

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Case No. 07-1445

COMCAST CORPORATION

Petitioner,

- v. -

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

REPLY BRIEF OF INTERVENOR

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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GLOSSARY

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of abbreviations and acronyms used in this brief:

2005 Order	<i>Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices</i> , Second Report and Order, 20 F.C.C.R. 6794 (2005)
CableCARD	The trademarked name of the separated security module referred to in FCC rules as a point of deployment module, or “POD.” These modules are compatible with retail navigation devices made by independent consumer electronics manufacturers.
CE	Consumer electronics
CEA	Consumer Electronics Association
<i>Charter</i>	<i>Charter Commc’ns, Inc. v. FCC</i> , 460 F.3d 31 (D.C. Cir. 2006)
DBS	Direct Broadcast Satellite: An MVPD that uses satellite facilities to transmit video programming directly to customer homes pursuant to 47 C.F.R. § 25.201.
Denial Order	<i>Comcast Corporation, Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules</i> , Memorandum Opinion and Order, 22 F.C.C.R. 17113 (2007)
DVR	Digital video recorder
EPG	Electronic program guide
FCC	Federal Communications Commission
HD, HDTV	“High-definition” television
Integration Ban	The FCC rule set forth in the second sentence of 47 C.F.R. § 76.1204(a)(1) that, as of July 1, 2007, prohibits cable operators (but not DBS providers) from providing customers with set-top boxes that include security in addition to navigation functions.

MVPD	Multichannel Video Programming Distributor: Defined in Section 602(13) of the Communications Act of 1934, as amended, 47 U.S.C. § 522(13), as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.”
Navigation Device	Converter boxes, interactive communications equipment, and other equipment (including televisions, VCRs, cable set-top boxes, personal computers, program guide equipment and cable modems) used by consumers to access multichannel video programming and other services offered over multichannel video programming systems. 47 U.S.C. § 549 and <i>Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices</i> , Report and Order, CS Docket No. 97-80, 13 F.C.C.R. 14775, at ¶ 25 (1998).
NCTA	National Cable & Telecommunications Association
Plug-and-Play NPRM	<i>Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices</i> , Third Further Notice of Proposed Rulemaking, 22 F.C.C.R. 12024 (2007)
Separate Security Requirement	The FCC rule set forth in the first sentence of 47 C.F.R. § 76.1204(a)(1), which requires that an MVPD “that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices.”
Set-top Box	A navigation device typically placed on or adjacent to a television set through which the television set receives multichannel video programming and other services offered over multichannel video programming systems.

SUMMARY OF ARGUMENT

In its Opening Brief, Comcast persuasively demonstrated that the FCC's denial of its request for waiver of the integration ban for "low-cost, limited-capability" boxes must be reversed as a matter of law. NCTA supplemented the Comcast showing by demonstrating that judicial review in this case is required to restore credibility to the regulatory process and to ensure that the FCC's actions under Section 629 are based upon and consistent with statutory requirements and Congress's objectives rather than on arbitrary and capricious decision-making. Neither the FCC nor Intervenor CEA effectively rebutted these arguments on the merits. Indeed, CEA, justifiably concerned that this Court might "find the FCC's decision-making process on this waiver application to have been fatally flawed," claims that the "only remedy called for under this Court's precedent is a remand to the FCC with instructions to elaborate on its reasoning." NCTA addresses that claim in this Reply Brief.

First, CEA's arguments against "outright reversal" are all addressed to the merits of the Comcast waiver request, not the remedy, and, in any event, are wrong as a matter of law. If this Court finds that the FCC's action merits reversal because it was contrary to the statute or otherwise "fatally flawed," then it will have addressed CEA's arguments on the merits and Comcast and other waiver applicants will then deserve immediate relief -- as "immediate" as such relief can be, coming almost two years after Comcast first filed for waiver in April 2006. *Second*, unless this Court remands with instructions to grant the Comcast waiver, the Commission will be allowed to sit on this Court's remand, much as it delayed Comcast's request for waiver for over sixteen months as the clock ticked toward the July 1, 2007 integration ban deadline. Further delay would be contrary to the public interest. *Third*, even if the Court were to instruct the Commission to act on the remand within a time certain and the FCC adhered to that timetable (notwithstanding its flouting of the 90-day deadline for deciding waiver requests under

the Section 629(c) standard), that too would be the death-knell for the Comcast request. Leaving aside allegations of the FCC Chairman's animus toward the cable industry, the Commission has touted the fact that it has never granted a waiver of the integration ban under Section 629 and cannot be expected to change its stripes now.

