

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

**WASHINGTON, D.C. 20554**

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

**REPLY COMMENTS OF AT&T CORP.**

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**REPLY COMMENTS OF AT&T CORP.**

AT&T Corp. ("AT&T"), by its attorneys, hereby files its reply comments in response to the Commission's Further Notice of Proposed Rule Making ("*Notice*") in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

In these reply comments, AT&T corrects a number of inaccurate statements made by the Consumer Electronics Retailers Coalition ("CERC") and the Consumer Electronics Association ("CEA") about the state of the navigation devices market and the alleged inadequacies of the OpenCable process. AT&T also demonstrates that CERC's and CEA's proposals to accelerate the phase-out date for integrated set-top boxes and impose substantial new regulatory burdens on the cable industry are unnecessary in light of recent developments in the retail market for navigation devices and the OpenCable process. Both CERC and CEA fail to acknowledge steps

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<sup>1</sup> 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, CS Docket No. 97-80, FCC 00-341 (rel. Sept. 18, 2000) ("*Notice*").

that AT&T, other cable operators, *and even their own members*, such as Philips, Panasonic, Sony, and Best Buy, are taking to pursue retail availability of advanced, digital set-top boxes.

Moreover, CERC's and CEA's proposals are clearly anti-consumer. For example, as numerous commenters demonstrate, advancing the phase-out date for integrated devices would delay the rollout of new digital services and equipment. Even Philips, a major CEA member, objects to accelerating the ban. Likewise, CERC's recommendation that the Commission eliminate equipment averaging -- aside from being unlawful -- would raise the cost of digital navigation devices for consumers. Furthermore, CEA's proposal that the Commission impose draconian standard-setting and disclosure obligations on the cable industry would stymie technological innovation and deployment of new services and conflict with the pro-consumer, pro-competitive objectives of Section 629 of the Communications Act (not to mention CEA's own strenuous objections to the imposition of similar standardization requirements on its members in the digital television and other Commission proceedings).

AT&T and the cable industry have invested substantial funds and thousands of man-hours to make the OpenCable process work and they continue to do so in ways that go beyond the Commission's requirements (*e.g.*, the middleware effort). Likewise, AT&T and other cable operators are working diligently with CERC and CEA members to enter into creative relationships to facilitate the retail sale of navigation devices. It is these marketplace developments, not CERC's and CEA's rhetoric, that should guide the Commission's action in this proceeding.

Finally, AT&T reiterates its request that the Commission revisit its prior decision to ban integrated devices as of January 1, 2005 because, as the overwhelming weight of the comments demonstrates, the ban is unnecessary and will deny consumers access to a cost-effective product option. However, should the Commission elect to retain the integration ban, it should clarify that

integrated cable devices *that are available for purchase by consumers at retail* are not subject to the ban. In addition, the Commission should clarify that the exemption in Section 1204(a)(2) of the Commission's commercial availability rules applies where integrated cable devices available at retail include embedded security *and* a POD slot.

**II. CONTRARY TO THE CLAIMS OF CERC AND CEA, AT&T AND OTHER CABLE OPERATORS ARE TAKING CONCRETE STEPS TO PROMOTE THE DEVELOPMENT OF A RETAIL MARKET FOR ADVANCED DIGITAL SET-TOP BOXES.**

CERC and CEA suggest that the cable industry has been conspiring to corner the set-top box market. For example, CERC states that the cable industry is “deploying digital equipment at astonishing rates,” and is on a pace to “foreclose” 80% of cable homes by 2005.<sup>2</sup> Similarly, CEA contends that “by the time POD functionality is entirely implemented, cable operators will likely have entrenched their proprietary technologies in the corresponding set-top boxes,” effectively “locking up” the market for navigation devices.<sup>3</sup> Both CERC and CEA conclude that the Commission should “level the playing field” by, among other things, accelerating the phase-out date for integrated set-top boxes and imposing onerous regulatory requirements on the cable industry.<sup>4</sup>

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<sup>2</sup> CERC Comments at 30-31.

<sup>3</sup> CEA Comments at 18-20. On a related note, CEA suggests that AT&T is “forcing its subscribers to take and rent new digital set-top boxes as part of a system upgrade” in Tustin, California. *See id.* at 23 & n. 50. CEA mischaracterizes the situation in that community. The Tustin plant has not yet been upgraded to digital, and, in order to add the channels needed to compete with DBS, AT&T is phasing out trap technology and converting to an addressable system. Consequently, a set-top box is needed for customers to access expanded-basic tiers and premium channels. No box is required to receive basic service. *See* Linda Haugsted, Multichannel News, Nov. 27, 2000, at 37.

<sup>4</sup> *See, e.g.,* CERC Comments at 6-7; CEA Comments at 5.

CERC's and CEA's theories are wrong. As an initial matter, both commenters have it exactly backwards when they suggest that cable operators have every incentive to "lock up the navigation devices market."<sup>5</sup> To the contrary, consumer demand and competition from DBS and other alternative MVPDs are spurring cable operators to *expedite* their pursuit of retail distribution for their digital equipment and services. As AT&T noted in its initial comments, the cable industry's principal competitors, DirecTV and EchoStar, have enjoyed remarkable success at retail in recent years.<sup>6</sup> Their significant retail presence has enabled DirecTV and EchoStar to achieve a combined 16.4% national share of MVPD customers, and they are taking four out of every five new multichannel video customers. AT&T and other cable operators *must* establish a retail presence in order to remain competitive in this hotly contested marketplace.<sup>7</sup> Furthermore, as AT&T also noted, cable customers are *demanding* such a retail presence.<sup>8</sup>

Moreover, both CERC and CEA completely ignore evidence that the cable industry and the consumer electronics industry (including members of CERC and CEA) are taking concrete steps to promote a retail market for digital set-top boxes.<sup>9</sup> AT&T, for example, has announced a

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<sup>5</sup> CEA Comments at 18.

