

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

In the Matter of	)	
	)	
Armstrong Utilities, Inc.	)	CSR-7112-Z
Atlantic Broadband Finance, LLC	)	CSR-7110-Z
Bresnan Communications, LLC	)	CSR-7117-Z
Cable & Communications Corporation	)	CSR-7144-Z
and Mid-Rivers Telephone Cooperative, Inc.	)	CSR-7145-Z
Cequel Communications, LLC, d/b/a Suddenlink	)	CSR-7115-Z
Communications	)	
Knology, Inc.	)	CSR-7200-Z
NPG Cable, Inc.	)	CSR-7109-Z
Orange Broadband Operating Company, LLC and	)	CSR-7111-Z
Carolina Broadband, LLC	)	
The World Company d/b/a Sunflower Broadband	)	CSR-7114-Z
	)	
Request for Waiver of Section 76.1204(a)(1) of	)	
the Commission’s Rules	)	
	)	
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: June 29, 2007**

**Released: June 29, 2007**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The above-captioned multichannel video programming distributors (“Petitioners”) have filed with the Chief of the Media Bureau requests for waiver (the “Waiver Requests”) of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission’s rules<sup>1</sup> to allow them to continue to place into service certain integrated digital cable set-top boxes (the “Subject Boxes”) after July 1, 2007. For the reasons stated below, we deny Petitioners’ Waiver Requests, but grant Petitioners leave to amend their requests.

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<sup>1</sup> 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the host device required by this rule is referred to as the “integration ban.”

## 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.<sup>2</sup>

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”).<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”<sup>6</sup> 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.<sup>7</sup>

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”).<sup>8</sup> 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”),<sup>9</sup> 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.<sup>10</sup> Then, in 2005, again at the urging of cable operators,<sup>11</sup> the Commission further

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<sup>2</sup> 47 U.S.C. § 549(a).

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

<sup>4</sup> H.R. REP. NO. 104-204, at 112 (1995).

<sup>5</sup> *Id.*

<sup>6</sup> S. REP. 104-230, at 181 (1996) (Conf. Rep.).

<sup>7</sup> 47 U.S.C. § 549(c).

<sup>8</sup> *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).

<sup>9</sup> For marketing purposes, PODs are referred to as “CableCARDS.”

<sup>10</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003).

extended that date until July 1, 2007.<sup>12</sup> In that decision, the Commission stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”<sup>13</sup>

4. The Media Bureau has acted upon six requests for waiver of Section 76.1204(a)(1) of the Commission’s rules, three on January 10, 2007,<sup>14</sup> and three on May 4, 2007.<sup>15</sup> The Bureau found that waiver was not warranted for any of the parties pursuant to Section 629(c) because none of the parties had demonstrated that waiver was necessary to assist in the development or introduction of a new or improved service.<sup>16</sup> The Bureau also found that devices with two-way functionality did not meet the waiver policy established by the Commission in the *2005 Deferral Order* for low-cost, limited-capability set-top boxes.<sup>17</sup> The Bureau found good cause, however, to conditionally grant Bend Cable Communications d/b/a BendBroadband (“BendBroadband”) a waiver of Section 76.1204(a)(1) of the Commission’s rules.<sup>18</sup>

## B. The Waiver Requests and Comments

### 1. Armstrong Utilities, Inc.

5. Pursuant to Section 629(c) of the Communications Act of 1934, as amended,<sup>19</sup> and Sections 76.7 and 76.1207 of the Commission’s rules,<sup>20</sup> Armstrong Utilities, Inc. (“Armstrong”) seeks waiver of the integration ban to allow it to continue to place into service new integrated digital cable set-top boxes after July 1, 2007.<sup>21</sup> Armstrong seeks relief very similar to what the National Cable and

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(...continued from previous page)

<sup>11</sup> *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).

<sup>12</sup> *Id.* at 6814, ¶ 31.

<sup>13</sup> *Id.*

<sup>14</sup> *See Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”); *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220 (2007) (“*Cablevision Order*”); *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 228 (2007) (“*Comcast Order*”). Collectively, these orders are referred to as the “*January 10 Orders*.”

<sup>15</sup> *See Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2008 (MB rel. May 4, 2007) (“*Charter Order*”); *Millennium Telcom, LLC d/b/a OneSource Communications Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2009 (MB rel. May 4, 2007) (“*OneSource Order*”); *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2010 (MB rel. May 4, 2007) (“*GCI Order*”). Collectively, these orders are referred to as the “*May 4 Orders*.”

<sup>16</sup> *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 11-15; *Cablevision Order*, 224-225, ¶¶ 12-16; *Comcast Order*, 22 FCC Rcd at 235-238, ¶¶ 15-23; *Charter Order* at ¶¶ 13-16; *OneSource Order* at ¶ 13.

<sup>17</sup> *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30; *Charter Order* at ¶ 17; *OneSource Order* at ¶¶ 12-17.

<sup>18</sup> In the *OneSource Order* and the *GCI Order*, the Bureau granted waiver on similar grounds. *See OneSource Order* at ¶¶ 16-18; *GCI Order* at ¶¶ 14-18.

<sup>19</sup> 47 U.S.C. § 549(c).

<sup>20</sup> 47 C.F.R. §§ 76.7, 76.1207.

<sup>21</sup> *See Armstrong Utilities, Inc. Emergency Request for Waiver of 47 C.F.R. § 1204(a)(1) and Request for Clarification* (filed November 6, 2006) (“*Armstrong Waiver Request*”).

Telecommunications Association seeks in its waiver request.<sup>22</sup> Armstrong seeks waiver of the integration ban for the DCT-700 until the earlier of December 31, 2009 or the availability of downloadable security.<sup>23</sup>

6. Armstrong asserts that the Waiver Request is limited in scope to the type of device the Commission identified in the *2005 Deferral Order* (i.e., a low-cost, limited-capability set-top box) and that grant of the Waiver Request would not undermine the goal of a competitive navigation device market.<sup>24</sup> Armstrong claims that grant of the Waiver Request is critical because low-end digital set-top boxes like the DCT-700 could allow it to transition to an all-digital network by the end of 2009.<sup>25</sup> According to Armstrong, absent a waiver, Armstrong will have no alternative but to switch to a more expensive set-top box model and to price its digital services out of the reach of many of its customers.<sup>26</sup> Armstrong argues that grant of the Waiver Request would serve the public interest by rapidly accelerating the digital transition in low-density and rural markets.<sup>27</sup>

7. Two parties filed comments in response to the Waiver Request.<sup>28</sup> The American Cable Association (“ACA”) and Motorola fully support a waiver in this circumstance.<sup>29</sup> ACA echoes Armstrong’s assertion that “enforcing the integration ban against [Armstrong] will raise the price of digital services beyond the reach of Armstrong’s smaller-market and lower-income subscribers.”<sup>30</sup>

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<sup>22</sup> See National Cable & Telecommunications Association’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) at 1 (filed Aug. 16, 2006) (“*NCTA Request for Waiver*”). NCTA seeks waiver for all integrated set-top boxes until the earlier of December 31, 2009 or until all cable operators have deployed downloadable security. *Id.*

<sup>23</sup> Armstrong Waiver Request at 2.

<sup>24</sup> *Id.* at 4-6.

<sup>25</sup> *Id.* at 2-3, 5-7.

