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 In the Matter of:)
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 Petition to Expand Marketing Opportunities)
 for Innovative Technologies)
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RM Docket No. 11857

Joint Reply Comments of Digital Liberty, R Street Institute and Americans for Prosperity

July 24, 2020

I. Introduction

As technology advances, so too must the Federal Communications Commission (“FCC” or “Commission”) and its regulatory regime. Over the last four years, the Commission has taken this mandate to heart, consistently updating or eliminating outdated rules that no longer make sense in the modern age.¹ The CTA Petition for Rulemaking presents another opportunity for the Commission to continue its work deregulating the telecommunications industry, which will provide significant benefits for consumers with limited, if any, cognizable harms.² The record already demonstrates strong support for the proposals in the petition, and these reply comments build off this support to fully explain that the benefits of the proposals strongly outweigh any potential harms.

II. Deregulating pre-authorization conditional sales and importation would provide significant pro-consumer benefits

Undoubtedly, the Commission should authorize devices before they enter the market. Indeed, as the manager of non-federal radio operation in the United States, it is incumbent upon the Commission to ensure that devices operate as intended without causing harmful interference. However, while the Commission adopted these rules in part as a means to prevent harmful interference, the rules necessarily limit the ability of manufacturers and retailers to correctly gauge consumer interest, effectively allocate resources and quickly release the new devices once authorization is obtained.³

¹ See, e.g., Declaratory Ruling and Third Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket Nos. 17-79 and 17-84, (Sept. 27, 2018). <https://bit.ly/2TP3hFQ>; Order on Reconsideration and Second Notice of Proposed Rulemaking, *In the Matter of 2014 Quadrennial Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50 et al. (Nov. 16, 2017). <https://bit.ly/36Gj3G7>.

² Petition for Rulemaking, *In the Matter of Petition to Expand Marketing Opportunities for Innovative Technologies*, RM-11857, (June 2, 2020). <https://bit.ly/2AEqMKD> (Herein after “CTA Petition”).

³ CTA Petition at 16.

By relaxing or waiving the rules prohibiting pre-authorization conditional sales and importation, the Commission can facilitate significant consumer benefits.

First, relaxing these rules will allow for better supply chain management. Currently, the actual consumer demand for devices can be difficult for retailers and manufacturers to gauge, and making a mistake “results in inefficiency, additional costs, and waste.”⁴ As a result, parties may produce too few devices to meet demand or too many devices that consumers do not want. By allowing pre-authorization conditional sales, the Commission can ease the challenge of determining consumer demand and allow the necessary parties to allocate resources efficiently.

Second, importing devices prior to Commission authorization allows parties to decrease shipping costs, which likely translates to lower costs for consumers.⁵ If parties plan to immediately offer the devices after authorization, they must quickly ship large quantities in a very short timeframe. By extending the period before authorization, parties can begin this process earlier, which means smaller batches with less urgency. This will ultimately reduce shipping costs and, as the market for new devices is highly competitive, these cost savings will likely be passed onto consumers.⁶

Third, relaxing these rules also allows for more consumers to try new devices prior to purchasing. For example, they may find it difficult to understand the capabilities of new AR, VR and MR headsets without physically testing them. While limited exceptions exist, Commission rules against importation place an artificial barrier on the ability to image, package and deliver limited quantities of radiofrequency devices. This means it will take more time before consumers can test them in person.⁷ In isolation, this is bad enough. But, considering the fast pace in the development of new services and devices—especially by startups with innovative ideas—limiting the ability for innovators to deliver

⁴ *Id.* at 9.

⁵ *Id.* at 10.

⁶ *Id.* at 9.

⁷ 47 CFR § 2.1204(a)(3), (4).

revolutionary technologies into the hands of consumers only makes it more difficult to produce and sell the next-generation devices that Americans have yet to imagine.

Finally, with the Commission's rightful interest in supply chain integrity and the potential dangers of relying too significantly on Chinese manufacturing, relaxing these pre-authorization rules can help rival manufacturers compete.⁸ By allowing pre-authorization importation and conditional sales, manufacturers can have more certainty that they can offload their supply. As a result, it will be more viable to work with manufacturers from countries like Brazil, Vietnam or India. In turn, this can provide more certainty regarding the security of devices and help end our reliance on Chinese manufacturing.

III. The risk of potential harmful interference is outweighed by the significant pro-consumer benefits

As the manager of radio operations in the United States, the Commission must ensure that operators refrain from causing harmful interference to others. And indeed, when the Commission passed these rules, it did so with the worry that mass marketed radio-frequency devices could reach the public prior to equipment authorization.⁹ If these un-authorized devices began to operate in the field, they likewise could cause harmful interference to existing radio operations. Because each individual radio-frequency device and relative operating parameters differ, potential harms could cause significant harms to important systems. However, just because potential harms *could* occur, does not mean that these harms are likely.

Often, the worst-case scenario, normally offered into the record by incumbent operators, can paint a dire picture for any potential new entrants into the radio ecosystem. However, as the Commission's

⁸ Order, *In the Matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs — ZTE Designation*, PS Docket No. 19-352 (June 30, 2020).

<https://bit.ly/2VZAPRV>.

⁹ CTA Petition at 16.

