

**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
)	
)	CS Docket No. 97-80

APPLICATION FOR REVIEW

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SUMMARY

The Bureau's arbitrary and discriminatory denial of NCTA's request for temporary waiver of the integration ban conflicts starkly with the requirements of Section 629 and Commission policy. The Commission and Congress expect a "regulatory regime that is technology and competitively neutral" and that accommodates innovation. By contrast, the Bureau granted waivers to over 140 MVPDs, but arbitrarily and irrationally denied NCTA relief for cable operators use of the very devices for which others were granted waivers. The Bureau claims that "common reliance" on the same security technology is critical to achieve the "commercial availability of navigation devices." But it holds only NCTA to that standard, exempting over 30% of the MVPD market – including Verizon, Qwest, and other telephone company video providers who have done nothing to comply with the law despite having had the time and resources to come into compliance with the rules since they were building video systems from scratch while existing operators had to redesign boxes for their existing systems. The Bureau claims that going "all digital" by February, 2009 will promote the digital transition and therefore justifies a waiver; but going "all-digital" has nothing to do with the goals of Section 629 (or, for that matter, the broadcast digital transition) and this Bureau-invented rationale is in conflict with law and policy established by Congress and the Commission.

The Bureau also violated every applicable procedure. It failed to act within the 90-day Congressional deadline. It ignored the standards which the Commission established in 2005 for handling this waiver request, which NCTA more than met. It ignored the extraordinary progress of DCAS, the wide deployment of CableCARDs (including the development and deployment of multistream CableCARDs), the availability of one-way digital "cable-ready" devices (DTVs, TiVo DVRs, PCs) and the development of two-way devices, all of which can be matched by no other MVPD (including DBS), and the extensive record of overwhelming support and

justification for temporary waiver. It invented a “burden,” pretended that NCTA was asking for a waiver beyond 2009, and concocted “facts” belied by its own records and orders, such as the myth that BBT’s downloadable security technology is “available today” when the record shows it is not. It *faulted* cable for prior waivers granted by the full Commission and for the purported lack of progress in negotiations with CEA when CEA had no incentive to report the progress that actually had been made.

Congress explicitly requires that the Commission grant waivers under Section 629(c) where “necessary *to assist* the development or introduction of [any] new or improved” service offered over an MVPD’s network. The Bureau accepted as justification for waiver every purported innovation by cable’s competitors, but rejected cable’s offerings of more digital cable, more HD channels, more video-on-demand, more digital simulcast, higher Internet speeds, better competitive phone service, new program networks and truly secure downloadable security that would be delayed and handicapped without waiver. More fundamentally, the Bureau read the word “assist” and the policy of innovation and technological neutrality out of the statute and Commission policy. The Bureau’s delay and mishandling of these waivers has already cost significant development time for a number of innovative cable projects, including downloadable security. It is doing exactly what Congress forbids: “freezing or chilling the development of new technologies and services” – but insidiously, only by cable. Under every standard for Commission review, the Bureau’s order must be reversed by the full Commission.

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APPLICATION FOR REVIEW

The National Cable & Telecommunications Association (“NCTA”) hereby seeks review of the Media Bureau’s decision denying its request for a temporary waiver of the integration ban¹ until the deployment of downloadable security or December 31, 2009, whichever is earlier.² The *NCTA Order* arbitrarily treats similarly-situated multichannel video programming distributors (MVPDs) differently, is in conflict with established law and Commission policy, is based on prejudicial procedural error and erroneous findings as to important and material questions of fact, and is based upon a misapplication by the Bureau of relevant waiver standards. Therefore, NCTA respectfully requests that the Commission reverse that Bureau decision and grant its waiver request.³

While NCTA’s member companies are complying with the integration ban (except for certain individual members who have received waivers or deferral of the ban), reversal of the ban is still warranted because the costs of the ban will be on-going – amounting to a \$600 million *annual* tax on consumers. Particularly in light of disparate treatment given by the Bureau to waiver requests of others such as telephone companies who provide video services in

¹ 47 C.F.R. § 76.1204(a)(1).

² *National Cable & Telecommunications Association*, Memorandum Opinion and Order, CSR-7056-Z, CS Docket No. 97-80, DA 07-2920 (rel. June 29, 2007) (“*NCTA Order*”).

³ See 47 C.F.R. § 1.115(b)(2)(i), (iv), (v).

competition with NCTA's members, action by the full Commission is essential. The Bureau's decision is also inconsistent with Commission policy that deferral of the integration ban would be entertained based on the feasibility and prospect of downloadable security if an applicant addressed a number of policy questions – which NCTA's waiver did.⁴ The Bureau ignored this specific Commission directive and NCTA's responses to that directive in denying NCTA's waiver request. For that reason alone, reversal is warranted.

I. THE BUREAU ORDER MUST BE REVERSED BECAUSE OF ITS ARBITRARY AND CAPRICIOUS DIFFERENTIAL TREATMENT OF SIMILARLY-SITUATED MVPDS

Section 629 of the Communications Act applies to all MVPDs – including Verizon, AT&T,⁵ DirecTV and EchoStar. As the Commission forcefully stated in 1998:

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 629.⁶

⁴ See *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 R&O*” or “*2005 Integration Ban Order*”).

