

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Implementation of Section 304 of the Telecommunications Act of 1996)	
)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	
)	
)	
Verizon's Petition for Waiver of The Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1))	CSR-7042-Z
)	

**COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”), the principal trade association for the U.S. cable industry representing cable operators serving more than 90 percent of the nation’s cable television households, submits these comments on Verizon’s request for waiver of the “integration ban” requirement set forth in the second sentence of Section 76.1204(a)(1) of the Commission’s rules. We believe Verizon makes a strong case that a waiver is appropriate and in the public interest because a less costly and more efficient solution to achieve the goal of the ban is on the horizon, *i.e.*, the prospect of downloadable security.¹ As detailed below, however, the other claims advanced by Verizon in support of its request – its purported status as a “new entrant,” its “small” market share, or the fact that its set-top boxes use a limited form of IP technology – do not support a waiver. Any waiver granted on those grounds would be inconsistent with both the Commission’s congressional mandate in this area and with

¹ See Verizon’s Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1) (filed Aug. 8, 2006) (“Verizon Waiver Request”).

Commission precedent and, as such, would be arbitrary, capricious and an abuse of the Commission's discretion.

SUMMARY

NCTA agrees with Verizon that it would be “wasteful, inefficient and harmful to consumers” to require a costly interim implementation of the integration ban only a short time before downloadable security solutions become available. The Commission has previously stated that it would consider a further extension of the ban given that downloadable security can be both technologically superior and far less expensive for consumers. Both Verizon and NCTA's requests² for waiver demonstrate that the Commission was correct in anticipating that a brief further extension could serve the public interest.

NCTA also agrees with Verizon that Section 629(c) requires the Commission to grant waivers because a wasteful interim and “ultimately superfluous physical separation solution [] will only delay the provision” of new and improved video and broadband services that Verizon and other MVPDs seek to offer. In order to spur the development and offering of such new services, the Commission should provide Verizon and NCTA's members – and their subscribers – with relief from this burdensome and costly interim separation requirement.

In any event, grant of Verizon's waiver would necessarily extend the same relief to all cable operators, including NCTA's members. By its terms, Section 629(c) requires that all waivers of regulations adopted under Section 629(a) – such as the integration ban – must be effective for all service providers. Therefore, grant of Verizon's waiver automatically results in the effective grant of NCTA's waiver.

² See Exhibit A attached hereto, *In the Matter of National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR- _____ (filed Aug. 16, 2006) (“NCTA Waiver Request”).

Despite Verizon’s suggestion that it should alone be granted a waiver on the basis that it is a “new entrant” to the video distribution market and currently has a small market share, such a claim is without merit. Verizon has greater market capitalization than that of the entire cable industry combined and boasts that within a few years it will become one of the largest MVPDs in the nation. With its massive financial and technical resources, Verizon hardly fits the notion of a “new entrant” that would merit special regulatory treatment.

Likewise, Verizon’s suggestion that grant of its waiver should be premised upon the specific technology it uses to deliver video programming would contravene the Commission’s well-established policy to avoid favoring one technology over another so as to prevent artificial market-skewing results. The Commission has held that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending disparate regulation of like services provided over different technological platforms, and Chairman Martin has emphasized that “all providers of the same service must be treated in a similar manner regardless of the technology that they employ.”³ Therefore, any relief granted by the Commission should extend to all cable operators and must be technology-neutral in nature.

I. VERIZON IS CORRECT THAT IT WOULD BE “WASTEFUL, INEFFICIENT AND HARMFUL TO CONSUMERS” TO IMPOSE THE INTEGRATION BAN BEFORE DOWNLOADABLE SECURITY SOLUTIONS BECOME AVAILABLE

The central premise of Verizon’s Petition is absolutely correct: a temporary waiver of the integration ban would spare consumers from pointlessly bearing the massive costs of an interim solution just a short time before superior and far less expensive downloadable security alternatives become available. This same premise is the foundation of NCTA’s virtually

³ Remarks of FCC Chairman Kevin J. Martin to the TELECOM 05 Conference, Las Vegas, NV (October 26, 2005) (emphasis added), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261868A1.pdf.

identical waiver request filed eight days after Verizon’s Petition. As demonstrated below, both requests have shown that a limited waiver of the integration ban should be granted until downloadable security alternatives are available.

Verizon presents a compelling case that imposition of the integration ban at this time would raise costs on customers and would impede the introduction of new and improved video and broadband services. Verizon argues that a waiver during this limited period would facilitate MVPD introduction of new and improved video and broadband services that would benefit consumers without jeopardizing the objectives of Section 629. Verizon is therefore correct that a “costly, complex, inefficient and ultimately superfluous physical separation solution [] will only delay the provision of important new services.”⁴ Accordingly, temporary relief from the integration ban would bring innovation, lower prices, and higher quality service to consumers – the fundamental objectives of the 1996 Act.⁵ Indeed, denial of either Verizon’s or NCTA’s waiver would be inconsistent with the pro-innovation goals of Section 629(c).⁶

Verizon states that placing CableCARD slots on its boxes would cost approximately \$75-95 per unit,⁷ and that “[t]hose costs will ultimately hurt consumers in the form of more expensive

⁴ Verizon Waiver Request at 4.

⁵ Congress adopted Section 629, and the 1996 Act generally, to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). As NCTA demonstrated in its waiver request, “[m]eeting the July 1, 2007 deadline for its own sake would be contrary to these paramount objectives when doing so would (1) impede competition, (2) increase regulation, (3) raise consumer prices, and (4) suppress the delivery of new and improved innovative services and technologies – all when the factual foundation that the Commission relied upon in 1998 in adopting the ban has dramatically changed.” NCTA Waiver Request at 6-7.

⁶ See S. Conf. Rep. No. 104-230 at 181 (“The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”).

⁷ Verizon Waiver Request at 15 (explaining, based upon a Declaration of its Executive Director–Technology, that “the physical hardware to accommodate CableCARDS ... can increase its wholesale price by as much as \$25 per unit, without factoring in the cost of the CARDS themselves, which can add an additional \$50 to \$70 of cost to the consumer per unit”).

set-top boxes.”⁸ Verizon’s cost estimate is supported by record evidence from cable operators’ vendors that the cost to enable their leased devices to work with CableCARDs would add approximately \$72-93 per unit.⁹ Indeed, the American Cable Association recently advised the Commission that a replacement for one integrated set-top box – the Motorola DCT-700 – “will nearly triple the box cost....”¹⁰ The Commission previously recognized that the public interest would be served if consumers could be spared these enormous costs by deferring implementation of the integration ban for a reasonable period until the deployment of downloadable security, and that it would consider further extensions of the deadline to achieve that result.¹¹

While cable’s pursuit of a downloadable security solution is well underway with the investment of over \$30 million in a new development company and presentations of test demonstrations to FCC staff in Washington in 2005 and to others at the 2006 Consumer Electronics Show, Verizon is correct that, unfortunately, downloadable security simply cannot be ready before July 2007.¹² Therefore, compelling conditions now exist for a deferral of the integration ban until downloadable security is deployed, or until December 31, 2009, whichever is earlier, as NCTA has proposed.¹³

⁸ *Id.* at 4.

⁹ See NCTA Waiver Request at 7 (citing Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, CS Docket 97-80, at 3 (filed Aug. 2, 2002) (“NCTA Cost Report”).

¹⁰ See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7012-Z, CS Docket No. 97-80, Notice of Ex Parte Presentation by the American Cable Association (filed August 31, 2006).

¹¹ See NCTA Waiver Request at 8-9, citing *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, ¶¶ 3, 31, 36 (Mar. 17, 2005) (“*Second Report and Order*”).

¹² See NCTA Waiver Request at 9-11.

¹³ *Id.* at 1-7.

Both Verizon and NCTA have also demonstrated that a waiver is compelled by their respective showings as it would assist in the development of new and improved video, broadband, and (in the case of traditional cable operators) voice services. These new and improved services would in turn promote competition, spur broadband deployment, aid the digital transition and generally benefit customers by giving them greater choice and value. For example, both Verizon and the cable industry have spent billions to upgrade their networks to bring broadband to consumers.¹⁴ They now plan to invest even more to extend the availability of broadband to more American households and to improve broadband services and capacity ahead of consumers' always-increasing appetite for better and faster services. But this vital effort, a cornerstone of the Bush Administration's technology and economic growth policies,¹⁵ would be impaired by the diversion of millions of dollars and limited technical resources into what Verizon has accurately described as a "costly, complex, inefficient and ultimately superfluous physical separation solution that will only delay the provision of important new services."¹⁶

Just as the *Wireline Broadband Order* found that intermodal facilities-based competition enabled the relaxation of outdated, burdensome monopoly-era regulations on wireline broadband services, the emergence of competition from telephone company video services compels a reassessment of the need to rush a high-cost implementation of the integration ban when a far less expensive solution is just around the corner. As the Commission explained:

[W]hen, as a relative matter, the regulations' costs outweigh their benefits, or are no longer necessary to achieve the desired objectives, we must evaluate whether our obligations and objectives can be met in a manner that reduces or eliminates

¹⁴ NCTA Waiver Request at 21-22; Verizon Waiver Request at 25.

¹⁵ The White House, *A New Generation of American Innovation* (Apr. 2004), available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

¹⁶ Verizon Waiver Request at 4.

such costs. This becomes even more critical if there is evidence that the regulation actually impedes or frustrates the accomplishment of important statutory goals.¹⁷

The Commission thus found that telephone companies should not be required to produce “‘de-integrated’ equipment” designed only out of regulatory compulsion to support a certain model of access to third-party services, if such equipment was not needed to “yield benefits that outweigh the obvious technological costs.”¹⁸ Instead, the Commission observed that “manufacturers develop broadband equipment that pushes technology in the direction they think will best respond to future consumer demands” and that “[o]ur rules should not force technological development in another, less efficient direction.”¹⁹

For these same reasons, because of intense intermodal competition, it is now clear that: (1) the integration ban is not “necessary to achieve [its] desired objective”; (2) the “obvious technological costs” of implementing the ban prior to downloadable security would outweigh its benefits; and (3) “its objectives can be met in a manner that reduces or eliminates such costs” (*i.e.*, by granting a waiver until downloadable security is available) rather than “forc[ing] technological development in another, less efficient direction” (*i.e.*, forcing MVPDs to incur a costly and intensive reengineering of their leased boxes when such a project would deliver no new functionality to consumers and would be mooted by downloadable security in 1-2 years). Indeed, this waiver is “even more critical” in light of “evidence that the regulation actually impedes or frustrates the accomplishment of important statutory goals.”

¹⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Report and Order, 20 FCC Rcd. 14853, 14890 (2005) (“*Wireline Broadband Order*”).

¹⁸ *Id.* at 14888-89.

¹⁹ *Id.* at 14890.

Section 629(c) requires the Commission to grant waivers that would assist the development of new and improved services, while Section 706 of the 1996 Act directs the Commission

to encourage the deployment ... of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity ... regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁰

Grant of both the NCTA and Verizon waiver requests would promote intermodal competition among cable, DBS, and telephone companies for video, voice and data services; would lead to greater innovation, lower prices and higher quality services for consumers; and would eliminate regulatory barriers to the development of new and improved services and to investment in infrastructure to be used to deploy advanced telecommunications capability to all Americans. Both waivers should therefore be granted.

II. GRANT OF A WAIVER ONLY TO VERIZON WOULD VIOLATE SECTION 629 AND THE COMMISSION'S POLICY OF TECHNOLOGICAL AND COMPETITIVE NEUTRALITY

By its terms, Section 629(c) requires that all waivers of regulations adopted under Section 629(a) – such as the integration ban – “shall be effective” for all service providers.²¹ Therefore, grant of Verizon’s waiver necessarily extends the same relief to all cable operators, including NCTA’s members. Verizon has suggested that it alone merits relief because it is a “new entrant” with a small market share and it uses IP in addition to QAM technology to deliver

²⁰ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157). See also Verizon Waiver Request at 25 (explaining that a waiver is warranted under Section 706).

²¹ Section 629(c) requires that any waiver of the rules adopted pursuant to Section 629(a) “shall be effective for all service providers and products in that category *and* for all providers of services and products.” 47 U.S.C. § 549(e) (emphasis added).

video programming.²² Such exclusive relief would contravene Section 629(c), the objectives of the 1996 Act, and Commission policy, and would be arbitrary, capricious and an abuse of the Commission's discretion.