<sup>6</sup> See AT&T Comments at 5-8.

<sup>7</sup> See NCTA Comments at 28-29 ("[C]able operators have strong economic incentives *not* to take any action which would inhibit the development of retail distribution channels for equipment that facilitates their ability to market their services to consumers.") (emphasis in original); Comments of Time Warner Cable at 6 ("Time Warner Comments") ("The intense competitive pressure from DBS and their retail partners only serves to increase the cable industry's desire and support for the retail availability of cable converter equipment.").

<sup>8</sup> See AT&T Comments at 7-8.

<sup>9</sup> It is curious that CERC, for example, would choose to overlook these retail developments while citing to press reports in its pleading that highlight those very developments. For example, CERC refers to a *Multichannel News* article that describes AT&T's recent groundbreaking agreement with Philips, but attempts disingenuously to use that article to support the

(footnote continued ...)

number of relationships with leading consumer electronics manufacturers and retailers, including Philips, Panasonic, and Best Buy, for the development, deployment, and marketing of advanced digital set-top boxes at retail, and is pursuing similar agreements with other consumer electronics equipment vendors and retailers, as well.<sup>10</sup> AT&T has also worked with Motorola to ensure that Motorola will license critical DES encryption and other core security technologies to Philips, Panasonic, and other consumer electronics vendors to enable such vendors to easily produce and make available for retail distribution full-function, integrated set-top boxes that work seamlessly on AT&T's systems. The result, of course, will be interbrand competition among AT&T's equipment suppliers, which will ultimately benefit consumers in terms of lower prices, more choice, and greater navigation device functionality.<sup>11</sup>

Likewise, Cablevision is planning to deploy integrated Sony set-top boxes in the New York City market that can be sold at retail.<sup>12</sup> Other cable operators are also taking specific strides toward a retail strategy for digital set-top boxes.<sup>13</sup>

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(... footnote continued)

unsustainable propositions that: (1) the set-top market is largely “foreclosed;” and (2) the cable industry is deploying digital boxes at an “astonishing” rate. *See* CERC Comments at n. 44 & n. 67 (citing Jeff Baumgartner, *AT&T Books Philips Order, Breaks Digital-Box Ranks*, Multichannel News, Aug. 21, 2000).

<sup>10</sup> *See* AT&T Comments at 8-12 (describing agreements with Philips and Panasonic), 12-15 (describing agreement with Best Buy and trials with Circuit City). In fact, AT&T's agreements with Philips and Panasonic place no constraints on their ability to sell these devices to any and all retailers for their resale to consumers. *See id.* at 9.

<sup>11</sup> *See id.* at 11-12.

<sup>12</sup> *See* Cablevision Comments at 2 (noting that Cablevision is planning to spend more than \$1 billion to deploy about four million digital boxes in the New York metropolitan area, and that such boxes will incorporate a POD interface).

<sup>13</sup> *See* AT&T Comments at n. 31 (citing press accounts of agreements between major cable operators and mainstream “brand-name” consumer electronic manufacturers to facilitate the  
(footnote continued ...)

Indeed, CEA's *own members* underscored these retail developments in the initial round of comments in this proceeding. For example, Panasonic states that it "has been gratified to announce a partnership for the provision of digital set-top appliances" with AT&T, further noting that the features and functions in these devices "will begin to fulfill the potential, long recognized in the digital environment, for navigation devices to become multi-purpose consumer electronics and information technology devices."<sup>14</sup> Likewise, Philips notes that the interactive devices it is developing with AT&T will provide "a cost-effective solution for institutional distribution" and create "product differentiation and added value."<sup>15</sup> Rather than applaud these positive developments toward retail distribution, CERC mischaracterizes them as a capitulation to the cable industry.<sup>16</sup>

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(... footnote continued)

operators' entry into the retail marketplace). CERC's and CEA's comments regarding the "astonishing" deployment rates for digital boxes, *see* CERC Comments at 30-31 and CEA Comments at 18-20, provide an inaccurate picture of the current and future state of the emerging retail market for set-top boxes because many of those boxes may very well be distributed at retail. For example, AT&T has ordered, and intends to continue ordering over the coming years, POD-equipped integrated boxes specifically designed for retail, thus advancing Congress' and the Commission's interest in commercial availability. *See* AT&T Comments at n. 55.

<sup>14</sup> Panasonic Comments at 4-5. Panasonic notes further that it is "keenly interested in providing a variety of digital television and digital cable-capable products to consumers as soon as possible, both in concert with cable service providers and directly in the retail market." *Id.* at 2.

<sup>15</sup> Philips Comments at 1-2.