<sup>26</sup> *Id.* at 1-3, 7.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> The Consumer Electronics Association (“CEA”) belatedly filed comments and a motion to accept late-filed comments on March 12, 2006, a week after comments were due. See Comments of Consumer Electronics Association on Armstrong Utilities Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, CSR-7112-Z (filed March 12, 2007) (“*CEA Ex Parte in CSR-7112-Z*”); and Motion of the Consumer Electronics Association to Accept Late-Filed Comments and for Extension of Time to File Reply Comments, CS Docket No. 97-80, CSR-7114-Z (filed March 12, 2007) (“*Motion to Accept Late-Filed Comments*”). In response to these filings, Armstrong filed a motion to strike and reply and addressed CEA’s arguments on the merits. See Motion to Strike and Reply of Armstrong Utilities, Inc., CS Docket, No. 97-80, CSR-7112-Z (filed March 21, 2007) (“*Motion to Strike*”). In this order, we deny CEA’s Motion to Accept Late-Filed Comments. We agree with Armstrong that CEA failed to show good cause to accept its late-filed comments. See Motion to Strike at 2-4. CEA claims that “the large number of [similar] filings spread over more than one docket led to a misunderstanding as to the comment dates.” See Motion to Accept Late-Filed Comments at 2. Yet, CEA timely submitted comments on requests for waiver filed by the City of San Bruno and RCN Corporation which were included in the same public notice as Armstrong’s Waiver Request. See Comments of the Consumer Electronics Association on the City of San Bruno Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, CSR 7116-Z (filed March 5, 2007); Comments of the Consumer Electronics Association on RCN Corporation Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, CSR 7113-Z (filed March 5, 2007). We find that CEA has not shown good cause to accept its late-filed comments. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the comments filed by CEA on March 12, 2007 as an *ex parte* presentation. 47 C.F.R. § 1.1206.

<sup>29</sup> ACA Comments in CSR-7112-Z at 3, Motorola Comments in CSR-7112-Z at 1-2.

<sup>30</sup> ACA Comments in CSR-7112-Z at 5.

8. Motorola states that using the DCH-100, Motorola's lowest-cost nonintegrated set-top box, will cost cable operators "substantially more than the DCT-700, even in higher volumes."<sup>31</sup> According to Motorola, the additional cost will be borne by consumers, which threatens to "negatively affect consumer uptake of digital services" and "risk the loss of price-sensitive customers to competitors, including DBS companies."<sup>32</sup>

9. CEA states in an ex parte that it is sympathetic to Armstrong's outlook and its objectives but believes that grant of the Waiver Request would undermine the objective of Congress "to create, at long last, a competitive market for cable navigation devices."<sup>33</sup> CEA also urges the Commission not to exclude refurbished integrated set-top boxes from the integration ban in Section 76.1204(a)(1) of the Commission's rules because such exclusion would "ensure that devices with separable security will remain a poorly supported niche product for many years to come, and further reduce incentives to deploy a truly open and non-integrated downloadable security technology in the near future."<sup>34</sup>

## 2. Atlantic Broadband Finance, LLC

10. Atlantic Broadband Finance, LLC ("Atlantic Broadband") has filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,<sup>35</sup> and Sections 76.7 and 76.1207 of the Commission's rules,<sup>36</sup> for waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission's rules on offering navigation devices that perform both conditional access and other functions with respect to the STBs.<sup>37</sup> Atlantic Broadband asserts that its Waiver Request is limited in scope to the type of device the Commission identified in the *2005 Deferral Order* (i.e., a low-cost, limited-capability set-top box) and that grant of its Waiver Request would not undermine the goal of a competitive navigation device market.<sup>38</sup> Atlantic Broadband claims that grant of its Waiver Request is critical because low-end digital set-top boxes like the STBs will accelerate Atlantic Broadband's move to an all-digital network.<sup>39</sup> According to Atlantic Broadband, without the requested waivers, its digital penetration will be slowed or halted, and the company will be unable to transition to all-digital services until downloadable security and the OpenCable Application Platform ("OCAP") become available.<sup>40</sup> Finally, Atlantic Broadband argues that if the Commission is for some reason reluctant to grant an across-the-board waiver for the STBs, it could alternatively grant limited waivers pursuant to Section 1.3 of the Commission's rules.<sup>41</sup> Atlantic Broadband suggests that these limited waivers would be applicable to small and medium-sized operators only, since these operators serve the price-sensitive low-density and rural areas that will be hit hardest by the application of the integration ban.<sup>42</sup> Atlantic Broadband also

<sup>31</sup> Motorola Comments in CSR-7112-Z at 4.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> CEA ex parte in CSR-7112-Z at 1.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> 47 U.S.C. § 549(c).

<sup>36</sup> 47 C.F.R. §§ 76.7, 76.1207.

<sup>37</sup> See Atlantic Broadband Finance, LLC's Request for Waiver of 47 C.F.R. § 1204(a)(1) (filed December 27, 2006) ("Atlantic Broadband Waiver Request").

<sup>38</sup> *Id.* at 6-8.

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.* at 4-6.

<sup>41</sup> *Id.* at 9 (citing 47 C.F.R. § 1.3).

<sup>42</sup> *Id.*

requests that the Commission clarify that refurbished integrated boxes acquired on the used equipment market are not “new” navigation devices and are therefore not subject to the integration ban in Section 76.1204(a)(1) of the Commission’s rules.<sup>43</sup>

11. Two parties filed comments in response to the Waiver Request.<sup>44</sup> ACA and Motorola fully support a waiver in this circumstance.<sup>45</sup> ACA echoes Atlantic Broadband’s assertion that because of the high cost of nonintegrated, limited feature set-top boxes, Atlantic Broadband “has no economic justification for moving to an all-digital network without a waiver of the integration ban.”<sup>46</sup> Motorola states that using the DCH-100, Motorola’s lowest-cost nonintegrated set-top box, will cost cable operators “substantially more than the DCT-700, even in higher volumes.”<sup>47</sup> According to Motorola, the additional cost will be borne by consumers, which threatens to “negatively affect consumer uptake of digital services” and “risk the loss of price-sensitive customers to competitors, including DBS companies.”<sup>48</sup>

12. In an *ex parte*, CEA states that it is sympathetic to Atlantic Broadband’s outlook and its objectives but believes that grant of the Waiver Request would undermine the objective of Congress “to create, at long last, a competitive market for cable navigation devices.”<sup>49</sup> CEA also asserts that granting the Waiver Request for advanced functionality devices on the basis of the *2005 Deferral Order* would “stretch the definition of a low-cost, limited functionality device beyond any meaningful limit.”<sup>50</sup> CEA also urges the Commission not to exclude refurbished integrated set-top boxes from the integration ban in Section 76.1204(a)(1) of the Commission’s rules because such exclusion would “ensure that devices with separable security will remain a poorly supported niche product for many years to come, and further reduce incentives to deploy a truly open and non-integrated downloadable security technology in the near future.”<sup>51</sup>

### 3. Bresnan Communications, LLC

13. Pursuant to Section 629(c) of the Communications Act of 1934, as amended,<sup>52</sup> and Sections 76.7 and 76.1207 of the Commission’s rules,<sup>53</sup> Bresnan Communications, LLC (“Bresnan”) seeks a limited waiver of the integration ban set forth in Section 76.1204(a)(1) of the Commission’s rules.<sup>54</sup> Specifically, Bresnan seeks a waiver of the integration ban until cable operators’ deployment of downloadable security or December 31, 2009, whichever is earlier. Bresnan asserts that the waiver is

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<sup>43</sup> *Id.*

<sup>44</sup> See discussion *supra* n.28. We find that CEA has not shown good cause to accept its late-filed comments. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the comments filed by CEA on March 12, 2007 as an *ex parte* presentation. 47 C.F.R. § 1.1206.

<sup>45</sup> ACA Comments in CSR-7110-Z at 3, Motorola Comments in CSR-7110-Z at 1-2.

<sup>46</sup> ACA Comments in CSR-7110-Z at 6.

<sup>47</sup> Motorola Comments in CSR-7110-Z at 4.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> CEA *Ex Parte* in CSR-7110-Z at 1.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.*

<sup>52</sup> 47 U.S.C. § 549(c).

<sup>53</sup> 47 C.F.R. §§ 76.7, 76.1207.

