

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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 OF COMCAST CORPORATION**

Pursuant to 47 C.F.R. § 1.115, Comcast Corporation (“Comcast”) hereby replies to comments filed in response to its Application for Review<sup>1</sup> of the Media Bureau’s Order<sup>2</sup> denying Comcast’s request for waiver of the integration ban rule for certain low-cost, limited-capability set-top boxes.<sup>3</sup> Viewed collectively or in isolation, these comments further strengthen the case for promptly overturning the Bureau’s decision and granting the requested waiver.

Multiple and diverse parties filed in support of Comcast’s Application for Review. Americans for Prosperity, Cisco, the Hispanic Federation, the League of Rural Voters, Motorola, Pace, Panasonic, and the U.S. Hispanic Chamber of Commerce all agree that substantial public interest benefits would flow from approval of the requested waiver, including, among other things, preserving a low-cost box option for consumers to access digital services and facilitating Comcast’s transition to digital and its reclamation of analog spectrum for more HD programming, faster Internet speeds, and other services customers want and value.<sup>4</sup> Exactly two

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<sup>1</sup> See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Application for Review, CSR-7012-Z, CS Dkt. No. 97-80 (Jan. 30, 2007) (“Application for Review”).

<sup>2</sup> See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Mem. Opin. & Order, 22 FCC Rcd. 228 (2007) (“Waiver Order”).

<sup>3</sup> See *In the Matter of Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Request for Waiver, CS Dkt. No. 97-80, CSR-7012-Z (Apr. 19, 2006) (“Waiver Request”).

<sup>4</sup> See Cisco at 1-2; Motorola at 2-3; Pace at 2; Panasonic at 3-5; see also Hispanic Federation; League of Rural Voters; Americans for Prosperity; U.S. Hispanic Chamber of Commerce; Hispanic Technology & Telecommunications Partnership.

parties filed substantive oppositions -- the Consumer Electronics Association (“CEA”) and Sony -- and they fail to credibly defend the Bureau’s Order.<sup>5</sup> Their goal is transparent: they want to make the integration ban regime as painful as possible for cable operators and consumers and use it as leverage to pursue other business objectives.

CEA/Sony ignore the fact that the Commission clearly committed not to allow the integration ban to displace a low-cost box option for consumers. They also ignore the Commission’s assurances to the D.C. Circuit that the Commission “promised to mitigate” consumer costs.<sup>6</sup> The simple fact is that the Bureau’s denial of the waiver would produce exactly the consumer harms the Commission was seeking to avoid. A CableCARD requirement will result in a substantial price increase in the lowest cost set-top boxes (even at volume).<sup>7</sup> As several consumer and public interest groups point out, this will force increases in consumer prices with no countervailing public benefit.<sup>8</sup>

CEA/Sony’s defense of the Bureau’s decision rests largely on the claim that a waiver would undermine “common reliance” on CableCARDS.<sup>9</sup> That is nonsense. Even with a low-end

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<sup>5</sup> Pioneer filed to support CEA but otherwise said nothing.

<sup>6</sup> See Brief of Respondents at 14, 30, *Charter Comm. Inc. v. FCC*, No. 05-1237 (D.C. Cir. Mar. 7, 2006); Oral Argument Transcript at 21, *Charter Comm. Inc. v. FCC*, No. 05-1237 (D.C. Cir. May 11, 2006); see also *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 ¶¶ 27, 29, 37 (2005). Sony quotes selectively from Paragraph 37 of the 2005 Order to leave out the Commission’s statement -- *at the very beginning of that paragraph* -- on preserving a low-cost box option and makes no reference to repeated Commission statements to the D.C. Circuit -- in its brief and at oral argument -- on this issue. See, e.g., Sony at 10. Therefore, Sony is simply wrong in claiming that the question of whether such consumer costs could justify a waiver of the rule “had been asked and answered in the negative on multiple occasions.” See *id.* at 8.