<sup>16</sup> *See* CERC Comments at 4 ("Manufacturers have been unable to obtain timely specifications or a license to make or distribute navigation devices that rely on POD modules. Meanwhile, they have been offered procurement contracts, dangled by MSOs, to help supply the millions of set-top digital cable devices that MSOs are now leasing to their digital customers, at rates subsidized by the leasing of analog boxes."); *id.* at 31 ("It is no wonder that consumer electronics manufacturers, vendors to CERC members in all other respects, have chosen to pursue the contracts for multi-million unit orders that MSOs have put in front of them.").

AT&T's commitment to retail, as reflected in these recent agreements with equipment vendors and retailers, should come as no surprise to CEA, CERC, or to anyone with a basic understanding of the cable industry. AT&T's core business is the sale of *services*, not the sale or lease of customer *equipment*.<sup>17</sup> AT&T believes the retail availability of equipment for use on its systems will drive more consumers to become AT&T customers and will free up capital for AT&T to invest in new and enhanced services.

The cable industry's experience with cable modems bears out this point. As noted in its initial comments, as a result of the cable industry's standardization efforts in the DOCSIS initiative, AT&T is enjoying considerable success in marketing cable modems and cable modem service at retail,<sup>18</sup> and other cable operators are pursuing similar retail strategies.<sup>19</sup> CERC and CEA cannot square this successful retail story on the cable modem front with their theories about the set-top box market. Simply stated, if, as CERC and CEA suggest, cable operators were intent on forestalling retail competition in the market for set-top equipment, why would they not have pursued the very same tactics with respect to cable modems? In fact, the cable industry is pursuing the same business model relative to both types of equipment (in fact, the OpenCable process is based on the highly successful DOCSIS process) because, in the face of strong

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<sup>17</sup> See AT&T Comments at 8 & n. 19 (quoting from Besen and Gale economic analysis which states that: "An MVPD sells services for which it collects monthly fees, and it wishes the demand for those services to be as large as possible. Limiting equipment choices to potential subscribers, or raising the price of equipment, is, therefore, not in the interest of the MVPD because that reduces the demand for its service.").

<sup>18</sup> See *id.* at 14-15 (noting, for example, that AT&T is selling cable modem service in 58 Circuit City stores and 22 CompUSA stores, and has launched with Best Buy in three markets).

<sup>19</sup> See *id.* (citing recent agreement between Excite@Home and RadioShack). See also NCTA Comments at 25 (noting retail availability of cable modems).

competition in the broadband sector, it must have a retail presence for cable modems *and* digital set-top boxes.<sup>20</sup>

### **III. AT&T’S DECISION TO DEPLOY POD-EQUIPPED SET-TOP BOXES UNDERCUTS CERC’S AND CEA’S CLAIMS ABOUT THE ALLEGED FAILINGS OF THE OPENCABLE PROCESS.**

CERC and CEA spend a significant portion of their pleadings criticizing the OpenCable process at CableLabs. CERC claims, for example, that the cable industry has “defaulted” on its technical obligations to support competitive entry under the retail sale rules, and suggests, among other things, that “there are real doubts as to whether the few PODs that exist to date would actually work reliably.”<sup>21</sup> CEA, in turn, complains that the cable industry has pursued a “two-track” strategy: on the one track, cable operators have developed proprietary specifications that support advanced interactive features, while on the other track CableLabs has issued specifications that support only core video services.<sup>22</sup> CERC and CEA conclude that the

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<sup>20</sup> CERC attempts to explain away the issue by suggesting that while cable operators already “own” the market for set-top boxes, they must “rely on retail competition to help establish a cable market for broadband data modems.” CERC Comments at 2. However, even assuming *arguendo* that cable operators could “own” such a growing and dynamic market as the digital set-top box market, they would still confront the difficulty of building a market for new digital cable services. Stated another way, it would not be particularly helpful for cable operators merely to own the boxes if they did not have a retail channel to sell digital boxes and services in response to the competitive challenge from DBS providers. Seen in this light, contrary to CERC’s claims, the cable industry is in the same market position with digital set-top boxes as it is with cable modems (*i.e.*, cable operators must convince consumers to subscribe to their new digital services just as they must persuade them to subscribe to their new cable modem offerings). *See also* AT&T Comments at 15-16 (explaining why cable modems are already available at retail while set-top boxes are not).

<sup>21</sup> CERC Comments at 8-9.

<sup>22</sup> *See* CEA Comments at 6-8. CEA also complains that the OpenCable process has not been open and has failed to ensure that manufacturers’ interests receive full and fair consideration. *See id.* at 9-11.

OpenCable process has effectively stymied development of a competitive market for set-top boxes.<sup>23</sup>

CERC and CEA are wrong on a number of accounts. First, as NCTA and other commenters noted, CableLabs has succeeded in meeting its obligations under the Commission's retail sale rules.<sup>24</sup> Notwithstanding the CERC and CEA allegations, the POD/host specifications establish an architecture and platform to deploy advanced services, and, therefore, allow for the production of host set-top boxes with features comparable to those currently available from cable operator-provided boxes.<sup>25</sup> Moreover, OpenCable is currently going beyond what the statute and the Commission's rules require by working diligently on the development of "middleware," a complex software integration project that will further enhance the portability of OpenCable-compliant host devices.<sup>26</sup> In fact, CEA's own members -- Philips and Panasonic -- were complimentary of the very OpenCable process that CEA and CERC denounce, noting, for

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<sup>23</sup> See CERC Comments at 10; CEA Comments at 11.

