

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

In the Matter of	)	
	)	
National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)	)	CSR-7056-Z
	)	

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

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The National Cable & Telecommunications Association (NCTA) submits these reply comments in support of its request for a temporary waiver of the integration ban until the deployment of downloadable security or December 31, 2009, whichever is earlier.

**SUMMARY**

The fundamental goal of Section 629 of the Communications Act, like that of the 1996 Telecommunications Act in general, is to facilitate delivery of the greater choices, lower prices and innovative new services that competitive markets provide in response to consumer demand. As the record in this proceeding demonstrates, during the limited period between July 2007 and the end of 2009, those goals would be frustrated by imposition of an extremely costly CableCARD technology on all new cable set-top boxes. Instead, a brief deferral of the ban until no later than December 2009 would not only achieve the goals of section 629 – by providing greater choices, lower prices and innovative new services to consumers – but it would avoid the additional costs that an earlier implementation would unnecessarily force upon consumers.

In its request, NCTA demonstrated that consumers deserve to be spared the millions of dollars in additional costs for soon-to-be-outdated equipment that provides them with nothing

extra in return.<sup>1</sup> NCTA further demonstrated that a waiver is warranted under Section 629(c) because imposition of the integration ban at this time would delay or derail the delivery of new and improved digital cable, voice, and broadband services to consumers.<sup>2</sup> The request also described how the purported benefits of the ban could be delivered in the near future at much less cost to consumers by a more efficient and technologically superior downloadable security solution.<sup>3</sup> Finally, NCTA's waiver request made clear that it would contravene the Commission's policy of technological and competitive neutrality, and the standards of Section 629, to impose the integration ban on cable operators but not its DBS competitors who are now far less supportive of retail navigation devices than the cable industry.<sup>4</sup> Only CEA and TiVo submitted oppositions to the NCTA waiver request and, as we show below, their claims are without merit.

CEA's claims regarding the costs of CableCARD-equipped set-top boxes are both completely unsupported and demonstrably false. By contrast, NCTA's cost estimates are real, recent, confirmed by Verizon, and already reflect volume discounts. But even under CEA's questionable calculations, a mandate for CableCARDS in all new cable set-top boxes would impose on consumers more than \$1 billion in additional costs between July 2007 and the end of 2009. Although CEA suggests that these costs would decrease over time, that argument overlooks the limited time CableCARDS would be used to satisfy the integration ban. Downloadable security will have long since eclipsed CableCARDS before further hypothetical economies advanced by CEA could be enjoyed. The opponents of NCTA's waiver have failed to

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<sup>1</sup> National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7056 (filed Aug. 16, 2006) ("NCTA Waiver Request") at 7-13.

<sup>2</sup> *Id.* at 13-24.

<sup>3</sup> *Id.* at 7-13, 33-36.

<sup>4</sup> *Id.* at 24-33.

present any specific, compelling evidence that denial of the requested waiver would deliver additional benefits to consumers sufficient to offset these hundreds of millions of dollars of costs.

Contrary to CEA's claims, NCTA demonstrated that denial of the requested waiver would undermine cable operators' delivery of new and improved services, including higher Internet speeds, competitive phone service, digital simulcast, more video-on-demand, new program networks, and more high definition programming. When the Commission properly focuses on the negative impact the ban would have on consumers during the period from mid-2007 through 2009 and the benefits in new and improved services a waiver would deliver, it must pay heed to the nearly 100 consumer groups and public interest organizations across the political spectrum, rural interests, legislators from both major political parties, content providers, and consumer electronics (CE) companies that have supported waivers of the integration ban.

Despite CEA's unsubstantiated arguments, cable's downloadable security solution (DCAS) continues its rapid evolution from the conceptual to a working technology that will replace CableCARDs. DCAS was operating on full display at the 2006 Consumer Electronics Show. Specifications have been published. The DCAS Host License has been signed by numerous CE manufacturers. The keying service facility is on line as promised. Development of secure micros and many other DCAS network elements is well underway under the professional management of the newly formed PolyCipher enterprise, on which the cable industry has already spent approximately \$30 million and has committed \$100 million. The *Second Report and Order* encouraged the cable industry to seek additional relief from the integration ban under exactly these circumstances, where downloadable security was being developed but not able to be delivered by July 2007.

CEA wants the Commission to prioritize the economic interests of the consumer electronics industry over the interests of consumers, but doing so would be contrary to congressional intent and Commission policy. The NCTA waiver request, by contrast, will benefit consumers by facilitating the delivery of new or improved services, avoiding added equipment costs, and giving consumers continued access to popular equipment options. In light of these clear benefits, the NCTA waiver request must be granted.

**I. CONSUMERS, SUPPLIERS, CONTENT PROVIDERS AND OTHERS BROADLY SUPPORT WAIVERS OF THE INTEGRATION BAN**

Support for the NCTA and other cable industry waivers has come from nearly 100 parties, including consumer groups and public interest organizations across the political spectrum, rural interests, legislators from both major political parties, content providers, and consumer electronics (CE) companies. Supporters include the parties listed in Figure 1 below.

**Figure 1: PARTIES SUPPORTING WAIVER OF THE INTEGRATION BAN**

<p><b>CONSUMER ELECTRONICS COMPANIES:</b></p> <p>BigBand Networks Pace Harmonic Terayon Motorola Cisco</p> <p>CE Companies Supporting at least a waiver for low-cost Devices:</p> <p>Panasonic Samsung Thomson</p>	<p><b>CONTENT PROVIDERS:</b></p> <p>Association of Public Television Stations ABC Sports A&amp;E Television Networks BET Holdings Discovery Communications Disney Media Networks ESPN Landmark Communications MTV Networks NBC Universal Cable Oxygen Media Showtime Networks Turner Broadcasting System TV One</p>
<p><b>COMMUNITY AND PUBLIC INTEREST ORGANIZATIONS:</b></p> <p>Black Leadership Forum (<i>represents leadership of 28 organizations, including NAACP, Congressional Black Caucus, National Urban League, and the Southern Christian Leadership Conference</i>) Hispanic Federation Hispanic National Bar Association Hispanic Technology &amp; Telecommunications Partnership (<i>represents American GI Forum, Cuban American National Council, Dialogue on Diversity, Hispanic Information Television Network, Hispanic Federation, Interamerican College of Physicians and Surgeons, League of United Latin American Citizens, Latinos in Information and Science Technology, MANA: A National Latina Organization, National Conference of Puerto Rican Women, National Puerto Rican Coalition, Inc., the ASPIRA Association, Inc., and the U.S. – Mexico Chamber of Commerce</i>)</p>	<p><b>TAXPAYER AND BUSINESS ORGANIZATIONS:</b></p> <p>Americans for Prosperity Americans for Tax Reform Citizens Against Government Waste Institute for Liberty League of Rural Voters National Black Chamber of Commerce National Taxpayers Union Reason Foundation U.S. Hispanic Chamber of Commerce Wall Street Journal Randolph J. May, Free State Foundation Thomas Lenard, Progress &amp; Freedom Foundation</p>
<p><b>LEGISLATORS:</b></p> <p>Sen. Ted Stevens (R-AK) Rep. Joe Barton (R-TX) Rep. Mike Doyle (D-PA) Rep. Gene Green (D-TX) Rep. Fred Upton (R-MI)</p>	<p><b>SMALL OPERATORS:</b></p> <p>American Cable Association Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) (<i>represents 550 small incumbent telephone companies</i>) Armstrong Utilities BendBroadband GCI RCN</p>

