

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

In the Matter of)	
)	
Charter Communications, Inc.'s)	
Request for Waiver of Section 76.1204(a)(1))	CSR-8470-Z
of the Commission's Rules)	MB Docket No. 12-328
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	PP Docket No. 00-67
)	
Commercial Availability of)	
Navigation Devices)	

**Opposition of The
Consumer Electronics Association**

November 30, 2012

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**Opposition of The
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The Consumer Electronics Association (“CEA”)¹ opposes this waiver application.² Although Charter seeks a waiver only for a two year “transition” period to an era of “downloadable” security that purportedly would satisfy Charter’s obligations under Section 76.1204(a)(1), the technology described in this Petition would not, in fact, satisfy Charter’s obligations under that rule, either in the two year “transition” period *or* when Charter’s plan has been fully implemented. Nothing in the Petition or in considered FCC precedent indicates that

¹ CEA’s more than 2,100 member companies include the world’s leading consumer electronics manufacturers. CEA’s members design, manufacture, distribute, and sell a wide range of consumer products including television receivers and monitors, computers, computer television tuner cards, digital video recorders (“DVRs”), game devices, navigation devices, music players, telephones, radios, and products that combine a variety of these features and pair them with services.

² *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 Petition”).

this technology is or should be deemed compliant or consistent with Section 629³ or with 47 CFR 76.1204(a)(1). If the FCC is to give any consideration to issues raised by Charter it should be in the context of a Commission rulemaking addressing the core issue that Charter purports to, but fails, to raise: In an all-digital and IP-delivery era, the FCC needs to identify a new, secure, open, and nationally standard interface between MVPD services and retail devices.

I. Charter’s System As Described Does Not Differ From Fully Integrated Security In Any Appreciable Or Relevant Respect. A Waiver Would Be Required For The Time Subsequent To The Two Year “Transition” Period, As Well As For The Transition, And Would Need To Address All Elements of Section 76.1204(a)(1), Not Just The “Integration Ban.”

Charter admits that its system is chip-based, rather than fully downloadable.⁴ This is not a minor or secondary consideration. The unavoidable facts and consequences of the Charter system are:

- Charter’s system requires a system-specific chip that must be installed in the navigation device.
- The system cannot work if the specific chip is not installed.
- The chip must be specifically and irrevocably programmed at the factory with non-downloadable elements that cannot be changed by any future download.
- The chip affords access only to a single conditional access system, and only Charter systems are likely to be able to download software that uses the conditional access hardware in the chip.
- There is no indication that access to any system other than Charter’s will or can be afforded once the chip is installed, programmed, and activated by download to work on Charter’s system. So, despite the downloadable component, the system will not support portability.
- These attributes (hardware made specifically for the conditional access system, a specific hardware component requirement, a system tied to a specific conditional access system, and lack of portability) are also the key attributes of non-portable, non-separable, integrated security systems.
- These attributes forestall retail entry, and are the reason that Section 76.1204(a)(1) was adopted.

³ 47 U.S.C. § 549.

⁴ Charter Petition at 5 (“... a security system that is partly software-based”).

- Without a waiver, the system would not satisfy Section 76.1204(a)(1), either during a two-year “transition” period or thereafter.
- A waiver would be necessary not only for common reliance (the “integration ban”) but also for the core obligation to provide separable security to support retail devices, which the Charter system would not meet.
- Granting such waiver would eviscerate the entirety of Section 76.1204(a)(1) with respect to Charter’s systems.

There is no considered FCC precedent for the open-ended evisceration of this regulation, with these known consequences, upon application of a major cable system. Charter points to Cablevision’s now-expired waiver and to asides and to references in Public Notices that projected, based on cable industry promises and extrapolations about “downloadable” security, that a fully downloadable system could be a successor to CableCARD.⁵ Even in these references, the Commission expected ultimate achievement of a functionally useful *separation of security from hardware* that is simply not present in Charter’s system. The Cablevision waiver, which reserved judgment⁶ on the compliance of Cablevision’s system with Section 76.1204(a)(1), is now expired.

⁵ The FCC documents cited by Charter in footnote 7 contain *caveats* and explicit expectations that neither the Charter technology nor any other “downloadable” technology can actually meet: The Second Report & Order, as cited in the Jan. 10, 2007 Public Notice, includes an expectation, proved false in practice, that “the conditional access functionality of a device with downloadable security is not activated until it is downloaded to the box by the cable operator. *To the extent* a downloadable security or other similar solution *provides for common reliance*, as contemplated herein, we would consider the box to have a severable security component.” CS Dkt. No. 97-80, Second Report and Order ¶ 35 (rel. Mar. 17, 2005) (“Second Report & Order”) (emphasis supplied); 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).

