

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Comcast Corporation	)	CSR-7012-Z
Request for Waiver of Section 76.1204(a)(1)	)	
of the Commission's Rules	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of	)	
Navigation Devices	)	

**OPPOSITION TO APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission's rules,<sup>1</sup> Sony Electronics Inc. ("SEL")<sup>2</sup> opposes the application for review ("Application") filed by Comcast Corporation ("Petitioner") seeking reversal of the FCC Media Bureau ("Bureau") decision denying the above-captioned waiver request.<sup>3</sup>

The Bureau properly denied the Petitioner's request for waiver (the "Waiver Request") of the common reliance provision of Section 76.1204(a)(1) of the Commission's Rules,<sup>4</sup> because: (1) Petitioner failed to demonstrate sufficient basis to justify a waiver, (2) the Bureau Decision is consistent with Section 629 of the Communications Act of 1934, as amended,<sup>5</sup> (the "Act") and the Commission's rules,

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<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> SEL is a manufacturer of consumer electronics products. SEL filed comments opposing Comcast Corporation's request for waiver of Section 76.1204(a)(1) of the Commission's rules. *Comcast Corporation's Request for Waiver of 47 C.F.R. 76.1204(a)(1) of the Commission's Rules*, CSR-7012-Z, Comments (filed June 15, 2006) ("SEL Comments").

<sup>3</sup> *Comcast Corporation's Request for Waiver of 47 C.F.R. 76.1204(a)(1) of the Commission's Rules*, CSR-7012-Z, DA 07-49 (rel. Jan. 10, 2007) ("Bureau Decision").

<sup>4</sup> 47 C.F.R. § 76.1204(a)(1) ("[N]o multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease or use that perform both conditional access and other functions in a single integrated device").

<sup>5</sup> 47 U.S.C. § 549.

policies and precedent interpreting and implementing Section 629; and (3) the Bureau properly evaluated the Waiver Request under the correct standards. Accordingly, SEL asks the Commission to deny the Application.

First, as further explained herein, the Bureau Decision does not violate the Act, or any Commission rule, policy or precedent, because Petitioner has failed to make the necessary showing to justify waiver of a valid, long-standing Commission rule. The common reliance requirement—the principle that navigation devices deployed by cable operators must rely upon the same conditional access technologies and support infrastructure as devices offered for retail sale by unaffiliated manufacturers—was adopted by the full Commission nearly nine years ago and has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) as a reasonable interpretation and implementation of Section 629(a) of the Act.

Second, the Bureau’s Decision is consistent with Commission precedent in the navigation devices proceeding and is supported by the record established by the parties, including SEL, commenting on Petitioner’s waiver request. Only a narrowly tailored, well-justified waiver request that fits in the context of the Act and Commission precedent could reasonably have been granted. Petitioner instead requested a broad waiver, grant of which would directly contravene common reliance and the underlying purpose of Section 629.

Third, the Bureau evaluated the Waiver Request under Section 629(c) of the Act, as well as under the Commission’s general waiver standards, and properly found that Petitioner failed to make the requisite showing to warrant a waiver under any standard.

For these reasons, SEL urges the Commission to deny Petitioner’s Application and uphold the Bureau Decision.

**I. THE BUREAU DECISION DOES NOT VIOLATE THE ACT, AND IS CONSISTENT WITH COMMISSION RULES, POLICIES AND PRECEDENTS**

The Bureau’s denial of Petitioner’s request for waiver of Section 76.1204(a) does not violate the Act or any Commission rule, policy, or precedent. Rather, the Bureau Decision mandates compliance with a valid Commission rule and, as such, is consistent with the Act, and Commission rules, policies, and precedent. It is also well-supported by the record in this docket.

