



Sony Electronics Inc.

1667 K Street, NW, Suite 200, Washington, DC 20006 Telephone: (202) 429-3650

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EX PARTE, VIA ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

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

Dear Ms. Dortch:

In its recent request for a waiver of Section 76.1204(a)(1) of the Commission's rules and subsequent reply comments,<sup>1</sup> Comcast Corporation ("Comcast") contends that a waiver of the separable security requirement for so-called "low-cost, limited-capability" MSO leased set-top boxes "is consistent with" prior Commission statements on this issue, and that the Commission has "pledged to consider favorably" waiver requests of the kind Comcast has submitted.<sup>2</sup>

Sony Electronics disagrees with these claims. The Commission has *never* said that it would grant waivers of 76.1204(a)(1) for so-called "low-cost, limited-capability" set-top boxes. Moreover, to the extent the Commission stated that it would *entertain* such waiver requests in its 2005 Further Extension Order,<sup>3</sup> it did so *only* in the context of furthering the analog-to-digital transition for over-the-air broadcasting. This policy rationale evaporated, however, when Congress set a hard deadline for the over-the-air transition in the Deficit Reduction Act of 2005,<sup>4</sup> which was enacted nearly a year *after* the Commission issued the 2005 Further Extension Order. Even so, if the Commission believes that the 2005 Further Extension Order somehow binds it to grant a waiver of Section 76.1204(a)(1) for cable set-top boxes, it should not grant the waiver requested by Comcast. Rather, to minimize the harm

<sup>1</sup> *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Comcast Request for Waiver, CSR-7012-Z, CS Dkt. No. 97-80 (April 19, 2006) ("Waiver Request"); *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Reply of Comcast Corporation, CSR-7012-Z, CS Dkt. No. 97-80 (June 30, 2006) ("Comcast Reply").

<sup>2</sup> Waiver Request at 8; Comcast Reply at 2.

<sup>3</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd. 6794 (2005) ("2005 Further Extension Order").

<sup>4</sup> Pub. Law No. 109-171, \_\_ Stat \_\_ (2006).

caused to the market for competitive navigation devices, it should limit any such waiver to those leased devices that offer precisely the same features and functionality as those available today in competitive retail devices through a CableCARD, nothing more.

**1) The Commission has never obligated itself to grant waivers of 76.1204(a)(1) for so-called “low-cost, low-capability” set-top boxes.**

Comcast contends that the should grant the Waiver Request because Commission has previously committed to granting waivers of 76.1204(a)(1) for “low-cost, limited capability” set-top boxes. In support of this assertion, Comcast states that the Commission “has said repeatedly – both in its *2005 Integration Ban Order* and in its recent advocacy before the D.C. Circuit in the appeal of that *Order* -- that it would *favorably* entertain requests for low-cost, limited-capability set-top boxes.”<sup>5</sup> A careful review of the record reveals otherwise.

The Commission did not commit to grant waivers of 76.1204(a)(1) in the 2005 Further Extension Order. The 2005 Further Extension Order discusses the possibility of such waivers in a single paragraph, reprinted here in pertinent part, as follows:

[W]e will also *consider* whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis. . . .  
[W]e will *entertain* requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.<sup>6</sup>

It is difficult to read any commitment to grant waivers for so-called “low-cost, low-capability” devices into this language. The Commission states that it would “entertain” requests for such waivers, and further states that “as cable systems migrate to all-digital networks” it would “consider” whether low-cost, limited-capability devices should be subject to the separable security requirement.<sup>7</sup> But nowhere does the Commission promise that a “low-cost, low-capability” waiver request, if submitted, would be granted, as Comcast asserts.

Comcast offers equally unavailing evidence from the Commission’s statements to the D.C. Circuit in the challenge brought by two cable operators to the 2005 Further Extension Order. Comcast argues that “[t]he Commission told the D.C. Circuit that it had already ‘determined’ that waivers for [low-cost, limited-capability] devices have pro-consumer benefits.”<sup>8</sup> Comcast further cites to a statement by the Commission’s counsel at appellate oral

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<sup>5</sup> Comcast Reply at 2 (italics added).

