

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Charter Communications, Inc.'s	)	CSR-8740-Z
Request for Waiver of Section 76.1204(a)(1)	)	MB Docket No. 12-328
of the Commission's Rules	)	

**OPPOSITION OF CHARTER COMMUNICATIONS, INC.  
TO APPLICATION FOR REVIEW**

Paul Glist  
Paul Hudson  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue N.W., Suite 800  
Washington, D.C. 20006-3401

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## EXECUTIVE SUMMARY

As it did for Cablevision four years ago, the Bureau granted Charter a two-year waiver from the integration ban to facilitate its transition to downloadable security, which the Commission has deemed its “preferred” method of separable security. CEA seeks review, making many of the very same arguments that it made in its unsuccessful application for review of the Cablevision waiver four years ago. CEA ignores substantial consumer benefits of the conditions required by the Bureau: that Charter transition 100% of its cable systems to all-digital, make broadband Internet access service of 100 Mbps or greater available to 200,000 additional homes, and cooperate with retail device manufacturers seeking to develop devices that would use Charter’s downloadable security, including by making its security chip available on an open, royalty-free basis to any requesting party at no charge and without any restrictions.

CEA once again objects to any cable operator’s use of downloadable security unless the Commission requires all cable operators to adopt a nationally-uniform implementation precisely configured to CEA’s preferred specifications. The Commission has previously rejected CEA’s argument, and MVPDs serving 40% of the market do not use CableCARDS at all. This diversity fosters innovation and consumer choice. In any event, a rulemaking of national standards for downloadable security is outside the scope of this waiver proceeding.

CEA asks the Commission to “disclaim” the Bureau’s discussion of the effect of the D.C. Circuit’s *EchoStar* decision, which vacated § 76.640 of the Commission’s rules. CEA apparently believed that this decision had no effect on § 76.1205(b)’s CableCARD support requirements, but in 2011 that rule was amended to apply only to MVPDs

“subject to the requirements of Section 76.640.” The Bureau recognized that after *EchoStar*, Charter no longer had any clear obligation to provide or support CableCARDs, so it conditioned the waiver on continued support. Vacating these conditions as requested by CEA would only weaken, rather than strengthen, the legal requirements for support.

For these reasons, CEA’s Application should be denied.

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Pursuant to Section 1.115(d) of the Commission's rules, 47 C.F.R. § 1.115(d), Charter Communications, Inc. ("Charter") respectfully submits this opposition to the Application for Review filed in this proceeding on May 20, 2013 by the Consumer Electronics Association (CEA) of the Media Bureau's Memorandum Opinion and Order ("*Waiver Order*") that granted Charter a limited two-year waiver from the integration ban.<sup>1</sup> The waiver will enable Charter to modernize 100% of its systems to all-digital networks with an open-standard, downloadable solution that supports third party retail devices.

**Introduction**

CEA's Application attempts to paint the Bureau's order as a dramatic and novel change of policy and course, but instead it is simply a re-application of the precedent of a similar waiver granted to Cablevision four years ago.<sup>2</sup> Thus, CEA's Application fails to

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<sup>1</sup> Consumer Electronics Association, Application for Review, MB Docket No. 12-328, CS Docket No. 97-80, CSR-8740-Z (May 20, 2013) ("CEA Application for Review"); *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, MB Docket No. 12-328, CSR-8740-Z, Memorandum Opinion and Order, DA 13-788, 28 FCC Rcd 5212 (Apr. 18, 2013) ("*Waiver Order*").

<sup>2</sup> *Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7078-Z, Memorandum Opinion and Order, DA 09-67, 24 FCC Rcd 393 (2009) ("*Cablevision Waiver Order*").

identify any basis under Section 1.115 of the Commission’s rules upon which the *Waiver Order* should be reversed. The *Waiver Order* is not “in conflict with statute, regulation, case precedent, or established Commission policy,”<sup>3</sup> but instead is entirely consistent with the Commission’s policy and precedent for encouraging downloadable security,<sup>4</sup> and with the *Cablevision Waiver Order* in particular.