⁵ AT&T claims that it is not a “cable operator” providing “cable service,” a conclusion just rejected by a federal court holding AT&T’s “U-Verse” service to be a “cable service” provided over a “cable system,” making AT&T a “cable operator.” *Office of Consumer Counsel and New England Cable and Telecommunications Association v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc., and Department of Public Utility Control of the State of Connecticut*, Case No. 3:06cv1106 (JBA), Slip Op. at 2-3 (D. Conn., July 26, 2007). In any event, AT&T concedes that it is an MVPD and that, “as a MVPD, it is subject to those obligations in Title VI applicable generally to other MVPDs,” which includes rules adopted pursuant to Section 629. Letter from James C. Smith, Senior Vice President, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36, at 14 (filed Sept. 14, 2005)(emphasis added). Nevertheless, AT&T did not seek a waiver of the ban and now claims to be exempt from it. See Ted Hearn, *AT&T: No Need For Set-Top Waiver*, MULTICHANNEL NEWS, July 5, 2007, <http://www.multichannel.com/article/CA6457755.html>. But other telephone companies (such as those in the “IPTV Providers Group”) who use the identical technology as AT&T did file for waiver and the Commission held them subject to the ban, giving them only limited additional relief for their advanced set-top boxes based on their IP technology. See *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CS Docket No. 97-80, DA 07-2921 (rel. June 29, 2007) at ¶¶ 53, 61 (“*Consolidated Order*”).

⁶ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, First Report and Order, 13 FCC Rcd. 14775, 14783, ¶ 22, (1998).

Moreover, Congress specifically prohibited the Commission from using waivers to favor some MVPDs over others. Section 629(c) requires that any waiver of the rules adopted pursuant to Section 629 “shall be effective for all service providers and products in that category *and* for all providers of services and products.”⁷ By denying NCTA’s waiver request, granting requests for similarly-situated MVPDs, including numerous telephone company competitors to NCTA’s members, and maintaining that DBS is still exempt from the ban,⁸ the Bureau acted in an arbitrary and capricious manner and in conflict with the statute and established Commission policy. The Bureau’s order must therefore be reversed.

As noted above, the Commission concluded that Section 629 applies to all MVPDs equally. Moreover, the Commission has pursued a well-established policy of regulatory parity for similarly-situated entities. 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,⁹ and it emphasized the importance of creating a “regulatory regime that is technology and competitively neutral.”¹⁰ 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 Commission to create

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

⁸ Even with respect to DBS, the Commission’s rules do not exempt DBS *per se* from the integration ban. Rightly or wrongly, the Commission determined that DBS providers (at least in 1998) were exempt because they met the platform-neutral exemption criteria set forth in the Commission’s navigation device rules. 47 C.F.R. § 76.1204(a)(2).

⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853, 14878, ¶ 45 (2005).

¹⁰ *Id.* at 14857, ¶ 4.

new artificial regulatory disparities, especially among entities all of which are plainly subject to the *same* statutory provision (in this case, Section 629).

With the orders issued on June 29, 2007 and July 24, 2007, the Bureau has now granted set-top box waivers to over 140 MVPDs. The Bureau has failed to explain not only why NCTA is being denied its waiver, but also how such a decision can be rationally justified while so many other similarly-situated waiver applicants are getting relief from the integration ban – often for the same devices for which NCTA sought waivers.

If only existing cable operators are forced to comply with the integration ban, they will suffer an enormous competitive disadvantage in the highly-competitive and price-sensitive multichannel 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 implementing an integration ban that provides no benefit either to cable operators or their customers. Worse, the continued exemption of DBS and the new waivers for the telephone companies will allow these competitors to devote their resources to developing new features and less-expensive equipment to try to attract more consumers away from traditional cable operators. While competition is good, competition skewed by arbitrary government policies is not.¹¹

In addition, the Bureau's rationale for granting waivers to Verizon and others – that they commit to go all-digital by February 17, 2009 or are already all digital – cannot be squared with the requirements of Section 629. If the Commission truly believes that “common reliance” on

¹¹ 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 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.”).

the same security technology (*i.e.*, the CableCARD) is critical to achieve the “commercial availability of navigation devices” that is the goal of Section 629 (even though that concept is mentioned no-where in the statute), that Commission “policy” is undermined by allowing DBS providers as well as telephone companies and any cable operator that commits to going “all-digital” by February, 2009, to be exempt from the integration ban. Exempting companies currently serving over 30% of the MVPD market from the integration ban puts the lie to the argument that “common reliance” on the same separate security technology is critical to ensuring the commercial availability of navigation devices. The Bureau simply has not explained why exempting “all-digital” MVPDs relates to or furthers *any* identified goal of Section 629, particularly the Commission’s claimed Section 629 interest in achieving “common reliance” by large numbers of MVPDs.

Moreover, requiring cable operators to go “all-digital” does not further the broadcast digital transition as the Bureau claims in justifying “all-digital” waivers.¹² As we have demonstrated elsewhere, Congress’s reasons for ordering the discontinuance of analog broadcasting do not apply to analog cable transmissions, and requiring cable operators to go “all-digital” would impede, rather than advance, the broadcast digital transition.¹³ As former Assistant Attorney General Charles Cooper concluded: “Ensuring that digital broadcast signals can be watched on analog sets (whether via analog carriage *or digital converter boxes*) would

¹² *Consolidated Order* at ¶ 58 (“[T]he ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits, particularly when considered in the context of the Commission’s goal of promoting the broadcast television digital transition.”) (emphasis added).

¹³ See Comments of the National Cable & Telecommunications Association, CS Docket No. 98-120, at 23 (filed July 16, 2007).

only retard, not advance,” the Commission’s goal of “transitioning all consumers ... to digital” since that would “reduce the incentive for consumers to purchase digital television technology.”¹⁴

Therefore, to the extent the Bureau denied the NCTA waiver request based on NCTA’s failure to commit its members to going “all-digital” by February, 2009, it constitutes establishment of a new policy on the digital transition that conflicts with law and policy established by Congress and the Commission.¹⁵

The arbitrariness of the Bureau’s actions is further evidenced by the grant of even more substantial relief to Verizon, Qwest, and other telephone company video providers. None of these petitioners, including Verizon, had bothered to take *any* steps over the course of the past several years to come into compliance with the integration ban.¹⁶ Yet, the Bureau made Verizon and these other providers the beneficiaries of *both* a permanent waiver for their low-end boxes (based on a commitment to go “all-digital” by February 2009) *and* a one-year waiver for their HD and DVR boxes.¹⁷ In contrast, NCTA’s members who have worked diligently to comply with the ban and are now deploying newly-engineered CableCARD-enabled boxes have been granted no relief, even for low-end boxes.

