Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	MB Docket 16-42
Expanding Consumers' Video Navigation Choices	)	CS Docket 97-80
	)	
Commercial Availablity of Navigation Devices	)	

COMMENTS OF ZOOM TELEPHONICS, INC.

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SUMMARY

There is currently a robust and competitive retail market for cable modems. As the only major marketer of cable modems selling primarily through U.S. retailers, Zoom submits these comments to ask that the Commission insure that in developing a comprehensive scheme to address the lack of a retail market for set-top boxes, the Commission must take care to recognize that cable modems are also subject to Section 629.

Most of the issues about which the Commission seeks comment do not affect cable modems and the Commission should avoid adopting rules which inadvertently jeopardize the competitive retail market for cable modems. To the limited extent that the proposals in the NPRM do affect cable modems, the Commission must insure that it continues to promote the development of a large, competitive retail market for cable modems.

When Congress adopted Section 629 in 1996, delivery of Internet service over cable was a nascent, but promising, offering. Thus, while Congress unequivocally included cable modems within the scope of Section 629, set-top boxes were the primary - but not exclusive - focus of concern with respect to cable subscribers' customer premises equipment in the Commission's 1998 decision adopting rules to implement Section 629. As a consequence of the emphasis on set-top boxes, there has been some ambiguity as to how the rules - not Section 629 itself - should be read with respect to cable modems. The Commission's proposed revision to 47 CFR §76.1206 would harmonize the rules while honoring the Congressional mandate that prices of leases for cable modems (and other navigation devices) should be separately stated and shoud not be bundled with Internet or other services. However, the proposal does not go far enough, as it does not specifically provide, as is required by Section 629, that prices for cable modem leases

should not be “subsidized by charges for” Internet service.

As in the past, the Commission’s discussion in the NPRM of the requirement for billing transparency and subsidization under Section 629 appears to be focused upon set-top boxes and does not recognize that different circumstances pertain with respect to cable modems. To the extent the Commission suggests that there is currently no problem with respect to cross-subsidization of equipment leasing prices, this is simply incorrect as to cable modems. It is a matter of indisputable fact that Charter Communications, Inc. (Charter) has been bundling cable modems with Internet service and marketing them as “free modems.” It is also the case that Cablevision Systems Corporation had a similar policy until recent changes that continue to inadequately protect cost savings for customers who supply their own cable modems. Thus, there is a clear imperative to fulfill the goal of Section 629 by protecting the existing retail market for cable modems through a clear prohibition on separate billing and subsidized prices. Thus, there is a clear imperative to fulfill the goal of Section 629 by protecting the existing retail market for cable modems through a clear prohibition on separate billing and subsidized prices.

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Zoom Telephonics, Inc. (Zoom) respectfully responds to the Federal Communications Commission's (FCC or Commission) *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (NPRM) in this proceeding.[1] As a participant in, and beneficiary of, a competitive retail market for cable modems, Zoom welcomes the Commission's initiative to develop a similarly competitive market for set-top boxes. It submits these comments so that in adopting new rules for customer premises equipment, the Commission protects, and does not inadvertently impede, the existing cable modem market.

Founded in Boston in 1977, Zoom produces and markets communications products, primarily for Internet access. Its cable modems and gateways, which account for the majority of Zoom's revenues, are sold through storefront retailers including Best Buy, Micro Center and Walmart and through etailers including Amazon. Zoom has sold cable modem under its Zoom brand since 2001, and in January 2016 began producing and marketing Motorola brand cable modems under an exclusive license from Motorola Mobility LLC. Because Zoom is the only major marketer of cable modems selling primarily through U.S. retailers, Zoom is well qualified to address issues in this proceeding relating to the retail sales of cable modems.

[1] *Expanding Consumers Video Navigation Choices*, 31 FCCRcd 1544 (2016).

INTRODUCTION

Both cable modems and set-top boxes are “equipment” within the meaning of Section 629 of the Communications Act. However, unlike the case of set-top boxes, for many years there has been a robust and competitive retail market for cable modems. Comcast, Time Warner Cable, Cox Bright House and many other service providers adhere to the requirements of Section 629 by separately stating an unsubsidized price for the lease of cable modems so that customers can calculate the significant savings they can realize by purchasing their own modem.