Finally, CEA's arguments against "outright reversal" are baseless and, as noted, go to the merits of the Comcast request, not the remedy. Putting aside CEA's curious suggestion that it represents the public interest and is the sole beneficiary of Section 629, the public interest will not be harmed by "immediate" grant of the waiver for the subject set-top boxes. Rather, as Comcast has demonstrated, a limited waiver for low-cost, limited-capability boxes will benefit consumers by: (1) giving them a less expensive entry-level set-top box to access digital cable services; and by (2) facilitating the transition to digital by Comcast and other cable operators and their reclamation of analog spectrum for new HD programming and other innovative services for consumers. CEA's further argument that "outright reversal" would "eviscerate the regulatory framework implementing Section 629" is ludicrous. Whatever validity the "common reliance" concept has, it will not be frustrated, let alone "eviscerated," if the Commission is instructed to grant a waiver so that Comcast and other cable operators may deploy less expensive integrated set-top boxes *in addition to the millions of CableCARD-enabled boxes they have already deployed and will continue deploying*. Similarly, any suggestion that a waiver would preclude the achievement of economies of scale with respect to the CableCARD is belied by the substantial and ongoing deployment of CableCARDS in operator-supplied set-top boxes.

ARGUMENT

THE APPROPRIATE REMEDY IN THIS CASE IS A REMAND WITH INSTRUCTIONS TO GRANT THE WAIVER REQUEST

A. Comcast Has Demonstrated That It Is Entitled To A Waiver Under Section 629(c).

Section 629(c) requires that the Commission “shall grant” waivers of its navigation device rules whenever “necessary to assist the development or introduction of [any] new or improved” service offered over an MVPD’s network. 47 U.S.C. § 549(c). The statute applies to all MVPDs and specifies that any waiver relief granted for a particular set-top box “shall be effective” for all MVPDs that use the device. *Id.* In its Opening Brief, NCTA showed that the Commission, its Chairman, and its Media Bureau (which acts at the Chairman’s direction) have disregarded these statutory mandates. First, NCTA showed that the Commission and its Media Bureau have granted set-top box waivers to competitors of traditional cable companies based upon almost any claimed technological innovation, but they have denied waivers to traditional cable companies for the same or similar devices -- even where the evidence demonstrates that such waivers are necessary to develop innovative services like new HD programming, faster Internet speeds, and new program networks. NCTA Br. at 24-26. Second, NCTA showed that these rulings read the word “assist” -- and the underlying congressional policies of innovation and technological neutrality -- out of Section 629. *Id.* at 21. Finally, NCTA demonstrated that the Commission’s “process” for handling waiver requests has been arbitrary in the extreme, characterized by unauthorized delays and other procedural irregularities. *Id.* at 22-23. In short, NCTA showed that, through its arbitrary and capricious decision-making, this Commission is doing to traditional cable operators exactly what Congress forbade: “freezing or chilling the development of new technologies and services.” S. Conf. Rep. No. 104-230, at 181 (1996) (ADD__).

Neither the FCC nor Intervenor CEA effectively rebutted these arguments -- when they bothered to address them at all. Rather, both briefs are essentially pleas to give the FCC a pass because of purported deference owed the FCC or the supposed heavy burden Comcast allegedly must bear to have the Court reverse the Commission's denial of its waiver request. They also argue illogically that, because this Court has upheld the integration ban *rule* against challenge, it must uphold the FCC's denial of a rule *waiver*, even though such a waiver request is obviously premised on the validity of the rule. Comcast's Reply Brief addresses the legal errors in the FCC and CEA arguments. This reply brief focuses primarily on one issue raised by CEA: the remedy this Court should invoke to cure the Commission's errors.

Comcast asked this Court to "vacate the Denial Order and remand with instructions that the Commission grant the requested waiver without further delay." Comcast Br. at 41. The FCC's Brief did not address the remedy Comcast sought, merely asking the Court to deny the Petition for Review in its entirety. Opp'n at 45. By contrast, CEA, justifiably concerned that this Court might "find the FCC's decision-making process on this waiver application to have been *fatally flawed*," CEA Br. at 25 (emphasis added), claims that the "only remedy called for under this Court's precedent is a remand to the FCC with instructions to elaborate on its reasoning," *id.* But that statement is wrong as a matter of law and equity.