**A. *The Bureau Decision is Consistent with the Act and the Commission’s Previous Actions in the Navigation Devices Docket***

The Bureau Decision is consistent with the Act and the history of the Commission’s navigation devices proceeding. Contrary to Petitioner’s claims, it is based on neither “a distorted reading of previous guidance by the full Commission” or “new and irrational standards for waiver that the Bureau fabricated out of whole cloth.”<sup>6</sup> The decade-long history of the Commission’s implementation of Section 629 has consistently focused on requiring cable operators to rely on the same security technology used by consumer electronics manufacturers in devices available at retail. The Bureau Decision follows this precedent, and the Commission should reject any claim to the contrary.

**1. The Bureau Decision is Fully Consistent with Section 629(a) of the Act**

Section 629(a) of the Act directs the Commission to adopt regulations to “assure the commercial availability” of navigation devices equipment used by consumers to

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<sup>6</sup> Application at i.

access services from multichannel video programming distributors (“MVPDs”).<sup>7</sup> By denying the Waiver Request and thereby enforcing a long-standing Commission rule, the Bureau Decision furthers this statutory directive.

As the Bureau Decision states, in enacting Section 629, “Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor.”<sup>8</sup> The Bureau Decision explicitly notes that “Congress characterized the transition to competition in navigation devices as an important goal, stating that ‘[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.’”<sup>9</sup>

In 1998, the Commission selected common reliance as the mechanism to effectuate the directive of Section 629. The Commission concluded that

[t]he continued ability to provide integrated equipment is likely to interfere with the statutory mandate of commercial availability and that the offering of integrated boxes should be phased out. We agree with those commenters who note that integration is an obstacle to the functioning of a fully competitive market for navigation devices by impeding consumers from switching to devices that become available through retail outlets.<sup>10</sup>

The Commission affirmed this conclusion in 2005, stating that “[a]t the heart of a robust retail market for navigation devices is the reliance of cable operators on the same security

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<sup>7</sup> 47 U.S.C. § 549.

<sup>8</sup> Bureau Decision, ¶ 2, *citing* S. REP. 104-230, at 181 (1996) (Conf. Rep.). *See also* *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004) (“*BellSouth Waiver Order*”).

<sup>9</sup> *Id.* at ¶ 3, *quoting* H.R. REP. NO. 104-204, at 112 (1995).

<sup>10</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14798 (1998) (“*1998 Order*”) (internal citations omitted). For further review of the history of common reliance, see *infra*, Section I.B.

technology and conditional access interface that consumer electronics manufacturers rely on in developing competitive navigation devices.”<sup>11</sup>

Perhaps most importantly, the DC Circuit has unequivocally endorsed the Commission’s selection of common reliance as the means for effectuating Section 629(a). In *Charter*, the court deferred to the Commission’s conclusion that “[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation [under Section 629].”<sup>12</sup> The Court summarized the Commission’s reasoning as follows:

If cable operators “must take steps to support their own compliant equipment, it seems far more likely that they will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment.” This explains the FCC’s “prohibition on integrated devices,” as it “assur[es] that MVPDs devote both their technical and business energies towards creation of an environment in which competitive markets will develop.”<sup>13</sup>

The Court then affirmed the Commission’s reasoning in favor of common reliance in the clearest possible terms, finding that “[i]t is an explanation that is neither arbitrary nor capricious.”<sup>14</sup>

By denying Petitioner’s Waiver request, the Bureau did nothing more or less than follow the law as interpreted by the Commission. The Bureau Decision requires the Petitioner to comply with a rule that the Commission first promulgated in 1998, that the Commission subsequently reaffirmed on multiple occasions, and that the D.C. Circuit explicitly endorsed. Thus, the Bureau Decision is consistent with Section 629(a) of the

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<sup>11</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd. 6794, 6807 (2005) (“2005 Further Extension Order”).

<sup>12</sup> *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 40 (D.C. Cir. 2006) (“*Charter*”), quoting *2005 Further Extension Order*, 20 FCC Rcd at 6813.

<sup>13</sup> *Charter*, 460 F.3d at 40 (internal citations omitted).