¹⁴ *Id.* at Appendix A (Charles Cooper, Brian Koukoutchos and Jonathan Massey, “The Commission’s Proposed Digital Carriage Requirement Would Violate the Constitution,” July 16, 2007) at 18 (emphasis added).

¹⁵ Comcast has presented this issue in greater detail to the Commission in its Application for Review and we incorporate those filings and arguments by reference. *See* Comcast Corporation, Application for Review, CSR-7012-Z, CS Docket No. 97-80, at 18-22 (filed January 30, 2007) (“Comcast Application for Review”).

¹⁶ *See* Todd Spangler, *CableCard Ready – or Not*, MULTICHANNEL NEWS (June 25, 2007) (“Big cable operators have assumed they won’t be receiving a pass from the FCC on the July 1 ban. Those companies and their vendors have scrambled over the last six months to get ready to meet the deadline. Verizon Communications does not appear to have done the same.”).

¹⁷ *See Consolidated Order* at ¶ 61.

The Bureau asserts that this differential treatment for Verizon and the other telcos is warranted because “set-top manufacturers have not developed any non-integrated HD or DVR boxes for use with [IP, ATM, or hybrid QAM/IP] systems.”¹⁸ But, as Comcast has observed:

At least with respect to Verizon, this claim is preposterous. Verizon is an enormous competitor, began building its video services from scratch during the period when the separate security requirement was in effect, knew full well what its obligations were under the Commission’s rules, and has proven itself perfectly capable of controlling the design and development of equipment used in its FiOS TV network – and yet apparently did nothing *over the past three years* to get boxes with separate security developed.¹⁹

For Verizon to represent that its manufacturers have not been able to make compliant boxes is absurd. Verizon’s largest supplier, Motorola, is the largest supplier of set-top boxes to the cable industry and managed to make compliant boxes for its cable operator customers. Rather, Verizon (and AT&T for that matter) had their manufacturers make the boxes they wanted them to make without the added expense for a CableCARD – FCC rules be damned.²⁰ Traditional cable operators had their existing boxes redesigned to satisfy the rule. Verizon, starting from scratch, took a calculated risk and made a business decision to ignore the rule.

Ironically, the same day it granted the Verizon waiver, the Bureau denied the waiver request of a “small, locally-run, family-owned” cable operator with 46,000 customers, which sought waiver for fewer than 3,255 integrated boxes that would remain in its inventory on July 1, 2007. The Bureau called the small operator’s plight the result of a “calculated risk” it took, and added that “regulated entities are responsible for the consequences that flow from their business decisions.... ‘Congress regarded the commercial availability of navigation devices from

¹⁸ *Id.*

¹⁹ Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene H. Dortch, FCC, CSR-7012-Z, CS Docket No. 97-80, at 4 (filed July 3, 2007)(emphasis added).

²⁰ The Commission’s navigation devices rules apply to the MVPD, not the device manufacturer. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596, 7623, ¶ 5657 (1999).

independent sources as a benefit in and of itself.’ Granting waiver of the integration ban based on a business decision ... will impede these benefits.”²¹ The Bureau failed to apply that same standard to Verizon and other telephone companies, giving them a pass based on their business decisions not to order compliant boxes, even though they had full knowledge of the requirement and ample time to comply. Given the arbitrary and capricious manner in which the Bureau treated NCTA’s members in contrast to its treatment of Verizon and other telephone companies – treatment inconsistent with the statute and Commission policy – the Bureau’s denial of NCTA’s waiver request must be reversed.

II. THE NCTA ORDER CONFLICTS WITH ESTABLISHED COMMISSION POLICY AND IS PREMISED UPON PREJUDICIAL PROCEDURAL ERROR

A. The Bureau Ignored or Misapplied the Criteria the Commission Established for Further Deferral of the Ban Based on the Prospect of Downloadable Security

1. The 2005 Integration Ban Order’s Criteria for Deferral of the Ban

The Bureau’s *NCTA Order* conflicts with established Commission policy set forth in the *2005 Integration Ban Order*. In that order, the Commission recognized that “consumers will face additional costs in the short term as a result of the prohibition on integrated navigation devices,” and expressed the Commission’s desire to “place as little of the cost burden resulting from the ban on the public.”²² The Commission specifically 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

²¹ *Massillon Cable TV, Inc.*, CSR-7229-Z, CS Docket No. 97-80, DA 07-2919, ¶14 (rel. June 29, 2009)(footnotes omitted).

²² *Second R&O*, 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 a further extension).

downloadable security. The Commission underscored that downloadable security can deliver significant benefits to consumers 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.”²³

Accordingly the Commission 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

Of critical importance here, the Commission concluded that “[a]s part of the Commission’s consideration of any further extensions, we will consider the extent to which there has been progress towards making navigation devices commercially available, as required by Section 629, and whether any further extension would promote Congress’ objectives.” Specifically, the Commission said it would consider: (1) “whether the cable industry is meeting its current obligations to deploy and support CableCARDS”; (2) “progress toward deployment of multistream CableCARDS and towards a bidirectional agreement”; and (3) “whether any

²³ *Second R&O*, 20 FCC Rcd. at 6794-95, ¶ 3 (emphasis added). Verizon reached this same conclusion in its 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, CSR-7042-Z, CS Docket No. 97-80, at 16 (filed July 10, 2006).