Though the *Waiver Order*’s relief is not new, it is not surprising that CEA nonetheless has sought review. By its own admission, CEA has a long-practiced policy to oppose every integration ban waiver, explaining that “has opposed and will continue to oppose any waiver that would undermine CableCARD common reliance unless and until an IP-based successor interface that is nationally standard and nationally portable is referenced in FCC regulations.”<sup>5</sup> Under this policy, CEA filed a very similar Application for Review of the *Cablevision Waiver Order*, making many of the very same arguments in this case that were unsuccessful four years ago. The Commission was not persuaded by CEA’s arguments then, and they are even less availing today, for at least two reasons: (i) CEA’s predictions that the *Cablevision* waiver would undermine the retail market have failed to come true, and the risk is even much lower in Charter’s case since, unlike

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<sup>3</sup> 47 C.F.R. § 1.115(b)(2)(i).

<sup>4</sup> See Charter Request for Waiver at 6-7. In *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, 20 FCC Rcd 6794 (2005) (“*Second Report and Order*”), discussed *infra* at pages 5-6 below, the Commission cited many benefits of downloadable security and predicted that it could create new retail options for consumers. In *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80, Memorandum Opinion and Order, DA 07-2921, 22 FCC Rcd 11780, ¶ 61 (2007) (“*Consolidated Waivers Order*”), the Commission granted integration ban waivers to companies to provide time to adjust their technology, “preferably [toward] a downloadable solution based on open standards,” and repeated that preference at n. 21 of the *Cablevision Waiver Order* and in Public Notice, Commission Reiterates that Downloadable Security Technology Satisfies the Commission’s Rules on Set-top Boxes and Notes Beyond Broadband Technology’s Development of Downloadable Security Solution, DA 07-51 (Jan. 10, 2007).

<sup>5</sup> See Comments of the Consumer Electronics Association, MB Docket No. 12-242, CS Docket No. 97-80, PP Docket No. 00-67, at 2 (Sept. 19, 2012). It also recounted that “CEA has opposed virtually every request for waiver of Section 76.1204(a)(1).” *Id.* at 6.

Cablevision, it commonly relies on approximately 2.75 million CableCARD devices; (ii) the Bureau imposed substantial additional public interest conditions on Charter, over and above those imposed on Cablevision, to protect consumer use of CableCARDS, foster new retail devices, and promote digital and broadband deployment.

The Bureau was well within its authority to grant a waiver that follows the same Commission guidance, with even more protections, as a prior waiver that the Commission has allowed to stand over CEA's same objections. Therefore, CEA's Application should be denied.

**I. Charter's Implementation of Downloadable Security and the Waiver Conditions Will Benefit Consumers**

Under the leadership of its new Chief Executive Officer, Tom Rutledge, Charter is building a forward-looking, next-generation all-digital network. A key component to this transition is the launch of a downloadable security system. Mr. Rutledge previously led Cablevision's successful deployment of downloadable security in 2009-2010 with the support of a previous Commission waiver, and now wants do the same for Charter and its customers.<sup>6</sup> Charter needs temporary relief from the integration ban so that it can deploy dual security boxes containing both a chip that would serve as the future platform for non-integrated downloadable security, and the traditional integrated security that would

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<sup>6</sup> CEA seeks to cast doubt on the Commission's ability to trust Charter to deploy downloadable security by reaching way back to the cable industry's first unsuccessful attempt at downloadable security. But since then, downloadable security was successfully launched as promised by Cablevision, under Mr. Rutledge's leadership and the Commission's prior transitional waiver. Charter's waiver will allow Mr. Rutledge the time and opportunity to deliver again. The *Waiver Order* also prescribes detailed reporting conditions on Charter that will enable the Commission to track and verify Charter's progress, including bi-annual reports over the next four years that include details of the status of the development and deployment of Charter's downloadable security system, the status of Charter's negotiations with consumer electronics manufacturers seeking to develop retail devices that will use the downloadable system and the assistance rendered by Charter to such manufacturers, Charter's integrated-box and CableCARD deployment statistics, and customer complaint and pricing information. *See Waiver Order*, ¶ 10.

be utilized during the two-year transitional period before downloadable security is activated.