A wide spectrum of consumer groups has supported waivers. The National Black Chamber of Commerce explained that “the integration ban is yet another example of needless government regulation that stifles competition and taxes unnecessarily. To make matters worse, consumers will be asked to bear these costs without gaining any new features or capabilities.”<sup>5</sup> Imposing the ban “would leave consumers in a technological time-warp, held back by soon-to-be outdated technology.”<sup>6</sup> The Black Leadership Forum, which includes the NAACP, Blacks in Government, the Congressional Black Caucus, the National Urban League, and the Southern Christian Leadership Conference, also opposed the enormous “regressive ‘tax’ on cable customers” for which “there is no consumer demand” and “and give[s] them nothing tangible in return.”<sup>7</sup> The Hispanic Federation likewise challenged this “highly regressive and unjustified tax” on consumers, which would divert resources best spent on the digital transition and downloadable security.<sup>8</sup> The Hispanic Technology & Telecommunications Partnership warned that the tax “is not needed [and] will disproportionately impact the Hispanic community.”<sup>9</sup> Americans for Prosperity, Americans for Tax Reform, Citizens Against Government Waste, the National Taxpayers Union, Institute for Liberty, and Reason Foundation expressed similar concerns about consumer harms: “This unnecessary regulation will result in a \$2 per month

<sup>5</sup> CS Docket 97-80, Letter from Harry C. Alford, President & CEO of the National Black Chamber of Commerce, to Hon. Kevin J. Martin, Chairman, FCC, *et al.* (Oct. 3, 2006) at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> CS Docket 97-80, Letter from Joe Leonard Jr., PhD., Executive Director, Black Leadership Forum, to Hon. Kevin J. Martin, Chairman, FCC (Sept. 28, 2006) at 1.

<sup>8</sup> CS Docket 97-80, Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation, to Hon. Kevin J. Martin, Chairman, FCC, *et al.* (Oct. 2, 2006) at 1-2.

<sup>9</sup> CS Docket 97-80, Letter from Manuel Mirabal, Founder and Co-chair, Hispanic Technology & Telecommunications Partnership (Oct. 4, 2006) at 1-2. The Partnership represents American GI Forum, Cuban American National Council, Dialogue on Diversity, Hispanic Information Television Network, Hispanic Federation, Interamerican College of Physicians and Surgeons, League of United Latin American Citizens, Latinos in Information and Science Technology, MANA: A National Latina Organization, National Conference of Puerto Rican Women, National Puerto Rican Coalition, Inc., the ASPIRA Association, Inc., and the U.S. – Mexico Chamber of Commerce.

increased fee for affected video service subscribers, imposed by government fiat. The subscribers receive no benefit from this expense[.]”<sup>10</sup>

The League of Rural Voters warned that waiver was necessary to promote the digital transition for rural America:

[I]ncreasing the cost of digital set-top boxes would make America’s digital transition goals even more challenging to achieve. It would dampen the incentive for rural Americans to switch from analog to digital services that offer premium content and help keep rural areas connected [and] reduce the incentive for network operators to spread their digital networks far and wide throughout rural America.<sup>11</sup>

Similarly, the American Cable Association, which represents nearly 1,100 independent cable operators that serve primarily smaller markets and rural areas, explained that “[d]ownloadable security will be available long before economies of scale produce any decrease in the prices of CableCARD-compatible boxes. The only thing that the integration ban will accomplish in the price-conscious markets served by ACA’s members is to discourage the deployment of digital services.”<sup>12</sup> And in reply comments in support of the NCTA waiver request, the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), a national trade association representing over 550 small, rural telephone companies, stated that “granting the waiver will also remove a regulatory barrier that has the effect of impairing the further deployment of broadband in rural areas. It has been demonstrated that when rural carriers

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<sup>10</sup> CS Docket 97-80, Letter from Grover Norquist, President, Americans for Tax Reform; John Berthoud, President, National Taxpayers Union; Tim Phillips, President, Americans for Prosperity; Geoffrey Segal, Director of Government Reform, Reason Foundation; Jason Wright, President, Institute of Liberty; and Tom Schatz, President, Council for Citizens Against Government Waste, to Hon. Kevin J. Martin, Chairman, FCC, *et al.* (Oct. 2, 2006) at 1.

<sup>11</sup> CS Docket 97-80, Letter from Niel Ritchie, Executive Director, League of Rural Voters, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission (Oct. 2, 2006) at 1-2.

<sup>12</sup> American Cable Association Comments at 4.

bundle video with high-speed Internet access services, penetration rates increase, making it more economically viable to deploy broadband.”<sup>13</sup>

ABC Sports, A&E Television Networks, BET Holdings, Discovery Communications, Disney Media Networks, ESPN, Landmark Communications, MTV Networks, NBC Universal Cable, Oxygen Media, Showtime Networks, Turner Broadcasting System and TV One unanimously supported NCTA’s requested waiver to “promote new and innovative content and services to cable customers.”<sup>14</sup> “Content distribution is exploding in so many ways, and to divert cable operator time, money and resources during this exciting but highly competitive time will not benefit consumers. *The ban will divert operator resources from spending that spurs innovative programming.*”<sup>15</sup> With a downloadable security solution on the horizon, they wrote, “it seems unwise to impose a more costly, less efficient, and much less consumer-friendly burden on cable operators and their customers.”<sup>16</sup>

Cisco warned that imposing the integration ban at this time would impose significant costs and burdens on consumers when downloadable security has already proven to be both feasible and significantly less expensive. The cost and inconvenience is “unnecessary,” would be “ultimately borne by consumers, with no corresponding consumer benefit,” would “divert scarce resources away from ongoing industry efforts to develop new, innovative digital

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<sup>13</sup> Reply Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies at 3.

<sup>14</sup> CS Docket 97-80, Letter from Decker Anstrom, President & Chief Operating Officer, Landmark Communications, Inc.; Matthew Blank, Chairman & Chief Executive Officer, Showtime Networks, Inc.; George Bodenheimer, Co-Chairman, Disney Media Networks and President, ESPN, Inc. and ABC Sports; John Hendricks, Founder & Chairman, Discovery Communications, Inc.; Philip Kent Chairman & Chief Executive Officer, Turner Broadcasting System, Inc.; Geraldine Laybourne, Chairman & Chief Executive Officer, Oxygen Media, Inc.; Debra Lee, President & Chief Executive Officer, BET Holdings, Inc.; Judy McGrath, Chairman & Chief Executive Officer, MTV Networks; Abbe Raven, President & Chief Executive Officer, A&E Television Networks; Johnathan Rodgers, President & Chief Executive Officer, TV One; and David Zaslav, President, NBC Universal Cable, to Hon. Kevin J. Martin, Chairman, FCC (Nov. 2, 2006) at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

services,” and harm the digital transition.<sup>17</sup> Motorola likewise warned that expending resources on the ban “would slow the implementation and development of the superior downloadable security solution.”<sup>18</sup> “Motorola ... relies upon the same personnel and testing facilities for downloadable security, CableCARD, and other projects, and cannot accelerate work on new CableCARD-related initiatives without compromising work on downloadable security.”<sup>19</sup> By contrast, Motorola explained, grant of the waiver will in no way undermine support for CableCARDS or “the ability of CE manufacturers to continue to develop new and innovative CableCARD-enabled devices.”<sup>20</sup>

Terayon, a company deeply involved in the digital transition, explained that grant of the waiver will promote the transition to all-digital programming and the many benefits that such programming brings.<sup>21</sup> Imposing the ban would create an unnecessary cost for CableCARDS soon to be “completely outmoded” by DCAS, impose them on “consumers that can least afford such a superfluous purchase,” “with little countervailing consumer benefits.”<sup>22</sup> Such a requirement would harm the “roll-out of voice telephony and broadband services.”<sup>23</sup> Harmonic, a leading seller of digital video compression systems, similarly observed that grant of NCTA’s waiver would spur consumer adoption of additional digital services.<sup>24</sup>

As was shown in NCTA’s request and as these reply comments demonstrate, the opponents of NCTA’s waiver request disregard the clear consumer and public interest benefits

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<sup>17</sup> Cisco Comments at 4.