<sup>7</sup> See Motorola 3; Cisco at 2; Pace at 3. CEA willfully ignores these marketplace realities in its comments about CableCARD costs. See CEA at 4-5. Numerous commenters in this docket, including Verizon, RCN, Thomson, and Armstrong, have reported on the significant real-world cost effects of the CableCARD requirement.

<sup>8</sup> See League of Rural Voters; Hispanic Federation at 1; Americans for Prosperity at 1; U.S. Hispanic Chamber of Commerce; Hispanic Technology & Telecommunications Partnership.

<sup>9</sup> See CEA at 10-11; Sony at 17. Sony goes so far as to assert (at 9) that grant of the waiver would establish a “broad loophole for avoiding the common reliance entirely” and (at 12) that grant of waiver “would further reduce or wholly eliminate any incentive of cable operators to provide customer service to CableCARD products.”

waiver, Comcast expects to deploy millions of CableCARD-enabled set-top boxes, these boxes will be used by Comcast's best customers, and Comcast therefore has every incentive to ensure CableCARDS work in all devices that use them.<sup>10</sup> Thus, common reliance can and will be assured without having to deprive consumers of the opportunity to lease low-cost digital set-tops.<sup>11</sup>

Sony claims, but utterly fails to show, that the Commission intended to limit low-end waivers to one-way devices.<sup>12</sup> Nothing in the 2005 Order supports this conclusion, and the Commission's explicit objective of *preserving* a low-cost box option could not possibly be served by limiting the waiver opportunity to one-way boxes *that do not even exist*.<sup>13</sup> CEA/Sony are silent about the inconvenient fact that every digital set-top that has ever been deployed in the United States is two-way, nor do they explain why the Commission would have limited waivers to one-way devices without expressly saying so.

CEA/Sony also misconstrue the relevant waiver standards that apply to the Comcast request. They assert that Section 629(c) must be read narrowly to allow only those waivers that are "indispensable" to the development or introduction of new or improved MVPD services.<sup>14</sup> The statute, the legislative history, and prior Bureau orders involving Section 629(c) apply no

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<sup>10</sup> See, e.g., Application for Review at 17-18; Comcast Reply at 14-15 & n.56.

<sup>11</sup> Sony is inconsistent on this point. On the one hand, it insists (at 12) that grant of the waiver will be the death knell to common reliance. On the other hand, it has no objections to the Bureau offer to consider a refiled waiver request if Comcast committed to go all-digital by February 2009 (*see id.* at 18) -- even though going all digital by that date would, by necessity, require the deployment of tens of millions of low-cost boxes.

<sup>12</sup> See Sony at 10-11.

<sup>13</sup> See Application for Review at 6-7; Motorola at 4; Pace at 3-4 (also underscoring absence of marketplace interest in Pace's Digital Cable Adapter product referenced in the *Waiver Order*). Moreover, Sony's insistence that the broadcasters' digital transition was the guiding principle behind the waiver policy in the 2005 Order is wrong. As noted, the Commission's focus was on mitigating consumer costs. In any event, as noted *infra* note 19, grant of the Comcast waiver would aid the broadcasters' transition.

<sup>14</sup> See Sony at 14; CEA at 8.

such standard.<sup>15</sup> Congress' purpose in enacting Section 629(c) was to spur innovation, and limiting that provision in the manner CEA/Sony advocate would not achieve that objective.<sup>16</sup> In any event, Comcast has demonstrated that the waiver *is* necessary to promote innovation, to permit a low-cost option for consumers to access digital services, and to more rapidly reclaim analog spectrum and assist in the introduction or development of new or improved services -- most immediately, more HD channels and faster Internet speeds.<sup>17</sup>

Sony also errs in claiming that waivers under Sections 76.7 and 1.3 require a showing of "unique or unusual circumstances that would result in an inequitable or unduly burdensome application of the underlying rule."<sup>18</sup> Sony provides no support for this narrow construction of the public interest waiver standard, and not even the Bureau took such a strained view in the *Waiver Order*. Rather, Sections 76.7 and 1.3 require a balancing of public interest benefits and harms. As Comcast demonstrated in its Waiver Request and its Application for Review, the requested waiver would provide clear public interest benefits and no countervailing harms to consumers, the CE industry, or anyone else.<sup>19</sup>