<sup>14</sup> *Id.*

Act. Indeed, it is rare that the Bureau's (or the Commission's) legal path is ever so clear.<sup>15</sup>

## **2. The Bureau Decision is Fully Consistent with Commission Precedent Implementing Section 629**

As noted above, common reliance is the fundamental, long-standing mechanism that the Commission has chosen, and the D.C. Circuit has endorsed, for implementing the requirements of Section 629. The Commission has worked over the past decade to implement the statutory directive to create a competitive navigation device market, consistently identifying common reliance as a fundamental, necessary element to achieve the goals of Section 629. The Bureau Decision follows this precedent.

Petitioner argues, however, that in refusing to forego enforcement of this fundamental, long-standing mechanism, the Bureau Decision somehow diverged from Commission precedent. By way of background, the Commission required MVPDs to make available by July 1, 2000, a security element separate from the host device in order to permit unaffiliated manufacturers to commercially market host devices while allowing MVPDs to retain control over their system security.<sup>16</sup> MVPDs were permitted to continue providing integrated equipment at that time, so long as the separated security components (which ultimately became known as CableCARDs) were also made available for use with host devices obtained through retail outlets.<sup>17</sup>

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<sup>15</sup> Section 629(c) does, of course, authorize the Commission to waive its navigation device rules in narrow and compelling circumstances. *See* 47 U.S.C. § 549(c) (requiring that waiver be granted when “necessary to assist the development or introduction of a new or improved multichannel video programming or other service.”) As the Bureau Decision observes, however, Petitioner has not proposed a “new or improved” service. *See generally*, Bureau Decision ¶ 19. Thus, Peitioner’s claim that a waiver is “necessary” to the introduction of such a service must fail. *See* discussion, *infra* at Section II.

<sup>16</sup> *See 1998 Order*, 13 FCC Rcd at 14808.

<sup>17</sup> *Id.*

Nearly nine years ago, the Commission adopted a January 1, 2005, deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device.<sup>18</sup> As the Commission later explained, “[t]he Commission concluded that achievement of the express mandate of Section 629—to assure that consumers have the ability to obtain navigation devices from manufacturers, retailers, and other vendors not affiliated with MVPDs—required prohibition of MVPDs providing security and non-security functionality in a single device.”<sup>19</sup> Shortly after adopting the prohibition, the Commission specifically “found that any cost savings that might exist from the offering of integrated devices likely would be offset by manufacturing gains from an open, competitive market.”<sup>20</sup>

In subsequent notices, the Commission sought comment on the 2005 common reliance deadline, the incentives created by the requirement, and the economic impacts and costs associated with the requirement.<sup>21</sup> Although the Commission has twice extended the original common reliance deadline of January 1, 2005<sup>22</sup>—to the detriment of competition in the navigation device marketplace—it never wavered from its initial determination that “the continued ability [of cable operators] to provide integrated

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<sup>18</sup> *Id.*

<sup>19</sup> *2005 Further Extension Order*, 20 FCC Rcd at 6796. The D.C. Circuit agreed: “If cable operators ‘must take steps to support their own compliant equipment, it seems far more likely that they will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment. This explains the FCC’s ‘prohibition on integrated devices,’ as it ‘assur[es] that MVPDs devote both their technical and business energies towards creation of an environment in which competitive markets will develop.’ It is an explanation that is neither arbitrary nor capricious.” *Charter*, 460 F.3d at 40 (internal citations omitted).

<sup>20</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 14 FCC Rcd 7596, 7610 (1999).

<sup>21</sup> *See, e.g., Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18203 (2000).

