

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Comcast Corporation's)	CSR-7012-Z
Request for Waiver of)	
47 C.F.R. § 76.1204(a)(1))	CS Docket No. 97-80

REPLY OF COMCAST CORPORATION

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SUMMARY

Comcast has presented a compelling case for a prompt grant of its requested waiver of the integration ban. The Commission has already “determined” that waivers for low-cost, limited-capability set-top boxes will provide substantial public interest benefits. The Commission has also said repeatedly -- both in its *2005 Integration Ban Order* and in its advocacy in the D.C. Circuit on the integration ban appeal -- that it will favorably consider waiver requests for such boxes and specifically referenced the instant Comcast waiver request in that regard at oral argument before the D.C. Circuit.

The extremely narrow factual question presented by the Comcast waiver request is whether the set-top boxes covered by the request are low-cost, limited-capability devices. Comcast has demonstrated that they are. Multiple comments from a variety of other parties -- including several filed by consumer electronics (“CE”) manufacturers -- provide additional support for this conclusion. No comments by those opposing the request show otherwise. That should end the inquiry, and the waiver should be granted promptly.

Those opposing the waiver intentionally ignore the Commission’s prior statements about favorably considering waivers for low-cost, limited-capability set-top boxes, including the Comcast waiver, and they fail to offer any reason why this waiver does not fall squarely within the category of boxes anticipated by the Commission. Instead, their opposition focuses on a hodge-podge of extraneous issues, and insist (despite the Commission’s previous statements to the contrary) that any waiver of any kind would be inconsistent with the integration ban rule. These arguments should be summarily rejected.

The simple fact is that the requested waiver would bring many public interest benefits to consumers, cable operators, and CE manufacturers and no corresponding harms. But denial of the waiver request would impose substantial costs on consumers and operators alike while

providing *no* corresponding public interest benefits. Denial would make low-cost, limited-capability set-top boxes significantly more expensive, slow consumer adoption of digital services, and delay the migration of cable systems to an all-digital, full-service network that can provide an unprecedented array of services to consumers. And denial would do nothing to promote the retail consumer equipment marketplace.

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To: Chief, Media Bureau		

REPLY OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to comments filed in response to its request that the Commission waive its integration ban rule for certain low-cost, limited-capability set-top boxes.¹ These comments confirm that the Waiver Request meets the Commission’s standard for waiver: allowing such set-top boxes to continue to be deployed with integrated security will advance important public interests and cause no public interest harms. Because the Commission has stated that it would favorably entertain waiver requests for low-cost, limited-capability set-top boxes, and because the statute directs that properly justified

¹ See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Comcast Request for Waiver, CSR-7012-Z, CS Dkt. No. 97-80 (Apr. 19, 2006) (“Waiver Request”); see also *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Public Notice, CS Dkt. No. 97-80, DA 06-1022 (rel. May 17, 2006).

waiver requests must be granted within 90 days,² the Commission should promptly grant Comcast's Waiver Request.

I. THE COMMISSION SHOULD PROMPTLY APPROVE THE COMCAST WAIVER REQUEST CONSISTENT WITH ITS PRIOR STATEMENTS REGARDING LOW-COST, LIMITED-CAPABILITY SET-TOP BOXES.

A. The Commission Pledged To Consider Favorably Waivers For Low-Cost, Limited-Capability Set-Top Boxes.

As noted by several commenters,³ the Commission has said repeatedly -- both in its *2005 Integration Ban Order* and in its recent advocacy before the D.C. Circuit in the appeal of that *Order* -- that it would favorably entertain waiver requests for low-cost, limited-capability set-top boxes. In the *2005 Integration Ban Order*, the Commission said that it “will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”⁴ Subsequently, in its brief to the D.C. Circuit, the Commission said that it “*promised to mitigate the potential short-term cost burdens of the integration ban by entertaining requests for waiver of the ban with respect to certain ‘low-cost, limited capability boxes’*”⁵ and added further in this regard that:

[T]he Commission undertook to consider waivers of the integration ban with respect to limited capability set-top boxes . . . [and] *determined* that waivers for such boxes would benefit those cable subscribers most concerned about the cost

² 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 . . .”).

³ See, e.g., NCTA at 2-3; Motorola at 2-3; Pace Micro at 3; Scientific-Atlanta at 1.

⁴ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Rept. & Order, 20 FCC Rcd. 6794 ¶ 37 (2005) (“*2005 Integration Ban Order*”).

⁵ Brief of Respondents at 14, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006) (“FCC Brief”) (emphasis added).

of equipment, while maintaining the overall benefits of the integration ban with respect to boxes with more advanced capabilities⁶

Finally, at oral argument before the D.C. Circuit on May 11, 2006, counsel for the Commission stated that: “The Commission . . . announced that it would receive waiver requests from cable companies that wanted to continue providing no frills, simple digital set-top boxes on an integrated basis. *The Commission said it would be favorably inclined to view waiver requests for these boxes . . . and, in fact, the Commission has already received such a waiver request from Comcast.*”⁷

Opponents of the Waiver Request willfully ignore these prior Commission statements. But, in point of fact, none of the opponents has *ever* objected to these statements when given the opportunity. The Consumer Electronics Association (“CEA”), for example, did not raise any objections to the grant of waivers for low-cost, limited-capability set-top boxes in its brief to the D.C. Circuit in the integration ban appeal⁸ -- and, in fact, a CEA representative sat with counsel for the Commission at oral argument when the counsel made his statement about the expected favorable treatment of waivers for low-cost, limited-capability boxes, including the instant Waiver Request. Yet not one of the waiver opponents even acknowledges these prior Commission statements -- much less offer any reason why the Commission should now go back on its word.

