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**BY HAND DELIVERY**

Federal Communications Commission
Media Bureau
P.O. Box 358205
Pittsburgh, PA 15251-5205

**Re: In the Matter of Application of Charter Communications Inc.'s Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)**

Dear Sir or Madam:

On behalf of Charter Communications Inc., we hereby transmit an original and four (4) copies of the above-referenced Request for Waiver. Also transmitted herewith are completed FCC Form 159 and a check in the amount of one thousand one hundred and sixty dollars ($1,160) to cover the required filing fee.

Please call us if you have any questions regarding this matter.

Sincerely,

Paul Glist
Paul Hudson

cc: Donna Gregg, Media Bureau Chief
Bill Johnson
Deborah Klein
Steve Broeckaert
Natalie Roisman
John Wong
Mike Lance
Andrew Long

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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|---|---|
| In the Matter of<br><br>Charter Communications, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1) | CSR- |

To: Chief, Media Bureau

**REQUEST FOR WAIVER**

Pursuant to Section 629(c) of the Telecommunications Act of 1996, 47 U.S.C. § 549(c), and Sections 76.7 and 76.1207 of the Commission's rules, 47 C.F.R. §§ 76.7, 76.1207, Charter Communications, Inc. ("Charter") respectfully requests the Commission to grant a waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1) to the limited extent set forth herein. Grant of the requested waiver will benefit consumers and will not impede Congress' and the Commission's objectives for the development of a competitive marketplace for navigation devices. Accordingly, the waivers are in the public interest and must be granted.

## I. The Commission is Required to Grant Waivers of the Integration Ban that Are Unnecessary to Effectuate Section 629 and that Would Serve the Public Interest.

Section 629(a) instructs the Commission to adopt regulations "to assure the commercial availability" of navigation devices.[1] Congress understood, however, that such regulations could have the unintended effect of chilling the development of new or improved service offerings. Indeed, the overriding goal of Section 629 was to bring

[1] 47 U.S.C. § 549(a).

about "innovation, lower prices and higher quality for consumers."[2] Where these objectives would be thwarted by regulation, Congress *required* the Commission to grant waivers.[3] The Commission's regulation to implement this requirement, Rule 76.1207, instructs cable operators to file waiver petitions pursuant to Section 76.7 of the Commission's rules, which, along with established precedent, provides that the Commission may waive or grant other special relief from its rules where, in doing so, "the public interest would be served."[4] More broadly, the Commission is always required to "take a 'hard look' at meritorious applications for waiver, and must consider all relevant factors," especially where the application of a general rule to a specific situation would not serve the public interest underlying the rule.[5]

## II. Charter Requests a Waiver for Low-Cost, Limited-Function Set-Top Boxes for Which the Commission Has Invited Waiver Requests on Three Occasions.

Charter seeks waiver of the integration ban for seven models of low-cost, limited-functionality set-top boxes that do not include any of the following capabilities: high-

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[2] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

[3] 47 U.S.C. § 549(c). "The Commission shall waive a regulation adopted under subsection (a) for a limited time upon an appropriate showing … that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology or products. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection …."

[4] *See* 47 C.F.R. § 76.1207 ("waiver requests should be made pursuant to § 76.7"); 47 C.F.R. § 76.7(i) ("The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request . . . ."). *See also id*. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[5] *KCST-TV, Inc. v. FCC*, 699 F2d 1185, 1191-1192 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the "logic of applying [the rule] collapses," and it was arbitrary to apply the rule. *Id.* at 1192, 1195. *See also WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("[A] general rule, deemed valid because the 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."); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

definition (HD) output, multiple tuners, digital video recorder (DVR) recording or storage, or broadband Internet access. The seven models are the Motorola DCT700 (standard definition (SD) all-digital), Motorola DCT2500e (SD analog/digital), Scientific Atlanta E1840 (SD all-digital), Scientific Atlanta E940 (SD all-digital currently under development designed to replace the E1840), Scientific Atlanta E3200 (SD analog/digital), Pace "Chicago" DC501p (SD all-digital for Scientific Atlanta conditional access systems) and Pace "Indiana" DC511p (SA SD analog/digital for Scientific Atlanta conditional access systems). Detailed specifications for each of these models are provided in Section III below and in Exhibits B-H hereto.[6]

