Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules	)))	CSR-7078-Z
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	))	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	))	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 2007 **Released: January 10, 2007**

By the Chief, Media Bureau:

I. INTRODUCTION

1. Cablevision Systems Corporation ("Cablevision") has filed with the Chief of the Media Bureau the above-captioned waiver request (the "Waiver Request") seeking a limited waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. For the reasons stated below, we temporarily grandfather Cablevision's SmartCard-based approach to separated security and issue a two-year waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to use their separated security, SmartCard, solution until July 1, 2009.[1]

II. BACKGROUND

A. Section 629 of the Act

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

> adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of 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.[2]

[1] 47 C.F.R. § 76.1204(a)(1).

[2] 47 U.S.C. § 549(a).

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor ("MVPD").[3] Congress characterized the transition to competition in navigation devices as an important goal, stating that "[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality."[4] At the same time, Congress recognized that MVPDs have "a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service."[5] Similarly, Congress also sought to avoid Commission actions "which could have the effect of freezing or chilling the development of new technologies and services."[6] Under Section 629(c) therefore the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.[7]

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000 a security element separate from the basic navigation device (the "host device").[8] The separation of the security element from the host device required by this rule (referred to as the "integration ban") was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules ("PODs"),[9] were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.[10] Then, in 2005, again at the urging of cable operators,[11] the Commission further extended that date until July 1, 2007.[12]

B. The Waiver Request

4. On November 27, 2006, Cablevision filed a request for a limited waiver of the integration ban for the digital cable set-top boxes that it leases to subscribers. In the Waiver Request, Cablevision explains that, unlike any other cable operator to date, it has incorporated a separate-security element into every set-top box it currently has in service. Rather than employing CableCARDs, the separate-security solution that consumer electronics manufacturers and other cable operators' leased devices rely upon for non-integrated conditional access, however, Cablevision utilizes SmartCards, a solution developed by NDS Group plc.[13] Cablevision states that SmartCards, which are plastic cards the size of a credit card,

---

[3] *See* S. REP. 104-230, at 181 (1996) (Conf. Rep.). *See also Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004).

[4] H.R. REP. NO. 104-204, at 112 (1995).

[5] *Id*.

[6] S. REP. 104-230, at 181 (1996) (Conf. Rep.).

[7] 47 U.S.C. § 549(c).

[8] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) ("*First Report and Order*"); 47 C.F.R. § 76.1204(a)(1).

[9] For marketing purposes, PODs are referred to as "CableCARDs."

[10] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) ("*Extension Order*").

[11] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) ("*2005 Deferral Order*"), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

[12] *Id.* at 6814, ¶ 31.

[13] Waiver Request at 3.

"contain the necessary encryption keys and other information necessary for the decryption of protected content."[14] Cablevision notes that it was the first – and is likely the only – U.S. cable operator to utilize SmartCards, although they are used by at least one other MVPD in the United States (DIRECTV). Cablevision began deploying SmartCard-capable set-top boxes in 2001, and today all of its nearly six million digital set-top boxes rely on SmartCards.[15]

5. In addition, Cablevision states that its SmartCard-based separate-security solution is compatible with CableCARD-ready consumer electronics devices. With the use of an adapter, CableCARD-ready consumer-electronics devices are supported by Cablevision's SmartCard-based conditional access system.[16] Accordingly, Cablevision believes that it complies with Section 76.1204(a)(1) of the Commission's rules and that its continued use of SmartCards "will not affect Cablevision's continued support of CableCARDs for third-party, CableCARD-ready CE devices, and will not adversely impact customers' experience with such CableCARDs.".[17]

C. Comments

6. The Waiver Request was placed on public notice for comment on December 12, 2006.[18] Only one party, the Consumer Electronics Association ("CEA"), filed comments, and Cablevision filed a response. In their opposition to the Waiver Request, CEA makes three basic arguments. First, CEA contends that the SmartCard-based approach used by Cablevision is not a truly separate conditional access solution. Second, CEA states that Cablevision's continued reliance upon SmartCards for its leased devices would be inconsistent with the goal of common reliance. Third, CEA argues that a waiver for Cablevision is not justified. In its Reply, Cablevision addresses CEA's arguments.

