

March 26, 2012

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

Re: CSR-8537-Z and CSR-7111-Z, Requests for Waiver from the Integration Ban

Dear Ms. Dortch:

On behalf of Adams Cable Equipment, Inc. (“ACE”) and Baja Broadband Operating Company, LLC, I am responding to the March 15 *ex parte* letter filed in these proceedings by the Consumer Electronics Association (“CEA”).

CEA argues that “The Commission has granted waiver after waiver in toleration of the cable industry’s decision not to procure lower-end CableCARD-reliant set-top boxes. So no CableCARD-reliant set-tops are available to Sweetwater at a price Sweetwater considers affordable.” “Lower end” (as opposed to *low cost*) CableCARD-reliant set-top boxes are available, such as the Motorola DCH-200. The problem is that these boxes cost far more than devices with integrated security because the CableCARD housing and heat dissipation requirements forced a complete engineering redesign that more than doubled the price of the device. Thus, there are not any new *low-cost*, low-end set-top boxes available. *This is not because of any waiver from the rules, but because of the rule itself* – it is apparently not technically feasible to develop such boxes at low cost under the rule itself, because if it were, presumably CEA’s members would have done so and they would be selling them at retail and to cable operators. CEA cannot (fairly) blame small cable operators for the lack of low-cost set-top boxes that CEA’s members do not build.

CEA tries to create a stir over the fact that Baja Broadband and Sweetwater Cable have sought temporary relief based upon a lack of sufficient DTAs to meet short-term demand. The DTA shortage is a temporary phenomenon that was caused by the suppression of pent-up demand for DTAs during the period when such devices were unavailable because of the integration ban. If CEA had not unnecessarily and counterproductively argued that DTAs should be subject to the integration ban in the first place, it is likely that this problem would not exist today. In any case, the DTA shortage faced by smaller operators need not affect the Commission’s evaluation of basic tier encryption because it will likely be largely resolved before

any significant number of smaller operators choose to encrypt their basic tiers, which is something they typically would do only in conjunction with or after a transition to an all-digital network.

From these two perversions, CEA concludes that “No waivers be granted or extended at this time based on the purported cost of CableCARD-reliant products, or based on any purported shortage of DTAs or HD DTAs.” In other words, CEA seems to be arguing that the Commission should turn a blind eye to the facts (the high cost of CableCARD devices and the short supply of DTAs), and that it should only seek to address CEA’s wish list for the future (AllVid) while completely ignoring actual consumer needs and problems of the present.

The Commission cannot lawfully ignore key facts or well-pled cases for waiver and attempt to regulate only through generally-applicable rulemaking, as CEA urges. Courts have required the Commission to “take a ‘hard look’ at meritorious applications for waiver,”¹ and waive a generally-beneficial regulation in individualized circumstances where application of the rule would result in costs to the public that would outweigh its incremental benefits.² Even if the Commission were to suddenly issue a new NPRM proposing to do exactly what CEA wants with respect to set-top boxes, such rules would not take effect in 2012 and thus could not address the specific short-term public interest problems identified by ACE or Baja. Sometimes “regulation by waiver” is necessary for the Commission to accomplish what is needed to tailor appropriate and timely measures to protect the public interest in the short term and in special circumstances. Indeed, just last week, CEA filed its own petition for waiver (from the ACS rules) stating that “the Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest, or alternatively, where “special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest.”³ In these cases, the public interest would be disserved by strict compliance with the integration ban in a manner that strands useful set-top boxes to waste, or that strands Baja’s customers without access through their service provider to new, low-cost affordable devices.

¹ *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the “logic of applying [the rule] collapses,” and it was arbitrary to apply the rule, *id.* at 1192, 1195). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“[A] general rule, deemed valid because the overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”).

² See 47 C.F.R. § 76.7(i) (“The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request”); see also 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

³ See *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, *Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Consumer Electronics Association Petition for Wavier (March 22, 2012), at 10, 16.

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
March 26, 2012
Page 3

CEA claims that the small operator requests in these cases present the Commission with a “Gordian Knot.” If so, the Commission simply needs to cut the knot with its sword by granting ACE’s waiver and extending Baja’s waiver, rather than allow itself to become flustered by CEA’s attempt to overcomplicate the cases. In fact, there are simple solutions:

- There are a small and finite number of stranded integrated set-top boxes that are unable to be re-used because of the integration ban. Grant of ACE’s waiver would avoid economic and environmental waste by allowing these boxes to be used to the benefit of consumers without any countervailing adverse impact on the Commission’s objective of common reliance. CEA would leave these boxes to rust.
- Consumers today have no option to purchase a low-cost set-top box at retail, except in the area served by Baja Broadband. Grant of ACE’s waiver could deliver that choice across the country. CEA would deny that choice to consumers – the opposite of what Section 629 was intended to promote.
- Baja Broadband seeks a short-term bridge until DTAs become available to it later this year. Grant of its request for six months in a small market of 12,000 digital subscribers would have no adverse impact on any Commission policy. CEA would leave Baja and its customers in the lurch over the coming next few months merely to try to score a point about what CEA thinks the future should look like years from now.

CEA also tries to tie the Commission in knots by writing that the Commission has granted integration ban waivers “based on the purported unaffordability of CableCARD-reliant products, but is now told by NCTA that CableCARDS are the proper and affordable solution for anyone wishing to offer a navigation device.” But CEA cannot have it both ways either. To the extent that CEA claims that CableCARDS are not an affordable option for manufacturers of over-the-top devices, that confirms the long-held position of small cable operators that the high-cost of including CableCARDS in all set-top boxes hurts consumers.

CEA attempts to distract the Commission’s focus from the immediate questions raised by ACE’s and Baja’s pending requests:

- Would consumers be better off if they have a new choice, for the first time, to purchase low-cost integrated set-top boxes at retail?
- Would consumers be better off if the Commission could prevent millions of dollars worth of useful integrated set-top box equipment from heading to the scrap heap, without undermining its policy of common reliance?

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
March 26, 2012
Page 4

- Would Baja's customers be better off if Baja continued to have access to new low-cost set-top boxes during the short-term period of months before it can obtain DTAs?

The answers to all of these questions are plainly yes. The waivers therefore should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "PUSH", written in a cursive style.

Paul B. Hudson
Counsel for Adams Cable Equipment, Inc. and Baja Broadband Operating Company, LLC