A. Verizon's Claim that it is a "New Entrant" is not an Appropriate Ground for a Waiver under Section 629(c)

1. Verizon is not a "new entrant" requiring special regulatory treatment

Verizon is obviously not a small, undercapitalized company lacking clout and brand recognition. It is a telecommunications giant with annual revenue of more than \$75 billion²³ – *more than the cable services revenue of all U.S. cable operators combined.*²⁴ Verizon's market capitalization is nearly 200 times larger than the fourth largest traditional cable operator in the nation, Charter, and Charter is, in turn, much larger than 1,000 other cable operators serving portions of the country.²⁵ By the end of 2006, Verizon's fiber-to-the-premises network – over which its "FiOS" TV service is offered – is expected to pass 6,000,000 homes and businesses in more than 800 communities spread out over 16 states, including the four most populous states in the nation, California, Texas, New York, and Florida.²⁶ Verizon's CEO has stated that "Verizon

²² Verizon Waiver Request at 21 and note 12.

²³ Verizon Communications Inc., 2005 Annual Report at 2, *available at* http://investor.verizon.com/financial/quarterly/pdf/05VZ_AR.pdf.

²⁴ See NCTA Industry Statistics (noting that, according to data from Kagan Research LLC, estimated total residential cable revenue for 2006 is \$69.5 billion), *available at* <http://www.ncta.com/ContentView.aspx?contentID=54>.

²⁵ See *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7012-Z, CS Docket No. 97-80, Comments of the American Cable Association, (filed June 15, 2006) (describing how imposition of the integration ban will adversely affect small cable companies' deployment of advanced services) ("ACA Comments").

²⁶ Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, Attachment B at 1 (May 23, 2006); *see also* "Fiber! To the People," Verizon promotional document, at 5-8 (Mar. 17, 2006), *available at* <http://www22.verizon.com/about/community/ma/files/FTTP051006.pdf>.

is the single largest investor in broadband technology in America,”²⁷ and that “[b]y 2010, we expect to deliver fiber facilities to around 18-20 million homes and businesses.”²⁸ Verizon boasts that it “offers an immense amount of bandwidth compared to a traditional cable operator,”²⁹ and it has already boosted its broadband offerings in certain states to download speeds of 10, 20 and 50 Mbps.³⁰

In short, Verizon is a mammoth competitor, and even in the earliest stage of its video development serves more cable homes than hundreds of cable companies that are subject to the integration ban. That is not to say that Verizon should be forced to waste any of its significant resources on installing CableCARD slots in its set-top boxes before the emergence of less expensive downloadable security solutions. No one should, as these unnecessary expenses are ultimately borne by consumers. Given Verizon’s massive resources, however, it would be arbitrary and capricious for the Commission to grant a waiver to Verizon to help it conserve resources to enter the video distribution business and improve its broadband services, while denying the same benefit to traditional cable companies for whom relief from financial waste is even more important to their ability to invest in competitive voice, video and broadband services.³¹

²⁷ Testimony before the Senate Commerce Committee, Verizon Chairman and Chief Executive Officer Ivan Seidenberg (Jan. 31, 2006), available at <http://commerce.senate.gov/pdf/seidenberg-021506.pdf#search=%22%2BVerizon%20%2B%22FiOS%20TV%22%20%2B18%20%2B2010%22>.

²⁸ *Id.*

²⁹ Verizon Waiver Request at 8.

³⁰ Verizon News Release, “Verizon Sparks FiOS Internet Service With Fastest Speeds Yet for New York, New Jersey and Connecticut, “Supercharged FiOS Internet at up to 50 Megabits per Second Available to Consumers and Small Businesses,” July 17, 2006, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93604&PROACTIVE_ID=cecdc6c9c8c7c9cbc8c5cecfcfcf5cecdcec9c7e9cccdcdcd5cf.

³¹ See NCTA Waiver at 18-24.

2. Grant of a waiver to Verizon on the basis of its currently small market share would be inappropriate

Verizon also suggests that it should receive a waiver because of its relatively small market share to date. Verizon's apparent theory is that, because its current number of subscribers is modest, any waiver it might receive on "new entrant" grounds would not have a significant effect on the overall national market for third-party navigation devices. This argument is unavailing.

Verizon already has a larger market share than many small operators that are now subject to the ban.³² Moreover, the Commission's policy directs it to assess the market not only on current penetration but also on Verizon's future plans.³³ These plans are aggressive – Verizon aspires to very quickly capture a significant percentage of the market. Verizon has secured more than 100 local video franchises covering approximately 3,000,000 households for its FiOS TV service.³⁴ Perhaps even more significant is Verizon's potential to leverage its vast resources and existing customer relationships to acquire a significant market share. Verizon's existing relationships with customers are clearly the basis for its claim to have achieved "over a twenty percent penetration among FiOS eligible customers within just four months" in Keller, Texas.³⁵ Given these distinct advantages that Verizon enjoys, it would be wholly inappropriate for the

³² See ACA Comments at 2-3.

³³ As the Commission has previously explained, "an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve." *Wireline Broadband Order*, 20 FCC Rcd at 14881.

³⁴ "Verizon Reports Continued Strong Quarterly Results," Verizon Investor News Release (Aug. 1, 2006), available at <http://investor.verizon.com/news/view.aspx?NewsID=759>.

³⁵ Verizon Waiver Request at 6.

Commission to further skew the marketplace in Verizon’s favor by limiting any waiver grant to Verizon as a “new entrant.”

3. The DBS exemption is inapplicable as precedent

In support for its “new entrant” theory, Verizon suggests that the Commission “categorically exempted DBS” from the integration ban in 1998 on the basis of the DBS’ companies then-status as new entrants,³⁶ and argues that it should receive a waiver today on those same grounds. While the *First Report and Order* did mention that the DBS providers were “relatively new entrants” with (at the time) small market shares, that was not the basis for the Commission’s exemption. The Commission’s rules do not “categorically exempt” DBS at all – instead they provide that the integration ban shall not apply to “a multichannel video programming distributor” (cable, DBS or otherwise) “that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system.”³⁷

In other words, the Commission exempted MVPDs, new or not, that *already* supported retail devices sought by Section 629; it did not exempt DBS operators because they were new entrants. Other “new entrants” that do not meet the criteria in Section 76.1204(a)(2) of the Commission’s rules, such as cable overbuilders, have always been subject to the ban.³⁸ Further,

³⁶ *Id.* at 2 (“The Commission has also expressly recognized that waivers may be needed to facilitate the deployment of innovative and competitive services, and, indeed, has categorically exempted DBS from the integration ban on this very basis”.)

³⁷ 47 C.F.R. § 76.1204(a)(2).

³⁸ *See, e.g., In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.12014(a)(1)*, Reply Comments of RCN Corporation, CSR-7012-Z, CS Docket No. 97-80 (filed June 15, 2006).

the DBS companies cannot qualify for the exemption without continued support for nationally-portable retail navigation devices, something Verizon does not purport to do.

In fact, Congress prohibited the Commission from using waivers to favor new entrants over other MVPDs. As noted above, Section 629(c) requires that any waiver of the rules adopted pursuant to Section 629(a) “shall be effective for all service providers and products in that category *and* for all providers of services and products.”³⁹ Congress adopted this nondiscrimination requirement fully aware that it would apply to the Commission’s consideration of new entrants. DirecTV started offering service to the public in June 1994, less than 20 months before the adoption of the 1996 Act,⁴⁰ and EchoStar only launched its first satellite on December 28, 1995.⁴¹ But despite the then-infancy of these intermodal competitors, the Commission concluded that Congress decided to apply Section 629 to such competitors equally as MVPDs. The *First Report and Order* found that “Congress did not exclude DBS from the reach of Section 629, even though the competitive state of DBS services was known at the time of the enactment of the 1996 Act.”⁴² The Commission further explained:

We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems. Our reading of the law is that consumer choice in navigation devices for all multichannel video programming systems was mandated by Congress when it enacted Section 629.⁴³

³⁹ 47 U.S.C. § 549(c) (emphasis added).

⁴⁰ See http://www.skyreport.com/dth_his.cfm#1994 and <http://www.cedmagic.com/history/rca-dss.html>.

⁴¹ See <http://www.dishnetwork.com/content/aboutus/satellites/echo1/index.shtml>.

⁴² *Commercial Availability of Navigation Devices*, Report and Order, CS Docket No. 97-80, 13 FCC Rcd. 14775, 14819 (1998) (“*First Report and Order*”).

⁴³ *Id.* at 14783.

Therefore, it is clear that Congress intended Section 629 regulations to apply equally to all MVPDs, old and new. That is why the Commission could not lawfully have exempted DBS or other new entrants “categorically” from the integration ban.⁴⁴ In light of these facts, Verizon’s reliance on the exemption granted to DBS providers as precedent supporting its waiver request is misplaced and without merit.

B. Verizon’s Limited Use of IP Technology is not an Appropriate Basis for Waiver

Verizon also suggests that its waiver could be limited to “those service providers who, like Verizon, are providing service using a hybrid QAM/IP system over FTTP architecture.”⁴⁵ Such a technology-specific waiver would flatly contravene the Commission’s well-established policy to avoid favoring one technology over another to avoid artificial market-skewing results.

In the *Wireline Broadband Order*, the Commission relied upon the emergence of new competition from cable operators as a basis to relax monopoly-era rules applicable to telephone company broadband services, in order to provide regulatory parity with cable broadband services and lessen disincentives to broadband investment. The Commission declared its “objective to create a broadband regulatory regime that is technology and competitively neutral,”⁴⁶ and accordingly held that “we should regulate like services in a similar manner so that all potential

⁴⁴ Even if the *First Report and Order* provided a model for the Commission to exempt classes of MVPDs from its Section 629 rules, that model is one of an exemption set forth in the text of the Commission’s rules. The Commission cannot modify its rules in this special relief waiver proceeding; notice and comment in a rulemaking proceeding would be required to create an exemption for new entrants.

⁴⁵ Verizon Waiver Request at fn. 12. Even AT&T – which, regardless of its erroneous position that it is not a “cable operator,” is subject to Section 629 and the integration ban because it applies to *all* MVPDs – would not qualify for this technology-specific waiver, because it is not deploying FTTP. Such a highly targeted technology-specific waiver would violate the intent of Section 629(c) to apply any waivers to all MVPDs equally, as discussed above. But even if the Commission interpreted Section 629(c) to mean that it could grant all MVPDs a waiver to put into service the specific type of devices used today only by Verizon, such a waiver would still, as discussed in this section, violate the Act’s and the Commission’s principles of technological and competitive neutrality.

⁴⁶ *Wireline Broadband Order*, 20 FCC Rcd at 14857.

investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.”⁴⁷

Chairman Martin later explained that this decision was part of an important larger move to the deregulatory parity envisioned by the 1996 Act and enabled by the facilities-based competition the Act inspired:

By these actions the Commission leveled the competitive playing field between different types of providers. We thereby encouraged all providers to invest in their networks to make them capable of delivering new 21st Century services.... As I have said on several occasions, *all providers of the same service must be treated in a similar manner regardless of the technology that they employ.*⁴⁸

Moreover, in similar contexts, the Chairman has said that the Commission policy against favoring one technology over another applies in full force to new technologies:

I will do my best to ensure that whatever solution is adopted, it will be technology neutral. That is, whatever rules the Commission ultimately adopts, these rules must impact all technologies – *both new and old* – equally. Regulation must not have the effect, unintended or otherwise, of favoring the adoption of certain technologies over others.⁴⁹

The Commission has previously applied this principle to its MVPD equipment rules. Though Congress had made only cable operators subject to Section 624A, the Commission applied certain of its implementing regulations to DBS too, explaining that

DBS did not exist at the time when Section 624A was enacted, but has since grown to serve approximately twenty percent of the MVPD marketplace. In order to accomplish the purposes of Section 624A, we believe that the Commission may

⁴⁷ *Id.* at 14878.

⁴⁸ Remarks of FCC Chairman Kevin J. Martin to the TELECOM 05 Conference, United States Telecom Association, Las Vegas, NV (Oct. 26, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261868A1.pdf. (“Advances in technology are leading to a convergence of multiple platforms. This development of intermodal competition is fundamentally changing the way that both carriers and their customers use telecommunications and technologies. Given these market changes, we can move towards a more deregulated, competitive environment. One undistorted by regulatory arbitrage and artificial distinctions.... [A] guiding principle that I believe should govern any attempt to accomplish these objectives [is] technological and competitive neutrality, We should be striving for regulatory parity between services as well as between service providers.”)

