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

In the Matter of	)	
	)	CSR-7012-Z
Comcast Corporation's	)	
Request for Waiver of	)	CS Docket No. 97-80
47 C.F.R. § 76.1204(a)(1)	)	
	)	

To: The Media Bureau

COMMENTS OF MICROSOFT CORPORATION

Introduction and Summary

Last year, Microsoft Corporation ("Microsoft") joined with leading cable companies to urge the Commission to extend the compliance deadline for the so-called "integration ban" on navigation devices because Microsoft believed that an extension would facilitate the development of a long-term solution to consumer choice in the market for digital set-top boxes (STBs) and other digital cable ready devices. Microsoft took this position while still firmly believing in the ultimate benefit of the ban — namely, to facilitate the Commission's success in implementing Section 629 of the Communications Act and to achieve Congress's goal of creating consumer choice in the market for navigation devices. In adopting the extension, the Commission noted that the creation of a marketplace for navigation devices "should not displace a low-cost set-top box option for MVPD subscribers," and so the Commission indicated that it would "entertain requests for waiver of the prohibition on integrated devices for *limited*

capability integrated digital cable boxes."[1] The Commission, however, made clear that waivers should not endanger the fundamental objectives of Section 629.[2] Pursuant to the Commission's Second Report & Order, Comcast has now requested a waiver of the integration ban for three devices (the DCT-700, the Explorer-970, and the Pace Chicago), each of which has two-way capabilities such as video-on-demand and pay-per-view. Because of its interest in developing technology for navigation devices and facilitating the DTV transition, Microsoft, by its attorneys, submits these comments on the Comcast Request for Waiver.

Waivers of the integration ban for STBs that are in fact low-cost and limited capability may be important to promote MVPD subscriber access to digital content both before and after the DTV transition. Microsoft believes that waivers narrowly crafted to achieve this objective should not interfere with the development of the marketplace in navigation devices. On this basis, we believe that the Commission should grant Comcast a waiver, *provided that* the Commission's grant decision upholds the statutory mandate of Section 629. To this end, we encourage the Commission to ensure that consumers can obtain navigation devices with the same "limited capability" at issue in the waiver, which includes certain two-way features such as electronic programming guides and video-on-demand, from multiple, non-affiliated providers. Microsoft believes that Comcast should be able to offer consumers these limited-capability set-top boxes to assist the DTV transition, but other providers should be able to do so as well.

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[1] Second Report & Order, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, FCC 05-76, at ¶ 37 (rel. Mar. 17, 2005) ("Second Report & Order" (emphasis added).

[2] *See id.* at ¶¶ 37, 39.

Consistent with Section 629, this balanced approach would benefit consumers by promoting innovation within the broad ecosystem of consumer electronics and information technology products connected to cable networks and foster the retail availability of cable products. A balanced, pro-innovation waiver decision also would address specific concerns raised by Comcast in its petition, including the availability of low-cost STBs to consumers, the need to preserve cable industry resources devoted to the development of a downloadable software conditional access solution, and the incentives and ability of other manufacturers to produce similar low-cost devices. However, a grant of the Comcast request without these conditions would challenge the Congressional objectives embodied in Section 629, since that step could reinforce cable operators' dominion over navigation devices for a large, important and growing segment of the market and potentially lessen the motivation to develop software-based downloadable security.

DISCUSSION

Microsoft agrees that waivers of the integration ban may be appropriate for precisely defined, low-cost, limited capability devices. The question is whether, on its face, the Comcast waiver request would indeed expand, in the near term, consumer access to digital content without interfering with Congress's and the Commission's stated goal of developing a marketplace in navigation devices. Microsoft believes that the devices identified by Comcast, though each has a two-way capability, may reasonably be considered to be eligible for a waiver; however, an unconditional grant of the Comcast waiver would likely harm the overall dynamism of the navigation device market.