<sup>22</sup> In April 2003, the Commission granted the first extension of the common reliance deadline from January 1, 2005 until July 1, 2006. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926 (2003) (“2003 Extension Order”). In March 2005, the Commission granted a further extension of the deadline until July 1, 2007. *2005 Further Extension Order*, 20 FCC Rcd at 6795.

equipment is likely to interfere with the statutory mandate of commercial availability .... [I]ntegration is an obstacle to the functioning of a fully competitive market for navigation devices.”<sup>23</sup>

Although Petitioner describes as “established Commission policy” the “preservation of a low-cost set-top box option for cable customers,”<sup>24</sup> the Commission recognized no such exception to the common reliance requirement until 2005. To the contrary, the Commission repeatedly considered and rejected the cable industry’s cost arguments against common reliance, and has long acknowledged that compliance with the common reliance requirement would result in short-term increased costs to cable operators.<sup>25</sup> Notwithstanding these considerations, the Commission consistently has maintained the common reliance requirement and successfully defended it before the D.C. Circuit.<sup>26</sup> Accordingly, Petitioner’s argument that the Bureau Decision did not explicitly acknowledge the costs of compliance must fail, because the question of whether such costs could justify an exception to the rule had been asked and answered in the negative on multiple occasions.<sup>27</sup>

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<sup>23</sup> 1998 Order, 13 FCC Rcd at 14803.

<sup>24</sup> Application at 4.

<sup>25</sup> See *Charter*, 430 F.3d at 42 (“On the cost side, the agency noted that there was considerable dispute between the cable and consumer electronics industries regarding what those costs would actually be. While the FCC did not dispute that ‘consumers will face additional costs in the short term,’ it ‘agree[d] with the [consumer electronics] parties and other commenters that the cost[s] ... likely will decrease over time as volume usage increases.’ The Commission also took steps to minimize industry costs .....”) (internal citations omitted).

<sup>26</sup> See *id.* (“Given the congressional command ‘to assure’ such availability ... and the FCC’s determination that the integration ban was necessary to do so, we cannot regard the agency’s cost-benefit balance as arbitrary.”).

<sup>27</sup> Similarly, Petitioner cannot now claim that a diversion of its resources justifies a waiver. This argument has failed on multiple occasions before the Commission, and, moreover, Petitioner and other cable operators have been on notice with respect to the common reliance requirement for nearly nine years.

### 3. The Bureau Decision is Fully Consistent with the 2005 Further Extension Order

Petitioner appears to conclude that the Commission adopted the 2005 Further Extension Order solely for the purpose of establishing a “waiver policy” for common reliance. In fact, the Commission adopted the 2005 Further Extension Order in response to the cable industry’s repeated requests for further extension of the effective date of the common reliance requirement, over the vociferous objections of SEL and the rest of the consumer electronics industry.<sup>28</sup> The 2005 Further Extension Order did not give the cable industry its cake (by extending the common reliance deadline) and allow it to eat it, too (by establishing a broad loophole for avoiding the common reliance requirement entirely).

In reality, the *2005 Further Extension Order* offered a sweeping endorsement of common reliance, and described very narrow circumstances where relief from the requirement would outweigh its benefits. The Commission concluded, as it had in the past, that “the heart of a robust retail market for navigation devices is the reliance of cable operators on the same security technology and conditional access interface that consumer electronics companies must rely on in developing competitive navigation devices”<sup>29</sup> The Commission described the common reliance requirement as “one of the few reasonable mechanisms for assuring that [cable operators] devote both their technical and business energies toward the creation of an environment in which competitive markets will develop.”<sup>30</sup> The *2005 Further Extension Order* identified narrow

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<sup>28</sup> Cable was given a “limited extension of the integration ban to determine whether it is possible to develop and deploy a downloadable security function that will permit them to comply with our rules without incurring the costs associated with the physical separation approach.” *2005 Further Extension Order*, 20 FCC Rcd at 6795.

<sup>29</sup> *Id.* at 6807.

<sup>30</sup> *Id.* at 6809.

circumstances where a broader public policy goal might supersede the benefits of common reliance. In particular, the Commission said as follows:

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. . . . 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.<sup>31</sup>

The Bureau properly rejected Petitioner's Waiver Request, because Petitioner failed to demonstrate that waiver would further this overarching policy goal at all, much less to a degree sufficient to avoid harm to common reliance.