⁶ The FCC noted that “Cablevision did not request the Commission to approve, nor did it provide specific details of its downloadable security solution. Accordingly, the Commission will not address this matter in the context of this order.” *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1)*, CSR-7078-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 9 (rel. Jan. 16, 2009).

The Commission's interest in "downloadable" security, like the cautious interest of the consumer electronics industry,⁷ was based on promises and projections of a functional, nationally standard interface as a successor to CableCARD – promises that were never met despite an explicit promise by the cable industry that its solution would be deployed *on a national basis* in 2008.⁸ CEA pointed out that these were undocumented promises about a technology that was still under nondisclosure agreement ("NDA").⁹ These promises and projections dated from a cable industry initiative that was taken over by CableLabs and then abandoned.¹⁰ Details of

⁷ On November 30, 2005, in a CEA Appendix to a joint report with the cable industry, CEA made this observation about the DCAS proposal: "We are aware that the Commission is considering approval of cable operator reliance upon a downloadable conditional access technology. The CE side has not had access to either the technical or licensing terms of such a technology, so we are unable to endorse any such approach at this time. We are able to observe, however, that any regulations permitting cable operators to rely upon downloadable conditional access security must also support common reliance by CE manufacturers in order to fulfill the competitive objectives the Commission has established. Irrespective of which specific method or technology that might be adopted for downloadable conditional access, the selected method must equally support both unidirectional and interactive (bidirectional) forms of competitive navigation devices and not create any unfair disadvantage for competitive navigation devices using either downloadable technology or CableCARDS when compared with the MVPD's own navigation devices leased to a subscriber. In addition, any license for downloadable conditional access security must be consistent with Sections 76.1201 – 1205." CS Dkt. No. 97-80, Consumer Electronics Appendix to Joint Status Report to FCC, at 13 (Nov. 30, 2005).

⁸ In its own Appendix to the Joint Report, *id.*, NCTA said: "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." CS Dkt. No. 97-80: Report of the NCTA on Downloadable Security (Nov. 30, 2005).

⁹ 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, would 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).

¹⁰ *See* Light Reading Cable, *MSOs Closing PolyCipher Headquarters*, http://www.lightreading.com/document.asp?doc_id=177662&site=lr_cable (June 5, 2009). "TWC EVP of technology policy and product management Kevin Leddy lamented during a panel on the topic of [tru2way](#) at the Consumer Electronics Show that the 'economics of downloadable security are challenging' while CableCARD costs continue to slide downward."

these projects, though touted to the Commission, were wrapped under an NDA. All optimism about actual, open, and standard “downloadable” security, as hoped for by the Commission in January of 2007, collapsed when CableLabs abandoned its project.¹¹ *Since then, there has been no pretense that any “downloadable” system would be national in scope or that it could be implemented on other than a specific chip that has been customized for a particular system.*

It is of no consequence that a particular chip is available for license, even on the most advantageous terms, if (1) other cable operators do not use the system that requires it¹² and (2) it does not employ technology that is actually portable across operators. Charter’s proposed system fails in each respect. Charter cites Cablevision’s waiver as a precedent, but CEA is not aware that any operator other than Cablevision has adopted Cablevision’s technology, *or* that any retail device has been configured with Cablevision’s chip.¹³ The record clearly indicates that,

¹¹ *Id.* The full text of paragraph 31 of the Second Report & Order, referenced by Charter in footnote 8 of its Petition, includes a specific expectation that downloadable security must in practice supply a *common* solution, so as to achieve actually common reliance: “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.” (emphasis supplied) It was this promise of common reliance, cited by the FCC based on representations about the CableLabs (still under NDA) PolyCipher system, that collapsed and was abandoned along with the PolyCipher project. As is discussed above, the promise of a “common” downloadable system has not been revived by Cablevision, Charter, or anyone else. Hence there is *no* FCC precedent, other than Cablevision and other expired waivers, for granting this waiver, and there is none that would satisfy the conditions stated by the FCC in either paragraph 31 of the Second Report & Order or in its Jan. 10, 2007 Public Notice.

