BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-1237

CHARTER COMMUNICATIONS, INC. AND
ADVANCE/NEWHOUSE COMMUNICATIONS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

1998 Order	*Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 13 FCC Rcd 14775 (1998)
Br.	petitioners' opening brief
DBS	direct broadcast satellite
Extension Order	*Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924 (2003)
Further Notice	*Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Further Notice of Proposed Rulemaking And Declaratory Ruling, 15 FCC Rcd 18199 (2000)
J.A.	Joint Appendix
MVPD	multichannel video programming distributor
NCTA	National Cable & Telecommunications Association
Order	*Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Second Report and Order, 20 FCC Rcd 6794 (2005)
Reconsideration Order	*Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 14 FCC Rcd 7596 (1999)

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STATEMENT OF ISSUES

Cable television operators Charter Communications, Inc. and Advance/Newhouse Communication (collectively, "petitioners"), both members of the National Cable & Telecommunications Association ("NCTA"), seek review of an order of the Federal Communications Commission in *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Second Report and Order, 20 FCC Rcd 6794 (2005) ("*Order*") (J.A.). That *Order* extended (from July 1, 2006, to July 1, 2007) the date by which cable operators must comply with an existing rule requiring them to cease offering their subscribers navigation devices (such as cable set-top

boxes) that bundle both security (descrambling) and non-security (*e.g.*, channel selection) functions, but declined for now to remove altogether the ban on such integrated navigation devices. The case presents the following questions for the Court's review.

1. Whether petitioners' claim that the Commission lacks authority under 47 U.S.C. § 549(a) to prohibit cable operators from providing integrated navigation devices is: (a) barred as untimely; (b) precluded because the Court already has rejected that claim on review of NCTA's challenge to the prior order that initially adopted the integration ban; (c) barred because it was not raised before the agency; and, in any event, (d) without merit.

2. Whether the Commission reasonably exercised its predictive judgment in determining that the integration ban, which had never gone into effect seven years after its initial adoption, remained necessary, pending further developments and industry reports on the market, to ensure the commercial availability of competitive navigation devices under 47 U.S.C. § 549(a).

3. Whether petitioners' claim that the Commission's integration ban arbitrarily accords disparate treatment to cable operators and direct broadcast satellite providers is barred because it is untimely, and, if it is not barred, whether it otherwise is without merit, given the record and the limited scope of this proceeding.

JURISDICTION

The Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations, in addition to those included in the petitioners' opening brief, are appended in the addendum to this brief.

COUNTERSTATEMENT

I. Regulatory Background

Section 629. Petitioners challenge regulations promulgated by the Commission in fulfillment of its statutory mandate under section 629 of the Communications Act, entitled "Competitive Availability of Navigation Devices." 47 U.S.C. § 549. Section 629 was added to the Communications Act as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Generally speaking, navigation devices are the equipment used to gain access to video programming and other services from multichannel video programming distributors ("MVPDs") such as cable television operators. Section 629 applies, by its terms, to "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems." 47 U.S.C. § 549(a).

As its title indicates, section 629 was adopted "to assure the commercial availability" of navigation devices "from manufacturers, retailers, and other vendors not affiliated with any [MVPD]." 47 U.S.C. § 549(a). In the cable television industry, for example, subscribers historically have leased navigation devices from their cable operators as part of the subscribers' overall service package. These leased devices typically integrate conditional access (security) functions, which control access to all encrypted or scrambled channels (such as HBO and other channels above the basic tier), along with other functions, such as tuning basic tier services. Because only the cable system operator could provide the conditional access technology, suppliers not affiliated with the cable operator were not able to offer consumers comparable navigation devices, and consumers were denied competitive choices at retail. This limitation on consumer choice meant that subscribers were "locked in" to the navigation device selected by the

cable operator, with no options on price, quality, or features. In enacting section 629, Congress sought to remedy this monopoly situation and thus provide options to consumers by effecting a "transition to competition in network navigation devices and other customer premises equipment." H.R. Rep. No. 104-204, at 112 (1995). Competition, Congress said, is "an important national goal" that will lead to "innovation, lower prices and higher quality." *Id*.

At the same time, recognizing the problem of unauthorized reception of service, section 629(b) directs the Commission not to prescribe regulations under subsection (a) that would jeopardize the security of services offered by an MVPD or impede an MVPD's legal rights to prevent theft of service, 47 U.S.C. § 549(b); and the statute forbids the Commission from prohibiting any MVPD from also offering navigation devices to consumers so long as the system operator's charges to consumers for such devices "are separately stated and not subsidized by charges" for the service, 47 U.S.C. § 549(a).

Finally, section 629 contains a "sunset" provision, which states that FCC regulations promulgated under the statute will cease to apply when the Commission determines that the market for MVPD service and associated navigation devices is "fully competitive" and that elimination of the regulations would "promote competition and the public interest." 47 U.S.C. § 549(e).

FCC Implementation of Section 629. The FCC in 1998 adopted rules to implement the statute, requiring MVPDs to make available by July 1, 2000, a security element (described by the Commission at the time as a "point-of-deployment module" and now commonly referred to as a

"CableCARD") separate from the basic navigation device (or "host device").[1] The CableCARD is a credit card-sized module that plugs into a slot in the host device, making the host device functionally equivalent to an integrated device (*i.e.*, capable of performing both navigation and security functions) for purposes of receiving all programming except interactive programming. The Commission concluded that the separation of the security element from the host device would permit unaffiliated suppliers to market host devices commercially while allowing MVPDs to retain control over their system security. This unbundling, the Commission determined, would "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." *1998 Order*, para. 49.

The *1998 Order* also required cable operators, by January 2005, to cease leasing new navigation devices that performed both conditional access and non-security functions. *1998 Order*, para. 49. The Commission determined that, even with unbundled security – *i.e.*, CableCARDs – available from cable operators, the continued availability of integrated navigation devices only from cable operators would impede competition by discouraging customers from switching to commercially available host devices. *Id.*, para. 69. The Commission acknowledged, in response to petitions for reconsideration, that integration might yield some cost savings for subscribers, but concluded that such savings would likely be offset

[1] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 13 FCC Rcd 14775, para. 76 (1998) ("*1998 Order*"), *petition for review denied, General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000) ("*General Instrument*") .

by increased innovation and manufacturing savings in an open, competitive market.[2] The Commission concluded that, in light of the competitive impediments caused by integrated navigation devices, a phased prohibition on such devices was required by the command of section 629(a) that the Commission "take actions to assure that consumers have the ability to obtain navigation devices" from sources other than the MVPD. *Reconsideration Order*, para. 25.