7. CEA asserts that the SmartCard developed by NDS Group plc is not a physically separate conditional access system "because a major component of the conditional access hardware remains in the navigation device, and not on the card."[19] According to CEA, "[a] cable navigation device accesses protected content by 1) receiving entitlement to the content, 2) receiving and storing keys to decrypt the content, and 3) decrypting the content."[20] CEA claims that the SmartCard can receive entitlement and receive and store keys, but the SmartCard cannot actually decrypt the content.[21] Because "a ubiquitous standard for interfacing with the SmartCard" currently does not exist,[22] CEA argues that consumer electronics manufacturers do not have the technical information necessary to build nationally portable devices that, like Cablevision's leased devices, interface directly with the SmartCard.[23] As a result, CEA argues that grant of the Waiver Request would undermine the goal of national portability of navigation

---

[14] *Id*. at 3.

[15] Waiver Request at 2-3.

[16] *Id*. at 4-5.

[17] *Id*. at 2-3.

[18] *Request for Waiver of 47 C.F.R. § 76.1204(a)(1) Filed with the Commission*, DA 06-2543 (MB rel. Dec. 12, 2006) (Public Notice).

[19] CEA Comments at 2.

[20] *Id*.

[21] *Id.*

[22] *Id*. at 3.

[23] *See id*. ("Different cable systems can use different content encryption systems with the SmartCard, so a SmartCard-accepting device will likely not be portable between cable systems.").

devices, thereby rendering moot the main purpose behind separated security.[24]

8. In addition, and for many of the same reasons, CEA claims that grant of the Waiver Request would impair the goal of common reliance, because consumer electronics manufacturers would not be able to market devices that rely upon the identical security solution as Cablevision-leased devices.[25] Set-top boxes provided by Cablevision, including the six million that they have deployed to date, would interface with a SmartCard, while devices offered by consumer electronics manufacturers would interface with a CableCARD.

9. Finally, CEA restates four arguments that it has made in other petitions for waiver of the integration ban. First, CEA does not agree with Cablevision's claim that the burdens associated with compliance with the integration ban provide adequate justification for waiver. CEA states that nearly all substantive rules require a diversion of resources, and that an argument against that diversion of resources is simply an attack on the rule itself.[26] Second, CEA argues that mere support for CableCARD-ready devices alone (*i.e.*, without cable operators also relying upon CableCARDs for their own, leased devices) has not proven adequate to meet Section 629's goals of a competitive navigation device market.[27] Third, CEA takes issue with Cablevision's cost figures for CableCARDs, arguing that they fail to account for the decline in CableCARD prices that would result from "the economies of scale that will follow from widespread reliance on CableCARD technology."[28] Finally, CEA asserts that Cablevision failed to request a waiver for a limited period of time.[29]

10. In its Reply Comments, Cablevision states that it is the only cable operator that "has already deployed set-top boxes that use separable, non-integrated security."[30] It also disagrees with CEA that its SmartCard-based solution is only partial separation of the conditional access function, arguing that the function performed by the SmartCard satisfies the definition of "conditional access" found in Section 76.1200(e) of the Commission's rules.[31] In addition, Cablevision reiterates its position that because it supports use of CableCARD-ready devices by its subscribers, it is in compliance with the Commission's rules.[32] Finally, in response to CEA's contention that it has improperly requested a "perpetual" waiver under Section 629(c), Cablevision responds that "it would be sufficient for the Commission to grant it until the cable industry's deployment of downloadable conditional access."[33]

III. DISCUSSION

11. Cablevision makes its request for waiver "[p]ursuant to [Section 629 of the

[24] *Id*.

[25] *Id*. at 3-4.

[26] *Id*. at 5.

[27] *Id*. at 5-6.

[28] *Id*. at 6.

[29] *Id*.

[30] Cablevision Reply at 1.

[31] *See* Cablevision Reply at 2-3, 47 C.F.R. § 76.1200(e) (defining "conditional access" as "[t]he mechanisms that provide for selective access and denial of specific services and make use of signal security that can prevent a signal from being received except by authorized users").

[32] *Id*. at 3-4. *See also id*. at 3 ("Cablevision's SmartCard solution promotes common reliance on the industry-standard CableCard solution because every manufacturer's CableCard-compatible set top box is compatible with Cablevision's network.").

[33] *Id*. at 4.

Communications Act] and Sections 1.3, 76.7 and 76.1207 of the Commission's rules."[34] Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c)[35] as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules. As described in detail below, we do not believe that Cablevision meets the standard for waiver found in Section 629(c) of the Communications Act. Cablevision has demonstrated extraordinary circumstances, however, including its efforts stretching back to 2001 to implement the integration ban[36] and its work to ensure the compatibility of SmartCard technology with CableCARD devices.[37] We therefore believe that a limited waiver under Sections 1.3 and 76.7 of the Commission's rules is appropriate in this instance.

