

**WILLKIE FARR & GALLAGHER LLP**

1875 K Street, NW  
Washington, DC 20006

Tel: 202 303 1000  
Fax: 202 303 2000

January 30, 2007

**FILED/ACCEPTED**

**JAN 30 2007**

Marlene Dortch  
Office of the Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Federal Communications Commission  
Office of the Secretary

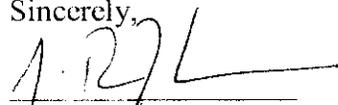
Re: *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. §  
76.1204(a)(1), CSR-7012-Z, CS Dkt. No. 97-80.*

Dear Ms. Dortch:

In accordance with Commission Rule 1.115(f), 47 C.F.R. § 1.115(f), enclosed please find for filing an original and four (4) copies of Comcast Corporation's Application for Review in the above-captioned proceedings. Comcast is also filing an electronic copy of the Application for Review on ECFS in CS Dkt. No. 97-80.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Jonathan Friedman  
*Counsel for Comcast Corporation*

Attachment

RECEIVED 047  
JAN 30 2007

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

FILED/ACCEPTED

JAN 30 2007

Federal Communications Commission  
Office of the Secretary

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

**APPLICATION FOR REVIEW**

Joseph W. Waz, Jr.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, PA 19102

James L. Casserly  
Jonathan Friedman  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, N.W.  
Washington, D.C. 20006-1238

James R. Coltharp  
Mary P. McManus  
COMCAST CORPORATION,  
2001 Pennsylvania Ave., N.W.  
Suite 500  
Washington, D.C. 20006  
(202) 638-5678

Thomas R. Nathan  
COMCAST CABLE COMMUNICATIONS, LLC  
1500 Market Street  
Philadelphia, PA 19102

January 30, 2007

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## SUMMARY

Comcast Corporation (“Comcast”) seeks expedited full Commission review of the Media Bureau’s order denying Comcast’s request for waiver of the Commission’s integration ban rules for certain low-cost, limited-capability set-top boxes (“*Waiver Order*”). The *Waiver Order* is in direct conflict with the Communications Act, Commission regulations, and established Commission policy. Comcast asks that the full Commission reverse the *Waiver Order* and grant Comcast’s request with all due speed. Given the importance of this issue to Comcast and its customers -- and the rest of the cable industry -- timely action is of the essence.

In its March 2005 *Order* and its advocacy before the D.C. Circuit on that *Order*, the Commission recognized that the integration ban could retard innovation and increase costs for consumers. To mitigate these adverse effects, the Commission invited parties to file requests for waiver of the ban for “low-cost, limited-capability” set-top boxes. On April 19, 2006, Comcast filed a request for waiver of the integration ban rule for three set-top box models: Motorola’s DCT-700; Scientific-Atlanta’s Explorer-940; and Pace Micro’s Chicago set-top boxes. These boxes -- the lowest cost and most limited capability set-top boxes that have ever been built -- are precisely the types of boxes for which the Commission said it would consider waivers.

The Communications Act directs the Commission to act on such waiver requests in *90 days*, but *266 days* after Comcast filed its request for waiver, the Media Bureau issued a denial based on a distorted reading of previous guidance by the full Commission, while adding some new and irrational standards for waiver that the Bureau fabricated out of whole cloth:

- Although concern for consumer costs was the touchstone of the Commission’s prior comments on the matter (and Commission counsel subsequently assured a federal appeals court that the Commission had “promised to mitigate these costs”), and although there was substantial record evidence in this proceeding demonstrating the significant cost impact denial of the Comcast waiver would have on consumers, the *Waiver Order* does nothing to address this essential concern.

- The *Waiver Order* misconstrues the Commission's characterization of "low-cost, limited-capability" devices in its *2005 Integration Ban Order*. The Bureau's claim that this term was intended to encompass only one-way devices is pretextual; the *2005 Order* said no such thing, and such a limitation would make no sense.
- The *Waiver Order* violates Section 629(c). Independent of the assurances that the Commission gave in 2005, the underlying statute directs that any navigation device rule that stands in the way of innovation must be waived. The Bureau arbitrarily decided that this Congressional directive should be construed narrowly, ignored substantial evidence that a waiver for low-cost devices would advance the development or introduction of new or improved services for consumers, and failed to act on the waiver request within the statutorily-mandated 90 days.
- The *Waiver Order* constitutes adoption by the Bureau of new policies that conflict with law and policy established by Congress and the full Commission. The Bureau has now unilaterally determined that the Commission's established waiver policy should be premised on cable operators discontinuing their delivery of analog signals by February 2009 (when analog broadcasting will cease), even though the Commission has a substantial factual record demonstrating that the cable transition to digital will take much longer for reasons of technology and consumer inertia. The Bureau has also taken it upon itself to enunciate new policies regarding the pricing and packaging of new programming tiers -- interjecting, sua sponte and without notice and comment, considerations well outside the Bureau's proper purview and in conflict with the Communications Act and Commission rules.

In decades of experience with the Commission, Comcast has never found itself placed in such a difficult position, forced to incur (and to pass along to its customers) substantial costs that are counterbalanced by no public benefit. The failure of the Bureau to act in a timely fashion on a soundly reasoned request for waiver, where the costs of delay were manifest, is inexplicable. Therefore, Comcast must take the highly unusual step of appealing to the sound judgment of the full Commission to promptly reverse the Bureau Order and grant the requested waiver.

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

**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission's rules,<sup>1</sup> Comcast Corporation ("Comcast") hereby files this application for review of the Media Bureau's order denying Comcast's request for waiver of the Commission's integration ban rule for certain low-cost, limited-capability set-top boxes.<sup>2</sup> Comcast asks that the full Commission reverse the *Waiver Order* and grant Comcast's request at the earliest possible date. Given the importance of this issue to Comcast and its customers -- and the rest of the cable industry -- prompt action by the full Commission is essential.<sup>3</sup>

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<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> See *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, CSR-7012-Z, CS Dkt. No. 97-80, DA 07-49 (rel. Jan. 10, 2007) ("*Waiver Order*").

<sup>3</sup> Comcast's waiver request was directed to the Bureau, and the Bureau had delegated authority to grant the waiver under the authority of the 2005 *Order*, Section 629(c), and/or Sections 1.3 and 76.7 of the Commission's rules. The Bureau, however, did not have the authority to change existing waiver standards or make up new policy standards. After it became clear in late August 2006 that the Bureau would not implement current law and policy, Comcast repeatedly asked that the *full Commission* vote on the waiver request. See, e.g., *Comcast Ex Parte* (Aug. 21, 2006); *Comcast Ex Parte* at 2 (Nov. 17, 2006); *Comcast Ex Parte* at 2 (Dec. 5, 2006); see also Statement of (footnote continued...)

**I. THE WAIVER ORDER VIOLATES COMMISSION POLICY WITH RESPECT TO LOW-COST, LIMITED-CAPABILITY SET-TOP BOXES.**

The *Waiver Order* violates Commission policy as set forth in the most relevant and recent Commission order on the subject, the *2005 Integration Ban Order*.<sup>4</sup> That *Order* recognized that “consumers will face additional costs in the short term as a result of the prohibition on integrated navigation devices,” expressed the Commission’s desire to “place as little of the cost burden resulting from the ban on the public,” and agreed that “establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers.”<sup>5</sup> Of particular relevance to the Comcast waiver proceeding, the Commission invited parties to file requests for waiver of the ban for “low-cost, limited-capability” set-top boxes. As the Commission subsequently explained to the D.C. Circuit in *Charter v. FCC*, the Commission “promised to mitigate” the adverse consumer costs of requiring dis-integration of low-cost boxes and “determined that waivers for such boxes would benefit those cable subscribers most concerned about the cost of equipment.”<sup>6</sup> In short, waivers of the ban would preserve a low-cost box option for MVPD customers.

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(...footnoted continued)

Commissioner Jonathan Adelstein, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, at 4 (Dec. 20, 2006) (“It is sadly ironic that this agency, which is now in violation of one of its own 90 day statutory deadlines [with respect to the Comcast waiver request], is telling localities to do as I say, not as I do.”).

<sup>4</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 (2005) (“*2005 Integration Ban Order*”).

