

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

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

**REPLY COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments on Comcast Corporation’s Application for Review in the above-referenced proceeding. Comcast has sought review of the Media Bureau’s denial of Comcast’s request for limited waiver of the “integration ban.”¹ The defense of that decision by certain consumer electronics companies is unavailing.² The Commission must reverse the Media Bureau’s decision because it is in conflict with Commission precedent and policy and is based on an erroneous finding as to an important and material question of fact.³ Perhaps more significantly, failure to reverse the Bureau decision would be flatly inconsistent with, and a stunning repudiation of, representations the Commission made to the United States Court of Appeals in defending its refusal to eliminate the integration ban.⁴

¹ *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. §76.1204(a)(1) of the Commission’s Rules*, Mem. Opin. & Order, CSR-7012-Z, CS Docket No. 97-80, DA 07-49 (rel. Jan. 10, 2007) (“*Waiver Order*”). In its request, Comcast sought a limited waiver of the integration ban – the Commission rule prohibiting, as of July 1, 2007, certain multichannel video programming distributors (“MVPDs”) from placing in service new navigation devices (*e.g.*, set-top boxes) that perform both conditional access and other functions in the same integrated device. 47 C.F.R. §76.1204(a)(1).

² *See e.g.*, Opposition to Application for Review, filed by Sony Electronics Inc, at 9-11 (Feb. 14, 2007) (defending Bureau decision that the DCT-700 was not the type of “low cost, limited capability” device referenced in the Commission’s *March 2005 Order*).

³ *See* 47 C.F.R. § 1.115(b)(2)(i), (iv). *See also* Comcast Application for Review at 6-10.

⁴ The Commission’s failure to act on the Comcast waiver – and other pending waiver requests including NCTA’s – within the statutory 90-day period exhibits a similar lack of regard for the agency’s Congressional mandates. Congress directed the Commission to act on requests for waiver of its navigation devices rules “within 90 days of

Following the guidance the Commission gave in its *March 2005 Order* refusing to eliminate the integration ban,⁵ Comcast requested a waiver of the rule for three models of “low-cost, limited capability” set-top boxes: Motorola’s DCT-700; Scientific-Atlanta’s Explorer-940; and Pace’s Chicago box. The Media Bureau’s denial of the Comcast waiver request – and its implicit suggestion that other requests may also be denied – is a puzzling, anti-consumer decision that will force the cable industry to re-engineer millions of new set-top boxes. It unnecessarily imposes hundreds of millions of dollars of annual costs on cable customers for no discernable benefits while, at the same time, slowing cable’s transition to digital.⁶ Even more disturbing is the unprecedented breach of faith with the Federal courts that the Media Bureau’s decision represents.

The Comcast Waiver Request is exactly the type that the Commission had repeatedly said it would entertain and view “favorably.” It did so first in its *March 2005 Order* refusing to eliminate the ban on cable operator provision of integrated set-top boxes. In response to an NCTA request that the Commission not foreclose a low-cost set-top box option for cable

any application filed” under rules adopted to implement the statute’s waiver provision. 47 U.S.C. § 549(c) (“Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection...”). The Commission has recognized that it must act on such requests within the 90 day time period established by the statute. *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd. 5639, 5672 ¶ 80 (1997) (“[T]he statute requires that waiver requests directed to rules adopted to implement this section be decided within 90 days of the filing of an application for waiver.”).

⁵ See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report & Order, 20 FCC Rcd. 6794 ¶ 37 (2005) (“*March 2005 Order*”).

⁶ The Media Bureau’s action reinforces the importance of the Commission – not the Media Bureau – acting on and approving the industry-wide waiver NCTA filed on August 16, 2006 which will prevent these unnecessary costs from being forced upon consumers. We urge the Commission to quickly approve NCTA’s limited-time waiver until a less expensive, more efficient technology is available to prevent more than 65 million American homes from being taxed through this preventable and useless surcharge.

customers, the Commission said that “we will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”⁷

Then, in defending on appeal its decision not to eliminate the integration ban, the Commission told the Court that it need not be concerned about the costs imposed on operators and consumers by the ban – costs the Commission conceded would be incurred – because the Commission had “promised to mitigate the potential short-term cost burdens of the integration ban by entertaining waivers” for “low-cost, limited capability” set-top boxes.⁸