A. Section 629(c) of the Act

12. Cablevision argues that grant of the Waiver Request is warranted under Section 629(c), which states in relevant part that:

> [t]he Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.[38]

As mentioned above, the principal goal of Section 629 of the Act is to foster competition and consumer choice in the market for navigation devices. Section 629(a) thus charges the Commission with adopting regulations that further that goal. At the same time, however, Congress intended "that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[39] Accordingly, waivers of those regulations are granted when doing so "is necessary to assist the development or introduction of a new or improved" service, such as, for example, a nascent MVPD offering from a new competitor.[40]

13. Cablevision argues that denial of the Waiver Request "would divert substantial financial, technical and human resources from Cablevision's effort to deliver new and improved services."[41] Specifically, Cablevision claims that it is improving its digital service offering to include "more digital, switched-digital, high-definition, interactive, and on-demand entertainment services."[42] Cablevision also claims that waiver is necessary to encourage consumers to choose digital cable – according to Cablevision, denial of the Waiver Request would require a redesign of its set-top boxes, which would

---

[34] Waiver Request at 1 (citing 47 U.S.C. § 549(c); 47 C.F.R. §§ 1.3, 76.7(i), and 76.1207).

[35] Section 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, implements Section 629(c) of the Act and tracks the language of that statutory provision almost verbatim.

[36] Waiver Request at 2-3.

[37] *Id*. at 4-5.

[38] 47 U.S.C. § 549(c). Section 76.1207 of the Commission's rules implements Section 629(c) of the Act and tracks the text of the statute nearly verbatim. 47 C.F.R. § 76.1207.

[39] S. REP. 104-230, at 181 (1996) (Conf. Rep.).

[40] *See First Report and Order*, 13 FCC Rcd at 14801, ¶ 65 (declining to apply the integration ban to DBS providers and noting that "in many instances, the Commission refrains from imposing regulations on new entrants") (citation omitted).

[41] Waiver Request at 6.

[42] *Id*. at 2.

significantly increase the cost of those boxes.[43]

14. As a general matter, we do not find compelling Cablevision's argument that grant of the Waiver Request is necessary to assist the development or introduction of the majority of these services. First, we note Cablevision reported that as of September 2006, approximately 77 percent of its subscribers already are digital cable subscribers.[44] Thus, a significant portion of Cablevision's subscribers already receive many of the services described in the Waiver Request, and it appears that those services have achieved success in the marketplace. The waiver could hardly be "necessary" for the "introduction" of these services as they already exist.

15. To the contrary, we believe that, under the circumstances, grant of Cablevision's Waiver Request under Section 629(c) effectively would nullify the goal of Section 629(a). The purpose of Section 629(c) is to allow for waivers where *necessary* to assist the development or introduction of new or improved services that otherwise would be prohibited by rules adopted pursuant to Section 629(a). And while it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).

16. In addition, we note that Cablevision failed to request a waiver "for a limited time," as required by Section 629(c).[45] This limit helps to ensure that the Commission progresses toward furthering the goal of a competitive market for navigation devices. Thus, on its very face, Cablevision's waiver request fails to meet the requirements envisioned by Congress.

B. Sections 1.3 and 76.7 of the Commission's Rules

17. We find that Cablevision's SmartCard-based approach does provide separated security, but does not completely separate the conditional access functions as the Commission's rules require. We further find that the SmartCard-based approach does not provide for common reliance. However, in light of the specific facts surrounding Cablevision's implementation of the SmartCard-based approach, we do believe there is good cause to temporarily grandfather Cablevision's implementation and issue a two-year waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to use their separated security, SmartCard, solution until July 1, 2009 pursuant to the general waiver authority in Sections 1.3 and 76.7 of the Commission's rules.[46]

18. With respect to compliance with the requirement Section 76.1204(a)(1) to provide the conditional access function in a separate device, the Commission intended that all of the conditional access functions – including decryption of the protected content – be performed by the separate-security element.[47] Because Cablevision's SmartCards rely upon the Cablevision-leased set-top box, or, in the

---

[43] *Id*. at 6.

[44] *See* Cablevision Systems Corporation, 2006 Quarterly Report on Form 10-Q, Securities and Exchange Commission at 99 (filed Nov. 8, 2006) (stating that of Cablevision approximately 3.1 million subscribers, approximately 2.4 million are digital subscribers).

[45] 47 U.S.C. § 549(c).

[46] 47 C.F.R. §§ 1.3, 76.7.