Notably, Petitioner does not argue that the grant of its Waiver Request would further the public interest by accelerating the over-the-air digital transition. Instead, Petitioner seems to contend that any set-top box, if it can somehow be described as "low-cost and limited capability", should qualify for a common reliance waiver as a matter of right. There are two problems with this formulation. First, the Commission didn't say that any "low-cost, limited capability" device would qualify for a waiver. It said, as discussed above, that it would "consider" granting waivers for "low-cost, limited capability" devices *in the context of furthering the over-the-air digital transition*. Second, Petitioner appears to claim that the *2005 Further Extension Order* specifies those features and functionalities that would preclude a particular device from qualifying as

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<sup>31</sup> *2005 Further Extension Order*, 20 FCC Rcd at 6813. SEL reiterates, and asks that the Commission incorporate by reference, its argument that the stated policy basis for even this exception no longer exists, because The Deficit Reduction Act of 2005 set a hard deadline for the over-the-air digital transition. See Letter from Jim Morgan, Director and Counsel, Sony Electronics Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CSR-7012-Z, CS Docket No. 97-80, at 4-6 (August 4, 2006).

“low-cost, limited-capability”, and that any device that does not include such features would automatically meet the definition and thus qualify for waiver.<sup>32</sup>

Again, and as the Bureau Decision makes clear, the *2005 Further Extension Order* says something different. Specifically, it clearly states that a waiver would not be “warranted for devices that contain personal video recording, high-definition, broadband Internet access, [or] multiple tuner[s].” It also states, however, that a waiver would not be granted for devices containing “other similar advanced capabilities.”<sup>33</sup> In short, a device that includes one or more of the specified functionalities will *per se* fail the “low-cost, limited capability” test, but devices that include other “similar advanced” functionalities might fail as well.

Because the Commission did not define “similar advanced capabilities,” the Bureau properly interpreted this term against the backdrop of the common reliance requirement and in the context of the overarching policy goals set forth in the 2005 Further Extension Order – promotion of the over-the-air digital transition and cable migration to all-digital networks. Thus, the Bureau confined the definition of “low-cost, limited-capability” to apply only to “those devices whose functionality is limited to making digital cable signals available on analog sets.”<sup>34</sup>

#### **4. The Bureau Decision is Clearly Supported by the Record Established in Response to Petitioner’s Waiver Request**

The Commission should not accept Petitioner’s contention that the Bureau arbitrarily denied Petitioner’s waiver request without any basis in the record. In fact, SEL and other parties clearly and repeatedly demonstrated the practical, legal, and policy

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<sup>32</sup> See Application at 6. (“[t]here is no reference anywhere in the [2005 Order] to excluding two-way set-top boxes from the waiver process.”).

<sup>33</sup> *2005 Further Extension Order*, 20 FCC Rcd at 6814.

<sup>34</sup> Bureau Decision, ¶ 26.

ramifications of a waiver grant, and the Bureau Decision explicitly relies on these filings. For example, commenters (including SEL) demonstrated that grant of a waiver would allow cable operators to retain a significant portion of the navigation devices market in the coming decade, preventing or, at a minimum, delaying development of a competitive market.<sup>35</sup> Commenters also discussed that a waiver would reduce or eliminate the incentive for Petitioner to devote sufficient resources toward technology that would allow consumer electronics manufacturers to offer competitive devices at retail.<sup>36</sup> Pointing to the history of poor cable industry customer service for CableCARD products, commenters noted that grant of a waiver would further reduce or wholly eliminate any incentive of cable operators to provide customer service to CableCARD products.<sup>37</sup>

In addition, Pioneer North America (“Pioneer”) and SEL explained that a waiver would create further inequity between the cable and consumer electronics industries. Specifically, if the waiver were granted, Petitioner could offer its subscribers two-way devices for which consumer electronics manufacturers currently cannot produce an equivalent.<sup>38</sup> SEL urged the Bureau to limit any waivers of the common reliance requirement to capabilities that an unaffiliated manufacturer is able to offer at retail.<sup>39</sup> The Bureau Decision is fully consistent with these arguments; the record in this docket

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<sup>35</sup> See Bureau Decision, ¶ 9; SEL Comments at 4.