Charter's task of transitioning to all-digital and deploying downloadable security is much more difficult than was Cablevision's. Cablevision's deployment occurred only in the concentrated New York City metropolitan area, and only across a few tightly-clustered headends passing millions of homes. By contrast, Charter's rollout of downloadable security would require deployment across 190 headends in 639 U.S. counties, more than half of which are majority rural. The two-year waiver granted by the Bureau gives Charter the time needed to roll out and test its deployment over this vast territory, and to complete the significant additional waiver conditions: to transition 100% of its cable systems, including all of its rural systems, to all-digital by July 2014, and to make broadband Internet access service of 100 Mbps or greater available to 200,000 additional homes by April 2015. The Commission has repeatedly found that this digital transition delivers substantial benefits to consumers by "freeing up spectrum to offer new or improved products and services like higher-speed Internet access and high definition programming."<sup>7</sup> Consequently, by facilitating Charter's deployment of downloadable security throughout its footprint, the waiver will uniquely accelerate the digital transition and broadband deployment in rural America, an area that the Commission has previously acknowledged is in greater need of digital investment and is a segment of the population widely acknowledged to be lagging behind in access to high speed broadband and other digital services.

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<sup>7</sup> *Basic Service Tier Encryption; Compatibility Between Cable Systems and Consumer Electronics Equipment, et al.*, MB Docket No. 11-169, PP Docket No. 00-67, *et al.*, Report and Order, FCC 12-126, 27 FCC Rcd 12786, ¶ 3 (2012) ("*Basic Service Tier Encryption Order*").

The waiver will not have any adverse impact on consumers or the retail navigation device market. Even after downloadable security is initiated, Charter would continue to “simulcrypt” its services using both security technologies to maintain service to customers with retail CableCARD devices and to Charter’s legacy leased set-top boxes, 2.75 million of which also include CableCARDs. This continued common reliance on CableCARDs assures that 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 their use in retail devices.

Instead, Charter’s downloadable security deployment will further Section 629’s objective of retail availability. The Commission has previously found that the deployment of downloadable security will advance the goals of Section 629 and consumer welfare, recognizing that it offers “a less expensive and more flexible system for both protecting system security and creating a consumer product interface,” “and will allow common reliance by cable operators and consumer electronics manufacturers on an identical security function without the potentially costly physical separation of the conditional access element.”<sup>8</sup> The *Waiver Order* includes conditions, not part of the *Cablevision Waiver Order*, designed to effectuate these consumer benefits. The Bureau required that prior to deploying an integrated set-top, Charter must submit a sworn declaration by its CEO that the company is engaged in good faith negotiations with a CE manufacturer that intends to develop a downloadable box for retail that “can be used by a Charter customer on all of Charter’s cable systems.”<sup>9</sup> Charter is designing its downloadable security around the same commodity chip that supports the Cablevision

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<sup>8</sup> *Second Report and Order*, ¶ 31, Appendix C.

<sup>9</sup> *Waiver Order*, ¶ 10.

solution, in order to facilitate retail development.<sup>10</sup> The *Waiver Order* requires that this chip, as well as “software, specifications and codes necessary to implement the downloadable security system” must be available on an open, royalty-free basis “to any requesting party at no charge and without any restrictions.”<sup>11</sup> The *Waiver Order* also requires Charter to cooperate with third-party manufacturers developing downloadable devices. Thus, Charter’s case can reasonably be expected to fulfill the Commission’s earlier prediction “that the development of set-top boxes and other devices utilizing downloadable security is likely to facilitate a competitive navigation device market [and] aid in the interoperability of a variety of digital devices.”<sup>12</sup>

But CEA accords no weight to any of these consumer benefits that will be secured by the waiver. As it did in the *Cablevision* case, CEA’s Application for Review once again objects to any cable operator’s use of downloadable security in its own devices instead of CableCARDs that are provided today for use in retail devices, unless all cable operators together migrate to a single implementation that is standard across the nation.<sup>13</sup> CEA’s Application goes even further, insisting that the Commission dictate the precise specifications and implementation details, such as a mandate that all cable operators use