⁶ *Id.* at 30 (emphasis added).

⁷ Oral Argument Transcript at 21, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006) (“Oral Argument Transcript”) (emphasis added).

⁸ *See* Brief of Intervenor Consumer Electronics Association, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 21, 2006).

B. The Record Clearly Shows That The Waiver Applies To Precisely The Types Of Low-Cost, Limited-Capability Devices For Which The Commission Said It Would Favorably Consider Waivers.

The narrow factual question presented by the Waiver Request is whether the set-top boxes specified in that request are low-cost, limited-capability devices. The simple answer is that they are. As noted in the Waiver Request and reiterated by various commenters, the DCT-700, Explorer-940, and Pace Chicago set-top boxes include a digital tuner, analog outputs, and other very basic functionality.⁹ Because the Commission has said it will favorably consider waivers for low-cost, limited-functionality devices -- and the boxes subject to the Waiver Request qualify as such -- the Commission should remain consistent with its prior statements and grant the waiver.

Contrary to the claims by one waiver opponent,¹⁰ none of these devices include any “advanced capability” enumerated by the Commission in its discussion of waivers for low-cost, limited-capability set-top boxes in the *2005 Integration Ban Order*.¹¹ These devices do *not* include digital video recording (“DVR”) or broadband Internet access capability; do *not* tune multiple channels of video programming; and do *not* produce a high-definition (“HD”) output. The mere fact that these devices support limited interactive services, such as video-on-demand (“VOD”) and electronic program guide (“EPG”) services, does not make these low-cost devices even remotely comparable to a high-end plasma HDTV or a DVR with HD functionality (“HD/DVR”).

⁹ See Waiver Request at 4-7 & Exhibits A-C; see also Motorola at 1-2; Pace Micro at 2-3; Scientific-Atlanta at 1-2. Microsoft also agrees that these devices are “limited capability.” See Microsoft at 2.

¹⁰ See IT Commenters at 3.

¹¹ See *2005 Integration Ban Order* ¶ 37.

C. The Waiver Grant Should Cover All Low-Cost, Limited-Capability Set-Top Boxes And All MVPDs That Deploy Them.

As even the waiver opponents acknowledge, grant of the waiver would apply to the three set-top boxes specified in the Waiver Request and would also apply to all multichannel video programming distributors (“MVPDs”) that deploy such boxes.¹² The waiver grant should also apply to replacement or successor set-top boxes with similarly limited capabilities as well as devices that share the same or similar characteristics as those set-top boxes referenced in the Waiver Request.¹³ Such an approach is fully consistent with the waiver standard in the Commission’s navigation device rules and with the navigation device statute, as well as the public interest.¹⁴

Microsoft expresses concern about what types of functionality successor boxes might provide and urges the Commission to limit the scope of the waiver to the devices specified in the Waiver Request.¹⁵ These concerns are misplaced. First, as the Waiver Request makes plain, Comcast is *not* asking that the waiver encompass set-top boxes with DVR, HD, multiple tuning, or broadband Internet access functionality, so successor set-top boxes subject to the Waiver Request would not include such capabilities.¹⁶ Rather, it is only asking that cable operators and their suppliers have the latitude to incorporate the latest advances in set-top box design to reduce

¹² See, e.g., Sony at 5; IT Commenters at 3; CEA at 12-13. Microsoft, which supports the waiver with conditions, also takes this view. See Microsoft at 5.

¹³ See Pace Micro at 4; Motorola at 6; Scientific-Atlanta at 2; see also NCTA at 3-4; ACA at 7.

¹⁴ See 47 C.F.R. § 76.1207 (“Such waiver shall be effective for all service providers and products in the category in which the waiver is granted.”); see also 47 U.S.C. §549(c) (“[S]uch waiver shall be effective for all service providers and products in that category[.]”).

¹⁵ See Microsoft at 10.

¹⁶ See Waiver Request at 7.

further the costs of such devices.¹⁷ Second, requiring Comcast or other MVPDs to apply for separate waivers for every successor device would impose substantial administrative burdens on MVPDs and the Commission.¹⁸ It would plainly be in the public interest to clarify that the waiver grant applies to successor devices.¹⁹

D. Consistent With The Statutory Waiver Standard, The Commission Must Act On The Waiver Request Within 90 Days Of Application.

As Comcast and NCTA have pointed out,²⁰ Section 629(c) of the Communications Act directs the Commission to grant properly justified requests for waiver of its navigation device rules “within 90 days of any application.”²¹ Comcast filed its Waiver Request under the relevant Commission rule for granting such waivers, Section 76.1207. The Commission must, therefore, act on the Waiver Request within 90 days of the application (*i.e.*, by July 18, 2006). The Commission has previously granted at least one permanent waiver pursuant to this waiver

¹⁷ Over time, it is routine that functions performed by multiple discrete components can be consolidated in fewer components through the design of integrated circuits. This can reduce size, complexity, power requirements, and heat buildup -- thus reducing costs. Comcast has already been able to take advantage of advances in set-top box design to bring down the cost of limited-capability set-top boxes. For example, the original series of limited-capability DCT set-top boxes from Motorola cost about \$300 per device. Now, low-cost, limited-capability set-top boxes, at volume, typically cost between \$70 and \$100 per device. Comcast expects that further advances in set-top box design will result in further cost savings.

¹⁸ See Waiver Request at 7; *see also* NCTA at 3-4; Pace Micro at 4-5; Scientific-Atlanta at 2; Motorola at 6.

