

The FCC has done its part by moving with alacrity to grant Special Temporary Authority (STA) to existing carriers to provide access to spectrum,³ and even granted STAs to Native American Tribes who have never held wireless spectrum before, in order to deploy services quickly in this time of special need.⁴ TechFreedom commends the FCC in these actions. As Chairman Pai noted concerning the FCC's grant of an STA to the Navajo Nation to deploy 2.5 GHz spectrum during the pandemic:

Tribal communities are having to adjust to the challenges of the coronavirus pandemic while already facing some of the greatest challenges caused by the digital divide that we see anywhere in the nation. As with any community—rural or urban—Tribal members are having to work from home and to rely increasingly on telemedicine and remote learning as they practice social distancing to minimize the spread of the virus on their reservations.⁵

Hand-in-hand with new spectrum deployment, however, must be the ability to deploy quickly equipment that can make use of these new spectrum assets, as well as underlying technologies such as 5G. New spectrum is useless unless the equipment is available to use it.

II. The Commission Should Move Swiftly to Institute a Rulemaking Proceeding to Update its Rules to Facilitate Development and Deployment of 5G Technologies.

CTA's Petition presents the FCC with a prime opportunity to review and revise regulations that are more than just antiquated – they are inflicting real harm on the public by slowing the deployment of the next generation of equipment that can assist in broadening the pipes through which we communicate. Specifically, CTA asks the FCC to begin a

[9/NRG-TheGreatRefresh-COVID19.pdf](#) (88 percent of those polled say they “have a better appreciation for technology and its positive impact on culture and society throughout this pandemic”).

³ FCC, Special Temporary Authority Licensing (Mar. 30, 2017), available at <https://www.fcc.gov/research-reports/guides/special-temporary-authority-licensing>.

⁴ See, e.g., FCC, Press Release, FCC Grants The Navajo Nation Temporary Spectrum Access to Meet Increased Wireless Broadband Needs During COVID-19 Pandemic, (Apr. 17, 2020), available at: <https://docs.fcc.gov/public/attachments/DOC-363803A1.pdf>.

⁵ *Id.*

rulemaking proceeding to look to amend Sections 2.803(c)⁶ to allow for the sale, **but not shipping**, of devices to consumers, and Section 2.1204(a)⁷ to allow for greater importation of devices not yet certified and displayed at retail locations, if properly labeled as not yet available for sale and delivery.

TechFreedom supports this effort. As the CTA Petition makes clear,⁸ the develop and life cycle of new electronic communication devices is so short, and the market so competitive, that the success or failure of a product is highly dependent on a company's ability to navigate the regulatory process for equipment authorization under Part 15, and guess when that "blackbox" process will be complete to coordinate marketing, packaging, and shipping to online and retail locations. Miss your guess on when Part 15 authorization will be granted, and a product could well be doomed.⁹

⁶ 47 C.F.R. § 2.803(c).

⁷ 47 C.F.R. § 2.1204(a).

⁸ CTA, Petition for Rule Making at 9, (June 2, 2020) [hereinafter *CTA Petition*], available at [https://ecfsapi.fcc.gov/file/1060263543654/CTA Petition to Expand Marketing Opportunities for Innovative Technologies.pdf](https://ecfsapi.fcc.gov/file/1060263543654/CTA%20Petition%20to%20Expand%20Marketing%20Opportunities%20for%20Innovative%20Technologies.pdf) ("Allowing pre-orders is important to generating efficiencies and meeting business challenges. Once products are developed and introduced to consumers, high-tech companies need to gauge market demand, source supplies, arrange for appropriate manufacturing volumes, and anticipate and allocate proper inventory allotments for device launches. A failure or inability to calculate launch-related factors accurately inevitably results in inefficiency, additional costs, and waste. Manufacturers lack the luxury of time; competition compels a race to market as quickly as feasible without compromising the quality, functionality, or security of their devices. These factors are exacerbated in the current pandemic, as factory work and other related in-person activities may be only intermittently available. In addition, the need to physically distance personnel for required in-person tasks is slowing necessary testing and certification activities.").