The Commission found that marketplace distinctions dictated a different result for navigation devices used to gain access to direct broadcast satellite ("DBS") services. *1998 Order*, para. 64; *Reconsideration Order*, paras. 36-37. Unlike the cable market, in which no navigation devices were available except through cable operators, in the DBS market, integrated navigation devices were already available at retail – offering consumers competitive choices and declining prices. *See 1998 Order*, para. 64 (noting that at least 10 equipment manufacturers were already competing to provide devices to consumers at retail and that the price of equipment had fallen significantly over the preceding three years). Moreover, although the DBS equipment on sale was not portable among DBS providers – equipment used to gain access to DirectTV programming could not be used to obtain Echostar programming – each DBS service provider had a nationwide service footprint. Unlike navigation devices used in the cable market, the DBS equipment thus was geographically portable across the nation enabling subscribers to continue using their equipment if they moved to a new location and continued to subscribe to the same DBS service provider. *1998 Order*, para. 66. In addition, DBS service providers were relatively new entrants in the MVPD market. *Id.*, para. 65. Concluding that requiring DBS providers to

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[2] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 14 FCC Rcd 7596, paras. 28, 30 (1999) ("*Reconsideration Order*"), *petition for review denied*, *General Instrument*, 213 F.3d 724.

separate security would serve little purpose and could be disruptive to that developing market, *id*., para. 64, the FCC thus declined to impose security separation requirements with respect to DBS navigation devices. *See* 47 C.F.R. § 76.1204(a)(2). The Commission determined that this result was consistent with section 629, because that provision "mandates the outcome of competitive availability, not uniform means to achieve this result." *Reconsideration Order*, para. 37.

General Instrument Corp. v. FCC. Several parties, including the cable industry's trade association (NCTA), sought judicial review of the Commission's orders. In *General Instrument*, this Court affirmed the action taken by the Commission to implement section 629 in the *1998 Order* and the *Reconsideration Order*. The Court held that the Commission had reasonably interpreted section 629 to authorize its prohibition on integrated navigation equipment, notwithstanding language in the second sentence of section 629(a) providing that the Commission's regulations "'shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming.'" *General Instrument*, 213 F.3d at 730 (quoting 47 U.S.C. § 549(a)). The Court noted that the same description of covered equipment also appeared in the first sentence of section 629(a), which requires the Commission "'to assure the commercial availability'" of such equipment. *Id.* The Court concluded that the agency reasonably gave meaning to both sentences of section 629(a) by construing the provision to authorize a prohibition on equipment that integrates security and non-security functions in order to achieve the goal of assuring availability without jeopardizing security. *Id*.

The Court in *General Instrument* did not rule on the reasonableness of the Commission's integration ban under the arbitrary and capricious standard, because the petitioners in that case

had waived the argument by failing to present it in their opening brief. 213 F.3d at 731-32. The Court did not consider their argument and did not remand the issue to the agency for further analysis. The Court did note that Commissioner Powell, dissenting in part from the *1998 Order*, had asserted that the integration ban was economically unsound because it denied consumers the efficient, low-cost alternative of purchasing integrated equipment. *Id.* at 731. The Court continued, however, that even if it were to conclude that Commissioner Powell "had the better argument, we would not on that basis alone be justified in reversing the Commission's economic judgment," so long as the agency spelled out the consumer benefits that it expected to flow from the rule. *Id*. at 732.

II. The Proceeding On Review

The Scope of the Proceedings. Shortly after this Court issued the *General Instrument* decision in 2000, the Commission released a *Further Notice* seeking comment on the effectiveness of the rules it had adopted and on whether certain changes were necessary.[3] The Commission requested comment on "the mechanics of the phase-out of integrated boxes" and, in particular, "whether the 2005 date for the phase-out of integrated boxes remains appropriate." *Further Notice*, para. 11. The Commission did not ask for comment on the continuing validity of its decision to exempt DBS service from the security separation requirements with respect to navigation devices, or on its prior determination – affirmed by this Court – that section 629 authorizes the agency to prohibit cable operators from providing subscribers with integrated navigation devices.

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[3] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd 18199, para. 1 (2000) ("*Further Notice*").

Before the Commission could act on the *Further Notice*, the cable and consumer electronics industries adopted a memorandum of understanding (the "plug and play MOU") that reflected a compromise agreement to integrate the non-security navigation functionality of set-top converter boxes into television receivers in a manner that would allow consumers to attach unidirectional "digital cable ready" television receivers directly to the cable system with the use of CableCARDs.[4] In light of this development, which could have an effect on "the development of technical specifications relating to host devices," the Commission in 2003 extended the deadline for phasing out integrated navigation devices until July 1, 2006, to accommodate "business ordering and manufacturing cycles."[5] At the same time, the Commission asked the cable and consumer electronics industries to supplement their comments from the 2000 *Further Notice*. The Commission asked for status reports regarding ongoing negotiations with respect to standards for "bidirectional digital receivers and products" which would enable "cable ready" televisions to gain access to "on demand" movies and other interactive cable services without a cable converter box. *Extension Order*, para. 5. The Commission announced its intention by 2005 to complete the "reassessment of the state of the navigation devices market" that it had begun with the *Further Notice* and determine "whether the designated time frame remains

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[4] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment* (CS Docket No. 97-80 & PP Docket No. 00-67), Further Notice of Proposed Rulemaking, 18 FCC Rcd 518 (2003) (seeking comment on the plug and play MOU). "Unidirectional" receivers allow subscribers to receive cable programming, but do not permit them to gain access to two-way functionalities, such as interactive menu guides and "on demand" movies, without a cable-supplied navigation device.

[5] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924, para. 4 (2003) ("*Extension Order*").

appropriate or whether the ban on integrated devices will no longer be necessary." *Extension Order*, para. 5.

The Administrative Record. The cable industry and manufacturers of integrated navigation devices argued in their comments that the Commission's prohibition on integrated devices should be eliminated, or, at least, that the deadline for phasing out the deployment of such devices should be extended. *See Order*, para. 13 (J.A.). Manufacturers and retailers of consumer electronics, by contrast, supported retention of the July 1, 2006, phase-out deadline. *Id.*

Cable Industry Comments. Cable commenters argued that changes in market conditions occurring since the Commission adopted the phased elimination of integrated navigation devices warranted repeal of the rule. They asserted, for one thing, that they now were willing to support the sale of integrated navigation devices at retail, rather than insisting on the lease of such devices directly to subscribers. *See Order*, para. 14 (J.A.). The cable industry also pointed to the adoption in late 2003 of one-way plug and play rules,[6] which they claimed had led to the development of CableCARD-ready digital television models from several different independent manufacturers. *See Order*, para. 16 (J.A.). They argued that, because the new plug and play rules require cable operators to support technically and maintain an adequate supply of CableCARDs that are compatible with commercially available receivers, the integration ban was no longer needed to provide cable operators with economic incentives to supply and support

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[6] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment* (CS Docket No. 97-80 & PP Docket No. 00-67), Second Report and Order, 18 FCC Rcd 20885 (2003), *petition for review pending*, *Echostar Satellite LLC v. FCC*, D.C. Circuit No. 04-1033 (filed January 27, 2004).

those security modules. *See id.* The cable commenters noted, in addition, that negotiations were progressing with respect to standards for two-way plug and play devices – suggesting that further market-opening developments would be forthcoming. *See Order*, paras. 17-20 (J.A.).

