

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

JOINT COMMENTS

I. Introduction

Mediacom Communications Corporation (“Mediacom”); the Pennsylvania Cable Television Association (“PCTA”); and Tele-Media Corporation of Delaware (“Tele-Media”) (collectively “Joint Commenters”), through their attorneys, file these comments to address serious misconceptions regarding impediments to greater retail availability of cable set-top boxes. The cable industry has gone well beyond its statutory and administrative obligations, attempting in good faith to foster consumer choice with respect to set-top boxes and other customer premises devices used in connection with cable service. Those efforts, however, have been met with unreasonable resistance from a consumer electronics industry motivated by its pecuniary interests.

Acceleration of the 2005 phase-out remains unjustified. Such actions would do more harm than good – compromising competition, innovation and consumer choice. It would eliminate equipment that might prove more cost effective and better suited to consumer needs. It would also remain manifestly unfair to the cable industry as it would disrupt MVPD equipment development and business plans predicated upon the 2005 phase-out date. The Commission must therefore remain skeptical of the consumer electronic industry’s cries for an earlier phase-out date and under the circumstances should instead eliminate the phase-out deadline altogether.

The Commission should retain the 2005 phase-out deadline only if it can directly attribute the lack of commercial availability of navigation devices to the continued availability of integrated boxes. The cable industry has met and exceeded Commission-established milestones. In contrast, consumer electronics retailers have failed to bring host devices to retail. If, however, the Commission should decide to retain the 2005 phase-out deadline and continue to regulate the cable industry in this context, fairness dictates that the Commission create milestones and impose comparable reporting obligations for the consumer electronics industry to meet.

II. Discussion

A. No Basis Exists to Advance the 2005 Phase-Out of Integrated Navigation Devices.

The Commission originally established 2005 as the deadline for phasing out integrated navigation devices to allow MVPDs and manufacturers time to adapt equipment and respond to a changed market.¹ Furthermore, the Commission selected this date “to allow an MVPD to recover its investment in subscriber equipment that has been placed into service prior to January 1, 2005 and a reasonable period of time to transition its equipment inventory to unbundled equipment.”² The fact that retailers have failed to uphold their obligation to offer retail set-top boxes cannot justify any advancement of the 2005 phase-out.

¹*See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling in CS Docket No. 97-80, FCC 00-341 (rel. Sept. 18, 2000) at ¶ 10 (“*FNPRM and Declaratory Ruling and Declaratory Ruling*”) (citing *Implementation of Section 204 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14803 (1998) (“*Navigation Devices Order*”).

²*See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order on Reconsideration, FCC 99-95, 14 FCC Rcd 7596 (1999) at ¶ 35 (“*Navigation Devices Reconsideration*”).

Significantly, acceleration of the phase-out deadline would result in greater harm than good. It would seriously compromise consumer choice. Integrated boxes typically cost less than those with separate security and non-security functions.³ Moreover, as retailers have not yet begun to offer host devices, no reliable data exists as evidence that consumers even want to purchase these devices at retail.⁴

Accelerating the phase-out deadline would have other negative consequences. The Commission selected 2005 to “minimize the economic impact . . . by allowing [MVPDs] sufficient time to respond to equipment modifications and a changed market.”⁵ To reverse its decision now would unfairly penalize MVPDs whose business plans necessarily contemplated a 2005 phase-out deadline.

Acceleration of the deadline could also negatively impact digital deployment. To date, consumer electronic retailers have failed to make navigation devices available at retail, which in part may be attributed to nothing more than greed, in other words, the consumer electronics retailers’ insistence that they receive a portion of MVPDs’ revenue.⁶ In contrast, the cable

³See *Navigation Devices Order*, 13 FCC Rcd 14775 (dissent of Commissioner Michael K. Powell); see also *Navigation Devices Reconsideration*, 14 FCC Rcd 7596 (dissent of Commissioner Michael K. Powell).

⁴Retailers have even acknowledged this point. See Paul Davidson, *Bickering Delays Retail Debut of Set-Top Cable Boxes*, USA TODAY, July 25, 2000, at 1B. (“‘Customers are not knocking on the door saying we want these boxes,’ says Rick Borinstein, senior vice president of Radio Shack.”).

⁵See *FNPRM and Declaratory Ruling* at ¶ 10.

