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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 304 of)
the Telecommunications Act of 1996) CS Docket No. 97-80
Television Consumer Protection)
)
Commercial Availability of)
Navigational Devices)

PARTIAL OPPOSITION TO PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby submits its partial opposition to the Petition for Reconsideration filed in the above-captioned proceeding by the Consumer Electronics Manufacturers Association ("CEMA").

As demonstrated in WCA's own Petition for Reconsideration with respect to the Commission's *Report and Order* ("R&O") in this proceeding,^{1/} it is absolutely imperative that the Commission state in no uncertain terms that its January 1, 2005 "security separation" deadline will not prohibit an MVPD from redeploying any "integrated" set-top boxes in the field on that date but, due to subscriber churn, are thereafter returned to inventory prior to expiration of their useful lives.^{2/}

The lack of clarity on this issue arises from paragraph 69 of the *R&O*, in which the Commission

^{1/} *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, FCC 98-116 (rel. June 24, 1998).

^{2/} See WCA Petition for Reconsideration, CS Docket No. 97-80, at 4-5 (filed Aug. 14, 1998) [the "WCA Petition"].

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states that the January 1, 2005 deadline does not apply to equipment “which has already been *placed in service* by the MVPD *before* [January 1, 2005].”^{3/}

As noted in WCA’s Petition, if that is the rule that the Commission truly intended to adopt, then the agency has exposed wireless cable operators to a potentially catastrophic risk of stranded inventory, and thus has violated Congress’s broad directive that the Commission “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”^{4/} Fortunately, according to at least one trade press report, it appears that the Commission’s staff has already recognized this flaw in paragraph 69 and is prepared to remedy the problem on reconsideration.^{5/} WCA urges that the Commission do so simply by amending Section 73.1204(a)(1)

^{3/} *R&O* at ¶ 69 (emphasis added). The confusion over the meaning of the quoted language is further reflected in the Petition for Expedited Reconsideration filed by the National Cable Television Association (“NCTA”). While agreeing that it is entirely inequitable and contrary to the public interest to prohibit MVPDs from deploying or redeploying pre-2005 “integrated” boxes before they have reached the end of their useful life, NCTA interprets the quoted language to mean that a set-top box is “placed in service” even if it is returned to inventory thereafter, and that the *R&O* therefore permits an MVPD to redeploy integrated set-top boxes returned to inventory after 2004. NCTA Petition for Expedited Reconsideration, CS Docket No. 97-80, at 17-18 (filed Aug. 14, 1998) [the “NCTA Petition”].

^{4/} H.R. Rep. 104-458, 104th Cong., 2d Sess., at 181 (1996) [the “Conference Report”]. *See also* WCA Petition at 5 [“[W]ireless cable operators must continue to invest hundreds of millions of dollars toward purchasing integrated set-top boxes that, absent regulatory relief, will be worthless after 2004. Simply stated, potential investors in the wireless cable industry cannot be expected to provide the substantial capital necessary for system launches if they perceive that the Commission’s rules expose wireless cable operators to a catastrophic risk of stranded inventory.”].

^{5/} *See* Grebb, “The Set-top Story,” *Cablevision*, at 42-43 (July 13, 1998) [“The FCC’s 2005 cutoff refers only to integrated boxes deployed after that date, which raises the question of what operators are supposed to do with the potentially thousands of integrated boxes that could be sitting in inventory on Jan. 1, 2005. . . ‘It’s not addressed,’ acknowledges William Johnson, Deputy Chief of the FCC’s Cable Services Bureau. ‘But I wouldn’t automatically assume you’ve got to take these things to the dump.’”].

of its Rules to reflect that the January 1, 2005 “security separation” deadline will not apply to any boxes purchased by an MVPD prior to that date.

WCA further notes that the only dissenting voice on this issue is that of CEMA, who, in an untimely Petition for Reconsideration, asks that the Commission prohibit cable systems and “other non-competitive [MVPDs]” to cease providing integrated set-top boxes as of July 1, 2000.^{6/} CEMA defines the term “non-competitive MVPD” to encompass all multichannel video programming providers except DBS, on the theory that DBS equipment is already “available at retail and offer[s] consumers a choice.”^{7/} Thus, CEMA’s argument necessarily is directed at wireless cable operators and other MVPDs who, though they indisputably lack market power, are in CEMA’s view “non-competitive” solely because their set-top boxes are not yet available through retail channels.

CEMA is wrong for a number of reasons. First and foremost, Congress did not, as CEMA suggests, intend *solely* to transform the equipment market “into one in which consumers are free to choose non-security equipment from a wide range of suppliers”^{8/} Indeed, as pointed out by other petitioners in this proceeding, there is nothing in Section 629 of the Telecommunications Act of 1996 which mandates that the Commission prohibit MVPDs from selling or leasing integrated set-

^{6/} CEMA Petition for Reconsideration, CS Docket No. 97-80, at 1-2 (filed Aug. 17, 1998) [the “CEMA Petition”]. A summary of the R&O was published in the Federal Register on July 15, 1998. See 63 Fed. Reg. 38089 (July 15, 1998). Under Sections 1.429(d) and 1.4(b)(1) of the Commission’s Rules, CEMA’s Petition was due within 30 days of July 15, *i.e.*, on August 14, 1998.

