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April 8, 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 April 8, 2013, as counsel on behalf of the Consumer Electronics Association ("CEA"), the undersigned communicated by email with Zachary Katz, Chief of Staff, and Lyle Elder, Legal Advisor, to Chairman Genachowski; and Bill Lake, Chief, and Michelle Carey, Deputy Chief, of the Media Bureau, with respect to the above entitled matters. The undersigned reiterated CEA's opposition to Charter's pending waiver petition, as expressed in CEA's Opposition of November 30, 2012, and in *ex parte* letters from Julie Kearney, Vice President, Regulatory Affairs, dated December 13, 2012, January 28, 2013, February 14, 2013, February 28, 2013, March 7, 2013, and March 15, 2013.

In reacting to Charter's April 5 *ex parte* filing, the undersigned expressed surprise that Charter now apparently anticipates that if its waiver petition is granted, this would relieve Charter of its core Section 76.1204 obligation to *supply* CableCARDS. Charter apparently now claims that by moving to its "downloadable" version of integrated security, which has *never* been demonstrated to be interoperable from system to system or device to device, Charter would be relieved of *all* obligations under the Commission's 1998 First Report & Order.

Charter's April 5 filing reserves the right to terminate CableCARD support as soon as an unspecified "third party" downloadable device is "available for use by Charter subscribers."¹ Charter does not say that a downloadable-reliant device would need to be available to subscribers of any other cable system, because Charter has never been able to support any such representation. Thus, Charter's "promise" is the same as could be made for any integrated security device – that a third party could sell a version of the device that Charter leases, or

¹ "Charter will continue to provide CableCARDS for new CableCARD devices until such time as a third-party retail device with downloadable security is available for use by Charter subscribers."

possibly could be induced to furnish a limited number of one-off devices, only to Charter subscribers.

This is a well-worn tactic to avoid compliance with Section 76.1204, which has been unsuccessful when proffered to the Commission in a regulatory context. A dozen years ago, NCTA tried to persuade the Commission to accept, as “compliance” with Section 629, the third party sale of integrated security devices.² The industry also claimed that CableCARD-reliant devices were “available” for consumer use, but did not appear in the market because retailers had refused to order them.³ The Commission saw through these ruses – it did not accept a retail offer of system-specific integrated boxes as compliance with Section 629. Nor was the Commission satisfied by claims that CableCARD-reliant products were somehow “available,” without any showing that such a device would actually work on more than one system.

It is disturbing that Charter already, prior to the grant of any waiver, purports to establish its own terms and terminology for what would constitute compliance. It is equally disturbing that Charter is already “walking back” the few promises that it *had* made to the Commission and to the public.⁴

² NCTA suggested as early as 2001 that its members might satisfy Section 76.1204(a)(1) by licensing their own integrated conditional access technologies. *See* Letter from Robert Sachs, Pres. & CEO, NCTA to Hon. Michael K. Powell, FCC re: Commercial Availability of Navigation Devices at 2, CS Dkt. No. 97-80 (Oct. 10, 2001); CS Dkt. No. 97-80, Consumer Electronics Retailers Coalition Reply to the NCTA Letter as to “Retail Set-Top Initiative” and to the NCTA Response to CERC Status Report “J2K Plus 1” at 6-7 (Nov. 6, 2001). This offer has never been regarded as sufficient by the FCC or, apparently, by any potential retail entrant.

³ *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CERC Status Report, .J2K Plus 1, at 4 (Jul. 16, 2001).

⁴ *Charter petition pp. 4-5*: “For consumer electronics manufacturers still not ready to take that approach, CableCARDS will continue to be supported even after the downloadable architecture is activated, because the simulcrypt system will support both current and downloadable security architectures.” *Charter Dec. 14 ex parte*: “Charter will continue to support CableCARDS by necessity.” *Charter Feb. 6*: “Charter voluntarily commits to continue support for Unidirectional Digital Cable Products ... and to support self-installation.” *Charter Feb. 28*: “Charter will not – and indeed cannot – abandon support for CableCARDS.”

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One problem with “regulation by waiver” is that, unlike a rulemaking, the opportunity for public comment is limited to whatever the private proponent – not the Bureau or the Commission – proposes. Where the Bureau arrives at a new, quasi-regulatory result, the outcome is further divorced from anything that *either* the proponent *or* the Commission has proposed. The result is that the Commission’s core responsibilities are delegated to *two* Bureaus – the Media Bureau *and* the Enforcement Bureau – to parse, months or years later, just what it was that the proponent asked for, and what it received – all without public comment or input.

In 1999, in responding to petitions for reconsideration, the Commission said:

“We continue to believe that the ban on integrated devices will serve the public interest. In the Navigation Devices Order, we stated our belief that competition among equipment manufacturers in the marketplace will lead to increased consumer choice and a corresponding decrease in the cost of equipment.”

When Charter sued the Commission over a footnote in the March 17, 2005 “deferral” order that said the Commission would not consider any additional delays in implementing Common reliance, Charter lost. 460 F.3d 31 (2006). The next year, in the MO&O granting the 2007 Cablevision waiver, the Media Bureau specifically *rejected* the argument that cost and related considerations were grounds for grant of a waiver under Section 629(c), observing that such a grant “effectively would nullify the goal of Section 629(a).” 2007 MO&O at 14-15.

The April 5 filing affords even less comfort than existed when CEA observed in its March 22 *ex parte* letter that even if Charter still supplies CableCARDS, a waiver would promote system development away from CableCARDS at a time when the Commission has taken no steps to identify a successor common interface. The result would be a waiver that eviscerates the rule under which it is issued.

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

Respectfully submitted,

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Cc:

Zac Katz
Lyle Elder
Bill Lake
Michelle Carey