¹⁹ Comcast filed its Waiver Request pursuant to the waiver provision in the navigation device rules and statute as well as the Commission’s general waiver provisions in Sections 1.3 and 76.7 of its rules. The Commission has a duty to entertain requests for waiver when the basis for the rule is no longer valid. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”); *see also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1192-93 (D.C. Cir. 1983).

²⁰ See Waiver Request at 7-8; NCTA at 3.

²¹ 47 U.S.C. § 549(c).

provision and it did so within *fifty days* of filing of the waiver application.²² The 90-day deadline should likewise be honored here.²³

CEA and Microsoft are mistaken when they say that the waiver should be denied because it is not for a “limited time.”²⁴ The Commission has *already* construed Section 629(c) and its accompanying rule, Section 76.1207, as allowing it to grant *permanent* waivers of the navigation device rules.²⁵ In any event, the Commission also has authority to grant permanent waivers of its rules pursuant to its general public interest waiver authority under Sections 1.3 and 76.7 of the Commission’s rules.²⁶

* * *

In sum, the Commission has said repeatedly that it will favorably consider waivers for low-cost, limited-capability set-top boxes -- and can now make good on those promises by granting prompt approval to the instant Waiver Request, consistent with the requirements in Section 629(c) of the Communications Act. Such Commission action is further supported by the substantial public interest benefits associated with a waiver grant, as discussed in the following section.

²² See *In the Matter of BellSouth Interactive Media Services, L.L.C.: Petition for Permanent Relief*, Mem. Opin. & Order, 19 FCC Rcd. 15607 (2004) (“*BellSouth Waiver*”).

²³ Comcast has also made the “appropriate showing” that a waiver should be granted here. As noted here and in the Waiver Request, Comcast is asking for waiver for exactly the types of low-cost, limited-capability set-top boxes for which the Commission has said repeatedly it would favorably consider waivers of the integration ban rule.

²⁴ See CEA at 13-14; Microsoft at 4.

²⁵ See *BellSouth Waiver* ¶ 8 (granting permanent waiver pursuant to Section 629(c) of the Communications Act and Section 76.1207 of the Commission’s rules).

²⁶ See Waiver Request at 20 n.55 (citing precedent where the Commission has granted permanent waivers pursuant to the public interest standard).

II. THE RECORD HIGHLIGHTS THE MANY PUBLIC INTEREST BENEFITS THAT WILL RESULT FROM GRANT OF WAIVERS FOR LOW-COST, LIMITED-CAPABILITY SET-TOP BOXES.

The Commission has already identified that substantial public interest benefits would flow from grant of waivers for low-cost, limited-capability set-top boxes.²⁷ The comments filed in this proceeding further underscore and expand on those Commission determinations.

First, grant of the waiver will accelerate consumer adoption of digital services. The Commission noted in its *2005 Integration Ban Order* that: “It is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition.”²⁸ Numerous commenters affirm that conclusion. The American Cable Association (“ACA”) provides several examples of small cable systems relying on low-cost, limited-capability set-top boxes “to provide smaller market customers with digital services that they can afford, including local VOD, family, and themed-tier programming.”²⁹ Likewise, Microsoft “recognizes the importance of ensuring consumers have access to low-cost [set-top boxes], and supports the cable industry’s desire to focus resources on solutions that will facilitate the digital transition.”³⁰ Panasonic notes that the Waiver Request “would provide [consumers with analog TVs] a first-time view of the

²⁷ See *supra* Section I.A (quoting Commission statements regarding the public interest benefits of waiver grants for low-cost, limited-capability set-top boxes).

²⁸ *2005 Integration Ban Order* ¶ 37.

²⁹ ACA at 2. ACA also notes that such low-cost set-top boxes have been very popular with customers of small market operators, such as BendBroadband, Atlantic Broadband, and Sunflower Broadband. See *id.* at 3-7. Comcast has had the same experience. See Waiver Request at 5.

³⁰ Microsoft at 10.

benefits of going ‘digital,’ both in improved signal quality, as the Comcast request notes, and in expanded quantity and choice of programming.”³¹

Second, grant of the waiver will facilitate Comcast’s (and other cable operators’) transition to all-digital networks. As the Commission recognized in its *2005 Integration Ban Order*, “[t]he availability of low-cost boxes will further the cable industry’s migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television.”³² Commenters agree. ACA emphasizes that, for small cable operators, low-cost set-top boxes are “the only feasible means of moving to an all-digital network.”³³ Thomson and Panasonic observe that this accelerated transition to digital will also spur consumer interest in HDTVs and other digital products. For example, Thomson notes that: “The quicker Comcast -- and other MSOs -- can make the transition, the quicker it can free up analog spectrum for HD and other digital services. The rollout of more HD services will, in turn, generate more consumer interest in buying HDTVs and other digital products at retail.”³⁴

Third, approval of the waiver will enable the cable industry to maintain momentum on downloadable security. The Commission has already highlighted the many public interest benefits associated with downloadable security, noting, among other things, that downloadable security will offer a “less expensive and more flexible system for both protecting system security

³¹ Panasonic at 5. Motorola, Scientific-Atlanta, and Pace also point out these pro-consumer benefits. See Motorola at 3; Scientific-Atlanta at 1; Pace Micro at 2-3.

³² *2005 Integration Ban Order* ¶ 37.

³³ ACA at 7.

³⁴ Thomson at 1; see also Panasonic at 2 (noting that the migration of consumers to digital service “will broaden awareness of the digital transition and encourage cable subscribers to learn more about their overall digital television choices”).

and creating a consumer product interface.”³⁵ Several commenters agree that the transition to downloadable security is highly desirable. Motorola notes the substantial progress that has been made on downloadable security and the substantial resources it is committing to this initiative.³⁶ Scientific-Atlanta and Pace Micro emphasize the benefits of downloadable security as well.³⁷

In sum, the record affirms what the Commission has already concluded: grant of waivers for low-cost, limited-capability set-top boxes will provide substantial public interest benefits. In contrast, as next discussed, there is no merit to claims by waiver opponents that approval of the waiver will result in public interest harms.