⁶See discussion *infra* Part II.B.2.b.

industry is aggressively deploying digital cable.⁷ It remains doubtful that the consumer electronics industry can timely meet the anticipated demand.

B. Circumstances Merit Repeal of the 2005 Phase-Out Deadline.

1. The cable industry has met and exceeded expectations regarding the development and implementation of separate security modules and host devices.

The cable industry has met and exceeded expectations regarding the development and implementation of separate security modules and host devices. The necessary specifications were released to the public in October 1999.⁸ Those specifications contemplated “‘interactive’ and ‘non-interactive’ host devices that [could] operate on bi-directional and unidirectional cable systems, respectively. These specifications . . . spell[ed] out for suppliers and others how to build products compatible with the OpenCable architecture.”⁹

The cable industry has conducted extensive testing of digital point-of-deployment security modules (“PODs”) and interoperability of those PODs with host devices. In December 1999, CableLabs cosponsored a forum at which

numerous companies teamed together to demonstrate the progress they had made in achieving interoperability. CableLabs conducted

⁷See Matt Stump, *Charter Makes Run at Digital Lead*, MULTICHANNEL NEWS, October 16, 2000, located at <<http://www.multichannel.com/weekly/2000/42/Chtrside42.htm>> (last visited November 7, 2000).

⁸See Status Report in CS Docket No. 97-80 (July 7, 2000) at 6 (“July 2000 Status Report”) (citing Status Report in CS Docket No. 97-80 (January 7, 2000) at 7 (“January 2000 Status Report”). That release “included specifications for hardware elements including the unidirectional functional requirements, the bi-directional functional requirement, the unidirectional terminal requirements, the OpenCable network interface and the host POD module interface.” See *id.* at note 10 (citing January 2000 Status Report at 7).

⁹See July 2000 Status Report at 6.

interoperability tests involving nine major consumer electronics manufacturers, five conditional access suppliers, and three headend suppliers. . . . Those tests demonstrated a significant level of interoperability between various removable security or POD modules and host devices.¹⁰

CableLabs has held several other tests as well.¹¹

The cable industry also worked diligently to make sure that it met the July 1, 2000 deadline for separation of security and non-security functions. As the July 2000 Status Report indicated, “cable operators were able to take delivery of digital POD modules by July 1, 2000 to meet consumer demand.”¹² Furthermore, despite the lack of analog PODs for hybrid navigation devices, cable operators worked tirelessly to find alternate solutions, seeking Commission relief only in the neediest of circumstances.¹³

The cable industry has not only met Commission expectations, it has exceeded them by working to develop “middleware” that will enhance the portability of navigation devices. These efforts “demonstrate[] the industry’s commitment to work with vendors and other interested parties to achieve the goals of retail availability – and eventually portability – of navigation

¹⁰See July 2000 Status Report at 7.

¹¹See *generally* July 2000 Status Report at 7-8.

¹²See *id.* at 5.

¹³See, e.g., Petition for Special Relief in CSR-5569-Z (June 29, 2000); see also *In the Matter of Charter Communications, Inc. et al.*, Memorandum Opinion and Order, DA 00-1870 (rel. August 15, 2000).

devices.”¹⁴ As the Commission did not specifically require portability or interoperability,¹⁵ the Commission should applaud, not punish, the progress to date and continue to allow marketplace forces dictate how to resolve these issues.

2. Retailers have failed to respond to cable industry efforts as host devices are not yet available at retail.
 - a. *Retailers have attempted to divert blame.*

Consumer electronics retailers have worked very hard to divert blame from their own failures. They have attributed delays to video content providers’ allegedly “illegal” insistence on copy protection. The Commission’s recent decision confirming that some level of copy protection remains appropriate renders such claims unfounded.¹⁶

Consumer electronics retailers have similarly blamed the lack of a final DFAST license as the reason underlying their failure to have host devices available at retail.¹⁷ The availability of a developmental license, however, has permitted the consumer electronics industry to develop a

¹⁴See July 2000 Status Report at 9-10.

¹⁵See *id.*; see also *Navigation Devices Order*, 13 FCC Rcd 14775 at ¶ 126.

¹⁶See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling in CS Docket No. 97-80, FCC 00-341 (rel. Sept. 18, 2000) at ¶¶ 25-32. The Commission found that “inclusion of some measure of copy protection within a host device [does not] violate[] the separation requirement of the Commission’s navigation devices rules.” *Id.* at ¶ 25.