²⁴ *Second R&O*, 20 FCC Rcd at 6813, ¶ 36 (emphasis added).

downloadable security function developed as a result of such extension would provide for common reliance by cable-deployed and commercially available devices.”²⁵

2. NCTA’s Order and Progress on DCAS

In its waiver request, NCTA demonstrated that downloadable security is indeed feasible, but that it could not be implemented by July 2007. Furthermore, it showed that the cable industry is strongly committed to the earliest possible development and implementation of a secure downloadable security solution, the Downloadable Conditional Access System (“DCAS”). NCTA’s waiver request advised the Commission that the cable industry has already spent the first \$30 million of its initial three-year \$100 million commitment toward DCAS development (which does not even account for the additional investment by vendors).²⁶ To date, more than 90 agreements have been successfully negotiated in the private marketplace and are in place with companies working on DCAS development, including 19 full DCAS licenses.

Under the DCAS licensing structure, the specifications for TVs and set-top boxes using DCAS have been developed in consultation with key consumer electronics (“CE”) vendors. The technology has been demonstrated to Commission staff and DCAS-enabled products have been exhibited live at the Consumer Electronics Show and the NCTA Convention, with CE industry participation. In those demonstrations, DCAS has been proven to work for leased set-top boxes and retail digital cable ready devices alike.²⁷

²⁵ *Id.*

²⁶ For additional details on DCAS, *see* NCTA Waiver Reply Comments, CSR-7056-Z, CS Docket No. 97-80 (filed Dec. 11, 2006); Report of the National Cable & Telecommunications Association on Downloadable Security, CS Docket No. 97-80 (filed Nov. 30, 2005); and Reply Comments of NCTA, CS Docket No. 97-80, (filed Feb. 6, 2006) (“NCTA DCAS Reply”).

²⁷ NCTA DCAS Reply at 4-5.

Moreover, substantial progress is being made in readying DCAS for commercial deployment. Suites of complementary specifications have been developed for the DCAS headend and keying, the secure microprocessor and its driver, firmware, network protocol messaging, authentication, secure database, and conditional access. A suite of DCAS specifications for host devices has been published by CableLabs and is under review by over 350 manufacturers.²⁸

DCAS enjoys strong support from several of the world's leading consumer electronics companies.²⁹ The DCAS license has been signed by, among others, digital television and set-top manufacturers Samsung, LG, and Panasonic, set-top manufacturer ADB, and a variety of chip manufacturers.³⁰ DCAS has also been endorsed by cable's content providers, who have said that “[d]ownloadable 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.”³¹

²⁸ *Id.* at 17.

²⁹ LG, Samsung and Panasonic have enthusiastically endorsed DCAS. LG has said DCAS is a “compelling security solution that will help enable nationwide interoperability of advanced two-way cable services” and that “benefits CE manufacturers by lowering material costs and reducing entry barriers in the digital cable receiver equipment market.” Press Release, *LG Electronics, CableLabs Sign Downloadable Security Technology Agreement*, Jan. 4, 2006, http://us.lge.com/aboutus/pressdetail/detail/press_Corporate_269_1.jhtml; Press Release *LG Electronics, Comcast NagraVision Conduct First Public Demonstration of Downloadable CAS Technology*, Jan. 4, 2006, http://us.lge.com/aboutus/pressdetail/detail/press_TV%7CAudio%7CVideo_258_2.jhtml. Samsung has called DCAS “an excellent solution for interactive devices.” 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. And 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.” 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.

³⁰ 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.

³¹ See Comments of the Motion Picture Association of America, CS Docket No. 97-80, at 1 (filed Jan. 20, 2006).

Despite this significant progress, NCTA explained that much remains to be done before DCAS can be deployed to consumers nationwide. Therefore, NCTA made clear that DCAS could not be ready by the effective date of the integration ban and sought a waiver on those grounds until DCAS was deployed, or *until December 31, 2009, whichever is earlier*.

3. The NCTA Order: What the Bureau Said

In denying NCTA's waiver request, the Bureau essentially ignored the above decisional criteria that the Commission had set out in the *2005 Integration Ban Order* for deferral of the ban based on the feasibility and progress on downloadable security and dismissed NCTA's request primarily on the ground that it was "not sufficiently certain in terms of implementation timeline and [is] inconsistent with marketplace developments."³² At the outset, the Bureau committed a prejudicial procedural error warranting Commission review and reversal,³³ by concluding that "[g]iven the extensions of the integration ban deadline that already have been granted, we believe that additional requests for waivers of that deadline appropriately have a *heavy burden* to overcome"³⁴

The full Commission did *not* assign a "heavy" burden – or any burden – on an applicant seeking a waiver if DCAS could not be deployed by July 1, 2007. Rather, it told applicants the showing they needed to make in order to support a waiver request, and that is what NCTA

³² *NCTA Order* at ¶ 17.

³³ 47 C.F.R. § 1.115(b)(2)(v).

³⁴ *NCTA Order* at ¶ 18 (emphasis added). The Bureau cited *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) in support of its conclusion. But, in that case, the Court found that a waiver applicant bore a heavy burden in asking a *court* to overcome the deference owed to the Commission's denial of a waiver where the applicant had only presented arguments that the Commission had previously considered and *rejected* in adoption of the rule. *Id.* at 683 ("It is quite clear that KIKK has presented no new expedients to the Commission not envisaged by the rules calculated to satisfy the objectives underlying them. Instead, it has merely raised broad questions about the rules which the Commission had already carefully dealt with.") But that is not the standard that applied to the *Bureau* when considering a request for waiver based upon arguments that the Commission has previously considered *and endorsed*. Instead, the standard the Bureau should have followed had already been explicitly prescribed by the Commission for exactly the request NCTA presented.

submitted. The Bureau completely ignored that submission in denying the NCTA waiver request. In any event, the Commission has deferred the effective date of the ban only twice – both times for sound public policy reasons – as the agency questioned the need for the CableCARD requirement in response to new marketplace and technological developments. Therefore, the Bureau articulated a review standard never established by the Commission and proceeded to rule under it.

