

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

In the Matter of)	
)	
Charter Communication's, 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)	
)	

PETITION FOR RECONSIDERATION OF TIVO INC.

May 20, 2013

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SUMMARY

TiVo Inc. (“TiVo”) seeks reconsideration by the Media Bureau of its Order granting Charter Communications, Inc. (“Charter”) a waiver of Section 76.1204(a)(1) of the Commission’s rules and releasing Charter from its obligations under Sections 76.1204(a)(1) and 76.1205(b)(1) to provide CableCARDS to consumers using competitive retail set-top boxes, without either a finding that Charter’s planned conduct will comply with Commission regulations or a specific waiver grant addressing these requirements.

Relying on the fact that Charter requested a *limited, two-year* waiver based on its unique circumstances and on Charter’s pledge to continue to support CableCARDS for consumer manufacturers who may “still” not be willing or able to use Charter’s planned system, TiVo did not oppose Charter’s request. In granting Charter’s waiver, however, the Bureau provided Charter with additional relief which is problematic for several reasons. First, the Bureau, in formulating novel and ill-defined conditions that may be satisfied by self-certification, releases Charter from its core obligations under both Sections 76.1204(a)(1) and 76.1205(b)(1) and (b)(2) of the Commission’s rules to provide CableCARDS to subscribers who want to use retail devices. Second, the Bureau makes an unsupported finding that Charter’s conditional access “approach” is compliant with the integration ban even though adequate information about Charter’s planned system was never presented to the Bureau for consideration or to the public for comment. Hence, neither the Bureau nor the public had notice or the opportunity to comment on whether Charter’s integrated security system would actually satisfy the integration ban after the waiver expires. Irrespective of the merits of granting a two-year waiver for

Charter to implement its planned system, the Bureau erred in granting Charter relief that denies consumers the ability to use new CableCARD devices without notice or an opportunity to be heard — relief that goes beyond Charter’s waiver request. Unless reconsidered, the result of this extraordinary grant to Charter will be to negate effectively the Commission’s obligation under Section 629 of the Communications Act to *assure the commercial availability* of navigation devices from manufacturers and vendors not affiliated with any Multichannel Video Programming Distributor.

Accordingly, TiVo respectfully petitions the Media Bureau to reconsider its Waiver Order and (1) require Charter to continue to supply and support CableCARDS to subscribers wishing to use new retail devices, (2) clarify that the Bureau has made no findings regarding whether Charter’s planned system or any other “downloadable” system complies with the integration ban; and (3) clarify that no security system is or will be compliant with the Commission’s rules unless the details of the complete system have been presented to the Commission in a proceeding with adequate notice and full opportunity for the public to comment.

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PETITION FOR RECONSIDERATION OF TIVO INC.

TiVo Inc. (“TiVo”) seeks reconsideration by the Media Bureau (the “Bureau”) of its Memorandum Opinion & Order (“MO&O”) granting Charter Communications, Inc. (“Charter”) a two-year waiver of Section 76.1204(a)(1) of the Commission’s rules. In addition to the grant of the two year waiver, the Bureau inexplicably went far beyond the waiver request and granted significant additional relief that Charter never requested, that was not included in the Public Notice seeking comment on the waiver request, and, therefore, not commented upon by interested parties.

In addition to the procedural irregularities associated with the MO&O, the additional relief granted to Charter is substantively deficient for several reasons. First, the Bureau, in formulating novel and ill-defined conditions, which, compounding the problem, may be satisfied by self-certification, released Charter from its core obligations under both Sections 76.1204(a)(1) and 76.1205(b)(1) and (b)(2) of the Commission’s

rules to provide CableCARDS to subscribers who want to use retail devices. Second, the Bureau made an unsupported finding that Charter’s conditional access “approach” is compliant with the integration ban, even though adequate information about Charter’s planned system was never presented to the Bureau for consideration and no other operator or consumer electronics manufacturer reviewed or supported the approach. Hence, the public did not have notice and the opportunity to comment on whether Charter’s integrated security system would in fact satisfy the integration ban after the waiver expires. Irrespective of the merits of granting a two-year waiver for Charter to implement its planned system, the Bureau erred in granting Charter relief that denies consumers the ability to use new CableCARD devices without notice or an opportunity to be heard. Unless reconsidered, the result of this extraordinary grant to Charter will be effectively to negate the Commission’s obligation under Section 629 of the Communications Act¹ to *assure the commercial availability* of navigation devices from manufacturers and vendors not affiliated with any Multichannel Video Programming Distributor.²

Accordingly, TiVo respectfully petitions the Media Bureau to reconsider its Waiver Order to (1) require that Charter continue to supply and support CableCARDS to subscribers wishing to use new retail devices for the indefinite future, (2) clarify that the Bureau has made no findings regarding whether Charter’s planned system or any other “downloadable” system complies with the integration ban; and (3) clarify that no security system is or will be compliant with the Commission’s rules unless the details of the

¹ 47 U.S.C. § 549 (“Section 629”).
Id. § 549(a).

complete system have been presented to the Commission in a proceeding with adequate notice and full opportunity for the public to comment.