1. The Devices at Issue Cover a Large Market Segment.

Before considering whether the devices for which Comcast is requesting a waiver would fit a precise definition of "limited capability," the Commission must first assess the requested waiver in terms of how it will impact the overall market for navigation devices. As the Commission as stated, the fundamental purpose of Section 629 is "to assure that consumers have the ability to obtain navigation devices from manufacturers, retailers, and other vendors not affiliated with MVPDs."[3] To achieve this statutory purpose and advance the objectives of the digital transition, it is essential that consumers across the economic spectrum and at various levels of MVPD service have the ability to choose among navigation devices. Indeed, the Commission has recognized that substantial benefits likely will flow to consumers from greater choice in the navigation device marketplace, including cost savings.[4] To this end, the statute and Commission rules do not contemplate broad waivers that would apply to large segments of the market for extended periods of time, but rather for limited waivers granted only "for a limited time" and only to the extent "necessary to assist the development or introduction of a new or improved multichannel video program[] or other service."[5]

Thus, as a threshold matter, the Commission must determine that the Comcast request is limited as the Commission's rules require. Comcast's filing indicates that its waiver request for the identified devices would apply to a significant – and growing – segment of the market. Comcast explains that the DCT-700 device is "very popular with Comcast customers," resulting in one million devices already purchased, and with plans to purchase another 1-1.5

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[3] *Id.* at ¶ 7.

[4] *Id.* at ¶¶ 29-30.

[5] 47 U.S.C. § 549(c); 47 C.F.R. § 76.1207.

million devices by the end of this year.[6] The number of devices already purchased comprises more than 10 percent of Comcast's current digital subscriber base of 9.5 million, and that at a minimum will double by the end of this year. Pursuant to the Commission's regulations, which state that waivers "shall be effective for all service providers and products in the category in which the waiver is granted,"[7] the impact of a waiver for these devices with their two-way capability would be potentially significant. It may be instructive to know the pace of growth for these devices, or how many have been shipped, but if the rate of growth at Comcast is indicative of the overall industry, by year end these devices could well be used in over twenty percent of digital subscriber homes. Moreover, Comcast indicated that the DCT-700, Explorer-940, and Pace Chicago serve or will serve the cable systems where Comcast is "simulcasting" -- a figure that is 75 percent of Comcast's systems.

The scope of this request is distinct from the Commission's previous grant of a waiver of Section 629 for BellSouth's cable service. That waiver applied to a new entrant into the MVPD marketplace that had only 40,000 subscribers and directly related to a cable system design that was developed prior to the Commission's integration ban.[8] Moreover, even in that limited circumstance, the Commission noted the importance of ensuring the waiver did not undercut the deployment and expected benefits of CableCARDs and, therefore, required

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[6] Comcast Waiver Request, at 5.

[7] 47 C.F.R. § 76.1207.

[8] Memorandum Opinion and Order, In re BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC: Petition for Permanent Relief, CSR-6355-Z, DA 04-2544, at ¶ 4 (Rel. Aug. 18, 2004) ("BellSouth Order").

BellSouth to provide subscribers who "request[] connection of a digital cable ready television to the [applicable cable systems] with a set-top box free of charge."[9]

In contrast to the BellSouth decision, an unconditional grant of Comcast's waiver would appear to give it and other leading MSOs substantial flexibility relative to the requirements of Section 629 and the Commission's implementing regulations with respect to a broad set of cable subscribers. Also unlike the BellSouth case, the technology at issue in Comcast's request -- namely, the three devices in question -- have been developed in the face of the integration ban. Further, as described below, the Comcast waiver would seemingly limit the requirements to deploy CableCARDs only to devices that provide HD output, multiple tuning, broadband Internet access, and local or network DVR. In these circumstances, Commission precedent argues for a grant of the waiver only to the extent that the Commission also advances the goals of achieving a marketplace in navigation devices.

2. The Commission Needs to Examine the Impact of Waivers for "Limited Capability" Devices That Have Two-Way Capabilities.