<sup>24</sup> See NCTA Comments at 14-26 (responding to retailers' specific criticisms of OpenCable process); AT&T Comments at 17 (noting that "CableLabs successfully implemented the digital separate security requirements which permitted cable operators to take delivery of digital POD modules by the Commission's July 1, 2000 deadline"); Motorola Comments at 7-9 (noting that the POD-host option does currently provide retailers and consumers a viable alternative to embedded boxes); Time Warner Comments at 4-6 (highlighting achievements of OpenCable process); Comments of Scientific-Atlanta at 2 (noting success in meeting July 1, 2000 deadline).

<sup>25</sup> See AT&T Comments at 17; NCTA Comments at 9-10, 19-21; Time Warner Comments at 9 (also responding to retailer criticisms of bi-directional specifications); Motorola Comments at 5-9. In addition, as NCTA explained, the OpenCable process through which the POD and host specifications were developed, reviewed, and refined was an open and inclusive process, with participation by a broad spectrum of interests, including a number of CEA members as well as other consumer electronics vendors and retailers. See NCTA Comments at 11 & App. A.

<sup>26</sup> See AT&T Comments at 17; NCTA Comments at 12-14.

example, that they had participated actively and vigorously in OpenCable and that progress continued to be made on a number of key technical issues.<sup>27</sup>

Second, the fact that AT&T is purchasing millions of boxes equipped with a POD interface undermines CEA's claims regarding a two-track approach for cable set-top boxes. As AT&T noted, it has entered into agreements to purchase one million boxes from Philips and another million boxes from Panasonic beginning next year, all of which will contain a POD slot that will ensure compliance with OpenCable standards, portability to non-AT&T systems, and a means to upgrade system security (if necessary).<sup>28</sup> Moreover, AT&T's commitment to the OpenCable effort does not end with its Philips and Panasonic agreements. AT&T is pursuing similar agreements for POD-equipped set-top boxes with other leading manufacturers, including Motorola,<sup>29</sup> and has emphasized that going-forward all advanced digital set-top boxes it purchases for deployment on AT&T's cable systems will be equipped with a POD interface, and

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<sup>27</sup> See Philips Comments at 2-3 (noting that the "OpenCable specification is sufficiently developed to allow manufacturers to design and test navigation devices with the *basic* functionality currently available in a majority of existing set-top boxes," and that "work continues on specifications necessary to build *advanced* interactive navigation devices") (emphasis in original); Panasonic Comments at 2-4 (noting that "since the inception of the CableLabs 'OpenCable' process, Panasonic has supported and participated actively, regularly, and fully").

<sup>28</sup> See AT&T Comments at 9-10. There is no merit to CERC's suggestion that the Commission would have to change its navigation device rules to allow for the retail sale of POD-equipped set-top boxes with embedded security. See CERC Comments at 13 & n. 39. As AT&T noted in its initial comments, the exemption in Section 1204(a)(2) of the commercial availability rules applies where POD-equipped integrated devices (like those AT&T has contracted with Philips and Panasonic to provide) are made available at retail. See AT&T Comments at 22-24. See also NCTA Comments at 40-41 ("[W]here integrated devices which include embedded security *as well as a POD-host interface (i.e., a POD slot)* are available not only from an MSO but also at independent retail outlets, the Commission should clarify that such devices are *not* subject to the post-1/1/2005 prohibition on cable operator provision of integrated boxes.") (emphasis in original).

<sup>29</sup> See AT&T Comments at n. 27.

that by 2005 all equipment vendors, including those operating under existing supply contracts with AT&T, will provide POD-equipped boxes to AT&T.<sup>30</sup>

**IV. THE COMMISSION SHOULD REJECT CERC'S AND CEA'S ANTI-CONSUMER PROPOSALS TO ACCELERATE THE BAN ON INTEGRATED DEVICES AND IMPOSE OTHER ONEROUS AND INNOVATION-STIFLING REGULATIONS.**

CERC and CEA request that the Commission take a number of actions that, they argue, are necessary to the development of a retail market for set-top boxes. First, they ask the Commission to accelerate the phase-out date for integrated boxes from January 1, 2005 to January 1, 2002.<sup>31</sup> Second, CERC and CEA propose that the Commission impose new mandatory standard-setting, licensing, and disclosure requirements on the cable industry.<sup>32</sup> Third, CERC asks the Commission to eliminate equipment averaging.<sup>33</sup> Fourth, CERC proposes

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<sup>30</sup> See *id.* at 2, 28-29 (“AT&T views its retail strategy with respect to fully functional POD-equipped integrated devices and the ongoing OpenCable middleware initiative as symbiotic in that they will both proceed in parallel for several years and eventually dovetail to provide a seamless transition to greater portability and functionality for consumers.”).

<sup>31</sup> See CERC Comments at 6; CEA Comments at 16.

<sup>32</sup> CERC Comments at 13 (suggesting, for example, that the Commission require that devices distributed by cable operators to consumers must operate according to whatever technical specifications cable operators provide for the products of their competitors, such that “no function or feature with respect to receipt of any service offered by an MSO should be available on one but not the other”); CEA Comments at 12-14 (insisting that the Commission direct CableLabs to establish new standards for set-top boxes and further require that “unique and proprietary features and functions that MSOs intend to offer be disclosed to independent manufacturers”). Moreover, CEA calls on the Commission to take the following additional actions: (1) require, where necessary, the compulsory licensing of intellectual property rights; (2) require cable operators to make a showing to the Commission that “deployment of proprietary set-top box equipment will increase efficiency or make the service technically possible in a manner that cannot be comparably achieved through the deployment of navigation devices based on open standards;” and (3) rely on alternative standards, such as EIA-819, should CableLabs fail to meet new standard-setting milestones. *Id.* at 12-14, 25-26.