<sup>54</sup> See Bresnan Communications, LLC’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (filed December 19, 2006) (“Bresnan Waiver Request”).

especially critical for operators serving small and rural markets “where the cost impact of a CableCARD mandate would be far more severe and where the potential incremental benefit of applying the ban before downloadable security would be negligible.”<sup>55</sup> Bresnan claims that denial of the Waiver Request would force it to reallocate expenditures from investment in upgrading its networks to offer digital services to higher-cost nonintegrated set-top box devices, a move it considers unnecessary in light of the near-term availability of a much cheaper downloadable security alternative.<sup>56</sup> Bresnan further argues that such a reallocation of resources would delay the delivery of wireless broadband and other new and improved services to small-town markets.<sup>57</sup> Additionally, Bresnan notes that failure to grant a waiver, while DBS operators are not subject to the integration ban, violates the Commission’s policy of competitive and technological neutrality.<sup>58</sup> Finally, Bresnan claims that the incremental benefit of imposing the ban on small operators would be minimal, since “the relative trickle of CableCARDS that would be used by small operators such as Bresnan would not have any material effect on nationwide volumes or pricing.”<sup>59</sup>

14. ACA and Motorola support Bresnan’s waiver request, while CEA urges denial.<sup>60</sup> ACA states that absent a waiver Bresnan would be unable to offer digital services to its subscribers in higher-cost, lower income areas or to deploy wireless broadband to its rural subscribers.”<sup>61</sup> ACA also states that a waiver is “necessary to avoid a regulatory distortion favoring DBS operators over their much smaller competitors – cable operators serving smaller and rural markets.”<sup>62</sup> Motorola supports a waiver because “adding cableCARD capabilities significantly increases the cost of the set-top box and that imposing these costs makes no sense when more cost-effective technologically-superior downloadable security solutions are being diligently pursued by the cable industry.”<sup>63</sup>

15. CEA urges the Commission to deny the waiver because Bresnan’s request is not limited to any particular integrated device but for the specific purpose of offering “advanced” features generally.<sup>64</sup> CEA argues that a blanket waiver such as Bresnan seeks is inappropriate because it would undermine Congress’s intent to promote effective competition in navigation devices with advanced features.<sup>65</sup> Finally, CEA refutes Bresnan’s assertion that downloadable security is imminent and argues

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<sup>55</sup> Bresnan Waiver Request at 1, 2-9. Bresnan operates cable systems passing approximately 600,000 homes in approximately 200 communities in Montana, Wyoming, Utah, and Colorado. Waiver Request at 3-4.

<sup>56</sup> *Id.* at 7. Bresnan notes, for instance, that without a waiver it will be unable to construct a hub for a fiber optic network needed to offer new HD, VOD, and other digital services to its southern region and to offer service reliability throughout its four-state region. *Id.* at 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 10-11. For instance, in support of its claim that granting the waiver will have a limited impact on consumers, Bresnan states that, “Not one person in Buffalo [Wyoming] has ever asked Bresnan to supply a CableCARD.” Reply Comments at 2.

<sup>60</sup> ACA Comments in CSR-7117-Z at 3, Motorola Comments in CSR-7117-Z at 1-2, CEA Comments in CSR-7117-Z at 1.

<sup>61</sup> ACA Comments in CSR-7117-Z at 6-7.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *Id.* at 1-2, n.2.

<sup>64</sup> CEA Comments in CSR-7117-Z at 1.

<sup>65</sup> *Id.* at 1-2 (citing *Memorandum Opinion and Order, Denying Comcast’s Petition for Waiver, CSR-7912-Z, CS Docket No. 97-80 (Jan. 10, 2007)* at 12 ¶ 26; *NPG Cable, Inc. Petition for Waiver, CSR-7109-Z, CS Docket No. 97-80 (Feb. 22, 2007)* at 6-7).

that this should not serve as a basis for granting a waiver.<sup>66</sup>

#### **4. Cable & Communications Corporation and Mid-Rivers Telephone Cooperative, Inc.**

16. Cable & Communications Corporation and its parent, Mid-Rivers Telephone Cooperative, Inc. (collectively, “C&CC”) have filed a request pursuant to Sections 629(a) and 629(c) of the Communications Act of 1934, as amended,<sup>67</sup> and Sections 1.3 76.7 and 76.1207 of the Commission’s rules,<sup>68</sup> for an eighteen month waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission’s rules on offering navigation devices that perform both conditional access and other functions with respect to the following integrated Motorola set-top boxes: DSR 470, DCT 6412/6416, DCT 2000, and DCT 2500.<sup>69</sup>

17. C&CC claims that grant of the Waiver Request is critical given the rural, economically disadvantaged area it serves. C&CC asserts that waiver will “allow it to conserve the capital necessary to complete the digital conversion of its system, and at the same time position itself to take advantage of the more economical solutions which may arise to effect the separation of set-top box security and navigation functions.”<sup>70</sup> C&CC claims that non-integrated navigation devices currently on the market are more expensive than integrated devices and that its customers cannot afford the higher-priced alternative. C&CC argues that the public policy advanced by the integration ban is not served by applying the ban to C&CC’s market.<sup>71</sup>

18. Two parties filed comments in response to C&CC’s Waiver Request. Motorola strongly supports grant of the request, echoing C&CC’s argument that denial of the Waiver Request will slow C&CC’s digital transition and impose greater costs on both C&CC and its subscribers.<sup>72</sup> CEA opposes waiver and argues that further delay of the implementation of the integration ban will have no effect other than to “continue to foreclose a local market for [non-integrated navigation devices],” thereby subjecting C&CC’s customers to being “locked into leasing devices from the operator[], while customers of larger operators reap the benefits of device innovation and competition, as fostered by separable security and common reliance.”<sup>73</sup> In its reply, C&CC reiterates its contention that “[g]rant of this limited waiver will enable C&CC to direct its resources toward digital transition, while maintaining the capability of providing economic cable service in a depressed community.”<sup>74</sup>

#### **5. Cequel Communications, LLC, d/b/a Suddenlink Communications**

19. Cequel Communications, LLC, d/b/a Suddenlink Communications (“Suddenlink”) seeks waiver of the integration ban to allow it to continue to place into service the following set-top box

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<sup>66</sup> *Id.* at 2.

<sup>67</sup> 47 U.S.C. §§ 549(a), 549(c).

<sup>68</sup> 47 C.F.R. §§ 1.3, 76.7, 76.1207.

<sup>69</sup> See Cable & Communications Corporation and its parent, Mid-Rivers Telephone Cooperative, Inc. Request for Waiver of 47 C.F.R. § 1204(a)(1) and Request for Clarification (filed March 12, 2007) (“C&CC Waiver Request”).

<sup>70</sup> C&CC Waiver Request at 5.

<sup>71</sup> *Id.* at 6-7.

<sup>72</sup> Motorola Comments in CSR-7144-Z and CSR-7145-Z at 7.

<sup>73</sup> CEA Comments in CSR-7144-Z and CSR-7145-Z at 3.

<sup>74</sup> C&CC Reply at 2.



models: the Motorola DCT-700 and DCT-2500e; Scientific Atlanta E1840, E940, and E3200; and the Pace “Chicago” DC501p and “Indiana” DC511p (collectively, “Suddenlink Boxes”).<sup>75</sup> Suddenlink asserts that denial of the Waiver Request would delay the delivery of digital services to hundreds of thousands of consumers, especially in smaller and rural markets.<sup>76</sup> Suddenlink argues that in order to make the investments necessary to bring digital services to smaller and rural markets, it cannot afford to have significant operational resources bled by a requirement to use more expensive set-top boxes, especially when the more expensive devices might be superseded shortly thereafter by the arrival of cheaper downloadable security solutions.<sup>77</sup>

20. Suddenlink claims that grant of the Waiver Request is critical because low-end digital set-top boxes like the Suddenlink Boxes are essential to Suddenlink’s digital transition.<sup>78</sup> According to Suddenlink, the Suddenlink Boxes have such limited functionality that they attract the most price-sensitive consumers who would otherwise opt for direct broadcast satellite services or no digital services at all.<sup>79</sup>

21. Suddenlink also asserts that none of its existing set-top suppliers has offered any binding commitments to deliver any type of CableCARD devices to Suddenlink in time for a July 2007 deployment.<sup>80</sup> Suddenlink argues that the application of the integrated device ban in a manner that would effectively prohibit Suddenlink from offering any low-cost navigation devices violates the Section 629(a) restriction against regulations that prohibit multichannel video programming distributors from also offering navigation devices.<sup>81</sup> Finally, Suddenlink suggests that at a minimum, the Waiver Request should be granted until either the end of 2009 or until downloadable security can be deployed, to spare consumers the cost of implementing the integration ban through a soon-to-be antiquated CableCARD solution in favor of a cheaper and technologically advanced downloadable security solution.<sup>82</sup>

22. One party filed comments in response to the Waiver Request.<sup>83</sup> Motorola fully supports a waiver in this circumstance.<sup>84</sup> Motorola states that using the DCH-100, Motorola’s lowest-cost nonintegrated set-top box, will cost cable operators “substantially more than the DCT-700, even in higher volumes.”<sup>85</sup> According to Motorola, the additional cost will be borne by consumers, which threatens to “negatively affect consumer uptake of digital services” and “risk the loss of price-sensitive customers to

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<sup>75</sup> See Cequel Communications, LLC d/b/a Suddenlink Communications Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (filed December 5, 2006) (“Suddenlink Waiver Request”).