<sup>18</sup> Motorola Comments at 3.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> Terayon Comments at 2-5.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> Harmonic Comments at 1-2.

associated with grant of the waiver, and their reasons for objecting to the waiver request are completely unfounded.

## **II. CEA’S OWN COMMENTS SHOW THAT IMPLEMENTATION OF THE INTEGRATION BAN PRIOR TO DCAS DEPLOYMENT WOULD SADDLE CONSUMERS WITH HUNDREDS OF MILLIONS OF DOLLARS OF UNNECESSARY COSTS**

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The cable industry has demonstrated that requiring all new set-top boxes to be redesigned to accommodate a CableCARD would increase their cost by \$72-\$93 per box (including the cost of the CableCARD). With approximately eight million new digital cable set-top boxes deployed each year, this would in the aggregate levy a \$574-\$744 million set-top box tax on cable consumers per year. Just during the period of NCTA’s requested waiver (from July 2007 to the end of 2009), that would translate to \$1.43 to \$1.86 billion in unnecessary costs. And these costs are real, as CEA has finally conceded.

After years of criticizing NCTA’s evidence of cost increases, CEA now concedes that the ban will impose substantial costs on consumers.<sup>25</sup> First, CEA acknowledges that the cost of adding CableCARD functionality to a host set-top box or device would translate to “an additional monthly lease cost of less than \$1.25.”<sup>26</sup> Second, CEA recognizes that the separate, additional cost of leasing a CableCARD currently costs an average of \$1.61 per month.<sup>27</sup>

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<sup>25</sup> The Commission has also agreed that there would be “significant” additional costs on consumers from imposition of the ban through CableCARDs. *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 . . . .’”).

<sup>26</sup> CEA Comments at 8 (estimating the price increase for consumer leases of CableCARD-ready set-top boxes to be “less than \$1.25”).

<sup>27</sup> CS Docket 97-80, Letter from Julie Kearney, CEA, to Marlene H. Dortch, FCC (Nov. 20, 2006), attaching Letter from Gary Shapiro, President & CEO, CEA, to Hon. Carlos M. Gutierrez, Secretary of Commerce; Hon. John M.R. Kneuer, Acting Asst. Secretary for Communications and Information, NTIA; and FCC Commissioners (Nov. 20, 2006) at 2 (acknowledging “an average of \$1.61 per month [lease price] for a CableCARD.”). This letter also acknowledges a separate price increase for consumer leases of CableCARD-ready set-top boxes of “less than \$1.25.” *Id.*

Therefore, CEA acknowledges that the CableCARD requirement would at least initially result in added consumer costs of up to \$2.86 per month per box — at the high end of the \$2-3 cost estimate NCTA has consistently provided to the Commission.<sup>28</sup>

Nevertheless, CEA hypothesizes that these costs would decline over time because of increased volumes.<sup>29</sup> However, the price quotes that cable operators have received are already based upon their vendors' projections of significantly increased volumes that absent a waiver would be necessitated by imposition of the integration ban in July 2007. CEA also argues that whatever the costs would be for CableCARD-equipped devices in 2007, those costs will decrease over time because of technological efficiencies.<sup>30</sup> CEA relies on its own data relating to 802.11 PCMCIA wireless cards, which it says have declined in price by 90% *over the last eight years*.<sup>31</sup> This example is unavailing since in 2015, eight years after the effective date of the integration ban, CableCARD technology will have been long since eclipsed by downloadable security or a successor technology.<sup>32</sup>

Thus, CEA has effectively conceded that, in the absence of a waiver, consumers would ultimately bear at least the vast majority of the \$1.43 to \$1.86 billion in costs estimated by NCTA for the period from July 2007 to the end of 2009. It would make absolutely no sense for the Commission to force new digital cable customers to spend millions of dollars during this

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<sup>28</sup> Using the Commission's equipment rate formula, NCTA showed that a CableCARD-enabled box will cost consumers \$2-3 per box per month more than current integrated boxes. *See* CS Docket 97-80, Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, Aug. 2, 2002, pp. 3-7 (describing study conducted by NCTA using data from set-top box manufacturers). As discussed below, CEA's rebuttal to this cost analysis is fatally flawed, since it relies upon an analysis of Smart Card technology rather than the more expensive CableCARD technology. *See supra* n. 34.

<sup>29</sup> CEA Comments at 7.

<sup>30</sup> CEA Comments at 7-8.

<sup>31</sup> CEA Comments at 8. CEA presents no direct evidence that CableCARDS would experience the same declines.

<sup>32</sup> The cable industry will of course continue to support existing CableCARDS and CableCARD devices after DCAS is deployed.

period on the theory that such a requirement would result in less expensive CableCARD-enabled devices long after DCAS has replaced that technology. As Senator Stevens and Representatives Barton and Upton explained in urging the Commission to defer the July 2007 implementation date, “[f]orcing a costly deployment of an outdated technology while another that offers more to consumers is just over the horizon is not good public policy.”<sup>33</sup>

Finally, CEA’s supposed “evidence” of lower costs is deeply flawed,<sup>34</sup> but more importantly, it is also irrelevant. Cable operators do not make set-top boxes; they purchase them from CE manufacturers. The prices of CableCARD-enabled boxes are set by the free market based on the offers of the CE companies that commit to make the devices, not by those on the sidelines who will not. As Charter recently explained, “At this stage, it is irrelevant what one party or another’s theoretical model might suppose as to what it might cost to build a CableCARD-equipped set-top box; what is relevant is the actual real-world price that potential vendors will charge cable operators for this equipment.”<sup>35</sup> NCTA’s cost estimates are consistent with actual price quotes received in 2006 from the only vendors willing to commit to selling

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<sup>33</sup> CS Docket 97-80, Letter from Sen. Stevens, Rep. Barton and Rep. Upton, to Hon. Kevin J. Martin, Chairman, FCC (Nov. 27, 2006) at 2.

<sup>34</sup> CEA’s earlier purported “evidence” is based on an old, plainly erroneous declaration that in fact provides a cost estimate for less expensive Smart Cards, not the CableCARD standard approved by the Commission. NCTA has refuted that analysis on the record. *See* CS Docket 97-80, Letter from Neal M. Goldberg, General Counsel, NCTA, to W. Kenneth Ferree, Chief, Media Bureau, FCC (Jan. 7, 2003) at 2 (showing, under sworn declaration, that the CE estimate of CableCARD costs “are based on the purported cost of manufacturing an entirely different product – a ‘smart card’ designed to conform to the National Renewable Security Standard (‘NRSS’) Part A standard, rather than the NRSS, Part B standard, which served as the basis for the POD-Host interface specifications;” that “NRSS-A devices are smaller, less sophisticated, and therefore less costly than the most complex, robust, and highly secure devices developed to comply with the NRSS-B-based OpenCable POD-Host specification;” that the “greater technological complexity and sophistication required in OpenCable PODs is necessary to satisfy the Commission’s requirement[s] . . . and to ensure that video programming and other advanced services provided over digital cable systems are not vulnerable to piracy;” and that the CE estimate ignored several necessary cost elements, including a key interface and “the additional costs associated with the duplicative hardware and software that must be included in the Host device, which are not necessary in an integrated set-top box”).