The Commission has specifically recognized on three recent occasions that a waiver of the integration ban may be particularly appropriate for these very types of low-cost, limited-function set-top boxes. In its 2005 *Second Report and Order*, the Commission explained:

> We are also in agreement with NCTA's assertion that achieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. 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. The 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. Accordingly, as cable systems migrate to all-digital networks, we will also consider whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis. We are inclined to believe that provision of such devices

[6] Charter requires a waiver for each of these models because different models must be used in different locations depending on the varying technology deployed in its different systems. For example, devices designed to work with Motorola conditional access security systems cannot operate where Charter uses Scientific Atlanta's security system, and vice versa. In addition, Charter must use analog/digital devices rather than all-digital devices in certain systems, particularly in rural areas, where for financial and technical reasons Charter could not complete a conversion to all-digital simulcast prior to the effective date of the integration ban.

> by cable operators will not endanger the development of the competitive marketplace envisioned in Section 629, particularly because the more advanced devices offered by cable operators for primary home use will be required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers. In the interim, we will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes. We do not believe that waiver will be warranted for devices that contain personal video recording ("PVR"), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities.[7]

In March 2006, the Commission renewed this invitation and promised to address Charter's concerns (set forth in its appeal of the integration ban to the D.C. Circuit) that a ban applied to Charter's low-cost leased boxes (1) is unnecessary, (2) would impede the digital transition, and (3) would disadvantage Charter's ability to compete with its larger MVPD competitors. The Commission responded by stating 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." …. recognizing the value of preserving a low-cost set-top box option for consumers, at least until volume usage of CableCARDs over time reduced the price of host devices, the Commission undertook to consider waivers of the integration ban with respect to limited capability set-top boxes (*e.g.*, boxes that do not contain capability for recording, display of high-definition programming, or broadband Internet access).[8]

The FCC reiterated this promise during oral argument before the Court on May 11, 2006. As demonstrated below, the Commission must now deliver on this promise by granting the requested waiver for low-cost set-top boxes. Application of the integration ban to these boxes is not necessary to effectuate the supposed benefits of common reliance, and in fact such application would be counterproductive by inhibiting the development of

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[7] *Implementation of Section 304 of the Telecommunications Act of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices,* Second Report and Order, 20 FCC Rcd 6794, ¶ 37 (2005).

[8] Brief for Respondents, *Charter Communications, Inc. and Advance/Newhouse Communications v. FCC,* D.C. Cir. No. 05-1237 at 14, 30-31, filed March 7, 2006.

new and improved digital services as well as video competition generally. The Commission has granted waiver requests for set-top boxes based on similar analyses,[9] and should do so here within 90 days as required by Section 629(c).

## III. Descriptions of the Devices for which Waivers are Requested

The specifications for the devices covered by this waiver request are summarized below and are set forth in more detail in the attached Exhibits B-H.

**Characteristics of All Devices**

All of the devices described below are limited capability set-top boxes that cost less than $100 and are designed to enable cable customers with analog TVs to access digitally delivered programming services and associated features. All of these devices provide access to an electronic program guide ("EPG"), and pay-per-view ("PPV") and video-on-demand ("VOD") services. All of the devices also support closed captioning, parental controls, Macrovision copy protection, and emergency alert messages.

None of these devices include DVR (PVR) recording or storage capability or broadband Internet access capability; none produce any High Definition (HD) output, and none are capable of simultaneously tuning multiple channels of video programming (i.e., for the support of picture-in-picture features).

[9] *See e.g. Pace Micro Technology*, Order, 18 FCC Rcd 21032, 21033, ¶ 4 (2003) (granting permanent relief of rules prescribing tolerances for audio and video carrier separation to avoid "unnecessary disruption for consumers when the degradation of quality to subscribers is minimal and the burden to consumers is significant."); *Media General Cable of Fairfax County*, Memorandum Opinion and Order, 14 FCC Rcd 9568 (1999) (granting request for waiver of the FCC's rules regarding measurements of the amplitude characteristics at the subscriber terminal and recognizing the cost to the consumer and damage to Media General's ability to compete); *GCI Cable Inc*., Memorandum Opinion and Order, 15 FCC Rcd 10843 (2000) (granting request for waiver of the FCC's rules regarding measurements of the amplitude characteristics at the subscriber terminal and noting significant cost to GCI and consumers).

