conclusion that the petition for reconsideration is without merit and should be denied.

Public Knowledge asserted in its petition that “the passage of time and changes in the law significantly reduced the need for low-cost, limited-capability boxes as a means of facilitating the digital transition.”³ Now, Public Knowledge agrees that there is a need for such devices but contends that the waivers of the integration ban that have been granted for various digital transport adapter (“DTA”) models are preventing a hitherto-unknown company called IPCO from selling its “compliant set-top boxes” to cable operators or retail outlets and driving this would-be competitor into bankruptcy.⁴ Public Knowledge’s latest claims, like the claims in the underlying petition, simply do not withstand scrutiny.

¹ See Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, FCC, CSR-7902-Z, CS Dkt. No. 97-80 (Dec. 8, 2009) (“PK Letter”).

² See Opposition of NCTA, CSR-7902-Z, CS Dkt. No. 97-80 (July 9, 2009); Joint Opposition of Motorola, Cisco, Pace, Thomson, and NagraVision, CSR-7902-Z, CS Dkt. No. 97-80 (July 9, 2009); Opposition of Disney, CSR-7902-Z, CS Dkt. No. 97-80 (July 9, 2009) (“Disney Opposition”); Opposition of Evolution Broadband, CSR-7902-Z, CS Dkt. No. 97-80 (July 9, 2009); Opposition of American Cable Association, CSR-7902-Z, CS Dkt. No. 97-80 (July 9, 2009).

³ Petition for Reconsideration of Public Knowledge *et al.*, CSR-7902-Z, CS Dkt. No. 97-80, at 10 (June 29, 2009).

⁴ PK Letter at 2-3.

Three central predicates of Public Knowledge's latest filing are that (1) IPCO's set-top boxes "fully comply" with CableCARD requirements; (2) its boxes are "available today" for purchase; and (3) its boxes are cost-competitive with the DTA models for which waiver was granted. None of these claims appears to be true.

With respect to the first claim, it does not appear that IPCO has met either the requirements established by the Commission's rules or the security requirements to make the set-top box functional. Under the Commission's rules, a manufacturer of a CableCARD device must submit its first device for verification testing at a qualified test facility. A manufacturer also is required to meet basic security requirements -- licensing the encryption technology used to secure content as it passes from the CableCARD to the set-top box and the digital security certificates that are embedded in the set-top box at manufacture. Without satisfying these requirements, a CableCARD device will not work. The declaration of IPCO's owner, James D. Gee, Jr., which is attached to the Public Knowledge filing, does not indicate that IPCO has satisfied any of these requirements. Rather, Mr. Gee suggests that his IPCO devices can be "software upgraded to support a single CableCARD."⁵ Such an approach is not consistent with license requirements or the expectations of content providers who rely upon CableCARD security.

With respect to the second claim, it does not appear that IPCO has ever manufactured, let alone sold, any of its set-top boxes anywhere in the world. Mr. Gee refers repeatedly in his declaration to the availability of the IPCO boxes in the future tense. For example, the declaration states that the boxes "are to be distributed," "are also to be available," and "are to be protected."⁶ The declaration does state that the IPCO set-top boxes "are available 60-days from purchase to cable operators and consumer electronics outlets,"⁷ but does not indicate how IPCO can fulfill such orders for "compliant" boxes in the absence of the necessary verification testing and security requirements. In sum, contrary to Public Knowledge's claims, the notion that cable operators could simply start buying and deploying these devices today in lieu of DTAs is entirely unsupported.

With respect to Public Knowledge's third claim, the IPCO devices do not appear to be cost-competitive with the DTA models for which waiver has been granted. IPCO states in its declaration that its one-way standard-definition ("SD") boxes "can wholesale as low as \$54.75."⁸ Adding CableCARD capability to the device would likely bring the total cost of the IPCO device closer to \$100.⁹ That would be three times the \$30 or so price that Comcast reportedly pays for

⁵ Declaration of James D. Gee, Jr. ¶ 3, attached as exhibit to PK Letter ("Gee Decl.").

⁶ *Id.* ¶¶ 4-7.

⁷ *Id.* ¶ 26.

