

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Charter Communications, Inc.'s)	
Request for Waiver of Section 76.1204(a)(1))	CSR-8740-Z
of the Commission's Rules)	
)	MB Docket No. 12-328
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of)	
Navigation Devices)	
)	

APPLICATION FOR REVIEW

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TABLE OF CONTENTS

SUMMARY AND FACTORS WARRANTING REVIEW BY THE COMMISSION i

INTRODUCTION AND SUMMARY 1

I. THE BUREAU’S ORDER IS INCONSISTENT WITH COMMISSION REGULATIONS AS ADOPTED IN THE FIRST REPORT AND ORDER IN 1998 AND IN THE THIRD REPORT AND ORDER IN 2010..... 5

 A. The Order’s Post-Waiver Terms Are Illegal Under The Commission’s 1998 First Report & Order, Which Specifically Requires Charter To Provide CableCARDS. 6

 B. The Order’s Post-Waiver Terms Are Also Illegal Under Section 76.1205(b)(1), Added In October 2010 In The Third Report & Order, Which Specifically Requires An MSO To Furnish A CableCARD To Any Subscriber Requesting One. 8

 C. The Echostar Decision Did Not Disturb The 76.1204(a)(1) and 76.1205(b)(1) Obligations Adopted In The First And Third R&Os. 9

II. THE BUREAU’S ORDER IS UNSUPPORTED BY ANY FACTUAL SUBMISSIONS OR FINDINGS AND IS RIFE WITH INCONSISTENCIES AND INCORRECT ASSUMPTIONS. 11

 A. The Bureau’s Order Relies On Vague Assumptions And Hopes In Lieu Of Factual Findings Necessary To Equate Charter’s Technology With CableCARDS..... 11

 B. The Technical Elements Relied On By The Bureau As Support For Its Beliefs, Hopes, And Assumptions Are No More Likely Than Fully Integrated Security To Support Operation Of A Device On More Than One MSO System. 13

 C. No Action By The Commission Has Equated “Downloadable” Technology With The CableCARD Requirements Set Forth In The First and Third R&Os. 19

III. THE BUREAU’S ORDER VIOLATES THE ADMINSTRATIVE PROCEDURE ACT..... 21

IV. THE BUREAU’S ORDER VIOLATES SECTION 629 OF THE COMMUNICATIONS ACT. 22

CONCLUSION..... 23

SUMMARY AND FACTORS
WARRANTING REVIEW BY THE COMMISSION

The Consumer Electronics Association (“CEA”) seeks Commission review pursuant to 47 C.F.R. Section 1.115 of the Media Bureau’s Memorandum & Order (“Order”) granting Charter Communications, Inc. (“Charter”) a waiver of Section 76.1204(a)(1) of the Commission’s rules, and granting other relief not petitioned for by Charter. The action taken pursuant to delegated authority satisfies every one of the factors listed in subsection 1.115(b)(2):

- (i) The Order is in conflict with Section 629 of the Communications Act and with Commission Regulations 76.1204(a)(1) and 76.1205(b)(1). Section 629 requires that FCC regulations assure competitive commercial availability of retail navigation devices, whereas the Order effectively nullifies these explicit Commission rules and orders with respect to Charter.
- (ii) The Order does not make any legal finding to support the post-waiver relief granted, hence poses a new question of law as to the status and meaning of Sections 76.1204(a)(1) and 76.1205(b)(1), as well as that of Section 629.
- (iii) The Order would establish a Bureau-level precedent undermining the need for cable operators to comply with requirements explicitly laid down by the Commission in the First and Third Report and Orders, as well as with the regulations themselves.
- (iv) The Order is based on clearly erroneous statements of belief and unsupported assumptions as to important and material facts, which constitute erroneous findings because they are the only support for the relief given.
- (v) The post-waiver relief granted to Charter was never included in either the Request for Waiver or the Public Notice. No legal findings were made in support of effective nullification of two Commission regulations. Supposition was substituted for findings. These are procedural errors under Commission practice and the Administrative Procedure Act.

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APPLICATION FOR REVIEW

The Consumer Electronics Association (“CEA”) files this application for review of the Media Bureau’s (“the Bureau”) Memorandum Opinion and Order (“Order”) granting Charter Communications, Inc. (“Charter”) a waiver of Section 76.1204(a)(1) of the Commission’s rules.¹ CEA files this application pursuant to Section 1.115 of the Commission’s rules² and asks that the Commission review and rescind the Order.

INTRODUCTION AND SUMMARY

On October 14, 2010, the Commission unanimously approved a Third Report & Order and Order on Reconsideration (“Third R&O”)³ emphasizing the importance, to

¹ *Charter Communications, Inc.’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order (rel. Apr. 18, 2013) (“Order”).

² 47 C.F.R. § 1.115.

³ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Third Report and Order and Order on Reconsideration (rel. Oct. 14, 2010) (“Third R&O”).

compliance with Section 629 of the Communications Act,⁴ of CableCARDs in providing a standard, uniform, and nationally interoperable interface for competitive devices on cable systems. On April 18, 2013, the Media Bureau effectively repealed the Commission's First⁵ and Third R&Os as they pertain to Charter, and established what may be a dangerous precedent. The Bureau granted relief for which Charter never petitioned, including a result that Charter's Petition, as published by the Bureau for public comment, specifically disclaimed. Yet the Bureau declined to rule whether this relief, which extends indefinitely *beyond* the waiver period granted, would comply with FCC regulations or the law. The Commission cannot let this Order stand.