⁴⁹ *Id.*

exercise ancillary jurisdiction over non-cable MVPDs in order to avoid the creation of a regulatory and marketplace imbalance between cable and DBS. Absent this approach, we believe that cable operators would be at a significant competitive disadvantage in obtaining access to content which could frustrate the ability to satisfy Section 624A's mandate.⁵⁰

The case for the applicability of the Commission's policy to avoid regulatory and marketplace imbalances is even more compelling here. Unlike Section 624A, Congress *did* explicitly extend Section 629 to all MVPDs.⁵¹ Moreover, it specifically prohibited the Commission from using waivers to favor some MVPDs over others, as discussed above. Given this, Verizon is incorrect in suggesting that "Section 76.1204(a)(1) was developed with the paradigm of a traditional cable network in mind, which assumes the existence only of a QAM network."⁵² Section 76.1204 does not mention any specific distribution technology and therefore cannot be said to apply to QAM and not IP (or QPSK used by DBS providers). Further, nothing in the Commission's rules prevents Verizon from developing a separated-security scheme that supports Verizon's limited use of IP technology, just as cable operators had to develop CableCARDS under the 1998 rules.⁵³

Verizon understands and has embraced the elimination of regulatory imbalances. In urging the Commission to eliminate rules that had been applicable to its broadband services that did not apply to cable broadband, Verizon argued that a "lopsided regulatory regime distorts the

⁵⁰ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885, ¶ 57 (rel. Oct. 9, 2003).

⁵¹ See *First Report and Order*, 13 FCC Rcd at 14783.

⁵² Verizon Waiver Request at 18.

⁵³ In any event, Verizon's suggestion that its use of a mixture of QAM and IP technology on its system somehow distinguishes it from the cable industry's QAM-based systems is a distinction without a difference. Despite minor differences in the manner in which the signals of services such as video-on-demand are routed (a manner which cable technology could easily duplicate), Verizon's system operates in exactly the same fashion as that of traditional cable operators. Indeed, this highlights the danger of basing regulatory obligations on technological distinctions, which is why the Commission's long-standing policy and practice has been to avoid them.

market, deters investment, and dampens competition.”⁵⁴ Verizon also noted to the Commission and to NTIA that such distortions contravene not only Commission policy but broader governmental policy to promote competition and consumer welfare:

No less an authority than the Department of Justice has recognized that “[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals.” Telephone companies are not asking for guaranteed success in the market or even a leg up on the competition; they just want a level playing field. Experience shows that the market will pick winning strategies and technologies if regulators will get out of the way and allow the market to work.⁵⁵

Verizon thus concluded that “it is critical, both as a matter of law and sound policy, that all competing services be regulated alike, rather than being subject to disparate regulation based on the history or parentage of the entity providing them.”⁵⁶ The Commission has repeatedly invoked these themes of technological and competitive neutrality to grant or entertain relief requested by Verizon and other telephone companies to provide them parity with cable. The Commission cannot now back away from these principles to give Verizon a new regulatory advantage at the expense of cable operators.

Many disparate regulations still exist under the Communications Act, but these differences are in most cases based on regulations rooted in an earlier era, where one type of entity is governed by one statute and another type by a different statute. It would be quite

⁵⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Comments of Verizon, at 19 (May 3, 2002).

⁵⁵ *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, NTIA Docket No. 011109273-1273-01, Comments of Verizon (Dec. 19, 2001) (citing *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Reply Comments of the U.S. Department of Justice at 26 n.42 (Sept. 28, 1990)). Verizon made a similar argument to the Commission in the *Wireline Broadband* proceeding. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Reply Comments of Verizon, at 34 (July 1, 2002).

⁵⁶ *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, NTIA Docket No. 011109273-1273-01, Comments of Verizon (Dec. 19, 2001).

another thing for the FCC to create new artificial regulatory disparities, especially between entities all subject to the same statutory provision (in this case, Section 629), rather than different provisions under different titles. Therefore, it would be contrary to the Commission’s policy of technological and competitive neutrality, and to the pro-competitive, technology-neutral goals of the Act, for the Commission to allow the integration ban to tip the scales of competition in favor of Verizon.

Verizon itself has warned the Commission that if it were “forced to commit the substantial technical and economic resources necessary to design and produce a physically compliant set-top box, the cost and competitiveness of Verizon’s service will be adversely impacted,” and that “[b]uilding these costs into the price of Verizon’s service will lead to increased costs to the consumer, and reduce the competitive pressure that Verizon can bring to the MVPD market.”⁵⁷ In requesting a waiver of the integration ban, Verizon is saying, in other words, that it could bring more of the benefits of competition (lower prices and better services) to consumers if it did not have to devote resources to the integration ban. We agree. But for this same reason, it is at least equally important for consumers that the Commission grant NCTA’s waiver in conjunction with Verizon’s.

⁵⁷ *Id.* at 17.

CONCLUSION

For the foregoing reasons, the Commission should grant both the NCTA and Verizon waiver requests.

Respectfully submitted,

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September 18, 2006

EXHIBIT A

National Cable & Telecommunications Association's Request for Waiver of
47 C.F.R. § 76.1204(a)(1), CSR- _____, filed Aug. 16, 2006

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
National Cable & Telecommunications) CSR- _____
Association's Request for Waiver of)
47 C.F.R. § 76.1204(a)(1))

REQUEST FOR WAIVER

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August 16, 2006

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
National Cable & Telecommunications) CSR- _____
Association's Request for Waiver of)
47 C.F.R. § 76.1204(a)(1))

To: Chief, Media Bureau

REQUEST FOR WAIVER

The National Cable & Telecommunications Association (“NCTA”), the principal trade association for the U.S. cable industry representing cable operators serving more than 90 percent of the nation’s cable television households, respectfully requests that the Commission waive the “integration ban” requirement set forth in the second sentence of Section 76.1204(a)(1) of its rules for all cable operators until their deployment of downloadable security or December 31, 2009, whichever is earlier. Verizon has asked for similar relief, although its request was for an unlimited time.¹

The integration ban currently provides that, effective July 1, 2007, certain Multichannel Video Programming Distributors (“MVPDs”) may no longer place in service set-top boxes and other “navigation devices” that combine conditional access and other functions in a single integrated device.² The United States Court of Appeals for the D.C. Circuit is currently

¹ See Verizon’s Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1) (filed July 11, 2006) (“Verizon Waiver Request”). In its request, Verizon asks for a waiver of the integration ban until its version of a downloadable security can be implemented. Should the Commission grant the Verizon waiver, under both the statute and the Commission’s rules, that waiver would also apply to “all service providers and products in the category in which the waiver is granted,” including, of course, the cable operators for whom this request is being filed. See 47 U.S.C. § 549(c); 47 C.F.R. § 76.1207.

² See 47 C.F.R. § 76.1204(a)(1) (“Commencing on July 1, 2007, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.”).

reviewing the lawfulness of the integration ban, and the cable industry has otherwise argued that it satisfies the exemption from the ban claimed by DBS.³ However, assuming *arguendo* that the ban will apply to cable operators, NCTA respectfully submits that this waiver request meets the statutory criteria for Section 629 waivers and would serve the public interest.

INTRODUCTION & SUMMARY

Section 629(c) of the Communications Act and the corresponding Commission rule expressly authorize the Commission to grant waivers of its navigation device rules:

The Commission shall waive a regulation adopted under subsection [629](a) for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary *to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.*⁴

Likewise, the Commission may waive any provision of its rules, on a temporary or permanent basis, under the general waiver standard set forth in Sections 1.3 and 76.7 of the Commission's rules.⁵ The Commission is always required to "take a 'hard look' at meritorious applications for

³ See *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237, Initial Brief of Petitioners and Intervenor NCTA (Dec. 27, 2005) ("Cable Brief"); see also *id.*, Reply Brief of Petitioners and Intervenor NCTA, (Mar. 31, 2006) ("Cable Reply Brief"). In that court appeal and elsewhere, NCTA and others have demonstrated that "cable has undoubtedly equaled or exceeded the threshold that the FCC believed sufficient to exempt DBS in 1998 and again in 2005[.]" Cable Brief at 30-37; see also Cable Reply Brief at 14-16. For this reason and others, by operation of section 1204(a)(2) of the Commission's rules, cable operators arguably are not now subject to the integration ban.

⁴ 47 U.S.C. § 549(c) (emphasis added); see also 47 C.F.R. § 76.1207 ("The Commission may waive a regulation adopted under this subpart for a limited time, upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider that such a waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. Such waiver requests should be made pursuant to Sec. 76.7. Such a waiver shall be effective for all service providers and products in the category in which the waiver is granted.").

⁵ See 47 C.F.R. § 76.7(i) ("The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request . . ."); see also *id.* § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if

waiver, and must consider all relevant factors,” especially where the application of a general rule to a specific situation would not serve the public interest underlying that rule.⁶

This instant waiver request satisfies the special waiver provision in Section 629(c) of the Communications Act and Section 76.1207 of the Commission’s rules, as well as the general standards of Sections 1.3 and 76.7 of the Commission’s rules.⁷ The Commission has said it would entertain further deferrals of the integration ban based on the feasibility of downloadable security.⁸ As we demonstrate below, such a waiver is warranted. *First*, as Verizon has persuasively argued in its similar waiver request, the requested waiver would spare consumers from pointlessly bearing the massive costs of an interim transition to CableCARD-slotted leased boxes with no corresponding consumer benefit, just one or two years before such devices are

extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁶ *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192, 1195 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the “logic of applying [the rule] collapses,” and it was arbitrary to apply the rule).

⁷ The Commission has granted waivers of Section 629 rules where, as here, approval of the waiver has strong public interest benefits and failure to grant the waiver would result in public interest harms. For example, in 2004, the Commission granted BellSouth a permanent waiver of the plug-and-play rules under its Section 629(c) waiver authority, concluding that grant of the waiver would facilitate the delivery of digital services to subscribers while denial of the waiver would undermine access to such services. *See BellSouth Interactive Media Services, LLC: Petition for Permanent Relief*, Memorandum Opinion and Order, 19 FCC Rcd. 15607 (2004). The Commission has also approved several waivers of its technical requirements for cable set-top boxes, holding that compliance with the rules would impose substantial costs on consumers and operators. *See Pace Micro Technology PLC: Petition for Special Relief*, Order, 19 FCC Rcd. 1945, 1947, ¶ 8 (2004) (concluding that failure to grant the permanent waiver for certain set-top boxes “would be burdensome to consumers and inordinately expensive for the [set-top box] manufacturer and its cable operator customers”); *GCI Cable, Inc.: Petition for Special Relief*, Memorandum Opinion and Order, 15 FCC Rcd. 10843, 10846, ¶ 9 (2000) (granting permanent waiver of Part 76 technical requirements to avoid imposing certain costs on consumers and the cable operator); *Media General Cable of Fairfax County, Inc.: Petition for Special Relief*, Memorandum Opinion and Order, 14 FCC Rcd. 9568, 9570-71, ¶ 8 (1999) (same).

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, 6810, 6812-13, ¶¶ 32, 36 (2005) (“*Second Report and Order*”).

superseded by a more efficient and cost-effective downloadable security solution.⁹ *Second*, the waiver is necessary to assist in the development of cable operators' new and improved digital cable, voice, and broadband services, which would bring innovation, lower prices, and higher quality service to consumers. And *third*, a waiver is needed so the Commission can reassess whether the rule can be implemented at all in a lawful, rational manner that does not arbitrarily skew competition in the multichannel video marketplace.

Granting this request until downloadable security is deployed, or until the end of 2009, will serve the public interest. By 2009, the record will be clarified with respect to many relevant technological and competitive issues now undergoing change. The Commission will by then be able to see for itself whether downloadable security has been widely deployed and adopted in consumer products. In addition, after the February 18, 2009, cut-off for analog broadcasting, and after further progress by cable operators toward all-digital networks, the Commission will be better able to judge the continued need for integrated set-top boxes to facilitate the digital transition. The Commission would also by then be able to evaluate the success of third-party bidirectional digital-cable ready navigation devices, the first of which are scheduled to be made commercially available by Samsung in early 2007.