<sup>76</sup> *Id.* at 4-12.

<sup>77</sup> *Id.* at 5-6.

<sup>78</sup> *Id.* at 6-12.

<sup>79</sup> *Id.* at 7-10.

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.* at 12-15.

<sup>82</sup> *Id.* at 15-16.

<sup>83</sup> See discussion *supra* n.28. We find that CEA has not shown good cause to accept its late-filed comments. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the comments filed by CEA on March 12, 2007 as an *ex parte* presentation. 47 C.F.R. § 1.1206.

<sup>84</sup> Motorola Comments in CSR-7115-Z at 1-2.

<sup>85</sup> *Id.* at 4.

competitors, including DBS companies.”<sup>86</sup>

23. In an *ex parte*, CEA states that it is sympathetic to Suddenlink’s outlook and its objectives but believes that grant of the Waiver Request would undermine the objective of Congress “to create, at long last, a competitive market for cable navigation devices.”<sup>87</sup> In reply,<sup>88</sup> Suddenlink argues that CEA failed to address many things, including the specific consumer benefits that would come with a waiver, the lack of consumer benefits that would come with application of the integration ban, and Suddenlink’s showing that application of the integration ban in a manner that would eliminate its ability to offer low-cost devices would violate Congress’ restriction against “regulations [that] prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access” MVPD programming to consumers.<sup>89</sup>

## 6. Knology, Inc.

24. Knology, Inc. (“Knology”) seeks waiver of the integration ban to allow it to continue to place into service integrated digital cable set-top boxes after July 1, 2007.<sup>90</sup> Knology states that it is placing orders for compliant set-top boxes, but doesn’t believe that the boxes will be delivered in time to meet the July 1 deadline.<sup>91</sup> Therefore Knology is requesting a waiver so that it may continue to deploy non-compliant boxes until they have received a sufficient supply of compliant boxes to commence deployment.<sup>92</sup> As justification for its waiver, Knology cites the *BendBroadband Order* in which we stated that we would allow a deferral of enforcement as long the company can demonstrate that it has placed an order for compliant set-top boxes, but that the boxes won’t be ready in time for compliance with the July 1 deadline.<sup>93</sup>

25. In addition, Knology is requesting a waiver of the integration ban once its supply of these ordered compliant boxes has run out,<sup>94</sup> at which point it would like to continue to deploy non-compliant boxes pending delivery of a set-top box that includes a downloadable security solution.<sup>95</sup> In support of this, Knology argues that the Commission has previously granted competitive providers exemptions to the integration ban, and that a waiver in this case would serve to promote competition.<sup>96</sup> Knology also asserts

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<sup>86</sup> *Id.* at 5.

<sup>87</sup> CEA *Ex Parte* in CSR-7115-Z at 1.

<sup>88</sup> Suddenlink belatedly filed a reply and a motion for an extension of time on March 21, 2007, six days after reply comments were due. *See* Motion for an Extension of Time of Cequel Communications, LLC, d/b/a Suddenlink Communications, CS Docket, No. 97-80, CSR-7115-Z (filed March 21, 2007) (Motion for Extension of Time). In this order we deny Suddenlink’s Motion for Extension of Time as we find that it has not shown good cause to accept its late-filed reply comments. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the reply comments filed by Suddenlink on March 21, 2007 as an *ex parte* presentation (“Suddenlink *Ex Parte* in CSR-7115-Z”). 47 C.F.R. § 1.1206.

<sup>89</sup> Suddenlink *Ex Parte* in CSR-7115-Z at 3-4.

<sup>90</sup> Knology, Inc. Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (filed April 2, 2007) (“Knology Waiver Request”).

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.* at 1-2.

<sup>93</sup> *Id.* at 6; *see BendBroadband Order*, 22 FCC Rcd at 215, ¶ 20.

<sup>94</sup> Knology Waiver Request at 3.

<sup>95</sup> *Id.* at 3-4.

<sup>96</sup> *Id.* at 4-7.

that the CableCARD solution is “fast becoming obsolete, in favor of lower cost, higher functionality [set-top boxes] that make use of a downloadable security solution.”<sup>97</sup> As such, over the long term Knology would like to completely transition to downloadable security devices.<sup>98</sup> Knology argues that “[f]orcing it to continue to purchase Cablecard devices into the future, when a downloadable security box may be available as soon as 2009, is forcing it to make unnecessary duplicative investment, which as a competitive operator, it cannot recoup, forcing it to divert funds from investment in its plant and services.”<sup>99</sup>

26. CEA was the only party to file a comment in response to the Waiver Request. CEA believes that a grant of the waiver is not justified because it doesn’t feel that Knology’s status as an overbuilder provides sufficient grounds for a waiver.<sup>100</sup> Further, in terms of Knology’s request for a waiver before they are able to purchase a downloadable security solution, CEA states that “[n]o such system, from CableLabs or anyone else, is sufficiently on the horizon and open to public comment to be a definitive basis of FCC action in a public-comment proceeding.”<sup>101</sup> CEA goes on to state that even if such a system were judged to be compliant, “most or all competitive devices at that time will still be reliant on CableCARDS.”<sup>102</sup>

## 7. NPG Cable, Inc.

27. NPG Cable, Inc. (“NPG Cable”) has filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,<sup>103</sup> and Sections 76.7 and 76.1207 of the Commission’s rules,<sup>104</sup> for waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission’s rules on offering navigation devices that perform both conditional access and other functions with respect to the Motorola DCT-700 set-top box.<sup>105</sup>

28. NPG Cable asserts that its Waiver Request is limited in scope to the type of device the Commission identified in the *2005 Deferral Order* (i.e., a low-cost, limited-capability set-top box) and that grant of the Waiver Request would not undermine the goal of a competitive navigation device market.<sup>106</sup> NPG Cable claims that grant of the Waiver Request is critical because low-end digital set-top boxes like the DCT-700 will accelerate NPG Cable’s digital transition.<sup>107</sup> According to NPG Cable, the DCT-700 is so basic and limited in its functionality that it attracts the most price-sensitive consumers who would otherwise opt for no digital services at all were this model unavailable.<sup>108</sup>

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<sup>97</sup> *Id.* at 3-4

<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Id.*

<sup>100</sup> CEA Comments in CSR-7200-Z at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.* at 3-4.

<sup>103</sup> 47 U.S.C. § 549(c).

<sup>104</sup> 47 C.F.R. §§ 76.7, 76.1207.

<sup>105</sup> See NPG Cable, Inc. Request for Waiver of 47 C.F.R. § 1204(a)(1) and Request for Clarification (filed December 14, 2006) (“NPG Waiver Request”).

<sup>106</sup> NPG Waiver Request at 4-7.

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 6-7.