On November 1, 2012, Charter requested a waiver from the "integration ban" provision of Section 76.1204(a) of the Commission's rules, on the basis that Charter intends to deploy purportedly "downloadable" security.⁶ Charter did not request a finding that its technology would substantively satisfy its post-waiver obligations to support competitive devices under Section 76.1204(a), nor did Charter petition for a waiver from Section 76.1205(b)(1),⁷ which requires cable operators to *supply* a CableCARD, for self-installation, to any subscriber requesting one.

⁴ 47 U.S.C. § 549(a).

⁵ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Report and Order (rel. June 24, 1998) ("First R&O").

⁶ *Charter Communications, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules*, CSR-8740-Z, CS Dkt. No. 97-80, MB Dkt. No. 12-328 (Nov. 1, 2012) ("Charter Request").

⁷ 47 C.F.R. § 76.1205(b)(1) was added to the Commission's rules in its Third R&O, released Oct. 14, 2010; *see* Third R&O, App. B at 45-46.

Charter did not assert that a device that will work on Charter's systems will in fact work on any other cable system, or that a device that will work on another system will work on Charter's. On November 7, the Bureau released Charter's Request for public comment.⁸ In the published Request, Charter assured that, since it could not guarantee that all manufacturers could or would build to its technology or that any other MSO would adopt or conform to it, Charter had no intention to stop supplying CableCARDS. Charter said that any decision to stop "supporting" CableCARDS would inconvenience subscribers. As to continued support of competitive devices, Charter assured the public that Charter's intention to continue "supporting" CableCARDS would allow *manufacturers* to continue, *indefinitely*, to offer competitive products that rely on CableCARDS.⁹ The Commission's Nov. 7 Public Notice relied on and quoted from this portion of Charter's Petition: "Charter has plenty of incentive to make sure that CableCARDS work in its systems to support the 33,000 CableCARDS it has provided to customers for use in retail devices."¹⁰ The Public Notice did not state or suggest that the Bureau might read Charter's pledge of "indefinite support" for CableCARDS as excluding any intention to keep *supplying* them. The Bureau required public comment by Nov. 30, 2012.

CEA opposed Charter's Request for relief from Section 76.1204(a) on the basis that as admitted in the Request the purportedly "downloadable" security system in fact

⁸ Public Notice, *Charter Communications, Inc. Files Request for Waiver*, 2012 WL 5462921 (rel. Nov. 7, 2012) ("Public Notice").

⁹ Charter Request, at 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").

¹⁰ Public Notice, at **1.

relies on the *integration* of a semiconductor chip and its unique format for software – thus is not really “downloadable,” either in concept or in function. CEA’s Opposition and subsequent filings pointed to specific facts showing that Charter’s system, as described, could not support devices designed to work on other systems; that devices designed for other systems could not work on Charter’s systems; and that the only other system with which interoperability *might* be attained is Cablevision’s.¹¹ Hence, CEA pointed out, while “downloadable security” *potentially* could support retail devices, Charter’s technology is not significantly different from other systems that rely on integrated semiconductor chips.¹² There is no reason to expect Charter’s system to provide, as do CableCARDS, a standards-based interface for support of competitive devices. Charter did not substantially deny this.¹³ Nor, in its Order, does the Bureau.

The Bureau’s Order did not disagree with or discount the facts as presented by CEA. Instead, the Bureau observed that Charter had “not requested” any finding that its technology would comply with Section 1204(a).¹⁴ Nevertheless the Bureau granted, in addition to a two year waiver, a *carte blanche* post-waiver authorization freeing Charter from compliance with Sections 76.1204(a)(1) and 76.1205(b)(1), so long as Charter observes certain back-of-the-envelope “conditions” that had never been offered for public

¹¹ CEA Comments, Nov. 30, 2012 re Charter Request, at 2 – 6; *ex parte* ltrs from Julie M. Kearney, Vice President, Regulatory Affairs, to Marlene H. Dortch, Sec., FCC, Dec. 13, 2012 at 1 – 4, Jan. 28, 2013 at 1 – 2, Feb. 14, 2013 at 3, Mar. 7, 2014 at 3 – 4, Mar. 15, 2013 at 2 – 4..

¹² Cable industry commentators reading the Order appear to agree: “Last Monday (April 20), something momentous happened We’re back to integrated security now.” Leslie Ellis, *What the Charter Waiver Means to Cable*, Multichannel News, Apr. 29, 2013.

¹³ Charter provided only speculation, not assurance, that devices designed for its system might also work on Cablevision’s system. Cablevision has not supported Charter’s Request.

¹⁴ Order ¶ 12.

comment. Charter had not applied for this relief or even suggested it until April 4, when Charter filed a 1-page *ex parte* letter that was publicly posted on April 5.¹⁵ The April 5 posting was the first public suggestion that, in the post-waiver period, Charter would stop supplying CableCARDs. In freeing Charter from its post-waiver obligations by fashioning arbitrary conditions never offered for public comment, while declining to determine whether this outcome complies with Commission regulations or Section 629 of the Communications Act, the Bureau's Order exceeds both its own delegated authority and the Commission's legal authority.