Cable commenters argued that the costs of the integration ban outweighed its incremental benefits in light of the highlighted market developments. In particular, they asserted that separate CableCARDs and host devices would cost cable operators and consumers significantly more than integrated set-top devices, and that the integration ban denied consumers the choice of a convenient and less expensive choice. *See Order*, para. 23 (J.A.). Cable commenters also stated that they were working on a lower-cost downloadable security solution that they claimed would achieve essentially the same result as separated security, but without the cost of a CableCARD and associated interface. *See Order*, para. 23 (J.A.). Finally, cable operators argued that the integration ban should be eliminated because it places cable operators at a competitive disadvantage with respect to DBS service providers, which are not subject to the ban. *See Order*, para. 26 (J.A.).

Consumer Electronics Industry Comments. The consumer electronics industry challenged each of the cable industry's assertions. With respect to cable's offer to allow retail distribution of integrated equipment, the consumer electronics manufacturers and retailers argued that there was no real world record of cable operators opening the market for integrated devices to competitive manufacturers on the same basis that it is open to cable operators and their direct suppliers; moreover, these commenters alleged, the deployment of integrated devices would continue to allow the cable industry to place obstacles or conditions on competitive entry. *See Order*, para. 14 (J.A.).

With respect to the development of plug and play standards, the consumer electronic commenters acknowledged that progress had been made, but argued that reliance by both cable operators and competitive suppliers on a common security interface remained essential for future progress. *See Order*, para. 16 (J.A.).[7] In particular, these commenters asserted, notwithstanding regulatory mandates with respect to CableCARDs and interface standards, cable operators will lack the necessary economic incentives to make separate security work if they are permitted to continue to deploy integrated navigation devices. *Order*, paras. 21-22 (J.A.). The consumer electronics commenters claimed, further, that to the extent that the provision of separate CableCARDs and host devices may be more expensive than integrated equipment, it is only because such separate equipment is not yet provided in sufficient quantities to benefit from scale economies; in their view implementation of the integration ban would allow the market to develop and result in lower prices and technological innovation. *Order*, paras. 23-24 (J.A.).

Finally, DBS service providers disputed cable claims that the exemption of DBS from the requirement to provide separated security places cable providers at a competitive disadvantage. DBS providers stated that MVPD competition still weighs heavily in favor of cable, and that, unlike cable, geographically portable DBS equipment remained widely available at retail. *See Order*, para. 26 (J.A.).

The Order On Review. Addressing the timing question most prominently posed in the *Further Notice* and *Extension Order*, the Commission, on the basis of the record before it,

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[7] The devices produced by consumer electronics manufacturers pursuant to the plug and play rules are not limited to set-top boxes and, in many cases are not set-top boxes at all, but television sets, digital video recorders, or even personal computers, with built in navigation functionality. These are among the devices that the consumer electronics manufacturers claim will survive only if the cable industry relies on the same security interface as competitors (*i.e.*, CableCARDs).

determined that an extension of the deadline for phasing in the integration ban until July 1, 2007, was warranted. *Order*, para. 36 (J.A.). That extension, the Commission said, would provide the industry time to determine whether it was feasible to implement a downloadable security solution that would satisfy common reliance objectives without the expense of physically separating the security and host components of navigation devices. *Order*, para. 31 (J.A.). The Commission stated that if parties demonstrate that downloadable security is feasible, but cannot be implemented by July 1, 2007, it would consider requests for further extension of the deadline. *Order*, para. 36. (J.A.). The Commission thus held open the possibility that successful development and implementation of a downloadable security system might obviate the need for the integration ban before it actually takes effect.

While extending the deadline, the Commission declined at this point to eliminate the prohibition on integrated devices. *Order*, para. 27 (J.A.). The Commission acknowledged progress in implementing the one-way plug and play rules, noting that CableCARD-compatible devices are available at retail and being used by consumers. *Order*, para. 28 (J.A.). At the same time, the Commission credited evidence that the cable industry was "not adequately supporting" the CableCARDs themselves, and the agency expressed disappointment with the progress of negotiations regarding two-way plug and play devices. *Order*, paras. 27, 28, 39 (J.A.).

The Commission concluded that "[t]he prohibition on integrated devices appears to be one of the few reasonable mechanisms for assuring that MVPDs devote both their technical and business energies toward the creation of an environment in which competitive markets will develop." *Order*, para. 30 (J.A.). "[C]ommon reliance by MVPDs and consumer electronics manufacturers on an identical security function," the Commission concluded, "will align

MVPDs' incentives with those of other industry participants so that MVPDs will plan the development of their services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon." *Order*, para. 30 (J.A.). The Commission concluded that alternative means of reaching the same result would likely "be far more intrusive" and require "detailed regulatory oversight, which might constrain technological advancement." *Id.* The Commission thus saw the choice before it as being between one rule – the integration ban – which would provide economic incentives for industry participants develop a competitive market, and or a whole list of detailed technical standards and conduct rules.[8]

The FCC acknowledged that, with current technology, "the prohibition on the use of integrated devices will have certain cost and service disadvantages" in the short term. *Order*, para. 29 (J.A.). However, the Commission credited consumer electronics industry assurances that the costs associated with separate security and host devices "likely will decrease as volume usage increases." *Id*. The Commission also predicted that these short-term costs "should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market," including "potential savings to consumers from greater choice among navigation devices." *Id.* Moreover, the Commission promised to mitigate the potential short-term cost burdens of the integration ban by entertaining requests for waiver of the ban with respect to certain "low-cost, limited capability boxes." *Order*, para. 37 (J.A.). The Commission, accordingly, determined that the balance of benefits and burdens supported

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[8] *See*, *e.g.*, Ex Parte Filing of Consumer Electronics Retailers Coalition Re Retention of POD Reliance, CS Docket No. 97-80, at 2 (March 20, 2003) (J.A.) (arguing that the integration ban "eliminates the need for the Commission to make ongoing regulatory judgments over whether cable [operators] are giving *equivalent* support to competitive entrant products that rely on an interface devised solely for their [own] use [and not for use by the cable operator]").

retention of the integration ban pending further consideration of reports it required on developments (*e.g.*, regarding CableCARD usage and possible downloadable security solutions) in the market. *Order*, paras. 27, 32, 36, 39 (J.A.).