Technology Advisory Committee (TAC) has made clear, this mindset can often cloud decision-making. Instead of asking “What is the worst that can happen,” the more important questions are: “What can happen, how likely is it and what are the consequences.”¹⁰

When looking at the likelihood of harmful interference caused by allowing pre-authorization marketing and importation of radio-frequency devices, a multitude of events need to go wrong. First, the devices must exit the control of the manufacturer or retailer into the hands of consumers, which violates Commission rules. Second, the device must be able to cause harmful interference to neighboring operations. Third, even if capable of doing so, a radio-frequency device would likely need to operate at a specific time, frequency and location. The likelihood of all three of these conditions occurring is relatively low, and the Commission could take steps to minimize the chance of each step occurring as well.

For radio-frequency devices to exit the control of the manufacturer or retailer who obtains them prior to authorization from the Commission, there are two main scenarios in which these devices could reach the public: a retailer could mistakenly sell them or they could be stolen. Neither event is particularly likely, especially on a large scale. After all, these devices are cutting edge, and therefore very valuable to both the manufacturer and the retailers, which means they will likely handle the devices with care and security. Those in control of the devices will likely understand that they are not yet available for public consumption and keep them securely stored and controlled. To the extent that the Commission worries some retailers might mistakenly release a device, it could require additional labeling so that the un-authorized status remains clear. Further, the Commission could require that one of the parties in the chain must take financial responsibility for any harmful interference that does

¹⁰ “A Quick Introduction to Risk Informed Interference Assessment,” The Spectrum and Receiver Performance Working Group of the Federal Communications Commission’s Technological Advisory Council, April 1, 2015, p. 1. <https://transition.fcc.gov/bureaus/oet/tac/tacdocs/meeting4115/Intro-to-RIA-v100.pdf>.

occur, should a device make its way into operation. By shifting more risk to those in control of these devices, controllers will likely take more care to secure them and ensure no unauthorized uses occur.

Further, just because a device remains un-authorized by the Commission does not mean that it will cause harmful interference. The reason the manufacturer wants to import and conditionally sell these devices is because they believe they will soon make their way into the market. This also means that they believe the device will receive authorization. So, in the event that the controls on these devices fail and some of them make their way into the public's hands, there is still a good chance that no harmful interference could occur due to the operating parameters of the device's design. Again, however, the Commission could take steps to minimize these risks by requiring manufacturers and retailers to, as CTA suggests, have a "reasonable basis to believe authorization will be granted within 30 days of importation."¹¹ This can further limit the chance that these devices will ultimately be able to cause interference, should they leave the control of the retailer or manufacturer.

Finally, even if a device mistakenly leaves the control of the retailer or manufacturer, and that device can cause harmful interference, it may never actually harmfully interfere with other radio operations. There are a multitude of ways that devices can cause harmful interference, and generally for harmful interference to occur, the device must operate in roughly the same time, geographic location and frequency as another receiver. To be clear, determining whether harmful interference will occur depends upon the specific facts of a given scenario, as radio operations often behave in ways that are difficult to predict.¹² This is why the devices must undergo the authorization process. However, if an unauthorized device is not operating anywhere near an existing operation (in terms of location, time or frequency), the risk of harmful interference will be reduced. And to the extent that the device causes

¹¹ CTA Petition at 14.

¹² J. Pierre de Vries and Jeffrey Westling, "Not a Scarce Natural Resource: Alternatives to Spectrum-Think," *TPRC45*, Oct. 2, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943502.

harmful interference, the Commission could place additional responsibility on the retailer or manufacturer to resolve the interference concerns, such as by creating a remote shutdown feature on the device.

Nevertheless, harmful interference may still occur should the Commission proceed with CTA's suggestion. However, simply looking at the worst-case scenarios, pontificating about what might occur will limit the significant benefits that pre-authorization marketing and importation bring with them. To the extent that the Commission worries about potential harmful interference occurring, it should instead focus on ways to minimize the risks of such an event rather than on ways to eliminate the risk entirely, which might necessarily foreclose the benefits.

IV. FTC consumer protection authority will prevent and remedy non-interference related harms

While interference remains the main concern regarding new device authorization, it is not the only one. Pre-authorization rules can prevent the sale of devices that pose a danger to the users and also minimize the risk that a manufacturer or retailer will defraud a consumer. However, to the extent that the Commission is worried about these potential harms, existing Federal Trade Commission consumer protection authority remains a tool to alleviate these concerns.¹³ This means that if a device fails to work as intended, or a conditional sale fails to proceed as expected, the FTC will remain the 'cop on the beat' to protect against any consumer harms.

Modernizing outdated regulations remains a key challenge for the Commission, and the Petition presents numerous opportunities to facilitate competition and reduce regulatory barriers. The Commission should immediately proceed to enact these changes.

¹³ CTA Petition at 17.

Respectfully submitted,

/s/

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ABOUT OUR ORGANIZATIONS

Digital Liberty is the sister organization of Americans for Tax Reform, which advocates for a consumer-driven market, free from heavy regulation or taxation of the Internet, technology, telecommunications and media. We fight to prevent new, onerous regulations that will stifle innovation, and we strive to eliminate antiquated regulations that hold back the development and adoption of new technology.

The R Street Institute (“R Street”) is a nonprofit, nonpartisan, public-policy research organization. R Street’s mission is to engage in policy research and educational outreach that promotes free markets and limited, effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

Americans for Prosperity is a broad-based grassroots organization that advocates long-term solutions to the country’s biggest problems that prevent people from realizing their potential—including removing regulatory barriers to technological innovation in the United States, protecting online digital free speech and eliminating illegitimate government surveillance.