The Commission cannot let stand this nullification of law and regulation, without process or public comment. Unless the Commission reviews and rescinds this Order the Bureau will have erased the core obligation of cable operators under Section 629 to support competitive devices, without any factual or legal finding to support this result, or any Public Notice. In addition to exceeding delegated authority, the Order violates the Administrative Procedure Act ("APA")¹⁶ by revising substantive rules without an opportunity for public comment, eviscerating a regulation in the guise of waiver relief, and ignoring extant regulations. If sustained by the Commission this result would not be entitled to deference by a court.

I. THE BUREAU'S ORDER IS INCONSISTENT WITH COMMISSION REGULATIONS AS ADOPTED IN THE FIRST REPORT AND ORDER IN 1998 AND IN THE THIRD REPORT AND ORDER IN 2010.

The Commission's May 14, 1999 Order on Reconsideration succinctly summarizes and confirms the obligations placed on cable operators by the Commission's

¹⁵ *Ex Parte* ltr from Thomas M. Rutledge, Pres. and CEO, Charter Communications, Inc. to Marlene H. Dortch, Sec., FCC, re: Charter Request (Apr. 4, 2013).

¹⁶ 5 U.S.C. 500 *et seq.*

1998 First R&O to implement Section 629 of the Communications Act, and confirms that the First R&O's specific requirements on certain MSOs include a *specific requirement to furnish CableCARDS* (referred to here by their earlier name, "PODs"¹⁷): ***

(4) MVPDs must separate out conditional access or security functions from other functions by July 1, 2000 *and make available modular security components, also called Point of Deployment Modules ("PODs")*;

(5) After January 1, 2005, *MVPDs shall not provide new navigation devices that have security and non-security functions combined*,¹⁸

The Bureau's Order violates Commission regulations by allowing Charter in the post-waiver period to substitute, for Charter's specific obligation to furnish CableCARDS, an ill-described integrated security technology that is functionally no different from the legacy technology for which Charter admits it requires a waiver. This violates law and regulation.

A. The Order's Post-Waiver Terms Are Illegal Under The Commission's 1998 First Report & Order, Which Specifically Requires Charter To Provide CableCARDS.

Section 629 of the Communications Act¹⁹ provides as follows:

(a) Commercial consumer availability of equipment used to access services provided by multichannel video programming distributors

The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other

¹⁷ "The early cable removable security cards were called Point-of-Deployment (POD) modules. CableLabs later coined the term CableCARD™ *These are two names for the same thing.*" CableLabs, *OpenCable CableCARD* (emphasis added), http://www.cablelabs.com/opencable/primer/cablecard_primer.html.

¹⁸ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Order on Reconsideration ¶ 4 (rel. May 14, 1999) ("Reconsideration Order," emphasis added).

¹⁹ 47 USC 549(a).

equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.

After a Notice of Inquiry followed by a Notice of Proposed Rulemaking, the Commission in 1998 adopted 47 CFR Sections 76.1200 – 1210. In its First R&O the Commission observed “strong advocacy” requiring common reliance on separable security and a standard interface for leased and retail devices. The Commission pointed to common industry standards, and specifically to CableLabs’ development of the standards-based technology that resulted in the CableCARD:

76. *** A process is underway at CableLabs that should lead to standardization, design, and production of these security modules and permit the design, production, and distribution of the associated navigation devices for retail sale. Although neither OpenCable nor CableLabs are accredited standards organizations, they are attempting to use existing standards to the extent possible and to submit standards for consideration by official standards bodies. A number of the core standards involved, including such critical parts as the digital video compression and transmission standards for cable television, have been approved by accredited standards organizations already.

The First R&O pointed specifically to a June 4, 1998 letter to the FCC from the heads of the NCTA, CableLabs, and the eight (then) largest MSOs, including the CEO of Marcus Cable, which was acquired that year by Charter for \$2.8 billion. The June 4 letter *pledged to provide and support standard and separable digital security interface modules*, referred to on Reconsideration as PODs [CableCARDS].²⁰ In reliance on this letter and on standards-based information from NCTA, the First R&O set July 1, 2000 for MSOs to begin supplying the CableCARD modules.²¹ This obligation is *triply* binding on Charter

²⁰ See First R&O ¶ 78 & n.182.

²¹ NCTA still files periodic reports with the Commission summarizing member *deployment and support* for CableCARDS. See, e.g., CS Docket No. 97-80, ltr from Neal

– as successor to Marcus, as an owner of CableLabs, and today as the 4th largest MSO.

Until the Bureau’s Order, nothing has relieved Charter of this obligation.

B. The Order’s Post-Waiver Terms Are Also Illegal Under Section 76.1205(b)(1), Added In October 2010 In The Third Report & Order, Which Specifically Requires An MSO To Furnish A CableCARD To Any Subscriber Requesting One.