The Commission did not consider the merits of claims that it should accord the same treatment to the navigation devices used in connection with DBS service that it does with respect to cable navigation devices. As shown above, the Commission determined that it should not at this point eliminate the integration ban for navigation equipment used in connection with cable services. The question of extending the integration ban to DBS equipment was not within the scope of the proceedings that had been defined in the *Further Notice* and *Extension Order*. The Commission, accordingly, determined that this proceeding did not "provid[e] a record on which * * * to resolve" the latter issue." *Order*, para. 38 (J.A.).

Subsequent Events. Although the Commission offered to consider further extensions of the integration ban deadline on a proper showing, *Order*, para. 36 (J.A.), the cable industry has not sought any additional extension. Instead, as in *General Instrument*, members of the cable industry once again seek judicial review of the integration ban, this time by challenging the *Order*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is mostly a case of second impression. The Commission did not adopt its integration ban in the *Order* that is now before the Court. That rule was adopted in the nearly eight-year-old *1998 Order* that was affirmed by this Court on review in *General Instrument*. The principal new action that the Commission took in the *Order* on review now was to extend the deadline for the phase-out of integrated set-top boxes to July 1, 2007. Petitioners do not challenge that action.

Petitioners apparently recognize the difficulty of their position. Thus, they repeatedly assert that the Commission in its decision "readopted" the 1998 integration ban after it had "reopened" the rulemaking proceeding. *See*, *e.g.*, Br. 3, 8, 11, 13, 16, 28, 30. They contend that a "reopening" and "readoption" mean that the rules now are open to full review on the merits, "even though the agency merely reaffirm[ed] its original decision." Br. 3 (quoting *Harris v. Federal Aviation Administration*, 353 F.3d 1006, 1011 (D.C. Cir.), *cert. denied*, 543 U.S. 809 (2004)). The Commission may have "reopened" the question whether the ban should be applied at the end of the new extension period; but it did not reopen its interpretation of the statute and it did not reopen its rule exempting DBS providers from the ban. Those issues are not before the Court in this proceeding.

1. Petitioners' claim that section 629 does not provide the Commission with authority to adopt an integration ban is barred for three separate threshold reasons. First, the claim is untimely, because it challenges an interpretation of the statute that the Commission adopted in the *1998 Order* and the *Reconsideration Order* and never reopened. The 60-day period for seeking review of that interpretation under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344 passed long ago. Second, petitioners' trade association – NCTA – previously litigated the same question in *General Instrument* and lost. 213 F.3d at 730-31. Petitioners are bound by that determination and are precluded from relitigating the issue. Third, no party appears to have presented the statutory authority question to the Commission in the proceedings leading to the issuance of the *Order* on review, and the claim therefore is barred by 47 U.S.C. § 405(a), which prevents the Court from considering questions on which the Commission has been "afforded no opportunity to pass."

Petitioners' statutory authority argument fails on the merits, in any event, because it is in all pertinent respects indistinguishable from the argument that this Court rejected in *General Instrument*, which constitutes controlling precedent on the question.

2. The Commission reasonably exercised its predictive judgment that the integration ban remains necessary to implement Congress's direction to assure the commercial availability of competitive navigation devices. Although the Commission's plug and play rules require cable companies to provide CableCARDs to subscribers who wish to use competitive navigation equipment, and although CableCARD-compatible television sets are now on the market, the record raised grave concerns about cable operators' commitment to supporting CableCARDs, as reflected in the fact that only a *de minimis* percentage of CableCARD-compatible sets are actually being used with CableCARDs. The Commission determined that without common reliance of cable operators and competitive equipment suppliers on the same conditional access interface, cable operators could not be expected to ensure that competitors have the equivalent access to the cable network needed to ensure a robust retail market for navigation devices. Contrary to petitioners' argument (Br. 20-29), the Commission, in concluding that the integration ban remained necessary, reasonably considered and balanced the costs and benefits of its decision. *Order*, paras. 27-39 (J.A.).

3. Petitioners claim that the Commission arbitrarily failed to take affirmative action to remedy the alleged disparate treatment of cable and DBS with respect to the integration ban. Br. 29-41. However, the Commission's decision to exempt DBS from the ban was adopted in the *1998 Order* and the *Reconsideration Order* and was never reopened. A challenge to the regulatory distinction the Commission drew, therefore, is untimely. On the merits, moreover, it was reasonable for the Commission to retain the integration ban as to cable for the reasons

already discussed; and the Commission was without power in this proceeding to extend the ban to DBS, because neither the *Further Notice* nor the *Extension Order* had provided any notice of that possibility and because the record did not support it. *See Order*, para. 38 (J.A.).

STANDARD OF REVIEW

The FCC's interpretations of the Communications Act generally, *see, e.g.*, *Cellco Partnership v. FCC*, 357 F.3d 88, 94 (D.C. Cir. 2004) (citation omitted), and of section 629 in particular, *see General Instrument*, 213 F.3d at 730, are governed by the principles set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *See also National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005) (under *Chevron*, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

To the extent that petitioners challenge the reasonableness of the Commission's application of section 629, the Court must uphold the Commission's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action"; the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003); *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195,

1202-08 (D.C. Cir. 1996). The Court's review, moreover, is "particularly deferential" when the agency's predictive judgment is involved, because "where the FCC must make judgments about future market behavior with respect to a brand-new technology, certainty is impossible." *Consumer Electronics*, 347 F.3d at 303 (internal citation omitted). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. Petitioners' Challenge To The FCC's Authority Under Section 629 To Prohibit Integrated Navigation Devices Is Not Properly Before The Court And, In Any Event, Is Without Merit.

With their lead argument, petitioners repeat the statutory claim – rejected previously by this Court – that the Commission lacks authority to implement the prohibition on integrated navigation devices under section 629(a). Br. 17-19. This challenge is not properly before the Court because: (1) it is time-barred; (2) it is barred by principles of issue preclusion; and (3) it was not raised below. In any event, the challenge lacks merit.

First, the Commission adopted the interpretation that section 629(a) authorized the integration ban in the *1998 Order* and in the *Reconsideration Order* issued the following year – not in the *Order* on review here. *See 1998 Order*, paras. 25-26, 49, 69; *Reconsideration Order*, paras. 23-27. Thus, unless the Commission in this proceeding reopened the statutory question, the time for challenging the Commission's interpretation passed long ago. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (requiring petitions for review of FCC orders to be filed within 60 days after issuance). Neither the *Further Notice* nor the *Extension Order* purported to reopen the

statutory authority question, and the *Order* on review did not address it. Petitioners' current challenge to the Commission's authority to prohibit the deployment of integrated navigation equipment under section 629 thus is time barred. *See Kennecott Utah Copper v. U.S. Dept. of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996) (challenge to a previously adopted rule as "violative of statute" is time-barred where the subsequent rulemaking order on review does not reopen the question).