^{7/} CEMA Petition at 1 n.1.

^{8/} *Id.* at 8-9.

top boxes.^{9/} As noted in the Conference Report and highlighted in Commissioner Powell's dissenting statement, Congress intended simply to "help ensure that consumers are not *forced* to purchase or lease a specific, proprietary converter box . . . from the cable system or network operator."^{10/}

Clearly, a wireless cable operator or other alternative MVPD who lacks market power is in no position to "force" a subscriber to buy or lease a set-top box *only* from the MVPD itself. Rather, an alternative MVPD has every incentive to make its equipment available for sale on reasonable terms and conditions at retail, should a marketplace demand for such access emerge. Any alternative MVPD who fails to do so faces the ultimate sanction of losing the subscriber to a competitor. As already pointed out by General Instrument, this type of marketplace dynamic will drive alternative MVPDs to do whatever is necessary to meet the demand for expanded consumer choice:

When consumers have access to *multiple* service providers, . . . , the benefits of commercial availability are obtained even if each service provider is the only source of consumer equipment that can be used on its system. In this case, competition among MVPDs will lower equipment prices and spur innovation in the same way that having

^{9/} See Petition for Reconsideration filed by Time Warner, Inc., CS Docket No. 97-80, at 3-4 (filed Aug. 14, 1998) [the "Time Warner Petition"]; NCTA Petition at 18-19.

^{10/} Conference Report at 181 (emphasis added); Statement of Commissioner Michael K. Powell re: Commercial Availability of navigation Devices, CS Docket No. 97-80 (dissenting in part), at 1 ["The real purpose of Section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment."] [the "Powell Statement"]. See also H.R. Rep. 104-204, 104th Cong., 1st Sess., at 112 (1995) ["The Committee intends that the rules adopted by the Commission . . . will assure consumers of the availability of navigation devices and other customer premises equipment from a variety of sources during the transition period to a competitive market for such devices."].

independent outlets does when there is a single MVPD. . . . Here, competition among delivery systems provides the same benefits as does competition in the sale of equipment for any particular system.¹¹⁷

Moreover, CEMA mistakenly assumes that consumer choice is enhanced by denying subscribers an opportunity to buy or lease integrated set-top boxes directly from their MVPD. While WCA understands CEMA's desire to guarantee that CEMA's members are able to manufacture and sell as many non-integrated boxes as possible in the retail market, that scenario is not the objective of Section 629. Rather, Congress directed the Commission to construct a regulatory framework that maximizes a subscriber's options for purchasing or leasing set-top equipment. As pointed out by Commissioner Powell, CEMA's proposed framework *defeats* consumer choice to the extent that it denies a subscriber the option of obtaining an integrated set-top box directly from his or her MVPD:

Many consumers may not elect to purchase boxes from their local retailer. They may find it inconvenient to have to hike out, plunk down hundreds of dollars for a box, and then get a security pod from their operator. Others may conclude that it is more prudent to lease a box from their provider rather than make an investment in a box, because of rapidly changing technology. These consumers should not be forced by regulation to lease a multi-component box (probably with other features such as VCR and DVD capability) at a higher price, simply because we, in our wisdom, decided "availability" should mean nudging consumers into stores and, at the outset,

¹¹⁷ Comments of General Instrument Corporation, CS Docket No. 97-80, at 92 (filed May 16, 1997) [emphasis in original]. CEMA also argues that the Commission's January 1, 2005 security separation deadline is an unauthorized "blanket waiver" of the "statutory commercial availability requirement." CEMA Petition at 7-8. As discussed above, neither Congress nor the Commission has adopted a rule requiring that MVPDs immediately unbundle security from nonsecurity functions in the set-top box. Instead, the Commission has determined that the commercial availability requirement is satisfied if MVPDs cease to offer new integrated boxes on January 1, 2005. In effect, CEMA is arguing that the Commission has issued a blanket waiver of a rule that does not exist, a position which is patently absurd on its face.

categorizing their possible preference for integration an “impediment” to retail availability. The market should be allowed to play this out.^{12/}

In addition, CEMA’s proposed restriction on the sale or lease of MVPD-supplied, integrated set-top boxes cannot be reconciled with the Commission’s mandate to “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.” On this point, CEMA offers nothing other than its broad statement that “there is no evidence that [integrated] equipment provides either technical benefits or economic efficiencies.”^{13/} To the contrary, the record before the Commission indicates that integration of security and non-security functions enhances system security, reduces costs and may provide an optimal platform for advanced services.^{14/} Given