In support of its remedy argument, CEA relies on cases in which an agency had failed to reach an issue or did not articulate the factors it considered in its order -- errors that on remand the agency might correct. Citing to *Burns v. U.S. Railroad Retirement Board*, *inter alia*, CEA claims that this Court's precedent "establishes a high hurdle for reversing an FCC waiver denial." CEA Br. at 26. But, in that case, remand was necessary because the agency had not reached the relevant issue at all; rather, the agency refused to waive a rule to recover benefit

overpayments because it erroneously found the recipient was at fault. *Burns*, 701 F.2d 193, 202 (D.C. Cir. 1983). The court remanded for the Board to consider whether the applicant qualified for a “hardship” waiver -- a separate criterion that the Board admittedly “did not reach” in its initial decision. *Id.* Similarly, in *Sangre de Cristo* -- a case involving the FCC’s denial of a waiver of its short-spacing rules under a broad regulatory waiver standard -- the court could not “discern with precision” whether the FCC considered the commercial status of the applicant as a “public interest” factor (and if so, whether it could do so consistent with the First Amendment). *Sangre de Cristo Commc’ns v. FCC*, 139 F.3d 953, 958 (D.C. Cir. 1998). The court declined to rule whether the agency abused its discretion, instead remanding for the FCC to “better explain the basis for its action . . . than it has done.” *Id.*

Neither of these cases (upon which CEA principally relies) is relevant to the proper remedy here if the Court finds -- as it should -- that the FCC abused its discretion in the Denial Order. On the contrary, the FCC’s rationales in the Denial Order are not merely ambiguous, but they flout the statutory and regulatory waiver standards and the record evidence. A court reviewing agency action may direct the agency to take an action on remand when there is only one conclusion that the agency could reasonably reach. *See* 2 Am. Jur. 2d *Administrative Law* § 573 (2008); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) (reversing agency’s denial of waiver based on consideration of factors outside the scope of its discretion); *Allied Signal, Inc. v. NRC*, 988 F.2d 146, 153-54 (D.C. Cir. 1993) (directing agency to grant regulatory exemption). Section 629 and the FCC’s own regulations state that waivers are to be effective “for all providers of services and products.” 47 U.S.C. § 549(c); *see also* 47 C.F.R. § 76.1207. Having granted other waivers for the same or similar set-top boxes, the FCC violated Section 629(c) and the FCC’s implementing rule by denying Comcast’s waiver request. The FCC’s

rationales are fatally flawed and leave no possibility of a reasonable order denying Comcast's waiver, thus making vacatur with instructions to grant the waiver the proper remedy.

B. Should This Court Reverse The Denial Order, Comcast Deserves Immediate Relief.

There are also equitable reasons why this Court should instruct the FCC to grant the Comcast waiver on remand. At the outset, it bears emphasis that CEA's arguments against "outright reversal" are all addressed to the merits of the Comcast waiver request, not the remedy. If this Court finds that the FCC's action merits reversal because it was contrary to the statute or otherwise "fatally flawed," Comcast and other waiver applicants deserve immediate relief. The Commission's pattern of inaction in this and related Section 629 waiver cases, unintentional or not, should not be overlooked in fashioning a remedy. Comcast's waiver request was filed more than *fourteen months in advance* of the July 1, 2007 integration ban effective date. It was not addressed by the FCC's Media Bureau (which takes its direction from the FCC Chairman) until *almost nine months later*. Comcast's appeal to the full Commission (a prerequisite for judicial review) was not addressed by the Commission (whose agenda is set by the FCC Chairman) until *seven months after that*. Then, when Comcast sought expedited review before this Court, FCC Counsel vigorously -- but unsuccessfully -- opposed that request. *See* Opposition of the FCC to Comcast's Emergency Motion for Expedited Review, No. 07-1445 (D.C. Cir. Nov. 9, 2007). In light of this history, permitting the FCC to bury this Court's remand, as happened with Comcast's original waiver request, would clearly not be in the public interest.¹

¹ Cable operators took the Commission and Commission counsel at their word that waivers for low-cost boxes would be decided in a timely manner, as Section 629 requires, before the effective date of the integration ban. Therefore, CEA's claim that Comcast "assumed the risk that the FCC would not decide [its] waiver on Petitioner's preferred schedule," CEA Br. at (footnote continued...)