<sup>35</sup> CS Docket 97-80 and CSR-7049, Reply Comments of Charter Communications, Inc. (Sept. 28, 2006) at 8 (“Charter Reply Comments”).

them CableCARD-enabled set-tops.<sup>36</sup> Verizon's own waiver request confirmed NCTA's figures.<sup>37</sup> As Pace explained in its comments supporting Charter's request for waiver:

Absent a waiver, until the deployment of downloadable security, it will be technically and economically impossible for any manufacturer to build a compliant set-top box that could be priced anywhere close to the amount of today's low-cost devices for which Charter seeks waiver. The unavoidable fact is that the combined cost of a "dis-integrated" host set-top box ... and a separate CableCARD is significantly greater than our integrated low-cost devices.<sup>38</sup>

Accordingly, the record is clear that notwithstanding CEA's unsupported hypotheses, the price increases estimated by NCTA are what cable operators and consumers would have to pay if required to use CableCARD set-top boxes during the period from 2007-2009.

CEA has not come close to making any detailed showing of consumer benefits that might offset the \$1 billion or more of consumer costs associated with the CableCARD requirement just in the mid-2007 to 2009 period for which waiver is sought. CE's generalized predictions of long-term consumer savings from a competitive navigation device market are not nearly enough to justify imposing these costs on consumers. First, downloadable security will soon be able to deliver any purported benefits from the integration ban at a fraction of the cost. Second, in the meantime, consumers already are receiving the benefits of a competitive device market, integration ban or not (*see* Section VI below).

<sup>36</sup> *See id.* at 8-9 ("Charter's sworn pleading reporting a cost increase in the range of \$72-93 ... is based upon the latest 2006 statements from its vendors as to what they will charge Charter for new CableCARD devices if the integration ban takes effect"); *see also* CS Docket No. 97-80, *Ex Parte* Presentation of American Cable Association and Armstrong Cable Services (Aug. 31, 2006), at 2 (explaining that Motorola had quoted Armstrong a price of "about \$190" for the CableCARD replacement for the DCT-700, almost two and one-half times as much as Armstrong now pays Motorola for the DCT-700); *see also* CS Docket 97-80, Letter from Amy C. Tykeson, President/CEO, BendBroadband, to Marlene H. Dortch, FCC (Nov. 2, 2006) at 1 (reporting that Motorola had quoted a price increase of \$130 for the DCT-700, from \$79 to \$209).

<sup>37</sup> Verizon Waiver Request at 15 (estimating a cost increase of \$75-95 per box, including the CableCARD).

<sup>38</sup> CS Docket 97-80 and CSR-7049, Comments of Pace Micro Technology PLC (supporting Charter waiver request) (Sept. 18, 2006) at 5.

### **III. GRANT OF NCTA'S WAIVER REQUEST IS NECESSARY TO FACILITATE DEVELOPMENT AND DEPLOYMENT OF NEW AND IMPROVED SERVICES**

Congress explicitly required the Commission to grant waivers where, as here, a “waiver is necessary to assist the development or introduction of [any] new or improved” service offered over an MVPD’s network.<sup>39</sup> TiVo claims that NCTA has not shown that its waiver request is “necessary” to promote new and innovative services.<sup>40</sup> This is patently untrue.

NCTA’s waiver request devoted 12 full pages to detailing the new and improved digital cable, telephone, and broadband services that would be delayed or derailed as a result of the imposition of the integration ban prior to the availability of downloadable security.<sup>41</sup> Further, individual cable operators have demonstrated the decisive impact that the Commission’s decisions on various pending waiver requests will have on their ability to offer new and improved services. For example, Charter has at stake its ability to offer digital simulcast to an additional 2 million homes in 2007 alone, as well as its ability to move nearly all of its systems to digital simulcast by 2009 in concert with the DTV transition.<sup>42</sup> BendBroadband explained that a waiver is necessary to move to an all-digital network by 2008 and to reclaim spectrum needed for even more HD and VOD, increased broadband capacity, and other new digital services.<sup>43</sup> Armstrong indicates that if it were allowed to continue to lease integrated devices, it could transition all video customers to digital as early as the end of 2009, and then be able to use the

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<sup>39</sup> 47 U.S.C. § 549(c).

<sup>40</sup> TiVo Comments at 8.

<sup>41</sup> NCTA Waiver Request at 13-24.

<sup>42</sup> Charter Reply Comments at 2-3. As the Commission noted in 2005, “The availability of low-cost boxes will further the cable industry’s migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high definition television.” *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, 6813, ¶ 37 (2005) (“*Second Report and Order*”). Thus, the digital transition is not, as CEA claims, a “red herring.” CEA Comments at 9.

<sup>43</sup> CS Docket 97-80 and CSR-7057, BendBroadband’s Request for Waiver (Oct. 4, 2006) at 5.

reclaimed bandwidth to offer higher Internet speeds and more HD programming.<sup>44</sup> Likewise, a waiver is also crucial to Suddenlink's ability to deliver telephone competition to the vast majority of its markets within 18 months.<sup>45</sup>

Cable's DCAS vendors have confirmed to the Commission that their efforts on DCAS development are being diverted to redesign set-top boxes for CableCARDs.<sup>46</sup> Cable's set-top vendors have had to forgo innovative new features on set-tops in order to redesign set-top boxes for CableCARDs.<sup>47</sup> Content providers, taxpayer interests, rural citizens, and consumer groups from across the political spectrum agree – imposition of the integration ban before downloadable security would hurt consumers far more than it could help them.

CEA's and TiVo's responses to this comprehensive showing are unavailing. CEA tersely states that NCTA has not identified a "technical obstacle posed by CableCARD reliance to the introduction of any new" or improved service.<sup>48</sup> TiVo simply claims that cable operators have not shown that a waiver is "necessary," and expresses its hope that cable operators will somehow find a way to deliver new services.<sup>49</sup> These blanket statements ignore the fact that cable (like any other industry) has finite resources, as do their customers.

Under any party's figures, a pre-DCAS implementation of the integration ban would drain hundreds of millions of dollars and enormous human and operational resources from cable operators. The diversion of these resources to implement the integration ban through an

<sup>44</sup> CS Docket 97-80, Letter from Jeffrey Ross, President, Armstrong Utilities, to Heather Dixon, Legal Advisor to Chairman Martin (Sept. 11, 2006) at 3.

<sup>45</sup> CS Docket 97-80 and CSR-7057, Cequel Communications, LLC d/b/a Suddenlink Communications' Request for Waiver (Dec. 5, 2006) at 5.

<sup>46</sup> *See, e.g.*, Motorola Comments at 4.

<sup>47</sup> *See* Motorola Comments at 4; *see also* NCTA Waiver Request at 15-16.

<sup>48</sup> CEA Comments at 7.

<sup>49</sup> TiVo Comments at 8.

expensive and soon-to-be-outdated technology would prevent or delay cable operators from delivering a number of new and improved digital cable, telephone and broadband services. In the absence of these new and improved services, many consumers will be less likely to adopt digital cable. The requested waiver is therefore exactly the type that Congress had in mind when it instructed the Commission not to “chill innovation” in implementing any navigation device rules, and to grant waivers necessary to facilitate new and improved services.<sup>50</sup>

#### **IV. CEA’s UNFOUNDED ASSERTION THAT DCAS IS NOT “IMMINENT” IS CONTRADICTED BY THE RECORD**

CEA and TiVo argue that the Commission cannot defer the integration ban to 2009 based upon the prospect of DCAS deployment, claiming that the technical viability of DCAS is doubtful and that there has been little or no progress on DCAS.<sup>51</sup> They are wrong on both counts.