BACKGROUND AND INTRODUCTION

On November 1, 2012, Charter filed a request for a limited, two-year waiver of the integration ban set forth in 76.1204(a)(1) of the Commission's rules.³ Charter explained that its new Chief Executive Officer intended to transition the company to an all-digital network, and the launch of a "software-based downloadable security" was a key component to this transition effort. Charter further explained that this undertaking would be more difficult for Charter because Charter's footprint is "distinctly rural" and much larger, scattered and diverse than Cablevision thereby making it more expensive, time-consuming and challenging. While Charter extolled the benefits of its "planned system" for consumers and consumer electronics manufacturers and made general statements about its approach, Charter did not provide a description of its planned system or explain precisely how that system would provide common reliance, national portability, or otherwise fulfill the purpose of the integration ban or, more generally, Section 629. Rather, Charter stated that even after the planned system is initiated, Charter would continue to "simulcrypt" its services using both CableCARD and its planned system to continue to support customers using CableCARDS. Specifically, Charter represented that "[f]or consumer electronics manufacturers still not ready to take that [downloadable-security] approach CableCARDS will continue to be supported even after the

³ *Charter Communications, Inc., Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules, CSR-8740-Z, CS Docket No. 97-80, MB Docket No. 12-328 (Nov. 1, 2012) ("Charter Waiver Request")*

downloadable architecture is activated, because the simulcrypt system will support both current and downloadable security architectures.”⁴

Relying on the fact that Charter requested a *limited, two-year* waiver based on its unique circumstances and on Charter’s pledge to continue to support CableCARDs for consumer manufacturers who may “still” not be willing or able to use Charter’s planned system, TiVo did not oppose Charter’s Request. TiVo relied specifically on Charter’s statement that its intention to support CableCARDs would benefit device *manufacturers*.⁵ TiVo relied further on the Bureau’s quotation, in its Public Notice, of Charter’s intention to continue its support for CableCARDs.⁶ TiVo did, however, meet with Commission staff to express concerns about the impact of waivers on the process to identify a successor to CableCARD and to emphasize the importance of CableCARD both to retail device manufacturer as well as to new entrants who hope to provide equipment and services to cable operators.⁷

On April 18, 2013, the Bureau released its MO&O not only granting Charter’s requested waiver, but also effectively finding that its undefined planned security solution would satisfy the integration ban and providing Charter the ability to deny consumers the

⁴ Charter Waiver Request at 4-5.

⁵ *Id.* A benefit to “consumer electronics manufacturers” can be read only as a pledge to continue to supply CableCARDs for new retail devices that need them to operate after Charter implements its planned system.

⁶ Public Notice, *Charter Communications, Inc. Files Request for Waiver of Section 76.1204(a)(1) With the Commission*, CSR-8740-Z, MB Docket No. 12-328, DA 12-1788, at 1 (Nov. 7, 2012) (“Public Notice”).

⁷ As recounted in TiVo’s *ex parte* letter of January 22, 2013, “TiVo discussed the continued importance of the Commission’s rules and policies under Section 629 of the Communications Act that allow retail set-top box and other navigation device manufacturers access to MVPD-provided signals, including the CableCARD rules.” Letter from Henry Goldberg and Devendra T. Kumar, Attorneys for TiVo, Inc., to Marlene H. Dortch, Secretary, FCC, CSR-8470-Z, MB Docket No. 12-328, CS Docket No. 97-80, PP Docket No. 00-67 at 1-2 (Jan. 22, 2013).

ability to use new retail CableCARD devices.⁸ The only requirement would be that Charter would have to satisfy certain “conditions” concerning retail availability of a set-top box using Charter’s security solution that were never subject to public comment and are fundamentally ineffective at assuring a market for competitive navigation devices as required by Section 629.