¹² NCTA suggested as early as 2001 that its members might satisfy Section 76.1204(a)(1) by licensing their own integrated conditional access technologies. *See* Letter from Robert Sachs, Pres. & CEO, NCTA to Hon. Michael K. Powell, FCC re: Commercial Availability of Navigation Devices at 2, CS Dkt. No. 97-80 (Oct. 10, 2001); CS Dkt. No. 97-80, Consumer Electronics Retailers Coalition Reply to the NCTA Letter as to “Retail Set-Top Initiative” and to the NCTA Response to CERC Status Report “J2K Plus 1” at 6-7 (Nov. 6, 2001). This offer has never been regarded as sufficient by the FCC or, apparently, by any potential retail entrant.

¹³ Nor did the Media Bureau’s now-expired waiver extension order that allowed Cablevision to proceed with its system include any finding that, upon expiration of the waiver, the system would be compliant with Section 76.1204(a)(1). *See n.6, supra.*

except for nomenclature and secondary detail, there is *no* effective difference between the system for which Charter seeks a waiver and the full integration of conditional access technology.

II. Charter’s Application Offers No Additional Competitive Or Other Benefit To Consumers So As Potentially To Justify A Waiver.

To merit consideration for a waiver, Charter’s system would have to offer value to consumers or to competition while not undermining the law or regulation from which a waiver is sought.¹⁴ Charter’s descriptions of *potential* advantages to competition, and hence to consumers, however, are no better than NCTA’s old advocacy that an offer to license integrated security chips and technology should be deemed to satisfy Section 76.1204(a)(1).

In the long record of the FCC’s oversight of the implementation of Section 629, there is nothing to indicate that retail entry can be promoted by making available a semiconductor chip for installation in retail products, when the system (“downloadable” or otherwise) would not enable attachment to all major cable systems. Every time the FCC has been down this road it has been a dead end. The Commission has granted time-limited waivers based on the hope that an IPTV or “downloadable” system would eventually support retail products. The result has been expiration of the waivers with no enablement of competitive entry. *This has been the case in every one of the waivers cited by Charter as precedent, including the Cablevision waiver that Charter touts as its prime example.*¹⁵ These waivers expired as to HD and DVR products more than four years ago, and except for Cablevision’s grandfathered implementation were expressly made *not* available to major cable operators. As the Commission observed in its June 29, 2007

¹⁴ An “agency must or should [not] tolerate evisceration of a rule by waivers.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁵ See Charter Petition at 8 n.11. One group of the cited waivers, pertaining to many small systems, was not time-limited only for SD, non-DVR products and like others has not resulted in any “downloadable” alternative to CableCARD.

“Consolidated Requests” Order, cited as precedent by Charter, “... we find that a waiver for *certain high-end devices for traditional cable operators* would be inconsistent with the narrowly defined goal of the conditional waiver granted to BendBroadband.”¹⁶

III. No Waiver Is Justified Either For the Two-Year “Transition” Period Or For The Period Thereafter.

What the precedents cited by Charter actually illustrate is that waivers beget more waivers. Charter cites a basket of previous waivers to allege that failures to comply with Section 76.1204(a)(1) haven’t done much damage, so neither will additional waivers.¹⁷ If the FCC accepts this premise and grants this waiver, it will be increasingly difficult for the Commission to deny *any* waiver of this regulation on *any* basis. Yet Charter’s observations are simply wrong:

- The waiver sought by Charter would free Charter entirely and indefinitely from the duty to supply and support CableCARDS, as well as from the duty to rely on them in Charter’s own leased devices. This would be a first for any major cable operator.¹⁸
- The Commission’s and Bureau’s previous waivers and delays in implementation – including the *extra year* granted by the FCC, based on NCTA’s broken promise of a nationally standard “downloadable security” technology – were in fact very damaging to the retail market, at a time that TV manufacturers were struggling and failing to gain operator support for CableCARD-reliant products.¹⁹

¹⁶ *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶ 60 (June 29, 2007) (emphasis supplied). This order’s allowance of integrated HD and DVR device deployment even for the smaller, non-traditional cable applicants, expired on July 1, 2008.

¹⁷ Charter Petition at 8.

¹⁸ Cablevision’s waiver was time-limited and has expired. *See n.13, supra*.

¹⁹ The damage that operator non-support of CableCARDS has done to retail entry has been recognized by both the Commission and the Court of Appeals. *See* CS Dkt. No. 97-80, PP Dkt. No. 00-67, Comments of CEA/CERC on the Fourth Further Notice of Proposed Rulemaking, at 3 nn.4-7 (June 14, 2010).