Even more importantly, by 2009 the Commission will be better able to assess the competitive video marketplace. With highly-capitalized entry by AT&T and Verizon, the continued competition of DBS, and the emergence of streaming video over the Internet, the

⁹ Verizon Waiver Request at 13 (Since downloadable security is not yet ready, "in order to comply with the current terms of the integrated set-top box ban in Section 76.1204 that takes effect next year, Verizon would need to design and deploy set-top boxes that utilize physically separate security features. In the end, these physically separate set-top boxes would almost certainly be replaced by a DCAS system, given the cost, customer convenience, and technical advantages that DCAS offers. Accordingly, it makes no sense to require Verizon to engage in the burdensome and ultimately pointless intermediate step of implementing a physically separate CAS solution").

video marketplace is volatile, competitive, and changing. By 2009, the Commission will be in a better position to judge the impact of these developments on both facilities-based intermodal MVPD competition and the evolving market for navigation devices.

The Commission has previously recognized that this is a “particularly perilous time for the adoption of [a rule such as the integration ban] ... because regulations have the potential to stifle growth, innovation and technical developments at a time when consumer demands, business plans, and technologies remain unknown, unformed or incomplete.”¹⁰ The Commission has repeatedly stated its intent to continuously reassess market developments and adjust its Section 629 regulations as needed to best serve the public interest.¹¹ Given the current uncertainties and their likely clarification by 2009, a reassessment at that time, with a waiver until that time, is reasonable, appropriate and compelling. Any implementation of the ban before then would contravene Congress’ direction to the Commission that, in implementing Section 629, it should “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.”¹²

In the meantime, it would be contrary to the public interest to implement the integration ban pending an assessment of the changing technological and competitive landscape, for the three reasons set forth above and described in detail below. While some may note that grant of this waiver would extend the effective date of the integration ban for a third time, it must be

¹⁰ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd. 14775, 14781, ¶ 15 (1998) (“*First Report and Order*”).

¹¹ *First Report and Order*, 13 FCC Rcd. at 14781-782, ¶ 16; see also *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd. 18199, 18202-203, ¶ 11 (2000); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 7924, 7926, ¶ 5 (2003).

¹² Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 181 (1996).

remembered that Congress did not demand or even suggest an integration ban be imposed on MVPDs.¹³ Nor did Congress seek to dictate technological specifications preferred by certain electronics manufacturers. Far from it. Instead, Congress adopted Section 629, and the 1996 Act generally, to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹⁴ Meeting the July 1, 2007 deadline for its own sake would be contrary to these paramount objectives when doing so would (1) impede competition, (2) increase regulation, (3) raise consumer prices, and (4) suppress and slow the delivery of new and improved innovative services and technologies – all when the factual foundation that the Commission relied upon in 1998 in adopting the ban has dramatically changed and is continuing to change. The general mandate of the Act, the specific mandate of Section 629(c), and the public interest therefore all demand grant of the waiver requested herein.

III. THE PUBLIC INTEREST WOULD BE DISSERVED BY A COSTLY INTERIM IMPLEMENTATION OF THE INTEGRATION BAN ONLY A SHORT TIME BEFORE SUPERIOR, LESS COSTLY, DOWNLOADABLE SECURITY SOLUTIONS BECOME AVAILABLE

The cable industry – now joined by Verizon – has documented the enormous costs to operators and consumers if operators were required to place CableCARD slots on their leased boxes. Equipping a set-top box with a CableCARD requires a substantial and costly redesign of the device. Among other things, a new chassis has to be developed for the CableCARD

¹³ In fact, Congress said that any FCC regulations “*shall not prohibit any [MVPD] from also offering converter boxes ... and other equipment used by consumers to access multichannel video programming ... if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.*” 47 U.S.C. § 549(a) (emphasis added). As cable petitioners argued in their recent appeal, the ban is therefore unlawful and should be eliminated altogether. *See* Cable Brief at 17-19; *see also* Cable Reply Brief at 20-22.

¹⁴ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

interface, power has to be added to support the CableCARD, and the motherboard has to be redesigned.¹⁵ When these design and development costs are considered along with the cost of a CableCARD, the overall cost of a set-top box increases greatly – both for the cable operator and the consumer.¹⁶

The cable industry has estimated that the re-engineering required to enable their leased devices to work with CableCARDS would add approximately \$72-93 per box¹⁷ – which translates into two or three dollars more in monthly lease charges to consumers¹⁸ – and that the direct cost to the cable industry to implement the CableCARD would exceed \$500 million per year. More recently, Verizon has told the Commission that placing CableCARD slots on its boxes would cost approximately \$75-95 per unit,¹⁹ and that “[t]hose costs will ultimately hurt consumers in the form of more expensive set-top boxes.”²⁰ And, of course, adding the CableCARD slot and

¹⁵ See Cable Brief at 12; see also Cable Reply Brief at 5-6; See *Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.12014(a)(1)*, Comcast Request for Waiver, CSR-7012-Z, CS Docket No. 97-80, at 17 (filed Apr. 19, 2006) (“Comcast Waiver Request”).

¹⁶ See Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, CS Docket 97-80, at 3-7 (filed Aug. 2, 2002) (“NCTA Cost Report”) (describing study conducted by NCTA using data from set-top box manufacturers); see also Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, Attachment at 3 (filed Nov. 22, 2004).

¹⁷ See NCTA Cost Report at 3. Even at the low estimates provided by consumer electronics manufacturers (“CE”) who favor the integration ban, the costs would be hundreds of millions of dollars. See Letter from Julie M. Kearney, Senior Director Regulatory Affairs, Consumer Electronics Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 2-3 (filed Nov. 23, 2004); see also Letter from Neal M. Goldberg, General Counsel, NCTA, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission, CS Docket No. 97-80, at 4 (filed Dec. 20, 2004).

¹⁸ The Commission acknowledged these added costs in oral argument before the D.C. Circuit. See COMM. DAILY at 6 (May 12, 2006) (“[Commission attorney Joseph] Palmore conceded that the FCC solution could raise costs that customers could have to shoulder. Asked by [Chief Judge] Ginsburg if those would be ‘significant,’ Palmore said: ‘The Commission is quite candid about that’”).

¹⁹ Verizon Waiver Request at 15 (explaining, based upon a Declaration of its Executive Director–Technology, that “the physical hardware to accommodate CableCARDS . . . can increase its wholesale price by as much as \$25 per unit, without factoring in the cost of the CARDS themselves, which can add an additional \$50 to \$70 of cost to the consumer per unit”).

²⁰ *Id.* at 4.

the CableCARD add absolutely no additional features, functions or benefit to the consumer who leases such a device.

The Commission has emphasized that “we wish to place as little of the cost burden resulting from the ban on the public”²¹ Thus, the Commission previously recognized that on balance the public interest would be served if consumers could be spared these enormous costs by deferring implementation of the integration ban for a reasonable period until the deployment of downloadable security. The Commission underscored that downloadable security can deliver significant benefits to consumers, cable operators, and consumer electronics manufacturers, and explained that “the development of set-top boxes and other devices utilizing downloadable security is likely to facilitate a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition ... *without* the potentially costly physical separation of the conditional access element.”²²

Accordingly, the Commission held that, “[i]f the ban were to go into effect [before downloadable security could be deployed], this would, as a practical matter, impede the development of a less expensive and more flexible system for both protecting system security and creating a consumer product interface, as resources would be diverted from producing a downloadable security system to physical separation of the security element from set-top

²¹ *Second Report and Order*, 20 FCC Rcd. at 6807-08, ¶ 27. *See also Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237, Brief of Respondent (FCC) (Mar. 7, 2006) at 29-31 (asserting that the Commission has taken “immediate action to minimize costs” associated with the integration ban, including the deferral of the ban to consider the feasibility of downloadable security and the promise to entertain waiver requests).

²² *Second Report and Order*, 20 FCC Rcd. at 6794-95, ¶ 3 (emphasis added). Verizon reached this same conclusion in its recent waiver request, noting that “[d]ownloadable software security implementation has the potential to be cheaper and easier to implement and is also more convenient for consumers. Doing away with costly and cumbersome cards and slots will make the manufacture and design of compliant devices simpler, and the solid-state circuitry necessary to implement software-based security is cheaper and less prone to wear than any solution involving physical separation.” Verizon Waiver Request at 16.

boxes.”²³ The Commission therefore extended the effective date of the integration ban to July 1, 2007 to allow it time to determine whether downloadable security is feasible, and held that “[i]f downloadable security proves feasible, but cannot be implemented by July 1, 2007, we will consider a further extension of the deadline.”²⁴

It is now clear that downloadable security is indeed feasible, but that it cannot be implemented by July 2007. Furthermore, it is also now clear that the cable industry is strongly committed to the earliest possible development and implementation of its downloadable security solution, the Downloadable Conditional Access System (“DCAS”). Cable operators have invested \$30 million toward the establishment of a new company – NGNA, LLC d/b/a PolyCipher, which is dedicated to the development of DCAS and is headed by Tom Lookabaugh, former President of the DiviCom division of C-Cube Microsystems and a professor of video communications and computer science.

Early progress on DCAS has been demonstrated live to Commission staff and shown at the 2006 Consumer Electronics Show (“CES 2006”) and the 2006 NCTA Convention. In those demonstrations, DCAS has been proven to work for leased set-top boxes and retail digital cable ready devices alike.²⁵ The DCAS license has been signed by, among others, digital television manufacturers Samsung, LG, and Panasonic, set-top manufacturer ADB, and chip manufacturer MediaTek.²⁶ A suite of DCAS specifications for host devices has been published by CableLabs

²³ *Second Report and Order*, 20 FCC Rcd. at 6810, ¶ 31.

²⁴ *Id.* at 6813, ¶ 36.

²⁵ Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 4-5 (filed Feb. 6, 2006) (“NCTA DCAS Reply”).

²⁶ *Id.* See CableLabs Press Release, *ADB Signs CableLabs’ Licenses for Downloadable Security* (Apr. 6, 2006), available at http://www.cablelabs.com/news/pr/2006/06_pr_adb_dcas_040606.html.

to over 350 manufacturers for community review.²⁷ LG has praised DCAS as a “compelling security solution that will help enable nationwide interoperability of advanced two-way cable services,”²⁸ while Samsung has called DCAS “an excellent solution for interactive devices.”²⁹ Panasonic Chief Technology Officer Dr. Paul Liao has noted: “Panasonic expects Downloadable Conditional Access will become the preferred approach to securing access to digital cable systems. Panasonic looks forward to implementing DCAS in its products.”³⁰ Construction of the new facility to produce security keys for DCAS chips along with initial equipment installation was completed in June, 2006. Procedures necessary for generating the secure keys are being finalized and development of secure microprocessors for DCAS is underway.

Despite this significant progress, much remains to be done before DCAS can be deployed to consumers nationwide. For example, conditional access suppliers are customizing their conditional access systems (the security and entitlement messaging systems used by cable operators to communicate between the headend and customer premises devices) to calibrate them to DCAS, and new authentication equipment will need to be incorporated into cable headends nationwide. Thus, it remains clear that DCAS cannot be ready by the current effective date of the integration ban.

Ironically, denial of the requested waiver would only delay the development and implementation of DCAS, and thereby increase the number of costly physically-separated devices that must be produced in the absence of a waiver. The cable industry relies on many of

²⁷ See NCTA DCAS Reply at 17.

²⁸ CableLabs Press Release, *LG Electronics, CableLabs Sign Downloadable Security Technology Agreement* (Jan. 4, 2006), available at http://www.cablelabs.com/news/pr/2006/06_pr_lge_dcas_010406.html.

²⁹ CableLabs Press Release, *Samsung Electronics Signs Up for Downloadable Security Technology* (Nov. 30, 2005), available at http://www.cablelabs.com/news/pr/2005/05_pr_dcas_samsung_113005.html.

the same employees and testing facilities for a range of technology projects, including DCAS, CableCARD implementation, the OpenCable Applications Platform (“OCAP”), and development of new and innovative services and software. These resources are already strained by the variety and pace of current activities independent of the integration ban. If the requested waiver is not granted, the cable industry would be forced to shift personnel and other resources away from DCAS towards implementation of the integration ban for all of its digital set-top boxes. This would dramatically slow progress on DCAS.