The Commission must also carefully weigh the market impact of Comcast's proposed waiver because of the nature of the devices at issue in this petition. As Comcast describes it, the DCT-700 is a STB that enables "cable customers with analog TVs… to access programming services, and associated features, that are delivered digitally."[10] These services and features include "pay-per-view [ ] services, VOD, and limited interactive television [ ] capabilities"[11] — each inherently a two-way function. The Explorer-940 provides exactly the

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[9] *Id.* at ¶ 8.

[10] Comcast Waiver Request, at 4.

[11] *Id.*

same services and functions, but simply uses Scientific-Atlanta technology rather than the Motorola technology in the DCT-700.[12] The Pace Chicago also serves "essentially the same function" and specifically "expand[s] consumer access to parental control, family tiers, and VOD."[13] Accordingly, each of the devices subject to Comcast's waiver request has the functionality -- and, in turn, relies on the technology -- that is generally understood to be "two-way" navigation devices. The Comcast request also seeks a waiver for the "natural evolution" of the devices. Given the functionality in the devices at issue, the only "natural evolution" that is seemingly left would be for devices that have such advanced capabilities as multiple tuning, HD output, broadband Internet access, and local or network DVR.

As the Commission has recognized, "a competitive market for two-way navigation devices is ... far from assured."[14] The Comcast waiver request would encompass two-way devices that already have a strong and growing market presence. The Commission should ensure that its ruling on Comcast's waiver request holds true to the purposes behind Section 629 and the end-goal of a market for two-way navigation devices.

3. A Waiver Should Be Tailored so That It Advances the Goals of Section 629 and the Orders Implementing That Congressional Policy.

Recognizing the important balance in promoting consumer choice in STBs while preserving the security of programming provided by MVPDs, the Commission long ago settled on a regulatory construct that permits MVPDs to retain control of the "security element" of how devices connected to their systems but otherwise is intended to provide device manufacturers

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[12] *Id.* at 5.

[13] *Id.* at 6.

[14] Second Report & Order, at ¶ 28.

with freedom to develop and compete on the basis of proprietary, differentiated devices. As noted, the Commission has since recognized there is much work to be done to fulfill the statutory requirement of a market for cable navigation devices, including two-way devices. In this regard, it has found that the cable industry's efforts to address the requirements of Section 629 by providing for the retail distribution of integrated devices "ha[ve] been unsuccessful."[15] The Commission likewise has recognized that the deployment and support of CableCARDs remains an essential component of creating a market and one that requires continual monitoring. Each of these points led the Commission to conclude last year that "the competitive reasons that led the Commission to impose the integration ban have not been eliminated by developments in the market."[16]

Unconditionally granting the Comcast request risks furthering this history. Comcast asserts that CableCARDs only apply to a limited, higher-end class of devices that would not be impacted by the waiver. If that argument were to carry the day, it would call into question the entire regulatory reason for the development of CableCARDs -- namely, to bridge the gap in the marketplace created by integrated devices until the Commission's ban became effective or conditional access solutions emerged that rendered the ban moot. We do not think it was Congress's intent to relegate consumers' choice of STBs only to these high-end devices, but Comcast's waiver applies to devices that are "very popular with Comcast's customers," and that are scheduled to be deployed in twenty percent of its digital homes by year end, and that

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[15] *Id.*

[16] *Id.* Developments in the market arguably have heightened the importance of the Commission's rule over the last year. Specifically, the cable industry's intention to use switched digital video for high-definition channels raises questions concerning its impact on the deployment and use of unidirectional cable ready products.

percentage is expected to grow.[17] Because the waiver would apply to similar devices, and the request also asks for the "natural evolution" of these devices, it would apply immediately to devices that serve a large segment of the market, and could create a potentially unlimited ceiling for the use of integrated devices. Such an unconditional waiver of Comcast's request would not advance the goal of Section 629.