TiVo’s products require CableCARDS. Therefore, TiVo relies on the Commission’s CableCARD rules as adopted and interpreted by the Commission in 1998,⁹ 1999¹⁰ (Reconsideration) and 2010¹¹ — rules adopted and affirmed pertaining to separable security generally and specifically to obligations to supply and support CableCARDS, which have been upheld by the Court of Appeals on three separate occasions when challenged by Charter and others.¹²

There is nothing in the record to suggest (much less assure) that TiVo or anyone else could make a viable retail product using Charter’s planned system. To be viable at retail, a product must be nationally portable. Consumers must be able to purchase the device and use it with any cable system the country. Nobody can sell retail cable devices

⁸ *Charter Communications, Inc. Files Request for Waiver of Section 76.1204(a)(1) With the Commission*, Memorandum Opinion & Order, CSR-8740-Z, MB Docket No. 12-328, DA 13-788 (Apr. 18, 2013) (“MO&O”).

⁹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket. No. 97-80, Report and Order, FCC 98-116 (rel. June 24, 1998) (“First R&O”).

¹⁰ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket. No. 97-80, Order on Reconsideration, FCC 99-95, ¶ 4 (rel. May 14, 1999).

¹¹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket. No. 97-80, PP Docket. No. 00-67, Third Report and Order and Order on Reconsideration, FCC 10-181 (rel. Oct. 14, 2010) (“Third R&O”).

¹² *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 (D.C. Cir. 2008).

that only work with certain operators in certain limited areas.¹³ Even if TiVo had the information and rights to build a product capable of operating on a Charter system, such a product would not be capable of operating on any cable system other than Charter's without industry-wide agreements and changes in conditional access device, software, and system architectures that are neither contemplated nor required by the MO&O. Charter's submissions and the Bureau's statement that Charter is not required to influence other cable architectures, or to make available any rights that Charter itself does not own, confirm this. Charter is unable to sway or control the necessary selections of other MSOs with respect to chip architecture, software, and the choice and licensing of Conditional Access Systems. Charter not only made no promise to attempt to do this, the MO&O explicitly releases Charter from even attempting to do so.¹⁴

I. THE POST-WAIVER PROVISIONS OF THE MEMORANDUM OPINION AND ORDER ("MO&O") VIOLATE SECTION 629 OF THE COMMUNICATIONS ACT AND SECTIONS 76.1204(a)(1) AND 76.1205(b)(1) OF THE COMMISSION'S RULES.

Section 629 requires that the Commission, in consultation with private sector standards bodies, *assure* in its regulations the *commercial availability* of MVPD navigation devices, from manufacturers and vendors that are independent of the service provider.¹⁵ The Commission's First R&O in 1998 promulgated Section 76.1204(a)(1) of

¹³ Products for DIRECTV or DISH may only work with one distributor but those distributors provide service nationwide. If a consumer moves from Washington, D.C. to Atlanta, Georgia, the consumer can continue to use its equipment in the new location.

¹⁴ The cable industry has already attempted and *abandoned*, only four years ago, its only effort to standardize its conditional access architectures so as to make possible a standards based approach to downloadable security comparable to the CableCARD interface. No such effort is likely to be revived because both the cable industry and the Commission consider chip-based Conditional Access to be an "interim" technology until the industry moves to Internet Protocol-based delivery. *See* Third R&O at ¶ 70.

¹⁵ 47 U.S.C. § 549(a).

its rules, which specifically requires system operators to make their conditional access security separable from other product features, and to rely on such separable security in their own products. From 1999’s Reconsideration Order and thereafter the Commission has referred to this obligation as, *inter alia*, specifically requiring major cable MSOs to make CableCARDS available to any subscriber requesting a CableCARD for installation in a device procured at retail. As recently as 2010 — five years after the Commission postponed, for a year, common reliance on CableCARDS, and three years after passing references in footnotes cited in this MO&O discussing “downloadable” security as an alternative — the Commission released a Fourth Notice of Proposed Rulemaking¹⁶ pertaining *specifically to CableCARD supply and support obligations*, and months later released its Third R&O, which was almost entirely addressed to the need to maintain and strengthen cable industry support and supply practices for CableCARDS. Nothing has occurred thereafter that would make the MO&O’s post-waiver relief to Charter lawful, appropriate, or consistent with the Commission’s past findings, policy, and regulations.

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 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.

Id.

¹⁶ *In the Matter of 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, Fourth Further Notice of Proposed Rulemaking, FCC 10-61 (rel. Apr. 21, 2010) (“Fourth FNPRM”).

A. The Bureau Has Not Granted Any Waiver From Charter’s Specific Obligation To Supply CableCARDS Pursuant To The First R&O, Nor Has It Found That Charter Will Be In Legal Compliance With This Obligation In The Post-Waiver Period.