<sup>36</sup> IT Comments at 8.

<sup>37</sup> Sharp Comments at 2; SEL Comments at 3.

<sup>38</sup> Letter from Adam Goldberg, Vice President, Government and Industry Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (Aug. 24, 2006); Letter from Jim Morgan, Director and Counsel, Government and Industry Affairs, Sony Electronics, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 (Aug. 11, 2006); Letter from Jim Morgan, Director and Counsel, Government and Industry Affairs, Sony Electronics, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 7-8 (Aug. 4, 2006) (“*Sony Aug. 4 ex parte*”).

<sup>39</sup> *Sony Aug. 4 ex parte* at 7.

generally, and in the context of the Waiver Request in particular, offer ample support for the conclusions reached therein.

**II. THE BUREAU CORRECTLY FOUND THAT PETITIONER DOES NOT MEET THE REQUIREMENTS FOR GRANT OF WAIVER**

**A. *Petitioner did not Meet the Requirements for Grant of a Waiver under Section 629(c)***

The Bureau correctly determined that Petitioner’s request exceeded the narrow and specifically prescribed waiver provision of 629(c).<sup>40</sup>

Section 629(c) of the Act states, in pertinent part, that the Commission:

shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing...that such a waiver is necessary to assist the development and introduction of new and improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.<sup>41</sup>

In concluding that “we do not find that a waiver is ‘necessary’ to assist in the development of introduction of new or improved services,”<sup>42</sup> the Bureau properly found that Petitioner did not meet the required showing.

The Bureau concluded the services identified by Petitioner as justification for the waiver were neither “new or improved” in that nearly half of Petitioner’s customers already subscribe to such services and that such service is already offered to its *entire* customer base.<sup>43</sup> The Bureau also found that a waiver was not “necessary” to assist in the “*development or introduction*” of the identified services. Not only were – as noted above – these services already ubiquitously available and widely utilized – but as quoted by the

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<sup>40</sup>See Bureau Decision, ¶ 19.

<sup>41</sup> 47 U.S.C. §549(c).

<sup>42</sup> Bureau Decision, ¶ 19.

<sup>43</sup> *Id.*, ¶ 17-18.

Bureau, Petitioner’s own press notes that revenues for VOD and PPV – two of the key supposedly nascent services identified by Petitioner as justifying a Section 629(c) waiver – “increased 30% in the second quarter of 2006 from the same time in 2005.”<sup>44</sup>

**1. If Applied, Petitioner’s Interpretation of the Section 629(c) Waiver Provision would Render Section 629(a) Meaningless**

The Bureau correctly found that “the purpose of Section 629(c) is to allow for waivers where necessary to assist in the development or introduction of new or improved services that otherwise would be prohibited.”<sup>45</sup> In contrast, Petitioner appears to argue that a Section 629(c) waiver “shall” be granted if it would merely assist in the development of services Petitioner wishes to offer.<sup>46</sup> As correctly noted by the Bureau, such an interpretation would result in the narrow exception – *i.e.*, the 629(c) waiver – eating the general rule – *i.e.*, Congress’ directive in Section 629(a) to the Commission to establish a competitive market for retail navigation devices.<sup>47</sup>

Although Petitioner identifies ways in which grant of its waiver request might decrease costs, it makes no effort to demonstrate why such a waiver is *necessary* as required by the plain language of Section 629(c). In context, “necessary” means “being essential, indispensable or requisite,”<sup>48</sup> and Petitioner offers no evidence that grant of the Waiver Request would be essential, indispensable, or requisite to the deployment of non-broadcast programming services, music audio channels, special tiers of service, digital parental control technologies, electronic program guides, pay-per-view programming, video on demand, or other interactive television applications. As the Bureau accurately

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<sup>44</sup> *Id.*, ¶ 18.

