

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Allowing Earlier Equipment Marketing and Importation Opportunities)	ET Docket No. 20-382
)	
Petition to Expand Marketing Opportunities for Innovative Technologies)	RM-11857
)	
To: The Commission		

**COMMENTS OF
NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE
PUBLIC KNOWLEDGE
CONSUMER REPORTS
ACCESS HUMBOLDT**

I. Introduction

New America’s Open Technology Institute, Public Knowledge, Consumer Reports and Access Humboldt (“Public Interest Organizations”) respectfully submit the following comments in response to the Commission’s Notice of Proposed Rulemaking on *Allowing Earlier Equipment Marketing and Importation Opportunities* (“NPRM”).¹ Commenters support the Commission’s proposals to update the equipment authorization program to ensure that consumers and industry are not hindered by outdated and cumbersome rules on device marketing and importation. As Commissioner Starks stated in voting to adopt the NPRM, updating these rules is “a good commonsense proposal” given that “[c]onsumer expectations and the market for radiofrequency devices have evolved since the Commission first established its equipment marketing rules, and this NPRM proposes rule changes that update our policies to reflect those changes.”²

¹ Notice of Proposed Rulemaking, ET Docket No. 20-382, RM-11857 (rel. Dec. 10, 2020), <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf> (“Equipment NPRM”).

² Statement of Commissioner Geoffrey Starks, ET Docket No. 20-382, RM-11857, <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A4.pdf>.

II. The Commission Should Allow Consumers to Pre-Order Devices While Delaying Delivery Until Equipment Authorization is Approved

The Public Interest Organizations support the Commission’s proposal to modernize the equipment authorization rules to allow conditional sales, but not delivery, of radiofrequency devices to consumers prior to authorization. The updates proposed in the NPRM represent a common-sense and pro-consumer policy that allow individuals to order their desired products when they choose, while still maintaining the agency’s protections against harmful interference. However, the Commission should further consider whether to require that companies have the financial resources to refund consumers if necessary. Consumers who are pre-paying for complex electronic devices may not know how far along the products are in their development cycle, whether they have yet to be manufactured, or whether regulatory bodies will ultimately approve them. However, these consumer risks can be addressed, not through blanket bans on pre-sales, but by requiring that companies either keep payments in escrow, or certify that they have the financial resources to fully refund buyers in the event of non-delivery.

The Commission correctly notes that “the marketplace and consumer experience have changed such that there is good reason to modify our rules to allow for conditional sales.”³ The Consumer Technology Association (CTA) highlights the fact that conditional ordering allows “manufacturers to gather more accurate information about consumers’ intent to purchase” and to lower costs by enabling better supply-chain management as well as “in the transportation and related energy expenditures and money to move devices over vast distances.”⁴

³ *Equipment NPRM* at ¶ 14.

⁴ Petition of Consumer Technology Association to Expand Marketing Opportunities for Innovative Technologies, RM-11857, at 3-6 (filed June 2, 2020) (“CTA Petition”) at 9-10; Reply Comments of Innovation Technology & Information Institute, RM-11857; Comments of Samsung Elecs. Am., RM-11857, at 6 (July 9, 2020).

The Commission’s current rules are needlessly at odds with the emerging business practices of technology companies, large and small. Device development cycles have tightened and the evolution of device models has quickened significantly. Large-scale showcases put on by the biggest companies and industry organizations—such as Apple’s annual unveilings and CTA’s Consumer Electronics Show—create widespread buzz that catalyze immediate interest in the latest products and models, many of which have become central to the U.S. economy and society. As a coalition of technology companies stated:

Our customers express interest in acquiring our new technologies as soon as possible and are frustrated when they cannot pre-order to guarantee prompt delivery. While many of these people are dedicated early adopters, others are motivated by potential product shortages that have accompanied new technology launches in the past. These customers are confused about why they cannot pre-order our devices in the same way they can pre-order the latest automobile, album, video game, book, or fashion.⁵