Furthermore, even if the Court were to instruct the Commission to act on the remand within a specified time frame and the Commission adhered to that timetable (notwithstanding its flouting of the 90-day deadline to decide waiver requests under the Section 629(c) standard), such a remand would also be the death-knell for Comcast's waiver request. Leaving aside allegations of the FCC Chairman's animus toward the cable industry,² it is beyond doubt how this case will be decided on remand based on the Commission's statements in its brief. The Commission proudly proclaims to the Court that it "has never granted a waiver of the integration ban or related separate security rules under section 629, and the agency's staff has granted waivers under that standard only twice -- both times involving unopposed applications that were ruled upon before the current July 2007 implementation date was established" Opp'n. at 39-40; *see also* CEA Br. at 8 (asserting that CEA has "opposed every waiver petition and rationale based on Section 629"). Under these circumstances, if the Court were to find the Denial Order fatally flawed, the same considerations that prompted this Court to expedite

(...footnote continued)

23, says more about how this Court should fashion its remand remedy, than it does about what should have been Comcast's legitimate expectations for FCC action when it filed its waiver request almost two years ago.

² *See* Amicus Br. at 5-9 (citing press accounts of Chairman's treatment of the cable industry); *see also* *Martin's Double Vision*, WALL ST. J., Dec. 19, 2007, at A20 ("Mr. Martin's animus toward the cable business is by now a matter of public record and yesterday's action [on cable ownership limits] can only be understood as part of his personal campaign to make the industry's life as hard as possible."); *Martin's "War on Cable" Viewed as Opportunities for Utilities in Pole-Attachment Proceeding*, TR DAILY, Jan. 13, 2008, (noting FCC Chairman Kevin J. Martin's reputation for conducting a "war on cable"); *House Committee Chairman Orders Inquiry Into FCC*, N.Y. TIMES, Dec. 4, 2007, at C10; Jim Puzanghera, *FCC Target of House Panel's Investigation: Chairman Kevin J. Martin Is Accused of "Possible Abuse of Power,"* L.A. TIMES, Dec. 4, 2007, at C3; Letter from the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, to Kevin J. Martin, Chairman, FCC, Dec. 3, 2007.

judicial review of this long-delayed proceeding, should counsel it to instruct the Chairman and the Commission to grant the Comcast waiver request.

C. CEA’s Arguments Opposing “Outright Reversal” Are Without Merit.

1. The Public Interest Will Not Be “Harmed” by “Outright Reversal.”

CEA argues that “[o]rdering the Commission to grant Comcast a waiver would harm the very representatives of the public interest Section 629 was intended to benefit.” CEA Br. at 14. CEA does not explain who these “representatives of the public interest” are, although it appears that CEA has presumptuously bestowed that mantle upon itself and its members. But this argument is fatally flawed for a number of reasons.

First, major CE manufacturers and CEA members like Panasonic, Samsung, and Thomson support the Comcast waiver, *see* Comcast Br. at 21, so it is unlikely that they would consider themselves “harmed” if the Comcast waiver were to be granted.

Second, as Comcast (with the support of Panasonic and Samsung) has shown, if it were granted a waiver for low-cost, limited-capability boxes, that would not “harm” CE companies or the competitive device market because no CE companies make such devices, and CEA’s concerns about “common reliance” will be satisfied by the millions of other CableCARD-enabled operator-supplied set-top boxes being deployed today. *Id.* at 22-23; NCTA Br. at 20.

Third, if CEA meant that consumers were the “representatives of the public interest Section 629 was intended to benefit,” Comcast has demonstrated that a limited waiver for low-cost, limited-capability boxes will benefit consumers by: (1) giving them a less expensive entry-level set-top box to access digital cable services; and by (2) facilitating the transition to digital by Comcast and other cable operators and their reclamation of analog spectrum for new HD programming and other innovative services for consumers. Comcast Br. at 16-18. In fact, the

FCC “promised” to grant waivers for low-cost, limited-capability set-top boxes for these very reasons. *See* 2005 Order, 20 F.C.C.R. 6794, 6813-14 (¶ 37) (2005).

Finally, to the extent that “representatives of the public interest” are the entities “Section 629 was intended to benefit,” then Section 629 must be read in its entirety. Under such a reading, cable operators are as much intended beneficiaries of Section 629 as others. Section 629’s waiver provision was obviously intended to benefit cable operators and others subject to FCC regulation since waivers would assist them in introducing new and improved services. Moreover, Congress emphasized that rules adopted to implement Section 629 should not “freez[e] or chill[] the development of new technologies and services” S. Conf. Rep. No. 104-230, at 181 (1996) (ADD__). And, to the extent CEA decries the fact that cable operators have been beholden to essentially two set-top box suppliers, CEA Br. at 14, CableCARD requirements adopted under Section 629 have helped cable operators diversify their set-top box supplier base. For example, Comcast explained that it has negotiated agreements to purchase CableCARD-enabled set-top boxes from Panasonic, Pace, Thomson, and Samsung. *See* Comcast Waiver Request, CSR-7012-Z, CS Dkt. No. 97-80, at 18 (Apr. 19, 2006) (JA__); Comcast Comments, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 10 (Aug. 24, 2007). Likewise, Time Warner Cable is now deploying CableCARD-enabled set-top boxes from Samsung in its New York City cable system. *See* NCTA Comments, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 12 (Aug. 24, 2007).