III. APPROVAL OF THE WAIVER WILL HAVE *NO* ADVERSE EFFECTS ON THE RETAIL MARKETPLACE FOR NAVIGATION DEVICES.

As the Commission correctly determined in its *2005 Integration Ban Order*, exempting low-cost, limited-capability set-top boxes from the integration ban “will not endanger the development of the competitive marketplace” for cable-ready equipment.³⁸ Waiver opponents do not directly rebut this prior Commission conclusion. Their efforts to assert alleged harms to the retail marketplace for navigation devices are without merit.

³⁵ *2005 Integration Ban Order* ¶ 31; *see also id.* (noting that downloadable security “is likely to facilitate the development of a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition”); *id.* (noting that downloadable security “would not require the potentially costly complete separation of the physical security element”).

³⁶ *See* Motorola at 4-5 (noting that “Motorola has dedicated over 80,000 man-hours so far to downloadable security development and testing” and “anticipates committing substantial, additional resources to the downloadable security effort in the future”).

³⁷ *See* Scientific-Atlanta at 2; Pace Micro at 3.

³⁸ *2005 Integration Ban Order* ¶ 37; *see also* FCC Brief at 30 (stating that the Commission “determined that waivers for [limited capability set-top boxes] would benefit those cable subscribers most concerned about the cost of equipment, while maintaining the overall benefits of the integration ban with respect to boxes with more advanced capabilities”).

A. Low-Cost Set-Top Boxes Do Not Compete With Retail Cable-Ready Devices.

As Comcast pointed out in its Waiver Request, the overwhelming majority of cable-ready products certified, verified, or self-verified for production are HDTVs or HD/DVRs.³⁹ CE manufacturers have shown virtually no interest in building low-cost set-top boxes for retail. Therefore, opponents' complaints about the lack of CableLabs' specifications and licenses for CE manufacturers to build low-cost products for sale at retail ring hollow.⁴⁰ The CE industry has never asked for such specifications and licenses. Rather, its entire focus has been on building higher-end products for retail.⁴¹

Furthermore, Microsoft's proposed condition to require Comcast to make the low-cost set-top boxes available from unaffiliated sources is completely unnecessary. First, as Comcast made plain in the Waiver Request, it is fully committed to diversifying its equipment supplier base for its set-top boxes. With respect to the low-cost boxes, Comcast's current plans are to purchase the devices from three suppliers -- Motorola, Scientific-Atlanta, and Pace Micro -- but

³⁹ See Waiver Request at 15 (citing CableLabs' data regarding certified, verified, or self-verified digital cable-ready products).

⁴⁰ See CEA at 13; IT Commenters at 3. None of these parties goes so far as to claim it eventually wishes to build such a product.

⁴¹ Broader complaints by CEA and others about CableLabs' licensing and specifications for two-way products and DCAS, *see, e.g.*, CEA at 11-13, IT Commenters at 4, are completely extraneous to the merits of this Waiver Request and are blatant attempts to increase these parties' leverage in inter-industry negotiations on issues that do not involve low-cost, limited-capability set-top boxes. In any event, NCTA has fully rebutted these allegations in prior filings in CS Docket No. 97-80. *See* NCTA Report on Two-Way Digital Cable Ready Televisions, filed in CS Dkt. No. 97-80 (Nov. 30, 2005) (describing licensing and specifications for two-way cable-ready products); NCTA Report on Downloadable Security, filed in CS Dkt. No. 97-80 (Nov. 30, 2005) (detailing licensing for DCAS); NCTA Reply Comments, filed in CS Dkt. No. 97-80 (Feb. 6, 2006) ("NCTA DCAS Reply Comments") (rebutting CE and IT industry claims regarding DCAS). Moreover, CE manufacturers are now developing two-way products subject to CableLabs' licenses and specifications. *See* Waiver Request at 15 n.44 (noting efforts by Samsung, LG, and Panasonic to develop and produce two-way cable-ready products).

Comcast wishes to expand its relationships with other equipment suppliers, as well.⁴² Grant of the waiver will facilitate those efforts. In contrast, Microsoft's proposal to limit the waiver to devices specified in the Waiver Request,⁴³ each of which is unique to a single manufacturer, would *prevent* Comcast from buying a virtually identical device from any new supplier.⁴⁴ Second, Comcast has no objection to selling low-cost set-top boxes directly to customers or through unaffiliated retail outlets and would be happy to explore such options with retailers if the waiver is granted. It is worth noting in this regard, however, that Comcast has approached retailers previously about selling integrated set-top boxes in their stores, and they have shown little or no interest in doing so.⁴⁵

B. Grant Of The Waiver Will Not Affect Consumers' Ability To Buy Cable-Ready Products At Retail.

Sony makes the astounding claim that "customers would be harmed if the waiver is *granted* as they would not be able to access the benefits of the CableCARD as readily."⁴⁶ This assertion is wrong as a matter of law and fact. First, Comcast -- like every other cable operator -- is required to support CableCARDS pursuant to the Commission's rules.⁴⁷ Comcast complies

⁴² See Comcast Waiver at 18.

⁴³ See Microsoft at 10.