<sup>33</sup> See CERC Comments at 26-29.

a range of possible sanctions against cable operators, including a prohibition on the leasing of set-top boxes and even an outright ban on cable distribution (both leasing and sale) of such devices.<sup>34</sup> AT&T details below the reasons why the Commission should reject these proposals for regulatory micromanagement.

**A. The Commission Should Not Accelerate The Ban On Integrated Devices Because Such Action Is Not Necessary To Promote The Commercial Availability Of Navigation Devices And Would Otherwise Harm Consumers.**

Several commenters provided compelling arguments for rejecting an accelerated phase-out date for integrated set-top boxes. AT&T noted, for example, that accelerating the ban is unnecessary to the development of a retail market because OpenCable has produced specifications that allow for the development of technologically viable POD and host devices and, moreover, AT&T is already pursuing a retail strategy that is expressly reliant on such OpenCable specifications.<sup>35</sup> Again, CERC and CEA fail entirely to acknowledge these facts. AT&T also pointed out that advancing the phase-out date would force consumers to forego even sooner the opportunity to select a cost-effective equipment alternative that may better suit their needs.<sup>36</sup>

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<sup>34</sup> See *id.* at 12 (ban on MSO distribution of navigation devices), 36-37 (prohibition on leasing of set-top boxes), 37-39 (requirement that MSOs sell boxes through separate affiliates).

<sup>35</sup> See AT&T Comments at 24-26; NCTA Comments at 28-30 (noting achievements of OpenCable process as well as AT&T's retail plans).

<sup>36</sup> See AT&T Comments at 26-27 (noting that efficiencies associated with integrated set-top boxes translate into cost savings of approximately \$75 to \$90 per device); Time Warner Comments at 13 ("Prematurely depriving consumers of the *option* to either lease a converter box from the MVPD or purchase such a device at retail would only impede competition, innovation, and consumer choice.") (emphasis in original); NCTA Comments at 30-32 ("To the extent an operator-provided integrated device offers a better combination of price, quality, and functionality to particular consumers, the effect of banning such devices is directly contrary to the fundamental purpose of Section 629, which was adopted to *expand* consumer choice.") (footnote continued ...)

A number of commenters also highlighted the fact that accelerating the ban would cause significant disruption to current plans for the design and deployment of new digital services and equipment. Several cable operators, for example, indicated that moving up the phase-out date would upset roll-out plans for interactive, video-on-demand, and other advanced services that were made in reliance on the original January 1, 2005 phase-out date, and ultimately delay the delivery of such services to their customers.<sup>37</sup> These commenters stressed that accelerating the phase-out date would similarly disrupt plans for the design, procurement, and deployment of digital set-top boxes.<sup>38</sup> They also emphasized that a 2002 phase-out date would place them at a competitive disadvantage relative to DBS providers, who face no similar obligations to separate the conditional access functions from their set-top boxes.<sup>39</sup>

And cable operators were not alone in raising objections to accelerating the integration ban. Diva and WorldGate, two leading providers of interactive services, stressed that advancing the phase-out date would not only disadvantage their companies, but would also impede further

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(... footnote continued)

(emphasis in original); Motorola Comments at 14-16 (noting negative effects on consumer choice).

<sup>37</sup> See, e.g., Charter Comments at 1-3; Comcast Comments at 2-4; Cox Comments at 2-7; Mediacom Comments at 2-3; NCTA Comments at 30-31; Time Warner Comments at 15.

<sup>38</sup> See AT&T Comments at 27-30 (noting that accelerating the ban would “deny[] consumers the functions, features, and cost-effectiveness of integrated, POD-equipped devices and force[] AT&T to go back to the drawing board with equipment manufacturers and retailers on design and deployment plans for advanced boxes”); Comcast Comments at 6-7 (noting harmful effects on equipment plans); Time Warner Comments at 15 (same); Cablevision Comments at 3 (same); Motorola Comments at 18 (same).

<sup>39</sup> See Comcast Comments at 7-8; Cox Comments at 7-9.

technical innovation and slow the growth of the interactive and enhanced television market.<sup>40</sup>

Philips, a principal member of CEA, was equally pointed in its objections to the early phase-out date:

The introduction and development of new interactive services, and, in particular, the fact that providers of these services still are in the earliest stages of building viable business models, requires that work on technical specifications be undertaken in a very careful manner. *For this reason, Philips believes the Commission's 2005 deadline for the complete phase-out of devices with integrated security remains appropriate at this time.*<sup>41</sup>

AT&T urges the Commission to reject CEA's and CERC's calls for acceleration of the ban and instead to accord great weight to the more objective, well-grounded, and pro-consumer views on these issues advanced by Philips, Diva, and WorldGate, who join the overwhelming number of commenters in opposing such acceleration.

**B. The Commission Should Reject Proposals To Micromanage The Standards-Setting Process At CableLabs And Otherwise Avoid Imposing Onerous Disclosure Requirements On The Cable Industry.**

CERC's and CEA's proposals to impose new mandatory standard-setting and disclosure obligations on the cable industry are not only unwarranted because, as noted above, the retail market for navigation devices is emerging and the OpenCable effort is succeeding, but are also profoundly anti-consumer. CEA's recommendation, for example, would require the

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<sup>40</sup> See Diva Comments at 1-3; WorldGate Comments at 1-3. Motorola, a CEA member, also registered its opposition to an accelerated phase-out date. See Motorola Comments at 12-20.