<sup>5</sup> See *id.* ¶¶ 27, 29, 37. The Commission also 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” and recognized that “[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.” *Id.* ¶ 37.

<sup>6</sup> Brief of Respondents at 14, 30, *Charter Comm. Inc. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006) (“FCC Brief”); see also Oral Argument Transcript at 21, *Charter Comm. Inc. v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006).

Relying on what the Commission had said in its 2005 *Order* and to the D.C. Circuit, and following all available Commission guidance to the letter, on April 19, 2006, Comcast filed a request for waiver of the integration ban for three set-top box models: Motorola's DCT-700; Scientific-Atlanta's Explorer-940; and Pace Micro's Chicago set-top boxes. As Comcast explained at length in its waiver request and other filings in this proceeding,<sup>7</sup> these are precisely the types of boxes for which the Commission said it would consider waivers. The boxes are low-cost (they cost between \$70 and \$100 at volume) and limited-capability (they include a simple digital tuner, RF and composite analog outputs, and other very basic functionality). *They are the lowest cost, most limited capability digital cable boxes that have ever been commercially offered*, and substantial record evidence showed that the next least expensive digital boxes in commercial production could cost two to three times as much.<sup>8</sup> But the Bureau has made the use of these boxes unlawful, even if specifically requested by the consumer. Thus, as a practical matter, if a consumer with an analog TV set wants to receive digital programming services, the consumer would be required either to lease a more expensive set-top box or buy an entirely new digital TV set. This "solution" may meet the objectives of certain *consumer electronics companies*, but it disregards the interests of *consumers*.

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<sup>7</sup> See, e.g., Comcast Waiver Request at 8-9; Comcast Reply at 4.

<sup>8</sup> See, e.g., *ACA Ex Parte* (Aug. 31, 2006) (noting that, with respect to Armstrong Utilities, DCT-700 costs \$80 while replacement box will cost \$190); *Armstrong Utilities Ex Parte* (Sept. 11, 2006) (same); *RCN Ex Parte* at 2 (Oct. 31, 2006) (noting that, with respect to RCN, DCT-700 costs \$84 while replacement box will cost \$232); *ACA Ex Parte* (Dec. 11, 2006) (noting that replacement box will cost two to three times as much as the cost of the DCT-700).

**A. The Bureau Ignored Established Commission Policy Regarding The Preservation Of A Low-Cost Set-Top Box Option For Cable Customers.**

The Media Bureau's *Waiver Order* wrongly concludes that the waiver process set forth by the full Commission in the *2005 Integration Ban Order* is only available for one-way digital-to-analog converter devices.<sup>9</sup> To limit the scope of waivers in this way would "displace a low-cost set-top box option for MVPD subscribers," which is precisely what the Commission wanted to avoid.<sup>10</sup> The behavior of consumer electronics ("CE") companies and consumers shows that there is little interest in a retail market for one-way devices, and Comcast has no interest in ordering one-way set-top boxes.<sup>11</sup> The whole point of the low-cost, limited-capability box is to provide a cost-effective way to *expand* consumer access to digital services via existing analog television sets. A waiver solely for one-way devices would, in contrast, *deny* consumers the benefits of services they clearly want and value, and it would do so with no countervailing public benefit.<sup>12</sup>

As a practical matter, the *Waiver Order* means that Comcast and most other cable operators will have to include CableCARDs in every new digital set-top box -- including low-cost, limited-capability boxes -- after the ban goes into effect in July. Comcast and other commenters have provided substantial record evidence underscoring the additional costs associated with requiring low-cost boxes to include a CableCARD, including a declaration from

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<sup>9</sup> See *Waiver Order* ¶ 26.

<sup>10</sup> *2005 Integration Ban Order* ¶ 37. The application for review should therefore be granted pursuant to Section 1.115(b)(2)(i) of the Commission's rules. See 47 C.F.R. § 1.115(b)(2)(i).

<sup>11</sup> See *Comcast Ex Parte* at 6 & n.32 (Aug. 9, 2006); *Comcast Ex Parte* at 1-2 (July 21, 2006).

<sup>12</sup> Making the DCT-700 a one-way device, for example, will not change the cost of the device. See *Motorola Ex Parte* (Nov. 8, 2006). The Bureau has not explained how consumers would benefit from paying the *same* amount for a device with *fewer* features.

Dr. Michael Katz, former Chief Economist of the Commission, which concluded that denial of the waiver request could trigger an estimated \$200-300 million of social costs per year.<sup>13</sup> And consumers will bear the costs of the Bureau's decision -- as the cost of limited-capability devices more than doubles.<sup>14</sup>

Incredibly, the *Waiver Order* is completely silent about this critical issue. At no point in the analysis does it address these or other consumer costs associated with denial of the waiver request, including, among other things, slowing Comcast's transition to digital and diverting resources away from downloadable security and other technology and service innovations.<sup>15</sup> (Indeed, Bureau inaction on the waiver request has *already* forced the cable industry to divert substantial resources toward developing other, more costly, limited-capability, CableCARD-enabled boxes.) The Bureau makes no reference to the filings of numerous consumer and

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<sup>13</sup> See Comcast *Ex Parte* (Aug. 1, 2006) (containing economic analysis of Comcast's waiver request by Dr. Katz); see also RCN Reply at 4-5; ACA at 2; Armstrong Utilities *Ex Parte* at 2 (Sept. 11, 2006); ACA *Ex Parte* (Dec. 11, 2006).

<sup>14</sup> See, e.g., Comcast Reply at 17-18 & n.66 (citing cost impact on consumers); Comcast *Ex Parte* (Sept. 12, 2006) (explaining that denial of waiver request will cause monthly lease rates for boxes subject to equipment averaging to increase); see also Oral Argument Transcript at 21 (quoting Commission counsel as saying that CableCARDS will raise costs to consumers by "perhaps an additional \$2 a month").

<sup>15</sup> See Comcast Waiver Request at 17-19; Comcast Reply at 19-21; Motorola at 5; Scientific-Atlanta at 2; see also Letter from Senator Ted Stevens and Congressmen Joe Barton and Fred Upton to Chairman Kevin J. Martin (Nov. 27, 2006). Contrary to the suggestion in the *Waiver Order* (§ 34), there is no downloadable security solution that is "available today" for deployment in Comcast cable systems. Developing a downloadable security solution that is secure, reliable, and scalable requires a significant commitment of time and resources. NCTA has reported on the substantial progress that is being made on such a solution, see NCTA Reply, filed in CSR-7056-Z, CS Dkt. No. 97-80, at 16-21 (Dec. 11, 2006), but the DCAS solution is not ready for commercial deployment today and likely will not be available for initial deployments until the 2008/2009 time frame. With respect to the Beyond Broadband Technology ("BBT") proposal, Comcast has never been shown a product by BBT, nor does Comcast believe the BBT proposal is as far along as DCAS was when the cable industry demonstrated the concept to the Commission in 2005. Moreover, the BBT product that has been described to Comcast is not compatible with any legacy conditional access system utilized by Comcast or with the two-way CableCARD. Consequently, even assuming that the BBT solution could be deployed at scale, doing so would require Comcast to design and support at substantial cost an entirely new conditional access architecture -- and potentially strand billions of dollars in existing equipment. Such an outcome would plainly run counter to the Commission's prior statements about the benefits of downloadable security. See *2005 Integration Ban Order* §§ 3, 31, 36.

advocacy groups and CE companies that supported the Comcast and other waiver requests and underscored the substantial consumer harms that will flow from failing to approve the waivers.<sup>16</sup> The Bureau's disregard of this critical cost issue requires reversal by the full Commission.<sup>17</sup>

**B. The Bureau Misconstrued What The Commission Meant By “Low-Cost, Limited-Capability” Set-Top Boxes.**

The *Waiver Order* states that low-cost, limited-capability devices do not include “devices with two-way functionality or the ability to act as functional PVRs” but rather are limited to “those devices whose functionality is limited to making digital cable signals available on analog sets.”<sup>18</sup> The Bureau's conclusion is contrary to Commission policy and factually incorrect, and should therefore be reversed by the Commission upon review.<sup>19</sup>

There is *no reference anywhere* in the *2005 Integration Ban Order* to excluding two-way set-top boxes from the waiver process. As noted, the *Order* states that: “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.”<sup>20</sup> In fact, the low-cost interactive boxes at issue in the Comcast waiver request include *none* of the advanced capabilities referenced in the *Order*. The Bureau's entire analysis turns on whether “interactivity” qualifies as a “similar advanced capability.” It bears emphasis that, *since*

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<sup>16</sup> See, e.g., Black Leadership Forum (Sept. 28, 2006); Hispanic Federation (Oct. 2, 2006); League of Rural Voters (Oct. 2, 2006); Americans For Prosperity *et al.* (Oct. 2, 2006); National Black Chamber of Commerce (Oct. 3, 2006); Hispanic Technology & Telecommunications Partnership (Oct. 4, 2006); Hispanic Chamber of Commerce (Oct. 6, 2006); Hispanic National Bar Association (Oct. 17, 2006); *see also* Thomson at 1.