<sup>45</sup> *Id.*, ¶ 19.

<sup>46</sup> See Application, 10-15.

<sup>47</sup> Bureau Decision, ¶ 19.

<sup>48</sup> See, *e.g.*, <http://dictionary.reference.com/browse/necessary> (last visited Feb. 14, 2007).

notes, “a significant portion of Petitioner’s subscribers already receive many of the services described in the Waiver Request [and] it appears that a number of those services have achieved success in the marketplace.” Petitioner does not, and cannot reasonably, argue that it will continue to offer these services *only* at the expense of common reliance.

By contrast, Petitioner appears to interpret the word “necessary” to mean “beneficial” or “helpful”. Aside from conflicting with the plain language of Section 629(c), such an interpretation would, as the Bureau Decision observes “effectively negate any rules adopted pursuant to Section 629(a).”<sup>49</sup> Petitioner would have the Commission set the bar for common reliance waivers so low that virtually anything that “would assist in the development or introduction of virtually any service offered by an MVPD”<sup>50</sup> would qualify. Thus, the Bureau correctly concluded that “Congress did not intend[] for [the Commission] to interpret this narrowly tailored exemption in such a lenient manner.”<sup>51</sup>

**B. *The Bureau Properly Concluded that Petitioner’s Waiver Request Failed to Make the Necessary Showing to Support a Waiver under Sections 1.3 and 76.7 of the Commission’s Rules***

In addition to engaging in the proper analysis and reaching the correct conclusion under Section 629(c), the Bureau properly analyzed Petitioner’s Waiver Request under the general waiver provisions of the Commission’s rules and, again, properly denied the request. Judicial and Commission precedent clearly place a substantial burden on the waiver applicant to justify an exception to a valid Commission rule, particularly one that

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<sup>49</sup> Bureau Decision, ¶ 19.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Petitioner further misreads Section 629(c) to require that the Commission act on waiver requests within 90 days of receipt. In fact, Section 629(c) requires the Commission to *grant* waiver requests within 90 days. It does not, however, establish any time limit for the *denial* of waiver requests, as the Bureau has done in this case.

has been upheld in court. Petitioner failed to meet its burden, and the Bureau properly denied Petitioner's request.

Section 1.3 of the Commission's rules sets forth the general waiver standard applicable to all Commission rules.<sup>52</sup> Section 76.7 offers a second, largely similar waiver standard that applies to the provisions of Part 76 of the Commission's rules.<sup>53</sup> As further discussed below, Petitioner's waiver request failed in each instance, and thus could not be granted.

**1. Petitioner Failed to Make the Necessary Public Interest Showing to Support a Waiver**

a. *Petitioner Failed to Demonstrate that the Grant of the Waiver Request Would Not Frustrate the Underlying Purpose of Common Reliance*

The record demonstrates, and the Bureau reasonably concluded based on that record evidence, that grant of the Waiver Request would harm common reliance and undermine the goals of that policy. Accordingly, the Petitioner's request cannot meet the public interest waiver test.<sup>54</sup> Petitioner contends that "the Commission's goal of 'common reliance' will be fully achieved via Petitioner's substantial deployment of higher-end CableCARD-enabled set-top boxes ... once the integration ban goes into effect."<sup>55</sup>

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<sup>52</sup> 47 C.F.R. §1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.").

<sup>53</sup> See 47 C.F.R. §76.7(a)(1), (i). Section 76(i) states, in pertinent part, that 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 [waiver] request . . . ."

<sup>54</sup> Petitioner argues that "grant of the waiver would have no impact on consumers' ability to buy, nor [Petitioner's] obligation to support, CableCARD-enabled products at retail." Application at 17. This point, even if true, is inapposite. It addresses the obligation of cable service providers to offer separable security to enable the operation of devices from unaffiliated manufacturers, as set forth in the first sentence of Section 76.1204(a)(1), and which Petitioner does not challenge. The common reliance obligation, which Petitioner does challenge, is set forth in the second sentence of Section 76.1204(a)(1).