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<sup>10</sup> Charter’s downloadable security implementation is not, as CEA baselessly suggests, “no different from fully integrated security.” CEA Application for Review at 14. The Commission has repeatedly distinguished downloadable security as compliant with the integration ban, and, unlike integrated security, Charter’s downloadable security will be available on a separable basis for third party retail devices. *See* Charter Request for Waiver at 3-5. The Multichannel News column by Leslie Ellis quoted by CEA (at fn. 12) that stated “We’re back to integrated security now” was clearly a reference to the integrated set-top boxes that Charter is permitted to deploy in the short-term waiver period, and not to downloadable security. As she put it: “Which means we’re back to integrated security, at least for the two years the FCC gave Charter to make it happen.”

<sup>11</sup> This obligation applies “to the extent such components are within [Charter’s] rights to license.” *See Waiver Order*, ¶ 10.

<sup>12</sup> *Second Report and Order*, ¶ 3.

<sup>13</sup> Consumer Electronics Association, Application for Review, CS Docket No. 97-80, CSR-7078-Z, at 13 (Feb. 17, 2009).

the same trusted authority,<sup>14</sup> a Commission-defined set of all possible cryptographic functions and common scrambling elements,<sup>15</sup> and a standard specification for the manner in which the conditional access is downloaded.<sup>16</sup> The Commission should reject CEA's request to have the Commission design downloadable security, for at least three reasons.

*First*, neither Section 629 nor the Commission's regulations require MVPDs to use any particular type of security, or to all use the same security. Indeed, the Commission has repeatedly recognized that MVPDs use a variety of security solutions.<sup>17</sup> Neither satellite, U-Verse, nor IPTV support CableCARDS, and CEA has not challenged these varied security implementations. Given that 40% of MVPD consumers now purchase video services from companies that do not support CableCARDS, it is paradoxical for CEA to argue that national uniformity in CableCARDS must be maintained.

The Commission has previously rejected CEA's claims that cable operators must use a uniform security system. It has held that each MVPD could choose either "a hardware-based solution (i.e., CableCARDS) or a software-based solution" as a means for

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<sup>14</sup> CEA Application for Review at 13-14.

<sup>15</sup> CEA Application for Review at 16.

<sup>16</sup> CEA Application for Review at 15.

<sup>17</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, First Report and Order, FCC 98-116, 13 FCC Rcd 14775, ¶ 12 (1998) ("When customer ownership of telephone CPE became available, the telephone network was effectively a national monopoly. Well developed technical standards existed throughout an almost ubiquitous network. CPE compatible with the telephone network was part of this environment. In contrast, cable networks do not reflect universal attributes, and have substantially different designs. Nor do satellite systems share commonality beyond the most basic elements."); *Consolidated Waivers Order*, ¶ 61 (2007) (granting additional one-year waiver from integration ban for HD and DVR set-top boxes for Internet Protocol ("IP"), Asynchronous Transfer Mode ("ATM") and hybrid QAM/IP systems in recognition that set-top box manufacturers need to develop different models of devices for each of these types of systems due to differences in technology).

achieving the objective of Section 629.<sup>18</sup> In another example, when Evolution Broadband sought a waiver for its integrated-security Digital Transport Adapters (DTAs), CEA made the same argument: that a waiver must be rejected because it would mean that not every cable operator device would use the same security used by all retail devices.<sup>19</sup> The Commission disagreed, and granted the waiver for the industry to deploy a new security while continuing to support CableCARDs for leased and retail devices.<sup>20</sup> The subsequent deployment of DTAs has had no adverse effect on support for retail devices.