Zoom’s principal concern is that, in developing a comprehensive scheme to address the lack of a retail market for set-top boxes, the Commission must take care to recognize that cable modems are also subject to Section 629. Most of the issues about which the Commission seeks comment do not affect cable modems and the Commission should avoid adopting rules which inadvertently jeopardize the competitive retail market for cable modems. To the limited extent that the proposals in the NPRM do affect cable modems, the Commission must insure that it continues to promote the development of a large, competitive retail market for cable modems.

When Congress adopted Section 629 in 1996, delivery of Internet service over cable was a nascent, but promising, offering. Thus, while Congress unequivocally included cable modems within the scope of Section 629, set-top boxes were the primary - but not exclusive - focus of concern with respect to cable subscribers’ customer premises equipment in the Commission’s 1998 decision adopting rules to implement Section 629. As a consequence of the emphasis on set-top boxes, there has been some ambiguity as to how the rules - not Section 629 itself - should be read with respect to cable modems. The Commission’s proposed revision to 47 CFR §76.1206 would harmonize the rules while honoring the Congressional mandate that prices of leases for cable modems (and other navigation devices) should be separately stated and should not be bundled with Internet or other services. However, the proposal does not go far enough, as it does not specifically provide, as is required by Section 629, that prices for cable modem leases should not be "subsidized by charges for" Internet service.

In seeking to open the set-top box market to competition, the NPRM seeks comment on licensing and certification issues arising from technologies that employ Internet connectivity to give new options and choices for viewing video offerings. The specific regulatory language the Commission proposes does not impact cable modems. However, because the Commission uses the term "navigation devices," and cable modems are navigation devices, Zoom asks that the Commission take care that any changes it makes to the proposals do not unintentionally harm the market for cable modems.

I. SECTION 629 AND CABLE MODEMS.

Section 629 of the Communications Act establishes a right to attach customer-owned devices and requires that cable operators must separately state the price for cable modems that it leases, and requires that the price not be subsidized by prices for other services, including Internet services.[2] To implement the right to attach, the Commission adopted Subpart P of Part

[2]The full text of Section 629(a) reads as follows:
a) Commercial consumer availability of equipment used to access services provided by multichannel video programming distributors
The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor. Such regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access

76 of its rules, titled "Competitive Availability of Navigation Devices."[3]

A. Cable Modems Are Covered by Section 629.

The Commission has unequivocally ruled that cable modems are covered by Section 629. In adopting rules relating to Section 629, the Commission stated that "[t]he language of Section 629 indicates that Congress sought to have the marketplace offer consumers a choice over a road range of equipment."[4] It specifically rejected arguments that Section 629 should not apply to cable modems,[5] and concluded that

> *We believe that the language of Section 629 indicates that its reach is to be expansive and* that Section 629 neither exempts nor limits any category of equipment used to access multichannel video programming or services offered over such systems from its coverage. Equipment used to access video programming and other services offered over multichannel video programming systems include televisions, VCRs, cable set-top boxes, personal computers, program guide equipment *and cable modems.*[6]

B. The Right to Attach Cable Modems.

To promote competition for customer premises equipment, Section 629 of the Communications Act requires cable operators to permit customers to employ third party equipment so long as it does not jeopardize safety.[7] It provides in pertinent part that

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multichannel video programming and other services offered over multichannel video programming systems, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

[3] 47 CFR §§76.1200 *et seq.*

[4] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCCRcd 14775, 14784 (1998)(*1998 Order*)(emphasis added). Most recently, in the National Broadband Plan, the Commission reaffirmed that Section 629 covers cable modems. *See Connecting America: The National Broadband Plan*, at 24, n.24 (2010).

[5] *1998 Order*, 13 FCCRcd at 13785.

[6] *1998 Order*, 13 FCCRcd at 13784 (emphasis added).

[7] The importance of the right to attach in the context of the Internet was underscored by the Commission's *2005 Internet Policy Statement*, adopted pursuant to Section 706 of the Telecommunications Act of 1996. It declares that "consumers are entitled to connect their choice of legal devices that do not harm the network...," and that "consumers are entitled to

> The Commission shall…assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services…from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.