<sup>17</sup> See 47 C.F.R. §§ 1.115(b)(2)(i), (iv).

<sup>18</sup> *Waiver Order* ¶ 26.

<sup>19</sup> See 47 C.F.R. §§ 1.115(b)(2)(i), (iv).

<sup>20</sup> *2005 Integration Ban Order* ¶ 37.

*Comcast started deploying digital set-top boxes more than 10 years ago, every single one has had two-way capability.*<sup>21</sup> So, if the Bureau's interpretation were correct, then the Commission would have been establishing a waiver process only for one-way devices that did not exist (and still do not exist)<sup>22</sup> -- and done so without explicitly stating that intention.<sup>23</sup> It defies logic and common sense to believe the Commission would have taken such an approach.<sup>24</sup>

The Bureau appears to rest its approach almost entirely on the use of the word "advanced" in the plug-and-play context.<sup>25</sup> This claim does not withstand scrutiny. First, there is no reference to plug-and-play filings or orders anywhere in Paragraph 37 of the 2005

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<sup>21</sup> See *Comcast Ex Parte* at 7 n.34 (Aug. 9, 2006).

<sup>22</sup> The best the Bureau can do is to cite to a "set-back" converter device exhibited at the NCTA show in 2003, which (as the Bureau notes) was never commercially deployed due to lack of marketplace interest, see *Waiver Order* ¶ 26 n.97; see also *Motorola Ex Parte* (Nov. 8, 2006) (noting "lack of demand" for one-way devices), and which (as the Bureau fails to note) did not support *any* conditional access or encryption, *any* on-screen graphics, or *any* guide capability. Moreover, the price quoted by the Bureau for the *one-way* Pace device is comparable to the price for the *two-way* DCT-700 (around \$70), thus further highlighting the low-cost nature of the two-way device and its eligibility for waiver.

<sup>23</sup> Moreover, in establishing this waiver policy for low-cost devices, the Commission was plainly seeking to accommodate the cable industry's request that a low-cost box option not be foreclosed once the integration ban went into effect. In particular, the Commission said in its *2005 Integration Ban Order* that: "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." *Id.* ¶ 37. NCTA was not talking about one-way devices, but rather the two-way devices offered by cable operators. See NCTA Comments, filed in CS Dkt. No. 97-80, at 14-17 (Feb. 19, 2004) ("Some consumers may prefer a less expensive integrated set-top box offered by a cable operator[.]"). The Bureau does not reconcile the *Commission's* statement that it was "in agreement with NCTA's [views on the matter]" with the *Bureau's* decision to apply a waiver policy for one-way boxes that did not even exist and that the cable industry had no interest in deploying.

<sup>24</sup> See *Comcast ex parte* at 7 n.34 (Aug. 9, 2006). It is noteworthy that no such limitation was mentioned even *after* Comcast filed its waiver request. To the contrary, during oral argument in the D.C. Circuit on the *2005 Integration Ban Order* (which was held just three weeks after Comcast had filed its waiver request), Commission counsel said 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.*" Oral Argument Transcript at 21 (emphasis added).

<sup>25</sup> See *Waiver Order* ¶¶ 27-28.

*Integration Ban Order*.<sup>26</sup> Second, the plug-and-play proceeding had nothing to do with defining the characteristics of a low-cost, limited-capability set-top box; it was focused exclusively on defining features for new unidirectional digital cable-ready products (“UDCPs”).<sup>27</sup> Moreover, NCTA referred to “interactivity” as “advanced” in the plug-and-play context because of the significantly complex issues that had to be negotiated and resolved with respect to allowing *third parties* to design interactive equipment for attachment to cable networks; this network harm concern does not exist with respect to the interactivity at issue here (*i.e.*, Comcast, not a third party, is leasing low-cost boxes to its customers to enable consumer access to interactive services). Third, it would have made no sense for the Commission to have relied on plug-and-play concepts from 2002 in its 2005 *Order*. Under the unidirectional plug-and-play framework, one-way retail devices *cannot* include interactive features (what the Bureau calls “advanced” features), but *can* include HD, DVR, and multiple tuning functionality.<sup>28</sup> If plug-and-play were truly the touchstone for how the Commission viewed “low-cost, limited-capability” boxes, why did the Commission include HD, DVR, and multiple tuning functionality in the list of proscribed “advanced capabilities”? The simple answer is that plug-and-play is irrelevant to what defines a “low-cost, limited-capability” set-top box, and the Bureau’s reliance on cable industry statements

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<sup>26</sup> Nor has any party to the Comcast waiver proceeding -- including waiver opponents -- suggested that the Commission was thinking about plug-and-play when it defined the parameters for low-cost, limited-capability boxes.

<sup>27</sup> See Letter from Carl Vogel, Charter, to Chairman Michael Powell (Dec. 19, 2002) (including memorandum of agreement between cable and CE industries on one-way plug-and-play devices); see also 47 C.F.R. § 15.123 (defining labeling requirements for UDCPs); *id.* § 76.640 (defining requirements for cable industry support for UDCPs).

<sup>28</sup> The TiVo Series3 product, for example, is a UDCP that includes HD, DVR and multiple tuning functionality, but is not considered an “advanced” interactive product under the plug-and-play regime. See <http://www.tivo.com/2.0.boxdetails.asp?box=series3HDDVR> (product description for TiVo Series3 device).

and other documents from the plug-and-play context is pretextual. In any event, the plug-and-play discussions provide no excuse for limiting the definition of waiver-eligible boxes to boxes no consumer would want.

Furthermore, contrary to the Bureau's determination, the potential networking capability in the Pace and Scientific-Atlantic boxes does not make them "advanced capability" devices. As Comcast explained in its waiver application, the Pace box includes an *optional* USB port and the Scientific-Atlanta box has an *optional* S-Video port that can be used for networking.<sup>29</sup> (The Motorola box does not include any such ports.) Comcast has *no* current planned uses for either port -- for home networking or any other purpose. As technology develops, these ports *might* be used at some future point to support the networking of video and audio content within the home.<sup>30</sup> Again, such an implementation does not currently exist and, even if it did, the server device in such a networking architecture would have a CableCARD once the integration ban goes into effect, and the Pace and Scientific-Atlanta boxes would merely be receiving standard-definition digital programming from the server device (just as they would receive VOD and linear programming from the network).<sup>31</sup> Neither box would have *any* ability to store content in this architecture -- so for the Bureau to suggest that these devices are "functional PVRs" is

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<sup>29</sup> USB and S-Video ports are standard industry ports for networking equipment. USB, for example, is a standard industry interface that has been used for almost a decade and is included in more a billion CE products today, including everything from mouse devices, keyboards, and joysticks, to scanners, digital cameras, and printers (among the hundreds of applications). See [http://en.wikipedia.org/wiki/Universal\\_Serial\\_Bus](http://en.wikipedia.org/wiki/Universal_Serial_Bus).

<sup>30</sup> Comcast suggested in its waiver application a possible scenario where video programming might be delivered from a DVR-enabled set-top (*i.e.*, a server device) in the living room to Pace boxes (*i.e.*, client devices) in other rooms via the USB port. See Comcast Waiver Request at 6 n.17; Comcast *Ex Parte* (July 24, 2006).