Second, petitioners' statutory claim is foreclosed by principles of issue preclusion, which "bars relitigation of an issue by a party 'that has *actually litigated [the] issue.*'" *SBC Communications Inc. v. FCC*, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (quoting Restatement (Second) of Judgments at 6 (1982)) (emphasis supplied by Court); *accord Qwest Corp. v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001). Parties, including NCTA, argued in *General Instrument* that the FCC lacked authority under section 629 to adopt the same integration ban that petitioners challenge here, and the Court expressly rejected that claim. 213 F.3d at 730-31. As members of NCTA – and offering no argument meaningfully distinct from NCTA's prior challenge – petitioners in this case are bound by that determination. *See Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984), and *Aluminum Company of America v. ICC*, 761 F.2d 746, 751 (D.C. Cir. 1985) (both holding that trade association members are precluded from relitigating claims previously litigated by their trade associations).[9]

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[9] As discussed below, there is no meaningful difference between the textual argument addressed in *General Instrument* and the one petitioners present here. However, to the extent that petitioners' emphasis here on the statutory phrase "other equipment used by consumers," rather than on the statutory term "converter boxes," could be construed as presenting a discrete issue, *see* Pet. Br. 17, petitioners' challenge nevertheless is barred by principles of claim preclusion. Under that doctrine, parties and those in privity with them are barred from "relitigat[ing] not only as to all matters which were determined in the previous litigation, but also as to all matters that *might have been determined*." *NRDC v. Thomas*, 838 F.2d 1224, 1235 (D.C. Cir), *cert. denied*, 488 U.S. 888 (1988) (emphasis added).

Third, petitioners' brief does not indicate that the question actually was raised by any party before the agency during the proceedings on the *Further Notice* and the *Extension Order*. And with good reason: The Court already had considered that question in its review of the *1998 Order* and *Reconsideration Order* and had affirmed the Commission's interpretation as reasonable. Because the question apparently was not raised below, review of the statutory authority question is barred by 47 U.S.C. § 405(a), which prevents the Court "'from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass.'" *American Family Ass'n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir.), *cert. denied*, 543 U.S. 1004 (2004) (quoting section 405(a)); *accord AT&T Corp. v. FCC*, 317 F.3d 227, 235-36 (D.C. Cir. 2003).

Petitioners' statutory claim fails on the merits, in any event, in light of this Court's holding in *General Instrument*. There this Court affirmed as reasonable the Commission's conclusion that the second sentence of section 629(a) – providing that the Commission's regulations "'shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming'" – did not grant cable operators an absolute right to lease integrated navigation devices merely because integrated converter boxes were the most commonly available type of navigation device at the time the statute was enacted in 1996. *General Instrument*, 213 F.3d at 730 (quoting 47 U.S.C. § 549(a)). The Court noted that the identical description of covered equipment also appeared in the first sentence of section 629(a), which requires the Commission "'to assure the commercial availability'" of such equipment. *Id.* If "converter boxes" in the second sentence necessarily meant *all* converter boxes, the Court continued, the FCC "unacceptab[ly]" would be "compelled by the plain

meaning of the statute to permit *retailers* to provide integrated navigation devices," even where MVPDs did not want to relinquish control of the security component. 213 F.3d at 730 (emphasis in original). The Court held that the Commission reasonably could construe the statute to avoid that result. *Id*.

Petitioners now assert that their statutory claim was "not completely answered" by *General Instrument*, because that decision focused on the statutory term "converter boxes" in section 629(a) and did not address the additional textual reference to "other equipment used by consumers." Pet. Br. 17-18. Aside from the fact no party apparently made this assertion below, both terms appear symmetrically in the first and second sentences of section 629(a) and are properly subject to the same interpretive analysis that the Court conducted in *General Instrument*. Applying that analysis, it is clear that just as "converter boxes" does not have to mean *all* converter boxes, "other equipment used by consumers" does not need to mean *all* other equipment used by consumers. Petitioners' categorical reading of the term "other equipment used by consumers," by contrast, would lead to the same "unacceptable result" the Court held that the Commission reasonably could construe the statute to avoid – that of giving retailers the right to provide integrated navigation devices, even where MVPDs do not want to relinquish control of the security component. 213 F.3d at 730.[10]

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[10] Indeed, petitioners' categorical reading would have far-reaching implications that go beyond the integration ban and are inconsistent with the cable industry's own understanding of the Commission's authority. For example, the plug and play rules – which implement a cable industry and consumer electronics industry memorandum of understanding regarding the compatibility of consumer electronics equipment with cable systems – require cable operators to make boxes available with a particular (IEEE 1394) interface, and effectively prohibit cable operators from making boxes available without that interface. *See* 47 C.F.R. § 76.640(b). Neither petitioners, nor the cable industry generally, suggest that that interface restriction on "other equipment used by consumers" violates section 629.

II. The Commission Reasonably Declined To Eliminate The Phased Prohibition On Integrated Navigation Devices.

In its initial implementation of section 629 in the *1998 Order* and the *Reconsideration Order*, the Commission dealt with a host of issues – statutory construction questions regarding the entities and equipment covered,[11] the right of subscribers to attach independently-provided equipment to the MVPD network,[12] subscriber access to technical information concerning interface parameters,[13] protection of network facilities from harm due to equipment attachments,[14] safeguards against theft of service,[15] signal leakage standards,[16] the prohibition on subsidies for MVPD-provided navigation devices,[17] and numerous other matters *in addition to* questions relating to the separation of security and non-security components in navigation devices. Indeed, that last topic itself involved a number of sub-issues, including the application of separation requirements to DBS, the timing of cable operators' obligation to make modular security devices available (July 1, 2000), technical standards for such devices, and the question whether separate modules were needed for analog devices, as opposed to digital or hybrid (analog and digital) devices. *See generally 1998 Order*, paras. 49-81; *Reconsideration Order*, paras. 7-22, 36-37. Given the breadth of issues simultaneously before the Commission, the agency in 1998 provided a relatively terse economic justification for prohibiting (following a

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[11] *1998 Order*, paras. 19-27.

[12] *Id.*, paras. 28-32.

[13] *Id.*, paras. 33-34.

[14] *Id.*, paras. 35-39.

[15] *Id.*, paras. 40-43.

[16] *Id.*, paras. 44-46.

