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Via Electronic Filing

July 31, 2012

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

Re: In the Matter of Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment, MB Docket 11-169, PP Docket 00-67; Commercial Availability of Navigation Devices, CS Docket No. 97-80.

Dear Ms. Dortch:

This letter is filed in response to the letter to Chairman Genachowski from Michael Powell, President and Chief Executive Officer of the National Cable & Telecommunications Association (NCTA), of July 25, 2012, and the ensuing July 30 *ex parte* filing of Boxee. In its letter, NCTA offered commitments, on behalf of “the six largest incumbent cable operators,” in exchange for a rule change that would allow operators to encrypt Basic programming tiers.¹ Boxee appropriately urges the Commission to address limitations in the NCTA proposal, to assure that it “fairly balances the needs of cable operators with those of makers and consumers of third-party devices.”

CEA agrees with Boxee that the NCTA proposal is so conditioned, limited, and interim in nature as to be utterly insufficient. It suffers from flaws of which CEA warned earlier in this proceeding. Specifically, CEA stated in its November 28, 2011 comments on this NPRM that:

If the Commission is going to continue with fixes that are only “interim,” it should proceed, as well, with a true solution. To the extent the Commission, as in this Notice, recognizes *part* of the problem posed by transitions to all digital techniques, it should evaluate and address, for

¹ *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Notice of Proposed Rulemaking (rel. Oct. 14, 2011) (“NPRM”).

public comment, the larger context and outstanding issues pertaining to competitive availability²

The NCTA proposal suffers from two basic flaws based on its “interim fix” approach: (1) the devices and interfaces are not defined, and licensing and certification commitments are lacking or insufficient; and (2) the “sunset” of the envisioned interface makes the options unworkable for competitive device entry. CEA recognizes and has no desire to impede the transitions of cable operators to digital distribution and IP-based interfaces. We continue to insist, however, that the necessary changes to FCC regulations should be forward as well as backward-looking.

“Option 1” As offered by NCTA, an MSO choosing “option 1” would provide yet another leased, non-CableCARD device, a DTA with an undefined and vaguely exemplified “standard home networking” capability. The DTA would support the operation of undefined retail products that are “IP-enabled” and able to receive Clear QAM, but that cannot decrypt cable conditional access.

“Option 2” MSOs choosing this option would offer instead to license undefined “commercially available security technology” to undefined “manufacturers” of undefined “IP-enabled Clear QAM Devices.” Such technology would need to be “*licensable*” on a “non-discriminatory basis” – but there is no commitment by any MSO that any license terms would actually be fair, reasonable, or non-discriminatory, or free from unreasonable requirements as to testing obligations and periods, certification and certification fees, and certificates and certificate fees. An MSO purporting to offer such a license would be free to implement basic tier encryption *within three months* after the “requirements” are submitted to the Commission, notwithstanding how long it might actually take for any manufacturer to license, design, build, and market such a product, or whether the product would ever actually be adequately or properly supported on that MSO’s system. Further, there is no assurance to the potential manufacturer of such a product that more than one MSO would actually offer to license it or that it would work on more than one system.

“Sunset” Any commitments made by MSOs, under either option, would sunset after three years. Thus, any manufacturer considering investing in a product outlined under Option 2 would have to recover its entire investment – already subject to unknown conditions, approvals, and costs – in an extremely short period of time.

Undefined Terms And Insufficient Commitments

If the NCTA proposal is to be given serious consideration for adoption by the Commission as a rule, it needs to be clearer and far more detailed:

² *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Comments of CEA (Nov. 28, 2011).

- The device terms need to be defined as to features and function, and the technology and referenced standards need to be identified, along with the reason to expect interoperation with retail products.
- Licensing must be based on a true FRAND (fair, reasonable, and non-discriminatory) commitment and *all* license, testing, and certification conditions, fees, and obligations should be subject to public comment before Commission approval is given for basic tier encryption.

