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**DEC 18 2000**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

December 18, 2000

**VIA COURIER**

Ms. Magalie R. Salas  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, S.W., Room TW-A325  
Washington, D.C. 20554

**Re: Reply Comments of Charter Communications, Inc. in Docket No. 97-80** /

Dear Ms. Salas:

Charter Communications, Inc. ("Charter") respectfully submits the enclosed Reply Comments of Charter in response to the Further Notice of Proposed Rulemaking in the Commission's ongoing navigation devices proceeding, CS Docket No. 97-80. Please find enclosed an original, four copies and a stamp-and-return copy of Charter's Reply Comments. A diskette containing these Reply Comments in electronic form, accompanied by a cover letter, has been sent to Mr. Thomas Horan pursuant to instructions given in the Further Notice of Proposed Rulemaking.

Kindly stamp this letter and the enclosed stamp-and-return copy and give them to the courier for return delivery to us. Please do not hesitate to contact undersigned counsel should you have any questions regarding Charter's submission.

Respectfully submitted,



David N. Tobenkin

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**For: Charter Communications, Inc.**

Enclosures

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

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

In the Matter of )  
)  
Implementation of Section 304 of the )  
Telecommunications Act of 1996 )  
)  
Commercial Availability of Navigation Devices )

CS Docket No. 97-80

**REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.  
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

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**REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.  
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

Charter Communications, Inc. (“Charter”), by its attorneys, hereby submits its reply comments in response to the Commission’s Further Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding.<sup>1</sup>

Consumer electronics retailers in their comments accuse the entire cable industry of “stockpiling” and deploying integrated devices just to harm competition from retailers.<sup>2</sup> They have entirely missed the point. Cable operators like Charter are rolling out innovative services to consumers in a marketplace supercharged with competition from other providers vying for the same customers. The set-top device is merely the device needed to do so. The set-top is not a profit center to Charter. FCC rules cap the return at cost.<sup>3</sup> Consumer benefits to date include the rapid

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<sup>1</sup> Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, FCC 00341 (released September 18, 2000) (“Notice”).

<sup>2</sup> See Comments of the Consumer Electronics Association (“CEA Comments”) at 17. The Consumer Electronics Retailers Coalition resorts to an even more farfetched claim: that cable operators sought to obstruct the Commission’s navigation devices rules through the filing of “bad faith” waivers of Section 76.1204. See Comments of the Consumer Electronics Retailers Coalition (“CERC Comments”) at 11. As the Commission made clear in its final order, the waivers were narrow, focused, dealt with dual carriage of analog signal on systems pending rebuild, and were granted. Memorandum Opinion and Order, *In the Matter of: Charter Communications, Inc. et al., Petition for Waiver of the Requirement To Provide Point of Deployment Modules Contained in Section 76.1204 of the Commission’s Rules*, DA 00-1870, 2000 FCC LEXIS 4314 (C.S.B., Aug. 15, 2000).

<sup>3</sup> See Communications Act, Section 623(b)(3), 47 U.S.C. § 543(b)(3); Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5800-25 (1993).

upgrades of service with multiple channels of digital video and the offering of an ever-expanding variety of other new services.

The business model for consumer electronics retailers has been to sell equipment with a mark-up. Thus, despite being offered the chance to buy the same host devices offered to cable, the retailers have not found the business to be sufficiently lucrative to place orders. Instead, they have sought to impose various regulatory “solutions” that would harm consumers, cable operators, and market innovation, solely to enrich themselves.

The consumer electronics retailers have proposed mandatory price supports for their retail sales.<sup>4</sup> If Circuit City and the other retailers are telling the Commission that set-top sales are not a business at this price, that is not a regulatory problem in need of Commission intervention. One waits for Moore’s law, or invests in new product development. One does not raise the price to consumers in order to subsidize an uneconomic business.

The consumer electronics retailers have proposed banning the lease of set-tops.<sup>5</sup> The set-tops are leased at cost as a means to the end of selling service. Removing leases as an option only harms consumers who might otherwise be denied entrée to digital services. Such a solution only victimizes consumers to benefit consumer electronics retailers.

The consumer electronics retailers have proposed accelerating the ban on cable operators’ ability to offer integrated devices,<sup>6</sup> at high cost to consumers. As the comments have detailed,

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<sup>4</sup> See CERC Comments at 30.

<sup>5</sup> *Id.* at 35-37.