<sup>6</sup> 2005 Further Extension Order ¶37 (italics added).

<sup>7</sup> *Id.* Notably, Comcast does not claim that it is migrating to an “all-digital network”. Rather, it states that it hopes to push digital penetration on its network to “over 75% by the end of the decade.” Waiver Request at 10.

<sup>8</sup> Waiver Request at 8-9, *citing* Brief for Respondents at 30, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006).

argument that the Commission “would be favorably inclined to view waiver requests” for low-cost digital set-top boxes.<sup>9</sup>

There are three problems with Comcast’s argument with respect to these statements. First, it is difficult to square the characterization by Counsel for the Commission of the 2005 Further Extension Order with what the Commission actually noted in the 2005 Further Extension Order. Counsel seems to read paragraph 37 of the 2005 Further Extension Order to indicate that the Commission has “determined” that waivers for low-cost, limited capability devices have pro-consumer benefits, and that the Commission would be “favorably inclined” to grant such requests. In fact, as shown above, the Commission in paragraph 37 only commits to “entertain” or “consider” such waivers. Second, Comcast seems to argue that, notwithstanding the plain text of the 2005 Further Extension Order, the Commission today should be controlled by a subsequent interpretation of that text by its Counsel. This conclusion raises novel and interesting questions of administrative law, but at best would seem to run afoul of the due process protections of the Administrative Procedure Act. Third, Comcast’s interpretation ignores the fact that paragraph 37 discusses the alleged public interest benefits of a low-cost, low-capability waiver *only* in the context of the over-the-air digital transition, a context that, as shown below, Congress has rendered obsolete.

Comcast also implies that opponents of the Waiver Request are somehow estopped from their opposition, because they did not object to the Commission’s statements in the 2005 Further Extension Order and before the D.C. Circuit in that court’s consideration of a Petition for Review of the 2005 Further Extension Order.<sup>10</sup> In fact, the Consumer Electronics Association, Sony Electronics, Hewlett-Packard Company, Intel Corporation, and Sharp Electronics *did* state their opposition at the first available opportunity to do so – upon the filing of the Waiver Request. Until that point, these opponents had no opportunity to object to the alleged statements of the Commission referenced by Comcast. Paragraph 37 of the 2005 Further Extension Order offers no final action, order or final order of the Commission that could be appealed consistent with the Commission’s rules or the relevant statute.<sup>11</sup> Further, there is no rational basis in law or logic for the notion that non-objection by a trade association intervenor in the D.C. Circuit’s review of the 2005 Extension Order should somehow estop all future opposition. In its brief, CEA addressed the issues that were before

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<sup>9</sup> Comcast Reply at 3, *citing* Oral Argument Transcript at 21, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006).

<sup>10</sup> See Comcast Reply at 3 (“[N]one of the opponents has *ever* objected to these statements when given the opportunity.” (*italics original*)).

<sup>11</sup> Section 1.429 of the Commission’s rules permits petitions for reconsideration only of “final actions” in rulemaking proceedings. See 47 C.F.R. § 1.429. The statutory bases for petitions for review of Commission actions permit such appeals only of an “order” or “final order”. See 47 USC § 402(a); 28 USC § 2342(1). The only final actions, orders or final orders of the Commission in the 2005 Further Extension Order were: 1) to amend its rules to extend the common reliance deadline, 2) to require certain MSOs to file reports on CableCARD deployment and require NCTA and CEA to file reports on the status of the bi-directional talks, and 3) to require the cable industry to file a report with the on the feasibility of deploying downloadable security. 2005 Further Extension Order at ¶¶43-45.

the court – waiver of Section 76.1204(a)(1) for low-cost, low-capability set-top boxes was not one of these issues – and had no permission to address the court at oral argument.