29. Finally, NPG Cable argues that if the Commission is for some reason reluctant to grant a broad waiver for the DCT-700, it could alternatively grant a limited waiver pursuant to Section 1.3 of the Commission's rules.<sup>109</sup> NPG Cable suggests that this limited waiver would be applicable to small and medium-sized operators only, since these operators serve the price-sensitive low-density and rural areas that will be hit hardest by the application of the integration ban.<sup>110</sup> NPG Cable also requests that the Commission clarify that refurbished integrated boxes acquired on the used equipment market are not "new" navigation devices and are therefore not subject to the integration ban in Section 76.1204(a)(1) of the Commission's rules.<sup>111</sup>

30. Three parties filed comments in response to the Waiver Request. ACA and Motorola fully support a waiver in this circumstance.<sup>112</sup> ACA echoes NPG Cable's assertion that it suffers from a "very low digital penetration rate" as a result of its "significant percentage of low-income subscribers."<sup>113</sup> ACA also supports NPG Cable's assertion that denial of the Waiver Request "will impede the company's already-slow digital transition."<sup>114</sup>

31. Motorola states that using the DCH-100, Motorola's lowest-cost nonintegrated set-top box, will cost cable operators "substantially more than the DCT-700, even in higher volumes."<sup>115</sup> According to Motorola, the additional cost will be borne by consumers, which threatens to "negatively affect consumer uptake of digital services" and "risk the loss of price-sensitive customers to competitors, including DBS companies."<sup>116</sup>

32. CEA states that it is sympathetic to NPG Cable's outlook and its objectives but believes that grant of the Waiver Request would undermine the objective of Congress "to create, at long last, a competitive market for cable navigation devices."<sup>117</sup> CEA also urges the Commission not to exclude refurbished integrated set-top boxes from the integration ban in Section 76.1204(a)(1) of the Commission's rules because such exclusion would "ensure that devices with separable security will remain a poorly supported niche product for many years to come, and further reduce incentives to deploy a truly open and non-integrated downloadable security technology in the near future."<sup>118</sup>

## **8. Orange Broadband Operating Company, LLC and Carolina Broadband, LLC**

33. Orange Broadband Operating Company, LLC and Carolina Broadband, LLC (collectively, "Orange Broadband") have filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,<sup>119</sup> and Sections 76.7 and 76.1207 of the Commission's

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<sup>109</sup> *Id.* at 7 (citing 47 C.F.R. § 1.3).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 8.

<sup>112</sup> ACA Comments in CSR-7109-Z at 3, Motorola Comments in CSR-7109-Z at 1-2.

<sup>113</sup> ACA Comments in CSR-7109-Z at 9.

<sup>114</sup> *Id.*

<sup>115</sup> Motorola Comments in CSR-7109-Z at 4.

<sup>116</sup> *Id.* at 5.

<sup>117</sup> CEA Comments in CSR-7109-Z at 1.

<sup>118</sup> *Id.* at 1-2.

<sup>119</sup> 47 U.S.C. § 549(c).

rules,<sup>120</sup> for waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission's rules on offering navigation devices that perform both conditional access and other functions.<sup>121</sup> Orange Broadband asserts that its Waiver Request is limited in scope to the type of device the Commission identified in the *2005 Deferral Order* (i.e., a low-cost, limited-capability set-top box) and that grant of its Waiver Request would not undermine the goal of a competitive navigation device market.<sup>122</sup> Orange Broadband claims that grant of the Waiver Request is critical because low-end digital set-top boxes will accelerate Orange Broadband's move to an all-digital network.<sup>123</sup> Finally, Orange Broadband argues that if the Commission is for some reason reluctant to grant an across-the-board waiver for the STBs, it could alternatively grant limited waivers pursuant to Section 1.3 of the Commission's rules.<sup>124</sup> Orange Broadband suggests that these limited waivers would be applicable to small and medium-sized operators only, since these operators serve the price-sensitive low-density and rural areas that will be hit hardest by the application of the integration ban.<sup>125</sup> Orange Broadband also requests that the Commission clarify that refurbished integrated boxes acquired on the used equipment market are not "new" navigation devices and are therefore not subject to the integration ban in Section 76.1204(a)(1) of the Commission's rules.<sup>126</sup>

34. Two parties filed comments in response to the Waiver Request.<sup>127</sup> ACA and Motorola fully support a waiver in this circumstance.<sup>128</sup> ACA echoes Orange Broadband's assertion that "If required to deploy non-integrated boxes, Orange Broadband does not believe that it will be able to transition to an all-digital network."<sup>129</sup> Motorola states that using the DCH-100, Motorola's lowest-cost nonintegrated set-top box, will cost cable operators "substantially more than the DCT-700, even in higher volumes."<sup>130</sup> According to Motorola, the additional cost will be borne by consumers, which threatens to "negatively affect consumer uptake of digital services" and "risk the loss of price-sensitive customers to competitors, including DBS companies."<sup>131</sup>

35. In an *ex parte*, CEA states that it is sympathetic to Orange Broadband's outlook and its objectives but believes that grant of the Waiver Request would undermine the objective of Congress "to create, at long last, a competitive market for cable navigation devices."<sup>132</sup> CEA also asserts that granting

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<sup>120</sup> 47 C.F.R. §§ 76.7, 76.1207.

<sup>121</sup> See Orange Broadband Operating Company, LLC and Carolina Broadband, LLC Request for Waiver of 47 C.F.R. § 1204(a)(1) and Request for Clarification (filed December 27, 2006) ("Orange Broadband Waiver Request").

<sup>122</sup> *Id.* at 4-7.

<sup>123</sup> *Id.* at 6.

<sup>124</sup> *Id.* at 7 (citing 47 C.F.R. § 1.3).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 7-8.

<sup>127</sup> See discussion *supra* n.28. We find that CEA has not shown good cause to accept its late-filed comments. Thus, pursuant to Section 1.1206 of the Commission's rules, we will treat the comments filed by CEA on March 12, 2007 as an *ex parte* presentation. 47 C.F.R. § 1.1206.

<sup>128</sup> ACA Comments in CSR-7111-Z at 3, Motorola Comments in CSR-7111-Z at 1-2.

<sup>129</sup> ACA Comments in CSR-7111-Z at 10.

<sup>130</sup> Motorola Comments in CSR-7111-Z at 4.

<sup>131</sup> *Id.* at 5.

<sup>132</sup> CEA *Ex Parte* in CSR-7111-Z at 1.

the Waiver Request for advanced functionality devices on the basis of the *2005 Deferral Order* would “stretch the definition of a low-cost, limited functionality device beyond any meaningful limit.”<sup>133</sup> CEA also urges the Commission not to exclude refurbished integrated set-top boxes from the integration ban in Section 76.1204(a)(1) of the Commission’s rules because such exclusion would “ensure that devices with separable security will remain a poorly supported niche product for many years to come, and further reduce incentives to deploy a truly open and non-integrated downloadable security technology in the near future.”<sup>134</sup>

## 9. The World Company d/b/a Sunflower Broadband

36. The World Company d/b/a Sunflower Broadband (“Sunflower Broadband”) filed its original request for waiver (the “Original Waiver Request”) on November 20, 2006. On February 22, 2007, Sunflower Broadband filed a supplement to its original request for waiver (the “Supplement to Original Waiver Request”). Collectively, we refer to these two submissions as the “Sunflower Waiver Request.”

37. In the Original Waiver Request, Sunflower Broadband seeks waiver of the integration ban to allow it to continue to place into service new Motorola DCT-700 integrated digital cable set-top boxes after July 1, 2007. Sunflower Broadband argues that granting its request would benefit consumers and speed the digital transition in the smaller markets that it serves.<sup>135</sup> Sunflower Broadband also asserts that the DCT-700 has allowed it to more than double its number of digital access subscribers.<sup>136</sup> In addition, Sunflower Broadband argues that the DCT-700 is a “low-cost, limited capability” set-top box like that referred to in the *2005 Deferral Order*.<sup>137</sup> It states that the DCT-700 cannot be used to output high-definition (“HD”) signals, store recorded programs, tune multiple channels simultaneously, or access the Internet.<sup>138</sup> Sunflower Broadband claims that the DCT-700 is so basic that “it does not even include an on/off switch, a clock or display.”<sup>139</sup> According to Sunflower Broadband, however, the DCT-700’s features do include an electronic programming guide (“EPG”), video-on-demand (“VOD”), pay-per-view (“PPV”) services, and other limited interactive television (“ITV”) capabilities.<sup>140</sup> In addition, it is our understanding that the DCT-700 supports the use of switched digital capabilities.

38. In the Original Waiver Request, Sunflower Broadband also requests that the Commission clarify that refurbished integrated boxes acquired on the used equipment market are not “new” navigation devices and are therefore not subject to the integration ban in Section 76.1204(a)(1).<sup>141</sup> Sunflower

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<sup>133</sup> *Id.* at 2.

<sup>134</sup> *Id.* at 2-3.