The language of Section 629 reflects Congress' desire to promote competition in the equipment market. The title of the section broadly refers to "services provided by multichannel video programming distributors." The legislative history reflects Congress' view that "competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices, and higher quality."[8]

To promote competition and facilitate the commercial availability of equipment, the Commission "mandate[d] that subscribers have a right to attach any compatible navigation device to an MVPD system, regardless of its source, subject to the proviso that the attached equipment not cause harmful interference, injury to the system or compromise legitimate access control mechanisms."[9] The Commission concluded that this "right to attach" would create a "substantial incentive" for manufacturers "to develop and distribute new products in response to consumer demands for equipment and features" and "lead to a broader market for equipment used with MVPD systems."[10]

The Commission adopted three separate provisions to establish and fortify consumers' rights to attach devices of their choosing to a multi-channel video provider's (MVPD) network.

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competition among network providers, application and service providers, and content providers." Thus, Section 706 clearly empowers the Commission to require cable operators to allow cable modems to be attached to their network. And it also commits the Commission to insure competition in the affected markets, including the market for equipment such as cable modems.

[8]Rept. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

[9]*Id.*, 13 FCC Rcd at 14786.

[10]*Id.*

47 CFR §76.1201 sets forth the "[r]ights of subscribers to use or attach navigation devices":

> No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service.

To insure that cable operators would not interfere with the right to attach, Section 76.1202 forbids any MVPD to

> by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator,..."

Section 76.1203 places a limit on technical specifications for devices such as modems. It specifies that any MVPD's "standards and descriptions of devices that may not be used with or attached to the system...shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service."

C. The Requirement to Offer Unbundled and Non-subsidized Modem Prices.

Section 629 also addresses charges for modems and other devices by providing that the Commission's

> regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, *and other equipment* used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, *if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.*

(Emphasis added.)

To implement this requirement, the Commission adopted Section 76.1206, which prohibits MVPDs from bundling customer premises equipment with other service offerings:

> Multichannel video programming distributors offering navigation devices subject to the provisions of §76.923 for sale or lease directly to subscribers, shall adhere to the standards reflected therein relating to rates for equipment and installation and *shall separately state the charges to consumers for such services and equipment.*

(Emphasis added.) The Commission did not adopt a new rule that specifically addressed subsidies for navigation devices. Instead, by requiring MVPDs to "adhere to the standards reflected" in Section 76.923, the Commission effectively prohibited cross-subsidization.

There has been ambiguity and controversy as to the applicability of Section 76.1206 to cable modems. Given that delivery of Internet service by cable operators was in its infancy in 1998, it is perhaps understandable that the Commission crafted Section 76.1206 without specifically speaking to cable modems. However, its cross-reference to Section 76.923 is incongruous as applied to cable modems. Section 76.923, which was adopted in 1993, before cable modems even existed, has never directly applied to cable modems. Indeed, cable modems have never been subject to local rate regulation.

Zoom has argued that it would not have made sense for the Commission to link the statutory anti-bundling and anti-subsidy requirements for cable modems to the local video rate regulations in 47 CFR §76.923.[11] Thus, Zoom believes the best reading of Section 76.1206 is that it applies to all rate-regulated MVPDs that offer any kind of equipment for lease, whether or not that equipment is used to receive the basic tier of video services. As such, cable modem pricing must be separately stated and not subsidized.

By its terms, Section 76.923 applies to all MVPDs, except in systems where there is

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[11] *See* Zoom Telephonics, Inc. Petition to Deny, or in the Alternative, for Conditional Grant, Docket 15-149 (October 13, 2015) at pp. 18-21; Zoom Telephonics, Inc. Reply to Opposition to Petition to Deny, or in the Alternative, for Conditional Grant, Docket 15-149 (November 12, 2015) at pp. 8-10.

effective competition. In regulated systems, Section 76.923 sets forth rate regulations, including anti-subsidy and anti-bundling requirements, for

> all equipment in a subscriber's home, provided and maintained by the operator, that is used to receive the basic service tier, regardless of whether such equipment is additionally used to receive other tiers of regulated programming service and/or unregulated service.[12]

Section 76.1206 could be read as referring to "equipment...subject to the provisions of §76.923...." Since cable modems are not necessarily devices "subject to the provisions of §76.923...," that reading would not extend the anti-bundling and anti-subsidy requirements to cable modems. However, the better reading is that Section 76.1206 refers to all "[m]ulti-channel video programming distributors...subject to the provisions of §76.923...," and is intended to extend the requirements of the pre-existing Section 76.923 to all equipment covered by Section 629. Thus, any MVPD which offers "navigation equipment for lease" is also subject to the requirements of Section 76.1206, and must therefore adhere to rate regulations and the requirement to separately state their unsubsidized prices for equipment subject to Section 629, *i.e.*, cable modems.