Verizon, which recently reported to the Commission that its downloadable security solution also cannot be ready by 2007, explained why a waiver of the integration ban is warranted under these circumstances. *First*, Verizon noted that downloadable security “has the potential to be cheaper and easier to implement and is also more convenient for consumers. Doing away with costly and cumbersome cards and slots will make the manufacture and design of compliant devices simpler, and the solid-state circuitry necessary to implement software-based security is cheaper and less prone to wear than any solution involving physical separation.”³¹ *Second*, Verizon observed that requiring compliance with the integration ban – and forcing implementation of “a security solution for set-top boxes not once but *twice* – would have a number of adverse effects for consumers.”³² *Third*, Verizon argued that such a requirement would force it “to commit substantial resources to deploying what is, in essence, a stop-gap solution that will soon be obsolete. This would, in turn, raise costs to customers, force Verizon to divert resources from other programs that would be more beneficial to consumers,

³⁰ CableLabs Press Release, *Panasonic Signs Up for Downloadable Security Technology* (Apr. 10, 2006), available at http://www.cablelabs.com/news/pr/2006/06_pr_dcas_panasonic_041006.html.

³¹ Verizon Waiver Request at 16.

³² *Id.* at 3-4 (emphasis in original).

and potentially either slow the deployment of its advanced broadband infrastructure or the rapid roll-out of its competitive, innovative video offerings.”³³ For all of these reasons, Verizon concluded that it therefore makes no sense to require it “to engage in the burdensome and ultimately pointless intermediate step of implementing a physically separate CAS solution.”³⁴

Cable operators would face these same burdens if they are forced to deploy non-integrated boxes prior to the deployment of DCAS – unwarranted costs on consumers, unnecessary diversion of resources, and, to quote Verizon, imposition of a “costly, complex, inefficient and ultimately superfluous physical separation solution that will only delay the provision of important new services.”³⁵ As detailed in the next section, grant of the waiver is necessary to avoid these costs and permit cable operators to dedicate resources that would otherwise be wasted on a costly interim implementation of the integration ban to help facilitate the rollout of DCAS and other new and advanced services that consumers highly value.

IV. GRANT OF THE REQUESTED WAIVER IS NECESSARY TO ASSIST THE DEVELOPMENT OF NEW AND IMPROVED DIGITAL CABLE, VOICE, BROADBAND AND OTHER SERVICES

The requested waiver is needed to assist in the development of cable operators’ new and improved digital cable, voice and broadband services, which would promote competition, spur broadband deployment, and aid the digital transition – all important Congressional and Commission objectives.³⁶ In this regard, NCTA agrees with Verizon that a waiver of the

³³ *Id.* at 19.

³⁴ *Id.* at 16.

³⁵ *Id.* at 4.

³⁶ *See* Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (declaring primary objectives of 1996 Act were to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”); *see also id.* § 706, 110 Stat. 153 (directing the Commission to encourage the deployment of advanced telecommunications capability to all Americans); Title III of the Deficit

integration ban is warranted because “[b]oth Congress and the FCC have made clear that the rules designed to implement Section 629 of the 1996 Telecommunications Act, which was meant to assure the commercial availability of set-top boxes, must not be permitted to trump the larger policy imperative of promoting competition and innovation.”³⁷ That is, in fact, exactly what Congress required by Section 629(c), which provides that the Commission:

[S]hall waive a regulation adopted under subsection [629](a) for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.³⁸

As detailed below, NCTA meets the requirements of this waiver provision.

A. The Requested Waiver Is Necessary To Assist the Development and Consumer Adoption of New and Improved Digital Services

The requested waiver is necessary to promote consumer access to new and improved digital cable programming and services through more equipment options at lower costs. Digital cable delivers numerous value-added services to consumers, including high-definition (“HD”) programming,³⁹ advanced services such as video-on-demand (“VOD”), powerful digital parental control technologies,⁴⁰ interactive program guides, and other interactive content.⁴¹ Digital cable

Reduction Act of 2005, Pub. L. 109–171, 120 Stat. 4, 21 (Feb. 8, 2006) (“2005 Budget Act”) (requiring termination of analog broadcasting by February 18, 2009 and establishing subsidy program to encourage digital transition).

³⁷ Verizon Waiver Request at 2.

³⁸ 47 U.S.C. § 549(c).

³⁹ See Comments of NCTA, MB Docket No. 05-255, at 27 (Sept. 19, 2005) (“NCTA Video Competition Comments”) (noting that there are 23 HD cable networks that transmit much of their programming in high definition). Furthermore, since January 2003, cable has more than doubled the number of homes passed by HDTV service, and it is now available to 96 million U.S. TV households. See NCTA, *2006 Industry Overview*, at 17 (Mar. 27, 2006) (“2006 Industry Overview”), available at http://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf.

⁴⁰ See 2006 Industry Overview at 20 (noting the cable industry’s leadership in providing parental control technologies and educating consumers about their availability); see also Comcast Waiver Request at 11 (noting that “Comcast’s digital set-top boxes provide an easy user interface for parents to limit the programming the

customers can also subscribe to a number of programming packages suited to their individual tastes, ranging from sports and movies to Spanish-language and numerous ethnic packages.⁴²

In addition, grant of the waiver will help accelerate the cable industry's migration to digital networks. At the end of 2005, cable operators served 28.5 million digital cable customers, or 43.6 percent of total cable subscribers.⁴³ Operators are seeking to boost digital penetration levels significantly over the next few years.⁴⁴ Over time, as more digital set-top boxes are deployed and the number of digital subscribers increases, cable operators will have the ability to reclaim analog spectrum for HD and VOD, as well as faster Internet access and other innovative services.⁴⁵ The Commission has noted this public interest benefit, observing that the availability of low-cost integrated set-top boxes would "further the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television."⁴⁶ In sum, with increased digital penetration and accelerated migration to

family watches, including the ability to block program by title, by TV or MPAA ratings, by channel, and (for many systems) by time of day").

⁴¹ VOD has been enormously popular with digital cable customers. For example, Time Warner Cable delivered about 73 million VOD streams in December 2005, up nearly 42 percent from December 2004, and Comcast delivered about 127 million VOD streams in February 2006, up from 87 million a year earlier. See George Winslow, *VOD Scorecard*, MULTICHANNEL NEWS, May 1, 2006. Likewise, Cablevision makes available about 1,200 hours of pay and subscription VOD programming each month, and Cox makes available over 1,300 hours of VOD programming. See *id.*

⁴² See, e.g., Comcast Waiver Request at 11 (citing examples of digital programming); *Cox Digital Cable*, available at <http://www.cox.com/digitalcable/default.asp> (describing digital cable offerings). Of course, subscribers using digital set-top boxes can enjoy digital picture quality, as well.

⁴³ See 2006 Industry Overview at 5-6.

⁴⁴ Comcast, for example, has indicated that it is pushing for digital penetration of over 75 percent by the end of the decade. See Comcast Waiver Request at 10; see also Time Warner News Release, *Time Warner Inc. Reports First Quarter 2006 Results*, at 4 (May 3, 2006) (noting that digital penetration reached 51 percent at the end of the first quarter of 2006).

⁴⁵ See *Second Report and Order*, ¶ 37 (noting that transitioning to an all-digital platform will enable cable operators to "free[] up spectrum and increas[e] service offerings such as high-definition television").

⁴⁶ See *Second Report and Order*, 20 FCC Rcd. at 6813, ¶ 37.

digital networks, cable operators will be able to provide more and better digital services to consumers to compete with DBS, telephone company and other all-digital MVPD platforms.⁴⁷

But the looming integration ban deadline and the enormous costs of the ban to cable operators and consumers – \$500 million per year – threaten these objectives. *First*, one of the cable industry’s largest set-top box vendors recently informed cable operators that it has been forced to suspend further development of innovative and competitive new features for digital set-top boxes to devote more of its limited technical and human resources to the re-engineering design for CableCARD slots on leased boxes. *Second*, work with content providers cannot go forward on technology needed to facilitate new and exciting business models because resources are being consumed by installing CableCARD slots on leased boxes – which add no additional functionality, security, or consumer benefit. *Third*, by artificially increasing the cost of digital set-top boxes, the integration ban will discourage many consumers, especially those who are price-sensitive, from switching from analog to digital cable service.

Moreover, grant of this waiver request would also facilitate the overall transition to digital broadcast television which Congress and the Commission have made a high priority.⁴⁸ Congress has established a deadline of February 18, 2009 for broadcasters to complete their

⁴⁷ The Commission has underscored the benefits of such increased competition to consumers, including “increased choice, better services, higher quality, and greater technological innovation.” *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2757 ¶ 4 (2005); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1608-09 ¶ 4 (2004) (same).

⁴⁸ *See, e.g., Requirements for Digital Television Receiving Capability*, Second Report and Order, 20 FCC Rcd. 18607 (2005) (promoting availability of HDTVs with off-air tuning capability); *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd. 18279 (2004) (establishing rules to accelerate broadcast transition to DTV); *Implementation of Section 304 of the Telecommunications Act of 1996: Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order & Second Further NPRM, 18 FCC Rcd. 20885 (2003) (promoting availability of digital cable ready products, including HDTVs).

transition to all-digital service.⁴⁹ Once analog broadcasting is terminated, consumers with analog TVs who today rely on over-the-air broadcasting will need to purchase a digital over-the-air receiver or switch to an MVPD service, such as cable, that will still deliver signals to analog TVs.⁵⁰ Integrated set-top boxes, if allowed to remain available at least through 2009, will provide a more cost-effective option for consumers who switch to digital cable than would boxes

with separate security to receive digital broadcast (and cable) signals.⁵¹ These boxes can deliver digital broadcast programming to customers with analog TVs (in such cases, the set-top box can downconvert digital broadcast signals to analog format).⁵² This would greatly facilitate the digital transition and benefit consumers who want to receive broadcast channels after the 2009 transition without buying a new digital television.

It would be particularly counterproductive and ironic for the federal government, just before the 2009 analog cut-off, to impose a substantial new *tax* on cable set-top boxes (and the consumers who use them) that could otherwise facilitate the transition to digital broadcasting for

⁴⁹ 2005 Budget Act, § 3002(b).

⁵⁰ As of September 30, 2005, cable operators voluntarily carried 681 digital broadcast signals, a six-fold increase from the 92 stations carried in January 2003. Furthermore, a total of 198 Designated Market Areas (out of 210) are served by at least one cable system that offers high definition programming, *available at* <http://www.ncta.com/IssueBrief.aspx?ContentId=2688&view=4>.

⁵¹ The Commission highlighted the importance of this issue in inviting cable operators to file requests for waivers for low-cost set-top boxes, saying that “[i]t is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets *both during and after the transition.*”) *See* Second Report and Order, 20 FCC Rcd. at 6813-14, ¶ 37 (emphasis added). The Commission’s recognition of the benefit of inexpensive boxes “after the transition,” demonstrates that its concern was not, as some have argued, with having boxes available solely to meet the “85% test” which existed before Congress enacted a “hard date” for the transition. *See Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7201-Z, CS Docket No. 97-80, Sony *ex parte* at 4 (filed August 4, 2006).

⁵² These include customers who have one or more analog televisions in their homes. NCTA has estimated that there are approximately 106 million analog TVs in cable homes that will require digital set-top boxes in order to get digital service. *See* NCTA Video Competition Comments at 28 n.81.

some consumers with analog TV sets, when it at the same time has established a \$1.5 billion fund to *subsidize* other set-top boxes in the form of up to two \$40 vouchers per analog TV consumer for non-cable converter boxes to achieve a similar result.⁵³ If consumers, attracted in part by a low-cost integrated set-top box, decide to purchase digital cable as their means of maintaining the use of an analog TV, that option would not, under current policy, drain any subsidy funds from the U.S. Treasury.⁵⁴ Therefore, grant of a waiver would simultaneously avoid a penalty to cable customers, provide consumers a lower cost option to navigate the digital transition, reduce demands on the U.S. Treasury for subsidies, and advance the digital transition.

After the end-date for analog broadcasting, the Commission would be able to observe the progress of this transition and determine whether the integration ban remains in conflict with the digital migration. Through 2009, a waiver would serve the public's, Congress' and the Commission's interest in minimizing consumer harm caused by the termination of analog broadcasting.

B. The Requested Waiver is Necessary to Assist Cable Operators' Continued Entry Into the Voice Services Market

Verizon's waiver request emphasized how the integration ban could impede the continued rollout of its cable service. Verizon noted that requiring it "to comply with Section 76.1204's integrated set-top box ban will create a chilling effect on Verizon's ability to expand and develop the FiOS TV service and have a corresponding negative impact on Verizon's ability to bring more competition and innovation to the MVPD market, forcing customers to wait longer

⁵³ See 2005 Budget Act, § 3005 (establishing subsidy program for low-cost digital-to-analog converter boxes).