In short, the Commission should not fall for the straw-man assertion that it has given “its word”<sup>12</sup> that it would grant waiver requests for low-cost, low-capability set-top boxes. A commitment to “entertain” a waiver request does not equal a commitment to *grant*, or even to be favorably inclined to *grant*, such requests.

**2) By setting a “hard deadline” for the over-the-air analog-to-digital transition, Congress eliminated the policy basis offered by the Commission for entertaining waivers for low-cost, low-capability cable set-top boxes.**

As shown above, the Waiver Request reads into the 2005 Further Extension Order a commitment by the Commission, where none exists, to grant waivers for low-cost, low-capability set-top boxes. More importantly, however, the Waiver Request also ignores the plain context in which the Commission offered to consider such waivers in the first place. This context is the over-the-air digital-to-analog transition, an issue of great concern to the Commission at the time it released the 2005 Further Extension Order, but not today.

In Paragraph 37 of the 2005 Further Extension Order, the Commission rationalizes entertaining low-cost, low-capability waivers, as follows:

It is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition. . . . Accordingly, as cable systems migrate to all-digital networks, we will also consider whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis.<sup>13</sup>

This argument apparently derives from claims made in earlier *ex parte* filings by the National Cable and Telecommunications Association (“NCTA”) and, to some extent, by Comcast, that “the prohibition on integrated devices may hinder the development of a low-cost digital set-top box and therefore delay a prompt transition to digital television[]”, that “the added costs of a CableCARD slot and accompanying CableCARD will adversely impact the development and deployment of inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets[]” and that “the prohibition of such inexpensive integrated devices will retard the transition.”<sup>14</sup>

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<sup>12</sup> Comcast Reply at 3.

<sup>13</sup> 2005 Further Extension Order ¶37.

<sup>14</sup> 2005 Further Extension Order ¶25, *citing* NCTA *Ex Parte* Presentation (Oct. 19, 2004) at 4; Letter from James Casserly, Counsel for Comcast Corp., to Marlene Dortch, Secretary, Federal Communications Commission (November 15, 2004) at 2.

The text of the October 19, 2004, NCTA *ex parte* filing provides the key to understanding the context of these arguments. In that filing, NCTA states as follows:

Inexpensive digital set-top boxes – which will permit the viewing of digital programming on analog TV sets – will facilitate the end of the digital transition since, under the Commission’s tentative conclusion, *customers need such devices to be counted in meeting the ‘85% test.’* Key Members of Congress agree.<sup>15</sup>

To clarify what NCTA meant in October 2004, some background is in order. The “85% test” is an apparent reference to former 47 USC 309(j)(14)(B)(iii), which would have prevented shut off analog over-the-air broadcasting in any market in which 85% or fewer of the television households: 1) subscribed to a multichannel video programming distributor that carried one of the digital television service programming channels and, 2) either a) had a TV set capable of receiving over the air DTV signals, or b) had a set-top box that could convert digital-to-analog.<sup>16</sup> The “tentative conclusion” is an apparent reference to the 2003 Notice of Proposed Rulemaking, in which the Commission grappled, *inter alia*, with how to determine whether a household would count toward meeting the 85% threshold set forth in 47 USC 309(j)(14)(B)(iii).<sup>17</sup> In the 2003 DTV NPRM, the Commission proposed to allow analog over-the-air broadcasting to continue only in those markets where “the requisite number of television households (15 percent or more) in the market are not capable of receiving digital signals either over the air or via an MVPD.”<sup>18</sup>

Thus, when it released the 2005 Further Extension Order, the Commission had a valid policy reason for encouraging the deployment of digital cable set-top boxes: more digital cable set-top boxes would mean more households would count when determining whether a market met the 85% test. And as more households counted toward meeting the 85% test, the Commission could move more quickly to reclaim and reallocate the spectrum used for analog over-the-air broadcasting.