As Microsoft has previously commented, we strongly believe that the efforts of the Commission and industry should ultimately be focused on the development of a principally software-based downloadable conditional access solution that meets the needs of cable content providers, manufacturers, cable operators and consumers alike. We have agreed with the Commission that the development of such a solution "is likely to facilitate a competitive navigation device market ... and [ ] further the DTV transition."[18] Such a solution, however, is unlikely to emerge in the absence of focused rulings from the Commission that provide incentives for all parties to achieve a downloadable security solution. In this regard, the Commission itself has noted that "[t]he prohibition on integrated devices appears to be one of the few reasonable mechanisms for assuring that MVPDs devote both their technical and business energies towards the creation of an environment in which competitive markets develop."[19] It therefore is essential for the Commission to rule on the Comcast request in a manner that delivers on the same intent and goal of the integration ban, at least until an appropriate downloadable security solution can be developed.

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[17] Comcast Waiver Request, at 7.

[18] Second Report & Order, at ¶ 3.

[19] Id. at ¶ 30.

4. A Properly Balanced Ruling Will Grant A Waiver on the Devices Identified by Comcast and Still Achieve the Objectives of Section 629.

Microsoft recognizes the importance of ensuring consumers have access to low-cost STBs, and supports the cable industry's desire to focus resources on solutions that will facilitate the digital transition. With respect to Comcast's waiver request, we believe that the right balance can be struck that will achieve these goals and, in the process, contribute to the development of consumer choices for commercial navigation devices.

As a first step, the Commission should precisely define the devices that would be subject to any waiver. A waiver would appropriately apply to devices that include each of (and only) the following: a single digital tuner, analog-only outputs, and defined limited interactive capabilities such as electronic program guide, pay-per-view, and video-on-demand. A waiver expressly should not apply to any device that includes multiple tuning, HD outputs, Internet access capability, or DVR capability (whether provided by the device or remotely). We also believe the Commission should find that it is in the public interest to limit such a waiver to the devices at issue, not their successors. Future waivers can be sought to cover any new devices.

Such a carefully defined waiver would effectively cover the devices identified by Comcast while still enabling the development of consumer choice among navigation devices. In the process, it also would enable the cable industry to avoid the costs associated with bringing these devices in line with the integration ban and to maintain resources committed to the development of a downloadable security solution.[20]

To uphold the objectives of Section 629 and promote consumer choice among navigation devices, the Commission also must ensure that it grants the waiver for such precisely

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[20] *Cf.* Comcast Waiver Request, at 18-19.

defined devices on terms that enable other manufacturers to develop offerings for the same market served by the DCT-700, Explorer-940, and Pace Chicago. A waiver grant that includes these conditions will ensure that consumers continue to have access to low-cost devices and benefit from a choice among those devices, that the cable industry is able to focus its efforts on developing more advance products that facilitate the digital transition, and that other manufacturers can likewise produce low-cost devices that have the same two-way capabilities as the devices covered by the Comcast request.

Finally, Microsoft would support making a waiver along the foregoing grounds immediately effective. Thus, under such a waiver, Comcast would be able to deploy the boxes subject to the waiver available without interruption (*i.e.*, it would not have to worry about replacing the devices by July 1, 2007), and cable operators could realize a first-mover's advantage in the market. At the same time, the Commission's waiver would ensure that consumers benefit in the long run from the goals set out in Section 629. Such a balanced approach on timing would facilitate Comcast's current plans, while upholding the requirements of Section 629 by enabling other CE and IT manufacturers to develop products for the same marketplace.

CONCLUSION

Microsoft remains committed to working with our partners in the cable, consumer electronics, and information technology industries to promote the development of a truly dynamic market for, and consumer access to, two-way digital cable ready products. We believe that a balanced ruling by the Commission on the Comcast waiver request that reflects the elements outlined above can facilitate the development of such a marketplace and, as such, would be entirely consistent with Section 629 and the Commission's implementing regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Comments of Microsoft Corporation were served by hand delivery this 15th day of June, 2006 on:

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