*Second*, the Commission should reject CEA’s call for the Commission to mandate uniform security because diversity in technological deployments well serves consumers: if only one security solution were permissible, consumers would not have cable service to tablets, to PCs, or low-cost DTAs, and MVPDs would not have the flexibility needed to enable consumers to use third-party IP-enabled devices such as Boxee boxes without a set-top box.<sup>21</sup> Allowing for multiple, rather than exclusive, solutions is the approach successfully used by the Commission in dealing with other dynamic technology environments. In 2010, the Commission replaced its mandate for high-definition set-top boxes to include a 1394 interface with a more flexible requirement that permits a variety home networking outputs demanded by a changing market, finding that “allowing manufacturers greater choice in the specific interface they include in their set-top boxes

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<sup>18</sup> *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, et al.*, CS Docket No. 97-80, CSR-7012-Z, Memorandum Report and Order, FCC 07-127, 22 FCC Rcd 17113, ¶ 4 (2007).

<sup>19</sup> Comments of the Consumer Electronics Association, CS Docket No. 97-80, CSR-7902-Z, at 5 (June 16, 2008).

<sup>20</sup> *In re Evolution Broadband, LLC’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7902-Z, Memorandum Opinion and Order, FCC 09-46, 24 FCC Rcd 7890, ¶ 14 (2009) (rejecting CEA’s arguments that Evolution’s waiver request should be denied because its devices would use a security not available to retail device manufacturers).

<sup>21</sup> *Basic Service Tier Encryption Order*, ¶ 19.

will serve the public interest by enabling connectivity with the multitude of IP devices in consumers' homes."<sup>22</sup> Similarly, in 2012, the Commission sunset the requirement that cable operators meet "viewability" requirements by transmitting must carry broadcast stations in both analog and digital format, in order to afford more flexibility to operators to free spectrum by transitioning to all-digital systems.<sup>23</sup> The Commission has also preempted micromanagement of set-top box design to permitting multiple forms of conditional access and networking technology.<sup>24</sup> These past Commission choices, as well as similar choices by Congress,<sup>25</sup> reflect recognition that accommodating the

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<sup>22</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Fourth Further Notice of Proposed Rulemaking, FCC 10-61, 25 FCC Rcd 4303, ¶ 20 (2010). *See also Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.*, CS Docket No. 97-80, PP Docket No. 00-67, File Nos. EB-07-SE-351, EB-07-SE-352, Third Report and Order and Order on Reconsideration, FCC 10-181, 25 FCC Rcd 14657, ¶ 43 (2010).

<sup>23</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, 27 FCC Rcd 6529, ¶ 18 (2012).

<sup>24</sup> In the "plug and play" rules, 47 C.F.R. § 76.1908, the Commission endorsed the use of any "commercially adopted access control method" for home domains without constraining the market's ability to choose which access control method would become commercially accepted. Likewise, the Commission does not prescribe MPEG-2 or MPEG-4 for satellite, or tell web designers to use Flash, Silverlight or HTML5. In adopting rules for wireless PCS, the Commission repeatedly adopted a "flexible approach to encourage the widest range of PCS services and devices," sought to "provide the maximum flexibility in technical standards so as to allow the new service to develop in the most rapid, economically feasible, diverse manner," and turned to "industry and standards groups" to handle the details of roaming and interoperability "in the most efficient and least costly manner." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, Second Report and Order, FCC 93-451, 8 FCC Rcd 7700, 7755-56, ¶¶ 135-38 (1993).

<sup>25</sup> The Commission, and then Congress, preempted state and local efforts to re-design set-top boxes in order to free innovation from regulatory constraints. *See City of New York v. FCC*, 486 U.S. 57, 65 (1988) (quoting with approval Commission findings that "[t]echnical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes"); 47 U.S.C. § 544(e) ("No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Report and Order, FCC 99-57, 14 FCC Rcd 5296, 5350-51, ¶ 126 (1999) (quoting H.R. REP. NO. 104-204, pt. 1, at 110 (1995)) ("The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.").

flexibility of MVPDs to use different architectures and technologies to reach consumers and consumer-owned devices will foster innovation and consumer choice.