In its National Broadband Plan the Commission identified a need to establish a successor to the CableCARD interface and a need to strengthen the existing obligations on MSOs to supply and support CableCARDS.²² The FCC implemented this element of its plan in the Third R&O, released October 14, 2010:²³

Adoption of the Third R&O specifically remedies the CableCARD regime’s shortcomings identified in the Fourth Further Notice of Proposed Rulemaking by: (1) ensuring that retail devices have access to all video programming that is prescheduled by the programming provider; (2) making CableCARD pricing and billing more transparent; (3) streamlining CableCARD installations; and (4) streamlining requirements for manufacturers who build CableCARD devices.²⁴

The Third R&O specifically addressed CableCARD *supply* in the context of CableCARD *support*. It relabeled Section 76.1205 to read “CableCARD Support,” and added Section 76.1205(b), requiring an MSO to *supply* a CableCARD for self-installation whenever requested by a consumer:

M. Goldberg, Vice President and General Counsel, to Marlene H. Dortch, Sec., FCC (April 30, 2013).

²² FCC, Connecting America: The National Broadband Plan, at 36, 50-52, Sections 3.2, 4.2 & Recommendation 4.13 (rel. Mar. 16, 2010).

²³ Chairman Genachowski observed: “We’re under a congressional directive to spur competition in this market, and the Commission previously selected the CableCARD as its main vehicle to do so.” Commissioner Clyburn said: “We all appreciate the importance to consumers and the competitive market of supporting retail alternatives to equipment leased from cable operators. *** The rules we adopt today will require cable companies to fully support subscribers who opt to buy a cable box at retail.” Third R&O, App. C, at 51, 57.

²⁴ Press Release, *FCC Takes Action to Unleash Video Innovation and Consumer Choice*, FCC (Oct. 14, 2010).

§ 76.1205 CableCARD Support. ***

(b) A multichannel video programming provider that is subject to the requirements of Section 76.1204(a)(1) must:

(1) provide the means to allow subscribers to self-install the CableCARD in a CableCARD-reliant device purchased at retail and inform a subscriber of this option when the subscriber requests a CableCARD.²⁵

The Bureau's Order specifically *declined* to find that Charter is not "subject to the requirements of Section 76.1204(a)(1)". The Bureau granted no waiver from Section 76.1204(a)(1) beyond a two year period, and granted no waiver at all, and made no finding, and *never sought public comment* as to Section 76.1205.²⁶ Hence, even if the Order's conditions had been based on policy determinations and facts of record, the provision that excuses Charter from supplying CableCARDS would still be plainly illegal under Section 76.1205(b)(1).²⁷ Charter never requested relief from this regulation and the Bureau never granted any. There was no reference to it in the Bureau's Public Notice publishing Charter's Request for comment.

C. The *Echostar* Decision Did Not Disturb The 76.1204(a)(1) and 76.1205(b)(1) Obligations Adopted In The First And Third R&Os.

The Court of Appeals for the D.C. Circuit has specifically upheld the obligations adopted in the First R&O on all three occasions on which cable MSOs, including Charter,

²⁵ The Third R&O also added Section 76.1205(b)(2), to require that Multistream CableCARDS, comparable to those in leased boxes, be provided to support retail products. Third R&O, App. B, at 45-46.

²⁶ The Order, at paragraph 10 note 58, notes this as a "technical rule" but blinks at the obvious – that this is a provision requiring the *supply*, not just the support, of CableCARDS.

²⁷ There would be no point in advising a subscriber of a right to self-installation if the subscriber's request for a CableCARD were to be *denied*. Nor can this regulation sensibly be interpreted as limited only to replacement of presently installed CableCARDS.

have claimed that they exceed the Commission's authority under Section 629.²⁸ Nothing in the *Echostar* decision, first referenced by Charter in a Feb. 28 *ex parte* letter and gratuitously in the Order, disturbs or even purports to disturb the obligations from which the Order would excuse Charter²⁹.

The Bureau's discussion (par. 9) entirely ignores the unchallenged continued validity of Sections 76.1204(a)(1) and 76.1205(b)(1) and the elements of the First and Third R&Os specific to CableCARDs and the requirements to furnish and support them. The Bureau does not assert that these requirements are invalid and it makes no findings, and has invited no public discussion, on whether cable operators would have the right to re-interpret their extant and continuing regulatory and license obligations pertaining to CableCARDs in the wake of *Echostar*'s language about the *Second Report & Order*. The *Second Report & Order* did not modify Section 76,1204(a)(1) and could not have anticipated Section 76.1205(b)(1), which does not depend on it and was added seven years later. This offhand suggestion in the Order about the status of FCC regulations after *Echostar* is thus irresponsible, goes far beyond Bureau authority or any basis in the record, was not subject to public comment, and should be specifically disclaimed by the Commission.

²⁸ *Gen. Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Commc'ns v. FCC*, 440 F.3d 31 (D.C. Cir. 2006); *Comcast Corp. v. FCC*, 526 F.3d 763, 764 (D.C. Cir. 2008). ("Petitioners, for the third time, challenge the FCC's policy regarding set-top converter boxes. We again deny their petition for review.")

²⁹ Order ¶ 4; *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013); ltr from Paul Glist, Counsel for Charter Communications, Inc., to Marlene H. Dortch, Sec., FCC, re Charter Request (Feb. 28, 2013).

II. THE BUREAU’S ORDER IS UNSUPPORTED BY ANY FACTUAL SUBMISSIONS OR FINDINGS AND IS RIFE WITH INCONSISTENCIES AND INCORRECT ASSUMPTIONS.

