



Consumer Electronics Association
1919 South Eads Street
Arlington, VA
22202 USA
(866) 858-1555 toll free
(703) 907-7600 main
(703) 907-7601 fax
www.CE.org

Via Electronic Filing

March 15, 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 March 13, 2013 *ex parte* submission by counsel Paul Glist, Charter is unable to support its February 28 assertion that the Media Bureau's January, 2009 temporary extension of the 2007 Cablevision waiver was a "separate" action. Charter also cannot dispel the fact that in extending the 2007 waiver the Bureau explicitly *declined* to rule that Cablevision's planned "downloadable" system would be compliant with Commission regulations. Charter instead in a footnote cites (without agreeing with) CEA's observation in its February 17, 2009, Application for Review that the Bureau, in extending the 2007 waiver for a limited time, had "changed the rationale."

CEA at no time questioned the obvious – that the Bureau's 2009 action was a *unique extension of a grandfathered waiver application*. CEA did complain that while *not* a legal precedent,¹ the potential breadth and the vagueness of the extension would invite follow-on waiver requests that lacked the history of Cablevision's. Indeed, CEA noted that the Bureau had *not even published Cablevision's extension petition for comment*.²

¹ Consumer Electronics Association Application for Review, CSR-7078-Z, CS Docket No. 97-80, at 8 and n. 11 (Feb 17, 2009) ("CEA Application").

² CEA noted that its Opposition had been filed on "only a failsafe basis after having been unable to determine whether the Bureau intended to publish [the extension petition] for comment." *Id.* at 2, n. 2.

CEA warned that, through regulation by waiver, the Bureau was approaching incoherence – on the one hand mandating compliance with a promised implementation of a security technology, and on the other explicitly *declining* to determine whether this technology would be compliant. Cablevision had not provided necessary facts, and the Bureau had neither demanded such information nor provided for public comment on any facts or assertions. It was in this sense that CEA noted that the Bureau had “changed the rationale.”³

What CEA did say in its Application, on which the FCC has never formally ruled,⁴ was that while CEA would not necessarily object to, and could support, a potential ruling by the Commission that Cablevision’s or some other operator’s “downloadable” system is compliant, the FCC could not sensibly do this outside a rulemaking that is subject to public comment. Quoting earlier exhaustive correspondence on this subject, CEA said at 10 – 11 (notes and emphasis in original):

CEA has on several occasions advised the Commission of the minimum requirements that any “downloadable” system must have to equate to the functionality of a CableCARD and to potentially supplant the CableCARD in use.⁵ Almost two years ago, CEA compiled and listed, in a filing with the Commission, what it viewed as the necessary attributes:

“As the Commission now deals with a veritable avalanche of local system requests for waivers or for, essentially, a declaration of compliance ... , the

³ *Id.* at 4-5.

⁴ However, pursuant to the CEA Application, the acting chief of the Media Bureau, on March 31, 2009, initiated and convened a conference call with Cablevision and CEA counsel, and counsel for the other objecting party, Nagra, in the presence of other Bureau staffers, in which the MB informed counsel for Cablevision that the FCC would *not* take action to enforce the M&O’s mandate that Cablevision purchase particular STBs by April 1, 2009 and thereafter.

⁵ *See, e.g., In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7131-Z, Letter from Julie M. Kearney, Sr. Dir. and Regulatory Counsel, CEA to Marlene Dortch, Sec. FCC, Re: *Ex Parte* Presentation, CS Docket No. 97-80, CSR-7131-Z (Apr. 24, 2006) (“CEA ex parte letter”); *In the Matter of Evolution Broadband, LLC Petition for Waiver of 47 C. F. R. § 76.1204(a)(1)*, CS Docket No. 97-80, CSR-7902-Z, Opposition of the Consumer Electronics Association to Evolution Broadband, LLC Petition for Waiver of 47 C. F. R. § 76.1204(a)(1) (Jun. 16, 2008).

Commission should clarify that, *in addition* to being truly and essentially “downloadable,” a representation as to a “downloadable” security system should prove compliance with the following attributes – *all* of which are provided for in the current CableCARD ...regime approved in October 2003:

- (1) a national interface so that a DTV television receiver or competitive product can be nationally marketed and moved by the consumer from one local system to another,
- (2) manufacturer input into the specification and any planned changes, and review prior to final adoption,
- (3) reasonable host device implementation specifications and support for competitive home networks,
- (4) self-certification of implementation,
- (5) support of competitive home networks,
- (6) true renewability to the software, including updates to the host end of the interface via firmware,
- (7) licensing terms that comport with FCC regulations limiting MSO control over devices to assurance against theft of service and harm to the cable network, and
- (8) compliance with all other FCC regulations pertaining to cable systems and competitive availability of devices.

These attributes are far from radical – as noted, all of them are met by the existing CableCARD, *if* adequately supported under any reasonable interpretation of the existing DFAST license for CableCARD technology. ***The Commission should insist that any successor to the CableCARD meet these same requirements.***⁶

The Application explained why a “downloadable” system without such metrics would be useless in facilitating entry, by quoting from a 2007 CEA filing (emphasis and note in original):

“The chipsets and firmware necessary for navigation devices to implement “downloadable” security are not themselves “downloadable.”

⁶ CEA ex parte letter at 9-10 (emphasis in original, internal citations omitted).

Rather, the electronic interface for each system would have to be separately engineered and built into the hardware and software of any television or other navigation device. If there can be any number of such "downloadable" systems – indeed, if more than one – any advantage of separable security would be lost, as there would still be no common security interface. The navigation devices would be no more, and perhaps less, nationally portable than are present integrated-security set-top boxes. And, as in the case of present set-top boxes, a different and perhaps incompatible license would be required from each system vendor. Thus, despite all of its efforts to assure competitive navigation devices via separable security, ***a national patchwork of different “downloadable” systems would put the Commission back where it started a decade ago – with individual, proprietary security solutions posing a fundamental obstacle to competitive entry***.⁷

These observations apply to Charter’s proposal as well. None has been contravened by anything filed by Charter.

Charter’s March 13 letter concludes by claiming CEA was wrong to be concerned about the waiver for Cablevision because CableCARDs continue to be deployed on its systems. The question, however, is whether “downloadable” security can be a substitute for CableCARDs in supporting retail devices. Six years after the 2007 waiver and four years after the 2009 extension, *no retail product has emerged that can rely on Cablevision’s, or any other operator’s, version of “downloadable” security*. Precisely for the reasons cited by CEA in 2005, 2007 and 2009 and reviewed above, Charter’s filings offer no hope that any retail product can be based on the system for which Charter now seeks a waiver.

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

Respectfully submitted,

/ ***Julie M. Kearney*** /

Julie M. Kearney
Vice President, Regulatory Affairs

⁷ *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7218-Z-CSR-7222-Z, CSR-7227-Z, Comments of the CEA on Six Requests for Waiver of 47 C.F.R. § 76.1204(a)(1) at 3 (July 5, 2007) (emphasis in original). Indeed, if each cable operator were to use a different “downloadable” technology, then it is difficult if not impossible to see how a competitive entrant could create any business model except selling devices directly to cable operators for lease to consumers.

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cc:

William Lake
Sean Lev
Michelle Carey
Mary Beth Murphy
Steve Broeckaert
Alison Neplokh
Brendan Murray
Adam Copeland
William D. Freedman
Suzanne Tetreault
Kim Mattos
Susan Aaron