[17] *Id.*, paras. 84-99.

transition period) cable operators from deploying integrated navigation equipment. *See 1998 Order*, paras. 49, 69; *Reconsideration Order*, paras. 28-31. Petitioners accurately note this Court's observation in *General Instrument* that "the Commission did not clearly spell * * * out" "the benefits that will flow to consumers from the integration ban." Pet. Br. 20 (quoting *General Instrument*, 213 F.3d at 732). But it was nothing more than an observation because the issue to which it was relevant had not been properly raised in that case. And the Court did not remand anything to the Commission or even suggest that the agency was obligated to consider the question further.

In any event, no such criticism reasonably could be leveled at the *Order* on review here, which devotes eight detailed pages to discussing why the integration ban continues to be needed and what the benefits to consumers are. *See Order*, paras. 27-39 (J.A.). The heart of the Commission's analysis is the predictive judgment that the development of "a robust retail market for navigation devices" depends upon "the reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices." *Order*, para. 27 (J.A.). The Commission explained that 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." *Order*, para. 30 (J.A.). The ban is thus designed to create incentives for cable operators to work toward the development of a competitive market for navigation devices as required by Congress. *See Order*, paras. 21, 30 (J.A.). And it blunts cable operators' natural inclination and historic tendency to cling to the monopoly provision of proprietary set-top boxes.

Petitioners' various challenges to the Commission's analysis are insubstantial. Petitioners argue that section 629 "only requires the FCC to assure commercial availability of retail devices, and not that consumers actually choose to use them." Br. 33. However, the market for such devices clearly will not last if consumers do not use them, and the Commission reasonably determined that imposing a common reliance regime (*i.e.*, an integration ban) on cable operators with respect to the security component of navigation devices was needed to give the market a chance to flourish.

Petitioners also contend that the integration ban is unnecessary to create an economic incentive to support CableCARDs. They assert, in this regard, that by the time the Commission issued the *Order*, "more than 140 models of CableCARD-compatible navigation devices from 11 different [consumer electronics] manufacturers" were commercially available, and that the cable industry had provided "extensive technical and developmental support to consumer electronics manufacturers" – allegedly "[w]ithout regulatory compulsion." Br. 21, 22. They claim, further, that even if economic incentives alone are insufficient to promote CableCARD usage, the plug and play rules now require cable operators to support CableCARDs. Br. 21.

As a general matter, petitioners overstate the alleged voluntarism associated with cable industry programs to facilitate an open market for navigation devices, given that the activities to which they refer were undertaken under a clear threat of regulatory intervention. In any event, notwithstanding the CableCARD support subsequently mandated by the plug and play rules, the Commission had ample basis to express serious continuing concerns regarding the cable industry's incentive to make CableCARD use viable absent the integration ban. *Order*, paras. 27, 39 (J.A.). Consumer electronic manufacturers had reported that consumers were experiencing "numerous technical implementation problems," including "persistent problems

with CableCARDs or their headend support, erroneous software or firmware fixes, [and the] inability of authorized subscribers to acquire some channels that offer encrypted content."[18] The evidence suggested that these problems were not simply the result of cable company intransigence; "good faith" on the part of most cable operators was assumed, but consumer electronics commenters argued that success nevertheless was unlikely, because CableCARD support "run[s] counter to [the cable companies'] own market imperatives [when] they need not rely on the technology that has been mandated for the benefit of others."[19] The record suggested that the development of new services, in particular, highlighted the need for common reliance by cable providers and competitive equipment suppliers on the CableCARDs:

> [CableCARD] design itself cannot remain static without consigning [CableCARD]-reliant devices to backwater status * * * * Completely new services will be deployed on cable systems in the future that will have to interoperate with [CableCARDs] – at least not conflict with [CableCARDs] – or else [CableCARD]-equipped devices will be unable to receive them. Every such innovation will require intensive work on design, development, testing, and "debugging." If such attention is apportioned to the [CableCARD] by companies not planning to rely on [CableCARDs] in their own products or on [CableCARDs] to carry their own programming or services, this work cannot possibly receive the necessary resources or priority.[20]

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[18] Letter from Lawrence Sidman, representing Thomson Inc. and Mitsubishi Digital Electronics America Inc., to FCC Secretary, CS Docket No. 97080, at 1 (filed October 28, 2004) (J.A.). *See also* Comments of the Consumer Electronics Ass'n on NCTA Downloadable Security Report, CS Docket No. 97-80, at 2-4 (January 20, 2006) (cataloguing record evidence of problems with CableCARD implementation) (J.A.).

[19] Letter from Julie M. Kearney, Consumer Electronics Ass'n, to FCC Secretary, CS Docket No. 97-80, at 2 (November 23, 2004) (J.A.). *See also* Consumer Electronics Industry Comments, CS Docket Nos. 97-80 & 00-67, at 6 (February 19, 2004) (J.A.) (noting that, even "with the best of intentions," the ''learning curve' is inescapable," and "[t]here is simply no substitute for doing a task under circumstances where success is essential")..

[20] Consumer Electronics Industry Comments, CS Docket Nos. 97-80 & 00-67, at 8 (February 19, 2004) (J.A.).

Given these difficulties in the absence of common reliance, it is not surprising that, at the time the *Order* was issued (and even today), only a *de minimis* percentage of the viewing public used CableCARDs, notwithstanding petitioners' claim that scores of CableCARD-compatible television models are commercially available.[21]

Petitioners complain that the Commission, in a footnote, repeats language from paragraph 69 of the *1998 Order* to the effect that integration acts as an obstacle to the creation of a functioning competitive market for navigation devices by "'impeding consumers from switching to devices that become available through retail outlets.'" Br. 24 (quoting *Order*, para. 28 n.133 (J.A.). In petitioners' view, this passing statement demonstrates that the Commission's decision is arbitrary, because the Court in *General Instrument* had said that that statement, standing alone, did not explain "why consumers would be 'impeded.'" Br. 24 (quoting *General Instrument*, 213 F.3d at 731). The thrust of the Commission's analysis, however, was that common reliance by cable operators and consumer electronics manufacturers on the same security components was required to give cable operators the necessary incentives to make separate host devices technologically and economically workable.

It is, of course, possible – although the Commission predicted otherwise[22] – that experience ultimately will demonstrate that today's integrated devices are better and more

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[21] *See* Letter from Neal M. Goldberg, NCTA, to FCC Secretary, CS Docket No. 97-80, at 2 (March 7, 2005) (J.A.) (stating that 27,000 CableCARDs have been deployed for use in plug and play devices); Letter from Julie M. Kearney, Consumer Electronics Ass'n, to FCC Secretary, CS Docket No. 97-80, at 1 (March 14, 2005) [first page of letter incorrectly indicates a March 14, 2004 date] (J.A.) (stating that CableCARDs have been installed in "no more than 2.7% of the devices capable of receiving them"); Comments of the Consumer Electronics Ass'n on NCTA Downloadable Security Report, CS Docket 97-80, at 2-3 (January 20, 2006) (J.A.) (estimating that, 8 months after the *Order* was issued, only about 2 percent of the CableCARD-compatible televisions sold to consumers were being used with CableCARDs).