The Bureau’s Order, like the Charter Request, deals in assumptions and hopes rather than in facts. In the face of contradictory record evidence, neither Charter nor the Bureau supplies anything more than assumptions and hopes. Thus, *even if* the Bureau had the authority to grant this waiver, nullify Commission regulations in periods beyond the waiver grant, and grant relief never requested or posted for public comment, its Order, if affirmed by the Commission, would be voidable as arbitrary and capricious.

A. The Bureau’s Order Relies On Vague Assumptions And Hopes In Lieu Of Factual Findings Necessary To Equate Charter’s Technology With CableCARDS.

The Order proffers the following hopes and assumptions in response to specific concerns and facts demonstrating that Charter’s technology cannot support a standard interface comparable to that supported by CableCARD technology: (1) That Charter’s requirement to supply CableCARDS “until a third party retail device is made available” would give Charter some new “incentive to foster creation of a retail device,”³⁰ (2) That because Charter “plans” to use “the same downloadable system as Cablevision” the creation of a retail market will be “more likely,”³¹ (3) That “we *believe* the collaboration between Charter and *a* consumer electronics manufacturer that we are requiring will ensure that the retail device developed will be nationally portable on Charter systems, Cablevision systems, and the systems of any other cable operator that *may* subsequently adopt the same type of downloadable security technology as Charter,”³² (4) That

³⁰ Order ¶ 12.

³¹ *Id.*

³² Order ¶ 13 (emphasis added).

“concerns that Charter will abandon support of CableCARD or adopt a downloadable system that does not rely on commodity chips or royalty-free key ladders are explicitly addressed by our conditions that require Charter to *indefinitely support*³³ CableCARD and implement a downloadable system relying on commodity chips and royalty-free key ladders.”³⁴

(1) The notion that Charter is being given an incentive in the post-waiver period to work toward a nationally portable and interoperable standard is baseless. Charter would need the cooperation of CableLabs and other MSOs to do so. As is discussed more specifically below, CableLabs and the cable industry set out to achieve national portability with its DCAS project and, in exchange for a year’s deferral of the “integration ban,” promised the FCC to achieve a nationally portable downloadable interface by 2008. *But CableLabs abandoned this project, as too expensive, in 2009.* Neither Charter nor the Bureau can point to any evidence that the cable industry is prepared to re-embrace this goal or such technology. Indeed, the only cable entity to file a comment on Charter’s Request was Beyond Broadband Technology, LLC (“BBT”), which has urged the Commission to either adopt its own incompatible technology instead, or to require elements, lacking in Charter’s technology, that purportedly would make interoperability possible.³⁵

(2) Technical standards is not a game of horseshoes. Even if Charter and Cablevision ultimately do align their systems (which neither of these operators nor the

³³ Reliance on the phrase “indefinitely support” would make the Commission complicit in Charter’s last-minute supposed distinction, posted on April 5, between “supporting” extant CableCARDS, and *supplying* CableCARDS to subscribers who request them.

³⁴ Order ¶ 13 (emphasis added, footnote omitted).

³⁵ Reply comments of Beyond Broadband Technology, LLC at 4 (Dec. 10, 2012).

Bureau has promised) this would not make devices designed for other systems any more likely to work on Charter's or Cablevisions. There is no evidence or promise in the record to even suggest such an outcome.

(3) Statements of "belief" that a result "may" occur are not findings and provide no basis for enforcement when events do not occur as "hoped" for. Substituting hope for findings is insufficient *when there has been no rulemaking and no public comment* as to the likelihood of a Bureau hope or belief having any real world basis.

(4) The Order's apparent acceptance of Charter's re-interpretation of its Request to say that "indefinite support" for CableCARD does not include "supply" is unworthy of the Commission. The Commission should not be complicit in misleading the public.

B. The Technical Elements Relied On By The Bureau As Support For Its Beliefs, Hopes, And Assumptions Are No More Likely Than Fully Integrated Security To Support Operation Of A Device On More Than One MSO System.

The Bureau relies entirely on Charter's nonspecific assertion that it will be "relying on commodity chips and royalty-free key ladders." There is no reason to assume, and the Bureau did not find, that these factors alone will provide a system that is any more friendly to retail devices than is fully integrated security.

"Commodity Chip" Nominally "downloadable" Conditional Access Systems ("CAS"), such as those of Cablevision, BBT, and Widevine are still based on an entire System On A Chip ("SOC"). That the chip is a "commodity" chip does not free it from all the obstacles to working on multiple devices on multiple systems:

- Charter cannot assure or even influence whether any other MSO will design its system to use the same chip or one that can interoperate with Charter's.

- Even if Charter could assure commonality of chips, this is just the first step in achieving interoperability. The next step is for all MSOs' CAS to use the *same* "trusted authority." Nothing in Charter's submissions indicates that Charter has the means to assure this, and no cable entity has filed to indicate or offer that this will be the case.³⁶
- Even if other MSOs were to suddenly change their hardware and standardize their roots of trust to conform their systems with Charter's, the Order does not require the *vendors* of the necessary CAS to license independent manufacturers and retailers – it only requires Charter to license technology that Charter itself controls.
- Hence, even if Charter can persuade or induce some vendor to make a product "available" at retail, there is nothing in the Order to fulfill the Bureau's "belief" that any device will work on more than *one* MSO's system. Thus, these requirements add up to a product working *at most* on Charter's system, but no others. This is no different from fully integrated security.