In sum, if as NCTA has argued -- and CEA fears -- the Commission’s decision must be reversed, instructing the Commission to grant the waiver to Comcast and other cable operators will fulfill the congressional purpose of Section 629 without harming any “representatives of the public interest Section 629 was intended to benefit.”

2. “Common Reliance” Will Not be “Disrupted” by “Outright Reversal.”

CEA next claims a remand with instructions to grant the waiver would “not only disrupt but eviscerate the regulatory framework implementing Section 629.” CEA Br. at 29. CEA’s theory is that granting the waiver would “allow Comcast, the largest MVPD in the nation, to maintain a large base of integrated navigation devices as its primary security scheme, lessening its incentive to support competitive devices that rely on separate security.” *Id.*

CEA’s arguments, erroneous as they are, go to the merits of the Comcast request, not the remedy. If the Court finds, as it should, that denial of the waiver was inconsistent with Section 629, then immediate grant of the waiver could hardly eviscerate the regulatory framework implementing that provision. In any event, CEA’s claims are incorrect on the law and the facts.

The case law cited by CEA is not on point. Three of the four cases involved the review of an agency *rule*, not a *waiver* of a rule. The “disruptive effects” from vacatur in those cases were imminent and substantial. *Id.* at 28 (citing, e.g., *Rodway v. United States Dep’t of Ag.*, 514 F.2d 809, 817 (D.C. Cir. 1975) (noting the “critical importance” of regulations to “the functioning of the entire food stamp system, on which over ten million American families are now dependent . . . ”)). There would be no similar effects with grant of the Comcast waiver. The fourth case cited by CEA, *Massachusetts v. NRC*, is not relevant either. In that case, the court remanded a grant of nuclear power plant licenses because it was “unable to determine from the Appeal Board’s terse explanation whether it acted properly” in considering allegations of inadequate emergency preparedness. 924 F.2d 311, 335 (D.C. Cir. 1991). The court remanded but declined to vacate the order granting the licenses because a scheduled emergency preparedness exercise “will likely moot this issue” if satisfactory; “[h]ence, we decide against imposing an immensely disruptive interim status quo that may itself be displaced by the Appeal

Board's subsequent reasoning or by the more recent full participation exercise." *Id.* at 336. The FCC's Denial Order warrants no such deference since it is contrary to Section 629(c) and its pro-innovation goals.

CEA's "disruptive effects" claims are also wrong as a factual matter. Contrary to CEA's claims, grant of the waiver would have no adverse effects on the cable industry's support for the CableCARD or on "economies of scale" with respect to CableCARD production costs.

Comcast and other traditional cable operators have complied with the FCC rules implementing Section 629 not only by making CableCARDS available for retail devices their customers have purchased, but also by complying with the integration ban since it went into effect on July 1, 2007. As shown in the Comcast and NCTA briefs, as of September 24, 2007, NCTA reported to the FCC that cable operators had deployed more than twice as many of their own CableCARD-enabled devices (650,000) than the total number of CableCARDS requested by customers for use in one-way retail devices (278,000). Comcast Br. at 22-23; NCTA Br. at 20. That trend is accelerating. NCTA's recent report to the FCC showed that, while over 300,000 CableCARDS have been deployed for use in retail devices, *more than 2,255,000 operator-supplied set-top boxes with CableCARDS have been deployed since the integration ban went into effect on July 1, 2007.* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, at 1 (Dec. 26, 2007).

The FCC suggests in its brief that this disparity requires even stricter enforcement of the integration ban because it "illustrate[s] how difficult it has been for competitive devices to establish a competitive toehold." Opp'n at 26. This statement is as cynical as it is misleading. First the FCC imposes the integration ban on all traditional cable operators, requiring them to include CableCARDS in every new set-top box as of July 1, 2007. Now it argues that cable's

deployment (under regulatory compulsion) of millions more CableCARD-enabled devices than have been purchased at retail somehow shows that cable operators have not supported CableCARDS in retail devices. This FCC argument also ignores the key point, which the FCC itself has acknowledged, that retail devices have failed in the marketplace because they do not receive cable's two-way services, like video-on-demand, not because of lack of support from cable operators. *See Plug-and-Play NPRM*, 22 F.C.C.R. 12024, 12026 (¶ 5 & n.12) (2007) (ADD__); *see also* Comcast Application for Review, CSR-7012-Z, CS Dkt. No. 97-80, at 17-18 (Jan. 30, 2007) (JA__).