The CEA-CERC comments in the CableCARD Fourth Notice of Proposed Rulemaking recount the dangers of vague commitments to “license,” without necessary assurances of freedom from arbitrary fees, requirements, and conditions, and without any affirmative assurance of real-world support.³ Based on hard experience, any “commitment” to support interfaces to devices (Option 1) or to license devices (Option 2) should define the device, technology, and referenced standards, and the reason to expect competitive products to be supported by those standards.

DTAs Should Be Subject To Section 76.640(b)(4)(iii), Without Sunset

In the Fourth Further Notice of Proposed Rulemaking, the Commission proposed, without exception, to replace the “1394” home interface requirement with an “IP enabled” interface. CEA and CERC joined cable operators in supporting this proposal, but were surprised and disappointed when operators asked the Commission to *exempt* their DTAs from it. In June 28, 2010 Reply Comments, CEA and CERC reacted:

Based on the history [of poor support for retail devices] reviewed in the preceding sections, it is understandable, but not comforting, why major cable operators and their vendors may wish to pre-empt the connection of HD DTAs to home networks. The combination, for example, of an HD DTA to an Internet-enabled Blu-Ray recorder, game device, *etc.*, could comprise a formidable competitor for cable *services* as well as for cable DVRs and two-way set-top boxes. Without making any record or asserting any reason other than unspecified “cost” of an interface not yet defined (but which could be as simple as an Ethernet IP connection), the industry is

³ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of the CEA and the Consumer Electronics Retailers Coalition (“CERC”) on the Fourth Further Notice of Proposed Rulemaking at 3 and n. 4-7 (June 14, 2010).

asking the Commission to foreclose, in advance, such competitive possibilities. This is an invitation that the Commission should not accept.⁴

Unfortunately the Commission did accede to the operators' request to exclude DTAs from providing a standard IP-based interface. It seems fair to say that if the Commission had agreed in 2010 that DTAs should not be exempt from Section 76.640(b)(4)(iii), NCTA and its members would not be needing now to carve a circuitous path toward basic tier encryption. The solution, per "Option 1," would be readily at hand. Now that NCTA is open to equipping DTAs with an IP interface, a much simpler, fairer, more transparent, and standards-based solution is simply to revoke the blanket waiver for the inclusion, in DTAs, of the standard interface that will now be required in all other operator-provided devices.⁵

CEA agrees with Boxee that the offer of an undefined and limited version of such an interface, available for only three years, makes no sense, either in terms of the operators' objections in 2010, or their offer now. The sole reason given and accepted in 2010 to exclude an IP interface from DTAs was "cost." The Commission, in effectively granting a blanket waiver, never required operators to document the purported cost of providing this interface. Now, in the context of a rulemaking to save operator costs by allowing basic tier encryption, the FCC should not repeat its mistake. If the Commission does require that the other flaws in the NCTA offer are cured,⁶ and changes its rules so as to allow basic tier encryption, it should also, in the same rulemaking, terminate its exclusion of DTAs from Section 76.640(b)(4)(iii) of its rules. Indeed, such a solution may make the interim palliatives offered by NCTA substantially or entirely unnecessary.

⁴ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Reply Comments of the CEA and CERC on the Fourth Further Notice of Proposed Rulemaking at 19 (June 28, 2010).

⁵ CEA and others, including a recent waiver petition by TiVo, have urged the Commission or the Media Bureau to clarify the requirements of 76.640(b)(4)(iii) and to assure that any referenced standard is nationally operable with retail products. There is no reason to exempt DTAs from this process, and any such exemption is likely, again, to be counter-productive to all.

⁶ With respect to Boxee's suggestions for a complex yet limited "Basic Tier Encryption Order," CEA adheres to its support for an IP-based Gateway interface that would obviate the need for any operator-provided hardware. See *In the Matter of Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of CEA and CERC on Notice of Inquiry (July 13, 2010).

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/ Julie M. Kearney /

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Vice President, Regulatory Affairs

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