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Via Electronic Filing

March 7, 2013

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

Re: In the Matter of Charter Communications, Inc.'s Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CSR-8470-Z, MB Docket No. 12-328, CS Docket No. 97-80, PP Docket No. 00-67.

Dear Ms. Dortch:

In a February 28, 2013 *ex parte* submission by counsel Paul Glist, Charter finally admits that its petition is based entirely on the premise that the FCC has somehow granted an advance exception from its rules, in favor of any nominally "downloadable" security system. CEA's November 30, 2012 Opposition to this petition noted this premise and demonstrated that it has no support in the record:¹

There is no considered FCC precedent for the open-ended evisceration of this regulation, with these known consequences, upon application of a major cable system. Charter points to Cablevision's now-expired waiver and to asides and to references in Public Notices that projected, based on cable industry promises and extrapolations about "downloadable" security, that a fully downloadable system could be a successor to CableCARD.² Even in these

¹ Opposition of the Consumer Electronics Association at 3 ("CEA Opposition," footnotes per the original).

² The FCC documents cited by Charter in footnote 7 contain *caveats* and explicit expectations that neither the Charter technology nor any other "downloadable" technology can actually meet: The Second Report & Order, as cited in the Jan. 10, 2007 Public Notice, includes an expectation, proved false in practice, that "the conditional access functionality of a device with downloadable security is not activated until it is downloaded to the box by the

references, the Commission expected ultimate achievement of a functionally useful *separation* of security from hardware that is simply not present in Charter's system. The Cablevision waiver, which reserved judgment³ on the compliance of Cablevision's system with Section 76.1204(a)(1), is now expired.

In an attempt to find record support, Charter counsel's February 28 letter simply misstates the nature of the Media Bureau's January 16, 2009 *extension* to Cablevision's grandfathered 2007 waiver. The letter from Charter's counsel baldly and incorrectly asserts:

"[I]n fact Charter's request has nothing to do with [the 2007] decision and instead is premised only on the Commission's separate 2009 waiver granted to Cablevision."⁴

This characterization is the opposite of correct. The first full paragraph of the Bureau's January 16, 2009 Memorandum Opinion and Order ("2009 M&O") reads:⁵

1. Cablevision Systems Corporation ("Cablevision") has filed with the Chief of the Media Bureau the above-captioned request for extension of its waiver (the "Extension Request") of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. In January 2007, the Media Bureau found good cause to temporarily grandfather Cablevision's SmartCard-based approach to separated security and issue a two-year waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to

cable operator. *To the extent* a downloadable security or other similar solution *provides for common reliance*, as contemplated herein, we would consider the box to have a severable security component." CS Dkt. No. 97-80, Second Report and Order ¶ 35 (rel. Mar. 17, 2005) ("Second Report & Order") (emphasis supplied); Public Notice, Commission Reiterates that Downloadable Security Technology Satisfies the Commission's Rules on Set-top Boxes and Notes Beyond Broadband Technology's Development of Downloadable Security Solution, DA 07-51 (Jan. 10, 2007).

³ The FCC noted that "Cablevision did not request the Commission to approve, nor did it provide specific details of its downloadable security solution. Accordingly, the Commission will not address this matter in the context of this order." *Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1)*, CSR-7078-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 9 (rel. Jan. 16, 2009).

⁴ Letter from Paul Glist to Marlene H. Dortch, February 28, 2013 ("February 28 letter").

⁵ *Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1)*, CSR-7078-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 1 (rel. Jan. 16, 2009).

use its separated security SmartCard solution until July 1, 2009. Cablevision now seeks a limited extension of that waiver until December 31, 2010 so that it can concentrate its efforts on deploying an open-standard downloadable security solution. For the reasons stated below, we grant the Extension Request.

The 2009 M&O that is purportedly “separate” from the 2007 “grandfathered” waiver, which Charter asserts its petition has “nothing to do with,”⁶ concluded:

11. For the reasons stated herein, we conclude that Cablevision has shown good cause for a temporary extension of its waiver of Section 76.1204(a)(1) of the Commission’s rules to allow Cablevision to use its SmartCard solution until December 31, 2010, subject to its commitment to deploy an open downloadable security solution by December 31, 2010.

The Cable Industry Assertions On Which Forward-Looking
CE Industry and Commission Observations About
“Downloadable Security” Were Based Have Never Been Fulfilled
And NCTA Promises Of A Standard System Have Never Been Kept

In its Opposition CEA reviewed in detail the unsupported assertions and un-kept promises on which both the Commission’s and the consumer electronics industry’s hopes about some fully “downloadable” system had been based:⁷

The Commission’s interest in “downloadable” security, like the cautious interest of the consumer electronics industry,⁸ was based on promises

⁶ February 28 letter at 6.

⁷ CEA Opposition at 4 – 5 (footnotes per original).