With the enactment by Congress on February 8, 2006, of The Deficit Reduction Act of 2005, everything changed. Section 3002 of the Act amended 47 USC 309(j)(14)(A) to set a “hard deadline” for the over-the-air DTV transition to February 17, 2009,<sup>19</sup> and deleted Section 47 USC 309(j)(14)(B) in its entirety.<sup>20</sup> The amendment eliminated the “85% test”, and with it, the Commission’s valid policy reason for encouraging the deployment of digital cable set-top boxes. Accordingly, the policy objective in favor of low-cost digital cable set-top boxes set forth in the 2005 Extension Order no longer holds. Increased deployment of

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<sup>15</sup> NCTA *Ex Parte* Presentation (Oct. 19, 2004) at 4 (italics added).

<sup>16</sup> See 47 USC 309(j)(14)(B)(iii), *repealed by* The Deficit Reduction Act of 2005, Pub. L. No. 109-171, \_\_\_ Stat. \_\_\_ (2006).

<sup>17</sup> *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1279 (2003) (“2003 DTV NPRM”)

<sup>18</sup> 2003 DTV NPRM ¶92.

<sup>19</sup> Section 3002(a)(1)(B), The Deficit Reduction Act of 2005, Pub. L. No. 109-171, \_\_\_ Stat. \_\_\_ (2006).

<sup>20</sup> *Id.* § 3002(a)(2).

such low-cost digital cable set-top boxes no longer advances the Commission's goal of reclaiming analog over-the-air broadcast spectrum. Congress has solved that problem for the Commission.

Comcast might argue, though it has not specifically to date, that there are two categories of consumers whom this waiver might theoretically help: 1) current analog over-the-air consumers who wish to continue to receive local broadcast programming after the over-the-air digital transition, and 2) analog cable subscribers who would be forced to take digital cable service as Comcast converts its entire network to digital. In practice, however, current analog over-the-air consumers who have made the choice to limit themselves to free television are unlikely to become cable customers and to pay a cable bill in perpetuity. Moreover, such customers will be eligible, by law, to receive a subsidy that covers most, if not all, of the cost of a digital-to-analog converter for over-the-air signals.<sup>21</sup> As to the second group, their ability to continue receiving basic cable services is only jeopardized when cable operators in fact convert to *all*-digital networks. Comcast, for its part, does not claim in the Waiver Request that it plans to convert to an all-digital network. Rather, it states that it "is aiming to push" its digital penetration to "over 75 percent by the end of the decade."<sup>22</sup> In short, Comcast admits that those consumers who wish to continue receiving analog services will have the ability to do so for the foreseeable future.

**3) If the Commission feels compelled to grant a waiver, it should do so only for a simple D-to-A converter box that allows precisely equivalent functionality to a CableCARD-enabled, unidirectional DCR device, and nothing more.**

The waiver requested by Comcast is not the type of waiver contemplated by the Commission in Paragraph 37 of the 2005 Extension Order. As explained above, Paragraph 37 was written in the context of furthering the over-the-air digital transition by encouraging the deployment of digital cable set-top boxes in order to satisfy the 85% test set forth in the former 47 USC 309(j)(14)(B)(iii). Assuming, for the moment, that this policy goal is still valid (though it is not), and that the Commission feels compelled to grant a waiver (though it should not), the Commission should limit any waiver so granted to: a) further its stated policy goal and not a post-hoc rationale, and b) minimize the impact on the market for competitive navigation devices.

In Paragraph 37 of the 2005 Further Extension Order, the Commission lists certain features and functionality that, if enabled in a given cable set-top box, would necessarily disqualify that device from waiver consideration.<sup>23</sup> The Waiver Request seizes on this list to argue that any device that does not include these capabilities necessarily *would* qualify for a

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<sup>21</sup> See Section 3005 ("Digital-to-Analog Converter Box Program"), The Deficit Reduction Act of 2005, Pub. L. No. 109-171, \_\_\_ Stat. \_\_\_ (2006).

<sup>22</sup> Waiver Request at 10.

<sup>23</sup> 2005 Further Extension Order at ¶37 "(We do not believe that waiver will be warranted for devices that contain personal video recording ('PVR'), high-definition, broadband Internet access, multiple tuner, or other similar capabilities").

waiver. Again, the Waiver Request misreads the 2005 Further Extension Order, in that the list in Paragraph 37 is explicative, *not* exclusive. Presumably, a device containing other, unlisted features and functionality could also fail to qualify.