In 2005, the cable industry provided live demonstrations of DCAS to the Commission staff. During these demonstrations, a Scientific-Atlanta set-top box using DCAS was able to operate on a Motorola network; a Motorola set-top box using DCAS was able to operate on a Scientific-Atlanta network; and both were able to easily move between Motorola and Scientific-Atlanta networks.<sup>52</sup> NDS and Samsung also demonstrated a *retail* Samsung set-top box using DCAS.<sup>53</sup> Samsung’s EVP and General Manager described DCAS as “an excellent solution for interactive devices. Samsung looks forward to continued collaboration with CableLabs and the

<sup>50</sup> See Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 181 (1996) (Congress instructed the Commission to “avoid actions which would have the effect of freezing or chilling the development of new technologies and services”); 47 U.S.C. § 549(c).

<sup>51</sup> CEA says that “The Commission should not consider any waivers based on downloadable conditional access unless and until it has made a determination that such a system is technically viable *and* itself would comply with the regulations from which a waiver is now sought.” CEA Comments at 5 (emphasis original).

<sup>52</sup> CS Docket No. 97-80, Report of the National Cable & Telecommunications Association on Downloadable Security (Nov. 30, 2005) at 4 (describing July 2005 and November 2005 demonstrations).

<sup>53</sup> *Id.*

cable industry to bring these cable-compatible products to market.”<sup>54</sup> In November 2005, the cable industry reported to the FCC that development and deployment of such a system is feasible, and it committed to the implementation of the DCAS system for its own devices as well as for DCAS-compliant retail devices.<sup>55</sup>

In addition, the Commission already has found that downloadable security complies with the Commission’s regulations so long as independent CE manufacturers can incorporate it in their devices and cable operators’ systems support those devices. In the *Second Report and Order*, it held:

Downloadable security comports with the rule’s ban on the inclusion of conditional access and other functions in a “single integrated device” because, by definition, the conditional access functionality of a device with downloadable security is not activated until it is downloaded to the box by the cable operator. Thus, at the time the consumer purchases the device, the conditional access and other functions are not ‘integrated.’ ... To the extent a downloadable security or other similar solution provides for common reliance, as contemplated herein, we would consider the box to have a severable security component. ... We would therefore find such boxes compliant with Section 76.1204(a)(1) of our rules.<sup>56</sup>

The Commission recognized that the “development of set-top boxes and other devices utilizing downloadable security is likely to facilitate the development of a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition.”<sup>57</sup> It emphasized that DCAS offers “a less expensive and more flexible system for

<sup>54</sup> Press Release, “Samsung Electronics Signs Up for Downloadable Security Technology,” (Nov. 30, 2005), [http://www.cablelabs.com/news/pr/2005/05\\_pr\\_dcas\\_samsung\\_113005.html](http://www.cablelabs.com/news/pr/2005/05_pr_dcas_samsung_113005.html).

<sup>55</sup> As demonstrated in the record, by using a secure microchip, DCAS can: (1) eliminate the need for a separate CableCARD matched to every network, (2) fit security into many more devices, (3) eliminate a manufacturer’s card slot, (4) reduce heat dissipation requirements, (5) increase energy efficiency, (6) simplify installation, (7) open up a world of competing vendors, (8) allow for more advanced DRMs, and (9) enable new service offerings to consumers. See CS Docket No. 97-80, Report of the National Cable & Telecommunications Association on Downloadable Security (Nov. 30, 2005).

<sup>56</sup> *Second Report and Order*, 20 FCC Rcd. at 6812, ¶ 35.

<sup>57</sup> *Id.* at 6810, ¶ 31.

both protecting system security and creating a consumer product interface;”<sup>58</sup> “add[s] significantly to the options that equipment manufacturers now have in using the CableCARD;”<sup>59</sup> and eliminates the “potentially costly complete separation of the physical security element.”<sup>60</sup> Plainly, downloadable security is “preferable to the existing separable security configuration.”<sup>61</sup>

The rapid evolution of DCAS from an aspiration to a working technology continues:

- DCAS was on full display at the 2006 Consumer Electronics Show operating on retail equipment. LG Electronics showcased a continuous demonstration of downloadable security operating on LG retail equipment, and Samsung demonstrated downloadable security operating on its retail equipment.
- The specifications for TVs and set-tops using DCAS – developed in consultation with key CE vendors – have been published by CableLabs under the standard OpenCable process, in which over 500 companies in the CE, IT, and other related industries participate. Seven companies have signed DCAS license agreements and more than 20 companies have signed agreements relating to the development of DCAS.
- Suites of specifications are in similar development for the DCAS headend and keying, the secure microprocessor and its driver, firmware, network protocol messaging, authentication, a secure database, and conditional access. The “Phase 1” DCAS chips have been developed for testing and for the development of network components. DCAS project specialists have developed the secure boot loader layer for the DCAS chip, test applications and tools for conditional access integration. Development of the “Phase 2” DCAS ASIC chip is underway.
- The cable industry hired noted computer scientist Tom Lookabaugh as CEO of a professional staff at PolyCipher, an organization created solely to manage the rapid pace of DCAS development.
- The cable industry has already spent approximately \$30 million of a \$100 million initial three-year commitment to its DCAS development project.
- As promised, construction of the keying service facility where secure microprocessors are programmed with unique keys commenced in the first quarter of 2006 and went online in the third quarter of 2006.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 6808, ¶ 27.

<sup>60</sup> *Id.* at 6810, ¶ 31.

<sup>61</sup> *Id.* at 6810, ¶ 32.

In addition to ignoring the extensive record before the Commission regarding DCAS, CEA objects to selected provisions of the DCAS license.<sup>62</sup> It suggests that the license be amended in ways that would be harmful to the development and delivery of cable services<sup>63</sup> – a suggestion which is on its face contrary to consumer interests, to vibrant, facilities-based competition, and to the CE industry’s written commitment in the unidirectional “plug and play” agreement. More importantly, CEA’s objections are out of step with market reality: the DCAS Host License has been agreed to and signed by more than a dozen independent consumer electronics companies, including CEA members Samsung, LG, and Panasonic. These manufacturers have praised DCAS as “a compelling security solution that will help enable nationwide interoperability of advanced two-way cable services” that “benefits CE manufacturers by lowering material costs and reducing entry barriers in the digital cable receiver equipment market.”<sup>64</sup> DCAS has also been endorsed by cable’s content providers who demand that devices that can access cable services are secure – or else they will not provide high-value content to cable operators.<sup>65</sup>

CEA also complains that “DCAS cannot be a substitute for the CableCARD” because the DCAS specifications include secrets protected by non-disclosure agreements.<sup>66</sup> It should be obvious that a security system must keep certain information secret that might otherwise be used

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<sup>62</sup> For a further discussion of CEA’s recent proposals, *see* CS Docket 97-80, Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch, FCC (Dec. 7, 2006).

<sup>63</sup> *See* CEA Comments at 5-6 (objecting to DCAS license term that licensee warrants not to harm cable service); *see also* CS Docket 97-80, Letter from various CE companies to Marlene H. Dortch, FCC (Nov. 7, 2006) at 5 and Attachment B, p. 2, Section 3.5 (asking FCC to enact a regulatory prohibition on cable operators from seeking to assure any level of quality of service for the delivery of its cable services via digital outputs).

<sup>64</sup> *See* CS Docket 97-80, Reply Comments of the National Cable & Telecommunications Association (Feb. 6, 2006) at 4 (citing Press Releases issued by LG Electronics).

<sup>65</sup> *See* CS Docket 97-80, Comments of the Motion Picture Association of America (Jan. 20, 2006) at 1 (“Downloadable security provides a superior means for cable MSOs to ensure that they can have the flexibility necessary to update the protections they employ to preserve the valuable programming services they provide to consumers.”).