Charter’s Request to the Bureau was for a *limited, two-year* waiver. Charter indicated that thereafter it planned to rely on its planned downloadable security system in the devices that Charter itself furnishes to consumers. While TiVo believed, and others told the Commission, that granting such authorization to Charter to ignore “common reliance” outside the context of a rule change or a waiver would be bad precedent and bad public policy,¹⁷ TiVo refrained from filing any formal opposition because both Charter, in its Nov. 1, 2012 Request, and the Media Bureau, in its Nov. 7, 2012 Public Notice, rendered clear and firm assurances to manufacturers and consumers that CableCARDS would continue to be supported on Charter systems.¹⁸ It was not until a single page letter from Charter dated April 4, 2012 — 14 days before the waiver was granted that Charter made any statement limiting this commitment.¹⁹

A decision freeing Charter from the obligation to supply CableCARDS, under *any* circumstance violates Section 76.1204(a)(1) and must be made at the Commission level

¹⁷ See Comments by Consumer Electronics Association (“CEA”), MB Docket No. 12-328 (Nov. 11, 2012); *ex parte* letters from CEA in MB Docket No. 12-328 dated Dec. 13, 2012, Jan. 28, 2013, Feb. 14, 2013, Mar. 7, 2013, Mar. 15, 2013, Mar. 22, 2013, Mar. 29, 2013, and Apr. 8, 2013; Comments of Public Knowledge, MB Docket No. 12-328 (Nov. 30, 2012); *ex parte* letter from Samuel Biller, MB Docket No. 12-328 (Mar. 8, 2013).

¹⁸ Indeed, Charter expressly cited “grandfathered” treatment given to a similar Cablevision request filed in 2007 and renewed in 2009, for a similar system, without any release from continuing to supply CableCARDS. Cablevision continues to supply and support CableCARDS to consumers wishing to use retail devices.

¹⁹ Letter from Thomas M. Rutledge, President and CEO, Charter Communications, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-328 (Apr. 4, 2013).

and not in a Bureau-level MO&O granting a waiver.²⁰ Charter petitioned only for limited, two-year relief from the “integration ban” as it applies to its *own* leased devices. As the MO&O notes, Charter “did not request” a finding that its activities after the two year waiver would be compliant with Section 76.1204(a)(1).²¹ Hence the Media Bureau has no delegated authority, outside the context of a waiver supported by specific factual and legal findings, to release Charter from obligations clearly and explicitly imposed by the Commission in rules adopted in the First R&O. If the Bureau did have such authority, its negation of the Rule without any public notice, any legal finding, or any factual findings violates the APA and is arbitrary and capricious.

B. Charter Did Not Request And The Bureau Did Not Grant Any Waiver From Charter’s Specific Obligation To Supply CableCARDS Pursuant To Sections 76.1205(b)(1) and (b)(2), and The Bureau Did Not Request Public Comment On Such Relief From This Regulation Or Determine That Such Relief Would Be Lawful.

Three years after passing references — made during the course of denying waivers to NCTA and to Comcast²² — to hypothetical future “downloadable security”

²⁰ Cf. Statement of Commissioner Ajit Pai on the Public Notice of the Wireless Telecommunications Bureau to Supplement the Record on the 600 MHz Band Plan, GN Docket No. 12-268, at 2 (May 17, 2013) (arguing that the Bureau’s decision to issue a Public Notice on alternate band plans was “precisely the sort of decision that the full Commission should make” and that the adoption of a band plan proposed in the Public Notice could give rise to litigation risk under “a claim that the Commission failed to abide by the notice-and-comment requirements of the [A.P.A.]”).

²¹ The specific relief granted to Charter under the MO&O is “for a waiver of Section 76.1204(a)(1) of the Commission’s rules to allow Charter to use the integrated security component of its dual-security boxes *for a period of two years until April 18, 2015.*” MO&O at ¶ 14. (emphasis added)

²² See *NCTA Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CSR-7056-Z, CS Docket No. 97-80, DA 07-2920, at ¶ 22 n.74 (rel. June 29, 2007); *Comcast Corp. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CSR-7012-Z, CS Docket No. 97-80, FCC 07-127, at ¶ 4 n.20 (rel. Sep. 4, 2007).

similar to that of BBT, the Commission returned specifically to the subject of supply and support of CableCARDS. In the proceeding that led to the Third R&O, the Commission noted the technological trend of moving device interfaces away from chip-based conditional access, in the form of both CableCARDS and possible “downloadable” iterations of chip-based conditional access, and toward Internet Protocol interfaces with home networks — interfaces that would fully supplant the older approaches.²³ The Commission *rejected* cable industry pleas, however, not to enhance enforcement of cable industry obligations to supply and support CableCARDS. The Commission observed:

Based on the record before us, we conclude that modifications to our rules are necessary to improve the CableCARD regime and advance the retail market for cable navigation devices. We are sympathetic to concerns that we are adopting these rules while we consider a successor regime,²⁴ but we must keep in mind that CableCARD is a realized technology – consumer electronics manufacturers can build to and are building to the standard today. Until a successor technology is actually available, the Commission must strive to make the existing CableCARD standard work by adopting inexpensive, easily implemented changes that will significantly improve the user experience for retail CableCARD devices.²⁵

Therefore, not only did the Third R&O maintain the obligations under Section 76.1204(a)(1), it added a *new CableCARD* provision, Section 76.1205(b)(1), that addresses both support *and supply*:

²³ Fourth FNPRM, ¶ 12.

²⁴ See *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, MB Docket 10-91, 25 FCC Rcd 4275, FCC 10-60 (rel. Apr. 21, 2010) (“*NOI*”). In the *NOI*, the Commission sought comment on a concept that is intended to develop a competitively neutral solution to navigation device compatibility. The Commission never stated or suggested that the BBT solution or downloadable iterations of chip-based security were successors to CableCARD compliant with the integration ban.

²⁵ Third R&O, ¶ 8.

§ 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.*²⁶

In addition, the Third R&O added Section 76.1205(b)(2), which requires that “Multistream CableCARDS” (the type employed in operators’ leased devices) be the CableCARDS that are *provided when a subscriber requests a CableCARD.*²⁷

Charter did not mention Section 76.1205(b)(1) or (b)(2) in its Request for Relief; the Bureau did not refer in its Public Notice to any possible release from the requirements of these Sections; and the Bureau did not expressly grant Charter a waiver of the requirements of these Sections. The Bureau’s MO&O simply ignored these Sections of the Commission’s rules in allowing Charter to stop provisioning new CableCARDS to subscribers merely by submitting a declaration that a local or online seller has made available for retail purchase a device using Charter’s integrated security system.²⁸ In other words, as soon as Charter can convince a single manufacturer to offer a device for sale using Charter’s integrated security system, Charter can deny consumers the choice of using TiVo devices. Under the terms of the MO&O, this would be true even if the Charter device is not marketed and *not a single consumer purchases one*. This anti-competitive, anti-consumer action exceeds the Bureau’s authority and is inconsistent with the Commission’s authority under Section 629 to assure the commercial availability of

²⁶ Third R&O, App..B,at 45-46.

²⁷ *Id.*

²⁸ MO&O at ¶ 8 n.65. (“After the third party downloadable devices are available, Charter will no longer be required to distribute new CableCARDS for new CableCARD devices.”)

competitive navigation devices. Moreover, the Bureau's far-reaching decision without seeking comment on relieving Charter of its CableCARD requirements under the Commission's rules fails to meet the standards required by the Administrative Procedure Act.

C. The Bureau's Reference To The *Echostar* Opinion Presents No Factual Or Legal Basis For Questioning The Continued Validity Of Sections 76.1204(a)(1) and 76.1205(b)(1) and (b)(2), No Such Relief Was Petitioned For, No Public Comment Was Requested On This Issue, And No Authority Has Been Delegated To The Bureau To Deal With The Issues The MO&O Purports To Raise.

Charter's statement withdrawing its assurance that it would continue to provide CableCARDS to any subscriber requesting one was made only after the Court of Appeals for the D.C. Circuit issued an opinion in *EchoStar Satellite L.L.C. v. FCC* that, pending any reconsideration or rulemaking, vacates the regulations adopted in the 2003 *Second Report & Order*.²⁹ Nothing in the *Echostar* decision, first referenced by Charter in a Feb. 28 *ex parte* letter and first mentioned by the Media Bureau in the MO&O, undermines or purports to undermine the obligations from which the MO&O would excuse Charter. The MO&O, par. 9, suggests without factual or legal support, that *Echostar* provides a reason that reliance on downloadable security rather than CableCARD may be appropriate or preferable to satisfy the Commission's rules and obligations under Section 629. This conclusion is without foundation.

As the Bureau admits in the MO&O, nothing in *Echostar* pertains to or can affect the specific obligations to supply CableCARDS as imposed by the First R&O. The Court

²⁹ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013). The Court vacated the rest of the Second Report & Order on the basis that counsel for the Commission had insisted that the Encoding Rules were not separable from other elements of the "Plug & Play" agreement that made more specific the CableCARD support requirements already contained in the First R&O and the regulations it enacted.

of Appeals for the D.C. Circuit has specifically upheld these obligations, most recently in 2008.³⁰ Moreover, as cited in the MO&O, the only part of the Third R&O potentially impacted by *Echostar* is the home networking amendment to Section 76.640 (which both Charter and the MO&O refrain from suggesting has been compromised). Sections 76.1205(b)(1) and (b)(2) are based on the First, not the Second, R&O. They have nothing to do with “Encoding Rules” or with DBS or with any part of the other regulations added in the Second R&O — they amend and strengthen only the obligations set forth in the First R&O.