<sup>135</sup> Original Waiver Request at 1.

<sup>136</sup> *Id.*

<sup>137</sup> Original Waiver Request at 5 (citing *2005 Deferral Order*, 20 FCC Rcd at 6813-14, ¶ 37).

<sup>138</sup> *Id.* at 5-6.

<sup>139</sup> *Id.* at 6 (emphasis omitted).

<sup>140</sup> *Id.* at Exhibit 1.

<sup>141</sup> *Id.* at 2. Specifically, Sunflower Broadband asks that “the Commission clarify that cable operators may still deploy after July 1, 2007 refurbished integrated boxes purchased on the used equipment market.” *Id.*

Broadband argues that “[t]hese refurbished boxes have ‘already been manufactured and deployed’ and still have a ‘useful life.’”<sup>142</sup>

39. On February 22, 2007, Sunflower Broadband supplemented its Original Waiver Request in light of the Bureau’s decision to conditionally grant a waiver to BendBroadband. In the Supplement to Original Waiver Request, Sunflower Broadband commits to “transition all its services to digital by December 31, 2008,” if the Sunflower Waiver Request is granted, but “also plans to offer limited analog simulcast services consisting primarily of broadcast stations.”<sup>143</sup> Specifically, in light of the conditions set forth in the *BendBroadband Order*, Sunflower Broadband commits to (1) transition all its services to digital by December 31, 2008 (with limited analog simulcast services consisting primarily of broadcast stations); (2) notify its customers of its plans to transition to digital at least six months in advance of the transition; and (3) ensure that at least six months prior to migrating to digital services, “it has an inventory or has placed order for enough set-top boxes to ensure that each of its customers can continue to view its video programming on analog television sets.”<sup>144</sup>

40. Two parties filed comments in response to the Waiver Request.<sup>145</sup> ACA and Motorola strongly support the grant of a waiver in this circumstance.<sup>146</sup> ACA argues that denying the requested waiver “will prevent the deployment of digital services to lower-income and rural and smaller-market consumers, and will halt the digital transition in many of [Sunflower Broadband’s] markets.”<sup>147</sup> ACA posits that low-cost integrated set-top boxes are the key for operators in smaller and rural markets to transition to all-digital networks.<sup>148</sup> Finally, ACA states that “consumers who gain access to digital services through the DCT-700 are not the target market for more expensive, non-integrated boxes.”<sup>149</sup> Motorola states that failure to grant the Waiver Request will eliminate low-cost, highly valued box options for cable operators and their customers.<sup>150</sup>

41. In an *ex parte*, CEA opposes the Waiver Request, arguing that “further postponement of common reliance on separable security devices will undermine Congress’s basic intention of creating, at long last, a true competitive market for navigation devices.”<sup>151</sup> CEA also asserts that a plan to reduce analog service cannot be considered a commitment to transition to an all-digital network, nor can it be considered a “new or improved” service.<sup>152</sup>

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<sup>142</sup> *Id.* at 7-8 (citing *Implementation of Section 30 of the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd. 7596 (1999) at ¶ 35 (*Order on Reconsideration*)).

<sup>143</sup> Supplement to Original Waiver Request at 3-4.

<sup>144</sup> Original Waiver Request at 3-5.

*See* discussion *supra* n.28. We find that CEA has not shown good cause to accept its late-filed comments. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the comments filed by CEA on March 12, 2007 as an *ex parte* presentation. 47 C.F.R. § 1.1206.

<sup>146</sup> ACA Comments in CSR-7114-Z at 3, Motorola Comments in CSR-7114-Z at 1-2.

<sup>147</sup> ACA Comments in CSR-7114-Z at 12.

<sup>148</sup> *Id.* at 4.

<sup>149</sup> *Id.* at 5.

<sup>150</sup> Motorola Comments in CSR-7114-Z at 4.

<sup>151</sup> CEA *Ex Parte* in CSR-7114-Z at 1.

<sup>152</sup> CEA Comments in CSR-7113-Z at 5 (incorporated by reference in CEA *Ex Parte* in CSR-7114-Z).

### III. DISCUSSION

42. Petitioners make their requests pursuant to the general waiver provision of Section 76.7 of the Commission's rules,<sup>153</sup> Section 76.1207 of the Commission's rules, and Section 629(c) of the Telecommunications Act of 1996.<sup>154</sup> In addition, because some Petitioners characterize some of the devices for which they seek waiver as "low-cost" devices, we will evaluate those requests under the waiver policy announced in the *2005 Deferral Order* as well.<sup>155</sup> As discussed below, and consistent with the reasons previously set forth in the *January 10 Orders*, we find that the requests do not justify the grant of waivers under any of these standards. We therefore deny Petitioners' requests. Some Petitioners have also asked us to clarify that refurbished integrated set-top boxes purchased on the used equipment market are not "new" navigation devices and therefore may be deployed after the integration ban goes into effect.<sup>156</sup> That request is also denied and discussed below.

#### A. Section 629(c) of the Act

43. Section 629(c) 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.<sup>157</sup>

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.

44. In the Waiver Requests, Petitioners argue that grant of the Waiver Request will allow them to upgrade their systems and would be a key step in the migration to an all-digital platform.<sup>158</sup> However, as we stated in the *January 10 Orders* and the *May 4 Orders*, we do not find that such arguments generally justify a waiver under Section 629(c) of the Act.<sup>159</sup>

45. Also, many of the Petitioners indicated in their individual Waiver Requests that they already offer digital services to a high percentage of their customers, or at least that that number has seen considerable improvements.<sup>160</sup> Thus, these services already are utilized by many of Petitioners' cable subscribers and the waiver could hardly be "necessary" for the "development or introduction" of these services, as they already exist.

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<sup>153</sup> See, e.g., Armstrong Waiver Request at 1; Sunflower Broadband Waiver Request at 1.

<sup>154</sup> See, e.g., Suddenlink Waiver Request at 1. 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.

<sup>155</sup> *2005 Deferral Order*, 20 FCC Rcd at 6813-6814, ¶ 37.

<sup>156</sup> See, e.g., Atlantic Broadband Waiver Request at 9; Orange Broadband Waiver Request at 7.

<sup>157</sup> 47 U.S.C. § 549(c).

<sup>158</sup> See, e.g., Orange Broadband Waiver Request at 6; Armstrong Waiver Request at 2.

<sup>159</sup> See *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 13-14 (denying BendBroadband's argument that waiver was necessary to assist the development or introduction of HD and VOD, wireless, business services, and more robust broadband, and citing Congressional intent for a narrow reading of the waiver provisions of Section 629(c)), *Comcast Order*, 22 FCC Rcd at 235-237, ¶¶ 16-19; *Charter Order* at ¶¶ 13-16; *OneSource Order* at ¶ 13.

<sup>160</sup> See, e.g., Sunflower Original Waiver Request at 2; Orange Broadband Waiver Request at 2.



46. 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, as we stated in the *BendBroadband Order*, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).<sup>161</sup>

## **B. The 2005 Deferral Order**

### **1. The Low-Cost, Limited-Capability Policy**

47. Because most Petitioners characterize their Waiver Requests as requests for “low-cost” and “limited capability” devices,<sup>162</sup> we evaluate the Waiver Requests under the waiver policy established in the Commission’s *2005 Deferral Order*, as well.

48. We conclude that the Subject Boxes do not meet the limited-capability standard announced in the *2005 Deferral Order*. As we explained in the *January 10 Orders* and the *May 4 Orders*,<sup>163</sup> the Commission never contemplated that “limited capability integrated digital cable boxes” would include devices with two-way functionality. Rather, this category of boxes is confined to those devices whose functionality is limited to making digital cable signals available on analog sets.<sup>164</sup> In explaining why it would entertain requests for waiver of the integration ban, the Commission emphasized that “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.”<sup>165</sup> In other words, the low-cost, limited-capability waiver standard that the Commission created in the *2005 Deferral Order* is, first and foremost, a narrow one.<sup>166</sup>

49. Moreover, the Commission remained aware of the goal to develop a competitive marketplace for navigation devices. Accordingly, the Commission stated that waiver requests would not be warranted “for boxes that contain personal video recording (‘PVR’), high-definition, broadband Internet access, multiple tuner, or *other similar advanced capabilities*.”<sup>167</sup> This list of capabilities was not intended to be exhaustive, as demonstrated by the inclusion of the phrase “other similar advanced

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<sup>161</sup> *BendBroadband Order* at 214, ¶ 14.