<sup>31</sup> Such a development, should it occur, would add to the options available to consumers and would serve the public interest. It is also consistent with the pro-innovation goals of Section 629(c) -- the statutory waiver provision under which the Comcast request was filed.

disingenuous.<sup>32</sup> In any event, although the *Waiver Order* fails to acknowledge Comcast's filing on the subject, Comcast did explicitly propose (after learning that the optional networking capability of the Pace box was a potential source of concern to the Bureau) to remove the USB port option from the Pace box and committed not to deploy the USB port on any low-cost box without prior approval of the Commission.<sup>33</sup> Since the *Waiver Order* denied the Comcast waiver based in part on the networking capabilities of the cited boxes, it should be reversed for this reason as well.<sup>34</sup>

## **II. THE BUREAU MISAPPLIED THE WAIVER STANDARD SET FORTH IN SECTION 629(c) OF THE COMMUNICATIONS ACT.**

Section 629(c) of the Communications Act -- the statutory provision under which Comcast filed its waiver request -- directs the Commission to grant waivers of the navigation device rules where necessary to assist the development or introduction of new or improved MVPD programming or services.<sup>35</sup> Congress underscored the pro-innovation purpose of this provision in the legislative history accompanying the navigation device statute. In particular, Congress instructed the Commission to "avoid actions which would have the effect of freezing or chilling the development of new technologies and services."<sup>36</sup> Consistent with Congressional policy, the *2005 Integration Ban Order* concluded that waivers for low-cost devices would

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<sup>32</sup> As the Bureau well knows, DVRs are far more sophisticated devices, and are substantially more expensive, than the low-cost set-top boxes included in the waiver application.

<sup>33</sup> See Comcast *Ex Parte* (Aug. 21, 2006) (Letter from Comcast Chairman Brian L. Roberts to Chairman Kevin J. Martin).

<sup>34</sup> See 47 C.F.R. § 1.115(b)(2)(iv).

<sup>35</sup> See 47 U.S.C. § 549(c); see also 47 C.F.R. § 76.1207.

<sup>36</sup> S. Conf. Rep. No. 104-230 at 181 (1996).

“further the cable industry’s migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television.”<sup>37</sup>

The Bureau wrongly concluded that grant of the waiver is not necessary to assist Comcast in the development or introduction of new or improved services.<sup>38</sup> Comcast does in fact make digital cable service available almost everywhere in Comcast’s footprint, Comcast has had success in building subscribership to the service, and Comcast has an incentive to continue to drive digital penetration,<sup>39</sup> but none of those facts is relevant to the merits of Comcast receiving a waiver under Section 629(c).

The fact that some digital services already exist does not preclude a waiver application from consideration under Section 629(c). In *BellSouth*, for example, the Bureau granted a waiver pursuant to Section 629(c) so that BellSouth could “*continue* to deliver digital services to its subscribers.”<sup>40</sup> The waiver was granted *without* condition that the MVPD roll out any new services. The Bureau took a similar approach when it granted Cox an interim waiver pursuant to Section 629(c).<sup>41</sup>

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<sup>37</sup> *2005 Integration Ban Order* ¶ 37.

<sup>38</sup> *See Waiver Order* ¶ 17. Because the *Waiver Order* misapplies the Section 629(c) waiver standard and also makes erroneous findings as to important or material questions of fact in this regard, the application for review must be granted by the Commission. *See* 47 C.F.R. §§ 1.115(b)(2)(i), (iv).

<sup>39</sup> *See Waiver Order* ¶¶ 17-18.

<sup>40</sup> *In the Matter of BellSouth Interactive Media Services*, Mem. Opin. & Order, 19 FCC Rcd. 15607 ¶ 8 (2004) (emphasis added) (“*BellSouth*”).

<sup>41</sup> *See In the Matter of Cox Communications, Inc.*, Mem. Opin. & Order, 19 FCC Rcd. 13054 (2004) (“*Cox*”).

The Bureau claims that Comcast's *incentive* to expand its digital customer base will not be diminished by denying the waiver,<sup>42</sup> but it ignores how the waiver affects Comcast's *ability* to expand and enhance digital services. As Comcast and other commenters have demonstrated in this proceeding, the low-cost, limited-capability box is instrumental to growing digital subscribership among existing analog customers,<sup>43</sup> and the availability of low-cost boxes has been especially helpful in migrating customers to Comcast's entry-level "Enhanced Basic" digital service at an extremely low incremental monthly charge.<sup>44</sup> But, without a waiver, this low-cost option disappears, a costlier CableCARD-enabled box must be deployed, and the price differential between analog and digital services necessarily increases. Inevitably, then, saddling consumers with these additional costs will slow consumer migration to digital.<sup>45</sup> This is the kind of hindrance to innovation that Congress directed the Commission to avoid by granting waivers (and that the Commission said it *would* avoid, as discussed above).

The Bureau also fails to address the fact that the waiver is necessary to the development or introduction of a wide range of *other* services desired by consumers. As Comcast and others explained, as more and more consumers transition to digital using the low-cost box, Comcast can reclaim analog spectrum for more HD programming, faster Internet service, and other new video

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<sup>42</sup> See *Waiver Order* ¶ 18.

<sup>43</sup> See, e.g., Comcast Waiver Request at 10; Comcast Reply at 8; ACA at 2; RCN Reply at 3; Microsoft at 10; Panasonic at 5; Thomson at 1.

<sup>44</sup> See Comcast Press Release, *Comcast Reports Third Quarter 2006 Results*, at 2 (Oct. 26, 2006) ("Comcast Earnings Statement") (noting that Comcast added 423,000 Enhanced Basic cable subscribers in the third quarter of 2006).

<sup>45</sup> See, e.g., Comcast Waiver Request at 17; Comcast Reply at 19; ACA at 5-6; RCN at 5; Armstrong Utilities *Ex Parte* at 2 (Sept. 11, 2006).

and non-video services that consumers want and value.<sup>46</sup> Denial of the waiver will delay the recapture of analog spectrum for other uses since the pace of digital migration will be retarded, which will delay the development or introduction of new or improved services.<sup>47</sup>

The Bureau erred in four additional respects. First, although the Bureau claims that Section 629(c) forecloses the grant of a *permanent* waiver,<sup>48</sup> the waiver granted to BellSouth under Section 629(c) was permanent -- a fact the Bureau ignored in the *Waiver Order*. The *Waiver Order* also ignores the fact that, when this concern was first raised more than four months earlier, Comcast promptly offered to limit its request to a five-year period.<sup>49</sup> For the Bureau to simply brush past these facts is irresponsible.

Second, the Bureau has no authority to bar applicants from filing low-cost box waivers under Section 629(c).<sup>50</sup> The command in Section 629(c) comes from Congress, and *any* waiver that will assist the development or introduction of a new or improved multichannel video

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<sup>46</sup> See, e.g., Comcast Waiver Request at 13; Comcast Reply at 9; ACA at 7; Thomson at 1; Panasonic at 2; Armstrong Utilities *Ex Parte* at 2 (Sept. 11, 2006); Samsung *Ex Parte* at 3 (Sept. 29, 2006). The success of the low-cost box has *already* enabled Comcast to start the process of reclaiming analog spectrum for other uses, and that process will accelerate with the continued availability of the low-cost box option.

<sup>47</sup> See, e.g., Comcast Waiver Request at 18; Comcast Reply at 19; ACA at 5-6; Thomson at 1; Panasonic at 2; RCN Reply at 4; see also ESPN et al. *Ex Parte*, filed in CS Dkt. No. 97-80 (Nov. 2, 2006).

<sup>48</sup> See *Waiver Order* ¶ 20.

<sup>49</sup> See Comcast *Ex Parte* (Aug. 21, 2006) (Letter from Comcast Chairman Brian L. Roberts to Chairman Kevin J. Martin). The *Waiver Order* sidesteps the elements of *BellSouth* that were important to the Comcast waiver request. See *Waiver Order* ¶¶ 21-23. Comcast never suggested that the facts in its waiver application were on all fours with those present in *BellSouth* or the other waiver cases cited in the Comcast waiver application. Rather, it cited *BellSouth* for the propositions that (1) the Commission has granted permanent waivers under Section 629(c), and (2) the Commission has granted waivers where the public interest benefits of granting the waiver outweigh potential harms. The Bureau did not dispute either of those arguments. Moreover, it is absurd for the Bureau to suggest that the applicable standard is whether the waiver applicant will have to “exit the MVPD marketplace” in order to qualify for waiver under Section 629(c). See *id.* ¶ 23. The purpose of Section 629(c) is to promote innovation, not prevent bankruptcies.