As the Commission observed in the Third R&O, CableCARDS are known commodities that remain subject to published specifications, contractual obligations by and with CableLabs, supporting documentation from CableLabs, status reports from the NCTA, and clear Commission imperatives enacted before and after the Second Report & Order. If the Commission or the Bureau entertains some notion that Sections 76.1204(a)(1) and 76.1205(b)(1) and (b)(2) have been compromised, it should invite public comment or initiate a rulemaking on the subject.³¹ Failing that, the Bureau has no authority to undermine these Commission regulations — especially in the absence of public notice and comment, or any factual or legal findings.

³⁰ *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).

³¹ It is worth noting that if *EchoStar* is interpreted to have such sweeping effect, then all of the operators that relied on the DTA exemption from the integration ban in the *Third Report and Order* would be in violation of the Commission’s rules.

II. THE MO&O GRANTS RELIEF CONTRARY TO CHARTER'S PETITION AND TO THE BUREAU'S REQUEST FOR COMMENT.

The Bureau did not mention in its Public Notice any prospect of Charter not having to supply CableCARDS to subscribers who request them in the future. To the contrary, the Public Notice quoted Charter's intention to *support* CableCARDS, which Charter had said was for the benefit of both consumers and manufacturers. The Bureau also did not mention the prospect of any change to Charter's obligation to *supply* CableCARDS, and to *supply* "M-Cards" pursuant to Section 76.1205(b) — indeed the Bureau's Public Notice did not mention this section *at all*.

Had the Bureau suggested that it would allow Charter to deny consumers the ability to continue to use CableCARDS for new retail,³² TiVo would have strongly and specifically opposed any such relief. But there was no hint that the Bureau was preparing to grant Charter such extraordinary and unprecedented relief.³³

Where, as here, an agency effectively replaces an existing regulation, a rulemaking is required. "Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or

³² Indeed, TiVo believes that several of the assumptions and projections that the Bureau made regarding the future of conditions access systems, and how such systems work, are questionable at best and should be reconsidered. The same holds true for the projections and assumptions the Bureau made about how conditional access systems work, and what Charter by itself can and cannot accomplish to promote interoperability even in the best of faith. For example, Charter's planned system is based on a System on a Chip ("SOC"). The fact that the SOC may be a commodity chip does not mean that it will be used by any other operator or that it will be interoperable. Likewise, there is no evidence that other operators and their vendors would use the same root of trust that is necessary for interoperability. The Bureau's expectation that Charter can or will succeed — with no record pledge of cooperation from the rest of the industry — is simply unrealistic and without foundation.

³³ Indeed, the cable industry has described the waiver order as "momentous." Leslie Ellis, *What the Charter Waiver Means to Cable*, Multichannel News, Apr. 29, 2013.

‘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.” *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (emphasis in original). Nor may an agency adopt a new position that is inconsistent with existing regulations. *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100, 115 S. Ct. 1232, 1239, (1995)

Agencies are also required to explain their actions adequately when they depart from Agency precedent. “[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that 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.” *FCC Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11, (2009, emphasis in original); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (“reasoned analysis [is necessary] indicating that prior policies and standards are being deliberately changed, not casually ignored”).

By relieving Charter of its obligation to supply CableCARDS (once it has met certain conditions) without sufficient legal or factual findings, the Bureau has exceeded its authority. Moreover, the lack of public notice deprived interested parties like TiVo from building an adequate record during the Comment period. In light of this, the Bureau should immediately reconsider the extent of the relief granted to Charter before operators, with the MO&O in hand, build their own tale of “reliance” on an inadequately considered action and eviscerate the Commission’s CableCARD rules.

III. THE BUREAU’S GRANT OF POST-WAIVER RELIEF IS BASED ON ARBITRARY AND INCORRECT FACTUAL ASSUMPTIONS, PROJECTIONS AND EXPECTATIONS AND IS NOT SUPPORTED BY VALID FINDINGS.