⁸ On November 30, 2005, in a CEA Appendix to a joint report with the cable industry, CEA made this observation about the DCAS proposal: “We are aware that the Commission is considering approval of cable operator reliance upon a downloadable conditional access technology. The CE side has not had access to either the technical or licensing terms of such a technology, so we are unable to endorse any such approach at this time. We are able to observe, however, that any regulations permitting cable operators to rely upon downloadable conditional access security must also support common reliance by CE manufacturers in order to fulfill the competitive objectives the Commission has established. Irrespective of which specific method or technology that might be adopted for downloadable conditional access, the selected method must equally support both unidirectional and interactive (bidirectional) forms of competitive navigation devices and not create any unfair disadvantage for competitive navigation devices using either downloadable technology or

and projections of a functional, nationally standard interface as a successor to CableCARD – promises that were never met despite an explicit promise by the cable industry that its solution would be deployed *on a national basis* in 2008.⁹ CEA pointed out that these were undocumented promises about a technology that was still under nondisclosure agreement (“NDA”).¹⁰ These promises and projections dated from a cable industry initiative that was taken over by CableLabs and then abandoned.¹¹ Details of these projects, though touted to the Commission, were wrapped under an NDA. All optimism about actual, open, and standard “downloadable” security, as hoped for by the Commission in January of 2007, collapsed when CableLabs abandoned its project.¹² *Since then, there has been no pretense that any “downloadable”*

CableCARDS when compared with the MVPD’s own navigation devices leased to a subscriber. In addition, any license for downloadable conditional access security must be consistent with Sections 76.1201 – 1205.” CS Dkt. No. 97-80, Consumer Electronics Appendix to Joint Status Report to FCC, at 13 (Nov. 30, 2005).

⁹ In its own Appendix to the Joint Report, *id.*, NCTA said: “We are pleased to report that downloadable security is a feasible Conditional Access (“CA”) approach, that it is preferable to the existing separate security configuration, and that the cable industry will commit to its implementation for its own devices and those purchased at retail. We expect a national rollout of a downloadable security system by July 1, 2008.” CS Dkt. No. 97-80: Report of the NCTA on Downloadable Security (Nov. 30, 2005).

¹⁰ In response to the NCTA Downloadable Security Report, *id.*, CEA pointed out the extent to which so much of the promised solution remained under NDA and would be subject to license that, purely for operators’ business purposes, would restrict the capabilities of competitive devices. This concern still applies to any “downloadable” system even if it does provide a standard national interface. *See* CS Dkt. No. 97-80, Comments of the CEA on NCTA Downloadable Security Report (Jan. 20, 2006).

¹¹ *See* Light Reading Cable, *MSOs Closing PolyCipher Headquarters*, http://www.lightreading.com/document.asp?doc_id=177662&site=lr_cable (June 5, 2009). “TWC EVP of technology policy and product management Kevin Leddy lamented during a panel on the topic of [tru2way](#) at the Consumer Electronics Show that the ‘economics of downloadable security are challenging’ while CableCARD costs continue to slide downward.”

¹² *Id.* The full text of paragraph 31 of the Second Report & Order, referenced by Charter in footnote 8 of its Petition, includes a specific expectation that downloadable security must in practice supply a *common* solution, so as to achieve actually common reliance: “We believe that the potential benefit of a *common security technology* with significantly reduced costs justifies a limited extension of the deadline for phase-out of integrated devices.” (emphasis

system would be national in scope or that it could be implemented on other than a specific chip that has been customized for a particular system.

Thus, no amount of repetition and distortion, now, will change the record:

- (1) Neither the FCC nor the Bureau has given blanket, advance approval to a security system based on its containing a downloadable *element*, where that system has *not* been demonstrated to provide a common interface comparable to CableCARD's;
- (2) The cable industry publicly admitted in June, 2009 (well after the forward-looking statements cited by Charter) that due to "expense" it had not fulfilled and would not fulfill its promise to provide such an interoperable system by 2008 (*see* n. 11, *supra*);
- (3) The Bureau's January 16, 2009 Cablevision M&O was solely and from beginning to end an 18 month extension of the "smart card" system grandfathered in 2007. That this extension has now expired supplies no support for the grant of a new waiver to Charter.

Nor is there any basis for Charter, now, to claim that in the January, 2009 purportedly "separate" action the Bureau implicitly approved Cablevision's future "downloadable" system. The Bureau in fact said exactly the opposite:¹³

9. Cablevision did not request the Commission to approve, nor did it provide specific details of its downloadable security solution. Accordingly, the Commission will not address this matter in the context of this order.

supplied) It was this promise of common reliance, cited by the FCC based on representations about the CableLabs (still under NDA) PolyCipher system, that collapsed and was abandoned along with the PolyCipher project. As is discussed above, the promise of a "common" downloadable system has not been revived by Cablevision, Charter, or anyone else. Hence there is *no* FCC precedent, other than Cablevision and other expired waivers, for granting this waiver, and there is none that would satisfy the conditions stated by the FCC in either paragraph 31 of the Second Report & Order or in its Jan. 10, 2007 Public Notice.