**Motorola DCT700**

The Motorola DCT700 includes a single digital tuner, two analog video outputs (RF and composite), and right and left audio channel outputs. *See* Exhibit B (Specifications for DCT700). Charter currently deploys the Motorola DCT700 in its cable systems that utilize Motorola's conditional access technology and where Charter is "simulcasting" (delivering digitally the same programming services that are delivered in analog).

**Scientific Atlanta Explorer 1840**

The Scientific Atlanta Explorer 1840 serves the same function and has generally the same features as the Motorola DCT700, except that it will be deployed in cable systems that utilize Scientific-Atlanta's conditional access technology instead of Motorola's conditional access technology. *See* Exhibit C (Specifications for Scientific Atlanta E-1840)

**Scientific Atlanta Explorer 940**

The Scientific Atlanta Explorer 940 is a low-cost, limited function set-top box that is currently under development by Scientific Atlanta. Charter expects to begin deploying the box later this year in Charter cable systems with Scientific-Atlanta security and conditional access headend equipment in locations where it has previously used the SA Explorer 1800 and 1840 models. This model is similar to the Scientific Atlanta Explorer 1840 model described above, except that the front display and panel will be eliminated. *See* Exhibit D (Specifications for Scientific Atlanta E-940).

**Pace "Chicago" DC501p**

The Pace "Chicago" DC501p is a low-cost, limited function set-top box that Charter utilizes in certain systems that utilize Scientific Atlanta's conditional access technology and where Charter is simulcasting. *See* Exhibit E (Specifications for Pace "Chicago" DC501p).

**Motorola DCT2500e**

The Motorola DCT2500e is a low-cost, limited function set-top box that serves the same function and has generally the same features as the Motorola DCT700, except that it also has an analog tuner that enables the consumer to receive analog signals where Charter is not simulcasting. *See* Exhibit F (Specifications for Motorola DCT2500e).

**Scientific Atlanta Explorer 3200**

The Scientific Atlanta Explorer 3200 is a low-cost, limited function set-top box that serves the same function and has generally the same features as the Scientific Atlanta E1840, except that it also has an analog tuner that enables the consumer to receive analog signals where Charter is not simulcasting. *See* Exhibit G (Specifications for Scientific Atlanta e3200).

**Pace "Indiana" DC511p**

The Pace "Indiana" DC511p is a low-cost, limited function set-top box that serves the same function and has generally the same features as the Pace "Chicago" DC501p, except that it also has an analog tuner that enables the consumer to receive analog signals where Charter is not simulcasting. *See* Exhibit H (Specifications for Pace "Indiana" DC511p).

## IV. Denial of the Requested Limited Waiver is Not Necessary to Secure the Supposed Benefits of the General Rule.

The Commission's stated rationale for imposing on consumers the costs of the integration ban is to secure the benefits that would supposedly result from a common "reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices."[10] Grant of the requested waiver would in no way compromise this objective. To the extent that Charter is subject to the ban if and when it becomes effective,[11] Charter would still utilize CableCARD-enabled mid-range (i.e., Standard Definition DVRs) and high-end (i.e., HD/DVRs) set-top boxes not covered by this waiver request. Charter estimates that such devices would collectively encompass more than half of all new Charter set-tops placed into service immediately after July 1, 2007, and would generally be leased to Charter's highest-revenue, best customers. Thus, even if the requested waiver is granted but the ban otherwise applies to Charter, Charter would have a "common reliance" on the security technology used by third-party devices, and Charter would have a powerful incentive to assure that such technology functioned properly in order to satisfy its highest-revenue customers to keep them from switching to an alternative MVPD.[12]

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[10] *Second Report and Order*, ¶ 27.

[11] *See, e.g., Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir., oral argument heard May 11, 2006); *see also, e.g.*, § 629(c) (extending, by operation of law, any waiver of the integration ban granted by the Commission (such as any grant of the waiver requested by Verizon on July 10, 2006) to "all service providers and products in that category *and* for all providers of services and products) (emphasis added).