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<sup>15</sup> The notion that "necessary" must mean "indispensable" is contrary to two centuries of American jurisprudence. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316, 413-414 (1819) (rejecting such a reading of the "necessary and proper" clause); *see also Prometheus Radio Project v. FCC*, 373 F.3d 372, 391-394 (3d Cir. 2004) (recognizing that "necessary" can mean "convenient," "useful," or "helpful," not "essential"). Plus, the statute here says "necessary to assist" innovation, not "necessary to innovate."

<sup>16</sup> Contrary to CEA's claims (at 9), Section 629(c) does not require a balancing of innovation benefits and harms. If, as here, the waiver will assist in the development or introduction of a new or improved cable service, the Commission's duty is to grant it. In addition, Sony is wrong in suggesting (at n.51) that the 90-day period for the Commission to act upon waiver requests under Section 629(c) is limited solely to waiver grants. The legislative history is unequivocal: "The conference agreement also directs the Commission to act on waiver requests within 90 days." S. Conf. Rep. No. 104-230 at 181 (1996).

<sup>17</sup> The waiver would therefore advance the broadband-related goals of Section 706, which the Bureau recognized as a basis for waiver in its *BendBroadband Order*. *See In the Matter of BendBroadband's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Mem. Opin. & Order, 22 FCC Rcd. 209 ¶ 25 (2007).

<sup>18</sup> Sony at 17.

<sup>19</sup> CEA's claim about a linkage between the broadcasters' transition and cable's migration to an all-digital network is incomprehensible. Comcast has said that a low-cost set-top box would aid the broadcasters' transition by giving cable customers a cost-effective way to access digital broadcast programming. Application for Review at 16, (footnote continued...)

Most of CEA's opposition is based on incoherent claims that Comcast's arguments in the Application for Review are in conflict with the cable industry's prior advocacy in support of deferral of the integration ban. In fact, Comcast's discussion of the plug-and-play rules was limited to rebutting the Bureau's assertion that plug-and-play considerations had anything to do with what constitutes a low-cost, limited-capability box.<sup>20</sup> Contrary to CEA's claims, Comcast's reference to plug-and-play was not intended to make a broader point about the validity of the integration ban. Likewise, Comcast did not "back away" from the cable industry's prior statements on downloadable security.<sup>21</sup> Comcast's comments were fully consistent with NCTA's filings on the DCAS initiative in this docket.<sup>22</sup>

Comcast reiterates its request that the full Commission reverse the Bureau's decision and grant, at the earliest possible opportunity, Comcast's request for waiver.

Respectfully submitted,



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February 26, 2007

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(...footnoted continued)

19; Comcast Reply at 8-10; Panasonic at 3-5. Comcast has never said that cable's transition to digital should be completed in lock-step with the broadcasters' transition. In fact, Comcast has highlighted the significant challenges involved in migrating large cable systems to all-digital networks. Application for Review at 20-21 & n.77.

<sup>20</sup> Notably, neither CEA nor Sony has anything to say about the Bureau's reasoning in this regard or any answer to Comcast's points on this issue in its Application for Review.

<sup>21</sup> Comcast noted that there has been substantial progress on DCAS, but that DCAS will not be ready for commercial deployment until the 2008/2009 time frame. See Application for Review at 5 n.15.

<sup>22</sup> See, e.g., NCTA Waiver Request, CSR-7056-Z, CS Dkt. No. 97-80, at 9-11 (Aug. 16, 2006); NCTA Reply, CSR-7056-Z, CS Dkt. No. 97-80, at 16-21 (Dec. 11, 2006).

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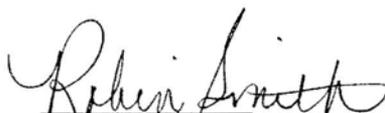
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