<sup>162</sup> See, e.g., Suddenlink Waiver Request at 11-12; Orange Broadband Waiver Request at 5.

<sup>163</sup> See *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶ 17; *Comcast Order*, 22 FCC Rcd at 239, ¶ 26; *Charter Order* at ¶ 17; *OneSource Order* at ¶¶ 12-17.

<sup>164</sup> In fact, several years ago Pace Micro developed precisely this type of device. The “Digital Cable Adapter” was a unidirectional “set-back” device that would have decoded digital signals for use with analog televisions and VCRs without any advanced features. See Press Release, Pace Micro, *Pace Unveils the World’s First Digital Cable Adapter* (June 9, 2003). This device, which was exhibited at the 2003 NCTA National Show in Chicago, would have cost about \$69 – but ultimately was never mass produced due to a lack of interest from cable operators. See Jeff Baumgartner, *New MSO-backed JV Proposes Sub-\$100 Set-Top with Downloadable Security*, CED BROADBAND DIRECT, Dec. 22, 2003, available at <http://www.cedmagazine.com/toc-bbdirect/2006/20061222.html>.

<sup>165</sup> *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37. Similarly, the Commission discussed how low-cost, limited-capability set-top boxes could facilitate the migration of cable systems to all-digital networks. See *id.* Advanced capabilities are not necessary to accomplish that goal, either; all that is required is a set-top box that can make digital cable programming viewable on an analog television set.

<sup>166</sup> See *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶ 17; *Comcast Order*, 22 FCC Rcd at 239, ¶ 26.

<sup>167</sup> *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37 (emphasis added).

capabilities.”<sup>168</sup> Throughout the navigation device and plug and play negotiations, all parties have understood the term “advanced” to include two-way capability. Indeed, an entire section of the Memorandum of Understanding signed by major cable and consumer electronics manufacturers – which helped to shape the Commission’s understanding of the topic during the unidirectional plug-and-play rulemaking proceeding<sup>169</sup> – deals exclusively with defining two-way products as “advanced.”<sup>170</sup>

50. In addition, in other pleadings before the Commission, the cable industry has advocated that these two-way, interactive features be classified as “advanced” capabilities. Specifically, the cable industry recommended that the Commission include in its regulations a requirement that non-interactive consumer electronics equipment contain a warning that “Certain advanced and interactive digital cable services such as video-on-demand, a cable operator’s enhanced program guide and data-enhanced television services may require the use of a set-top box.”<sup>171</sup> The Subject Boxes contain precisely these advanced functions, as well as PPV capabilities. Accordingly, we conclude that the Subject Boxes do not constitute “limited capability” devices under the *2005 Deferral Order* waiver policy.

51. In the *2005 Deferral Order*, the Commission set forth the circumstances in which it would consider waiving the integration ban for low-cost, limited capability boxes. Specifically, the Commission stated that, “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.”<sup>172</sup> Here, while Petitioners indicate that grant of the Waiver Requests would allow them to move to an all-digital network,<sup>173</sup> the boxes for which they seek waivers are not “limited capability” set-top boxes. Therefore, we cannot grant waivers of the integration ban under the *2005 Deferral Order* waiver standard. We wish to emphasize, though, that we continue to believe that “[i]t is critical to the DTV transition that consumers have access to”<sup>174</sup> limited-capability set-top boxes, and therefore will entertain and grant future requests that satisfy the criteria set forth in the *2005 Deferral Order*.

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<sup>168</sup> Although the Motorola DCT-700 does not contain any of the listed capabilities, it does enable subscribers to access EPGs, PPV services, VOD and interactive television. In addition, it is our understanding that the DCT-700 supports the use of switched digital capabilities.

<sup>169</sup> See generally *Implementation of Section 304 of the Telecommunications Act of 1999: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 518 (2003) (seeking comment on the Memorandum of Understanding and the rules proposed therein).

<sup>170</sup> Letter from Carl E. Vogel, President and Chief Executive Officer, Charter Communications, et al. to The Honorable Michael K. Powell, Chairman, Federal Communications Commission, *attaching* Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers at 10 (Dec. 19, 2002). The section includes a discussion of EPGs: “Cable operators’ EPG will be provided for advanced interactive digital cable products via OCAP or its successor technology.” *Id.*

<sup>171</sup> NCTA Reply Comments, CS Docket No. 97-80, PP Docket No. 00-67 at Appendix 1, page 7 (filed April 28, 2003). See also National Cable & Telecommunications Association’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) at 14 (filed Aug. 16, 2006) (“NCTA Waiver Request” (describing VOD and EPGs as “advanced services”).

<sup>172</sup> *Id.* at 6813, ¶ 37.

<sup>173</sup> See, e.g., Orange Broadband Waiver Request at 6; Armstrong Waiver Request at 2.

<sup>174</sup> See *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

## 2. The Availability of Downloadable Security

52. We recognized in the *2005 Deferral Order* that a software-based security system can significantly reduce costs compared to physical separation of security.<sup>175</sup> Armstrong and Bresnan seek waivers until the earlier of (i) December 31, 2009 or (ii) the availability of a downloadable conditional access solution.<sup>176</sup> Based on past experience, however, we are not convinced that cable operators in fact will deploy a downloadable conditional access system (“DCAS”) within that specified timeframe. Indeed, in November 2005, the National Cable and Telecommunications Association (“NCTA”) represented that expected national deployment of DCAS at that point was approximately two-and-a-half years away, but Armstrong’s Waiver Request (as well as NCTA’s August 2006 waiver request), represented that expected nationwide deployment at that point was more than three years away.<sup>177</sup> Needless to say, this is not a record that can give us any confidence that DCAS will be deployed within NCTA’s current timeline. Moreover, while Armstrong’s and NCTA’s Waiver Requests imply that DCAS could take longer than three years to deploy,<sup>178</sup> we have evidence on the record that another downloadable security solution will be ready to be deployed by the end of this year. As we noted in a January 10, 2007, *Public Notice*,<sup>179</sup> Beyond Broadband Technology (BBT) has developed a downloadable security system that will be available “on an ‘open standard’ basis (similar to DOCSIS modems) to all consumer electronics and set-top box manufacturers.”<sup>180</sup>

53. We continue to believe that “devices utilizing downloadable security [are] likely to facilitate a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition.”<sup>181</sup> We do not believe, however, that cable operators should be able to shield itself from the clear directives in the Commission’s rules implementing Section 629 by asserting that a better approach is on the ever-expanding horizon, particularly when it appears that a similar approach will be ready for deployment by cable operators before the end of 2007.

### C. Sections 1.3 and 76.7 of the Commission’s Rules

54. Petitioners also submitted their Waiver Requests under the general waiver provision found in Section 76.7<sup>182</sup> of the Commission’s rules.<sup>183</sup> For the same reasons set forth in subsections A.

<sup>175</sup> *2005 Deferral Order*, 20 FCC Rcd at 6794, ¶ 31.

<sup>176</sup> Armstrong Waiver Request at 2; Bresnan Waiver Request at 1.

<sup>177</sup> See Armstrong Waiver Request at 2; NCTA Waiver Request at 7-13.

<sup>178</sup> See Armstrong Waiver Request at 2; NCTA Waiver Request at 1 (by requesting waiver until cable operators deploy downloadable security or December 31, 2009, whichever is earlier, Armstrong and NCTA suggest that this deployment may occur in 2010 or beyond).

<sup>179</sup> See *Commission Reiterates that Downloadable Security Technology Satisfies the Commission’s Rules on Set-Top Boxes and Notes Beyond Broadband Technology’s Development of Downloadable Security Solution*, DA 07-51 (MB rel. Jan. 10, 2007) (Public Notice); 47 C.F.R. § 76.1204. See also Letter from Seth A. Davidson, Counsel for Beyond Broadband Technology LLC, to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 22, 2006) (noting BBT’s plans to offer “‘severable security’ based on a flexible, cost-efficient, and ‘open standard’ downloadable conditional access system”).