On the merits of the NCTA request, the Bureau was equally arbitrary. Pursuant to the Commission’s invitation in its *2005 Integration Ban Order*, NCTA sought a waiver until downloadable security was deployed or until December 31, 2009, *whichever is earlier*. By including an outside date for the waiver to terminate, NCTA was responding to the statutory requirement that waivers be “for a limited time” and sought to provide assurance that, even if deployment of DCAS was delayed, the waiver would expire by a date certain. For this reason, the Bureau’s conclusion that the waiver request was “not sufficiently certain in terms of implementation timeline” is simply wrong. While no one could say for certain when DCAS will be fully deployed, the request was “sufficiently certain in terms of implementation timeline” because it would expire no later than December 31, 2009.

In a similar vein, the Bureau observed that “[g]iven the history of delays that has undermined our efforts to encourage an industry driven approach to achievement of the goals of Section 629, this substantial postponement of the date by which cable operators might deploy downloadable security gives us great concern.”³⁵ But the Bureau ignored the fact that the full Commission made the determination that those previous “delays” advanced, rather than undermined, the pursuit of legitimate public policy goals, and did not explain why or how any

³⁵ *NCTA Order* at ¶ 21.

DCAS “delays” had “undermined” any “industry driven approach” to achieving the goals of Section 629.

The Bureau’s unsupported skepticism about the DCAS deployment schedule is also exemplified by its statement that “evidence on the record in the commercial availability of navigation devices proceeding suggests that the amount of time that NCTA has requested may be more than is necessary.”³⁶ The Bureau cited a January, 2007 Commission *Public Notice*³⁷ in which the Commission said that a downloadable security solution satisfies the integration ban and that technology from Beyond Broadband Technology (“BBT”) “*will be available in time to comply with our July 1, 2007 ban on integrated security devices.*”³⁸ In its January order denying the Comcast waiver request³⁹ and again in the order in this proceeding,⁴⁰ the Bureau said that the BBT solution “is available today” and if NCTA’s members “deploy a downloadable conditional access security solution that is *available today*, such as that developed by Beyond Broadband Technology, no waiver of the ban would be necessary.”⁴¹

Subsequently, the Bureau, BBT and operators relying on the BBT “solution” have all conceded that there have been delays in the anticipated deployment of the BBT technology – just as there have been delays in the roll-out of the much more sophisticated and secure DCAS solution – and the BBT “solution” is *not* “available today.” In an order released the same day as

³⁶ *Id.* at ¶ 22.

³⁷ *Id.* at n. 74 (emphasis added). The Bureau also cited a letter from the CEO of Widevine Technologies which claims Widevine has been delivering downloadable security “since 2001.” *Id.*

³⁸ FCC Public Notice, “*Commission Reiterates That Downloadable Security Technology Satisfies the Commission’s Rules on Set-Top Boxes and Notes Beyond Broadband Technology’s Development of Downloadable Security Solution,*” DA 07-51, January 10, 2007.

³⁹ *Comcast Corporation*, CSR-7012-Z; CS Docket No. 97-80, DA 07-49, at ¶ 34 (rel. January 10, 2007).

⁴⁰ *NCTA Order at ¶ 31.*

⁴¹ *Id.* (emphasis added).

the *NCTA Order*, the Bureau observed that the BBT solution, rather than being “available today,” will not be ready to be deployed until “the end of the year.”⁴² And even BBT and its customers are not that sanguine about its deployment schedule. BBT itself told the Bureau as early as April, 2007 that “[its] boxes will *not be available for delivery* any earlier than the fourth quarter of 2007 and that it “remains on track to *commence production of the boxes* ordered by JetBroadband by December 2007.”⁴³ And Jet Broadband (which hopes to use the BBT solution and sought deferral of the ban on those grounds) advised the Bureau on April 26, 2007 (more than two months before the Bureau released its *NCTA Order*), that it “anticipates that it will complete the *Beta testing*” of the equipment necessary to implement BBT downloadable security “by the end of 2Q 2008.”⁴⁴

The point is not to dwell on BBT’s “solution.” The point is that the Bureau premised its denial of NCTA’s waiver request in significant part on the erroneous assumption that BBT’s downloadable security technology is “available today” while DCAS is not.⁴⁵ This was an

⁴² *Armstrong Utilities, Inc. et al.*, CSR-7112-Z et al., CS Docket No. 97-80, DA 97-2916 (rel. June 29, 2007) at ¶ 52.

⁴³ Reply Comments of Beyond Broadband Technology, LLC, CSR-7131-Z, CS Docket No. 97-80, , at 2, 8 (filed April 16, 2007).

⁴⁴ Letter from David M. Baum, President, JetBroadband, to Brendan Murray, Media Bureau, CS Docket 97-80, CSR-7131-Z (filed April 26, 2007)(emphasis added).

⁴⁵ In any event, as Comcast has described to the Commission, comparing the timetable for deployment of the BBT solution even if it were “available today” to DCAS is misleading at best:

Developing a downloadable security solution that is secure, reliable, and scalable requires a significant commitment of time and resources. . . . With respect to the Beyond Broadband Technology (“BBT”) proposal, Comcast has never been shown a product by BBT, nor does Comcast believe the BBT proposal is as far along as DCAS was when the cable industry demonstrated the concept to the Commission in 2005. Moreover, the BBT product that has been described to Comcast is not compatible with any legacy conditional access system utilized by Comcast or with the two-way CableCARD. Consequently, even assuming that the BBT solution could be deployed at scale, doing so would require Comcast to design and support at substantial cost an entirely new conditional access architecture – and potentially strand billions of dollars in existing equipment. Such an outcome would plainly run counter to the Commission’s prior statements about the benefits of downloadable security.