Key Ladder. Publication of the key ladder³⁷ does not provide a device with the necessary knowledge of how to use those keys to construct a secure communication path, nor does it give a receiver knowledge of how the higher-level functions such as entitlement are performed. It does not yield the mechanisms to download software to the receiver (to perform these functions), any way to verify that the downloaded software is trusted, or even a standardized CPU/OS architecture such that downloaded software is even possible. A similar "open" key ladder specification already exists within the European DVB.³⁸ That specification confirms that the key ladder is not sufficient for a

³⁶ Indeed, a part of BBT's claim that its incompatible system is superior to Charter's is that it purports not to rely on any trusted authority. Reply Comments of Beyond Broadband Technology, LLC, at 4 note, attached White Paper, at 3, 4, Addendum-I at 5 (Dec. 10, 2012).

³⁷ The "key ladder" is a mechanism for calculating the keys used to create the secure communications path.

³⁸ ETSI, ETSI TS 103 162 V1.1.1 (2010-10), Access, Terminals, Transmission and Multiplexing (ATTM); Integrated Broadband Cable and Television Networks; K-LAD Functional Specification,

full system³⁹ and requires both additional necessary technical items including the standard DVB cipher,⁴⁰ as well as conformance and robustness rules.

Software Download, Cryptographic Elements, and APIs. Conditional access software contains the proprietary secrets of the CAS vendor. In order to create a true downloadable CA solution, how this component is securely downloaded must be specified in a standard manner – otherwise, a device manufacturer must negotiate, implement and test with every possible CAS vendor to license their particular download model. CableLabs recognized this and created a “Common Download” as well as a “firmware upgrade” process in the CableCard requirements.⁴¹ When these methods for securely downloading the CA software are not standardized, the complexity, expense, and delay to market posed by this obstacle to a standard middleware or downloadable CA solution has been one of the rocks upon which previous efforts have foundered, even when – as in the case of OCAP/tru2way and DCAS – a solution has been pursued on an industry-wide basis.

http://www.etsi.org/deliver/etsi_ts/103100_103199/103162/01.01.01_60/ts_103162v010101p.pdf.

³⁹ *Id.* “The present document does not specify conformance and robustness rules for chipset hardware nor interoperability or certification requirements. Such rules are beyond the scope of the current specification and are expected to be the responsibility of an Industry Licensing Authority (ILA).” An “effective and safe implementation and deployment of content security systems based on the mechanisms described in the present document will require a complete security infrastructure that can deal with business, security, intellectual property, documentation and trusted information distribution issues.”

⁴⁰ ETSI Technical Report, ETSI ETR 289: “Digital Video Broadcasting (DVB); Support for use of scrambling and Conditional Access (CA) within digital broadcasting systems” (Oct. 1996), http://www.etsi.org/deliver/etsi_etr/200_299/289/01_60/etr_289e01p.pdf.

⁴¹ Cable Television Laboratories, Inc., OpenCable Specifications, Common Download 2.0, OC-SP-CDL2.0, <http://www.cablelabs.com/specifications/OC-SP-CDL2.0-I11-100507.pdf>.

A finite set of all possible cryptographic functions and common scrambling elements used in the solution must also be defined.⁴² These are completely defined in the CableCARD™ Copy Protection 2.0 Specification, which “defines the characteristics and *normative* specifications for the system.”⁴³ In the absence of full industry agreement on a standard comparable to CableCARD’s, a commercial retail device would have to implement, certify, and test every possible cryptographic element across all CAS vendors and all new devices. A reason the cable industry adopted the larger and more expensive CableCARD over the lower cost DVB solution used in Europe is that, unlike in Europe, U.S. MSOs use proprietary and incompatible ciphers.⁴⁴ Moreover, unless the “APIs”⁴⁵ are defined across CAS vendor software solutions, each device’s software would have to be customized and tested across every different set of CAS vendor APIs. Device functionality would vary from system to system. Thus, the CableCARD Interface 2.0 Specification⁴⁶ necessarily “defines the characteristics and normative specifications for the interface between the Card device and the Host device.”

⁴² ETSI spec states, “The present document defines the key ladder, authentication mechanism, and cryptographic *requirements* of a compliant chipset implementation.” ETSI, *supra* note 32, at 7 (emphasis added).

⁴³ CableCARD™ Copy Protection 2.0 Specification, OC-SP-CCCP2.0-I12-120531, www.cablelabs.com/specifications/OC-SP-CCCP2.0-I12-120531.pdf (May 31, 2012).

⁴⁴ Thus BBT, viewed by the Bureau as purportedly supporting the Order’s outcome, has filed additional, post-Order *ex parte* letters complaining that the Order does not impose sufficient “simulcrypt” requirements to make interoperability possible. *Ex parte* ltrs from Stephen R. Effros, Beyond Broadband Technology, LLC to Marlene H. Dortch, Sec., FCC re: Charter Request (May 2, 2013 and Apr. 25, 2013) (“BBT post-Order filings”).

