

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

Comments of ITIF

The Federal Communications Commission (FCC or Commission) has proposed modifications of rules governing the marketing and importation of devices prior to FCC device authorization, recognizing that its equipment authorization process has in some ways “failed to keep pace with developments in the modern device ecosystem.”¹ The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on these proposals, and supports the Commission’s efforts to enhance the equipment authorization process to match the dynamic marketplace.²

ITIF previously wrote the Commission in support of the Consumer Technology Association’s (CTA) June 2020 petition calling for modernization of the equipment authorization process.³ There we argued that aspects of conditional sale limitations and imports prior to authorization unnecessarily slow innovation and

¹ *Allowing Earlier Equipment Marketing and Importation Opportunities*, ET Docket No. 20-382, Notice of Proposed Rulemaking, FCC 20– 180 (Dec. 2020), https://docs.fcc.gov/public/attachments/FCC-20-180A1_Rcd.pdf.

² Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF’s goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, <https://itif.org/about>.

³ See Reply Comments of ITIF, RM-11857, (July 2020), (*available at* <https://itif.org/publications/2020/07/24/letter-fcc-regarding-opportunities-modernize-radio-device-marketing-rules>).

dynamism in the consumer radiofrequency (RF) device space—a belief we continue to hold. Recognizing the importance of the RF authorization process in minimizing the risk of interference and the Commission’s need to thoroughly consider the impact and implementation of changes to the authorization process, the decision to deny CTA’s requested interim waiver is understandable. However, ITIF encourages the Commission to work quickly to modernize its authorization rules, with an eye toward facilitating rapid innovation and new marketing models in the RF device sector.

THE COMMISSION SHOULD MODERNIZE ITS RULES TO FACILITATE DYNAMISM IN THE WIRELESS DEVICE MARKETPLACE

The equipment authorization program is an important component of the Commission’s efforts to ensure RF devices comply with its technical and equipment authorization requirements. However, the Commission’s rules around marketing and importation of pre-authorized devices are quite dated. Allowing firms greater flexibility to pre-sell to consumers and permit limited importation of devices before FCC authorization would help bring these regulations in line with the pace of today’s device market.

The Commission Should Allow for Conditional Consumer Sales Prior to Authorization

As several commenters have noted, the current rules governing device marketing prior to FCC authorization only allow such sales on a conditional basis to wholesalers or retailers, but not consumers.⁴ Pre-ordering devices, especially pre-ordering done directly by the end-user, is a far more common practice today.

The wireless device market is incredibly innovative, with fast-paced development and change in new wireless offerings. Regulation should not slow this process unless there is a compelling upside. Early marketing and pre-ordering of devices by consumers provides considerable efficiencies, allowing firms to adjust production and other aspects of business plans in a dynamic market. Conditional pre-sales to consumers prior to the receipt of regulatory authorization eases the burden for direct-to-consumer businesses, which is often more efficient than distribution systems which were more common when these regulations were last updated.

The conditional sale model is now common in the marketplace, and consumers are familiar with placing orders that they know may not materialize.⁵ Allowing for radio devices to be marketed and reserved prior to and conditional on authorization would align FCC rules with contemporary reality of the device market. The

⁴ See e.g., CompTIA Comments at 2.

⁵ For discussion, see, e.g., Michael O’Rielly, “Kickstarting the FCC’s Product Marketing & Import Rules,” FCC Blog (June 2020), <https://www.fcc.gov/news-events/blog/2020/06/02/kickstarting-fccs-product-marketing-import-rules>.

Commission should modify Section 2.803 to encourage a faster, smoother product launch for multiple different sales channels.⁶

Consistent with the Commission's proposal, structures must be in place to ensure pre-authorized devices do not end up in consumers hands or "in the wild" until after the authorization process is complete. Many (likely all) commenters on CTA's petition agreed on this point.⁷ The testing and authorization process will only grow in importance with the continually increasing complexity of RF devices.

So clearly there is a balance to be struck: The Commission must have a robust testing process and prevent interfering devices from ending up in the wild. The goal is not to simply maximize the speed at which devices get into consumer's hands, but instead to examine where the authorization process imposes undue impediments and can be streamlined without increasing the risk of interference or other problems. Conditional sales, especially when managed by large, sophisticated retailers, present little risk.

The Commission Should Broaden Imports Allowed Prior to Authorization

Similarly, the Commission's rules on the importation of radio devices could be adjusted to better reflect the dynamism of today's 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 as to prevent sufficient 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.

The Commission should modify Section 2.1204 in line with CTA's petition to allow show-room devices to be imported prior to authorization.⁸ ITIF appreciates the Commission's goal of modernizing its regulations to keep pace with changes in the marketplace and supports most of the modifications as proposed.