TiVo has long supported the idea of alternative security solutions *so long as they actually enable retail competition*. TiVo joined with CEA, from the earliest mentions of “downloadable security,” in expressing interest in developing a system that, as the Commission expected in its 2005 “Deferral Order,” would be a “*common security technology*.”³⁴ CEA, from 2005 on, has repeatedly urged the Commission to expect concrete assurances of standards-based commonality before deciding that a technology would, as required by law, *assure* commercial availability of independent devices.³⁵

The MO&O departs from the standards objective referenced by the Commission in 2005, with no basis whatsoever to believe or expect that what the entire industry could not accomplish four years ago can be accomplished now using the same available conditional access technologies. The MO&O’s references (not findings) are grossly insufficient:

- BBT’s system, as confirmed by BBT in both pre-and-post-MO&O filings,³⁶ is different from Charter’s, is not compatible with other operators’ (making impossible interoperability across operators), and also has never been fully described to the

³⁴ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket. No. 97-80, Second Report and Order, FCC 05-76, ¶ 31 (Mar. 17, 2005).

³⁵ *See, e.g.*, Comments of the CEA on NCTA Downloadable Security Report, CS Docket. No. 97-80 (Jan. 20, 2006); *Ex parte letter* from Julie M. Kearney to Marlene H. Dortch, Secretary, FCC, CSR-8470-Z, MB Docket No. 12-328, CS Docket No. 97-80, PP Docket No. 00-67 at 2-3 (Mar. 15, 2013).

³⁶ Reply Comments of Beyond Broadband Technology, LLC, MB Docket No. 12-328 (Dec. 10, 2012); *Ex Parte* filing by Beyond Broadband Technology, LLC (Apr. 25, 2013); *Ex Parte* filing by Beyond Broadband Technology, LLC (May 2, 2013).

Commission or to the public for Comment. The only way it appears common in “approach” is that BBT also calls it “downloadable.”

- Cablevision’s system is said, without specifics, to be “similar.” In such case, the easiest and quickest promise that Charter could have made to the Bureau, and that the Bureau could have made to the public, would have been a requirement — not a non-binding “expectation” — that products actually work interoperably on Charter and Cablevision systems. Such a promise would *not* have been a demonstration of a national standard, and thus would not have been legally sufficient, but it would at least have established some level of credibility and fact as to in what way the “downloadable” aspect of Charter’s systems might differ from integrated security. That the Bureau could not even require *this* level of assurance (and received no support in the record from Cablevision) shows how low the MO&O’s standards bar is compared to the Commission’s 2005 expectation.
- The notion that making “available” a single retail device for a single system under unspecified conditions and self-certification could possibly lead to a *commercial* market of devices from manufacturers and vendors not related to the system operator calls out for public notice, documentation, and factual findings, because all experience to date is *against* its plausibility. Cablevision’s system is described as “similar” to Charter’s — yet TiVo is unaware of, and the record does not recount, a single unaffiliated third party retail device using Cablevision’s downloadable security or other conditional access interface other than CableCARD on a Cablevision system. There is no reasonable basis for the Bureau to jettison a fully realized solution that is available nationwide, marketed, and used by hundreds of thousands of consumers and

growing (i.e., CableCARD) for an undefined system that is claimed to be “similar” (yet not interoperable with) the system used by one operator — Cablevision — that has not resulted in *any* retail availability whatsoever.

IV. THE PURPORTED PRECEDENT FOR THE RELIEF GRANTED IS BASED SOLELY ON A COMMISSION “FINDING” BASED ON FACTS NO LONGER OPERATIVE, A MISAPPLICATION OF THE CABLEVISION WAIVER, AND DICTA IN DENIED WAIVERS BASED ON QUESTIONABLE ASSUMPTIONS ON WHICH PUBLIC COMMENT WAS NEVER REQUESTED.

In 2007, two years before the cable industry abandoned its industry-wide effort to achieve a common platform for “downloadable security” systems, the Media Bureau made three speculative public statements supposing that an approach “similar” to BBT’s could, under future circumstances, be a workable alternative for satisfying Section 76.1204(a)(1). (Sections 76.1205(b)(1) and (b)(2) would not be adopted for another three years). The MO&O cites these Bureau-level observations as a basis for nullifying regulations adopted by the Commission both before and after these statements.³⁷

These statements were a press release³⁸ outside any regulatory context and as passing observations in two waiver denials.³⁹ The Commission has not properly

³⁷ MO&O at ¶ 12 n.81.

³⁸ 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). In this public notice, the Bureau merely reiterated that the use of downloadable security technology *can* comply with the integration ban *if it provides for common reliance* and noted that BBT had submitted a letter alleging that it had already developed such a system. However, the Bureau did not say that it had investigated the claims contained in BBT’s letter and the Bureau never ruled that BBT’s solution actually satisfied Section 76.1204(a)(1).