“erroneous finding as to an important or material question of fact” and warrants review and reversal.⁴⁶

The Bureau also rejected NCTA’s demonstration that “compliance with the integration ban will result in an expensive interim solution between now and cable operators’ deployment of DCAS that would lead to higher prices for consumers without providing any benefit.” While conceding elsewhere (and for others) that there are costs to implementing the integration ban,⁴⁷ the Bureau ignored the NCTA argument and merely concluded that, “based on past experience, we are not convinced that cable operators in fact will deploy DCAS within the specified timeframe.”⁴⁸ This statement ignores NCTA’s cost-benefit argument and makes no countervailing cost-benefit argument. It also ignores the fact that, as noted above, NCTA’s waiver request had an outside limit – December 31, 2009 – even if DCAS was not fully deployed by then.

Finally, the Bureau states that it does not believe that “*NCTA should be able to shield itself from the clear directives in the Commission’s rules implementing Section 629 by continuing to assert that a better approach is on the ever-expanding horizon.*”⁴⁹ This Bureau conclusion is inconsistent with the Commission’s *2005 Integration Ban Order* since the Bureau

See Comcast Application For Review, at n.15. See also Jonathan Tombes, “BBT’s DCAS Set-Top Passes Test, Prepares to Ramp Up,” CableNet 360, June 29, 2007 (BBT “may have to fight mission creep. One of yet another of [its] objectives is to create a video-on-demand (VOD) system that works for the small operator ... [which] would require adding a return path to [the] set-top design.”).

⁴⁶ 47 C.F.R. § 1.115(b)(2)(iv).

⁴⁷ *NCTA Order* at ¶ 19. The Commission had already acknowledged those costs. *See Second R&O*, 20 FCC Rcd at 6809, ¶ 29. The Commission also told the D.C. Circuit 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’”).

⁴⁸ *NCTA Order* at ¶ 22.

⁴⁹ *Id.* at ¶ 23 (emphasis added).

ignored the Commission's clear directives about how to treat deferral requests based on the prospect of downloadable security.

4. The NCTA Order: What the Bureau Didn't Say

The Commission had said that, in considering whether to grant deferrals based on the prospect of downloadable security, it would consider responses to specific questions posed in the *2005 Integration Ban Order*. Each question was addressed in the NCTA waiver request, responses that plainly supported grant of the waiver. The Bureau refused even to weigh the factors that the Commission laid out. Therefore, the Bureau's resulting waiver denial was in conflict with established Commission policy.

First, as to the *Order's* query "whether the cable industry is meeting its current obligations to deploy and support CableCARDS," NCTA showed that cable operators have already demonstrated their commitment to ensuring CableCARD-enabled retail devices work on cable systems; an extraordinary amount of time, money, and resources have been expended in provisioning and supporting such devices. At the time of the waiver request, operators had deployed over 200,000 CableCARDS for use in the over 500 models of digital cable ready devices that then had been made available at retail from 26 manufacturers.⁵⁰ As of June, 2007, there were over 271,000 CableCARDS deployed by the ten largest cable operators for use in the over 568 models of digital cable ready devices approved for use by CableLabs.⁵¹ Cable operators' "current obligations" require them to provide a CableCARD upon customer request and they have done so. Installation problems which may have accompanied the introduction of CableCARDS, as with the introduction of any new technology, have been declining significantly

⁵⁰ NCTA Waiver Reply Comments at 21.

⁵¹ Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, CS Docket No. 97-80 (filed June 25, 2007)("June 25, 2007 CableCARD Report").

– at least insofar as those problems have been the result of operator CableCARD or network issues.⁵²

Cable operators have strong incentives to provision, install, and support CableCARDS in retail devices, and manage their networks to deliver services in a manner 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. If a customer cannot access cable’s video services because of a fault with the CableCARD, cable may well lose that customer to a competitor. In any event, in the absence of *any* formal, substantiated complaints, the Bureau could not reasonably conclude that the cable industry was not meeting its “current obligations to deploy and support” CableCARDS. All of this information was in the record available to the Bureau and it showed that the “cable industry is meeting its current obligations to deploy and support CableCARDS.” The Bureau ignored this record and therefore acted inconsistent with the Commission’s policy directive.

Second, as to “progress towards making navigation devices commercially available,” the Bureau ignored that digital cable ready navigation devices *are* now commercially available, including CableCARD-enabled DTVs, TiVo DVRs,⁵³ and the OCUR for digital cable ready personal computers⁵⁴ and that many more options will soon be available, such as two-way

⁵² See Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, CS Docket No. 97-80, at 8-14 (filed June 29, 2006). Cable operators are committed to working with CE companies to address any issues with CableCARDS. *Id.* at 14.

⁵³ See Todd Spangler, *TiVo Debuts \$299 HD DVR for Cable*, MULTICHANNEL NEWS, July 24, 2007, <http://www.multichannel.com/article/CA6462451.html>; Steve Donohue, *TiVo Rolls Out New DVR*, MULTICHANNEL NEWS, April 25, 2006, <http://www.multichannel.com/article/CA6328089.html?display=Breaking+News&referral=SUPP&nid=2226>.

⁵⁴ See *e.g.*, Velocity Micro, Home Multimedia Center Systems, <http://www.velocitymicro.com/category.php?cid=33>.

products from Samsung, LG Electronics and Panasonic.⁵⁵ *No other MVPD can demonstrate this level of retail availability of diverse navigation devices that can access its services from a variety of unaffiliated manufacturers.*

The record showed substantial progress in the deployment of the OpenCable Platform, which enables innovators to develop applications that will run on operator and retail devices, including recent announcements touting new relationships with Intel and Microsoft.⁵⁶ These trends confirm the Commission’s observation in 2005 that “innovation continues to be a hallmark of the navigation devices and digital cable ready equipment markets.”⁵⁷ All of this information was in the record available to the Bureau and it showed that there had been significant “progress toward making navigation devices commercially available.” The Bureau ignored this record too, and therefore acted inconsistent with the Commission’s policy directive.