<sup>55</sup> Application at 17.

As SEL and others have stated in the record, however, grant of Petitioner’s waiver request would undermine a substantial percentage of the consumer benefits of common reliance.<sup>56</sup> As a result, the Commission’s decade-long history of implementing the statutory direction of Section 629 would be similarly impaired. As the Commission observed in the 1998 Order, common reliance “will facilitate the development and commercial availability of navigation devices by permitting a larger measure of portability among them, *increasing the market base and facilitating volume production and hence lower costs.*”<sup>57</sup> As SEL observed in its comments, and which Petitioner does not rebut, grant of the Waiver Request would decrease today’s CableCARD market base by an estimated thirty to forty percent,<sup>58</sup> resulting in the concurrent loss of volume production benefits to consumers. Accordingly, the Bureau was correct to conclude that a grant would “nullify the goal of Section 629(a).”<sup>59</sup>

b. *Petitioner Could Not Show any Unique or Unusual Circumstances that Would Make Application of the Common Reliance Requirement to Petitioner Inequitable or Unduly Burdensome*

Waiver does not serve the public interest because Petitioner cannot demonstrate any unique or unusual circumstances that would result in an inequitable or unduly burdensome application of the underlying rule. Thus, the rule must be applied. As the largest MVPD in the market today, Petitioner does not and cannot demonstrate any unique circumstance that would render application of the common reliance requirement inequitable. Petitioner’s arguments regarding the costs of common reliance demonstrate, at best, that some burden will result from this policy. Indeed, as noted above, the

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<sup>56</sup> See SEL Comments at 4-6, CEA Waiver Comments at 6-7.

<sup>57</sup> 1998 Order at ¶49 (emphasis added).

<sup>58</sup> See SEL Comments at 5.

<sup>59</sup> Bureau Decision, ¶ 19.

Commission has acknowledged that common reliance might impose some burden on cable service providers, but has concluded that any such burden would be more than offset by countervailing public interest benefits.<sup>60</sup> Absent a showing of unique circumstances, this burden alone, even if proven and unmitigated, does not establish a public interest harm sufficient to justify a waiver.

c. *The Bureau Properly Found More Generally that the Public Interest Would Not be Served by Grant of the Requested Waiver, and that Denial Would Not be Contrary to the Public Interest*

In reviewing the impact of the waiver request on the public interest generally, the Bureau concluded that the public interest benefits of the waiver, if any, would be outweighed by the public interest harms that would result from the concurrent undermining of common reliance.<sup>61</sup> Accordingly, the Bureau properly concluded that the net impact of the waiver request on the public interest would be negative.

Though under no obligation to do so, the Bureau also took the step of providing guidance to Petitioner and others on the elements of possible future common reliance waiver requests that might offer public interest benefits sufficient to offset the public interest harms that would result. In doing so, the Bureau did not establish “new policy” or “conjure up an entirely different waiver regime,”<sup>62</sup> as Petitioner contends. Rather, the Bureau Decision suggests to Petitioner ways in which it might modify its waiver request in order to better its chances of successfully meeting the Commission’s general waiver standards viewed in the context of the 2005 Further Extension Order. This unnecessary extra effort by the Bureau is nothing more than a benefit to Petitioner and others similarly

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<sup>60</sup> See Bureau Decision, ¶ 31, n.109.

<sup>61</sup> See *id.*, ¶ 31.

<sup>62</sup> Application at 18.



**CERTIFICATE OF SERVICE**

I, Jim Morgan, do hereby certify that I have served a true and complete copy of the foregoing Opposition to Application for Review by first class United States mail, postage prepaid, or via electronic mail, on this, the 14<sup>th</sup> day of February, 2007, on the following:

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