³⁹ See *NCTA Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CSR-7056-Z, CS Docket No. 97-80, DA 07-2920, at ¶ 22 n.74 (rel. June 29, 2007); *Comcast Corp. Request for Waiver of Section*

considered and ratified these Bureau statements, and indeed proceeded three years later to *strengthen* its CableCARD requirements. Such Bureau statements, even if they were the actual bases for actions taken rather than observations in passing, are not Commission precedent⁴⁰ and have never been publicly noticed as such.

The actions referenced by the Bureau did not mention the obligation to supply CableCARDS and provided no public notice of an intention by the Bureau or the Commission to conceivably substitute reliance on a future, undefined version of nominally “downloadable” security in lieu of longstanding obligations specifically adopted by the Commission.

CONCLUSION

In the *Third Report and Order*, the Commission expressed its view that “[w]hile we are optimistic about the prospects of a successor technology, we must be pragmatic about harnessing realized solutions. Therefore, until a successor technology is actually available, the Commission must strive to make the existing CableCARD standard work effectively.”⁴¹ Based on Section 629 and the FCC’s regulations as promulgated in the First Report & Order, the Order on Reconsideration, and the Third Report & Order, TiVo has invested tens of millions of dollars into making retail CableCARD devices work and selling hundreds of thousands of them to consumers across the country — consumers that are happy to have a retail alternative to operator-supplied boxes as envisioned by Section 629 of the Communications Act. Commercial investment requires a settled and

76.1204(a)(1) of the Commission’s Rules, Memorandum Opinion and Order, CSR-7012-Z, CS Docket No. 97-80, FCC 07-127, at ¶ 4 n.20 (rel. Sep. 4, 2007).

⁴⁰ A Bureau-level declaration “simply means that those rulings are binding on the parties to the proceeding. . . . [U]nchallenged staff decisions are not Commission precedent.” *Comcast*, 526 F.3d at 770.

⁴¹ Third R&O at ¶ 70.

predictable regulatory environment. If the MO&O is allowed to stand, the regulatory environment would be characterized only by uncertainty and doubt. Neither TiVo nor its competitors and future entrants should be expected to navigate such a tortuous path.

CableCARDS are the only realized solution for retail today and the requirement to continue to provide CableCARDS to new retail subscribers is no burden to Charter because Charter agreed to “continue, indefinitely, to support CableCARD” for existing customers by continuing to simulcrypt its services so that all third party CableCARD devices remain operable until such point as no Charter customers wish to use CableCARD devices purchased at retail. If Charter’s planned system results in retail availability such that consumers no longer have any use for CableCARDS, then there will be no reason to continue to support CableCARDS. But that is a “Big If” for the reasons explained earlier in this petition. Otherwise, Charter must continue to provide their customers real choice by supplying CableCARDS upon request because Section 629 and the Commission’s implementing rules require it. The Bureau had no basis for ignoring the Commission’s rules in this regard.

TiVo did not oppose the Bureau granting a limited, two-year waiver of the integration ban to allow Charter to implement its planned system. At this point, Charter’s system is largely undefined. Once it is defined and implemented, it can be properly evaluated to determine whether it complies with the integration ban in a proceeding with notice and the opportunity for interested parties to comment. There was no basis for the Bureau to make any finding regarding Charter’s planned system when, as the Bureau admits, the Waiver Request was not a request for approval of the system and there is insufficient evidence for the Bureau to make any informed decisions regarding the system.

For the Commission's implementation of Section 629 to be in substantive and procedural compliance with law, and to assure the future viability of the only commercial market established by this provision of the Communications Act, TiVo respectfully petitions the Media Bureau to reconsider its Waiver Order to (1) require Charter to continue to supply and support CableCARDs to subscribers wishing to use new retail devices, (2) clarify that the Bureau has made no findings regarding whether Charter's planned system or any other "downloadable" system complies with the integration ban; and (3) clarify that no security system is or will be compliant with the Commission's rules unless the details of the complete system have been presented to the Commission in a proceeding with notice and the opportunity for the public to comment.

Respectfully submitted,

/s/

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Dated: May 20, 2013

CERTIFICATE OF SERVICE

I do hereby certify that on May 20, 2013, I caused a true and correct copy of the foregoing to be sent via U.S. mail to the following:

Paul Glist
Counsel for Charter Communications, Inc.
Davis Wright Tremaine LLP
Suite 800
1919 Pennsylvania Avenue NW
Washington, DC 20006

A handwritten signature in black ink that reads "T. Devendra Kumar". The signature is written in a cursive style with a prominent underline at the end.

Devendra T. Kumar
Goldberg, Godles, Wiener & Wright