⁴⁵ An application programming interface (API) is a [protocol](#) intended to be used as an [interface](#) by [software components](#) to communicate with each other. Wikipedia, http://en.wikipedia.org/wiki/Application_programming_interface.

⁴⁶ OpenCable, CableCARD Interface 2.0 Specification, OC-SP-CCIF2.0-I25-120531, at 1, <http://www.cablelabs.com/specifications/OC-SP-CCIF2.0-I25-120531.pdf> (May 31, 2012).

Thus, so long as the interface between systems and devices is at the level of conditional access, the different CPUs, operating systems, and features necessitate that a “downloadable” approach can support more than a single system only if there are a limited number of *documented product architectures* in the market. Otherwise, though nominally “downloadable,” the CA system is no superior to “integrated security” and in fact *is* integrated security. Charter has not claimed that it can standardize or even limit the number of system architectures that U.S. operators will employ and the Order is silent on the subject. So in fact there is *no* evidence of record to support the Bureau’s *hope* that some unspecified degree of *potential* architecture commonality between Charter and Cablevision can move the market any “closer” to having a device designed for one system work on another – any more than using the same motor in a car model and a boat model will turn all cars into boats.

It was to overcome precisely this (and other) obstacles that CableLabs invested in its “DCAS” system that would provide a single, standard, chip, platform, and interface between chip and CPU. It was on the basis of CableLabs’ promise to field a *standard interface* downloadable system by 2008 that the FCC issued its March 17, 2005 Deferral Order, delaying the “integration ban” until June 1, 2007.⁴⁷ *But* in mid-2009 CableLabs *broke* its promise to the FCC and decided to abandon the DCAS project on grounds that achieving an interface comparable to CableCARD’s is “too expensive”:

“TWC EVP of technology policy and product management Kevin Leddy lamented during a panel on the topic of [tru2way](#) at the Consumer

⁴⁷ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report and Order (Mar. 17, 2005) (“Deferral Order”).

Electronics Show that the ‘economics of downloadable security are challenging’ while CableCARD costs continue to slide downward.”⁴⁸

Thus Charter’s technology suffers from the same technological lack that existed *before* CableLabs promised a “downloadable” solution. Indeed, the post-Order filings by BBT highlight this lack of commonality and urge solutions different from Charter’s.

“Availability” of a “Retail” Device. The “conditions” are premised heavily on Charter’s self-certification that “a” manufacturer will make “available” a device that works on Charter’s system. As is illustrated above, inducing some supplier to help Charter fulfill this condition promises *nothing* about interoperability with any other system. CEA immediately pointed out that this is a shortcut that the Commission has rejected. In an *ex parte* response filed the next business day after the posting of Charter’s April 4 letter, CEA cautioned:⁴⁹

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. 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. 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

⁴⁸ Jeff Baumgartner, *MSOs Closing PolyCipher Headquarters*, Light Reading Cable, (June 5, 2009), http://www.lightreading.com/document.asp?doc_id=177662&site=lr_cable.

⁴⁹ *Ex parte* ltr from Robert S. Schwartz, Counsel, CEA to Marlene H. Dortch, Sec., FCC re: Charter Request (Apr. 8, 2013, fn’s omitted).

“walking back” the few promises that it *had* made to the Commission and to the public.

C. No Action By The Commission Has Equated “Downloadable” Technology With The CableCARD Requirements Set Forth In The First and Third R&Os.

In freeing Charter from complying with Commission regulations enacted to assure commercial availability of retail navigation devices, the Order cites⁵⁰ Bureau level *dicta* from 2007 – footnotes in the context of *denying* waiver applications. In neither case did the denied waiver application pertain to the obligation to supply CableCARDS, and in neither case had relief been sought generally from Section 76.1204(a)(1). (The waiver petitions and denials could not have discussed relief from Section 76.1205(b)(1), which was adopted by the Commission three years later after full notice and public comment.)

These June 2007 Bureau statements, like its January, 2007 press release,⁵¹ occurred more than two years before the cable industry *gave up* on achieving a common interface comparable to CableCARD’s, and have never been reviewed or adopted by the Commission.⁵² In any event, the Court of Appeals has made plain, in the most recent

⁵⁰ Order at 10 n.81.

⁵¹ Public Notice, *Media Bureau Acts on Requests for Waiver of Rules on Integrated Set-Top Boxes and Clarifies Compliance of Downloadable Conditional Access Security Solution* (rel. Jan. 10, 2007). As cited in the Bureau’s waiver denial footnotes, the Bureau previously had made forward looking statements that technology such as BBT’s *could* offer common reliance, but included no rulings or factual or legal findings with respect to going-forward compliance with Section 76.1204(a)(1).

⁵² CEA timely filed an Application for Review of the Bureau’s 2009 Cablevision waiver in which CEA specifically asserted that a Commission finding of legality would have been necessary to implement downloadable security, and that the Bureau’s action was defective because the Bureau made no such finding. *See Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-7078-Z, CS Dkt. No. 97-80, Application for Review, at 8-11 (Feb. 17, 2009). This Application, except for the subsequent telephone conference revoking enforcement as described in CEA’s *ex parte* letter of March 15, note 4, has never been acted upon by the Commission so presumably remains pending.

cable industry appeal of the Commission’s navigation device rules, that Bureau level orders are precedent only as to the parties involved and cannot bind the Commission. A Bureau action “simply means that those rulings are binding on the parties to the proceeding. ... [U]nchallenged staff decisions are not Commission precedent.”⁵³

To the extent the Commission would consider again basing a regulatory action on incomplete information and unfounded hopes, it is worthwhile to recount the specific history of the promises and projections of a functional, nationally standard interface as a successor to CableCARD. In its separate Appendix to a 2005 Joint Report to the Commission with CEA, NCTA said:⁵⁴

“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.”