⁴⁴ Likewise, denial of the Waiver Request would undermine Comcast's efforts to persuade other CE manufacturers to build these low-cost set-top boxes because Comcast would have to pursue other equipment options. See Waiver Request at 18; *see also* Pace Micro at 4 (noting the harmful effects of denial of the waiver on Pace Micro and other "second source" suppliers of set-top boxes to cable operators).

⁴⁵ The Commission has also noted previously that Motorola and Scientific-Atlanta "had attempted to negotiate deals with retailers to purchase and market set-top boxes, but received little to no retailer interest." *2005 Integration Ban Order* ¶ 14.

⁴⁶ Sony at 10 (emphasis in original).

⁴⁷ See 76.640(b) (requiring cable operators to support CableCARD-equipped devices in their digital cable systems); *see also* 76.1204(a)(1) (requiring MVPDs to make available separate security equipment).

with this requirement today and will comply with that requirement after grant of the Waiver Request.⁴⁸ Second, approval of the Waiver Request will have no effect on the ability of consumers to buy digital cable-ready products at retail.⁴⁹ Comcast has over 70,000 CableCARD subscribers today⁵⁰ and will continue to support CableCARDS used by these customers and any subsequent CableCARD customers after the waiver is granted.

C. Grant Of the Waiver Will Not Adversely Affect “Common Reliance.”

CEA, Sony, Sharp, and IT Commenters complain that grant of the waiver will undermine “common reliance” and thereby impair the marketplace for navigation devices.⁵¹ These concerns are baseless. The Commission has taken the view that common reliance by leased and retail

⁴⁸ Sony and other waiver opponents also make a number of extraneous claims regarding cable industry support for CableCARD-equipped products. As discussed *supra* note 41, such extraneous claims are not properly considered in this waiver proceeding. Moreover, those claims have been fully rebutted in prior filings by NCTA in CS Docket No. 97-80 and the integration ban appeal to the D.C. Circuit. See NCTA Report on CableCARDS, filed in CS Dkt. No. 97-80, at 9 (June 29, 2006) (“But CE problems with [Unidirectional Digital Cable Products (“UDCPs”)] go well beyond the ordinary set of issues in the launch of a new product. *This is largely due to inadequate testing of UDCPs, and manufacturer efforts to hide problems from the cable industry, consumers, the FCC, and from each other.*” (emphasis in original)); see *id.* (noting that problems with UDCPs include “selling non-verified ‘Digital Cable Ready’ UDCPs for use on cable systems (an FCC labeling violation); selling UDCPs with various hardware problems such as defective power supplies, bad tuners, bad solder joints, projector lamps that interfere with the CableCARD interface, defective main boards, bad wave solder processes, component tolerance issues, bent pins, and software/firmware problems such as improperly designed software, corrupt software and firmware that doesn’t function properly”); see also NCTA Report on CableCARDS, filed in CS Dkt. No. 97-80 (June 26, 2006) (“6/26/06 NCTA CableCARD Report”) (detailing problems with CableCARD-equipped retail products); NCTA Report on CableCARDS, filed in CS Dkt. No. 97-80, at 2 (Mar. 30, 2006) (“In fact, where issues have arisen, CE manufacturing problems have led to many of the customer frustrations with CableCARD-equipped DTV sets. The lack of ‘common reliance’ cannot be the reason why one manufacturer’s CableCARD-enabled DTV does not work properly with a CableCARD when the DTVs from other manufacturers work perfectly using the same CableCARD on the same cable system. Many of these problems experienced with CableCARD-enabled sets have nothing to do with, and cannot be fixed by, ‘common reliance.’ *More than likely they are due to the process of ‘self-verification’ under which most CableCARD-enabled DTVs are not tested at CableLabs.*” (emphasis in original)); NCTA DCAS Reply Comments at 26-27; Reply Brief of Petitioners and Intervenors at 11, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 31, 2006) (“Cable Reply Brief”).

⁴⁹ See Waiver Request at 14-15.

⁵⁰ See 6/26/06 NCTA CableCARD Report (providing Comcast CableCARD data).

⁵¹ See CEA at 2-10; Sony at 4-7; IT Commenters at 7-8; Sharp at 1-2.

navigation devices on the same security technology is necessary to ensure that MVPDs “will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment.”⁵² The cable industry has taken issue with claims regarding the need for common reliance,⁵³ but even assuming its validity, common reliance will be unaffected by the Waiver Request.

As Comcast noted in its Waiver Request, under the integration ban, new higher-end set-top boxes Comcast leases to its customers (such as those with HD/DVR capabilities) would have to rely on separable security just like cable-ready equipment offered at retail, whether that security is delivered via a CableCARD or downloadable security.⁵⁴ Comcast deploys such higher-end leased boxes (such as HD/DVRs) in every digital cable system it operates,⁵⁵ and that will continue to be the case after the integration ban goes into effect.⁵⁶

⁵² 2005 Integration Ban Order ¶ 30.

⁵³ As noted *supra* Section III.B., cable operators already have a legal obligation to support CableCARD-equipped devices. Furthermore, in light of intense competition from DBS and other service providers, cable operators already have strong incentives to maximize the range of equipment options and distribution outlets for devices to enable customers to obtain cable service. See Initial Brief of Petitioners and Intervenor NCTA at 10-11, 42-43, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Dec. 27, 2005) (“Cable Brief”) (“Cable’s economic interest is to increase the number and features of navigation devices that may attract and retain customers and the number of sources where consumers can obtain such equipment.”); see also Cable Reply Brief at 10-11.

⁵⁴ See Waiver Request at 15-16.

⁵⁵ It is worth noting that, as of March 31, 2006, 28% of Comcast’s digital customers subscribed to DVR and/or HDTV services, as compared to 17% a year earlier. See Comcast Press Release, *Comcast Reports First Quarter 2006 Results*, at 2 (Apr. 27, 2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=848480&highlight=>.