⁹ See *CTA Petition* at 13 ("The timelines to test and certify radiofrequency devices create challenges for manufacturers because they are uncertain and increasing.⁴⁵ The combination is, in turn, squeezing the time to complete necessary activities to enable full retail launch. Accordingly, it is ever more difficult to plan and ensure that the most innovative and in-demand devices are in the stockrooms of flagship retail locations so that the devices can be unboxed, displayed, and provide consumers valuable hands-on or in-person experience at authorization. In an era where retailers are competing with online ordering, retailers need to have the latest devices in their showrooms as soon as possible.").

As an example, in 2006 Sony's PS3 gaming console was ready for launch and unveiling at the highly popular E3 computer show.¹⁰ Sony hadn't received Part 15 authorization for the units, however. But for a last-minute experimental license grant to allow Sony to import up to 400 units to display at E3, the launch would have been a disaster, and the near-parity of competition it brought to the game console market against the Xbox 360 unveiled in 2005 quite probably would not have happened. All because of a regulatory glitch.¹¹ This is the perverse result that the CTA Petition is designed to eliminate. The regulatory system should not favor those who can guess correctly as to regulatory timelines over those companies who design the best products for the public. The marketplace should decide winners and losers, not a random roll of the regulatory dice.

TechFreedom therefore supports the CTA's Petition. Companies should be allowed to sell, **but not ship**,¹² products that are awaiting regulatory approval. As the CTA Petition points out, consumers are becoming more and more comfortable pre-ordering products that

¹⁰ See Adam Washington, *E3 2006 - Complete Sony Press Conference*, YOUTUBE (Apr. 2, 2013), <https://www.youtube.com/watch?v=PLjWeMTwRVc> (Sony's 2006 E3 press conference unveiling the PS3 in public for the first time).

¹¹ We are aware that the FCC modified its rules in 2013 and 2017 to obviate the need for experimental licenses such as Sony was required to get in 2006. See *CTA Petition* n. 12, citing *Promoting Expanded Opportunities for Radio Experimentation and Market Trials under Part 5 of the Commission's Rules and Streamlining Other Related Rules; 2006 Biennial Review of Telecommunications Regulations - Part 2 Administered by the Office of Engineering and Technology (OET)*, Report and Order, 28 FCC Rcd 758, 804 ¶ 127 (2013) (adding "Section 2.805(d)(2) to permit general operation of RF devices subject to certification that have not yet been certified without the need for an experimental license, provided that the devices are operated as part of a trade show demonstration and at or below the maximum power level permitted for unlicensed devices under our Part 15 rules") ("*Part 5 Report and Order*"); *Amendment of Parts 0, 1, 2, 15 and 18 of the Commission's Rules regarding Authorization of Radiofrequency Equipment*, First Report and Order, 32 FCC Rcd 8746, 8772 ¶ 61 (2017) ("permit[ing] the importation of up to 400 for devices of any type for demonstration purposes at trade shows") ("*2017 Equipment and Labeling Order*").

¹² A prohibition on shipping uncertified devices remains necessary, as recalling non-compliant devices, especially those that operate "better" because of exceeding power limitations, has proven difficult in the past. See, e.g. *NAB Renews Pleas for FCC Recall of 'Unlawful' Satellite Radio Devices*, ALL ACCESS (Feb. 12, 2007), <https://www.allaccess.com/net-news/archive/story/20858/nab-renews-plea-for-fcc-recall-of-unlawful-satelli> (Sirius/XM deployed a number of receivers that allegedly bleed over into the FM).

are just over the horizon.¹³ In today's COVID-19 environment, consumers are even willing to put in their online cart, and pay for, cleaning supplies that are out of stock, confident that their orders will be filled, or money refunded.¹⁴