Finally, during oral argument on the appeal of the *March 2005 Order*, after Comcast had filed its waiver request, Commission counsel represented to the Court that the Commission has “demonstrated how cautiously it has proceeded in this area” by, among other things, announcing that it would receive waiver requests “from cable companies that wanted to continue providing no frills, simple digital set-top boxes on an integrated basis.”⁹

Commission counsel then went further to demonstrate to the Court that the Commission would be flexible in mitigating the adverse effects of the integration ban for companies that wanted “to continue providing” such set-top boxes, by representing to the Court that “[t]he Commission said it would be favorably inclined to view waiver requests for those boxes [as] another way of controlling costs in this area, and, in fact, the Commission has already received such a request from Comcast.”¹⁰

⁷ *March 2005 Order* ¶ 37. As Comcast points out, NCTA’s request dealt with two-way low-cost devices – the only digital devices ever made available by operators – so when the Commission said it was “in agreement with NCTA’s [position on low-cost options],” it had to mean with respect to two-way devices. Comcast Application for Review at n. 23.

⁸ Brief for Respondents at 14, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006).

⁹ Transcript of Oral Argument at 21, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006) (emphasis added).

¹⁰ *Id.* (emphasis added).

Given these Commission statements and representations to the Court, the Media Bureau's conclusion that the devices for which Comcast sought a waiver are not the types the Commission referenced in its *March 2005 Order* is untenable and amounts to a deliberate repudiation of the Commission statements to a Federal appeals court. The *Waiver Order* concludes that the "low-cost, limited capability" devices the Commission referenced in the *March 2005 Order* do not include "devices with two-way functionality" but rather are limited to "those devices whose functionality is limited to making digital cable signals available on analog sets."¹¹ The Bureau's conclusion that the Commission's invitation to cable companies to submit waivers did not apply to two-way set-top boxes (but instead referred to "one-way" boxes which do not exist) is made up out of whole cloth.

The Comcast Request was precisely the type of waiver request that the Commission told the Court it would be "favorably inclined to view." *In fact, it is the very waiver request the Commission cited to the Court* in oral argument in describing how "cautiously" it would proceed in implementing the ban to limit the conceded costs it would otherwise impose on operators and consumers.

As the Application for Review makes clear "[t]here is no reference anywhere in the [*March 2005 Order*] to excluding two-way set-top boxes from the waiver process."¹² But more significantly, as Commission counsel told the Court, the Commission intended to grant cable operators flexibility to "*continue providing*" low-cost boxes on a non-integrated basis. *Since cable operators' digital boxes are – and always were – two-way devices*, those are the devices cable operators were seeking to "*continue providing*" and it is just such devices for which Comcast sought waiver. The record is indisputable on that issue.

¹¹ *Waiver Order* ¶ 26.

¹² Application for Review at 6.

As Comcast states: “[S]ince Comcast started deploying set-top boxes more than 10 years ago, every single one has had two-way capability.”¹³ Pace makes clear that “U.S. marketplace demand has focused on *two-way digital set-top boxes*.... *In fact, every digital set-top box Pace has ever deployed in the U.S. has been two-way to meet that marketplace demand.*”¹⁴ Motorola makes the same point, observing that “[a]ll of the digital set-top boxes that Motorola has manufactured for U.S. cable operators ... have been two-way.”¹⁵ Cisco reiterates the point, noting the boxes for which Comcast sought waiver “are the lowest cost, most limited capability digital cable boxes that are currently being commercially offered.”¹⁶

Since the Bureau’s decision is in conflict with Commission precedent and policy and is based on an erroneous finding as to an important and material question of fact, it must be reversed by the Commission as a matter of law – a course the Commission should take in any event to preserve its credibility with the Court.¹⁷

Respectfully submitted,

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¹³ Application for Review at 7 (emphasis in original).

¹⁴ Comments of Pace Micro Technology plc at 3-4 (emphasis is original).

¹⁵ Comments of Motorola at 4 (emphasis added).

¹⁶ Comments of Cisco Systems, Inc. at 2.

¹⁷ If Commission counsel had advised the Court that the Comcast request was *not* what the Commission had in mind because it involved “two-way” set-top boxes and that the Commission only intended to consider waivers for “one-way” devices that cable operators had never offered, the Court might well have taken a different view of how “cautiously” the Commission intended to proceed in limiting costs when it implemented the ban and might well have refused to affirm the *March 2005 Order*.

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that, on February 26, 2007, copies of the attached Reply Comments of the National Cable & Telecommunications Association, were served via regular mail, on the following:

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