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March 29, 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:

On March 29, 2013, as counsel to the Consumer Electronics Association ("CEA"), the undersigned had a telephone conversation with Lyle Elder, Legal Advisor to Chairman Genachowski, on the subject of purportedly ameliorative circumstances pertaining to and offers made by Charter, and on whether a waiver granted to Charter, although sought as a singular circumstance, would likely be cited as a general precedent by other cable operators. During this conversation and on March 27, on behalf of CEA the undersigned answered questions as to both the singularity of Charter's circumstance and whether the ameliorative representations made by Charter are, in CEA's view, sufficient to justify a waiver as potentially contributing to interoperability, hence not undermining the regulation as to which the waiver is granted. In these conversations the undersigned conveyed that CEA's position on these points remains as expressed in his *ex parte* letter, on behalf of CEA, of March 22. Pursuant to the undersigned's obligations under Section 1.1206 of the Commission's rules, however, the references and observations made on behalf of CEA are set forth below.

Singular Factors With Respect To Charter

In response to questions as to elements that would contribute to a finding that Charter's case is singular or unique, the undersigned acknowledged the following on behalf of CEA:

- **Capital Costs and Expenditures.** More than half of the counties that Charter serves are majority rural, and the cities that it serves are primarily second tier cities. Charter systems are widely dispersed and are the least densely concentrated among the six largest cable operators. Accordingly, Charter's per-headend subscriber cost to deploy downloadable security is substantially higher than for any other large operator. Charter's capital expenditures as a percentage of revenue are the highest in the industry.

- **Commonality with Cablevision.** To the extent Charter's solution is to be the same as Cablevision and will be interoperable with Cablevision, this provides *some* hope of an industry standard being developed.

Ameliorative Conditions Lacking In Offer

In answer to questions as to commitments by Charter that potentially would aid interoperability with other MSO systems and with competitive devices, the undersigned identified the following commitments that, if offered, would demonstrate an enforceable commitment toward interoperability (though still in CEA's view would be inadequate):

CableCARD Support. Charter has not committed to providing free CableCARDS to retail devices for so long as customers want CableCARDS. This is a relatively small cost to Charter relative to the savings claimed for the waiver yet would demonstrate a commitment to future retail innovation as well as a benefit to subscribers using retail devices.

Chips, Technology, Software, Code. Consistent with Charter's claims as to future interoperability:

- Any waiver should be limited to the use of commodity chips, available to leased and retail host manufacturers through established supply chains.
- The code for downloadable security should be required to be available royalty free to facilitate easy inclusion in readily-available commodity chips.
- Charter should be required to assure, pursuant to Section 76.1205, that its downloadable security technology be commercially available on a non-discriminatory basis to manufacturers of retail devices, and the requirements necessary for such devices to access Charter's cable services be publicly available.¹

Licensing. CEA observed in its March 15, 2013 letter that proponents of downloadable security should be held to commitments equivalent to those accepted by CableLabs and cable MSOs in the DFAST license agreement for the conditional access technology used in CableCARDS.² Hence any waiver granted to Charter should at a minimum require Charter to

¹ Charter has "recommitted to the Commission's CableCARD support rules," though expressing doubt as to the status of "many" of them in light of the Echostar decision. *See* Charter counsel letters of February 6 and February 28, 2013.

² *See* www.cablelabs.com/opencable/.../DFAST_Tech_License.pdf.

meet the same criteria, as set forth at page 3 of CEA's March 15 letter. Any such Charter commitment should be subject to enforcement by the Commission for non-adherence.

Interoperability. CEA stressed in its March 15 (page 4) and March 22 (page 1) letters that there has been no real world proof that a nominally "downloadable" system actually affords interoperability with more than one manufacturer's device or with any other operator's system. If Charter is to be allowed to proceed via waiver it should commit to such demonstrations, in a preliminary stage, before being allowed to deploy more widely:

- Charter should prove interoperability between their "downloadable" solution and Cablevision's, on a minimum of 1,000 devices in customers' homes for at least 6 months before wider deployment can proceed.
- Charter should prove interoperability among several hardware vendors, at least two independent vendors deployed, each with minimums.

Include CableCARD-Reliant Products In Innovation. CEA has expressed the concern, based on episodes such as the deployment of "switched digital" techniques, that when navigation devices reliant on the nominally "downloadable" conditional access regimes receive upgrades via firmware, software, codes, or new services, the same or equivalent upgrades will *not* be offered to CableCARD-reliant devices (or they will be hobbled by the requirement of additional MSO-provided boxes, as in the case of switched digital). By such means, Charter can move its market away from CableCARD-reliant products, *even if* Charter keeps every other pledge. Hence, any new services on a navigation device reliant on "downloadable" conditional access, including IP-delivered services, must be made available on CableCARD devices *at the same time as they deploy on "downloadable" devices, not after*. This may entail implementing changes to the CableCARD specification and testing regime in place first, or openly publishing and providing a testing regime for the web services used in advance.

Presumably Charter intends that the navigation devices subject to waiver would be "two-way" products (capable of interactive service discovery so as to furnish an interactive EPG and provide services on demand), whereas Section 2.1 of the current DFAST license specifically does not grant any license for "manufacture, sale or distribution of advanced interactive (two way) digital cable products." Charter's enablement of IP service delivery to CableCARD-reliant devices, therefore, should require both Charter and DFAST licensor CableLabs to affirm to the Commission that the DFAST license should not be construed to restrict, limit, or govern the IP-enabled (*i.e.*, inherently two-way) operation of DFAST-licensed products on any cable system with respect to MVPD programming or services, and that such operation would not be contrary to Sections 1.19, 2.1, 2.2, or any other provision of the DFAST license or of its Amendments or Appendices, or contrary to any other agreement or undertaking required by CableLabs, or by a system operator, of a DFAST licensee.

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CEA maintains its concern and position that any waiver granted to Charter, even though conditioned as above, would further move system development away from CableCARDs at a time when the Commission has taken no steps (as promised in the National Broadband Plan, in the Basic Tier order, and elsewhere) to identify a successor common interface pursuant to its obligations under Section 629. Even if Charter in good faith and as an evolutionary step supports IP-enabled operation on its systems of CableCARD-reliant devices there would be no assurance that Charter's IP interface would be interoperable with that of any other cable operator or MVPD, despite the obvious benefits for competition among MVPD systems, as well as in leased and retail device offerings, that such interoperability would afford.

As CEA has asserted consistently with respect to this and other waiver applications, and as the Commission implicitly agreed in note 162 to the Basic Tier Report & Order, Media Bureau waivers cannot be substitutes for policy decisions by the Commission. For the Commission to maintain compliance with Section 629 of the Communications Act, a Notice of Proposed Rulemaking seeking comment on a common and interoperable IP-based interface is essential and overdue.

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

Respectfully submitted,

Robert S. Schwartz

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Cc:

Zac Katz
Lyle Elder
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