<sup>41</sup> Philips Comments at 8 (emphasis added). Philips proposed an alternative approach under which "navigation devices that include integrated security would *also* be required to include a POD interface." *Id.* at 9 (emphasis in original). While as a general matter AT&T does not favor any further government regulation of navigation devices, it notes that the Philips proposal is not necessarily inconsistent with AT&T's business plans going-forward relative to integrated set-top boxes. See AT&T Comments at 28 (noting plans to purchase integrated boxes equipped with a POD interface).

Commission to review every new feature and function that cable operators might introduce in their set-top boxes and presumably to disallow such innovative features or functions even though they are highly desired by consumers, simply because CEA believes its members need more time to offer such features or functions themselves.<sup>42</sup> The clear upshot of this proposal would be to slow or stall the development and deployment of innovative services and products, thus depriving consumers of the benefits of new digital technology. Such a result would conflict with the pro-consumer, pro-competitive objectives of Section 629 as well as the Commission's implementing rules.<sup>43</sup> Congress specifically mandated in the conference report accompanying the 1996 Act that "the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services."<sup>44</sup> It would be impossible to square CEA's proposal to halt innovative developments by cable operators with this congressional directive.

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<sup>42</sup> CEA urges the Commission to force CableLabs and the cable industry to abandon the OpenCable process in favor of a new, far-ranging, and as yet undefined set of standards, all under the guise of enabling national portability of set-top boxes, the provision of navigation functions such as EPG, and the offering of advanced services such as video-on-demand. *See* CEA Comments at 8-16. These recommendations would require the Commission to pursue a course of action that ignores the technical complexities inherent in the heterogeneous cable system environment. In contrast, CableLabs and the cable industry are developing a standard for a set-top box middleware component that will: (1) run on all OpenCable-compliant hardware platforms (*i.e.*, hosts); (2) run all third party-developed applications written to the middleware API specifications (*e.g.*, an Internet browser with e-mail client); and (3) ensure national portability as the middleware will be downloadable via the cable system to the set-top box. Moreover, since the major cable operators have agreed to transmit PSIP on their networks, EPGs are fully supported.

<sup>43</sup> *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Rept. & Order, 13 FCC Rcd. 14775, at ¶ 7 (1998) ("*Commercial Availability Order*") (noting Commission's objective in establishing rules for navigation devices of maximizing "consumer choice and flexibility" and its "preference for minimizing regulation in the equipment design and installation process").

<sup>44</sup> S. Conf. Rept. 104-230 at 181 (Feb. 1, 1996).

CEA's standard-setting and disclosure proposals would also conflict with Commission equipment regulation precedent. For example, in arguing for full disclosure of new features and functions to independent manufacturers, CEA states that the Commission should require compulsory licensing of the underlying intellectual property rights to such features and functions.<sup>45</sup> To the extent the Commission has adopted standards that rely on the licensing of proprietary intellectual property, it has only done so where the holder of the underlying intellectual property rights *voluntarily* agreed to such licensing.<sup>46</sup> In addition, CEA's suggestion that the Commission micromanage the standards-setting process<sup>47</sup> would be contrary to the Commission's efforts in recent years to privatize such processes to the greatest extent possible. Just last month, for example, the Commission privatized the process for establishing technical criteria for customer premises equipment ("CPE") and eliminated the requirement that manufacturers of CPE seek Commission authorization of the equipment.<sup>48</sup>

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<sup>45</sup> See CEA Comments at 14.

<sup>46</sup> See, e.g., *See In re Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, Rept. & Order, 8 FCC Rcd. 8216 (1993) (noting that Motorola had encouraged the Commission to adopt its AM stereo standard, and expressed its willingness to license its patented technology on a reasonable and nondiscriminatory basis). Moreover, the Commission may not have authority to impose such a compulsory licensing system. See Comments of General Instrument Corp., filed in CS Docket No. 97-80, at 100-109 (May 16, 1997) (noting that Congress has not granted the Commission authority to compel licensing of proprietary technology and that Section 629 of the Communications Act did not confer such authority).

<sup>47</sup> See CEA Comments at 11-15.

<sup>48</sup> See *FCC Privatizes Standards-Setting And Certification Process For Telephone Equipment*, FCC Press Release (Nov. 9, 2000) (summarizing Commission order streamlining Part 68 rules in CC Docket No. 99-216, FCC 00-400). See also *Commercial Availability Order* at ¶ 34 (rejecting proposals to adopt network disclosure requirements similar to the requirements of the old Part 68 rules); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd. 7596, at ¶ 41 (1999) ("*Commercial Availability Reconsideration* (footnote continued ...)