Charter's deployment of downloadable security will be one such example of an innovative solution that will benefit consumers. The *Waiver Order* provides Charter with the time and space to test and deploy a downloadable security system, with specific conditions developed by the Bureau for monitoring that development. Just as the Commission has done in the cases described above, it should, as the Bureau has done here, allow Charter the room to innovate and to let optimal technology develop during the waiver period. CEA attacks the Bureau as being insufficiently prescriptive, but the Bureau struck a careful balance between affording room to innovate while pointing in the desired direction.

*Third*, and finally, CEA's request for the Commission to mandate national standards for downloadable security are outside the scope of this waiver proceeding. While CEA argues that the Bureau impermissibly engaged in "rulemaking" in the context of this waiver docket,<sup>26</sup> it is CEA that is apparently seeking a rulemaking to try to mandate a specific technical implementation of its preferred methods for downloadable security. CEA's Application effectively urges the Commission to hold Charter's waiver case hostage until the Commission adopt CEA's laundry list of proposed national rules for downloadable security and/or a next-generation retail architecture. This waiver case is not the vehicle for such a broad policy initiative. Requests for temporary waivers must instead be addressed expeditiously based on the existing rules and record, which fully

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<sup>26</sup> CEA Application for Review at 19.

supports the Bureau’s grant of Charter’s request.<sup>27</sup> Moreover, under Section 1.115(c) of the Commission’s rules, CEA cannot present new facts, such as CEA’s preferred prescription for downloadable security, that were not presented to the Bureau in the underlying proceeding.<sup>28</sup> For all of these reasons, the Commission should find that Charter’s downloadable security will serve the public interest in justification of the waiver, and that CEA’s Application should therefore be denied.

## **II. The Waiver Order Only Strengthens, Rather than Weakens, Charter’s Legal Obligation to Support and Supply CableCARDS**

CEA also argues that even if Charter’s waiver from the integration ban is to be upheld under the *Cablevision Waiver Order* precedent, the Commission should “disclaim” two portions of the *Waiver Order*: one that provides “At such time that a third-party device compatible with Charter’s downloadable security is available for purchase at retail, Charter will no longer be required to provision new CableCARDS to customers;”<sup>29</sup> and the other acknowledging that the D.C. Circuit’s *EchoStar* decision affected cable operators’ obligations under Section 76.1205 of the Commission’s rules. CEA mistakenly claims that these statements by the Bureau have bestowed Charter with additional “post-waiver relief” from the Commission’s CableCARD rules beyond the integration ban. In fact, as demonstrated below, the Charter waiver strengthens CableCARD support through conditions placed upon Charter, rather than weakening the legal requirements for support.

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<sup>27</sup> Courts have repeatedly held that the Commission has a legal obligation to “take a ‘hard look’ at meritorious applications for waiver,” and must grant waivers where the application of a general rule to a specific situation would not serve the public interest. *See, e.g., KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192, 1195 (D.C. Cir. 1983).

<sup>28</sup> 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

<sup>29</sup> *Waiver Order*, ¶ 10.

CEA's arguments are premised on a mistaken understanding of the impact of the *EchoStar* decision, and therefore, a mistaken understanding of Bureau's approach in the *Waiver Order*. In *EchoStar*, the D.C. Circuit vacated Section 76.640 of the Commission's rules.<sup>30</sup> CEA's Application for Review reflects a belief that the Court's decision had no effect on Commission Rule 76.1205(b), which is the rule that had required support for CableCARD self-installation, M-Cards, switched digital video solutions, uniform CableCARD fees, and bring-your-own-box discounts. But CEA is apparently unaware that in 2011, prior to *EchoStar*, the Commission amended Section 76.1205(b) to apply only to MVPDs "subject to the requirements of Section 76.640."<sup>31</sup> Thus, when *EchoStar* vacated Section 76.640 (after Charter filed its petition for waiver), the requirements of Section 76.1205(b) no longer clearly applied to Charter.

While Charter does still have an obligation to provide separable security under § 76.1204(a)(1), the Commission has recognized that the rule does not specify that such security must be in the form of a CableCARD and could instead be met through downloadable security.<sup>32</sup> Therefore, with § 76.640 vacated and § 76.1205(b) effectively so, between the time that Charter filed its Request for Waiver and the time that the Bureau wrote the *Waiver Order*, a significant change had occurred – Charter no longer had any clear obligation to provide CableCARDS.