⁵⁴ See National Telecommunications and Information Administration, *Implementation and Administration of a Coupon Program for Digital-to-Analog Converter Boxes*, Docket Number: 060512129-6129-01, Notice of Proposed Rulemaking, 71 Fed. Reg. 42067 (Jul, 25, 2006) (tentatively concluding that subsidy checks would be provided only to consumers who "receive only over-the-air transmissions in analog format, and [not] from a multichannel video program distributor such as a cable or satellite service.").

to enjoy these benefits and thus ultimately harming consumers.”⁵⁵ It further explains that “building and deploying a physically compliant set-top box will inevitably divert and unnecessarily tie up resources that would otherwise be available either for investment to speed fiber deployment or for research and development into additional services that Verizon could offer over the FiOS network.”⁵⁶

The same logic applies equally to cable companies entering the phone business. Just as Verizon understandably bemoans the waste of limited resources that could instead be used to further its expansion into the video services market, the public interest would also be better served if cable operators did not have to divert their limited resources that could be better used to further their expansion into the voice services market.

One of the fundamental objectives of the 1996 Act was to spur intermodal competition for telephone services. Cable’s successful entry into the residential voice market is now especially critical for consumers in light of the elimination of UNE-P, and the disappearance of MCI and the old AT&T. Cable is the facilities-based alternative to incumbent telephone companies. Indeed, “cable TV providers who offer telephone service ranked highest in customer satisfaction in five of six U.S. regions, surpassing traditional phone companies among people who subscribe to national calling plans, said a study by J.D. Power & Associates.”⁵⁷ With its digital voice and phone offerings, the cable industry is delivering the competition sought by the 1996 Act.

⁵⁵ Verizon Waiver Request at 11.

⁵⁶ *Id.* at 17.

⁵⁷ *Phone Customers Rank Cable Plans High*, THE WASHINGTON TIMES, July 13, 2006, at C10-11; *see also A “Wake-up Call” for Ma Bell*, SAN DIEGO UNION-TRIBUNE, July 13, 2006, at 1, 5; *Cable-Phone Plans Win Fans*, THE WALL STREET JOURNAL, July 13, 2006, at D-2.

According to the J.D. Power and Associates study, customers of cable voice providers reported paying an average of just \$42.40 per month, compared to customers of traditional telephone companies, who paid an average of \$53.59, resulting in monthly savings of \$11.19.⁵⁸ If all of the 85 million households⁵⁹ to which cable voice service is projected to be marketed during 2006 were to take advantage of these savings, they would enjoy annual savings of \$11.4 billion.

Grant of the instant waiver request will advance the goal of the 1996 Act to promote telephone competition. Without such a waiver, resources that otherwise might be devoted to further roll-out of cable's voice product would be siphoned off to a wasteful interim implementation of the integration ban. Grant of the waiver would also be fully consistent with the waiver standard in Section 629(c), which requires the Commission to grant waivers not only where such waivers are to assist the development or introduction of a new or improved multichannel video programming, but also for "*other service[s]* offered over multichannel video programming systems, technology, or products."⁶⁰

Furthermore, it would be arbitrary and capricious for the Commission to grant a waiver to Verizon to help it conserve resources to enter video, but deny the same waiver for traditional cable companies that need to conserve resources to invest to compete in voice. Such a dual standard would be especially arbitrary in light of the fact that Verizon has vastly more resources than every other cable operator. For the year ending December 31, 2005, Verizon had total

⁵⁸ J.D. Power and Associates Press Release, *Cable Companies Dominate Customer Satisfaction Rankings for Local and Long Distance Telephone Service*, July 12, 2006, available at <http://www.jdpower.com/corporate/news/releases/pdf/2006108.pdf>.

⁵⁹ *Broadband Technology*, February 17, 2006, Kagan Research LLC.

⁶⁰ 47 U.S.C. § 549(c) (emphasis added).

revenue of more than \$75 billion⁶¹ – more than the cable services revenue of all U.S. cable operators combined.⁶² Verizon’s dividend payments alone, \$4.4 billion dollars in 2005,⁶³ were higher than the revenue of all but the four largest traditional cable operators and greater than the revenue of 34 companies included in the 2006 Fortune 500 rankings.⁶⁴ Verizon’s market capitalization is nearly 200 times larger than the fourth largest traditional cable operator in the nation, Charter. Furthermore, more than 1,000 cable companies smaller than Charter serve customers in the U.S., including many small cable companies investing to deliver competitive voice service in smaller markets.⁶⁵ These companies would need to divert resources from deploying competitive voice and other services to deploy entirely different and more costly suites of set-top boxes. The FCC cannot reasonably conclude that Verizon needs financial assistance to enter video more than traditional cable operators need assistance by waiver of the same rule to facilitate their entry into voice.

C. The Requested Waiver is Necessary to Sustain the Rapid Deployment and Improvement of Broadband Services to All Americans

Grant of the requested waiver could also enable cable operators to use resources that would otherwise be wasted on soon-to-be superfluous CableCARD-enabled leased boxes on

⁶¹ Verizon Communications Inc. 2005 Annual Report.

⁶² See NCTA Industry Statistics (quoting data from Kagan Research LLC), available at <http://www.ncta.com/ContentView.aspx?contentID=54>.

⁶³ *Id.*

⁶⁴ See 2006 Fortune 500, FORTUNE MAGAZINE, April 17, 2006, available at <http://money.cnn.com/magazines/fortune/fortune500/>.

⁶⁵ See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7012-Z, CS Docket No. 97-80, Comments of the American Cable Association, (filed June 15, 2006) (describing how imposition of the integration ban will adversely affect small cable companies’ deployment of advanced services).

continued investment in their broadband capabilities and services, in furtherance of Section 706 of the 1996 Act⁶⁶ and the Bush Administration's goal of nationwide broadband deployment.⁶⁷

Since 1996, the cable industry has invested more than \$100 billion in private risk capital to upgrade its networks.⁶⁸ One of the important results of this investment in hybrid-fiber coaxial networks was the ability to deliver broadband Internet access service. The cable industry took the lead in both developing and deploying high-speed data connections when phone companies were reluctant to do so for fear of cannibalizing their ISDN and T-1 services. Ultimately, the acceleration of broadband adoption was facilitated by the cable industry's infrastructure investments – investments that must continue to provide consumers the higher quality service they demand. Traditional cable operators' continued investment is critical not only to keep pace with ever-increasing demand for greater bandwidth, but also to keep pace with the multi-billion dollar fiber expansions of Verizon and AT&T.

By the end of 2005, Verizon's new fiber-to-the-premises "FiOS" service passed 3,000,000 homes and businesses in almost 800 communities spread out over 16 states."⁶⁹ Verizon plans to pass 3,000,000 additional homes annually until 2010, when its fiber network

⁶⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157).

⁶⁷ The White House, *A New Generation of American Innovation* (April 2004) ("The President has called for universal, affordable access for broadband technology by the year 2007 ... The Bush Administration has implemented a wide range of policy directives to create economic incentives, remove regulatory barriers, and promote new technologies to help make broadband affordable. The President believes that lowering the cost of broadband will increase its use and availability. ... The Federal Government must do its part to remove hurdles that slow the deployment of broadband."), available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

⁶⁸ "The Greatest Story Never Told: How the 1996 Telecommunications Act Helped to Transform Cable's Future," Brian L. Roberts, FEDERAL COMMUNICATIONS LAW JOURNAL, Vol. 58, No. 3, at 572-577 (June 2006); see also NCTA 2006 Annual Report at 5 (2006), available at http://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf (documenting cable operators' investment of \$100 billion since 1996).

⁶⁹ Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, Attachment B at 1 (May 23, 2006).

will cover 18,000,000 households, or approximately one-half of the customers in its current footprint.⁷⁰ Verizon boasts that it “offers an immense amount of bandwidth compared to a traditional cable operator,”⁷¹ and has already boosted its broadband offerings in certain states to download speeds of 10, 20 and 50 mbps,⁷² far more than most cable broadband offerings.

AT&T’s fiber-to-the-node service, an integrated video, data and voice network, was launched in San Antonio in June of 2006.⁷³ It is scheduled to be launched in up to 20 markets by the end of 2006, and is projected to reach almost 19,000,000 homes by the end of 2008.⁷⁴ Although at least initially AT&T has not announced plans to match the download speeds of FiOS, by pushing fiber deeper into neighborhoods AT&T would be able to offer much greater speeds than its current consumer ADSL services.

In the face of this competition, cable cannot afford to rest on its laurels. To this end, CableLabs recently announced publication of the next generation of DOCSIS: DOCSIS 3.0.⁷⁵ DOCSIS 3.0 will, once implemented, provide for downstream data capacity of 160 Mbps or higher, and upstream capacity of 120 Mbps or higher. Upgrading to DOCSIS 3.0 as rapidly as possible would provide consumers with a superior, competitive data service. However, DOCSIS

⁷⁰ See UBS Investment Research, Telecommunications Services, *Tightening our Video Model*, at Table 1, February 14, 2006.

⁷¹ Verizon Waiver Request at 8.

⁷² Verizon News Release, “Verizon Sparks FiOS Internet Service With Fastest Speeds Yet for New York, New Jersey and Connecticut, “Supercharged FiOS Internet at up to 50 Megabits per Second Available to Consumers and Small Businesses,” July 17, 2006, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93604&PROACTIVE_ID=cecdc6c9c8c7c9cbc8c5cecfcf5cecdcec9c7c9cccdcdcdc5cf.

⁷³ AT&T Press Release, *Through July 31, New Customers May Receive Three Months of Free TV*, (June 26, 2006), available at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22358>.

⁷⁴ *AT&T Adds Bloomberg to U-verse*, MULTICHANNEL NEWS, Jul. 26, 2006, available at <http://www.multichannel.com/article/CA6356381.html>.

⁷⁵ http://cablelabs.com/news/pr/2006/06_pr_docsis30_080706.html.

3.0 will require a significant investment and such an upgrade effort would obviously be affected by any diversion of cable network resources, personnel, and money to implementation of the integration ban.

Traditional cable operators should not alone be saddled with the enormous cost of the integration ban while their much larger competitors, Verizon and AT&T, are freed of this obligation and are deploying advanced broadband networks and services to compete with cable. Instead, a waiver is appropriate for *all* MVPDs until the less-expensive alternative of DCAS becomes available, so that they may continue to invest in broadband capacity and other services so greatly valued by American consumers and businesses. Section 706 of the 1996 Act directs the Commission “to encourage the deployment ... of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity ... regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁷⁶ Because a wasteful interim implementation of the integration ban would be an unnecessary barrier to broadband infrastructure investment and could thereby impede broadband deployment to all Americans, the requested waiver is warranted.

V. A WAIVER IS NEEDED TO DEFER THE RULE UNTIL IT CAN BE IMPLEMENTED IN A LAWFUL, RATIONAL MANNER THAT WOULD NOT ARBITRARILY SKEW VIDEO COMPETITION

Section 629 applies to all MVPDs – including Verizon, AT&T,⁷⁷ DirecTV and EchoStar.

As the Commission forcefully stated in 1998:

⁷⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157).

⁷⁷ Despite its claim that it is not a “cable operator” providing “cable service,” AT&T concedes it is an MVPD and, “as a MVPD, it is subject to those obligations in Title VI applicable generally to other MVPDs.” Letter from James C. Smith, Senior Vice President, SBC, to Marlene H. Dortch, Secretary, Federal Communications

We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems. Our reading of the law is that consumer choice in navigation devices for all multichannel video programming systems was mandated by Congress when it enacted Section 629.⁷⁸

Verizon is incorrect in its assertion that the FCC “categorically exempted DBS from the integration ban.”⁷⁹ Instead, the FCC rules provide that the integration ban shall not apply to “a multichannel video programming distributor” (cable, DBS or otherwise) “that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system.”⁸⁰ While the Commission found in 1998 that DirecTV and EchoStar met these criteria but cable did not, those findings could not be made today. In fact, if DirecTV and EchoStar can still be held to qualify for this exemption today, cable operators qualify as well.

Today’s DBS navigation device market is now completely distinguishable from the one evaluated by the Commission in 1998. At the time the Commission found that EchoStar and DirecTV satisfied the exemption criteria, consumers were able to choose among differentiated DBS navigation devices branded and sold by third-party manufacturers in retail stores. Today, however, EchoStar and DirecTV issue specifications to manufacturers to build for “retail” exactly what the DBS provider offers when it leases or sells equipment directly to customers. Beyond that, CE manufacturers have little, if any, right to produce DBS navigation devices or to

Commission, WC Docket No. 04-36, at 14 (filed Sept. 14, 2005)(emphasis added). Nevertheless, AT&T has shown no indication it is preparing to provide set-top boxes with separated security.