Finally, AT&T finds it ironic that CEA aggressively argues for the imposition of more stringent standardization requirements on cable operators, while it has taken precisely the opposite position regarding mandatory standards in the DTV context, where it has strenuously opposed broadcasters' proposals to impose television performance standards on the digital televisions manufactured by CEA's own members.<sup>49</sup>

**C. CERC's Proposal To Eliminate Equipment Averaging Would Be Unlawful And Contrary To The Interests Of Consumers.**

AT&T categorically opposes CERC's suggestion that the Commission eliminate the equipment averaging rules. As an initial matter, it would be unlawful for the Commission to take such action. Congress directed the Commission to establish rules for equipment averaging in Section 301(j) of the 1996 Act, and the Commission has no authority to ignore that mandate.<sup>50</sup>

Furthermore, even assuming *arguendo* that the Commission had such authority, eliminating the

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(... footnote continued)

*Order*") ("We continue to believe that the CableLabs/OpenCable efforts will lead to a useable standard for the separation of security and non-security functions by July 1, 2000 and decline to assign responsibility for this development to another group such as C3AG.").

<sup>49</sup> See, e.g., CEA Comments, filed in MM Docket 00-39, at 12-16 (May 17, 2000) (noting, among other things, that "mandatory receiver performance standards would be unwise because their most likely effect would be to dampen the competitive incentive to improve receivers and thereby limit consumer choice"); CEA Reply Comments, filed in MM Docket 00-39, at 3-12 (June 16, 2000) (noting that "market forces provide the best incentive to create receiver and converter designs most in demand by consumers").

<sup>50</sup> See 47 U.S.C. § 543(a)(7) ("The Commission *shall* allow cable operators . . . to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category.") (emphasis added). CERC's suggestion that Section 304(e) of the 1996 Act (*i.e.*, the sunset provisions of the retail sale statute) somehow operates to limit the equipment averaging provisions in a separate section of the 1996 Act, *see* CERC Comments at 27-29, has no support in the plain statutory language or the legislative history, nor would it serve Congress' policy goal in enacting the equipment averaging provisions, namely to accelerate the deployment of digital services and equipment.

equipment averaging rules would not serve the public interest. As other commenters have noted, Congress enacted these provisions in order to promote the development and deployment of broadband equipment, including the rollout of such equipment in rural and low-income areas.<sup>51</sup>

It is clear that CERC's proposal to eliminate equipment averaging will not benefit consumers. Congress and the Commission have already made the policy judgment that equipment averaging helps, rather than hurts, consumers by enabling "cable operators to reduce the monthly charges to consumers that often are associated with the introduction of new technology."<sup>52</sup> In fact, CERC's proposal is designed to force cable operators to charge *higher* prices to consumers for advanced digital set-top boxes, so that retailers can charge higher prices and capture higher profit margins on boxes sold at retail.<sup>53</sup> CERC says as much in its pleading when it proposes that cable operators can avoid Commission sanctions by "voluntarily" choosing to "make navigation devices available for consumers solely through sale at prices that reflect acquisition costs and reasonable margin."<sup>54</sup> AT&T believes that a much better approach would

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<sup>51</sup> See NCTA Comments at 22-23 (citing to legislative history accompanying equipment averaging provisions); Time Warner Comments at 10.

<sup>52</sup> H. Rept. 104-204 at 107 (1995).

<sup>53</sup> See NCTA Comments at 23; Time Warner Comments at 10 ("There is no justification for gutting these [equipment averaging] rules to ensure inflated profit margins for the CE industry, and the equipment averaging rules certainly provide no reason for excusing the CE retailers' failure in committing to commercial availability.").

<sup>54</sup> CERC Comments at 35. Alternatively, CERC suggests that cable operators can also avoid sanctions if they "voluntarily" agree to "adopt distribution programs similar to those in the wireless and DBS industries." *Id.* In other words, CERC wants to extract from cable operators a portion of their revenues from services provided to subscribers who obtain devices at retail. As NCTA noted in its comments, cable operators and retailers are free to negotiate financial arrangements they find mutually beneficial, but Section 629 and the Commission's implementing rules clearly do not give retailers any entitlement to a share of customer-generated revenues. See NCTA Comments at 24-25.

be for CERC to encourage its members to pursue other retail strategies to make their offerings more appealing to their customers. For example, retailers could develop and market products which integrate host navigation device functions in other consumer electronics equipment (*e.g.*, TVs, DVDs, VCRs, PVRs) in ways that may be appealing to consumers, or they could enhance the commercial viability of their product offerings through various other means, such as joint marketing and bundled pricing. Retailers have pursued such strategies in other areas and there is no reason why they cannot do so here.<sup>55</sup>

**D. CERC And CEA’s Remaining Proposals To Bar Cable Operators From Providing Set-Top Boxes And Otherwise To Saddle Them With Onerous Regulations Are Entirely Unjustified.**

CERC recommends that if cable operators do not voluntarily agree to raise their prices on digital set-top boxes and take other measures to financially benefit retailers, then the Commission should impose a number of sanctions on the cable industry, including: (1) a prohibition on leasing of navigation devices by cable companies to consumers; (2) a separate affiliate requirement for all cable company sales of navigation devices; and (3) as a last resort, the imposition of an outright ban on cable operators’ distribution (both leasing and sale) of navigation devices.<sup>56</sup> CEA proposes similarly onerous burdens, including telco-style regulations based on the requirements established in the *Computer III* proceeding for Network Channel Terminating Equipment (“NCTE”).<sup>57</sup>

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<sup>55</sup> See AT&T Comments at 25 & n. 50; NCTA Comments at 32-33 and App. B (providing numerous examples of how retailers typically bundle and cross-promote various equipment to create more attractive options for consumers).

<sup>56</sup> See CERC Comments at 12, 36.

<sup>57</sup> See CEA Comments at 25.