Third, as to the “progress toward deployment of multistream CableCARDs and towards a bidirectional agreement,” the Bureau flatly ignored evidence of the former and took a short-sighted view of evidence on the latter. With respect to multistream CableCARDs (“M-Cards”) – which allow consumers to watch one program while recording another on CableCARD-enabled

⁵⁵ See Peter Grant, “*Cable TV’s New Aim: Free Us From Tangle of Boxes and Remotes*,” WALL STREET JOURNAL, February 21, 2007, at B1 (“[M]anufacturers such as Panasonic, Samsung and LG already have designed OCAP TV sets that will eliminate the need for set-top boxes With OCAP TVs scheduled to be available as early as this year, users just have to attach a cable and the set will get video-on-demand, advanced program guides and other interactive features from cable.”). More than a dozen manufacturers displayed OpenCable Platform-enabled “two-way” products at the 2007 CES. See Letter from Neal M. Goldberg, NCTA, to Heather Dixon, Legal Advisor to Chairman Martin, CS Docket No. 97-80 (filed February 23, 2007) (attaching CableLabs January 24, 2007 Press Release).

⁵⁶ See NCTA News Release, “*NCTA Previews Cable’s Interactive Future at OpenCable Showcase: Intel and Microsoft Partnerships Solidify OpenCable Approach*,” June 27, 2007. See also COMM DAILY, June 26, 2007 at 5 (“Cable executives touted new agreements under which Intel and Microsoft will develop products with the industry’s OpenCable system. . . .”).

⁵⁷ *Second R&O*, 20 FCC Rcd. at 6811, ¶ 34 n.146.

devices – the record showed that “M-Cards” *are* now available for retail products.⁵⁸ Both CISCO/Scientific-Atlanta and Motorola M-Cards have been qualified by CableLabs, and CableLabs, with the assistance of consumer electronics parties including representatives from TiVo, Motorola, Digeo Interactive, and others, developed new testing procedures to verify one-way products that have an M-Card interface. In March, 2007, CableLabs verified a TiVo DVR as the first one-way device with an M-Card interface.⁵⁹

As for “progress towards a bidirectional agreement,” the record shows that major CE companies, including Samsung, LG Electronics, Panasonic, and Toshiba, have entered into agreements with the cable industry to bring two-way devices to market. CableLabs has made these agreements available to all CE manufacturers on an open and nondiscriminatory basis. Based on those agreements, in November, 2005, NCTA filed with the Commission a proposal including recommended “two-way” rules to complement the Commission’s existing rules for one-way devices.⁶⁰ The Commission has recently sought public comment on this proposal.⁶¹ This certainly constitutes “progress towards a bidirectional agreement” which the Bureau ignored.

The Bureau did briefly discuss what it believed to be the state of the “bidirectional negotiations” between the cable and consumer electronics industries, observing that “the fact that NCTA and CEA have been unable to negotiate an agreement to provide bidirectional plug-and-play devices at retail compels us to strictly enforce the Commission’s rules implementing

⁵⁸ June 25, 2007 CableCARD Report at 2.

⁵⁹ *Id.*

⁶⁰ Letter 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).

⁶¹ *See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, PP Docket No. 00-67, Third Further Notice of Proposed Rulemaking, FCC 07-120 (rel. June 29, 2007).

Section 629(a).”⁶² Even if the Bureau’s description of the status of the negotiations were accurate (which it is not), the Bureau could not rationally use the failure of the cable and *consumer electronics* industries to reach a bidirectional agreement *against the cable industry* by denying its waiver. To do so constitutes prejudicial procedural error warranting Commission review and reversal.⁶³

The Bureau failed to recognize CEA’s obvious incentive to suggest in the joint reports to the Commission that no progress is being made in the bidirectional negotiations or outside of those negotiations; to do otherwise would give support to the cable industry’s grounds for waiver of the ban, which CEA has fought vigorously at every turn. Progress has been made – particularly since the intervention of the NCTA and CEA CEOs in December, 2006 – *but CEA has refused to permit the inclusion in the joint status reports of any language suggesting that progress has been made.* Thus, the Bureau reached the wrong conclusion when it determined that “grant of this waiver would adversely impact the ... retail availability of bidirectional digital cable ready devices” because the cable and CE industries have not both reported “evidence of progress.” This is an “erroneous finding as to an important or material fact,” and its decision must be reviewed and reversed.⁶⁴

Finally, the Commission had asked waiver applicants to address “whether any downloadable security function developed as a result of such extension would provide for common reliance by cable-deployed and commercially available devices.” As the cable industry reported to the Commission in November, 2005, it is committed to the implementation of the

⁶² *NCTA Order* at ¶ 29.

⁶³ 47 C.F.R. § 1.115(b)(2)(v).

⁶⁴ 47 C.F.R. § 1.115(b)(2)(iv).

DCAS system for its own devices as well as for DCAS-compliant retail devices. 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. As is evidenced by the numerous independent CE manufacturers and others who are working with the cable industry on the development of DCAS, that solution will "provide for common reliance by cable-deployed and commercially available devices." But the Bureau failed to address this factor too in denying NCTA's waiver request.

B. The Bureau Misapplied Applicable Waiver Standards

Congress explicitly required the Commission to grant waivers under Section 629(c) 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.⁶⁵ NCTA's waiver request devoted 12 full pages to detailing the new and improved digital cable, telephone, and broadband services, including higher Internet speeds, competitive phone service, digital simulcast, more video-on-demand, new program networks, and more high definition programming that would be delayed or derailed as a result of the imposition of the integration ban prior to the availability of downloadable security.⁶⁶

Further, in the other waiver proceedings, individual cable operators demonstrated the real-world impact waiver decisions will have on their ability to offer new and improved services.