- Even if Charter continues to supply CableCARDS to retail devices, those devices will be at an increasing disadvantage in ease of installation and access to services. If Charter follows in the shoes of other operators allowed to depart from common reliance, Charter will offer new services only to their own “downloadable” devices that cannot be offered to retail devices.²⁰

CEA documented in its Comments on the Basic Tier NPRM that through expired waivers and fuzzy expectations the Commission was in danger of failing in its oversight of 47 C.F.R. Section 76.1204 specifically, and Section 629 generally. CEA said that divergent practices and interfaces may forestall retail entry entirely in the coming era of IP-based distribution, so the FCC must identify a nationally standard successor to the CableCARD interface.²¹ The Commission, in its Report & Order, agreed.²²

An exemption from all Section 76.1204(a)(1) obligations without any actual benefit to competition would open the last floodgate. Charter and those who rely on this waiver as precedent would be under no obligation to support CableCARDS and under no obligation to rely on them in leased devices. The Commission cannot grant waivers that so vitiate its own regulations.²³

²⁰ An egregious precedent is the practice, tolerated by the Commission, of moving channels to “switched digital” video, which requires consumers owning CableCARD-reliant retail devices to procure an additional set-top box to view channels that are included in their paid subscriptions.

²¹ *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Comments of CEA, at 10-12 (Nov. 28, 2011).

²² *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Report and Order, at 26 n.162 (rel. Oct. 12, 2012). The Commission, however, decided that it was not necessary to hold up its Basic Tier Order until the issue of a successor interface to CableCARD had been addressed. Nor, in CEA’s view, should the Commission effectively abandon CableCARD before a new interface has been identified.

²³ n.14, *supra*.

IV. A Systematic Change Requires A Systematic Rulemaking By The Commission.

Charter cites a coming systematic change to its system as purported justification for customizing its conditional access interface. Such a policy decision would be at odds with Section 629. The effect of this waiver and of follow-on waivers would be to embed separate regimes that are obstacles to, rather than points of attachment for, competitive retail products. Before inviting such a standards *diaspora* the Commission should invite comment on all policy options. These options should include, as the Commission acknowledged in the Basic Tier Order, an IP-based successor to CableCARD.

The Commission should not proceed outside the context of a rulemaking. Even if Charter's proposal were a real-world retail solution for cable operators, it would do nothing for DBS and IPTV systems, which remain in regulatory limbo. The Section 76.1204(a)(1) waivers to IPTV providers have expired. The interim forbearance granted to DBS operators dates from 1998 and has long outlived its rationale (allowing time for the FCC to focus its regulations on more immediate cable industry obstacles to device competition). When operators move to IP-based distribution, CableCARD – the Commission's solution for the cable industry – will have been superseded. The time has come for the FCC to identify a successor common interface that affords device access to all MVPD services. Rather than create obstacles that the FCC will be asked to “grandfather” when it does this, the FCC should release an NPRM that results in a *rule* that will refer to an IP-based interface for the direct²⁴ attachment of competitive products for *all* MVPDs.

²⁴ As stated by the Commission in the National Broadband Plan and supported by CEA, a “direct” attachment would include modem-like operation through a gateway device that includes an integrated conditional access system chosen by the operator. *In the Matter of A National Broadband Plan for Our Future, et al.*, GN Dkt. Nos. 09-47, 09-51, 09-137, and CS Dkt. No. 97-80, Comments of the CEA on NBP Public Notice # 27, at 2-3, 8-9, 20-23 (Dec. 21, 2009).

V. Conclusion: The Commission Should Deny This Petition And Instead Should Release A Rulemaking On The Interface Of MVPD Systems To Retail Devices.

The Commission needs to decide whether it will accept nominal and partial “solutions” that cannot fairly be projected to work in the real world. The effect of granting this waiver would be only to make it cheaper for cable operators to return to an era of integrated security, as the common CableCARD solution becomes irrelevant. The hope for *any* direct and standard attachment of retail devices to MVPD systems would be abandoned just as technologically it becomes possible. IPTV systems would remain in limbo and DBS systems would enter a 15th year of interim forbearance. The Commission indicated in its Basic Tier order that it has no intention of allowing this to happen.

Therefore, the FCC should view this Charter Petition as the occasion for a forward-looking rulemaking to identify what Section 629 requires: A nationally standard interface for the direct attachment of retail devices to MVPD systems.

Respectfully submitted,

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Dated: November 30, 2012