It should not be necessary to have to resolve the ambiguity with respect to the current version of Section 76.1206 because the Commission's proposal to modify Section 76.1206 offers the opportunity to eliminate the confusion. As discussed below, the Commission can and should modify Section 76.1206 to remove uncertainty as to cable modems.

II. PROPOSED RULES PERTAINING TO THE RIGHT TO ATTACH.

Section 629 and the Commission's rules quite properly provides that MVPDs may devise

[12] 47 CFR §76.923(a)(1).

reasonable standards to insure that navigation devices do not cause electronic or physical harm and to preclude attachment of "devices that assist in the unauthorized receipt of service." Because the Commission contemplates updating its set-top box rules to accommodate advances in digital technology, including Internet connected set-top boxes, it has asked for comment on a licensing and certification scheme for these devices.

As described by the Commission in paragraphs 58-60 and 70-71 of the NPRM[13] and in proposed new Section 76.1211,[14] the mechanisms the Commission propose clearly would not apply to or affect cable modems. However, because the Commission uses the term "navigation devices," which also includes cable modems, Zoom asks that if the Commission departs from its current proposals, it take care not to inadvertently apply these new requirements to cable modems.

Similarly, the Commission asks at paragraph 72 of the NPRM if it must modify Section 76.1203 "to assure that those devices do not cause physical harm to the network" and states that it does "not believe that each MVPD should have its own testing and certification process."[15] Zoom would not oppose appropriate changes to Section 76.1203, but it calls upon the Commission to bear in mind that many of the concerns it seeks to address with respect to new set-top box technologies, including concerns about video piracy, are not present in the case of cable modems. Accordingly, Zoom asks that the Commission insure that any modifications made to Section 76.1203 do not impose inappropriate or unreasonable additional requirements for cable modems, such as requirements that jeopardize the retail market for customer-owned

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[13]NPRM, 31 FCCRcd at 1572-73. 1576-77.
[14]NPRM, 31 FCCRcd at 1591-1592.
[15]NPRM, 31 FCCRcd at 1579-1580.

cable modems, or that they unambiguously exempt cable modems from any changes made to Section 76.1203.

With respect to any testing and certification requirements that the Commission may allow cable operators or test facilities to employ for cable modems, Zoom asks that the Commission specify that the approval process be completed within 75 days after a complete application is submitted.

III. PROPOSED RULES PERTAINING TO BILLING AND SUBSIDIZATION.

Regardless of how the Commission determines to revise its rules for set-top boxes, it should clarify that cable modems must be billed separately from Internet service and that the price for cable modem leases not be subsidized.

As in the past, the Commission's discussion in the NPRM of the requirement for billing transparency and subsidization under Section 629 appears to be focused upon set-top boxes and does not recognize that different circumstanceS pertain with respect to cable modems. In particular, at paragraph 85 of the NPRM,[16] the Commission suggests that there is currently no problem with respect to cross-subsidization of equipment leasing prices. While that may or may not be the case for set-top boxes, it is a matter of indisputable fact that Charter Communications, Inc. (Charter) has been bundling cable modems with Internet service and marketing them as "free modems." It is also the case that Cablevision Systems Corporation had a similar policy until recent changes that continue to inadequately protect cost savings for customers who supply their own cable modems. Thus, there is a clear imperative to fulfill the goal of Section 629 by protecting the existing retail market for cable modems through a clear prohibition on separate

[16] 31 FCCRcd 1585-1586.

billing and subsidized prices.