In the face of that uncertainty, the Bureau sought to secure CableCARD support as a condition of the waiver. Charter explicitly accepted as a condition of waiver to

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<sup>30</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013).

<sup>31</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices et al.*, CS Docket No. 97-80, PP Docket No. 00-67, CSR-7902-Z, Order on Reconsideration, FCC 11-7, 26 FCC Rcd 791, Appendix (2011).

<sup>32</sup> See *Second Report and Order*, ¶ 35. Charter does not, as CEA mistakenly suggests at page 7 of its Application, have an independent obligation to supply CableCARDS under the statements of other cable operators or CableLabs that preceded the adoption of § 76.1204 in the *First Report and Order*.

commit to a package of support for CableCARD devices, including to maintain simulcrypt indefinitely for use by existing retail CableCARD devices, and to the provision of CableCARDS for retail devices that had been required by § 76.1205(b) at least until a device that uses Charter’s downloadable security becomes available at retail, notwithstanding the *EchoStar* decision. The conditions also require Charter to comply with the Commission’s CableCARD technical rules in 47 C.F.R. §§ 76.640, 76.1205 and 76.1602, including continued support of CableCARD self-installation, M-Card, switched digital video solutions, uniform CableCARD fees, the IP output requirement, and the bring-your-own-box discount requirement. Thus, the Bureau strengthened and assured CableCARD support in the wake of the *EchoStar* decision issued during the course of considering Charter request for waiver. The Bureau did not weaken CableCARD support requirements – the D.C. Circuit did. Granting CEA’s Application and vacating the *Waiver Order* would not strengthen CableCARD support requirements, it would weaken them.

Moreover, the *Waiver Order* makes clear that “Should the Commission address its CableCARD rules or adopt any new or revised rules that apply to set-top box conditional access, Charter must come into compliance with any subsequent rule changes implementing Section 629.”<sup>33</sup> Therefore, CEA has mistaken these post-waiver *conditions* as “post-waiver relief.” As such, its Application for Review presents no cognizable claim and should be denied.

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<sup>33</sup> *Waiver Order*, n. 64.

### III. Conclusion

CEA has failed to make the required showing that the *Waiver Order* is “in conflict with statute, regulation, case precedent, or established Commission policy.” In fact, the *Waiver Order* is a straightforward re-application of the Commission’s existing precedent from the *Cablevision Waiver Order*, will help advance the Commission’s goals for the digital transition and broadband deployment to rural America, and will enable Charter to implement what the Commission has identified as its “preferred” method for cable operator separable security. Moreover, because CEA has based its argument on an outdated set of Commission rules from 2010 that do not reflect the Commission’s 2011 amendments, it has misunderstood that vacatur of the *Waiver Order* and its conditions requiring Charter to maintain such support would actually undermine the CableCARD support that CEA seeks.

The *Waiver Order* will benefit consumers, facilitate Charter’s introduction of better technology, and further the Commission’s objectives for the development of a next-generation, competitive marketplace for navigation devices, without undermining the purpose of the integration ban. The Commission should therefore deny CEA’s Application for Review.

Respectfully submitted,

/s/ Paul Glist  
Paul Glist  
Paul Hudson  
Davis Wright Tremaine, LLP  
1919 Pennsylvania Avenue NW, # 800  
Washington, DC 20006

*Attorneys for Charter Communications, Inc.*

June 3, 2013

**CERTIFICATE OF SERVICE**

I do hereby certify on this 3<sup>rd</sup> day of June, 2013 that a true and correct copy of the foregoing Opposition of Charter Communications, Inc. to Application for Review has been sent via electronic mail to the following:

Julie M. Kearney  
Vice President, Regulatory Affairs  
Consumer Electronics Association  
1919 S. Eads Street  
Arlington, VA 22202

Robert S. Schwartz  
Constantine Cannon LLP  
1301 Street, N.W.  
Washington D.C. 20005

/s/ Paul Hudson