⁸ *Id.* ¶ 7.

⁹ The Media Bureau has suggested that a CableCARD adds about \$56 in cost to a set-top box. See *In the Matter of James Cable, LLC et al., Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, 23 FCC Rcd. 10592, ¶ 9 n.30 (MB 2008).

DTAs.¹⁰ Comcast has indicated that it has deployed over 4.5 million DTAs so far.¹¹ If Comcast had deployed the IPCO boxes instead, it would have incurred an additional \$315 million in costs (\$70 x 4.5 million = \$315 million).

In light of these cost differences, it is absurd for Public Knowledge to suggest that the IPCO devices are a serious alternative to DTAs or that forcing their use would somehow benefit consumers. As Disney explained in this reconsideration proceeding, if “cable operators are prevented from deploying low-cost, limited-capability devices, their efforts to reclaim analog bandwidth will be slowed and the ability of programmers to distribute more HD programming to cable customers will be impaired.”¹² Public Knowledge does not explain, nor could it, how such an outcome would serve the public interest.

Furthermore, PK’s claim that the DTA waivers are driving IPCO into bankruptcy is unsupported. First of all, Mr. Gee does not say anywhere in his declaration that the DTA waivers are forcing him out of business.¹³ In any event, Public Knowledge’s claims are undercut by statements in Mr. Gee’s declaration. Mr. Gee asserts that he started working on his set-top boxes after the Commission adopted its navigation device order in 1998.¹⁴ More than a decade later, it appears that IPCO has yet to manufacture or sell any of its devices. This includes not only the one-way SD boxes, but also IPCO’s HD box models, to which Mr. Gee’s claims about the anti-competitive effects of the DTA waivers do not apply. Meanwhile, a large and growing number of equipment suppliers are serving the set-top box marketplace, including Pace, Cisco, Motorola, Thomson, Evolution Broadband, Samsung, Panasonic, and TiVo, among others. That IPCO has not made or sold any devices in this competitive marketplace over the last decade may have a number of causes, but there is no basis whatsoever on the record for assuming that the grant of the DTA waivers over the last seven months is one of them.

The simple fact is that the DTA waivers are having precisely the effect that the Commission contemplated. They are facilitating the rapid digitization of cable systems and enabling the reclamation of large swaths of analog bandwidth for faster Internet, more HD, more

¹⁰ See Comcast Corp. Q1 2009 Earnings Conference Call Final Transcript, at 6 (Apr. 30, 2009).

¹¹ See Comcast Corp. Q3 2009 Earnings Conference Call Final Transcript, at 6 (Nov. 4, 2009) (“Comcast Q3 2009 Earnings Transcript”).

¹² Disney Opposition at 4. There is no basis for the claim in IPCO’s declaration that the availability of the DTAs “retards the transition to digital . . .” Gee Decl. ¶ 7. In fact, Comcast reported in its most recent earnings call that that it has completed its digitization efforts in Portland and is most of the way through its digitization efforts in Seattle, San Francisco, and Philadelphia. See Comcast Q3 2009 Earnings Transcript at 6. Furthermore, IPCO also is wrong in asserting that DTAs “include proprietary security systems that require the acquisition of additional headend equipment . . .” Gee Decl. ¶ 8. Rather, the security used with the DTAs is compatible with existing system security, so operators do not have to install separate headend security to support the DTAs.

¹³ Global Cable Inc., the entity through which the IPCO boxes “are to be distributed” and which also is owned by Mr. Gee, states on its web site that the company has been successful as a cable equipment broker selling new, used, and refurbished equipment, see <http://www.gcil.com/>, so it is unclear whether and to what extent the IPCO devices are central to the viability of Mr. Gee’s equipment business.

¹⁴ Gee Decl. ¶ 12 (“Seeing that the law required the unbundling of the security function from the navigation function of the STB, I set about designing and developing an STB that met the law’s requirements.”).

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ethnic channels, and other digital services. In light of the foregoing, and the oppositions filed by NCTA and others in this proceeding, the Commission should promptly deny Public Knowledge's petition for reconsideration.

Sincerely,

/s/ Neal M. Goldberg

Neal M. Goldberg