[22] *Order*, paras. 29-30 (J.A.).

efficient than the separate security and non-security components that necessarily will develop under the integration ban. However, the Commission reasonably concluded that, without the integration ban or more intrusive regulation, the marketplace might never have a fair opportunity to test that hypothesis – and the Congressional objective of section 629 to assure the commercial availability of competitive navigation devices would not be served. *See Order*, para. 36 (J.A.) ("Absent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation."); *see also id*., paras. 2, 28-30 (J.A.).[23] That objective, in turn, reflected Congress's determination that the availability of competitive devices would best serve consumer interests.

There is no basis for petitioners' contention that the Commission arbitrarily failed to consider the costs that will result from the integration ban. Br. 27-29. Although the Commission acknowledged that the integration ban would impose some costs on cable operators and consumers in the short term, the agency reasonably concluded that such costs were a necessary predicate to achieving the competitive market for navigation devices that section 629 required the Commission to ensure. *Order*, paras. 27, 29 (J.A.). The Commission also reasonably

[23] Petitioners contend that this conclusion is arbitrary in light of several Commission references to progress that the cable and consumer electronics industries had made in resolving technical concerns and in bringing new security and host products to market. *See, e.g.*, Br. 23, 26 (citing *Order*, paras. 28, 34 n.146 (J.A.)). However, whatever progress occurred did so under impending integration ban deadlines. The Commission fully rewarded that progress by extending the deadline on several occasions, including in the *Order* itself, but the agency reasonably concluded that that progress at this point did not warrant eliminating the common reliance requirement.

predicted – with substantial record support[24] – that scale economies would bring costs down significantly as subscribers began using CableCARDs with *both* consumer electronics host devices and host devices provided by cable operators. *Order*, para. 29 (J.A.). At the same time, the Commission predicted – again with record support[25] – that the integration ban would spur innovation and greater choice for consumers as consumer electronics manufacturers gained a meaningful opportunity to compete in the market for navigation devices. *Order*, para. 29 (J.A.).[26] These reasonable predictions, grounded in the record, of consumer benefits from future market behavior with respect to brand new technologies are entitled to deference. *Consumer Electronics*, 347 F.3d at 303; *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998).

The FCC not only considered the likelihood that there would be a future downward trend in costs as the navigation equipment market developed; it also took immediate action to minimize costs. The Commission deferred the deadline for implementing the integration ban

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[24] *See, e.g.*, Consumer Electronics Industry Comments, CS Docket No. 97-80 & PP Docket No. 00-67, at 3-4 (February 19, 2004) (J.A.); Consumer Electronic Industry Reply Comments, CS Docket No. 97-80 & PP Docket No. 00-67, at 4 (March 10, 2004) (J.A.); *Ex Parte* Filing of the Consumer Electronics Retailers Coaltion Re Retention of POD Reliance, CS Docket No. 97-80, at 3-4, Attachment (Declaration of Jack W. Chaney) at 1-3 (March 20, 2003) (J.A.); Letter from Julie M. Kearney, Consumer Electronics Ass'n, to FCC Secretary, CS Docket No. 97-80, at 2-3 (November 23, 2004) (J.A.); Letter from Jeffrey T. Lawrence, Intel Corp., to FCC Secretary, CS Docket No. 97-80, at 2 (November 17, 2004) (J.A.). *See also Order*, para. 24 (J.A.) (cataloguing comments).

[25] *See Order*, para. 22 (J.A.) (cataloguing comments).

[26] Petitioners assert (Br. 26-27) that the integration ban will chill innovation. However, the Commission stressed that – apart from the prohibition on integration of security and host components in navigation devices – cable operators remain free under the prohibition "to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services." *Order*, para. 30 (J.A.). If a common reliance requirement with respect to security were proscribed, it is hard to imagine any equipment technology standard that the Commission would be permitted to impose.

from July 1, 2006, to July 1, 2007 – and promised to consider requests for further extensions – to give the cable industry time to test the feasibility of utilizing a downloadable security solution that potentially could achieve the goal of common reliance without requiring physical separation of security and non-security functions. *Order*, paras. 31-36 (J.A.).[27]

Similarly, recognizing the value of preserving a low-cost set-top box option for consumers, at least until volume usage of CableCARDs over time reduced the price of host devices, the Commission undertook to consider waivers of the integration ban with respect to limited capability set-top boxes (*e.g.*, boxes that do not contain capability for recording, display of high-definition programming, or broadband Internet access).[28] The Commission determined that waivers for such boxes would benefit those cable subscribers most concerned about the cost of equipment, while maintaining the overall benefits of the integration ban with respect to boxes with more advanced capabilities (and therefore more likely to be the subject of a competitive market) *Order*, para. 37 (J.A.). This careful consideration of the costs of implementing a

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[27] Petitioners contend that, in granting this extension of the deadline, the Commission "insist[ed], now and in the future, upon an integration ban *regardless* of the extent of commercial availability of cable-ready navigation devices." Br. 41 (emphasis in original) (citing *Order*, para. 36 (J.A.)). That is incorrect. Having watched market developments for seven years and having granted two-and-a-half years of integration ban extensions, the Commission stated that it would not be inclined to grant any further *extensions*, past July 2007, on the basis of general levels of competition in the navigation device market. *Order*, para. 36 (J.A.). The Commission made clear, however, that it would consider claims that the markets for video programming and for navigation devices had become fully competitive sufficient to trigger the sunset provision in section 629(e). *Id*.

[28] Among other reasons for preserving a low-cost set-top option, the Commission found that as programming increasingly is delivered in digital form and cable operators upgrade their facilities to all-digital networks, consumers must have access to inexpensive boxes that will "downconvert" digitally delivered signals to analog format to permit viewing on analog television sets. *Order*, para. 37 (J.A.).

common reliance regime refutes petitioners' charge that the Commission arbitrarily discounted the costs of its regulatory program.[29]

III. Conditions In The DBS Market Were Beyond The Scope Of The Proceedings Established By The *Further Notice A*nd *Extension Order* And Provide No Basis On Which To Eliminate The Integration Ban With Respect To Cable Operators.