¹³ 2009 M&O ¶ 9.

The BBT Comments On This Petition
Actually Document That, As Charter Is
Forced To Admit, Charter's System Is Not Standard

The February 28 letter on behalf of Charter assumes that CEA and the public bear some burden to prove that Charter's planned system is *not* standard. That the system is not standard, however, has already been demonstrated in the record by the BBT Comments to which Charter now turns for support. As CEA noted in its December 13, 2012 *ex parte* letter, BBT commented on Charter's petition about its supposedly "standard" solution by urging the Bureau to adopt BBT's *different* technology *instead*.¹⁴

BBT, in supporting Charter's waiver, does not claim that its own technology or Charter's is standards-based, does not claim that its technology is interoperable with Charter's or with Cablevision's, and cannot cite a single instance of a competitive device operating on a system that uses BBT technology. Indeed, BBT uses the FCC comment forum to urge Charter to adopt the BBT system *in preference to the one for which a waiver is sought*. BBT:

- Cites the FCC as recognizing downloadable security as "potentially" better than CableCARD, but admits that the only system that was promised, like CableCard, to be nationally interoperable "failed."¹⁵
- Admits that its system is microchip-based and can cite only "cable set-top boxes" as employing this microchip.¹⁶
- Urges that its own system is "the best approach" but admits it would be "foolish" to claim it is the only approach that will be deployed.¹⁷
- Urges Charter to adopt the BBT technology in preference to the technology for which Charter has sought this waiver.¹⁸

¹⁴ Letter from Julie M. Kearney, December 13, 2012, at 2 – 3 (footnotes per original).

¹⁵ BBT Comments at 5.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4 – 5.

The very record item now cited by Charter as establishing that its system is “standard” actually says that it would be “foolish” to make any such claim. Indeed, the February 28 letter on behalf of Charter can cite only *possible* interoperability with Cablevision’s (undocumented) system, on which the Bureau has *explicitly declined to rule*, and no other.

Charter is left only to assert that its system is a step “closer to” interoperability.¹⁹ As the well-documented and torturous experience with CableCARD implementation and support showed, being “close to” interoperable and being “interoperable” are far from the same thing in the real world.²⁰

There Is No Public Benefit From Grant Of This
Petition Other Than That Claimed For A
Bureau-Level Rejection Of Common Reliance

As CEA noted in its February 14 letter, Charter could not document its assertion that its planned procurement of non-compliant customer premises equipment was necessary to a transition to digital techniques. The February 28 letter now claims, instead, that grant of the petition is necessary for Charter to move to a “more modern” system that is “less expensive.”²¹ As CEA also noted on February 14, however, Charter has assured investors that if the waiver is not granted it has both the resources and the incentive to move to more modern systems and more advanced set-top boxes *and will do so in any event*.²² Thus there is no evidence in the record that this waiver is necessary to any system modernization.

¹⁹February 28 letter. Charter admits at p. 2 that its “solution” is *not* software based, and at p. 3 that its system is designed to “*increase interoperability and portability*” (emphasis added) so that a device might possibly work on Cablevision’s network too. Charter thus admits that its system (1) is hardware-based and (2) is not interoperable with other cable networks, except, possibly and potentially, Cablevision’s.

²⁰ See, e.g., CEA Opposition at 7 and n. 19.

²¹ February 28 letter at 7.

²² “[W]e’ve gone to the FCC and actually asked for a waiver so that we can buy an even less expensive box. But our strategy isn’t predicated on the FCC approving it, but we think it would be great if they did, because it would actually take cost out of the business and ultimately get us to a place where we could go all-digital faster.” Corrected Transcript, UBS Global Media and Communications Conference, response of Thomas M. Rutledge, president, Chief Executive Officer & Director, Charter Communications, Inc., Dec. 3, 2012. The full transcript may be purchased at <http://www.alacrastore.com/research/thomson-streetevents-Charter at UBS Global Media and Communications Conference-T4963408>.

Conclusion

Each of Charter's new arguments to save its waiver application is one that has been previously made and has been demonstrated to be either a mis-statement of the record or to have no support in the record. What Charter actually seeks is a change in Commission policy that would require a Commission-level rulemaking rather than a Bureau waiver. CEA closed its November 30 Opposition by observing that a comprehensive rulemaking to modernize the Commission's implementation of Section 629 is overdue. In any such rulemaking, however, the Commission should move forward – toward a truly standard, IP-based interface – rather than backward, so as to undermine the degree of retail commonality it has managed to achieve in its rules.

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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cc:

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