[12] CableCARDs have been deployed to more than 170,000 subscribers by the 10 largest cable operators. Docket CS 97-80, Letter from Neal Goldberg, NCTA, to Marlene H. Dortch, FCC, Jun. 26, 2006, p. 1. The waivers for low-cost devices would not affect competition between cable ready equipment available at retail and the *advanced* set-top boxes offered by Charter. Charter's subscribers are, and will remain, free to purchase cable-ready equipment at retail, and Charter will continue to provide subscribers with separable security for such equipment and support such equipment in accordance with the separate security

Charter's incentive to assure customer satisfaction with their navigation device options would already be maximized and could not be made stronger by the additional inclusion of new low-cost set-top boxes into the equation. There is no getting around the absolute imperative that MVPDs in a *competitive* video services market must satisfy their best and highest-revenue customers.[13]

The Commission has already recognized this fact. As noted above, the *Second Report and Order* tentatively concluded that a waiver for low-cost devices (as is requested herein) would not undermine the Commission's objective of common reliance:

> We are inclined to believe that provision of such devices by cable operators will not endanger the development of the competitive marketplace envisioned in Section 629, particularly because the more advanced devices offered by cable operators for primary home use will be required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers.[14]

Accordingly, application of the integration ban to low-cost set-top boxes is not necessary to achieve the purpose of Section 629 or the Commission's regulations.

It is notable that the Commission has never determined, nor reasonably could it, that it is necessary for 100% of cable customers to use navigation devices with the same security as third-party devices. Whether or not this waiver is granted, the vast majority of Charter customers will not use CableCARD-enabled set-top boxes in 2007. First, the majority of Charter customers do not use any set-top box, period, since set-top boxes are only required for the receipt of digital services. Second, the rule applies only to new boxes placed into service, and does not require Charter to replace boxes already in the field. Both of these categories comprise more customers than the maximum number of

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requirement of 47 C.F.R. § 76.1204(a)(1) and the Commission's "plug and play" rules, 47 C.F.R. §§ 76.640, 76.1901 *et seq*.

[13] *See infra* Section V.B.

[14] *Second Report and Order*, ¶ 37.

CableCARD-enabled set-top boxes that Charter would under any scenario expect to place into service in 2007. If the exclusion of analog and existing customers is not fatal to the success of common reliance or the economic viability of CableCARDs – and the Commission has apparently concluded correctly that they are not – neither would be the limited incremental exclusion of consumers that wish to use low-cost set-top boxes.

Moreover, there is no indication that there would be a benefit to "common reliance" for low-cost, limited-functionality devices since no CE manufacturers apparently have any intent to produce such devices for retail sale. Of the more than 450 CableCARD-enabled products certified, verified or self-verified, almost all of those devices are digital televisions, and none are low-cost, limited-functionality devices similar to those at issue here. Retailers have been unwilling to market low-cost cable set-top boxes directly to consumers, and the CE industry is instead focusing on high-end cable-ready devices that cost hundreds or thousands of dollars.[15]

In addition, forcing MVPDs to devote massive technical, financial, and human resources into putting card slots on low-cost boxes would distract and divert resources from the implementation of downloadable security. The Commission has recognized 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;" that it offers "a less expensive and more flexible system for both protecting system security and creating a consumer product interface;" would "add significantly to the options that equipment manufacturers now have in using the CableCARD;" and would relieve consumers of the "potentially costly complete

[15] *See e.g.*, CS Docket 97-80, Comments of Motorola, Inc., Nov. 15, 2000, pp. 9-11 (describing Motorola's unsuccessful attempts to negotiate deals with Circuit City and Best Buy to purchase and market host set-top boxes).

separation of the physical security element."[16] It would be contrary to the public interest to delay the deployment of downloadable security by pulling resources from that project to the reengineering of low-cost set-top boxes that offers no incremental consumer benefit.