Subsequent events demonstrate the wisdom of this approach, because grant of a waiver for devices like those described in the Waiver Request would harm competition in the market for navigation devices, and thereby undermine the statutory directive of Section 629. The Waiver Request would lift the separable security requirement for devices that offer certain so-called “two-way” functionality – an electronic program guide (“EPG”), pay-per-view (“PPV”) services, video-on-demand (“VOD”), and limited interactive television (“ITV”) capabilities, in the case of the Motorola DCT-700, for example.<sup>24</sup> Further, the devices in the Waiver Request would offer this functionality without implementing the CableLabs OpenCable Application Platform (“OCAP”), and incurring substantial additional expense and risk as a result. **Today, at least, unaffiliated manufacturers cannot offer an equivalent device for sale at retail.**

Unaffiliated manufacturers that wish to sell digital-cable-ready devices today have two options. They may build the device pursuant to the DFAST license, which permits unidirectional functionality only. Accordingly, products built under the DFAST license could not offer consumers the EPG, PPV, VOD and ITV functionality that, for example, the Pace set-top box offers. Alternatively, an unaffiliated manufacturer may build the device pursuant to the CHILA license, which permits both uni- and bidirectional functionality, but which requires implementation of OCAP. OCAP, if/when it is deployed, will presumably allow a manufacturer to implement EPG, PPV, VOD and ITV functionality, but it will also force the manufacturer to assume additional licensing and bill-of-materials costs, as well as the risk of implementing a technology that has yet to be successfully tested in large-scale deployment. Either way, an unaffiliated manufacturer cannot make a device that competes with the DCT-700, or any of the other devices described in the Waiver Request, which offer EPG, PPV, VOD and ITV functionality without OCAP. In this sense, the Waiver Request is nothing more than a request that the Commission carve out a segment of navigation device market to be the sole dominion of the cable operators.

In its comments in this proceeding, Microsoft Corporation (“Microsoft”) recognizes the depth and difficulty of this problem. Although supporting the Waiver Request, Microsoft argues that “[t]o 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 defined devices *on terms that enable other manufacturers to develop offerings for the same market* serviced by the DCT-700, Explorer-940, and Pace Chicago.”<sup>25</sup> Sony Electronics agrees with Microsoft’s underlying assertion, and sees a substantial competitive opportunity in the device market that Microsoft describes. In the context of the Waiver Request, however, Microsoft’s solution – granting the Waiver Request in exchange for a future promise to allow unaffiliated manufacturers to offer competitive devices – puts the cart

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<sup>24</sup> See Waiver Request at 4.

<sup>25</sup> Comments of Microsoft Corporation at 10-11 (emphasis added).

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before the horse. No license exists today that would allow manufacture and sale of devices that could compete directly with the DCT-700, Explorer-940, and Pace Chicago, and Sony Electronics is not aware of any plan by CableLabs or any cable provider to offer such a license. To ensure competition consistent with the directive of Section 629, the Commission should mandate a license that permits manufacture of equivalent, competitive devices as a condition precedent to any waiver of the separable security requirement.

For the reasons set forth above, the Commission should deny the Waiver Request. If the Commission decides that it is somehow compelled to grant a waiver of Section 76.1204(a)(1) for cable set-top boxes, it should do so only for cable-provided digital-to-analog converter devices that offer functionality identical to that available at retail today through the unidirectional CableCARD.

Respectfully Submitted,

**/s/ Jim Morgan**

Jim Morgan  
Director and Counsel  
Government and Industry Affairs  
Sony Electronics Inc.

cc:

Heather Dixon

Jessica Rosenworcel

Rudy Brioché

Aaron Goldberger

Cristina Chou Pauzé

Andrew Long

John Wong

Michael Lance

Alison Greenwald

Brendan Murray

Kathryn Todryk

David Bodnariuk