⁶⁵ 47 U.S.C. § 549(c)(emphasis added). At the outset, it must be noted that the Bureau acted on the NCTA waiver request *317 days after it was filed* despite the fact that the statute mandates Commission action under Section 629(c) within 90 days. *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 . . ."). The Bureau acknowledged that NCTA's waiver request was filed under Section 629(c). *See NCTA Order ¶¶* 18-29. It was therefore required to complete its review of the waiver request within the 90-day time frame set forth in the statute, which is not limited solely to waiver grants. *See* S. Conf. Rep. No. 104-230 at 181 (1996) ("The conference agreement also directs the Commission to act on waiver requests within 90 days."). This was fatal and prejudicial procedural error that alone requires review and reversal of the Bureau's decision. 47 C.F.R. § 1.115(b)(2)(v).

⁶⁶ NCTA Request for Waiver, CSR-7056-Z, CS Docket No. 97-80 (filed August 16, 2006) at 13-24.

Cable's DCAS vendors confirmed to the Commission that their efforts on DCAS development are being diverted unnecessarily to redesign set-top boxes for CableCARDs, as they have had to forgo innovative features on set-tops in order to redesign set-top boxes for CableCARDs. The delay in acting on waivers and the ultimate denial of those waivers already has delayed DCAS, as vendors and operators had to take critical engineering resources off of the DCAS project and use that talent to create, qualify and deploy low-end boxes with CableCARDs.

As a result, NCTA showed that grant of the waiver would “assist the development [and] introduction” of new and improved services as Section 629(c) requires. The Bureau rejected these showings on the theory that a waiver is not “necessary” to assist the development or introduction of any of these services because “a significant portion of cable subscribers already receive many of the services described in the [NCTA] waiver request” and a “number of those services have achieved success in the marketplace.”⁶⁷ For this reason, the Bureau found that “a waiver is not necessary to promote deployment of these services.”⁶⁸

By reading the word “assist” out of the statutory waiver standard, the Bureau undermined its entire rationale. Congress underscored the pro-innovation purpose of Section 629(c) in the legislative history; it instructed the Commission to “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.” Consistent with Congressional policy, the *2005 Integration Ban Order* concluded that waivers for low-cost devices would “further the cable industry’s migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television.”⁶⁹

⁶⁷ *NCTA Order* at ¶26.

⁶⁸ *Id.* at ¶27.

⁶⁹ *Second R&O*, 20 FCC Rcd at 6813.

The Bureau wrongly concluded that grant of the waiver would not “assist” NCTA’s members in the development or introduction of new or improved services. While many of NCTA’s members do in fact make many such services available to their customers today, that fact is irrelevant to the merits of NCTA receiving a waiver under Section 629(c). Many do not take these services yet; innovation in these services is far from done; the waiver denial chills these developments and new, yet undeveloped, services are foregone or delayed. More cable customers will be inclined to transition to digital services if less expensive integrated set-top boxes are available. This will permit cable operators to reclaim analog spectrum more quickly for more HD programming, more on-demand programming, faster Internet service,⁷⁰ improved digital telephone services, and new services that integrate features across digital platforms.⁷¹ It will also accelerate consumer adoption of digital services, facilitate cable operators’ transition to digital, assist consumers in coping with the broadcasters’ digital transition, and maintain industry momentum on downloadable security and other technological innovations.⁷²

⁷⁰ The waiver would advance the goals of Section 706, which the Bureau recognized as a basis for waiver in its *BendBroadband Order*. See *BendBroadband’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 209, 217 ¶ 25 (2007).

⁷¹ See Comments of BigBand Networks, CSR-7049-Z, CS Docket No. 97-80, at 2 (filed September 18, 2006). (“Digital networks can improve video quality Digital systems can offer more HDTV, more on-demand content [and] provide consumers with greater control over their viewing choices, with additional tiers and parental controls. They can offer faster data services (such as through bonded channels) . . . interactive features, richer integration across media for enhanced services, and other advanced video and data services which accelerate consumer adoption of more digital services and more digital devices.”) Comments of Harmonic Inc., CSR-7049-Z, CS Docket No. 97-80, at 3 (filed September 15, 2006) (grant of waiver would facilitate Charter’s deployment of digital simulcast, and “simulcasting not only improves video quality, content security, service reliability, and transport costs, but also enables all-digital bandwidth savings because reclaimed analog spectrum can be used for more, faster high-speed data rates and other advanced video and data services.”).

⁷² In its recent decisions, the Bureau has endorsed continued rollout of Qwest’s VDSL and FTTH-BPON, Verizon’s FiOS, and ATM and IPTV technologies used by cable’s competitors as sufficient to justify waiver – while penalizing the cable industry’s continued efforts in deploying its innovative services.

FCC precedent recognizes that continued rollout is part of service innovation,⁷³ yet, in one brief paragraph, the Bureau gave short-shrift to the public interest grounds supporting NCTA's waiver request.⁷⁴ It gave credence only to the claims of waiver opponents, asserting in a conclusory fashion the potential harms to the retail marketplace for navigation devices. However, as NCTA and others have demonstrated, there is no substance to these claims, much less concrete evidence of harm supporting the Bureau's action here.

CONCLUSION

For the foregoing reasons, the Commission should grant NCTA's Application for Review and its request for waiver of the integration ban.

Respectfully submitted,

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⁷³ In *BellSouth*, for example, the Bureau granted a waiver pursuant to Section 629(c) so that BellSouth could “continue to deliver digital services to its subscribers.” *BellSouth Interactive Media Services*, Memorandum Opinion and Order, 19 FCC Rcd. 15607 ¶ 8 (2004) (emphasis added). The waiver was granted *without* any condition that the MVPD roll out any new services. The Bureau applied this same reasoning when it granted Cox an interim waiver pursuant to Section 629(c). See *Cox Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd. 13054 (2004).

⁷⁴ “NCTA provides no specific commitment to furthering the digital transition or a competitive navigation device market” and that, “to the extent that there are any public interest benefits that might result from a waiver, they would not outweigh the significant harm that would result from undermining the integration ban and impeding the development of a competitive market for navigation devices.” *NCTA Order* at ¶ 30 (footnotes omitted).

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that, on July 30, 2007, copies of the attached Application for Review were served via first class mail, on the following:

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