Finally, it is clear that the success of the CE industry does not depend on the presence of CableCARD slots in low-end set-top boxes. As noted by Consumer Electronics Association ("CEA") president Gary Shapiro in his opening remarks at the Consumer Electronics Show in January, "We'll look back in the not too distant future and see 2005 was the tipping point year for digital television when Americans bought some 12 million DTV sets – nearly more than all the prior years of DTV sales combined."[17] Indeed, according to the latest data from the CEA, CE industry revenue rose a record 11 percent to $125.9 billion last year, with digital televisions accounting for $17 billion of the total and expected to increase to $23 billion in 2006.[18] Grant of the requested waiver would not harm this rapidly growing retail market or the thriving CE industry.

Therefore, denial of the waiver is not necessary to effectuate the goals of Section 629 or the Commission's rules. By contrast, as demonstrated below, grant of the waiver is warranted because it would serve the public interest.

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[16] *Second Report and Order*, ¶¶ 28, 31.

[17] Gary Shapiro, 2006 International CES Opening Keynote, Jan. 5, 2006, http://www.cesweb.org/docs/Shapiro_transcript.pdf (viewed July 5, 2006).

[18] *See Consumer Electronics Wholesale Revenue Will Reach $135.4 Billion in 2006, CEA Projects*, CEA Press Release (Jan. 2, 2006), http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=10910 (viewed July 5, 2006).

## V. Grant of the Requested Waiver Would Promote the Public Interest.

### A. Grant of the Requested Waiver For Low-Cost, Limited-Function Navigation Devices Is Necessary to Assist the Development and Consumer Adoption of New and Improved Digital Services.

For many consumers, the most important characteristic of low-cost set-top boxes is just that – their low cost. The devices for which waivers are sought cost less than $100 in volume, and can be reused, enabling Charter to lease the boxes for a modest monthly charge with no term commitment (enabling consumers to return a box or upgrade to one with more or fewer features with no penalty). But the reengineering required to enable these devices to work with CableCARDs would add approximately $72-93 per box,[19] increasing the cost of these boxes by 75%-100% or more. Thus, the relative price increase would be heavily disproportionately borne by a consumer purchasing what until then had been a "low-cost" set-top box, whose price would have increased to a point outside the range of "low cost." Thus, without a waiver, there would no longer be any such thing as a "low-cost" set-top box available from MVPDs that are subject to the integration ban.

The elimination of low-cost cable set-top boxes (integrated or not) would undermine two related objectives that are tremendously important to the Commission and consumers, both of which the Commission has previously determined depend upon the continued availability of "inexpensive digital set-top boxes."

The first of these two objectives is the promotion of digital cable services to replace analog technology. Digital cable offers consumers numerous new and improved capabilities, including more advanced parental controls, video-on-demand, digital picture

[19] *See* CS Docket 97-80, Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, Aug. 2, 2002, pp. 3-7 (describing study conducted by NCTA using data from set-top box manufacturers).

quality, greater channel capacity, and specialized programming and packages of tiers, such as family or international packages. The affordability of low-cost integrated set-top boxes is the foot in the door for many consumers to the world of digital cable that they might otherwise forgo. Thus, the *Second Report and Order* observed correctly that "[t]he availability of low-cost boxes will further the cable industry's migration to all-digital networks."[20]

Charter's digital cable offers an easy user interface for parents to limit the programming the family watches, including the ability to block programs by title, by TV or MPAA ratings, by channel, and in some systems by time of day, with even greater sophistication expected in the future. The requested waivers will ensure that more of Charter's customers will have access to these easy-to-use parental controls for all analog sets within the home. Failure to grant the waivers would slow Charter's transition to an all-digital platform. If Charter is not permitted to offer low-cost set-top boxes, fewer set top boxes would be deployed and fewer customers would have access to digital programming and services. As a result, the migration to an all-digital platform would be slowed.

Second, the Commission found the continued availability of low-cost set-top boxes to be "critical to the DTV transition."[21] On the one hand, such availability will further the cable industry's migration to all-digital networks, which in turn will enable cable operators to "free[] up spectrum and increas[e] service offerings such as high-definition television,"[22] which in turn will stimulate further consumer demand for digital

[20] *Second Report and Order*, ¶ 37.