⁵⁶ Sony’s and CEA’s comments about the alleged lack of scale economies for CableCARDs are without merit. See Sony at 6; CEA at 6-7. The cable industry has already deployed approximately 170,000 CableCARDs. See 6/26/06 NCTA CableCARD Report at 1. Furthermore, Comcast anticipates that deployments of CableCARD-equipped higher-end set-top boxes will number in the millions after the integration ban goes into effect (regardless of the eventual migration of its cable set-top boxes to downloadable security).

As a result, the Commission can have every confidence that Comcast's networks, operations, and customer care services will be fully supportive of CableCARDs, whether deployed in leased boxes or digital cable-ready products purchased at retail. In short, the Commission's goal of common reliance will be fully realized. Furthermore, there would be no added benefit from a common reliance standpoint in requiring CableCARDs in low-cost, limited-capability set-top boxes. Higher-end set-top boxes provide all of the services that can be delivered by low-cost set-top boxes and, of course, much more. Thus, including a CableCARD in low-cost set-top boxes would provide no added level of assurance regarding Comcast's support for the CableCARD in its networks, operations, and customer service.

For these and other reasons, Sony's and Microsoft's concerns about how many low-cost set-top boxes Comcast or other operators may deploy are misplaced.⁵⁷ First of all, since common reliance is unaffected by the deployment of low-cost set-top boxes, the precise number of low-cost set-top boxes that might be deployed in coming years is irrelevant. What matters from a common reliance standpoint is that Comcast will be deploying higher-end set-top boxes with separable security in all of its digital cable systems once the integration ban goes into effect, and those devices -- not low-cost set-top boxes -- will assure common reliance.⁵⁸ Second, it is unclear how transitioning as many analog customers to digital as quickly and cheaply as possible

⁵⁷ See Sony at 5-6; Microsoft at 4-5.

⁵⁸ The fact that Comcast will be deploying these CableCARD-equipped set-top boxes in substantial numbers also answers CEA's concerns that CableCARD-related products will be viewed as "specialty" items. See CEA at 4, 8.

could possibly give cause for concern, particularly to CE manufacturers who stand to benefit by selling digital products to such customers.⁵⁹

Finally, Sony’s allegations about the “stockpiling” of low-cost set-top boxes are completely without merit. Stockpiling is not an issue regardless of whether or not the Waiver Request is granted. If, on the one hand, the Waiver Request is granted, the integration ban would not apply to the integrated low-cost set-top boxes and stockpiling considerations with respect to such devices would be irrelevant. If, on the other hand, the Waiver Request is denied, Comcast will have to pursue a CableCARD alternative to the integrated low-cost set-top boxes, so stockpiling low-cost boxes would make no sense.

* * *

In sum, as the Commission has previously stated, grant of the waiver will have substantial public interest benefits “while maintaining the overall benefits of the integration ban with respect to boxes with more advanced capabilities.”⁶⁰ In contrast, as next explained, denial or delay of the Waiver Request will create profound harms.

IV. THE RECORD MAKES CLEAR THAT DENIAL OF THE WAIVER WILL IMPOSE SUBSTANTIAL PUBLIC INTEREST HARMS ON CONSUMERS AND CABLE OPERATORS.

A. Denial Of The Waiver Will Increase The Cost Of Low-Cost Set-Top Boxes.

As Comcast noted in its Waiver Request, imposing a CableCARD requirement on low-cost, limited-capability set-top boxes would entail a costly redesign of the devices and, when combined with the cost of the CableCARD, would increase the costs of the devices by 50% or

⁵⁹ See *supra* note 34 (citing statements by Panasonic and Thomson that the cable transition to an all-digital network will spur consumer interest in buying HDTVs and other digital products at retail).

⁶⁰ FCC Brief at 30.

more.⁶¹ Thomson underscores the point, noting that separable security “now represents a very large percentage of the cost of low-end [set-top boxes]” and that “[n]ot granting a waiver for low end [set-top boxes] would mean a significant incremental cost.”⁶² Other manufacturers concur.⁶³

Sony rehashes arguments made previously in the navigation device docket regarding the costs of including a CableCARD in a set-top box.⁶⁴ These arguments are extraneous to the Waiver Request and should be disregarded -- and in any event have been fully rebutted by NCTA in numerous filings in the navigation device docket.⁶⁵ But even assuming that the redesign costs were at the low range suggested by Sony (*i.e.*, \$25 per device), such costs would still have a dramatic impact on the economics of a set-top box, which at volume typically cost between \$70 and \$100 per device.

It bears emphasis that these CableCARD-related costs would translate into higher costs not only for Comcast and other cable operators, but also for cable customers. Indeed, the Commission has acknowledged this fact.⁶⁶ Sony says that “it does not advocate enforcement of

⁶¹ See Waiver Request at 17.

⁶² Thomson at 1.

⁶³ See Motorola at 4; Scientific-Atlanta at 2.

⁶⁴ See Sony at 7-9.

⁶⁵ See, *e.g.*, Letter from Neal M. Goldberg, NCTA, to Jonathan Cody, FCC, filed in CS Dkt. No. 97-80 (Jan. 11, 2005); Letter from Neal M. Goldberg, NCTA, to Jonathan Cody, FCC, filed in CS Dkt. No. 97-80 (Jan. 4, 2005); Letter from Neal M. Goldberg, NCTA, to W. Kenneth Ferree, FCC, filed in CS Dkt. No. 97-80 (Dec. 20, 2004); Letter from Neal M. Goldberg, NCTA, to W. Kenneth Ferree, FCC, filed in CS Dkt. No. 97-80 (Jan. 7, 2003); Report of NCTA Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, filed in CS Dkt. No. 97-80 (Aug. 2, 2002).