⁷⁸ *First Report and Order*, 13 FCC Rcd. at 14783, ¶ 22.

⁷⁹ Verizon Waiver Request at 2.

⁸⁰ 47 C.F.R. § 76.1204(a)(2). The *First Report and Order* found that “Congress did not exclude DBS from the reach of Section 629, even though the competitive state of DBS services was known at the time of the enactment of the 1996 Act.” *First Report and Order*, 13 FCC Rcd. at 14819, ¶ 112.

innovate outside of the DBS provider's specifications. As DirecTV succinctly explained, "the various consumer electronics brands [previously] associated with DirecTV equipment will be replaced by the DirecTV brand."⁸¹ As a result, consumers have faced diminished variety and choice in their options for DBS equipment.

This dramatic change became especially clear on March 1, 2006, when DirecTV initiated a new equipment policy that effectively eliminates the ability of most new customers to access its service by any means other than a proprietary set-top box *leased from DirecTV*.⁸² If consumers now go to Circuit City or another retailer to "purchase" a "retail" receiver to use DirecTV's service, their only options are four or five models of DirecTV's own proprietary boxes under the DirecTV brand (typically a low-cost, limited function device; a standard definition DVR, a high-definition receiver, and a high-definition DVR).⁸³ But retailers do not "sell" these boxes in the traditional sense; instead, they hand over these boxes *only* after the consumer has signed an agreement to lease the box from DirecTV.⁸⁴ Consumers cannot choose to use non-DirecTV devices; they do not own the device even though they paid the retailer an "upfront equipment fee" of as much as \$500; nor can they use this equipment if they later decide

⁸¹ See Comments of NCTA, CS Docket 97-80, at 19 (filed Feb. 19, 2004) (*citing DirecTV Press Release*, "DirecTV Debuts New Hardware Strategy at CES 2004," January 8, 2004).

⁸² Linda Moss, *DirecTV Opts for a Leasing Model*, MULTICHANNEL NEWS, Jan. 23, 2006 (describing DirecTV's decision to lease, rather than sell, its set-top boxes).

⁸³ See, e.g., "TV & Video – Satellite and Digital Cable," <http://www.circuitcity.com>, then select "TV & Video – Satellite and Digital Cable." EchoStar has an approach similar to that of DirecTV, except that customers purchase the boxes rather than lease them. Circuit City does not offer EchoStar boxes, but at Radio Shack, one of EchoStar's preferred retailers, there are about five models of receivers that can be used to access its service, and all of them are under its DISH Networks brand and produced for EchoStar. There are no set-top boxes for Verizon's new FiOS TV available from any retailer; they can only be obtained by leasing them from Verizon.

⁸⁴ See DirecTV's HD/DVR receiver at Circuit City's website, showing "An upfront equipment upgrade fee of \$499.99 -PLUS- a monthly lease fee of \$4.99," at <http://www.circuitcity.com/ssm/Satellite-and-Digital-Cable/sem/rpsm/catOid/-12877/N/20012866+20012877+312877004/link/ref/rpem/ccd/categorylist.do>. When the receiver is placed in the website's Shopping Cart and the consumer proceeds to Checkout, a DIRECTV EQUIPMENT LEASE ADDENDUM appears, and the consumer must click their agreement to "purchase" the receiver.

to switch to another MVPD's service; and they must pay to lease the device at rates and terms prescribed by DirecTV.⁸⁵

These facts show that DirecTV's level of support for third-party navigation devices is, to put it plainly, not what it was in 1998, or even 2005. Meanwhile, cable operators have moved in the other direction, and now support active use by subscribers of more than 450 models of competitive navigation devices certified or verified for use with CableCARDS built by 24 different CE manufacturers. These "digital cable ready" devices operate throughout the continental United States, are available from unaffiliated retail outlets nationwide, and are sold to consumers on whatever terms those manufacturers and retailers wish.⁸⁶ *Cable operators are legally obligated to support these third-party devices under the "plug and play" rules,⁸⁷ while DBS providers have moved to eliminate their support for third-party retail DBS devices altogether.* As a judge on the U.S. Court of Appeals recently asked Commission counsel: "Why doesn't cable now meet this exemption from the integrat[ion ban]?"⁸⁸ To the extent that DirecTV continues to qualify for the exemption, then the answer to the Court's question can only be that cable operators do too.

Like DirecTV and EchoStar, Verizon and AT&T rely exclusively or almost exclusively on integrated devices and appear not to be in a position to offer non-integrated devices by July

⁸⁵ *Id.*

⁸⁶ See Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 1 (filed June 26, 2006).

⁸⁷ See 47 C.F.R. §76.640(b) (requiring cable operators to support CableCARD-equipped devices in their digital cable systems); see also 47 C.F.R. § 76.1204(a)(1) (requiring MVPDs to make available separate security equipment).

⁸⁸ *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237, Transcript of Oral Argument at 29, (D.C. Cir. May 11, 2006).

2007.⁸⁹ Were only existing cable operators forced to comply with the integration ban, they would suffer an enormous competitive disadvantage in the now highly-competitive and price-sensitive video services market. In a dynamic industry in which players constantly vie to stay ahead of highly-innovative competitors, there is an enormous opportunity cost to dedicating massive resources to a project with no return benefit to cable operators or their customers.⁹⁰ Cable operators have previously advised the Commission that “a large and growing proportion of the finite technical resources of cable industry suppliers and of cable operators will need to be dedicated toward meeting” the integration ban deadline.⁹¹ As noted above, this diversion of resources is now taking a very real toll by causing cable’s set-top vendors to suspend development of new services and features that cable had been relying upon to boost its competitiveness with DBS and the telephone companies.

Worse, any continued exemption of DBS or new waiver for the telephone companies would allow them to devote their resources to developing new features and less-expensive equipment to try to attract more consumers away from traditional cable operators.⁹² And that competition is plain for all to see. For example, Verizon says it has a plan for “FiOS TV” to

⁸⁹ Verizon’s waiver request provides no indication it is developing set-top boxes that would comply with the integration ban in the event its waiver request is not granted. For its part, AT&T awarded contracts to Scientific-Atlanta and Motorola that run through the end of 2008 to develop and supply integrated IPTV set-top boxes that are subject to a set of specifications provided by AT&T. AT&T Press Release, *SBC Communications Selects Motorola and Scientific-Atlanta as Set-Top Box Suppliers for SBC U-Verse TV* (Aug. 18, 2005), available at <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21772>.

⁹⁰ See Letter from Neal M. Goldberg, General Counsel, NCTA, to Jonathan Cody, Legal Advisor, Office of Chairman Michael Powell, Federal Communications Commission, CS Docket No. 97-80, at 2 (filed Jan. 11, 2005) (“Today, DBS is exempted from the rule, does not incur this cost, and can innovate rapidly. . . . In this intensely (and increasingly) competitive environment, cable operators should not be required to divert the development dollars and resources that should be going into new features and new services to a set-top engineering redesign that provides no consumer benefit and only adds to consumer cost.”).

⁹¹ Letter from James L. Casserly, Willkie Farr & Gallagher LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 1 (filed Jan. 19, 2005).

⁹² See Letter from Paula Boyd, Regulatory Counsel, Microsoft Corporation, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at 1 (filed March 4, 2005) (“[I]mplementing the

deliver a “raft of new and unique services and new competition in existing services to the video marketplace,”⁹³ and “an immense amount of bandwidth compared to a traditional cable operator,”⁹⁴ while AT&T has boasted that its newly-launched video services will be a “game-changing alternative to traditional cable service....”⁹⁵

Verizon has made clear that the integration ban would have an adverse impact on an MVPD’s competitiveness, warning the Commission that if it were “forced to commit the substantial technical and economic resources necessary to design and produce a physically compliant set-top box, the cost and competitiveness of Verizon’s service will be adversely impacted,” and that “[b]uilding these costs into the price of Verizon’s service will lead to increased costs to the consumer, and reduce the competitive pressure that Verizon can bring to the MVPD market.”⁹⁶ The same is of course true for cable operators as they seek to stay ahead of the telcos’ “rafts” of new services and “game-changing alternatives.”

And while regulations governing leased set-top box rates would permit cable providers to pass through increased costs to consumers (while DBS and the telephone companies would be spared such costs), this would increase the risk of cable losing price-sensitive customers to its competitors.⁹⁷ These are the customers who already are the most likely to consider changing

integration ban could unnecessarily raise prices for consumers, place cable at a cost disadvantage with competing multichannel video programming distribution services, and further impede the kinds of collaborative efforts between CE, IT, and cable industries that are needed to devise more forward-looking and effective solutions to the issues that the integration ban was thought to address.”).

⁹³ Verizon Waiver Request at 3.

⁹⁴ *Id.* at 8.

⁹⁵ Statement of James D. Ellis, Senior Executive Vice President and General Counsel, SBC Communications, Inc., Statement to United States Senate Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, November 9, 2005, at 3.

⁹⁶ Verizon Waiver Request at 17.

⁹⁷ The estimated increase in set top box rates would be \$2-3 per month per box. *See* NCTA Cost Report at 4-7.

providers.⁹⁸ It would be particularly irrational and arbitrary for the Commission to impose such a one-sided result at a time when Verizon, whose market value is significantly more than all cable operators, boasts that it has been “able to achieve over a twenty percent penetration among FiOS eligible customers within just four months;”⁹⁹ when Verizon’s trade association has spent lavishly on an advertising campaign claiming that “cable rates are going through the roof;”¹⁰⁰ and when DirecTV and EchoStar have emphasized low prices¹⁰¹ en route to becoming the second and fourth largest MVPDs in the nation.¹⁰²

It is the Commission’s well-established policy to avoid such market-distorting results. In the *Wireline Broadband Order*, the Commission proclaimed that “we should regulate like services in a similar manner” to promote market-based investment decisions, not ones driven by regulatory disparities,¹⁰³ and it emphasized the importance of creating a “regulatory regime that is technology and competitively neutral.”¹⁰⁴ Many disparate regulations still exist under the Communications Act, but these differences are in most cases based on regulations rooted in an earlier era, where one type of entity is governed by one statute and another type by a different statute. It is quite another thing for the FCC to create new artificial regulatory disparities,

⁹⁸ See *In the Matter of Charter Communications Inc. Request for Waiver of 47 C.F.R. § 79.1204(a)(1)*, Request for Waiver, CSR-_____, (filed July 14, 2006).

⁹⁹ Verizon Waiver Request at 6.

¹⁰⁰ <http://www.ustelecom.org/media/video/ThroughTheRoof.wmv>.

¹⁰¹ “Dollar for dollar, DIRECTV delivers more entertainment and choice than any other provider.” See answer to “Key Questions: Will my monthly fee be very high?”, available at <http://www.cincinnati-bell.com/consumer/tv/directv/advantages/>; see also Dish Network, “Get TV that’s better (on your wallet),” available at <http://dishtv.com/offer1.jsp>.

¹⁰² DirecTV: http://media.corporate-ir.net/media_files/12/127160/pdf/Q12006EarningsRelease.pdf; EchoStar: <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=855304&highlight=>.

¹⁰³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853, 14878 ¶ 45 (2005).

¹⁰⁴ *Id.* at 14857, ¶ 4.

especially between entities all subject to the same statutory provision (in this case, Section 629), rather than different provisions under different titles.

The Commission has specifically applied this approach to avoid skewing the market in the context of MVPD equipment rules even when Congress has not applied a statute to all market participants. Though Congress had made only cable operators subject to Section 624A of the Communications Act, the Commission applied its implementing regulations to DBS too, explaining that:

DBS did not exist at the time when Section 624A was enacted, but has since grown to serve approximately twenty percent of the MVPD marketplace. In order to accomplish the purposes of Section 624A, we believe that the Commission may exercise ancillary jurisdiction over non-cable MVPDs in order to avoid the creation of a regulatory and marketplace imbalance between cable and DBS. Absent this approach, we believe that cable operators would be at a significant competitive disadvantage in obtaining access to content which could frustrate the ability to satisfy Section 624A's mandate.¹⁰⁵

Here, DBS *did* exist when Section 629 was adopted, and Congress contemplated that video services from the telephone companies were on the way. Knowing this, Congress consciously applied Section 629 to all MVPDs, not just cable operators.¹⁰⁶

The Commission's policy to avoid regulatory and marketplace imbalances is even more compelling here. Congress in effect demanded that result by specifically prohibiting the Commission from using waivers to favor some MVPDs over others. Section 629(c) requires that any waiver of the Section 629 rules "shall be effective for all service providers and products in

¹⁰⁵ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885, 20910, ¶ 57 (2003).