<sup>66</sup> CEA Comments at 6.

to try to break its security. Every successful commercially-deployed pay-TV security system uses confidentiality as a defense against hacking. Almost every consumer electronics product is developed using non-disclosure agreements. For example, CE companies used non-disclosure agreements to develop AACS security for HD-DVD devices, which will display the same high-value content that cable will be protecting with DCAS. Compromising this environment would violate the specific direction that Congress provided to the FCC to not “jeopardize security of multichannel video programming.”<sup>67</sup>

In addition, many other stakeholders participating in DCAS – such as secure microprocessor manufacturers, transport processor manufacturers, and conditional access developers – do so with the assurance that *their* secrets will be protected. Many parties have already signed DCAS licenses and others have signed non-disclosure agreements with PolyCipher for development work. Furthermore, contrary to CEA’s suggestion, it is obviously not in cable’s interest to propose unreasonable terms: if CE manufacturers and other parties do not sign the DCAS licenses and agreements, then DCAS would never develop and be deployed and the cable industry would be required to use more expensive, less consumer-friendly conditional access alternatives.

NCTA proposed a waiver until DCAS is deployed or December 31, 2009, whichever is earlier, in order to provide the Commission with an enforceable assurance that the cable industry would have an incentive to deploy DCAS. If cable operators have not deployed DCAS by December 31, 2009 – and they fully expect they will – the waiver would end. Therefore, CEA is obviously wrong in suggesting that the prospect of DCAS cannot form a basis for a limited waiver of the integration ban. The Commission granted an extension in 2005 when DCAS was

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<sup>67</sup> 47 U.S.C. § 549(b).

simply an aspiration. Today, it is a demonstrated technology and well-funded project well on its way to actual commercial deployment.

**V. THE REQUESTED WAIVER IS CONSISTENT WITH, NOT A DEPARTURE FROM, EXISTING COMMISSION POLICY**

CEA claims that NCTA's waiver request merely seeks to delay support for retail devices.<sup>68</sup> CEA's revisionist history is wrong. Cable has complied with all of the FCC's navigation device requirements and, to the extent the integration ban has been previously deferred, the Commission did so unanimously for sound public policy reasons.

The Commission adopted two distinct navigation device rules in 1998. The first required that MVPDs develop separable security by July 1, 2000 and make it available to their customers.<sup>69</sup> The cable industry invented, supported, and deployed CableCARDs on schedule. Those CableCARDs enable consumer electronics manufacturers to offer real alternatives to operator leased set-top boxes. Cable has made them work in integrated digital cable-ready TVs, DVRs, and personal computers – a much wider array of devices than originally contemplated by Congress or the Commission. There are over 500 models of digital cable-ready devices from 26 manufacturers available at retail today, and many more (including two-way devices) are on the way.<sup>70</sup> Cable operators have deployed over 200,000 CableCARDs for use in these digital cable-ready devices.

The second rule adopted in 1998 imposed the integration ban – but that was not scheduled to go into effect until January 2005.<sup>71</sup> When the rule was affirmed upon Commission

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<sup>68</sup> CEA Comments at 2.

<sup>69</sup> 47 C.F.R. § 76.1204(a)(1) (first sentence).

<sup>70</sup> CS Docket 97-80, Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch (Sept. 25, 2006) at 1-2 (“as of September 19, 2006, 26 consumer electronics (‘CE’) manufacturers have had over 524 product models (such as Digital Cable Ready DTV sets) certified or verified for use with CableCARDs.”).

<sup>71</sup> 47 C.F.R. § 1204(a)(1) (1998).

reconsideration in 1999, the Commission promised to reexamine the ban in 2000 to determine whether the integration ban “will no longer be necessary.”<sup>72</sup> The Commission has twice deferred the original effective date of the rule: once in 2003 as it was implementing the cable and consumer electronics industry’s landmark agreement to develop one-way plug and play navigation devices that use CableCARDS;<sup>73</sup> and again in 2005, “to afford cable operators an opportunity to implement a lower-cost solution [downloadable security] to comply with the rule.”<sup>74</sup> In the latter decision, the Commission invited further requests for deferral based on the feasibility and expected availability of less expensive, more efficient and consumer-friendly downloadable security technology.<sup>75</sup>

In late 2005, the cable industry reported to the Commission on the feasibility of DCAS.<sup>76</sup> Because the industry report determined that downloadable security cannot be implemented by July 1, 2007, NCTA and Verizon have filed requests to defer the effective date of the integration ban, just as the FCC suggested. Thus, TiVo is clearly wrong in claiming that NCTA’s request “does little more than ask for reconsideration of the integration ban rule.”<sup>77</sup> In fact, the NCTA waiver request asks the Commission to consider what it said it would consider, not to reconsider issues the Commission had declared to be resolved.

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<sup>72</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 7924, ¶ 5 (April 25, 2003).

<sup>73</sup> *Id.*

<sup>74</sup> *Second Report and Order*, 20 FCC Rcd. at 6810, ¶ 31.

<sup>75</sup> *Id.* at 6812-6813, ¶ 36 (“If downloadable security proves feasible, but cannot be implemented by July 1, 2007, we will consider a further extension of the deadline.”).

<sup>76</sup> CS Docket No. 97-80, Report of the National Cable & Telecommunications Association on Downloadable Security (Nov. 30, 2005).

<sup>77</sup> TiVo Comments at 1.

**VI. NCTA'S WAIVER REQUEST WOULD PRESERVE AND PROMOTE CONSUMER CHOICE AND A MARKETPLACE THAT RESPONDS TO CONSUMER DEMAND**

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CEA suggests that implementation of the integration ban is urgently needed, whatever its costs to consumers, to prevent cable operators from permanently undermining the development of a competitive market by locking up consumers with new integrated devices.<sup>78</sup> CEA states that:

With the passage of each year in which common reliance is not enforced, adequate support for competitive devices becomes less and less likely, because any CableCARD-reliant devices-competitive or MSO-will be that much a smaller percentage of the installed base. [Since 1998] the installed base of integrated-security devices has grown from a pool to a sea to an ocean.<sup>79</sup>

This claim is baseless. Cable operators lease their set-top boxes without any term commitments. Consumers are free to return a box at any time, for any reason. No matter how many integrated devices operators distribute, they are not locking up any market from competition, present or future. Any time that digital cable customers decide that they want to buy a new DTV or TiVo with a CableCARD-slot, they can turn in their existing leased equipment the same day. In fact, this flexibility is one of the important reasons why many consumers have to date preferred inexpensive leased cable devices to the very expensive CableCARD devices sold at retail by CE (ranging from \$1000-7000).<sup>80</sup> The November 2006 *Consumer Reports* itself recommends that consumers lease cable (and satellite) DVRs rather than buy retail DVRs for exactly this reason. As it wrote in ““Digital Recorders: Lease a Model in this Time of Transition,” “CR’s Take: For

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<sup>78</sup> CEA Comments at 3.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> See Charter Reply Comments at Exhibit A (showing that the only CableCARD-ready devices from Best Buy and Circuit City in September 2006 were DTVs priced from \$1700-7000 and a TiVo Series 3 priced at \$800 plus more than \$150/year in TiVo subscription fees).

high-definition recording, a DVR from a cable or satellite provider is the best way to go – it’s convenient and you need not worry about investing in obsolescent equipment.”<sup>81</sup>

The fact that many consumers prefer leased integrated devices in no way signals that the Commission has failed its obligations under Section 629. Rather, ten years after the adoption of Section 629, consumers today *do* have many new commercially-available alternatives to set-top boxes leased by their cable operator.