[21] *Id.*

[22] *Id.*

televisions. In addition, the Commission found 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."[23] Consumers that currently rely on over-the-air broadcasting and who cannot afford new digital televisions before 2009 will need to find other alternatives, and one such alternative would be through a low-cost set-top box leased from a cable company. But to preserve that option, the Commission must grant the waivers that are necessary for low-cost set-top boxes to remain available. As the D.C. Circuit has noted, it would be a bitterly "ironic outcome for an order implementing 'one of the most pro-consumer, pro-competitive provisions of the Telecom Act" if the Commission permitted the integration ban to operate in such a way that it would "deny the most cost-effective product choice to consumers"[24] – which would be the case if cable operators are prohibited from offering integrated low-cost devices that the CE industry has in any event decided not to make available for retail sale.

Thus, grant of the requested waiver is necessary to assist in the development of Charter's new and improved digital cable services, and will also facilitate the national transition to digital television.

### B. A Waiver is Necessary to Enable Charter to Compete on a Level Playing Field with its Larger MVPD Competitors.

Grant of the requested waiver is also critical for consumers to receive the full benefit of a competitive video services market. The Commission is well aware that

[23] *Id.*

[24] *General Instrument Corp. v. FCC*, 213 F. 3d 724, 731-32 (D.C. Cir. 2000).

Charter is subject to intense competition on many fronts.[25] DirecTV and EchoStar are now the second and third largest MVPDs in the nation, each with many more customers than Charter. In addition, Charter faces new competition from Verizon – a company with a market capitalization nearly 200 times the size of Charter – in Keller, Texas, with many other markets to come, and will soon apparently face similar competition from even larger AT&T. Application of the integration ban to Charter's low-cost set-top boxes would significantly hobble Charter in its ability to compete with these much larger MVPD competitors because each of them apparently intend to continue to place integrated set-top boxes into service beyond July 1, 2007.

To be able to offer non-integrated, limited-functionality set-top boxes, Charter would have to bear the enormous capital costs of the integration ban up front.[26] Whatever the capabilities of larger cable operators, Charter simply does not have adequate financial resources to undertake this expense for all of its new devices.[27] And even if Charter could undertake these costs, the act of passing them through to its end-users at an estimated $2-3 per month per box[28] would risk the loss of price-sensitive customers to its competitors, who already are the customers most likely to consider

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[25] *See generally* Twelfth Annual Report to Congress on Video Competition, FCC 06-11.

[26] *See, e.g.,* CS Docket 97-80, NCTA ex parte, Dec. 20, 2004, p. 2. ("With a leased set-top box, the up-front investment rests with the cable operator, who leases the box at a government-prescribed price, and must replace it when the customer tires of its features and wants the next new feature – HD, or a DVR, or more storage capacity.")

[27] *See* Exhibit I, "Charting A New Course," MULTICHANNEL NEWS, Jun. 19, 2006, and Exhibit J, "Charter, Hurt By Satellite TV, Posts Wider Loss," WALL STREET JOURNAL, Mar. 2, 2005.

[28] *See* CS Docket 97-80, Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, Aug. 2, 2002, pp. 3-7 (describing study conducted by NCTA using data from set-top box manufacturers). Note that many customers lease two or more set-top boxes.

changing providers.[29] Because these most price-sensitive customers are also typically the ones most attracted to low-cost integrated set-top boxes, denial of the requested waiver would threaten Charter's ability to retain and attract such consumers, and would thus have serious consequences for Charter.

In a dynamic industry in which players constantly vie to stay ahead of highly-innovative competitors, there would be an enormous opportunity cost to dedicating massive resources to a project that has no return benefit to cable operators or their customers. The cable industry has previously advised the Commission that "a large and growing proportion of the finite technical resources of cable industry suppliers and of cable operators will need to be dedicated toward meeting" the integration ban deadline,[30] and this remains true today. The massive undertaking to develop non-integrated low-cost set-top boxes in addition to other non-integrated devices would thus would divert financial and other resources from future projects, while Charter's larger competitors will remain free to devote their greater resources to developing new features and equipment to try to attract more consumers away from cable.[31] Verizon and AT&T's fiber build-outs are being targeted to select portions of communities, one result of which, if allowed, is that they would be able to cherry-pick cable customers and consequently offer them cable

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[29] It has been Charter's experience that basic customers (which are generally the most-price sensitive customers) have been the most likely to switch to competitive services such as DBS. *See, e.g.*, "Steering through the Storm," MULTICHANNEL NEWS, Oct. 25, 2004 (indicating that most of Charter's approximately 60,000 lost customers during the third quarter of 2004 had been basic-only subscribers).