¹⁰⁶ *First Report and Order*, 13 FCC Rcd. at 14783, ¶¶ 22, 112.

that category *and* for all providers of services and products.”¹⁰⁷ Thus, if the Commission grants Verizon’s waiver request, such waivers would automatically apply to all MVPDs as a matter of law, and cannot, as Verizon suggests, be limited to “those service providers who, like Verizon, are providing service using a hybrid QAM/IP system over FTTP architecture.”¹⁰⁸

The market is clearly undergoing revolutionary changes: AT&T is deploying wireline facilities-based competition to cable using U-Verse and integrated set-top boxes leased to consumers; Verizon is also deploying wireline facilities-based competition to cable using FiOS and integrated set-top boxes leased to consumers, but migrating to downloadable security. DirecTV has moved away from using multiple retail brands towards relying on leased set-top boxes built to its specifications. EchoStar continues to specify exactly what is sold at retail as the EchoStar set-top box. The cable industry is simultaneously supporting hundreds of models of retail digital cable ready television receivers – including CableCARD-equipped digital televisions and CableCARD-equipped TiVo DVRs – leasing integrated set-top boxes to consumers, and migrating to downloadable security.

The nation is approaching a hard date for analog sunset on February 17, 2009, while cable is moving to digital simulcast. The Treasury is planning to fund digital-to-analog converters which cannot receive MVPD programming. All MVPDs are moving aggressively to offer bundles of services to compete with each other. This is an incredibly dynamic market in which it makes little sense to single out one video provider for the unique burden of re-engineering their leased devices to use CableCARDS that add cost and give no consumer benefit.

¹⁰⁷ 47 U.S.C. § 547(c) (emphasis added). Verizon’s argument that it should be granted a waiver because it is a “new entrant” is meritless given its revenues, market capitalization and other resources, relative to individual cable operators.

¹⁰⁸ Verizon Waiver Request at fn. 12.

For these reasons, the instant request should be granted to avoiding skewing an intensely competitive marketplace. By the end of the waiver period, the Commission would have had a meaningful opportunity to assess the dramatic changes to the relevant facts that prompted the integration ban, rather than permitting the ban to take effect in 2007 when to do so would plainly hurt consumers and competition.

VI. GRANT OF THE WAIVER REQUEST WILL NOT ADVERSELY IMPACT RETAIL DIGITAL CABLE READY DEVICES

Waiver of the integration ban will not diminish the cable industry's economic incentive, or its legal obligation under the "plug and play" rules, to support CableCARDs. Cable operators have already demonstrated their commitment to ensuring CableCARD-enabled retail devices work on cable systems by the extraordinary amount of time, money and resources they have expended in provisioning and supporting such devices. That support for retail has been catalogued in many prior reports.¹⁰⁹ Moreover, cable operators have a regulatory duty to ensure that their digital networks support CableCARD-enabled devices and that obligation will be unaffected by grant of this waiver request.¹¹⁰

The cable industry has stepped up to the plate in furtherance of the Commission's goal to support innovative one-way digital cable ready CE products and to have two-way digital cable-ready products brought to market as soon as possible. Among other things, cable has:

- *Provided the Commission with a framework for promptly bringing two-way products to market.* This proposal, filed in November 2005, included rules the FCC could adopt to facilitate industry-wide development and

¹⁰⁹ See e.g., Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, CS Docket No. 97-80 (filed June 29, 2006) ("NCTA June 29, 2006 Report").

¹¹⁰ See 47 C.F.R. § 76.640(b) (requiring cable operators to support CableCARD-equipped devices in their digital cable systems); see also 47 C.F.R. § 76.1204(a)(1) (requiring MVPDs to make available separate security equipment).

deployment of two-way digital cable ready products based on the CableLabs CableCARD-Host Interface License Agreement (“CHILA”).¹¹¹

- *Worked with Individual CE Companies in Supporting the Development/Deployment of OCAP-based Retail Products.* Major CE companies including Samsung, LG Electronics, Panasonic, Toshiba, Thomson, and Digeo, as well as CE support and chip and component companies such as Broadcom, Himax, ATI Technologies, Digital Keystone, and Video Without Boundaries, have entered into contracts with the cable industry to bring two-way devices to market. Six of the largest MSOs committed to specific market deployment of OCAP in 2006. Consumer electronics manufacturers LG Electronics, Panasonic, and Samsung voiced their support for OCAP at CES 2006. Samsung announced the deployment of working certified two-way OCAP-based navigation devices with Time Warner Cable in a North Carolina test market. Panasonic and Samsung each announced the industry’s first agreements for their manufacture and deployment of Comcast’s new series of digital cable set-tops, with OCAP-enabled high-definition digital video recording (DVR) capabilities with 250 GB+ storage capacity, and both MPEG-2 and H.264 decoder capabilities. Successful OCAP interoperability lab working sessions were held with more than 50 companies, including vendors of headend/servers, tools, applications, implementations and major content suppliers such as Walt Disney-ABC and Showtime.
- *Supported Development of Digital Cable Ready PCs.* The Microsoft 2006 CES booth and the keynote address by Bill Gates featured OCUR-enabled “digital cable ready” personal computers that receive cable programming, including high-definition premium digital cable content without a set-top box leased from the cable operator.
- *Produced “Engineering Change Requests” (“ECRs”) to the OCAP specification in cooperation with CE companies to better facilitate the use of two-way set-top box functionality inside two-way digital televisions that also have other features and functions.* Those ECRs, developed in cooperation with consumer electronics industry engineers, are now moving through the CableLabs process that involves peer review by a wide array of manufacturers and vendors.
- *Developed MultiStream CableCARDS (“M-CARDS”) For Use in Retail Products.* Both CISCO/Scientific-Atlanta and Motorola M-CARDS – which allow consumers to watch one program while recording another on CableCARD-enabled devices – have been qualified by CableLabs. M-CARDS should be available from cable operators within the next few months.

¹¹¹ Report from Daniel L. Brenner, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at Exhibit B (filed Nov. 30, 2005).

Cable operators have strong incentives to provision, install, and support CableCARDS in retail devices, and manage their networks to deliver services in a manner that is compatible with CableCARD technology. Apart from Commission rules requiring that cable operators support CableCARDS, operators have an economic incentive to make sure that consumers who have purchased digital cable ready devices receive all of the services that those devices are capable of receiving. Those customers are cable's customers too, and if their DTV sets cannot access cable's video services because of a fault with the CableCARD, cable may well lose that customer to a competitor. The Commission can have every confidence that cable operators' networks, operations, and customer care services will be fully supportive of CableCARDS in digital cable-ready products purchased at retail.

If a problem were to arise with a cable operator's support for CableCARDS during the period of the waiver (or later), the Commission in its 2005 *Second Report and Order* has already established an expeditious remedy:

The Commission takes seriously allegations that the cable industry, or individual cable operators, are failing to meet their obligations to deploy and support CableCARDS. If specific allegations of CableCARD support violations are brought to the Commission we will investigate such allegations and take appropriate action if necessary.¹¹²

While there have been anecdotal reports of problems with CableCARD-equipped devices, most likely they arise due to inadequate testing of CE devices, not in the provision, installation or support of CableCARDS.¹¹³ In any event, in the absence of *any* formal, substantiated complaints, the Commission cannot reasonably conclude that an additional regulation (especially one as invasive, costly and burdensome as the integration ban) is necessary in the period before 2009.

¹¹² *Second Report and Order*, 20 FCC Rcd. at 6814-15, ¶ 39.

In addition, CE manufacturers have already demonstrated their ability to innovate even without the integration ban having taken effect. The Commission itself noted in the *Second Report and Order* that “innovation continues to be a hallmark of the navigation devices and digital cable ready equipment markets.”¹¹⁴ That record of innovation continues unabated today. Samsung has produced a two-way digital cable ready HDTV set that has been tested and certified by CableLabs.¹¹⁵ LG Electronics and Panasonic are also developing two-way products.¹¹⁶ Likewise, TiVo is developing a digital cable ready DVR that has been certified by CableLabs and is expected to be available at retail outlets by the end of this year.¹¹⁷ CES 2006 provided more evidence of this marketplace dynamism and innovation.¹¹⁸ In sum, there is no reason to believe that grant of the waiver requested here will harm the retail marketplace for CableCARD-enabled devices or other CE products.

¹¹³ See NCTA June 29, 2006 Report at 8-14. We also note that cable operators are committed to working with CE companies to address any issues with CableCARDS. *Id.* at 14.

¹¹⁴ *Second Report and Order*, 20 FCC Rcd. at 6811, ¶ 34 n.146.

¹¹⁵ See CableLabs Press Release, *Samsung Electronics Gains CableLabs Certification on 2-Way Digital Television* (Aug. 23, 2005), available at http://www.cablelabs.com/news/pr/2005/05_pr_samsung_082405.html.

¹¹⁶ See CableLabs Press Release, *Cable Television Industry Voices Support for OCAP and Two-Way Digital Cable Ready Product Deployments* (Jan. 5, 2006), available at http://www.cablelabs.com/news/pr/2006/06_pr_ocap_ces_010506.html.

¹¹⁷ See Steve Donohue, *TiVo Rolls Out New DVR*, MULTICHANNEL NEWS, Apr. 25, 2006.

¹¹⁸ See *CES News Tracker*, WALL STREET JOURNAL (Jan. 6, 2006) (describing innovative products on display at CES 2006); see also CEA Press Release, *Independent Audit Results Reveal Most Successful International CES in History* (May 4, 2006) (noting that more than 152,000 people from 144 countries attended the CES this year and witnessed the introduction of thousands of new products and technologies from more than 2,700 exhibitors). Among the innovative products were an OCAP-enabled DTV running an interactive electronic cable guide ported to OCAP; a DVR built to CableLabs' Host 2.0 specifications and capable of receiving unidirectional and bidirectional cable content; and an “OCUR” device which enables personal computers to decrypt cable content for display, recording, and networking around the home – all developed without any CableCARDS installed on operator-provided set-top boxes.

CONCLUSION

NCTA requests that the Commission act expeditiously on this waiver request, and in any case no later than 90 days from the date of this filing, as required by Section 629(c).¹¹⁹ The Commission's integration ban is scheduled to take effect in less than one year. Absent a change in that deadline, the requested waiver is essential to permit cable operators to continue to deploy integrated set-top boxes instead of pursuing more costly options that will ultimately harm consumers, the industry, and the competitive MVPD market in numerous ways.

¹¹⁹ See 47 U.S.C. § 549(c) (Upon an "appropriate showing," "the Commission shall grant any such waiver request within 90 days of any application filed under this subsection."). See also Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 181 (1996) ("The conference agreement also directs the Commission to act on waiver requests within 90 days."). This language indicates that Congress intended to require the Commission to rule on all requests for waiver within 90 days of their filing date, whether or not the Commission believed that an "appropriate showing" had been made.

For the foregoing reasons, NCTA respectfully requests that the Commission grant its request for waiver of the integration ban until the cable industry's deployment of downloadable conditional access or December 31, 2009, whichever is earlier.

Respectfully submitted,

/s/ **Daniel L. Brenner**

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August 16, 2006

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
National Cable & Telecommunications)
Association's Request for Waiver of) CSR- _____
47 C.F.R. § 76.1204(a)(1))

DECLARATION OF WILLIAM A. CHECK

1. My name is William A Check. I am Senior Vice President, Science & Technology, for the National Cable & Telecommunications Association. By virtue of my position, I am familiar with the set-top box equipment currently deployed by cable operators.
2. I have read the foregoing Request for Waiver ("Request") and I am familiar with the contents thereof.
3. I declare under penalty of perjury that the facts contained herein and within the foregoing Request are true and correct to the best of my knowledge, information, and belief.

/s/ William A. Check

William A Check, Ph.D.
Senior Vice President
Science & Technology
National Cable & Telecommunications
Association

Executed on: August 16, 2006

Certificate of Service

I do hereby certify that on September 18, 2006, I caused a true and correct copy of the foregoing Comments of NCTA to be served via USPS or e-mail, on the following:

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