*First*, as noted above, consumers can purchase certified CableCARD-ready TVs, TiVos, and other devices made by 26 manufacturers.<sup>82</sup> The record evidence shows that CableCARDS are working even without the integration ban. CableCARD adoption now numbers over 200,000. While CEA and TiVo suggest that cable operators are to blame that the number is not higher, the reality is that most consumers who buy CableCARD-ready HDTVs for thousands of dollars do not want to give up popular two-way services such as video-on-demand and access to the cable operator’s on-screen guide that one-way devices do not support. CE’s decision to focus on expensive one-way products is a problem of its own making. In any event, two-way retail devices will soon be brought to market under the framework submitted by the cable industry to the Commission in November 2005. Individual CE companies, such as Samsung,<sup>83</sup> Panasonic,<sup>84</sup>

<sup>81</sup> Digital Recorders: Lease a Model in this Time of Transition,” CONSUMER REPORTS (Nov. 2006) at 35.

<sup>82</sup> CS Docket 97-80, Letter from Neal M. Goldberg, General Counsel, NCTA, to Marlene H. Dortch (Sept. 25, 2006) at 1-2 (“as of September 19, 2006, 26 consumer electronics (‘CE’) manufacturers have had over 524 product models (such as Digital Cable Ready DTV sets) certified or verified for use with CableCARDS.”).

<sup>83</sup> Samsung is now the world leader in HDTVs. *See* “Who’s the World’s HDTV Leader?” TVPredictions.com, November 27, 2006 (“Sony . . . will now have to cede that title to a Korean company. . . . Samsung is selling more TVs – and generating more revenue – than any other set manufacturer in the world.”).

<sup>84</sup> “Panasonic was the best-selling plasma TV brand in the United States this year.” *See* “Panasonic Plasma HDTV Goes from Wish List to Reality for Many This Holiday Season,” <http://money.cnn.com/news/newsfeeds/articles/prnewswire/NYTH18116112006-1.htm>.

and LG,<sup>85</sup> are working cooperatively with the cable industry and are building two-way digital cable-ready devices, regardless of the integration ban. Imposing the integration ban now would do nothing but delay additional two-way developments, by forcing the cable industry to divert its resources to making its own boxes CableCARD-compatible.

The record is replete with how much work the cable and the consumer electronics industries have done to ensure that CableCARDS work. On cable's side, the work includes consumer education, internal training, free lab time to CE manufacturers, extensive troubleshooting, and much more that has been previously reported in this docket. CE vaguely claims that support is lacking, and from time to time offers largely unsupported anecdotes that have been previously addressed on the record.<sup>86</sup> But, in the six years since CableCARDS became available, the Commission has not made any determination even of a single violation by a cable operator. Furthermore, quite apart from Commission rules requiring cable operators to support CableCARDS, operators' economic incentives ensure that consumers who have purchased digital cable-ready devices receive all of the cable services that those devices are capable of receiving. Those customers are cable customers too, and if their retail navigation devices cannot access

<sup>85</sup> "LG is the world's largest producer of flat-panel displays . . ." See "Interview: LG Electronics," <http://www.physorg.com/printnews.php?newsid=66310119>.

<sup>86</sup> TiVo states that approximately 100 of its customers have complained regarding cable operator support for CableCARDS. TiVo Comments at 5, fn. 7. Cable operators have worked closely with TiVo to address these isolated incidents, and are in possession of emails from TiVo thanking them for their prompt assistance. While there are reports of installation issues on the TiVo Community website referenced in TiVo's comments, there are many more posts praising cable operator installation and CableCARDS as "flawless," "without a hitch," and "smooth." LZG <http://www.tivocommunity.com/tivo-vb/showthread.php?p=4469576&&#post4469576>. Moreover, as one post noted, "The problem with forums is that people only come online to discuss things when they have problems or questions. Its just a natural effect of going to ANY forum about ANY product and most of the posts seem negative. That doesn't mean that's the reality. I got my S3 when it launched and the Comcast setup went smoothly." *Id.* The New York Times review of the Series 3 TiVo stated that "CableCard is a terrific technology." David Pogue, "Costly, Sure, but It's Nirvana for TiVo Fans," N.Y. TIMES (Sept. 21, 2006), available at [http://www.nytimes.com/2006/09/21/technology/21pogue.html?pagewanted=1&ei=5070&en=6143adadec8165\\_d&ex=1165899600](http://www.nytimes.com/2006/09/21/technology/21pogue.html?pagewanted=1&ei=5070&en=6143adadec8165_d&ex=1165899600). In addition, the cable industry has now enabled multi-stream capabilities for TiVo. See CS Docket 97-80, Letter from Judson D. Cary, Deputy General Counsel CableLabs, Matthew Zinn, Sr. VP and General Counsel, TiVo, et al., to Marlene H. Dortch, FCC (Nov. 13, 2006).

cable's video services because of a CableCARD fault, cable may well lose that customer to a competitor.

*Second*, consumers have the option of obtaining video services from other distribution outlets. For example, most consumers can subscribe to DirecTV or EchoStar, which have grown from lesser-known alternatives in 1996 to the second and fourth largest MVPDs in the nation. An ever-increasing number of consumers also have the option of switching to Verizon, AT&T, or an overbuilder such as RCN. Consumers can also increasingly access content over the Internet, on their mobile phones, by PC, on their iPods, and on other portable devices. Choice abounds, and will only increase. No one in America today is, as CEA asserts, "forced" to lease a set-top box from their cable operator.<sup>87</sup> CEA knows better - its members supply equipment to cable's DBS competitors and those DBS companies are dues-paying CEA members. CEA's assertion is also highly ironic since it is CEA that is trying to take away a choice - the choice of a reasonably-priced, no-commitment set-top box.

Ironically, CEA asserts that grant of NCTA's waiver would "chain[] their customers to technology of the past."<sup>88</sup> Far from "chaining their customers to technology of the past," if cable operators are spared the wasted effort and cost of reengineering their set-top boxes and providing CableCARDS for all new boxes, they can focus their time and money on new and innovative services and features, downloadable security, the digital transition, and supporting retail CableCARD devices. As one consumer group put it, "[CEA's] analogy that cable companies are 'chaining' customers to 'technology of the past' contradicts the clear fact that all parties in this debate are working collectively to develop new 'downloadable' security that would make

<sup>87</sup> CS Docket 97-80, Letter from Gary Shapiro, President and CEO, Consumer Electronics Association, to Lillian Rodriguez-Lopez, President, Hispanic Federation (Oct. 16, 2006) at 1 ("We simply do not understand why an important group like yours would want to force consumers to rent boxes from monopoly cable companies.").

<sup>88</sup> *Id.* at 2.

CableCARDS a thing of the past. The ‘integration ban’ ... would seem to chain consumers to the more dated set-top box technology.”<sup>89</sup>

The Commission ought not to lose sight of the power of the marketplace to deliver the consumer what the consumer really wants. Consumers have demanded high-definition television, DVRs, and better phone service – and the cable industry is delivering competitive choices and consumer savings. Consumers are not demanding leased boxes at more cost for no added functionality. Indeed, when the government through NTIA is preparing to subsidize over-the-air households to the tune of \$40 per digital-to-analog converter to ease the digital transition for consumers, it would be absurd for the Commission to simultaneously force consumers to pay \$72 to \$93 more for leased digital boxes that could help facilitate the digital transition *without* any government subsidy.