<sup>50</sup> See *Waiver Order* ¶ 24 n.92.

programming service or other service offered over multichannel video programming systems -- no matter what kind of box is involved -- “shall” be granted.<sup>51</sup>

Third, the Bureau is wrong in suggesting that 629(c) should be limited to “a nascent MVPD offering from a new competitor.”<sup>52</sup> The Bureau has previously granted waivers under Section 629(c) to established operators,<sup>53</sup> and there is nothing in the statute or legislative history that supports discriminatory treatment of competitors; to the contrary, Congress made it plain that any waiver should apply to *all* service providers.<sup>54</sup>

Fourth, the Bureau failed to observe the 90-day requirement under Section 629(c).<sup>55</sup> The Bureau acknowledged that Comcast’s waiver request was filed under Section 629(c).<sup>56</sup> It was

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<sup>51</sup> 47 U.S.C. § 549(c). The Bureau is incorrect in suggesting that the Commission has any discretion in the matter. *See Waiver Order* ¶ 2 (suggesting that the Commission “may” grant waivers where necessary to assist the development or introduction of new or improved services).

<sup>52</sup> *Id.* ¶ 15.

<sup>53</sup> *See BellSouth; Cox*. In fact, there is no new entrant exception in Section 629, nor did the Commission exempt DBS from the navigation device rules because DBS was a new entrant (rather, the Commission determined that DBS satisfied the criteria set forth in Section 1204(a)(2) of the rules). Congress specifically applied Section 629 to all MVPDs, not just to the cable industry, and RCN and other relatively new entrants are subject to the Commission’s rules. Furthermore, the Bureau plainly misreads Section 629(c) if it is suggesting that the waiver provision be limited to new cable entrants like Verizon and AT&T -- companies whose market capitalization is bigger than every cable company and hundreds of times bigger than some of the cable operators who supported Comcast’s waiver request, such as Armstrong Utilities and RCN. (RCN, which has rarely agreed with Comcast about anything, supported Comcast’s waiver request.)

<sup>54</sup> *See* 47 U.S.C. § 549(c) (“such waiver shall be effective for all service providers and products in that category and for all providers of services and products”). As noted, while the navigation device statute applies equally to all multichannel video programming distributors, *see id.* § 549(a), the Commission has left in place an exemption for the two DBS providers (serving nearly 30 million customers, or more than one out of four MVPD homes). That earlier decision cannot be attributed to the Bureau, and it warrants separate reexamination by the Commission. However, the group of Bureau waiver orders released on January 10, 2007 shows a peculiar series of policy contortions that seem intended to favor individual MVPDs, including those affiliated with the 18th and 39th largest companies in the Fortune 500 (*i.e.*, Verizon and AT&T). Exacerbating the disparate treatment of video competitors in this way violates the Commission’s policy of competitive and technological neutrality. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Rept. & Order, 20 FCC Rcd. 14853 ¶¶ 1, 3, 16 n.44 & 45 (2005).

<sup>55</sup> *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 . . .”).

therefore required to complete its review of the waiver request within the 90-day time frame set forth in the statute.<sup>57</sup>

### **III. THE BUREAU MISAPPLIED THE PUBLIC INTEREST WAIVER STANDARD UNDER SECTIONS 1.3 AND 76.7 OF THE COMMISSION'S RULES.**

#### **A. The Bureau Ignored The Public Interest Benefits Of The Waiver And Provided No Concrete Evidence Of Harms.**

The Commission has granted waivers pursuant to the general public interest waiver standard in Sections 1.3 and 76.7 of its rules, where, as here, the public interest benefits of granting the waiver outweigh any potential harms.<sup>58</sup> Likewise, *WAIT Radio* and other court waiver precedent requires that the Commission take a “hard look” at meritorious applications for waiver and consider all relevant facts, especially where the application of a general rule to a specific situation would not serve the public interest underlying that rule.<sup>59</sup>

Comcast and other commenters in this waiver proceeding have catalogued the many and substantial public interest benefits that will flow from granting this waiver and the harms associated with denial of the waiver. As noted, waiver supporters include numerous consumer

(.footnoted continued)

<sup>56</sup> See *Waiver Order* ¶¶ 15-23 (analyzing waiver request under Section 629(c) waiver standard).

<sup>57</sup> The Bureau cannot now claim that it has no duty to complete its review of the Comcast and the other waiver requests filed under Section 629(c) within the statutorily-mandated 90-day period. See *Waiver Order* ¶ 23 n.92. Congress plainly expected prompt Commission action on such waiver requests. In contrast, the Bureau took 266 days to decide the Comcast waiver request, and the Charter, Verizon, and NCTA waiver requests have been pending for over 150 days. Furthermore, deciding the waiver at the Bureau level will further delay Commission -- and potentially court -- review of the matter. The D.C. Circuit has warned the Commission in the past against engaging in an “administrative law shell game.” *American Tel. & Tel.*, 978 F.2d 727, 731-32 (D.C. Cir. 1992).

<sup>58</sup> See, e.g., *Pace Micro Technology PLC: Petition for Special Relief*, Order, 19 FCC Rcd. 1945 (2004); *GCI Cable, Inc.: Petition for Special Relief*, Mem. Opin. & Order, 15 FCC Rcd. 10843 (2000); *Media General Cable of Fairfax County, Inc.: Petition for Special Relief*, Mem. Opin. & Order, 14 FCC Rcd. 9568 (1999).

<sup>59</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192, 1195 (D.C. Cir. 1983).

and advocacy groups, Congressional leaders, overbuilders and small and rural cable operators, and several leading CE companies, including Samsung, Thomson, Panasonic, Cisco, Motorola, and Pace. The record makes plain that approval of the waiver will, among other things, accelerate consumer adoption of digital services, facilitate Comcast's (and other operators') transition to digital and aid the broadcasters' transition, and enable the cable industry to maintain momentum on downloadable security and other technological innovations.<sup>60</sup> The *Waiver Order* inexplicably ignores this substantial record of public interest benefits -- including the comments filed by CE supporters of the waiver -- while exclusively crediting the claims of waiver opponents.<sup>61</sup>

The *Waiver Order* provides only conclusory assertions regarding the potential harms to the retail marketplace for navigation devices.<sup>62</sup> As Comcast and others (including the CE companies referenced above) have demonstrated, there is no substance to these claims, much less concrete evidence of harm supporting the Bureau's action here. As an initial matter, there is no concrete evidence that CE manufacturers compete with the low-cost devices subject to the waiver request.<sup>63</sup> The chief focus of the CE industry has consistently been on building higher-end products for retail, such as HDTVs and HD/DVRs, *not* the low-cost set-top boxes that are

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<sup>60</sup> See, e.g., Comcast Reply at 8-10. The Association of Public Television Stations ("APTS") also filed comments in support of the waiver request, underscoring the benefits to the digital transition for broadcasters. APTS at 1-2.

<sup>61</sup> The *Waiver Order* should therefore be reversed by the Commission upon review. See 47 C.F.R. §§ 1.115(b)(2)(i), (iv).

<sup>62</sup> See, e.g., *Waiver Order* ¶¶ 19, 23.

