

**JOINT STATEMENT OF
COMMISSIONERS ROBERT M. MCDOWELL
AND JONATHAN S. ADELSTEIN
CONCURRING**

Re: Comcast Corporation Application for Review, CS Docket No. 97-80

In this Order, the Commission upholds the Media Bureau's denial of Comcast's request for waiver of the integration ban. The primary reason for the denial is that the subject set-top boxes contain an advanced capability *i.e.*, two-way functionality, and thus are not the "low-cost, limited-capability" boxes that would qualify for a waiver under the Commission's *2005 Deferral Order*.

Before discussing the specifics of the application for review, it is important to survey how we arrived at this juncture. As part of the Telecommunications Act of 1996, Congress passed Section 629, directing the Commission to adopt regulations to "assure the commercial availability" to MVPD consumers of navigation devices, specifically "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."¹ Congress intended to create a competitive market for navigation devices by ensuring that consumers have the opportunity to buy navigation devices from sources other than their MVPD. In other words, Congress wanted to create a national, competitive market for navigation devices to give consumers the option of going to their electronics retailer to choose a set-top box with the features they want, rather than having only the boxes supplied from their MVPD.

To carry out the goals of Section 629, in 1998 the Commission adopted the "integration ban," which established a date after which cable operators no longer may place into service new set-top boxes that perform both conditional access and other functions in a single, integrated device. Specifically, the FCC required cable operators, not all MVPDs, to make available by July 1, 2000 a security element separate from the basic navigation device. Separating the security element from the host device (known as the "integration ban") would enable unaffiliated manufacturers, retailers and vendors to commercially market devices while allowing cable operators to retain control over their system security. Separated security allows individual cable operators to design and operate equipment reflecting their particular security needs, while still facilitating the development of a market for consumer equipment that is geographically portable. Technologically, this separation of security from other features could be achieved by equipping set-top boxes with "CableCARDS" supplied by the cable operator, which would access security functions. The Commission order allowed cable operators to use devices with integrated security until January 1, 2005.

¹ 47 U.S.C. 549(a).

The purpose of the ban was to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution. This “common reliance” was intended to spur a competitive market in set-top boxes and thus provide consumers more choices and more innovative features offered by several vendors. The ban would thus help achieve the broader goal of Section 629 – allowing consumers to buy set-top boxes at retail, rather than only from their MVPD.

Both Congress and the Commission provided grounds for waiver of the regulations. Section 629(c) mandated that the Commission shall waive its regulations “for a limited time” upon a showing by an MVPD provider or equipment provider that a waiver is “necessary to assist the development or introduction of a new or improved multichannel video programming or other service” offered over their systems. In its *2005 Deferral Order*, the Commission decided to consider requests for waiver of the integration ban for limited-capability integrated digital cable boxes to ensure that establishing a competitive market would not displace a low-cost set-top box option for MVPD subscribers.

The Commission originally fixed January 1, 2005 as the deadline for compliance with the integration ban. The cable industry sought and was granted two extensions of that deadline. In April 2003, the Commission extended the effective date until July 1, 2006 and then in 2005, further extended the date until July 1 of this year. The Commission granted the extensions on the basis that a downloadable security solution was feasible in the near term. All the relevant parties now agree that the industry is still years away from implementing downloadable security nationwide.

The cable industry has been on notice of this rule since 1998 and has already been granted extensions for two and a half years. The statute, in Section 629(c), contemplates waivers only for a limited period of time. In addition, Section 629(e) states that the Commission should sunset its rules only if a competitive market for navigation devices is established. Although the waiver standard in Section 629(c) may not apply because of the type of set-top boxes at issue, it is clear that Congress intended waivers to be temporary. Granting multiple extensions of the effective date essentially sunsets the rules before they take effect and before a competitive market emerges, contrary to Congress’ explicit intent.

The statutory basis for waiver focused on the capabilities of the subject box to provide for new or improved services. Similarly, when the Commission established grounds for waiver of the integration ban in 2005, it made clear that we would look at the capabilities of the box. As we stated in the *2005 Deferral Order*:

[W]e will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes. 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 advanced capabilities.

What we have done instead, through a series of Bureau-issued orders, is focus on *the operator* who requested the waiver, rather than *the box*. Comcast filed a petition for waiver for three set-top box models: Motorola's DCT-700; Scientific-Atlanta's Explorer-940; and Pace Micro's Chicago set-top boxes. Many other waiver applicants sought and were granted relief for exactly the same boxes covered by the Comcast request. The basis for granting the waivers had nothing to do with the boxes – in each instance, the Bureau found the two-way functionality of these boxes to be too advanced to qualify as limited-capability devices. Instead, the Bureau orders used generic regulations in Sections 1.3 and 76.7 of the CFR to grant waivers based on certain characteristics of the operator – for instance, the operator's "demonstrated financial hardship," the operator's delivery of service to an area prone to natural disasters, or most often, the operator's commitment to migrate to an all-digital network before the digital transition date for broadcast television. We concur in this Order because of the inconsistent and arbitrary application of the waiver standard to applicants.

The policy objective of the 2005 Commission was to preserve a low-cost set-top box option for consumers, both for those who have analog TVs after the broadcast transition and for those who choose to try an economical digital cable service. The Commission intended these low-cost boxes to help cable's own digital transition, but did not intend to force cable companies to complete their digital transitions by the deadline set for the broadcast DTV transition. In the *2005 Deferral Order*, the Commission stated:

[A]chieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. 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. The availability of low-cost boxes will further the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offering such as high-definition television. 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.

This reasoning provides a sound basis for waivers, but does not offer a basis for treating the same boxes differently. Each box should either be exempted from the integration ban or not, based on its characteristics, not on how a particular operator is situated. Also, in our opinion, the reasoning fails to justify granting waivers on the basis of a commitment to complete the transition to *digital cable* by February 17, 2009, the deadline Congress set for *broadcasters* to transition to DTV.

We think the Bureau reached the correct result when it determined that the subject boxes, although low-cost, are not "limited-capability" boxes. Unfortunately, the Bureau orders did not stop at this analysis, but rather continued on to grant waivers for these boxes for certain applicants and not others. The result of these inconsistent decisions is

that consumers will be treated differently, based on where they live and which MVPD they choose. This inconsistent application of the waiver policy does not further Congress' goal of promoting a national retail market for these devices.

Because Comcast's waiver request was not granted, the company will have to deploy more expensive boxes that contain separated security and likely will pass on this cost to its subscribers. Those who subscribe to a company whose waiver was granted will pay less for an integrated box, even though that box comes with the same functions and features as Comcast's. That result doesn't make sense -- for consumers, for MVPDs for the consumer electronics industry, or for the creation of the national retail market Congress intended.