## **VII. VERIZON’S BID FOR WAIVER APPLIES EQUALLY TO OTHER CABLE OPERATORS**

The comments filed by Verizon, nominally in response to NCTA’s waiver request, in fact have nothing to do with the merits of NCTA’s request, but relate only to Verizon’s own waiver request. NCTA filed comments explaining its conditional support for Verizon’s waiver request on September 18, 2006, and refers the Commission to those comments which we incorporate by reference herein.<sup>90</sup> NCTA has demonstrated that grant of its waiver request would serve consumers and the objectives of the Act. Grant of NCTA’s waiver would moot Verizon’s arguments here, which are nothing more than an attempt to gain an artificial regulatory advantage over other cable operators.

<sup>89</sup> CS Docket 97-80, Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation to Gary Shapiro, President and CEO, Consumer Electronics Association (Oct. 26, 2006) at 1.

<sup>90</sup> CS Docket 97-80, CSR-7042, Comments of the National Cable and Telecommunications Association (Sept. 18, 2006).

However, to set the record straight, NCTA will respond here to two Verizon misstatements. First, Verizon claims that Section 629 was intended to “provide the needed flexibility *for new entrants*,” and that the Commission may therefore grant its petition but deny one to NCTA because it is a “new entrant.” This interpretation is completely unsupported by fact and history. There is no “new entrant” exception in Section 629 nor did the Commission, as Verizon suggests, grant DBS providers a “waiver” of its navigation device rules because DBS was a new entrant.<sup>91</sup> Congress specifically applied Section 629 to all MVPDs, not just to the cable industry.<sup>92</sup> There is absolutely no distinction in Section 629 between incumbents and new entrants, nor is there anything in the legislative history to suggest such a distinction.

Second, Verizon is also incorrect in suggesting that the “Commission can legally limit any waiver it grants under the set-top box rules to a ‘category’ of provider and need not apply that waiver to all providers,” and that NCTA’s position to the contrary conflicts with its support for the low-cost waivers sought by some cable operators.<sup>93</sup> Verizon’s twisted reading of Section 629(c) focuses exclusively on the term “category” in part of one sentence. In doing so, it ignores the clear Congressional instruction that any waiver “shall be effective for all service providers and products in that category *and for all providers of services and products.*”<sup>94</sup> Contrary to Verizon’s own correct notation that a statute must be read to give effect to all words in the statute,<sup>95</sup> Verizon’s reading would render this italicized language meaningless.

Moreover, Verizon’s position is based upon a gross misstatement of NCTA’s prior filings. Verizon states:

<sup>91</sup> See NCTA Waiver Request at 25.

<sup>92</sup> *Id.* at 24, citing *First Report and Order*, 13 FCC Rcd. at 14783, ¶ 22.

<sup>93</sup> Verizon Comments at 9.

<sup>94</sup> 47 U.S.C. § 549(c) (emphasis added).

<sup>95</sup> Verizon Comments at 11.

In NCTA's filing regarding Charter Communications' request for waiver of the integration ban, for example, it argues that the Commission can *limit* that waiver "to the extent [another MVPD] deploys devices that are the same or similar to [the limited capability devices] for which waiver is granted."<sup>96</sup>

But the NCTA letter Verizon is supposedly quoting from does not say anything about *limiting* the applicability of a waiver. NCTA was explaining that a grant of waiver to Charter must be *extended* to all MVPD offerings of the "same or similar" devices.<sup>97</sup> NCTA's position is consistent across all proceedings: Section 629 is explicit that if the Commission grants a particular MVPD's waiver request for a particular type of device, the waiver must apply to all providers who supply the same or similar devices, without awaiting a petition from every MVPD; and if the Commission grants a waiver to one provider for all of its set-top boxes, that same relief must be extended to all providers. Therefore, if the Commission grants Verizon's waiver for any devices it may offer, it must grant NCTA's similar request. In addition, as NCTA has demonstrated, grant of a waiver to Verizon but not to cable operators would violate the Commission's policy of competitive and technological neutrality, a policy that Verizon has so strongly advocated in other proceedings.<sup>98</sup>

<sup>96</sup> *Id.* at 12-13 (emphasis added).

<sup>97</sup> See CS Docket 97-80, CSR-7049, Letter from Neal M. Goldberg, General Counsel, NCTA to Marlene H. Dortch, FCC, at 3 (Sept. 18, 2006). See also CS Docket 97-80, CSR-7012, Letter from Neal M. Goldberg, General Counsel, NCTA to Marlene H. Dortch, FCC, at 4 (June 15, 2006) ("the Commission should extend any waiver granted in this proceeding to any other MVPD to the extent it deploys the devices for which waiver is granted. The obvious purpose of the statutory requirement was to reduce the burden on the Commission and on similarly situated parties who would otherwise have to request waivers for the same or similar devices. . . . NCTA respectfully requests that the Commission expeditiously grant the waiver requested by Comcast and extend any such waiver to other devices and MVPDs as the statute directs.").

<sup>98</sup> See CS Docket 97-80, CSR-7042, Comments of the National Cable and Telecommunications Association (Sept. 18, 2006) at 16-17 (providing quotes of Verizon statements in other proceedings urging technological and competitive neutrality in regulation).

**VIII. NO PARTY SUBSTANTIVELY RESPONDED TO NCTA'S SHOWING THAT FAILURE TO GRANT THE NCTA WAIVER WILL VIOLATE THE COMMISSION'S POLICY OF TECHNOLOGICAL AND COMPETITIVE NEUTRALITY**

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As demonstrated in NCTA's waiver request and the waiver requests submitted by several cable operators, regardless of whether DBS ever should have been deemed to qualify for the exemption set forth in Section 76.1204(a)(2) of the Commission's rules, cable operators now provide much greater support for interoperable retail navigation devices than do DirecTV or EchoStar,<sup>99</sup> and are thus more entitled to the exemption than DBS. In light of these facts, denying a waiver to cable operators would skew the competitive MVPD marketplace, violate the Commission's policy of technological and competitive neutrality,<sup>100</sup> and would be arbitrary and capricious. Neither CEA, nor TiVo, nor any other party offered *any* response to these showings in their comments on the NCTA waiver request.<sup>101</sup>

<sup>99</sup> NCTA Waiver at 25-27. Similar showings were made by BendBroadband and Charter in their own waiver requests. BendBroadband presented detailed evidence that DirecTV in particular has moved exclusively to *proprietary, leased* boxes for new customers as of March 1, 2006, and provided a copy of DirecTV's new leasing agreement for the record. *See* BendBroadband Request for Waiver at 13-18. Charter provided detailed information regarding the current availability of numerous cable-ready navigation device models from both Circuit City and Best Buy. *See* Charter Reply Comments 20-22; Charter Request for Waiver at 14-17.

<sup>100</sup> NCTA Waiver Request at 30-31 (citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853, 14878, ¶ 45 (2005)).

<sup>101</sup> CEA erroneously repeated its response to Verizon's arguments concerning DBS rather than replying to the substance of NCTA's very different arguments. CEA claimed that NCTA, like Verizon, argued that DBS had received a waiver and that such waiver is precedent for grant of a waiver to NCTA. CEA Comments at 10. On the contrary, NCTA's comments on the Verizon waiver make clear that NCTA agrees with CEA that the Commission has never granted a waiver from the integration ban to DBS. Indeed, an entire section of NCTA's comments on Verizon's waiver request was entitled, "The DBS exemption is inapplicable as precedent." *See* CS Docket 97-80, CSR-7042, Comments of NCTA (Sept. 18, 2006) at 9-11, 12-14.

## CONCLUSION

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/ **Neal Goldberg**

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December 11, 2006

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

In the Matter of )  
 )  
National Cable & Telecommunications ) CSR-7056-Z  
Association's Request for Waiver of )  
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 Reply Comments and I am familiar with the contents thereof.
3. I declare under penalty of perjury that the facts contained herein and within the foregoing Reply Comments 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: December 11, 2006