<sup>63</sup> The *Waiver Order* mischaracterizes Pioneer's intentions with respect to low-cost devices. Pioneer did not say it "would" market low-cost devices, see *id.* ¶ 10, but rather that it "may very well consider marketing" such devices. Pioneer *Ex Parte* (Aug. 24, 2006).

the subject of the Comcast waiver request.<sup>64</sup> For example, Sony's sudden and improbable statement of interest in building low-cost devices is belied by the facts that (1) it has never sought to manufacture or sell low-cost, limited-function set-top boxes in the 50-year history of cable television<sup>65</sup> and (2) its retail strategy today is focused on higher-end HDTV products.<sup>66</sup>

In addition, the Bureau's claim that grant of the waiver would "nullify the goal of Section 629(a)"<sup>67</sup> is undermined by two basic facts, both fully explained on the record and both entirely ignored by the Bureau in its analysis. First, grant of the waiver would have *no* impact on consumers' ability to buy, nor Comcast's obligation to support, CableCARD-enabled products at retail.<sup>68</sup> Second, the Commission's goal of "common reliance" will be fully achieved via Comcast's substantial deployment of higher-end CableCARD-enabled set-top boxes, such as HD/DVRs, once the integration ban goes into effect. Comcast has indicated that it expects the

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<sup>64</sup> CEA/Sony's recent filing on two-way plug-and-play issues provides yet more evidence of this fact. CEA and Sony would define "limited-capability" devices to include HD, DVR, and other advanced capabilities, in clear contrast to the Commission's understanding of limited-capability devices in the *2005 Integration Ban Order*. See CEA Proposal for Bi-Directional Digital Cable Compatibility and Related Issues, filed in CS Dkt. No. 97-80 (Nov. 7, 2006). Moreover, CEA/Sony's claims regarding OCAP are a red herring. As NCTA has explained, OCAP is necessary for the portability of two-way retail devices and is already supported by leading CE companies, including Samsung, Panasonic, LG, and Toshiba, among others. See *NCTA Ex Parte* (Oct. 30, 2006); see also *NCTA Ex Parte* (Dec. 11, 2006) (further underscoring cable's commitment to two-way retail products, importance of OCAP to retail effort, and infirmities with CEA/Sony's latest two-way proposal). Furthermore, CEA/Sony do not explain, nor could they, how their two-way proposal solves the problem of getting digital programming and services to *existing customers with analog TV sets* -- unless, of course, CEA/Sony are suggesting that all of these customers replace their existing analog TVs with new TV sets.

<sup>65</sup> Sony entered (and then exited) the cable set-top box business several years ago, but never built boxes like the low-cost, limited-capability devices covered by Comcast's waiver request.

<sup>66</sup> See *Comcast Ex Parte* at 1 (Aug. 14, 2006) (describing Sony's focus on HDTVs). Moreover, Comcast has said repeatedly in this proceeding that it is fully committed to continuing to diversify its equipment supplier base for its low-cost set-top boxes. See *Comcast Waiver Request* at 18; *Comcast Reply* at 11-12; *Comcast Ex Parte* at (Aug. 14, 2006). Comcast has welcomed Sony and other waiver opponents to participate, but they have thus far declined to do so.

<sup>67</sup> *Waiver Order* ¶ 19.

<sup>68</sup> See *Comcast Waiver Request* at 14-15; *Comcast Reply* at 12-13; see also 47 C.F.R. § 76.640.

number of higher-end devices in use post-integration ban will number in the millions.<sup>69</sup> The customers who use these high-end boxes are Comcast's best customers, and Comcast has every incentive to ensure that the CableCARD technology (and its successor, downloadable security technology) works properly. There is nothing in the *Waiver Order* to the contrary.

In sum, the Bureau's *Waiver Order* imposes substantial costs on cable consumers and cable operators while providing no countervailing benefit to CE manufacturers or anyone else.

**B. The Bureau Has No Authority To Establish New Policy On The Digital Transition And Specialty Tiers As Part Of The Waiver Process.**

The Commission established a straightforward process for cable operators to file waiver requests for low-cost boxes. The Commission set forth basic guidance on how a low-cost box should be defined and it invited operators to file applications with specifications for such boxes. The Bureau has now conjured up an entirely different waiver regime which is completely disconnected from the simple process established by the full Commission in 2005. Under the Bureau's newly-concocted test, if Comcast wants to deploy the DCT-700 and similar low-cost boxes after the ban, it must commit to going all-digital before February 2009 or to using the boxes solely for specialty tier customers.<sup>70</sup> The Bureau has no authority to establish these policies, which conflict with law and policy established by Congress and the Commission.<sup>71</sup>

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<sup>69</sup> See Comcast Reply at 14-15 & n.56. For example, in 2006, Comcast deployed more set-top boxes with HD and/or DVR capabilities than low-cost boxes and spent almost four times as much on high-end boxes as on low-end devices.

<sup>70</sup> See *Waiver Order* ¶ 34; see also *In the Matter of BendBroadband's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, DA 07-47 ¶¶ 24-25 (rel. Jan. 10, 2007) ("*BendBroadband Order*").

<sup>71</sup> Consequently, the *Waiver Order* must be reversed by the Commission on review. See 47 C.F.R. § 1.115(b)(2)(i).

**1. The Bureau May Not Require Comcast To Go All-Digital Under The Waiver Process.**

The Bureau asserts that Comcast may file an amended waiver request “based on a commitment to go all-digital by a date certain, such as February 2009 or sooner, when broadcasters will cease their analog operations.”<sup>72</sup> This is an entirely new policy that does not derive from any previous Commission order. Moreover, it is irrational.

In the relevant portion of the *2005 Integration Ban Order*, the Commission’s chief policy objective in inviting waiver requests was to preserve a low-cost box option for consumers. The *2005 Order* says *nothing* about cable operators committing to discontinue analog service before becoming eligible for waiver for low-cost boxes, let alone doing so by February 2009. The *Order* does note that the public interest benefits of granting waivers include speeding up the cable industry’s *migration* to all digital-networks and facilitating consumer access to digital broadcast signals before and after the broadcasters’ transition; as noted, Comcast and other commenters demonstrated that grant of the Comcast waiver request would advance both cable’s and the broadcasters’ digital transitions and that denial of the waiver could substantially impair them.<sup>73</sup> There is no rational basis upon which the Bureau can conclude that this language in the *2005 Order* imposed a requirement to go all-digital on waiver applicants, much less that it requires doing so at a pace that would be injurious to companies, their investors, and their customers.

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<sup>72</sup> *Waiver Order* ¶ 34. The Bureau explains nowhere in the *Waiver Order* how it came up with this policy. At one point, the Bureau suggests that a waiver applicant filing under the *2005 Order* must show that the waiver “would have a direct and immediate impact” on its migration to an all-digital network, *see id.* ¶ 29, but only at the end of the *Waiver Order* is there any reference to completing that migration by the end of the broadcasters’ transition.

<sup>73</sup> *See supra* Section III.A.

In fact, the Bureau's new policy ignores the realities of migrating large cable systems to all-digital networks. The Commission understood those realities when it adopted the 2005 *Order*, and it meant to accommodate them. As Comcast made plain in its filings in this proceeding, it has every intention of migrating its cable systems to all-digital networks.<sup>74</sup> Comcast has made dramatic strides in achieving that goal already. Today, slightly more than half of its customers take digital service<sup>75</sup> -- up from 43% a year ago and 37% the preceding year. Comcast is making this transition as rapidly and cost-effectively as possible. As noted in its waiver application, the goal is to get to 75% penetration by the end of the decade and to achieve all-digital service in subsequent years.<sup>76</sup> The Bureau ignores the obvious facts that a transition of this magnitude takes time and depends upon consumers' interest in and incentives to make the switch. Approximately 12 million Comcast customers still do not take digital service.<sup>77</sup> Comcast makes a continuing effort to educate these customers about the benefits of digital and to present them with attractive digital service and equipment options, and customers are signing up

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<sup>74</sup> See Comcast Waiver Request at 13 ("The ultimate objective, of course, is to reclaim all of that spectrum for other uses.").

<sup>75</sup> Comcast Earnings Statement at 2.

<sup>76</sup> See Comcast Waiver Request at 10, 13.