⁶⁶ See Comm. Daily at 6 (May 12, 2006) (noting that, at oral argument before the D.C. Circuit, “[Commission attorney Joseph] Palmore conceded that the FCC solution could raise costs that customers could have to shoulder. Asked by Ginsburg if those would be ‘significant,’ Palmore said: ‘The Commission is quite candid about that . . . perhaps an additional \$2 a month’”); see also Oral Argument Transcript at 21.

the [integration ban] mandate simply to cause economic harm to Comcast,”⁶⁷ but that is precisely the effect that denial of the waiver would have on Comcast *and its customers*. Sony, CEA, and other waiver opponents are insisting that Comcast’s customers incur significant additional costs merely because those customers want to have more powerful parental controls, or to access family tiers, or to have access to digital programming, or to keep a TV that previously was used for over-the-air broadcast reception working after analog broadcasting is discontinued. And waiver opponents demand that these costs be imposed on consumers notwithstanding the absence of any clear public interest benefits for the CE industry or anyone else.⁶⁸ As Thomson points out, “[d]iversion of Comcast’s resources to solutions that may have been bypassed by technology will not enhance the robustness or competitiveness of the future digital marketplace.”⁶⁹

⁶⁷ Sony at 9, 13-14.

⁶⁸ CEA's advocacy here is decidedly in contrast with its advocacy in other contexts. In connection with possible legislation to protect content delivered via satellite radio, CEA has run full-page ads in Capitol Hill publications faulting the content industry for advocating government solutions to marketplace issues. *See, e.g.,* “You’ve Heard This Song Before,” *Roll Call*, at 27 (June 20, 2006). CEA faults the content providers for asking government to “step in and stop new technologies” -- precisely what CEA is doing here. CEA salutes Congress for having “chosen free markets over regulation” -- a choice CEA opposes with respect to low-cost, limited-capability set-top boxes. CEA concludes: “It’s time to say Enough is Enough. Let Innovation Work -- Oppose Technology Mandates” CEA has made similar points in its “Guiding Principles for Telecommunications Policy Reform,” stating, among other things that “government should not be picking winners and losers among the emerging, competing technologies” but instead “government should let service providers and manufacturers compete in the open marketplace” and “impose only a minimal level of regulation” on new networks and services. *See CEA Guiding Principles for Telecommunications Policy Reform*, available at http://www.ce.org/shared_files/initiatives_attachments/282Telecom%20Principles%20FINAL.pdf; *see also* “CEA Government and Policy Initiatives,” available at http://www.ce.org/GovernmentAffairs/Current_Policy_Initiatives/initiatives_issues.asp (noting that CEA favors marketplace rather than regulatory solutions to “fair use,” energy conservation, recycling, and broadband issues, among other things). It is unfortunate that CEA is singing a different tune in this proceeding.

⁶⁹ Thomson at 1.

B. Denial Of The Waiver Will Slow Consumer Adoption Of Digital Services And Delay Comcast’s Transition To An All-Digital Network

Comcast emphasized in its Waiver Request that requiring low-cost set-top boxes to include a CableCARD would force Comcast to pursue more-costly equipment options and that this, in turn, would slow consumer adoption of digital services and delay Comcast’s transition to an all-digital network.⁷⁰ ACA provides further concrete examples on how denial of the Waiver Request will undermine the digital transition plans of small cable operators:

- “Armstrong management believes that if the Waiver Request is not granted, its business and its subscribers will suffer. The company anticipates that CableCARD-compatible boxes will be at least \$70 more than the [low-cost set-top boxes], so fewer subscribers will be able to afford digital services. . . . Without the requested waiver, Armstrong’s digital transition will be hobbled.”⁷¹
- “Atlantic Broadband reports that if these [low-cost] boxes are subject to the integration ban, the company will be required to spend about \$125 more for each CableCARD-compatible box, and will have to pass on the higher cost to its subscribers. Atlantic Broadband believes that this would adversely impact its digital penetration rate and its ability to compete with DBS.”⁷²
- “Accordingly, if these [low-cost] boxes are not carved out of the integration ban, Cable ONE will need to re-evaluate its plans and the economic feasibility of moving to an all-digital network throughout its footprint.”⁷³

Thomson also agrees that denying the Waiver Request will “slow down the transition to all-digital services and technologies.”⁷⁴

⁷⁰ See Waiver Request at 18.

⁷¹ ACA at 5.

⁷² *Id.* at 6.

⁷³ *Id.* See also *id.* at 4 (noting, with respect to BendBroadband, “the ban on integrated boxes will have the unintended effect of stopping the digital transition in its tracks in smaller markets”).

⁷⁴ Thomson at 1; see also Panasonic at 2 (“Panasonic supports Comcast’s waiver request primarily as a means to help ensure the Nation’s smooth, non-disruptive transition to digital television”); Motorola at 4; Scientific-Atlanta at 2.