Moreover, even CEA does not believe that CableCARDS must be included in all new cable set-top boxes to satisfy common reliance. The rules it has proposed in the two-way plug-and-play proceeding for its favored two-way device concept are premised on the assumption that the goals of common reliance can be achieved where only *20 percent* of cable set-top boxes rely on certain CableCARD technology. *See* CEA Comments, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at Appendix A (Aug. 24, 2007).

Therefore, for CEA to assert that the “regulatory framework” for “common reliance” will come tumbling down if a waiver is granted for low-cost, limited-capability boxes is absurd. Whatever validity the “common reliance” concept has, it will not be frustrated if the Commission grants a waiver so that Comcast and other cable operators may deploy less expensive integrated set-top boxes *in addition to the millions of CableCARD-enabled boxes they have deployed and will continue deploying.*³ Indeed, even if all cable operators were to take advantage of such a

³ As NCTA stated in its initial brief, NCTA Br. at 24-25, if the Commission and CEA truly believe that “common reliance” on the same security technology (*i.e.*, the CableCARD) is critical to achieve the “commercial availability of navigation devices” that is the goal of
(footnote continued...)

waiver, they still would have to include CableCARDS in their other boxes, including in their top-of-the-line HD and HD/DVR boxes. These higher-end boxes are deployed to the customers who purchase the most valued cable services and whom operators must keep happy lest they switch to another multichannel video provider. *See* Comcast Reply, CSR-7012-Z, CS Dkt. No. 97-80, at 14-15 (June 30, 2006) (JA__).

Furthermore, grant of the waiver will not affect “economies of scale” with respect to CableCARDS. CEA suggests that granting a waiver to Comcast will reduce the number of CableCARD devices and thus prevent the achievement of “economies of scale” associated with CableCARD production costs. *See* CEA Br. at 6; *see also* Opp’n at 25-26 (*citing* Denial Order, 22 F.C.C.R. 17113, 17117 (¶ 6 & n.33) (*citing* CEA Feb. 14, 2007, Opposition)). CEA’s brief cites to purported “very specific evidence as to how economies of scale and a ‘learning curve’ would bring ‘common reliance’ costs down to a fraction of those cited by cable interests, and *already had done so in other markets.*” CEA Br. at 6 (emphasis added). This argument again goes to the merits of Comcast’s request, not the remedy if the Court reverses the FCC decision. Nevertheless, CEA’s analysis is faulty for two basic reasons. First, CEA understates the cost of CableCARD compliance, relying on purported examples from “other markets” and ignoring more persuasive evidence in the record. *See, e.g.*, Comcast Reply, CSR-7012-Z, CS Dkt. No. 97-80, at 17 & n.65 (JA__) (*citing* record evidence of CableCARD-related costs). Second, as

(...footnote continued)


Section 629, that “policy” is undermined by exempting from the integration ban DBS providers, telephone companies, and any cable operator that commits to going “all-digital” by February 2009. Exempting companies currently serving over 30% of the MVPD market from the integration ban gives the lie to the argument that “common reliance” on the same separate security technology is critical to ensuring the commercial availability of navigation devices.

noted, cable operators are already deploying millions of CableCARDs, so concerns about “economies of scale” are not credible.

CONCLUSION

For these reasons and those stated in the Comcast, NCTA, and Amicus briefs, NCTA requests that the Court vacate the Denial Order and remand with instructions that the Commission grant the requested waiver without further delay.

Respectfully submitted,


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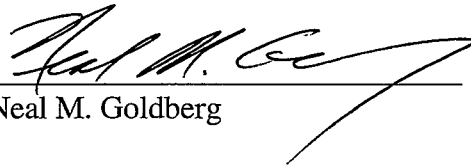
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 4,309 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2003) used to prepare this brief.

Dated: February 1, 2008



Neal M. Goldberg

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2008, I served two copies of the foregoing Reply Brief of Intervenor National Cable & Telecommunications Association on the following parties as indicated below.

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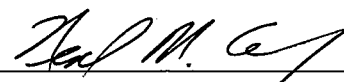
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