<sup>77</sup> See Comcast *Ex Parte* (Oct. 25, 2006); see also Comcast Earnings Statement at 10. The challenge is actually even greater than getting analog customers to take digital service. As Comcast has previously explained in this and other proceedings, it cannot discontinue analog transmissions until *every TV of every customer* has the ability (itself or through a set-top box) to process digital signals. See Comcast *Ex Parte* (Aug. 21, 2006); see also Comcast *Ex Parte*, filed in CS Dkt. No. 98-120, at 2-3, 5 (Feb. 3, 2005); Comcast *Ex Parte*, filed in CS Dkt. No. 98-120, at 2 (Sept. 16, 2004). Comcast's 24 million customers have on the order of 65 million TVs, the overwhelming majority of which are analog. Today, not even half of those TVs are connected to digital set-top boxes. The costs of equipping every one of the remaining analog TVs in Comcast households with low-cost, limited capability boxes would be over \$2 billion. (The costs of using CableCARD-enabled boxes would be more than twice as much.) There is no public interest reason why consumers and investors should be forced to incur those expenses before they are ready.

in droves. However, Comcast would face substantial consumer backlash if it attempted to compel consumers to convert to digital on a forced march.<sup>78</sup>

Moreover, the *Waiver Order* is at cross-purposes with the Bureau's stated goal of completing cable's transition to digital, to say nothing of the Commission policy set forth in the 2005 *Order*. As noted, low-cost set-top boxes are instrumental to Comcast's transition plans. Denying the waiver will eliminate this low-cost box option and thereby *slow* Comcast's migration to an all-digital platform. There is a fundamental inconsistency in the *Waiver Order* on this point. The Bureau goes to great lengths to discount the importance of the waiver for the low-cost boxes to Comcast's transition plans,<sup>79</sup> but then invites Comcast to amend its waiver request for exactly the same boxes if it commits to complete its transition before February 2009.<sup>80</sup> This makes no sense. If the low-cost boxes are not instrumental to Comcast's transition plans, then why does the Bureau invite Comcast to refile to use these boxes to complete a 19-month transition? And if the conversion to all-digital networks is the right goal, but cannot be completed by February 2009, why would the Bureau throw roadblocks in the way of the most rapid completion that is feasible?

The Bureau's new waiver plan also fails to recognize the clear distinctions Congress has drawn between the broadcasters' transition and cable's transition. Congress established a hard

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<sup>78</sup> BendBroadband, in contrast, has only 34,000 customers. See BendBroadband Waiver Request, CSR-7057-Z, at 4 (Oct. 4, 2006). It is a far different proposition for BendBroadband to go all-digital than for Comcast.

<sup>79</sup> See *Waiver Order* ¶ 18 ("Indeed, we note that while Comcast claims that failure to obtain a waiver would 'slow[]' its migration to an all-digital network; it does not claim that it would not achieve that goal absent a waiver."); see *id.* ¶ 29 ("Comcast has not demonstrated that the waiver it seeks would have a direct and immediate impact on its migration to an all-digital network[.]").

<sup>80</sup> See *id.* ¶ 34. Likewise, in the *BendBroadband Order*, the Bureau acknowledges the importance of the low-cost box to cable's transition efforts. See *BendBroadband Order* ¶ 24. (recognizing that conditioned grant of waiver for the DCT-700 would "facilitate BendBroadband's rapid transition to an all-digital network (*i.e.*, by 2008)").

deadline of February 2009 for *broadcasters* to complete their transition to digital because broadcasters use the public's airwaves and Congress wants to get the analog spectrum back and put it to more productive use.<sup>81</sup> Congress also established a special subsidy program for broadcast converter boxes to mitigate the consumer disruption that will occur when analog signals are discontinued to the 15 million or so homes that rely solely on over-the-air broadcasting.<sup>82</sup> Congress has imposed no similar requirements on cable's transition. There is *no* transition deadline for cable; *no* subsidy program for cable boxes; and *no* statutory basis for the Bureau to set artificial deadlines or incentives that could increase the number of cable consumers who will face service disruptions and increased expenses.

**2. The Bureau Has No Authority To Require Comcast To Offer Specialty Tiers On A Standalone Basis Under The Waiver Process.**

The Bureau also states that Comcast may file an amended waiver request that seeks a limited waiver for family and ethnic tier customers only. This specialty tier requirement, like the all-digital requirement, is unrelated to the waiver process established by the Commission in the *2005 Integration Ban Order* or the navigation device proceeding generally. The full Commission has never been presented with this question, let alone ruled on it.

The Bureau's plan also raises serious First Amendment concerns. The Bureau would require that Comcast offer specific types of programming content -- family and ethnic tiers -- if it wants to receive a waiver. Such content-based regulation is subject to strict scrutiny. Moreover,

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<sup>81</sup> Those considerations do not apply to cable. Cable operators have used *private* capital to build *private* cable systems, and they have used *private* capital to expand the capacity of their systems and to convert them from analog-only, one-way, one-service facilities to part-digital, two-way, multi-service facilities.

<sup>82</sup> See 2005 Budget Act § 3005, 120 Stat. 4, 23-24 (2006).

even if, as the Bureau unconvincingly attempts to argue,<sup>83</sup> its special tier requirement is not content-based, it would still be subject to heightened scrutiny since it infringes Comcast's editorial discretion in how it offers its programming services to customers.<sup>84</sup>

Furthermore, the Bureau's plan contravenes the buy-through rules established by Congress and implemented by the Commission. Congress already decided that cable operators may not require customers to buy any tier, other than the basic tier, as a condition of access to any service sold on a per-channel or per-program basis, but it did *not* preclude buy-through with respect to specialty or other tiers of service.<sup>85</sup> Indeed, the Commission's rules specifically state that: "A cable operator may, however, require the subscription to one or more tiers of cable programming services as a condition of access to one or more tiers of cable programming services."<sup>86</sup> The *Waiver Order*, which purports to extend the buy-through prohibition to specialty tiers, is inconsistent with the Communications Act and the Commission's own rules.<sup>87</sup>

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<sup>83</sup> See *Waiver Order* ¶ 32 n.110.

<sup>84</sup> See *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (stating that cable television is "engaged in 'speech' under the First Amendment"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press protections of the First Amendment."); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.").

<sup>85</sup> See 47 U.S.C. §543(b)(8)(A) ("A cable operator may not require the subscription of any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis.").

<sup>86</sup> 47 C.F.R. § 76.921(a). See also *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, Third Order on Reconsideration, 9 FCC Rcd. 4316, ¶ 25 n.17 (1994) (stating that buy-through provision "does not prohibit operators from requiring the purchase of an intermediate tier of cable programming services in order to obtain access to another tier of cable programming services").

<sup>87</sup> With respect to the family tier, Comcast already gives customers the option of taking that tier of service with just the basic tier of service.

The Bureau's plan also will *slow* the growth of specialty tier subscribership. Comcast is committed to providing programming choices to its customers and has rolled out a variety of specialty tier options, including family, ethnic, and sports tiers, and the low-cost box is critical to building consumer interest in and access to these offerings.<sup>88</sup> The Bureau's plan will reduce the number of subscribers to specialty tiers, however, because it will limit the low-cost box option only to customers who take specialty tiers, but not subscribers who want a broader mix of digital services.<sup>89</sup>

Finally, the Bureau's plan is unworkable. Neither Comcast nor any other cable operator is likely to pursue it. No cable operator manages equipment inventory based on what programming tiers particular customers might buy. To comply with the Bureau's plan, an operator would need to develop entirely new procedures for tracking equipment. The cost and complexity of such new procedures would be compounded by the fact that the exact same types of boxes would be used for both digital and specialty-tier-only customers. So, for example, a DCT-700 placed in service before the integration ban went into effect could be deployed to any digital customer, but a DCT-700 placed in service subject to the waiver could only be deployed

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<sup>88</sup> The Bureau's statements about the availability of the family tier and success of the Spanish-language tier, *see Waiver Order* ¶ 32 n.112, are outdated. Comcast makes the family tier available to the vast majority of its subscribers today, with further rollout underway, and Comcast's Spanish-language programming packages (Selecto and CableLatino) are enjoying considerable success, in part due to 125 hours per month of VOD content at no additional charge.

<sup>89</sup> The plan is harmful to consumers in another respect. If a customer takes a specialty tier only with the low-cost box, but then decides she wants to take other non-specialty tier services, she would need to get a new -- more expensive CableCard-equipped -- box to do so. The Bureau has not explained -- nor could it reasonably do so -- why it would serve the public interest to make the customer go through this new installation process or be forced to pay a higher equipment price simply because she chooses to purchase additional tiers of service which the lower-cost equipment would be perfectly adequate to deliver.

to specialty-tier customers. Comcast would have to design a process to ensure that legacy and waiver boxes go to the right type of customer.

