Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF ZOOM TELEPHONICS, INC.

Zoom Telephonics, Inc. (Zoom) respectfully submits these reply comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[1]

Zoom was joined by TiVo and the Consumer Video Choice Coalition (CVCC), among others, in supporting the Commission's proposal to adopt rules that specifically implement the billing transparency mandate of Section 629. As CVCC observed, the plain language of Section 629 is unambiguous and specifies that "the Commission should not prohibit 'any' MVPD from offering, for example, set-top boxes to consumers, as long as that MVPD separately states a charge for such a device and it is not subsidized by charges for any other service."[2]

The comments supporting adoption of the proposed billing transparency rules underscore Zoom's position that separate billing at unsubsidized prices is not only mandated by law but is also sound and necessary policy. As TiVo said,

> Each of these requirements is necessary for consumers to enjoy the benefits of competition....Separately stating charges and reducing charges for subscribers who bring their own [device] will allow consumers to compare the cost of leasing v. purchasing a navigation device and to make informed choices. In addition, a prohibition on cross-subsidization will prevent MVPDs from disadvantaging competitive devices and potentially keeping a competitive market from developing by using predatory pricing practices until the competitive entrants are

[1] *Expanding Consumers' Video Navigation Choices*, 31 FCCRcd 1544 (2016)(*NPRM*).
[2] CVCC Comments at p. 46.

forced out.[3]

The only objections to the Commission's billing transparency proposals come from the National Cable and Telecommunications Association (NCTA), which mischaracterizes the Commission as proposing "rate regulation...[which] would increase consumer prices by prohibiting MVPDs from providing free or discounted devices."[4] But the Commission is not regulating or setting prices, and NCTA completely overlooks the reality that, in the context of being bundled with other services, "free or discounted devices" are neither free nor discounted, but cross-subsidized. That is precisely the practice that Congress sought to prohibit.

What is conspicuously absent from NTIA's comments is any mention, much less any discussion, of the plain language of Section 629. Using the word "shall," Section 629 unambiguously directs the FCC to adopt rules on billing and subsidization[5] and specifies that those rules

> *shall* not prohibit any multichannel video programming distributor from also offering...equipment...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.[6]

Rather than explain how "shall" does not mean what it means, NCTA ignores the principle that legislative history is relevant only when there is statutory ambiguity. It points to the one question and answer colloquy in the Senate floor debate on the 1996 Act which Zoom discussed in its initial comments. According to the NCTA, this isolated statement of one Senator

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[3]TiVo Comments at p. 31.

[4]NCTA Comments at p. 169 (citing *NPRM* at ¶¶82-86).

[5]"The Commission *shall*,...adopt regulations to assure the commercial availability,..of converter boxes, interactive communications equipment, and other equipment used by consumers...." (Emphasis added.)

[6]*Id.* (Emphasis added.)

nullifies the clear statutory language. Moreover, NCTA claims, without evidence, that "consumers are attracted to simplified, inclusive pricing,"[7] and that may even be true for some customers. However, it is also true that most customers are attracted to saving money and freedom of choice, and that many customers prefer to save money by buying the modem of their choice.

As the NPRM and the record show, there are two separate problems created by the Commission's failure to have regulations that clearly require unbundled equipment offerings at unsubsidized rates. First, when the price is not separately stated, there is no opportunity for consumers to assess the true charge for their "free" devices because that price is hidden from them. Second, even if there is a separate line item for leased equipment, a subsidized price hampers or precludes the market for customer-owned devices. As to the latter point, NCTA repeats the Commission's statement from 1998, when it adopted rules implementing Section 629, to the effect that

> there is minimal concern with below cost pricing [of navigation devices] because revenues do not emanate from monopoly profits. The subsidy provides a means to expand products and services, and the market provides a self-correcting resolution of the subsidy"[8]

However, in the current proceeding, the Commission quoted that very statement in the NPRM to express its skepticism about the continuing validity of that assertion and of the desirability of linking the billing transparency requirements to local video rate regulation.[9] Significantly, the NCTA does not respond to the Commission's doubts. Indeed, the NPRM and

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[7]NCTA Comments at p. 170.

[8]*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCCRcd 14775, 14812-13, ¶87 (*1998 Order*).

[9]NPRM, 31 FCCRcd 1544, 1584, ¶82 (2016).

the comments in this proceeding overwhelmingly demonstrate that the market for consumer equipment is rife with distortion. And, as to cable modems, the market has unquestionably failed to "self-correct" in the case of Charter Communications, which proudly displays its "free" unsubsidized modems as a feature, not a bug, and has stated its intention to expand that pricing mechanism to its newly-acquired Time Warner Cable and Bright House Networks customers.

There is already ample market information to show that "free" cable modems significantly impair a competitive market for cable modems sold by U.S. retailers. Comcast and Time Warner Cable separately state on customer bills an unsubsidized price for cable modems, and Charter instead offers a "free" cable modem. The result is that retail stores in Charter territories sell almost no cable modems. U.S. retailer sales of cable modems in 2015 exceeded $200 million, and retail sales would be near zero if every service provider followed Charter's example.

As Zoom noted in its comments, even if the Commission were not disposed to change its billing rules for set-top boxes, it should adopt changes that clearly require separate billing and unsubsidized pricing for cable modems. It is noteworthy that NCTA trains its fire on claiming that that the video market is competitive, but does not address the broadband Internet services market, where there is indisputably inadequate competition, or the wireline broadband Internet services market, which is a monopoly or duopoly in most markets. Thus, whatever decision the Commission makes as to billing transparency for set-top boxes, it should require billing transparency for cable modems.

Finally, Zoom notes that NCTA rather listlessly attempts to argue that cable modems are not subject to the coverage of Section 629. However, the settled law is to the contrary; the

Commission expressly held that cable modems are covered by Section 629 in its *1998 Order*[10] and that holding has gone undisputed even now, because NCTA does not even cite it, much less claim that it was in error. In fact, during the pendency of this docket, the Media Bureau entered into a consent decree with Charter Communications for its non-compliance with Section 629 by Charter improperly "prevent[ing] the connection or use of navigation devices...."[11] In its *Order*, the Bureau unequivocally stated that "'[n]avigation devices' include cable modems, which are used to access "other services" (namely, broadband Internet access) offered over a cable system."[12]

CONCLUSION

The issues here are straightforward, and the answers are clear. The Commission has a duty and sound reason to adopt clear rules to insure that leases for navigation devices, including cable modems, must be offered on an unbundled basis at unsubsidized prices. The need for prompt action to adopt such rules is especially important as to cable modems, as the absence of such rules and Charter's recent acquisition of Time Warner Cable and Bright House Networks threaten to significantly reduce the current robust retail market for cable modems.

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[10]Zoom Comments at p.4, citing *1998 Order*, 13 FCCRcd at 13784.

[11]*Charter Communications, Inc., Investigation of Compliance with Rules Relating to Navigation Devices*, DA 16-512 (MB), released May 10, 2016, at p.1.

[12]*Id.*

Respectfully submitted,

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