<sup>180</sup> BBT Reply Comments, CSR-7131-Z, CS Docket No. 97-80, filed Apr. 16, 2007 at 3.

<sup>181</sup> *Id.*

<sup>182</sup> See 47 C.F.R. § 76.7 (“On petition by any interested party . . . the Commission may waive any provision of this part 76. . .”).

and B. above, we conclude that Petitioners are not eligible for waivers of the integration ban under these provisions. Despite Petitioners' assertion that grant of the Waiver Requests would further the digital transition and the deployment of digital services,<sup>184</sup> we do not believe that these waivers will significantly further these public interest benefits, as this assertion is too speculative. Moreover, we conclude that, to the extent that there are any public interest benefits that might result from a waiver, they would not outweigh the significant harm that would result from undermining the integration ban and impeding the development of a competitive market for navigation devices.<sup>185</sup>

55. As noted above, the paramount goal of the integration ban is a competitive navigation device market, and we conclude that this objective outweighs the relative public interest benefits and harms associated with Petitioners' requests.<sup>186</sup> Likewise, the Commission has held that common reliance on a separated security function was the best means to meet that goal.<sup>187</sup> Grant of the Waiver Requests would create an exception to the integration ban rule that would substantially undermine the goals of common reliance, *e.g.*, developing a commercial market for navigation devices.<sup>188</sup> While we recognize the concerns that Petitioners raise that imposition of the integration ban may lead to higher cable bills in the short term,<sup>189</sup> we believe that "the costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market."<sup>190</sup> Therefore, we conclude that the possible public interest benefits suggested by Petitioners in support of

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<sup>183</sup> We will also consider Petitioners' Waiver Requests under the general authority of Section 1.3 of the Commission's rules. *See* 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefore is shown.")

<sup>184</sup> *See, e.g.*, Orange Broadband Waiver Request at 6; Armstrong Waiver Request at 2.

<sup>185</sup> The benefits of the integration ban include the consumer savings and technological advances that will result from a competitive market as well as "the fact that Congress regarded the commercial availability of navigation devices from independent sources as a benefit in and of itself." *Charter Communications, Inc. v. FCC*, No. 460 F.3d 31, 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29).

<sup>186</sup> *See Comcast Order*, 22 FCC Rcd at 241, ¶ 31, n.109.

<sup>187</sup> *See Comcast Order*, 22 FCC Rcd at 241, ¶ 31. In the *2005 Deferral Order*, the Commission explained the justification for common reliance:

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 . . . [T]he concept of common reliance is intended to assure that cable operator development and deployment of new products and services does not interfere with the functioning of consumer electronics equipment or the introduction of such equipment into the commercial market for navigation devices.

*2005 Deferral Order*, 20 FCC Rcd at 6809-6810, ¶ 30. *See also Charter Communications, Inc. v. FCC*, 460 F.3d 31, 40-41 (D.C. Cir. 2006).

<sup>188</sup> *See, e.g.*, Armstrong Waiver Request at 3 (noting unprecedented consumer demand for the DCT-700).

<sup>189</sup> *See id.*

<sup>190</sup> *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29.

their Waiver Requests do not outweigh the substantial public interest benefits associated with the integration ban and the possible harm that could result from granting Petitioners' waiver requests.

#### D. Petitioners' Request for Clarification

56. Some Petitioners asked us to clarify whether refurbished integrated set-top boxes purchased on the used equipment market may be deployed after the integration ban goes into effect.<sup>191</sup> Section 76.1204(a)(1) states that MVPDs subject to the integration ban may not “place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device” after July 1, 2007.<sup>192</sup> In the 1999 *Order on Reconsideration*, the Commission addressed whether the integration ban “applies to navigation devices that are in consumer use [at the time the integration ban goes into effect] and are returned to inventory at a later date.”<sup>193</sup> The Commission concluded that the integration ban “is not intended ... to render equipment obsolete that has already been manufactured and deployed and still has a useful life” and noted that January 1, 2005, the original effective date for the integration ban, “was chosen to allow an MVPD to recover its investment in subscriber equipment that has been placed into service prior” to that date.<sup>194</sup> We believe that the Commission only intended to permit MVPDs to redeploy boxes to their own subscribers boxes that are in the cable operator's inventory and still have a useful life in order to recover their investment in that equipment. We do not think that the Commission anticipated that this narrowly targeted relief would lead to a secondary market for used integrated set-top boxes after the integration ban has gone into effect. Indeed, allowing the development of a secondary market for used integrated set-top boxes could essentially defeat the Commission's integration ban and thereby seriously impede Congress' goal of assuring the commercial availability of navigation devices. Accordingly, we clarify that boxes that are returned to an MVPD's own inventory may be redeployed by that MVPD – but that once such a box is transferred to a third party, it will be treated as a “new” device for purposes of Section 76.1204(a)(1).

#### IV. CONCLUSION

57. For the reasons stated herein, we conclude that Petitioners' Waiver Requests, as submitted, do not justify waivers under either Section 629(c), the standard set forth in the *2005 Deferral Order*, or Sections 1.3 or 76.7 of the Commission's rules. Accordingly, we deny the Waiver Requests. However, we grant Petitioners leave to file amended waiver requests that seek waivers for truly low-cost, limited capability set-top boxes, or seek waivers based on a commitment to go all-digital by a date-certain such as February 2009 or sooner, when broadcasters will cease their analog operations.

58. While we deny these waiver requests for the reasons stated above, we are cognizant of the difficulties that these operators may face in complying with the July 1, 2007 deadline in Section 76.1204(a)(1) of the Commission's rules, particularly given the impending deadline. Each of these operators filed their waiver requests before July 1, 2007, and according to NCTA data, all but one of these operators has fewer than one million subscribers.<sup>195</sup> Therefore, we will defer enforcement of the rule with respect to the Petitioners until September 1, 2007. We encourage the Petitioners to use this time to take

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<sup>191</sup> See, e.g., Orange Broadband Waiver Request at 7; Atlantic Broadband Waiver Request at 9 (“Atlantic Broadband asks the Commission to clarify that cable operators may still deploy after July 1, 2007 refurbished integrated boxes purchased on the used equipment market.”).

<sup>192</sup> 47 C.F.R. § 76.1204(a)(1).

<sup>193</sup> 14 FCC Rcd 7596, 7612 at ¶ 34.

<sup>194</sup> *Id.* at ¶ 35.

<sup>195</sup> See Top 25 MSOs - As of December 2006, NCTA, available at <http://www.ncta.com/ContentView.aspx?contentId=73>.

all steps possible to come into compliance with the separated security requirement. Starting from the date of this order, Petitioners must place orders for compliant devices.<sup>196</sup> Petitioners able to document that their vendors will be unable to fill their orders for compliant devices by September 1, 2007 may file for a limited extension of that date,<sup>197</sup> but we do not expect to routinely grant such requests.

## V. ORDERING CLAUSES

59. 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 1.3, 76.7, and 76.1207 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, and 76.1207, the above-captioned requests for waiver filed by the Petitioners of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1) **ARE DENIED**.

60. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai  
Chief, Media Bureau

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<sup>196</sup> Petitioners may deploy devices with integrated security during this limited period.

<sup>197</sup> If this situation does arise, we expect the Petitioner to file its request as soon as it receives notification from its vendor. We expect any such requests to include specific information as to the reason for the extension, and that the request would, at the very least: (1) state that the Petitioner has placed an order for a sufficient number of compliant boxes that, if filled, would satisfy its equipment needs, specifies the number of boxes ordered, and provides information to support its statement that the number of compliant boxes ordered would be sufficient, if the order could be filled; (2) states that the manufacturer has informed the Petitioner that the order will not be filled by September 1, 2007; (3) sets forth when the order will be filled; (4) requests deferral of the integration ban until that time; (5) states that the Petitioner intends to order only enough integrated boxes to meet its needs until compliant boxes can be obtained, indicates how many such boxes it will be ordering and provides information to support those numbers; and (6) attaches all relevant documentation, including order forms and correspondence with its manufacturers.