February 17, 2012

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: Commercial Availability of Navigation Devices, CS Docket No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67; Adams Cable Request for Waiver, CSR 8537-Z

Dear Ms. Dortch:

This letter is filed in response to the ex parte letter filed by Adams Cable Equipment, Inc. ("ACE") on February 15, 2012.

Having had the policy rationale for its waiver exposed as being unfounded, ACE still tries to justify its unbounded waiver as being retail focused (see ACE February 15, 2012 ex parte ("selling at retail is an exciting opportunity ACE plans to embrace with vigor")) and yet it agrees with TiVo that sales to MSOs are the real aim of its waiver request (see ACE February 15, 2012 ex parte ("history indicates that wholesale is likely to produce more STB sales than retail and ACE is eager to sell more devices)).

Although nominally based on the Baja Broadband Order, ACE continues to ignore key elements of that waiver order. First, the Baja waiver was limited in duration and scope, and based on extreme and non-speculative financial hardship. ACE's waiver shares ***none*** of these elements.[1]

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[1] ACE's discussion of DTAs in its ex parte is unavailing. The policy rationale for DTAs was to advance the digital transition by providing one-way, low-cost, limited capability boxes. ACE is not proposing to resell DTAs. Rather, ACE seeks to resell the ***opposite*** of DTAs, namely, two-way, HD, and DVR boxes. Such devices are not needed to further cable operator migrations to all-digital networks.

Moreover, the FCC expressly stated that for a future waiver it would want to know the number of subscriber-purchased devices that have been activated during the period of the Baja waiver.[2] ACE was the "retail" supplier to Baja, so ACE should be able to provide the Commission with the number of "retail" boxes that it sold to Baja during the waiver period. The FCC should be able to assess the "vigor" at which ACE has sold boxes to Baja subscribers during the waiver period. This would shed light into the bona fides of ACE's "retail" arguments.[3]

ACE's calculation of the cost of a TiVo DVR is similarly flawed. ACE includes the DVR service fee in the "real cost" of the TiVo DVR while ACE does not include the cost of the DVR service fee that operators charge in the "real cost" of refurbished DVR.[4] Unless ACE is somehow proposing to guarantee to the FCC that cable operators will ***not*** charge customers a DVR service fee if they use a refurbished DVR, its "real cost" calculation is as unsound as the rationale for its waiver request.

The more ACE reveals about its waiver request, the clearer it becomes that ACE is seeking to undercut common reliance by waiver. ACE essentially argues that the integration ban has served its purpose, creation of a retail market can be accomplished merely by "offering for sale" (by putting up a web site) the exact same boxes to consumers as are fielded by the operators themselves, and these policy decisions can be made by waiver determinations that undercut the rule. These assertions are unfounded.

The Commission should not permit ACE to sell non-compliant boxes to MSOs behind a policy smoke-screen of advancing retail sales. ACE apparently wants to build a business selling boxes that it can buy for as little as $10 to operators (and perhaps a few consumers) for $49-$299. TiVo understands ACE's desire to make a healthy margin on used set-top boxes but that is not good cause for waiver of Commission policy.

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[2] *See Baja Broadband Operating Company, LLC's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-711-Z, Memorandum Opinion and Order, DA 10-373, at para. 13, n. 51 (rel. March 4, 2010) ("*Baja Order*") ("If, after, one year, Baja believes that a further extension is warranted, Baja may file updated financial and other information for review (***including the number of subscriber-purchased devices it has activated during this period***) and request an extension." (emphasis added))

[3] This information would not be competitively sensitive as ACE doesn't compete with anyone in the "market" for selling non-compliant refurbished set-top boxes.

[4] MVPD DVR service fees typically range from $10-$20 per month. TiVo service fees range from $13-$20 per month.

Until a viable successor to CableCARD exists, the Commission must ensure that CableCARD rules are strictly enforced and not allow Commission policy underlying CableCARD to be undermined – particularly by waiver.

Respectfully submitted,

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