The notice portions of the *Further Notice* and the *Extension Order* defined the scope of the administrative proceedings leading to the *Order* on review. Those notices clearly sought comment on whether the phase-in date for the integration ban should be advanced, extended, or kept as it was. *See Further Notice*, para. 11. The Commission also asked whether cable operators should be permitted to continue providing integrated navigation devices "if [their] integrated boxes are also commercially available." *Id*. And, broadly construed, the Commission may have sought comment in the alternative on whether it should remove the ban on cable-provided integrated navigation equipment. *Extension Order*, paras. 5, 6. Neither notice, however, even remotely could be read as seeking comment on the DBS exemption that had been adopted in the *1998 Order*, or on the relationship between developments in the DBS and cable markets. Indeed, neither notice mentioned DBS at all.

Not surprisingly, in light of the fact that the DBS issue had not been raised in the notices, the question drew little comment. NCTA, the cable trade association, filed comments

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[29] In light of the Commission's careful assessment of likely cost trends, its adoption of immediate measures to limit costs, and its assessment that the integration ban was necessary to assure commercial availability of navigation devices under section 629, this case does not implicate this Court's prior observation that another provision of the Communication Act provided no "'license to the Commission to inflict on the economy * * * costs * * * where it has no reason to think doing so would bring on'" corresponding benefits. *See* Br. 28 n.67 (quoting *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003)).

complaining in a general way that "the integration ban puts a thumb on the scale in favor of one competitor over another" and urging the Commission, as a result, to eliminate the ban.[30] The consumer electronic commenters responded briefly – stating that NCTA had supplied no concrete evidence that differing treatment of cable and DBS with respect to navigation device security would have a real world impact on competition between the two multichannel video programming vehicles.[31] DBS commenters argued briefly that, as in 1998, market circumstances continued to justify application of the integration ban to cable and an exemption for DBS. *See Order*, para. 26 (J.A.). The Commission acknowledged the parties' comments in the *Order*, but reasonably ruled that the proceeding did not "provid[e] a record on which * * * [to] resolve these issues" regarding the lack of parity in treatment of DBS and cable. *Order*, para. 38 (J.A.).

Petitioners now contend that the Commission's failure to take affirmative action to remedy the alleged disparate treatment of cable and DBS was arbitrary, particularly in light of evidence that cable-ready plug and play devices increasingly are available, while the DBS equipment market allegedly is becoming more restrictive than it was in 1998. *See generally* Br. 29-41, 42-44. This claim provides no basis upon which to set aside the *Order*.

As a threshold matter, the claim is an untimely challenge to the FCC's *1998 Order* and *Reconsideration Order*, which adopted the ban and exempted DBS. The FCC in the *Order* under review here did not reopen or readopt that decision to distinguish between cable and DBS for

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[30] NCTA Comments, CS Docket No. 97-80, at 17 (February 19, 2004) (J.A.). *See generally id.* at 17-20 (J.A.). The cable industry added a brief flurry of comments on the DBS issue on the eve of the *Order*. *See* petitioners' brief at 34.

[31] Consumer Electronics Industry Reply Comments, CS Docket No. 97-80 & PP Docket No. 00-67, at 6 (March 10, 2004) (J.A.).

purposes of the integration ban and thus did not provide a new opportunity for judicial review. *Kennecott Utah Copper v. U.S. Dept. of Interior*, 88 F.3d at 1213-15.

On the merits, the petitioners fare no better. First, assuming for the sake of argument that cable operators and DBS providers were in pertinent respects similarly situated, one way that the Commission theoretically could have remedied the lack of parity in treatment would have been to extend the integration ban to DBS. However, because the FCC never provided any notice in the *Further Notice* or the *Extension Order* of the possibility of extending the ban to DBS, any action to do so in the *Order* in all likelihood would have been found unlawful. *See MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-43 (D.C. Cir. 1995) (vacating FCC rule modification for failure to provide adequate notice under the Administrative Procedure Act (5 U.S.C. § 553(b)), where the NPRM focused almost entirely on one category of industry participant (enhanced service providers) while the modified rule applied to another category of participant (interexchange carriers)). Indeed, petitioners do not argue that the ban should have been extended to DBS here.

Another way in which the Commission could have addressed the allegedly disparate treatment of cable and DBS would have been to eliminate (or provide an exemption from) the integration ban for cable providers. For reasons already discussed in Argument II, above, the Commission determined that maintaining the integration ban with respect to cable was necessary to ensure that the objectives of section 629 were met. Nothing in the Administrative Procedure Act or elsewhere required the Commission here to remove *necessary* regulatory requirements with respect to cable on the ground that existing regulations – which the agency could not change without a further notice – did not already extend as well to DBS. Courts do not demand that "the Government make progress on every front before it can make progress on any front." *United*

States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993). Rather, regulation "may take place one step at a time." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984).

In all events, any putative Commission obligation (in *another* proceeding) to adjust its rules – one way or the other – to accord cable and DBS the same treatment with respect to the integration ban would depend upon a finding that they are, in pertinent respects, similarly situated. Petitioners do not demonstrate – on the basis of the current record – that such a finding would be warranted. The Commission determined in 1998 that integrated navigation devices for DBS service *already* were available at retail; and, "due to the [nationwide footprint] of [DBS] signal delivery, a particular provider's equipment [was] *already* portable as to that provider across the continental United States." *1998 Order*, para. 66 (emphasis added).[32] Although petitioners point (Br. 33-37) to the increasing availability since 1998 of CableCARD-compatible television sets with embedded non-security host devices, that development has had little practical impact on portability. Most televisions in use today are not CableCARD-compatible, and thus still are technologically reliant on non-portable, cable operator-supplied integrated set-top boxes. Moreover, the record showed that, of the CableCARD-compatible sets already in homes, less than three percent were actually being used with CableCARDs (*see* note 21, above) – meaning that, if the sets were being used by cable subscribers, those subscribers continued to depend upon non-portable cable boxes and the embedded host devices were lying dormant. Accordingly,

[32] The regulation that exempts DBS does not explicitly except DBS providers, but states that the ban does not apply to MVPDs whose practices meet certain criteria that obviate the need for the ban. *See* 47 C.F.R. § 76.1204(a)(2). Petitioners have not filed a petition alleging that DBS no longer meets those criteria or, for that matter, that cable operators do meet those criteria, but instead seek repeal of the integration ban.

there was ample basis – as a practical matter – for the Commission's conclusion that the distinction between cable and DBS equipment portability that it had identified in 1998 remained valid in 2005, *Order*, para. 38 (J.A.), and there is no substance to petitioners' assertion (Br. 42-44) that the Commission arbitrarily ignored intermodal aspects of the market for navigation devices.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARTER COMMUNICATIONS, Inc. and Advance/Newhouse Communications, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 05-1237

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 10531 words.

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