#### IV. CONCLUSION

In sum, the *Waiver Order* is fatally flawed. It is egregious in its factual and legal distortions and its bias. Prior Commission rulings have been misread; the record has been twisted or largely ignored; established policies have been jettisoned without explanation; and new policies have been created without reason or authority. Comcast respectfully asks the full Commission to reverse the Bureau's decision and to grant, at the earliest possible opportunity, Comcast's request for waiver of the integration ban as applied to the DCT-700, Explorer-940, and Pace Chicago set-top boxes.

Respectfully submitted,



James L. Casserly  
Jonathan Friedman  
WILLKIE FARR & GALLAGHER LLP  
1875 K Street, N.W.  
Washington, D.C. 20006-1238  
*Attorneys for Comcast Corporation*

Joseph W. Waz, Jr.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, PA 19102

James R. Coltharp  
Mary P. McManus  
COMCAST CORPORATION,  
2001 Pennsylvania Ave., N.W., Suite 500  
Washington, D.C. 20006

Thomas R. Nathan  
COMCAST CABLE  
COMMUNICATIONS, LLC  
1500 Market Street  
Philadelphia, PA 19102

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## CERTIFICATE OF SERVICE

I, Robin Smith, hereby certify that, on January 30, 2007, copies of the attached Application for Review were served via first class mail, on the following:

Mr. Frank E. Dangeard  
Chairman and CEO  
Thomson  
46 quai A Le Gallo  
92648 Boulogne Cedex  
France

Mr. Paul G. Schomburg, Senior Manager  
Government and Public Affairs  
Panasonic Corporation  
1130 Connecticut Ave., N.W.  
Suite 1100  
Washington, D.C. 20036

Mr. Jim Morgan  
Sony Electronics Inc.  
1667 K Street, N.W.  
Suite 200  
Washington, D.C. 20006

Mr. Christopher C. Cinnamon  
Cinnamon Mueller  
307 North Michigan Avenue  
Suite 1020  
Chicago, IL 60601  
*Attorneys for American Cable Association*

Mr. Michael V. Pulli  
Pace Micro Technology Americas  
3701 FAU Boulevard  
Suite 200  
Boca Raton, FL 33431

Steve B. Sharkey  
Director, Spectrum and Standards Strategy  
Motorola, Inc.  
1350 I Street, N.W.  
Suite 400  
Washington, D.C. 20005-3305

Mr. Adam Petruszka  
Director, Strategic Initiatives  
Hewlett-Packard Company  
20555 State Highway 249  
MS-140302  
Houston, TX 77070

Mr. Jeffrey T. Lawrence  
Director, Content Policy and Architecture  
Intel Corporation  
JF3-147  
2111 N.E. 25<sup>th</sup> Avenue  
Hillsboro, OR 97124-5961

Mr. Michael D. Petricone, Esq.  
Vice President, Technology Policy  
Consumer Electronics Association  
2500 Wilson Boulevard  
Arlington, VA 22201

Mr. Neal M. Goldberg  
General Counsel  
National Cable & Telecommunications  
Association  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

Mr. Gerard J. Waldron  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401  
*Counsel for Microsoft Corporation*

Mr. Jeffrey A. Campbell  
Director, Technology & Comm. Policy  
Cisco Systems, Inc.  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Mr. Brendan Murray  
Media Bureau  
Room 4-A802  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Mr. Adam Goldberg  
Vice President, Government Affairs  
Pioneer North America, Inc.  
8000 Towers Crescent Drive, 13<sup>th</sup> Floor  
Vienna, VA 22182

Mr. John Godfrey  
Vice President, Government Affairs  
Samsung Information Systems America, Inc.  
1200 New Hampshire Avenue, N.W., #550  
Washington, D.C. 20036

Mr. Neil Ritchie  
Executive Director  
League of Rural Voters  
P.O. Box 80259  
Minneapolis, MN 55408

Mr. Craig K. Tanner  
Vice President, Cable Business Development  
Sharp Laboratories of America  
8605 Westwood Center Dr., Suite 206  
Vienna, VA 22182

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Ms. Jean L. Kiddoo  
Bingham McCutchen LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
*Counsel for RCN*

Mr. Jeffrey Ross  
President, Armstrong Utilities, Inc.  
One Armstrong Place  
Butler, PA 16001

Ms. Lillian Rodriguez Lopez  
President  
Hispanic Federation  
55 Exchange Place, 5<sup>th</sup> Floor  
New York, NY 10005

Mr. Jason Wright  
President  
Institute for Liberty  
4094 Majestic Lane, #278  
Fairfax, VA 22033

Mr. Grover Norquist  
President  
Americans for Tax Reform  
1920 L Street NW, Suite 200  
Washington, DC 20036

Mr. Tim Phillips  
President  
Americans for Prosperity  
1726 M Street NW, 10th Floor  
Washington, DC 20036

Mr. Tom Schatz  
President  
Citizens Against Government Waste  
1301 Connecticut Ave., NW, Suite 400  
Washington, DC 20036

Mr. Harry C. Alford  
President & CEO  
National Black Chamber of Commerce  
1350 Connecticut Avenue, N.W., Suite 405  
Washington, DC 20036

Mr. Matthew Blank  
Chairman & CEO  
Showtime Networks, Inc.  
1633 Broadway  
New York, NY 10019

Ms. Debra Lee  
President & CEO  
BET Holdings, Inc.  
1235 W Street, NE  
Washington, DC 20018

Ms. Abbe Raven  
President & CEO  
A&E Networks  
235 E. 45th Street  
New York, NY 10017

Mr. Geoffrey Segal  
Director of Government Reform  
Reason Foundation  
3415 S. Sepulveda Blvd., Suite 400  
Los Angeles, CA 90034

Mr. John Berthoud  
President  
National Taxpayers Union  
108 N. Alfred Street  
Alexandria, VA 22314

Mr. Chris Llana  
110 Melville Loop  
Chapel Hill, NC 27514

Mr. Manuel Mirabal  
Founder & Co-Chair  
Hispanic Technology & Telecommunications  
Partnership  
1901 L Street, N.W., Suite 802  
Washington, DC 20036

Mr. Philip Kent  
Chairman & CEO  
Turner Broadcasting Systems, Inc.  
One CNN Center  
Atlanta, GA 30303

Ms. Judy McGrath  
Chairman & CEO  
MTV Networks  
1515 Broadway  
New York, NY 10036

Mr. David Zaslav  
President  
NBC Universal Cable  
100 Universal City Plaza  
Universal City, CA 91608

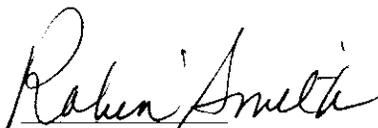
Mr. Michael L. Barrera  
President & CEO  
Hispanic Chamber of Commerce  
2175 K Street, N.W., Suite 100  
Washington, D.C. 20037

Mr. Alex Curtis  
Policy Director  
Public Knowledge  
1875 Connecticut Avenue, N.W., Suite 650  
Washington, D.C. 20009

The Honorable Fred Upton  
House Energy and Commerce Committee  
Rayburn House Office Building  
Washington, D.C. 20515

George Bodenheimer  
Co-Chairman, Disney Media Networks  
President, ESPN, Inc. and ABC Sports  
ESPN Plaza  
Bristol, CN 06010

John Hendricks  
Founder & Chairman  
Discovery Communications, Inc.  
7700 Wisconsin Avenue  
Bethesda, MD 20814

  
Robin Smith

Mr. Jimmie V. Reyna  
President  
Hispanic National Bar Association  
815 Connecticut Avenue, N.W., Suite 500  
Washington, D.C. 20006

The Honorable Joe Barton  
House Energy and Commerce Committee  
Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Ted Stevens  
Senate Commerce Committee  
Dirksen Senate Office Building  
Washington, D.C. 20510

Decker Anstrom  
President and Chief Operating Officer  
Landmark Communications, Inc.  
150 W. Brambleton Avenue  
Norfolk, Virginia 23510-2075

Geraldine Laybourne  
Chairman & CEO  
Oxygen Media, Inc.  
75 9<sup>th</sup> Avenue  
New York, NY 10011