However, the Commission's proposal to limit early importations to 4,000 devices nationwide seems too low. For example, 4,000 devices would not be enough to provide even a single device for each retail store of any one of the three major wireless carriers. Verizon and T-Mobile both have over 7,000 retail store locations, and

⁶ 47 C.F.R. Part 2.803.

⁷ See e.g., CTIA comments at 5 (citing CTA Petition at 15) (citing the "fundamental premise" that devices may not be delivered to consumers until the equipment authorization process is complete).

⁸ 47 C.F.R. Part 2.1204.

AT&T is estimated to have nearly 6,000.⁹ Several considerations would go into determining an appropriate limit, but 4,000 is almost certainly too low for an expansion of imports that would have meaningful effect on the pace of innovation and device distribution. Even a limit of over 10,000 devices would likely still be small enough to mitigate the small risk of unauthorized wide scale distribution.

THE FCC SHOULD CONTINUE TO IMPROVE ITS ENFORCEMENT RESOURCES

The FCC's product authorization process and importing of devices through customs play an important role in preventing harmful interference. Interference concerns will only increase with the ever-growing number of connected Internet of Things devices. As U.S. homes continue to incorporate more and more devices operating closely together in frequency, time, and space, it is critical that these devices are in compliance with FCC regulations. The Commission should consistently consider ways to shift pressure away from the post-hoc enforcement process and keep enforcement in mind as it designs its rules and spectrum plans.

The Commission's regulations around Specific Absorption Rate and RF exposure are an important component of the authorization process. Compliance with those health-oriented regulations will continue to be important, especially as we consider using higher frequencies in consumer devices. Future consumer wireless devices likely will eventually use frequencies over one terahertz. These frequencies, although non-ionizing and generally safe, have complicated and unpredictable physics, meaning a robust testing system will continue to be critical as RF exposure rules become more of a design concern.¹⁰ Maintaining robust enforcement and compliance with these regulations will hopefully help to mitigate misinformation around the health effects of RF exposure.

To be clear, the risk from these requested rule modifications is quite low. Importation for wide distribution would still require authorization, and products from well-established companies often go through rigorous testing prior to even applying for authorization. Under no circumstances should radio devices that have not been authorized be prematurely delivered to end-users, even under the proposed modifications.

CTA has proposed several safeguards to minimize any risks associated with rule changes, which ITIF generally supports. Close coordination with customs officials to ensure importation limits are not evaded is appropriate. Requiring manufacturers have a reasonable basis for expecting a timely approval makes sense, even if it would

⁹ See, Bevin Fletcher, "T-Mobile's retail store count climbs past AT&T, Verizon," *Fierce Wireless* (Aug. 2020), <https://www.fiercewireless.com/operators/t-mobile-s-retail-store-count-climbs-past-at-t-verizon>; ScrapeHero, "Number of AT&T Locations in the United States," (accessed Feb. 2021), <https://www.scrapehero.com/location-reports/AT%20&%20T-USA/>.

¹⁰ See Carter M Armstrong, "The Truth About Terahertz," *IEEE Spectrum* (Aug. 2012), <https://spectrum.ieee.org/aerospace/military/the-truth-about-terahertz>.

be difficult to enforce a “reasonable” expectation of approval given increasing complexity of devices. The Commission should consider giving manufacturers multiple options for demonstrating a reasonable belief of imminent authorization. Large manufacturers who regularly navigate the authorization process likely have a good sense of the timeline of expected authorization—low-cost options like simply achieving milestones or pre-approval guidance should be sufficient. If a company wants to import a new, complicated device where authorization is less certain, it does so at its own risk. If authorization is not gained, in no event should devices reach the end-user.

Similarly, the Commission should consider cost burdens while developing labeling requirements. Physical labelling can be difficult with small devices—this is of course compounded if temporary labels are required. The Commission should be flexible with labeling and aim to keep compliance costs low while achieving the goals of tracking devices and informing consumers.

There is always a risk of bad actors knowingly flouting regulations or small, unsophisticated parties unknowingly failing to comply. These concerns are amplified as the development and distribution of flexible, agile, low-cost radios becomes cheaper and faster. While the risk of non-compliant radios getting into the wild does not seem to increase with the proposed rule changes, the Commission should always keep enforcement concerns front of mind when modifying its regulations.

CONCLUSION

The growing importance of 5G and Internet of Things devices to the digital economy should compel regulators to consider how rules can be updated to reflect today’s dynamic market with tight product cycles without risking harm to consumers or businesses. Modernizing these conditional pre-sale and display import rules can help accelerate the adoption of cutting-edge technology. ITIF urges the Commission to quickly adopt the proposed changes.

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