A rule update that permits conditional sales will benefit consumers by allowing device makers and retailers to plan for more efficient production runs, marketing, and distribution. The current rules tend to increase costs and waste because they often result in the production of “too few devices to meet demand or too many devices that consumers do not want,” as R Street Institute, Digital Liberty, and Americans for Prosperity note.⁶ Commenters agrees with ITIF that “[e]arly marketing and pre-ordering of devices by consumers allows for considerable

⁵ Ex Parte Letter from Amazon.com, Inc., AT&T Services, Inc., Ericsson Google LLC, Intel Corporation, Microsoft Corporation, Nokia Qualcomm Incorporated, Samsung Electronics America, Inc., Sony Electronics Inc., Sharp Home Electronics Company of America, T-Mobile USA, Inc., and Verizon, RM-11857 (July 31, 2020) (“Company Coalition Letter”).

⁶ Joint Reply Comments of Digital Liberty, R Street Institute and Americans for Prosperity, RM Docket No. 11857, at 3 (July 24, 2020) (“R St. Institute et al. Comments”).

efficiencies, allowing firms to quickly adjust production and other aspects of business plans in an incredibly dynamic market.”⁷ As CTA has explained:

In addition to helping us meet our customers’ expectations, conditional sales would allow our companies to gauge the level of serious interest in and intent to purchase new technologies. This would allow us to properly prepare our supply chain (i.e., more precisely stage shipments to users or delivery to retailers), know how many devices to manufacture, and deliver new technologies into users’ hands sooner.⁸

Smaller companies should also benefit from this rule change. Many smaller companies may not be able to afford to develop or manufacture new products without being able to fully gauge demand. Allowing pre-sales would in turn allow smaller firms to produce the right quantities of their devices, and to secure capital. At the same time, customers who pre-pay for products are not investors, and their money should not be at risk. Some kind of financial requirements for companies that take advantage of the Commission’s rule changes can help prevent customers paying for products that companies cannot deliver.

Giving companies the option to ship products prior to final equipment authorization also seems likely to benefit consumers by reducing shipping costs.⁹ Companies would have the flexibility to begin shipping devices earlier in the process. This would allow smaller and more geographically targeted shipments without the same urgency required when firms must wait to ship after authorization. This should, as the R Street Institute and others maintain, “ultimately reduce shipping costs and, as the market for new devices is highly competitive, these cost savings will likely be passed onto consumers.”¹⁰

⁷ Reply Comments of Information Technology and Innovation Foundation, RM-11857, at 2 (July 24, 2020), <https://ecfsapi.fcc.gov/file/107240596811685/ITIF%20letter%20CTA%20marketing%20RM-11857%20final.pdf> (“Reply Comments of ITIF”).

⁸ Company Coalition Letter at 2.

⁹ *Id.*

¹⁰ Comments of R St. Institute et al. at 3.

The Commission’s proposed updates are particularly timely as the device ecosystem seems poised for another dramatic expansion as augmented reality, virtual reality and other innovative technologies are enabled by next-generation Wi-Fi 6 and mobile 5G networks that can potentially support high-bandwidth and near-real-time applications and services almost anywhere. Updating the current, outdated limitations on device sales would provide companies greater flexibility to produce and market these new 5G-enabled devices on shorter time frames.

The pandemic period has only amplified and accelerated the reality that much of Americans’ lives—education, employment, entertainment, information and other crucial services—takes place online and using an increasing variety of connected devices. Making these next-generation technologies and devices available as quickly and affordably as possible is clearly in the public interest, particularly if there is no substantially greater risk of harmful interference from unauthorized devices. Commenters agrees with the Computer & Communications Industry Association in this regard: “Now that Americans have moved more of their lives online, a trend that may not be transitory, the Commission needs to promote policies that ensure fast and reliable networks, including advancing 5G technologies.”¹¹

Commenters further agree with R St. Institute et al. that “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 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.”¹² Moreover, as the NPRM acknowledges, online marketing and direct-to-consumer sales conducted over the Internet using crowd-funding platforms such as

¹¹ Comments of Computer & Communications Industry Association, RM-11857, at 3 (July 9, 2020), <https://ecfsapi.fcc.gov/file/107240596811685/ITIF%20letter%20CTA%20marketing%20RM-11857%20final.pdf> (“Comments of CCIA”).