A. Section 629 Imposes A Mandatory Obligation to Prohibit Bundling and Subsidization.

In discussing its proposed modification of 47 CFR §76.1206, the Commission explains that its *1998 Order* was premised on the notion that it need not concern itself with equipment pricing in markets where there is effective competition.[17] The Commission's analysis cannot be squared with the mandatory command in the plain language of Section 629, which states that the Commission

> ***shall***,...adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services...of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services....

(Emphasis added.) Section 629 further provides that

> Such regulations ***shall not prohibit*** any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

(Emphasis added.)

It is a fundamental tenet of statutory construction that "Unless the context otherwise indicates, use of the word "shall" (except in its future tense) indicates a mandatory intent."[18] There is nothing in the context of Section 629 that provides any basis for concluding that Congress intended to make the billing and subsidy provisions of Section 629 discretionary.

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[17] NPRM, 31 FCCRcd at 1584, citing *1998 Order*, 13 FCCRcd at 14810.

[18] 1A Sutherland Statutory Construction §25:4 (7th ed.)(citing cases); *see Mallard v. United States District Court*, 490 U.S. 296, 302 (1989).

Where statutory language is unambiguous, contrary legislative history is of no consequence. "Legislative history is irrelevant to the interpretation of an unambiguous statute."[19]

However, notwithstanding the mandatory language of Section 629, in the 1998 Order the Commission justified linking the billing and subsidization requirements of Section 629 to a snippet of legislative history. The passage consists of one very short question and answer in the Senate floor debate of Section 629 in which Senator Faircloth asked about the application of the subsidization provision to "rate regulated services" and Senator Burns replied that "The bill's prohibition on bundling and subsidization no longer applies when cable rates are deregulated.[20]

B. The Market For Internet Services Is Not Competitive.

There is no textual basis in the statute upon which the Commission can justify its adherence to the statement of a single Senator. Even if the cited legislative history could support forbearance from applying separate billing and subsidization requirements to set-top boxes, it unquestionably would have no bearing on cable modems. Neither Internet service nor cable modem leases have ever been rate regulated, so using rate regulation as a measure would make no sense. Moreover, the basis on which local cable rates are subject to deregulation is when the FCC determines that there is "effective competition" under Section 623(a)(2) of the Communications Act. Whatever may be the case for video services, there clearly is not effective competition in the market for fixed broadband. As the Commission has most recently determined,

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[19] *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 n.3 (1989)(citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977)).

[20] *1998 Order*, 13 FCCRcd at 14813 (citing 142 Cong. Rec. S700 (daily ed. Feb 1, 1997)).

> only 38 percent of Americans have more than one choice of providers for fixed advanced telecommunications capability. The competitive options for advanced telecommunications capability are even more limited in rural areas with only 13 percent of Americans living in rural areas having more than one choice of providers of these services compared to 44 percent of Americans living in urban areas.[21]

Thus, even if the Commission were correct that it need not enforce Section 629 when services are subject to effective competition, that certainly cannot be a justification for failing to require that cable modem prices be separately stated and not subsidized.

C. The Commission Must Insure That MVPDs Separately State the Price for Leased Cable Modems.

While Zoom believes that the current version of 47 CFR §76.1206 requires cable operator to state separate prices for cable modem leases and prohibit subsidization, it strongly urges the Commission to adopt the proposed revision of Section 76.1206 to delink the separate billing requirement from local video rate regulation. Even if the Commission declines to take that step for set-top boxes, it should clarify that under existing rules, any requirement for separate billing for cable modems is not linked to local video rate regulation. Alternatively, if it chooses to continue to link separate billing requirements for set-top boxes to local video rate regulation, it should modify Section 76.1206 to provide that separate billing is required for cable modems without regard to the state of local video rate regulation.

D. The Commission Must Prohibit Cross-subsidization of Cable Modem Leases.

In proposing to amend Section 76.1206 to require that equipment prices be separately stated, the Commission has also asked whether it "should also impose a prohibition on cross-

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[21] *2016 Broadband Progress Report*, 31 FCCRcd 699, 702 (2016).

subsidization of device charges with service fees."[22] It says, without explanation, that "we read the statute to permit us to make an individual determination whether to impose one requirement or the other, or both (or neither)."[23] It then asks, among other things, if "present market circumstances warrant adoption of an anti-subsidization rule?"[24]

As discussed above, Zoom believes that the requirements of Section 629 are mandatory, not discretionary. Even if that were not so, to the extent that the Commission determines that conditions require that it enforce Section 629, there is no textual or logical basis to adopt a separate billing requirement without also prohibiting cross-subsidization. And, as to cable modems, it is unquestionably the case that market conditions justify an anti-subsidy provision. Charter has continued to bundle the price of cable modems and Internet service and to aggressively promote its offerings as including "free modems." This policy has dramatically reduced retailers' sales of cable modems in stores located in Charter territories.