[47] *See*, *e.g.*, *First Report and Order*, 13 FCC Rcd at 14805-06, ¶¶ 74-75 (citations omitted) (agreeing with commenters that relying upon the NRSS (EIA-679) and the related CableLabs/OpenCable efforts, "which … allow[] system operators to place *all* security-related circuitry on a module or a security card that can be inserted into a competitively supplied navigation devices[,] … will provide a usable standard for digital communications and our rule reflects this premise" (emphasis added)).

case of the Cablevision-provided SmartCard/CableCARD combination device, the CableCARD adapter, we conclude that Cablevision's SmartCard-based approach is not consistent with the definition of "conditional access" in Section 76.1200(e).[48]

19. In the *2005 Deferral Order*, the Commission explained its justification for requiring MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions:

> We believe that common reliance by MVPDs and consumer electronic manufacturers on an identical security function will align MVPDs' incentives with those of other industry participants so that MVPDs will plan the development of their services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon. Moreover, if MVPDs must take steps to support their own compliant equipment, it seems far more likely that they will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment. We believe that cable operator reliance on the same security technology and conditional access interface that consumer electronics manufacturers must rely on is necessary to facilitate innovation in competitive navigation device products and should not substantially impair innovation in cable operator-supplied products.[49]

Accordingly, the Commission's intent was to require cable operators to rely upon the identical separate-security solution as consumer electronics manufacturers. Because consumer electronics manufacturers cannot build devices that directly interface with the SmartCard that Cablevision provides for its own leased set-top boxes, but instead must reply upon the CableCARD, we conclude that Cablevision's approach does not support the goal of common reliance.

20. Although Cablevision's approach is not a fully separated conditional access solution and does not further the goal of common reliance, we nevertheless conclude that Cablevision's longstanding use of the SmartCard separated security solution justifies a limited, two-year extension of the deadline for compliance with the integration ban. In the Waiver Request, Cablevision explains that in fall 2001 it began to use the SmartCard separable-security conditional access solution developed by NDS Group plc.[50] Thus, through its use of SmartCards, Cablevision was able to begin deploying devices with at least partial separation of the conditional access function in 2001 – whereas other cable operators are only now beginning to place orders for digital cable set-top boxes that do not include integrated security in order to meet the July 1, 2007 deadline for compliance with the integration ban[51] – and today all six million of its set-top boxes include SmartCards. Moreover, through the use of the CableCARD adapter, Cablevision asserts that the SmartCard works with all consumer electronics devices that can use CableCARDs, and

---

[48] *See* 47 C.F.R. § 76.1200(e) (defining "conditional access" as "[t]he mechanisms that provide for selective access and denial of specific services and make use of signal security that can prevent a signal from being received except by authorized users"). *See also Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 14 FCC Rcd 7596, 7613, ¶ 36 (1999) (discussing how the SmartCard-based approach relies upon the host device to perform part of the conditional access function: "In doing so the Commission is urged to recognize, as a general matter, that devices using a "smart card" as part of the security system could satisfy the separation requirement even if some conditional access circuitry remained in the commercially available portion of the device").

[49] *2005 Deferral Order,* 20 FCC Rcd at 6809, ¶ 30 (footnote omitted).

[50] Waiver Request at 2-3.

[51] *See* Cablevision Reply at 1 ("Cablevision, alone among the nation's cable operators, has already deployed set-top boxes that use separable, non-integrated security.").

supports this statement by noting that more than 12,000 of its customers use CableCARDs with SmartCards.[52] We also find it particularly persuasive that Cablevision began implementing its SmartCard-based approach in 2001, more than three years before the Commission clarified that the integration ban requires reliance on an identical security function. To require Cablevision to modify its devices that effectively further the goals of the integration ban would only serve to punish it for seeking to comply with the Commission's rules in a timely manner. Given these extraordinary circumstances, we believe that Cablevision has shown good cause for a two-year extension of the integration ban. Accordingly, Cablevision may continue to place in service SmartCard-dependent set-top boxes until July 1, 2009.

IV. CONCLUSION

21. For the reasons stated herein, we conclude that Cablevision's Waiver Request does not justify a waiver under either Section 629(c) or Sections 76.1207 of the Commission's rules. We do conclude, however, that Cablevision has shown good cause for a temporary two-year waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to use their separated security, SmartCard, solution until July 1, 2009.

V. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that, pursuant to Section 629(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(c), and Sections 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, the request for waiver filed by Cablevision Systems Corporation of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

23. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, the request for waiver filed by Cablevision Systems Corporation of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED IN PART** to allow Cablevision to use their separated security, SmartCard, solution until July 1, 2009.

24. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[53]

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

[52] Waiver Request at 5.

[53] 47 C.F.R. § 0.283.