¹⁷See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report, CS Docket 97-80 (August 2, 2000) at 10-14.

host device pending the license's finalization.¹⁸ Moreover, having resolved the copy protection issues, the cable and consumer electronics industries continue to work towards finalization of the PHI/DFAST license, eliminating any further impediment to production of retail host devices.¹⁹

- b. *The lack of retail host devices remains attributable to consumer electronics retailers' other business objectives.*

The lack of retail host devices can be attributed to consumer electronics retailers' other business objectives. Retailers have unreasonably demanded a financial stake in MVPDs' programming service revenues.²⁰ They also have indicated that they would prefer to wait for next generation devices and integrated DTV sets.²¹ As Congress' interests in seeking commercially available navigation devices focused on consumer choice and the public interest, the Commission must not permit consumer electronics retailers to manipulate regulatory policy simply to advance their private business objectives.

¹⁸See National Cable Television Association *ex parte* filing dated August 15, 2000 (submitting into the record NCTA's letter, dated August 15, 2000 to Honorable William J. Tauzin from Robert Sachs responding to CERC's Response to July 2000 Status Report) ("CableLabs has made available to manufacturers an 'evaluation' license for the technology – without the terms to which CERC objects – so they can develop, build and test set-top boxes pending signing a 'production' license enabling them to supply such boxes for retail sale.")

¹⁹See *FNPRM and Declaratory Ruling* at ¶ 32. See Letter dated October 18, 2000, from Richard R. Green, Ph.D, President and CEO, Cable Television Laboratories, Inc. to Magalie Roman Salas, in CS Docket No. 97-80 (advising the Commission that the DFAST license is "now referred to as the POD-Host Interface License Agreement or the PHI license" and updating the Commission as to the parties' status in negotiating a final license).

²⁰See Paul Davidson, *Bickering Delays Retail Debut of Set-Top Cable Boxes*, USA TODAY, July 25, 2000 at 1B (quoting Rick Borinstein, senior vice president of Radio Shack as saying, "We believe that we deserve a piece of that revenue stream."(emphasis added)); see also July 2000 Status Report at 11-12 (discussing retailers' insistence on receiving a portion of MVPDs' revenue).

²¹See July 2000 Status Report at 10-11.

C. Should the Commission Retain the 2005 Phase-Out Deadline, It Must Necessarily Impose Milestones and Reporting Obligations on the Consumer Electronics Industry.

The Commission must make sure that the consumer electronics industry has every incentive to promptly offer set-top boxes at retail. While marketplace solutions offer a more appropriate method to spur commercial availability of navigation devices, should the Commission find it necessary to continue to regulate the cable industry, it must impose comparable obligations on the CE industry. This includes the threat of Commission sanction absent progress, much like the sanctions to which the cable industry remains subject.

The cable industry has actively worked to achieve the Congressional objective of promoting retail availability of set-top boxes. Established milestones exist by which to gauge the cable industry's successes or failures, and regulatory intervention remains possible if the cable industry fails to meet its obligations.

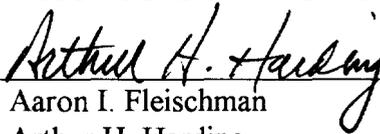
In contrast, the consumer electronics industry, to date, has remained free from Commission scrutiny. Consumer electronic retailers have had no accountability for their failure to make host devices available at retail. To the extent the cable industry remains subject to sanctions; the consumer electronics industry must have similar accountability. To the extent it continues to regulate the cable industry in this context, the Commission should create milestones and impose reporting obligations on the consumer electronics industry. It should monitor the consumer electronics industry's progress in meeting those requirements before taking any action that would unnecessarily and unfairly penalize consumers and the cable industry.

III. Conclusion

The cable industry has worked diligently to meet and exceed Commission expectations and to promote commercially available navigation devices. The cable industry's efforts to comply in good faith with the Commission's requirements have been met with tremendous resistance from consumer electronics retailers. The fact remains that the lack of commercially available navigation devices remains largely attributable to consumer electronics retailers' obstinance. The Commission therefore should remain suspect of consumer electronics retailers' finger-pointing and exaggerated statements. Acceleration of the 2005 deadline remains entirely inappropriate; in fact, the circumstances advocate repeal of the deadline altogether. The Joint Commenters therefore respectfully request that the Commission take such actions as discussed above.

Respectfully submitted,

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November 15, 2000

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