AT&T has demonstrated above that the Commission has no authority to eliminate equipment averaging under Section 623(a)(7) of the Communications Act. The Commission is similarly barred from prohibiting the leasing or general distribution of set-top boxes by cable operators. Section 629(a) clearly provides that:

Such [navigation device] 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 and other services offered over multichannel video programming systems, to consumers . . . .<sup>58</sup>

The Commission has acknowledged this statutory command, noting that its retail sale rules “did not bar MVPDs from the equipment market.”<sup>59</sup>

CERC’s proposal that cable operators sell navigation devices through separate affiliates is entirely unnecessary, would impose substantial burdens on cable operators as well as the Commission, and again would run counter to the retail developments already under way in the cable industry. It is also inconsistent with the Commission’s deregulatory efforts in recent years on equipment-related matters. The Commission previously rejected such a “separate affiliate” requirement in this proceeding<sup>60</sup> and should do so again here.

Finally, CEA’s suggestions that telco-related regulations be imported wholesale into the cable equipment business ignore the clear differences between the telephone and cable

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<sup>58</sup> 47 U.S.C. § 549(a) (emphasis added).

<sup>59</sup> Brief for Respondents, *General Instruments Corporation, et al. v. FCC*, Case No. 98-1420 (D.C. Cir.), filed Dec. 1, 1999, at 29. CERC suggests that based on responses to the Commission’s annual cable price survey, some cable operators may be bundling programming and equipment services even though they do not face effective competition. *See* CERC Comments at 32 (citing responses to 2000 cable price survey). AT&T did not fill out the 2000 cable price survey (or the 1999 price survey) in the manner suggested by CERC.

<sup>60</sup> *See Commercial Availability Order* at ¶ 99.

architectures -- differences which the Commission itself has repeatedly noted<sup>61</sup> and which would make telephone regulations significantly more onerous to implement in the cable context.

**V. AT&T AGAIN RESPECTFULLY URGES THE COMMISSION TO REVISIT ITS RULES REGARDING INTEGRATED CABLE SET-TOP BOXES.**

In light of the marketplace developments in the retail market for set-top boxes and the progress in the OpenCable initiative, AT&T continues to believe that the Commission should revisit its prior decision to ban integrated devices as of January 1, 2005.<sup>62</sup> As AT&T and others have previously noted, not only is the ban unnecessary, it will deny consumers access to a cost-effective product choice.<sup>63</sup> The record shows that a POD/host combination would cost approximately \$75 to \$90 more than an integrated device performing the same functions. As the U.S. Court of Appeals for the D.C. Circuit noted in its recent decision on the retail sale rules, barring consumers from obtaining “the most cost-effective product choice” would run counter to the pro-competitive, pro-consumer provisions of the commercial availability statute.<sup>64</sup>

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<sup>61</sup> See *id.* at ¶ 12 (noting that “[t]he parallel to the telephone has limitations” and that in contrast to telephone architecture, “cable networks do not reflect universal attributes, and have substantially different designs”).

<sup>62</sup> See AT&T Comments at 18-24. See also Mediacom Comments at 4-6 (noting that circumstances merit repeal of 2005 phase-out deadline for integrated devices); Motorola Comments at 12-18 (noting retail developments); NCTA Comments at 36-37 (citing retail developments and OpenCable achievements); Time Warner Comments at 16 (advocating elimination of ban).

<sup>63</sup> See AT&T Comments at 18-21; Motorola Comments at 14-16 (noting that maintenance of ban denies consumers a cost-effective product choice and inhibits innovation); Scientific-Atlanta Comments at 3-4 (noting that ban will limit consumer choice and require consumers to pay higher prices for non-integrated set-top boxes); Comments of Telecommunications Industry Association at 1-3 (same).

<sup>64</sup> *General Instrument Corp. v. FCC*, 213 F.3d 724, 731-32 (D.C. Cir. 2000).

However, should the Commission elect to retain the integration ban, it should clarify that integrated cable devices *that are available for purchase by consumers at retail* are not subject to the ban.<sup>65</sup> If a cable operator provides an integrated set-top box that is also available for sale at retail, the basis for the ban is entirely removed. Indeed, in such cases the *only* effect of the ban is to increase consumer prices by approximately \$75 to \$90, a result that is plainly anti-consumer. In addition, the Commission should clarify that the exemption in Section 1204(a)(2) of the commercial availability rules applies where integrated cable devices available at retail include embedded security *and* a POD slot.<sup>66</sup> The exemption applies in this context because such POD-equipped devices can be used on any AT&T system across the country without a POD and on any non-AT&T cable systems with a POD. Thus, consistent with the requirements of the exemption, such devices will: (1) operate throughout the continental U.S.; and (2) be available from retail outlets and other vendors throughout the U.S. that are unaffiliated with the MVPD.<sup>67</sup>

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<sup>65</sup> See AT&T Comments at 21; NCTA Comments at 39-41 (asking the Commission to clarify that the ban permits cable operators to make integrated boxes available directly to customers after January 1, 2005 so long as those same devices are available at retail).

<sup>66</sup> See AT&T Comments 22-24.

<sup>67</sup> See 47 C.F.R. § 76.1204(a)(2).

## VI. CONCLUSION

For the foregoing reasons, AT&T respectfully urges the Commission to adopt an order in this proceeding that is consistent with the reply comments herein and with AT&T's initial comments.

Respectfully submitted,

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