<sup>6</sup> See CEA Comments at 16-21; CERC Comments at 15-17.

consumers would suffer from the delay in digital deployment,<sup>7</sup> the interruption of the product development cycle,<sup>8</sup> reduced innovation by developers of new programming and services,<sup>9</sup> increased prices for navigation devices,<sup>10</sup> and increased threats to programming security.<sup>11</sup>

Underlying such requests is an occasionally-spoken premise that navigation devices attached to cable systems should be exactly like the telephone customer premises equipment (“CPE”) regime. But even the telephone regime does not support the demands of the consumer electronics retailers. Part 68 was adopted to address the claimed fragility of the telephone network. It specified minimum criteria for CPE devices in order to prevent harm. It was not a cap on innovation.

Even in the Part 68/CPE regime, the Commission did not restrict telephone companies that were offering new services from promoting the devices needed to access such new services. Consider the case of retail caller ID boxes. Caller ID boxes required more than the primitive interaction (12 keys, stutter dial tone) that prior applications relied upon. Where new applications

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<sup>7</sup> See Comments of the National Cable Television Association (“NCTA Comments”) at 3, 34; AT&T Corp. (“AT&T Comments”) at 3, 27; Comcast Cable Communications, Inc. (“Comcast Comments”) at 4; Cox Communications, Inc. (“Cox Comments”) at 7.

<sup>8</sup> See AT&T Comments at 3, 27; Comments of Cablevision Systems Corp. at 3; Comcast Comments at 2, 4; Motorola, Inc. (“Motorola Comments”) at 17, 18 (noting that the disruption is particularly great given the greater rate of technological change in the multichannel programming distribution industry than in the past).

<sup>9</sup> See Comments of Worldgate Communications, Inc. at 2-3; DIVA Systems Corp. at 2; Motorola Comments at 18.

<sup>10</sup> See AT&T Comments at 2 (Detailing additional costs of \$75 to \$90 for the purchase of non-integrated units).

<sup>11</sup> As a recent case involving DeCoss demonstrates, we do not yet live in a world in which cable operators may dispense with hardware to deploy proprietary programming and services. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), <http://news.cnet.com/news/0-1005-200-2547756.html> (Judge Kaplan’s decision enjoining online publication of a software which allows DVD movies to be decoded and played on personal computers.) We might anticipate continued developments in, and movement towards, the standardization of various encryption technologies. But accelerating the sunset date does nothing to accelerate the time when software-based security is reliable.

required greater interaction, consumers had to buy new CPE for this purpose. ILECs were still allowed to run promotions to provide the Caller ID devices at discount for the service. Another example is Digital Network Channel Terminating Equipment (“DNCTE”). DNCTEs were devices originally needed to make T-1 lines work. The Commission allowed ILECs to put DNCTE equipment at both ends (on a bundled basis) to enable T-1 service. The basic functionalities of the network remained open, but ILECs were allowed to roll out new applications. If the consumer electronics retailers had their way, cable operators would be denied the opportunity to roll out new applications on a comparable basis.

The Comments have demonstrated that consumer electronics retailers are trying to leverage this rulemaking into a bargaining chip unrelated to its purpose.<sup>12</sup> Unhappy with the business of selling equipment, they hope to extract recurring revenue from the applications enabled by set-top devices. But just as independent CPE manufacturers have no stake in the recurring revenues of ILECs, consumer electronics retailers have no vested right in the recurring revenues of cable operators.

CEA asks that cable operators should fully disclose the technical parameters of all new cable services, so that manufacturers can design and develop navigation devices that are fully interoperable.<sup>13</sup> One of the navigation devices rules, 47 C.F.R. § 76.1205, already requires operators to provide on request, and in a timely manner, technical information concerning interface

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<sup>12</sup> See NCTA Comments at 3, 23-24 (retailers have manipulated environment to justify acceleration of ban; comments of retailers evidencing intent to seek to sell more than “just boxes”); Motorola Comments at 9, 10 (retailers have been unwilling to negotiate with equipment manufacturers to buy host set-top boxes; Motorola understood retailers’ interest in buying such units to be conditional upon “navigation devices. . . [being] bundled with MVPD services in such a way as to give the retailers some form of payment from the MVPD.”), accord: Comments of Scientific-Atlanta (“Scientific-Atlanta Comments”) at 3. The exact same device has been offered to both MSO customers and retailers and the latter have declined to buy. *Id.*

<sup>13</sup> CEA Comments at 5.