As the record in Docket 15-257 establishes, prior to November 2014, Cablevision provided all of its customers with what it characterized as "free" modems. Many customers with older service contracts are grandfathered and receive bills that separately state a price of "$0.00" for their modems.[25] Similarly, as the record in Docket 15-149 demonstrates, since 2012 Charter has bundled its cable modem leases with Internet service and aggressively promoted its "free modems."

It is clear from the facts on the ground that merely requiring that cable modem leasing

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[22] NPRM, 31 FCCRcd at 1585.
[23] *Id.*
[24] *Id.*
[25] See Attachment A.

prices be separately stated is insufficient to protect against cross-subsidization and that a specific prohibition is necessary. Thus, the Commission's speculation that "[a] requirement of separate statement, by itself, should help to enable competition in the marketplace" is demonstrably wrong, at least as to cable modems. For instance, it clearly does not enable competition to separately state a price of zero for the cable modem. Moreover, as the Commission suggests, a clear prohibition on cross-subsidization will, indeed, "provide a useful prophylactic against future attempts to cross-subsidize[.]"[26] Zoom notes in this regard that, in seeking to acquire cable systems owned by Time Warner Cable and Bright House Networks, Charter proposed to extend its cross-subsidized "free" modem pricing to those companies' customers.

The Commission has also asked how to implement an anti-subsidy rule. Zoom agrees that the provisions of Section76.1205(b)(5) could provide a useful model for determining a price "reasonably allocable" to a device lease. Zoom also agrees with the suggestion that the Commission should prohibit long-term contracts that include a cable modem lease or conditioned upon the lease of a cable modem. Alternatively, and more simply, the Commission might adopt a presumption that a lease price is not subsidized if it is no less than 75% of the average price charged by the three MSOs most similar in size and that charge a non-zero price. Such an approach would also address circumstances where an MVPD attempts to ascribe a zero or near-zero price for a cable modem.

Finally, the Commission asks parties to address its 1998-era concern that "[a]pplying the subsidy prohibition to all MVPDs would lead to distortions in the market, stifling innovation and

[26]NPRM, 31 FCC Rcd at 1585.

undermining consumer choice."[27] At least as to cable modems, history demonstrates precisely the opposite to be true, and that this speculation was completely unfounded. Where cable modems are separately billed at a non-subsidized price, a robustly competitive market for cable modems has developed with aggressive price competition. Equally important, where cable modems are offered "free" with Internet service as in the case of Charter, the retail market has been stifled. At least where there is no comparable or higher speed service competition such as fiber optic service, cable operators have strong financial incentives to leave increasingly outdated equipment in place rather than to replace it with new, state of the art equipment with additional features and capacity. Zoom and its retail competitors offer a wide range of cable modems, including high-speed 16x4 models (*i.e.*, 16 downstream channels and 4 upstream channels) and 32x8 models as well as models with wireless routers that support such features as 802.11ac wireless. By contrast, the "free" modems Charter has supplied its customers are simple moderate-speed 8x4 "bridge cable modems," which do not have the higher speeds, wireless router, or telephony capabilities.

There is, in short, a compelling need to for the Commission to comply with the mandate to adopt a specific prohibition on subsidized prices for cable modem leases and that is not linked to local cable video rate regulation or any other limiting measure.

CONCLUSION

The cable modem market is a model for what the Commission seeks to establish for set-top boxes. The Commission can and should protect and promote a vigorous and competitive retail market for cable modems by enforcing Section 629 to require separate billing of

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[27] NPRM, 13 FCCRcd at 1585 (citing *1998 Order*, 13 FCCRcd at 14812).

unsubsidized prices for cable modem leases.

Respectfully submitted,

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