^{12/} Powell Statement at 3. *See also* Time Warner Petition at 3-4 (“As long as consumers have the *option* to purchase or lease component devices, there is no reason they should not also have the option to obtain an integrated device from their MVPD. Consumer electronics manufacturers themselves provide many forms of integrated products in response to consumer needs and desires. It is wrong to prohibit only MVPDs from providing consumers the benefits of product integration, especially where the only purpose is to reduce the likelihood that some consumers may prefer to lease equipment from their MVPD rather than purchase equipment at retail.”) [emphasis in original]; Petition for Reconsideration filed by the Telecommunications Industry Association, CS Docket No. 97-80, at 7 (filed Aug. 14, 1998) [“Limiting consumer choice to separate devices for security and non-security functions would also result in increased costs to consumers. It would be more expensive to manufacture two separate devices and there would, in some instances, be more costs associated with distributing multiple devices.”] [the “TIA Petition”].

^{13/} CEMA Petition at 5.

^{14/} *See, e.g.*, Reply Comments of Time Warner Entertainment Company, L.P., CS Docket No. 97-80, at 26 (filed June 23, 1997) [“[P]roduct integration may be an economic way to ensure that the navigation device purchased by a consumer at retail does not become prematurely obsolete as the MVPD upgrades its network or provides new services. It may well be desirable to include additional memory or some other feature which can be added at little or no additional cost in a security module provided by the MVPD that will allow the navigation device to perform well in an upgraded network environment.”]; Comments of the Telecommunications Industry Association, CS Docket No. 97-80, at 17 (filed June 23, 1997) [“[R]egulations requiring

that MVPDs are just beginning to explore the possibilities of digital technology and the services that may be provided therefrom, it certainly would be premature and not in the best interests of consumers to subject MVPDs to artificial constraints as to what may or may not be incorporated into the set-top box.^{15/}

There is, however, one point on which WCA and CEMA share common ground. WCA has already advised the Commission that certain alternative MVPDs (including one wireless cable operator) have been excluded from the CableLabs' "OpenCable" project, which the Commission is relying on in connection with the "standardization, design, and production of . . . security modules and . . . the design, production, and distribution of the associated navigation devices for retail sale."^{16/} The scope of CableLabs' exclusionary conduct is highlighted in CEMA's Petition, where CEMA states that consumer electronics manufacturers also have been excluded from CableLabs' standards-setting process, and that as a result "there is no established procedure to ensure that manufacturers'

separation of security and other functions could inadvertently impact the design and cost of today's semiconductor technology and integrated circuits ("ICs"), which allows manufacturers to provide multiple functions on a given IC, saving cost and miniaturizing products."]; General Instrument Comments at 57 n.103 ("Based on extensive experience as the leading security system manufacturer for MVPD systems, GI firmly believes that embedded security systems afford operators the greatest protection from signal theft, particularly when the embedded security can be supplemented by a renewable security element in the event of a security breach.).

^{15/} See, e.g., Comments of the Ad Hoc Computer and High-Technology Coalition, CS Docket No. 97-80, at 7 (filed May 16, 1997) ["Some manufacturers may choose to integrate programming and security features into their devices, eliminating the "set-top" box entirely, while others may opt to transform the set-top box into a PC-based "digital server," providing consumers with access to the Internet, telephone and home automation functions in addition to multichannel video programming. And it is likely that virtually all of these developments will occur in the digital domain, with transmission, navigation and conditional access functions provided as a stream of computer bits rather than an analog signal."].

^{16/} WCA Petition at 12, quoting R&O at ¶ 76.

interests will receive full and fair consideration.”^{17/} CEMA therefore asks that the Commission not rely on the CableLabs standards-setting process, and that the Commission instead direct the Cable Consumer Electronics Compatibility Advisory Group (“C3AG”) to develop specifications vis-a-vis separation of security and non-security functions.^{18/}

Obviously, if any affected parties are deliberately excluded from a private standards-setting process that is the heart of this proceeding, it is highly likely that the resulting standards for set-top boxes and other navigation devices will not accommodate technologies that compete with cable. And, once a cable subscriber purchases a box that can only be used with wired cable systems, it is equally unlikely that he or she will switch to an alternative MVPD whose technology is incompatible with the box. There is no sound basis for the Commission to promote this result. Therefore, WCA reiterates that the Commission must state unequivocally that deliberate exclusion of alternative MVPDs and other affected parties from the standards-setting process will not be tolerated, and that it will not accept any standards from CableLabs or any other organization unless the process is fully and fairly open to all affected interests.

^{17/} CEMA Petition at 14.

^{18/} *Id.* at 12.

WHEREFORE, for the reasons set forth above, WCA requests that the Commission deny CEMA's Petition as requested above, and grant WCA's Petition in accordance with the recommendations set forth in that filing.

Respectfully submitted,

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