As the CTA Petition points out, there is ample redress under existing law to ensure that the public is not ripped off by unscrupulous actors selling “vaporware” products.¹⁵ As further assurance, TechFreedom would support two additional mandates by the FCC:

- 1) Standardized language that the FCC could require any retailer (online or brick-and-mortar) to display, warning potential customers that they are pre-ordering a device that is not yet certified under FCC rules, and ultimately may never be delivered;
- 2) Require, as part of the part 15 certification process, that any manufacturer inform the FCC if it is allowing the pre-ordering of the device that is the subject to Part 15 certification, and provide the FCC with a monthly update on the number of units pre-ordered. If the FCC ultimately denies certification, it can order the applicant to refund any pre-orders, and issue a Public Notice informing the public at large that the device has been refused certification and that consumer should seek refunds.

¹³ *CTA Petition* at 11 (“Customers pre-order everything from Kickstarter initiatives to playoff tickets, fully aware that they will need to await delivery, and fully prepared for the consequences if a necessary contingency – meeting a Kickstarter goal, or a playoff win – does not occur.”).

¹⁴ *See Household cleaning products like Lysol and Clorox wipes won't be fully back in stock until July or August, supply-chain experts say*, BUSINESS INSIDER (Apr. 24, 2020), available at <https://www.businessinsider.com/when-lysol-clorox-wipes-back-in-stock-available-by-summer-2020-4>.

¹⁵ *CTA Petition* at 15-17 (FTC enforcement of consumer protection laws).

III. The Commission Should Institute a Streamlined Waiver Process to Allow Conditional Sales of New Products.

While TechFreedom supports the institution of a rulemaking proceeding to formally address CTA's Petition, "the game is afoot," and when it comes to 5G, there's an out-and-out race with China for technological supremacy in 5G.¹⁶ The fastest way to ensure that the United States leads in 5G is not by imposing regulatory barriers to Chinese companies,¹⁷ but rather to remove the regulatory underbrush that slows down U.S. companies. Because of this, TechFreedom support a policy of granting waivers to U.S. companies of Sections 2.803(c) and Section 2.1204(a) upon a commitment by the company to: i) properly inform consumers that the device(s) in question are not yet certified, and ii) to refund consumer pre-orders and remove all items from retail display within a short period (nominally 15 days) after receiving notice that the item has not received certification.

IV. Conclusion.

One of the hallmarks of this Administration,¹⁸ and this FCC,¹⁹ is to look for and break down needless government regulation. TechFreedom generally supports these efforts, and

¹⁶ Henry M. Paulson Jr., *We're letting China win the 5G race. It's time to catch up*, THE WASHINGTON POST (Dec. 16, 2019), https://www.washingtonpost.com/opinions/were-letting-china-win-the-5g-race-its-time-to-catch-up/2019/12/16/da74dcca-1c56-11ea-8d58-5ac3600967a1_story.html.

¹⁷ See, e.g. *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – Huawei Designation*, Order, PS Docket No. 19-351 (June 30, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-690A1.pdf>; *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – ZTE Designation*, Order, PS Docket No. 19-352 (June 30, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-691A1.pdf>.

¹⁸ See, e.g., *Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs*, Executive Order (Jan. 30, 2017), available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/> ("it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.").

¹⁹ See, e.g., *Restoring Internet Freedom*, FCC, <https://www.fcc.gov/restoring-internet-freedom> ("Removing these outdated and unnecessary regulations will create a strong incentive for companies to pour resources into building better online infrastructure across the country and bringing faster, better, and cheaper Internet access to more Americans.").

specifically supports this effort by CTA to clear out unnecessary “regulatory underbrush” that slows deployment of 5G to the American public, so long as this can be done with sufficient safeguards to protect the public from unscrupulous companies peddling 5G “snake oil.” TechFreedom is confident that the FCC can do both in this instance, at it should move quickly to open a docket to seek public input on these important issues.

Respectfully submitted,

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