parameters that are needed to permit navigation devices to operate with MVPDs. This is a fair balance between the needs of cable operators and competitors. The retailers, however, seek to go further and transform this proceeding into a design rulemaking, which it is not. The consumer electronics retailers have proposed various forms of mandating exactly the services that may or must be built into the set-top.<sup>14</sup> They are essentially asking the FCC to require navigation devices be built to subsidize their marginal services. Cable operators are not required to deploy boxes to support services in the imagination of consumer electronics retailers. This is not a must carry case or “open access” case. Digital services are in a minority of households, and most of the new digital services are still unproven. This should not be a product design rulemaking. Instead, the Commission should wish to encourage first movers to invent an application, and do what is necessary to deploy the product. Some applications will survive, some will fail. That is the nature of innovation and risk-taking.<sup>15</sup>

The consumer electronics retailers also assume that if cable operators deploy integrated set-tops in the home, there will never be a market for competing host devices.<sup>16</sup> This premise is completely belied by consumer behavior with other items of consumer electronics. C-band dishes were replaced by DBS dishes. Personal computers, cell phones and videocassette recorders are upgraded and replaced routinely. Consumers are not bound by their prior purchases if a new application is sufficiently attractive. Come 2005, not even an embedded base of digital devices will

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<sup>14</sup> See CERC Comments at 13.

<sup>15</sup> The absurd degree of Commission intervention in standards and equipment functionalities sought by the retailers is best-summed up in the incredulous response of an equipment manufacturer, Motorola, to the retailers’ demands: “The Commission certainly never intended that OpenCable would design particular retail products – Motorola and its competitors have to take care of that job themselves. The consumer electronics manufacturers that traditionally supply products to electronics retailers – including Motorola – have to assume responsibility for designing products and making arrangements to license the technologies necessary to keep up with the state of the art.” Motorola Comments at 19.

<sup>16</sup> See CEA Comments at 19; CERC Comments at 30.

protect cable operators from the next wave of retail equipment, with new functionalities and Moore's law on its side. Consumers will respond to the retail availability of new (and changing) set-tops whether or not they have an existing leased or purchased cable box on the premises. In fact, the relatively short depreciation life of decoders reflects this likelihood that they will be displaced by next wave of innovative devices. *See, e.g., Prime Communications-Potomac, LLC*, 15 FCC Rcd 10915 (2000) (addressable decoders depreciated over five years); *Tele-Media Company Of Western Connecticut*, 11 FCC Rcd 3161 (1996) (five years reflects that addressable decoders are prone to technological obsolescence). Maintaining the same five-year transition conforms with the expected economic life of such units in the face of competition.

The pessimism of retailers regarding the development of a retail market for host devices is also undercut by collaboration between them and cable operators to jointly provision such customer premises equipment. Charter on November 15, 2000, for example, launched a five-store test for the sale of Charter high speed data access and digital cable products with CompUSA in which stores are equipped with multi-media kiosks. Charter is currently negotiating similar deals with Circuit City, Best Buy and Radio Shack.<sup>17</sup> There is no need to upend the industry to make navigation devices available in retail outlets; it is already beginning to happen.

### **Conclusion**

The retailers' comments shift the blame for the lack of a commercial set-top box markets from their own apathy to supposed anticompetitive actions by the cable industry. They claim that cable technological advances and equipment deployment will foreclose a competitive market. The comments of two of the leading set-top box manufacturers, however, have made clear that retailers

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<sup>17</sup> *See also* Comments of AT&T at 12 (Noting its agreement with Best Buy to market and sell digital services and equipment, including digital set-top boxes, and negotiations for additional agreements with other retailers).

have had ample opportunity to participate in this marketplace and have chosen not to do so. For their part, cable operators comments clearly and uniformly note that their primary interest in deploying new advanced boxes is to allow them to provide advanced services to customers to prevent further marketshare erosion by DBS, not to sell rate-regulated equipment. Advancing the ban on integrated navigation devices, or adopting any of the other draconian and ill-conceived limitations suggested by the retailers, will do nothing to further the development of a competitive navigation devices marketplace, but much to endanger the provisioning of new generation of cable services and products to consumers.

For the foregoing reasons, the Commission should not accelerate the date by which cable operators would be prohibited from providing new integrated set-top boxes, nor adopt any of the restrictions on navigation devices deployment and design advanced by the retailers in their comments.

Respectfully submitted,

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