Sony's answer to these clear public interest harms is to say, in essence, too bad: Comcast and other cable operators should redesign their low-cost set-top boxes to include the CableCARD, notwithstanding the substantial costs associated with such a redesign and the lack of any corresponding benefit to consumers, cable operators, or even CE manufacturers.⁷⁵ Sony then makes the astounding claim that grant of the waiver will actually constitute a *subsidy* to Comcast and other cable operators as they transition to all-digital networks.⁷⁶ It is difficult to address this absurdity -- the suggestion that removing a costly and unnecessary regulatory requirement that serves no public interest benefit somehow qualifies as a subsidy.⁷⁷

C. Denial Of The Waiver Will Slow Implementation Of Downloadable Security.

The Commission expressed concern in its *2005 Integration Ban Order* regarding the diversion of resources away from downloadable security,⁷⁸ and there are similar risks present if a CableCARD alternative must be developed for low-cost set-top boxes.⁷⁹ As Motorola notes, reallocation of resources away from downloadable security efforts to develop such CableCARD alternatives “will slow progress on downloadable security and deny cable operators, cable customers, and CE manufacturers the many public interest benefits associated with

⁷⁵ See Sony at 8.

⁷⁶ See *id.* at 7.

⁷⁷ Comcast has spent billions of dollars in private capital to build out its broadband networks, and the cable industry as a whole has invested over \$100 billion in its infrastructure over the last 10 years. See NCTA, *2006 Industry Overview*, at 9 (Mar. 27, 2006), available at http://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf. It is also curious that Sony would complain about subsidizing the transition to digital when CE manufacturers will benefit enormously from the new \$1.5 billion government subsidy program for digital converter boxes. See 2005 Budget Act § 3005, 120 Stat. 4, 23-24 (2006).

⁷⁸ See *2005 Integration Ban Order* ¶ 31 (noting that, if the integration ban were not deferred, “resources would be diverted from producing a downloadable security system to physical separation of the security element from set-top boxes”).

⁷⁹ See Motorola at 5; see also Waiver Request at 19.

downloadable security and generally detract from further innovation with respect to cable equipment -- all without any clear public interest benefit.”⁸⁰

Waiver opponents make two basic objections regarding further investment in downloadable security. First, CEA complains that, as cable migrates to downloadable security, that transition will serve to marginalize CableCARD-equipped devices.⁸¹ As noted above, Comcast’s new higher-end set-top boxes will include CableCARDs (and number in the millions) after the integration ban goes into effect, so concerns about common reliance are misplaced.⁸² Moreover, as the Commission has recognized, eventual migration to a downloadable security platform will provide cost and efficiency benefits for cable operators and CE manufacturers alike, and should be encouraged.⁸³ Second, the IT Commenters renew their criticism of the DCAS license that has been developed by CableLabs⁸⁴ and make no bones about their interest in using the Waiver Request as a way to leverage more advantageous licensing terms from CableLabs.⁸⁵ These complaints are outside the scope of this proceeding and otherwise without merit.⁸⁶

⁸⁰ Motorola at 5.

⁸¹ See CEA at 5.

⁸² See *supra* note 56 (noting Comcast’s deployments for CableCARD-enabled set-top boxes).

⁸³ 2005 Integration Ban Order ¶ 31.

⁸⁴ See IT Commenters at 4.

⁸⁵ See *id.* at 8 (“In sum, The IT Commenters urge the Commission to reject the Comcast request and *direct the cable industry to work with the IT industry more closely on win-win solutions*” (emphasis added)).

⁸⁶ See NCTA DCAS Reply at 6-24 (rebutting IT industry complaints about DCAS). For the same reasons, the Commission should reject the IT Commenters’ request that CableLabs approve DTCP-over-IP as an output protection technology for cable-ready devices. See IT Commenters at 6. This request has nothing to do with low-cost, limited-capability devices and thus is completely irrelevant to this waiver proceeding.

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In sum, denial of the Waiver Request will create substantial public interest harms for consumers and cable operators alike. Grant of the waiver, in contrast, would help avoid these harms and, as explained next, would also comport with prior Commission decisions granting waivers of its cable equipment rules.

V. GRANT OF THE WAIVER WOULD BE FULLY CONSISTENT WITH COMMISSION PRECEDENT.

Contrary to Sony's claims,⁸⁷ grant of the waiver is fully consistent with relevant Commission precedent. First, the Commission has granted permanent waivers pursuant to Section 629(c) of the Communications Act and Section 76.1207 of the Commission's rules where, as here, "waiver is necessary to assist the development or introduction of a new or improved multichannel video programming service."⁸⁸ Second, the Commission has granted permanent waivers of its cable equipment rules where, as here, application of the rules would result in clear and substantial public interest harms.⁸⁹ Denial of the Waiver Request would be costly and highly disruptive for Comcast and its customers. It would deny customers a cost-effective option to receive digital services and delay the transition to digital; it would also slow work on downloadable security.

Sony's attempts to distinguish this precedent are unavailing. Of course, the facts in prior waiver cases are not identical to the facts presented here, but that is hardly relevant to whether the legal principles articulated in those cases can be applied here. Sony itself would strenuously

⁸⁷ See Sony at 10-12.

⁸⁸ *BellSouth Waiver* ¶ 8; see also 47 U.S.C. § 549(c); 47 C.F.R. § 76.1207.

⁸⁹ See Waiver Request at 20 n.55 (citing relevant precedent).

resist, in other contexts, the extraordinarily narrow view it espouses here with respect to how precedent should be applied. Under the Sony view expressed in this proceeding, the fair use principles articulated in the *Betamax* decision in 1984, for example, would have no application beyond the VCRs discussed in that decision.⁹⁰ Of course, Sony elsewhere argues for an extremely expansive reading of the *Betamax* case, including its application to technologies that were utterly unimaginable in 1984.

⁹⁰ See *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

VI. CONCLUSION

For the foregoing reasons and those detailed in the Waiver Request, Comcast respectfully urges the Commission to promptly grant its request for waiver of the integration ban as applied to the DCT-700, Explorer-940, Pace Chicago, replacement and successor set-top boxes, and set-top boxes that share similar characteristics as these boxes.

Respectfully submitted,

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