¹² *Id.* at 3-4.

Kickstarter and Indiegogo are increasingly common and beneficial for consumers.”¹³

Commenters further agree with the Commission’s observation that “[e]ntrepreneurs and start-ups can use these new distribution models to grow their businesses and bypass the channels often controlled by large incumbents.”¹⁴

III. The Commission Should Permit the Importation of Devices for Pre-Marketing Activity While Equipment Authorization is Pending

The Public Interest Organizations fully support the Commission’s proposal to modernize the rules “to allow a limited number of radiofrequency devices subject to Certification to be imported into the United States prior to equipment authorization for pre-sale activities, including imaging, packaging, and delivery to retail locations.”¹⁵ Currently companies are permitted to import only a very limited number of devices for specific purposes such as display at trade shows and testing, but not for retail display, advertising, and preparation for public sale. Commenters agree with former Commissioner Michael O’Rielly’s observation that the Commission’s proposed change to the importation rules “will allow manufacturers to advertise and plan marketing campaigns, increasing the chances of a successful product rollout, even if the equipment authorization is delayed.”¹⁶

As the rules are currently designed, firms are saddled with significant restrictions that hinder their ability to pre-position devices for marketing and sale to consumers. This delays availability, as well as consumer awareness of new devices. A coalition of technology companies supporting CTA’s petition describe the “complicated choreography” required to import new

¹³ *Equipment NPRM* at ¶ 15.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 31.

¹⁶ Statement of Commissioner Michael O’Rielly, ET Docket No. 20-382, RM-11857, <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A3.pdf>.

devices, prepare products to satisfy customers, and deliver them to the brick-and-mortar stores.¹⁷ “Any breakdown runs the risk of foiling marketing and rollout campaigns, which can threaten prospects for a product’s successful launch and ultimate commercial success,” the companies argue.¹⁸ This, in turn, harms consumers, since needless restrictions on the importation, marketing and pre-sale of devices “slow down companies’ ability to get devices into the hands of consumers once the devices have been authorized.”¹⁹

Commenters generally agree with ITIF and other parties who concur that the equipment authorization rules should be updated to better reflect the realities of the modern market:

Globalized, tightly timed supply chains face a slow-down prior to product launch when the ability to import devices prior to FCC authorization is so limited to prevent the importing of show-room display devices. Highly anticipated, in-demand radio products require significant preparation and planning prior to launch. Allowing this process to be slightly accelerated by importing devices for display can help accelerate the introduction of innovative new products.²⁰

In short, OTI agrees that the record demonstrates that the benefits to consumers of relaxing these restrictions outweigh any potential harms.²¹

¹⁷ Company Coalition Letter at 2.

¹⁸ *Ibid.*

¹⁹ Comments of CCIA at 5.

²⁰ Reply Comments of ITIF at 2.

²¹ Comments of R. St. Institute et al. at 4-6 (“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 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.’”); Comments of CCIA at 2.

IV. Conclusion

The Commission should update its equipment authorization rules to permit the importation, marketing and conditional pre-sale, but not delivery, of radiofrequency devices to consumers prior to final certification. The benefits appear to exceed the costs for both consumers and industry, especially if the risk to buyers is reduced by requiring that companies be able to issue timely refunds in the event of non-delivery. The removal of these restrictions should result in faster and more cost-effective production, promotion, and sale of next-generation technologies, which would benefit consumers with lower prices and an ability to learn more about new devices at an earlier date.

Respectfully submitted,

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