[30] CS Docket 97-80, Comcast *ex parte*, Jan. 19, 2005, p. 1-2.

[31] For example, DirecTV launched an additional satellite in November 2005 and reportedly has two additional launches scheduled for 2007 to vastly expand its capacity for high-definition and other new services. SBC and Verizon are each spending billions to increase their transmission capacity, which Verizon says will result in "an immense amount of bandwidth compared to a traditional cable operator," lower retail prices, and a "raft of new and unique services and new competition in existing services to the video marketplace." "Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)," filed Jul. 10, 2006, at 2, 7-8.

services at prices lower than those now offered by cable operators that have been required to build-out their plant to serve an entire franchised service area. Verizon has boasted that it achieved a 20% penetration within four months of starting its MVPD service in Keller.[32] Charter should not be required to take on these larger competitors with yet another hand tied behind its back, this time by an enormous financial penalty that, within its service territory, only it and no one else is forced to bear.[33] Given the ultimate pro-competitive objectives of the 1992 and 1996 Acts, and the fact that Congress intended Section 629 to apply to all MVPDs,[34] the Commission cannot idly allow such a result.

While the requested waiver must be granted in any event, the otherwise anti-competitive consequences of the elimination of integrated low-cost set-top boxes make its approval all the more compelling. Denial of the waiver would jeopardize the public interest benefits of vigorous video competition, while grant of the limited waiver would not block the supposed benefits of the general application of the rule and would assist the development of new and improved digital services.

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[32] "Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)," filed Jul. 10, 2006, at 6, fn. 2.

[33] DirecTV no longer supports multiple retail models of set-tops and has shifted retailers into providing only leased proprietary set-top with integrated security. EchoStar also requires use of its own proprietary set-top with integrated security. AT&T and Verizon's video services rely upon a leased proprietary set-top with integrated security. None of these DBS or telephone company devices are interoperable should consumers wish to switch providers. In addition, unlike the case with cable services, there are no digital televisions available at retail today that can be used to access the digital video programming services of DirecTV, EchoStar, Verizon or AT&T without those providers' separate proprietary set-top box.

[34] *Commercial Availability of Navigation Devices,* Report and Order, CS Docket No. 97-80, 13 F.C.C.R. 14775, ¶ 22 (rel. June 24, 1998) ("We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems.).

## VI. Charter Separately Requests Any Additional Waivers Granted by the Commission.

If the Commission grants other waivers of any requirements of its Section 629 regulations, such waivers would automatically apply to all MVPDs as a matter of law. *See* Section 629(c) (providing that if any waiver of Section 629 regulations is granted by the Commission, "such waiver shall be effective for all service providers and products in that category *and* for all providers of services and products." (emphasis added). Thus, Charter need not separately request any such waiver. However, for the avoidance of doubt, Charter formally requests receipt of any waiver granted to Verizon in response to its July 10, 2006 request,[35] as well as any other waiver granted to any other MVPD.

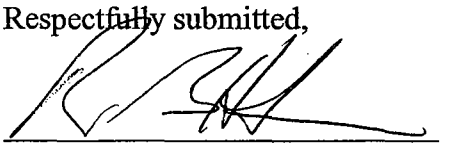
## CONCLUSION

Congress adopted Section 629 to help consumers by *expanding* the choices available to them for navigation devices to access multichannel video programming, in the hope that this expansion would lead to lower prices and a greater variety of services. It would be untenable to allow a regulation adopted solely under the authority delegated by Section 629 to operate to *take away* consumers' ability to choose the option best suited to deliver new digital services at the lowest possible prices. This is especially so where application of the regulation to low-cost boxes is not necessary to produce the supposed benefits of the rule that would otherwise remain in effect. It would also be untenable for the Commission to allow its Section 629 regulations to suppress free and fair competition for video services by allowing companies that are much larger than Charter offer consumers the low-cost devices they want, while prohibiting Charter from

[35] "Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)," filed Jul. 10, 2006.

doing the same. For these foregoing reasons, the Commission should grant the requested waiver within the 90-day time period specified by Section 629(c).

Respectfully submitted,



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