CEA’s own Appendix, though cautious about an undocumented promise about a technology still under a nondisclosure agreement,⁵⁵ applauded NCTA’s intention to achieve a standard interface comparable to CableCARD’s. But, as noted above, in June, 2009, CableLabs *gave up* trying to achieve this because a standard architecture for downloadable systems would be too expensive compared to CableCARDs.

⁵³ *Comcast*, 526 F.3d at 770.

⁵⁴ CS Dkt. No. 97-80: Report of the NCTA on Downloadable Security (Nov. 30, 2005, *emph. supplied*).

⁵⁵ 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, could 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).

Yet Charter's Request cites and relies on the statements in the Commission's March 17, 2005 "deferral order" that were based on the very NCTA promise of a standard interface that CableLabs later abandoned.⁵⁶ The goal of industry-wide commonality abandoned by CableLabs has not been revived by Cablevision, Charter, BBT, or anyone else.⁵⁷ Hence there is *no* Commission-level precedent. There is only Bureau 2007 *dictum* in a press release and in denials of waivers, and in the Bureau Order for Cablevision, which *also* refrained from finding Cablevision's system compliant with FCC regulations. There is simply no basis for the Bureau to hope and assume that using "downloadable security" is a substitute for supplying and commonly relying on CableCARDS, as required by the First and Third R&Os and by Sections 76.1204(a)(1) and 76.1205(b)(1).

III. THE BUREAU'S ORDER VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

Effectively, by this Order the Bureau has repealed a regulation, while admitting and in fact proclaiming that it did not have enough information to justify such action if it had been taken by the full Commission. The Commission cannot let this stand.

At a minimum, the APA requires that the Bureau must adequately explain its actions, particularly where it departs from precedent. *FCC Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009). ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that

⁵⁶ "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." Deferral Order ¶ 31.

⁵⁷ BBT, in its post-Order filings, claims that an approach *different from Charter's* could succeed. The Commission has never requested public comment on BBT's post-Order ideas.

it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (holding that agencies must provide a “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”).

Moreover, the Commission may not, as a gloss to an existing regulation, add a requirement that it otherwise would have been required to consider in the context of a rulemaking. “Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to ‘repeals’ or ‘amendments.’ . . . To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.” *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see also Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995) (noting in dicta that an APA rulemaking is required where an agency interpretation “adopt[s] a new position inconsistent with . . . existing regulations.”).

IV. THE BUREAU’S ORDER VIOLATES SECTION 629 OF THE COMMUNICATIONS ACT.

Not one of the Order’s “findings” adds up to a regulation providing the *assurance* required by Section 629 that Charter’s technology will be the least bit interoperable with other MSOs systems or that a device that works on Charter’s system will work on other systems, or vice versa. Given the extant and explicit mandate to both supply and rely on CableCARDS, this should be a *sine qua non* finding for any post-waiver relief as broad as that granted here, even if adopted in a procedurally proper manner by a rulemaking with public notice.

The only potentially logical and fact-based premise for equating “downloadable” security with the CableCARD interface would be a finding that a “downloadable” system, like CableCARD, provides a standards-based interface that can support a national market for devices that work on varied systems. Prior to mid-2009, when CableLabs abandoned the DCAS effort, it was at least reasonable to point to a factual basis for the Bureaus’ endorsements by press-release and *dictum* in the context of denied waiver applications. Now, with the absence of any evidence offered by Charter, the silence of the rest of the cable industry, including Cablevision, on the subject of whether *any* other cable system has the capability or intention of becoming interoperable with Charter’s, the termination of the only such industry-wide project in 2009 (two years after the Bureau *dicta* about “downloadable security”) and the affirmative adoption of Section 76.1205(b)(1) in 2010 (*three* years after the Bureau *dicta*), there is simply no basis for the Commission or a court to find that this result is one that “assures,” in the Commission’s regulations, the commercial availability of navigation devices from manufacturers and vendors not affiliated with the system operator.

CONCLUSION

CEA respectfully requests the Commission to review and *rescind forthwith* the Bureau’s Order. The present record is not sufficient for either the Bureau or the Commission to establish public expectations or cable industry guidelines as to “downloadable security.” It provides no guidance for industry toward the establishment of a uniform set of expectations for a downloadable security system that, like the CableCARD, would support competitive entry products through a national standard –

the Commission's basis for the 2005 Deferral Order, on which Charter's Request relied. Worse, the Bureau's opinion and the ordering clauses establish a basis for Charter and other operators to assert to the Commission and to a reviewing court that *any* nominally "downloadable" security system meets the requirements of Section 629. The Bureau lacks the authority to so relax Commission regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on May 20, 2013, I caused a true and correct copy of the foregoing to be served by First Class mail on the following:

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