

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

In the Matter of)
Innovative Cable TV St. Thomas-St. John & St.) CSR-7224-Z
Croix)
Petition for Waiver of 47 C.F.R. § 76.1204(a)(1))
Implementation of Section 304 of the) CS Docket No. 97-80
Telecommunications Act of 1996)
Commercial Availability of)
Navigation Devices)

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2007

Released: July 23, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. Innovative Cable TV St. Thomas-St. John & St. Croix ("Innovative") has filed with the Chief of the Media Bureau the above-captioned request for waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules (the "Waiver Request").

II. BACKGROUND

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.

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

1 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."

2 47 U.S.C. § 549(a).

(“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 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 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.”¹³

4. The Media Bureau previously acted upon six requests for waiver of Section 76.1204(a)(1) of the Commission’s rules, three on January 10, 2007,¹⁴ and three on May 4, 2007.¹⁵ The

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).

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 *Id.*

¹⁴ 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*”).

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.¹⁶ The Bureau also found that devices with two-way functionality did not meet the waiver policy announced in the 2005 *Deferral Order* for low-cost, limited-capability set-top boxes.¹⁷ 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.¹⁸

5. In the *BendBroadband Order*, we recognized “the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators.”¹⁹ We stated that small operators could request deferral of the July 1, 2007 deadline if they could demonstrate that they have placed orders for compliant set-top boxes²⁰ that will not be fulfilled in time for them to comply with the deadline.²¹ In the *GCI Order*, we explained further that a small cable operator requesting such a deferral must submit a signed affidavit that: (1) states that it has placed an order for a sufficient number of compliant boxes that, if filled, would satisfy the operator’s 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 it that the order will not be filled by July 1, 2007; (3) sets forth when the order will be filled; (4) requests deferral of the integration ban until that time; (5) states that it 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.²²

6. On June 29, 2007, in six separate orders the Media Bureau acted upon 143 requests for waiver of Section 76.1204(a)(1) of the Commission’s rules. First, the Bureau granted 129 waiver requests based on each applicant’s current operation, or commitment to operate before February 17, 2009, of an all-digital video distribution network comparable to the all-digital network to which

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¹⁵ 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*”).

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

¹⁷ *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.

¹⁸ 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.

¹⁹ *BendBroadband Order*, 22 FCC Rcd 209, 212, ¶ 10.

²⁰ This includes both low-cost and high-end compliant boxes.

²¹ *BendBroadband Order*, 22 FCC Rcd 209, 212-213, ¶ 10.

²² *GCI Order* at ¶ 18. We explained that we will treat this documentation as confidential upon the operator’s request, consistent with our rules and policies regarding confidential information. *Id.* See generally 47 C.F.R. § 0.459; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998).

BendBroadband, GCI, and Millennium committed to migrate.²³ Second, consistent with policies established in the *GCI Order*, the Bureau granted the request of the City of Crosslake, MN d/b/a Crosslake Communications to defer the July 1, 2007 deadline based on its affidavit demonstrating that it placed orders for compliant set-top boxes that will not be filled by the July 1st deadline.²⁴ Third, the Bureau granted Guam Cablevision, LLC a limited waiver of the integration ban based on the unique circumstances stemming from typhoon-related damage to Guam Cablevision's system and the system's separation from the fifty states.²⁵ Fourth, the Bureau denied the request of the National Cable & Telecommunications Association seeking a general waiver of the integration ban until cable operators' deployment of downloadable security or December 31, 2009, whichever is earlier.²⁶ Fifth, the Bureau declined Massillon's waiver request to allow it to continue to deploy its inventory of non-compliant set-top boxes after the July 1, 2007 deadline, finding that Massillon's decision to purchase thousands of integrated set-top boxes rather than compliant, non-integrated set-top boxes for delivery in the months leading up to the July 1, 2007 deadline did not justify a waiver of the rule.²⁷ Finally, the Bureau denied ten waiver requests for set-top boxes that it concluded were not the "low-cost, limited-capability" set-top boxes that the Commission committed to exempt from the integration ban in the *2005 Deferral Order*.²⁸

A. The Waiver Request

7. Pursuant to Section 629(c) of the Communications Act and Section 76.1207 of the Commission's rules,²⁹ Section 706 of the Telecommunications Act of 1996,³⁰ Sections 1.3 and 76.7 of the Commission's rules,³¹ and the *2005 Deferral Order*, Innovative seeks a waiver of Section 76.1204(a)(1) to allow it to continue to deploy the integrated Motorola DCT-1000 ("DCT-1000") and the Motorola DCT-2000 ("DCT-2000") set-top boxes until December 31, 2009.³² Innovative states that it is a small cable operator serving approximately 15,251 subscribers on the island of St. Thomas-St. John and approximately 10,762 subscribers on the island of St. Croix.³³ Innovative asserts that grant of a waiver is necessary in order to enable it to transition to an all-digital network.³⁴ Innovative states that it has approximately 19,000 analog set-top boxes in service and that it can replace each using a combination of

²³ See *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2921 (MB rel. June 29, 2007).

²⁴ See *The City of Crosslake, Minnesota d/b/a Crosslake Communications Petition for Deferral of Enforcement of July 1, 2007 Deadline in 47 C.F.R. § 76.1204(a)(1)*, DA 07-2918 (MB rel. June 29, 2007).

²⁵ See *Guam Cablevision, LLC Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2917 (MB rel. June 29, 2007).

²⁶ See *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2920 (MB rel. June 29, 2007).

²⁷ See *Massillon Cable TV, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2919 (MB rel. June 29, 2007).

²⁸ See *Armstrong Utilities et al Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2916 (MB rel. June 29, 2007).

²⁹ 47 U.S.C. § 549(c); 47 C.F.R. § 76.1207.

³⁰ 47 U.S.C. § 157 nt.

³¹ 47 C.F.R. §§ 1.3, 76.7.

³² Waiver Request at 1.

³³ *Id.* at 2.

³⁴ *Id.* at 5.

the DCT-1000 and the DCT-2000 for approximately \$2 million.³⁵ Innovative claims that replacing these boxes with compliant set-top boxes instead will double the cost.³⁶ Citing the *BendBroadband* and *Millennium Orders*, Innovative states that if it is granted a waiver of the July 1st deadline, it will (1) transition to an all-digital network by December 31, 2009; (2) notify all of its analog customers of its plans to go all digital in an insert in the first subscriber bill issued after the Commission's grant of the waiver; (3) submit a sworn declaration to the Commission confirming that such notice has been provided; (4) ensure that, as soon as possible following the grant of the waiver, that it has inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view its video programming on analog television sets; and (5) submit a sworn declaration to the Commission confirming its inventory of set-top boxes.³⁷ Although Innovative claims that it would like to commit to deploying an all-digital network by February 17, 2009 consistent with the *BendBroadband* and *Millennium Orders*, it claims that it is not capable of doing so because of the significant costs of upgrades needed to make the digital transition and because of the complications caused by pending bankruptcy cases involving its parent companies.³⁸

8. In addition to relying on the *BendBroadband* and *Millennium Orders*, Innovative argues that the DCT-1000 and the DCT-2000 set-top boxes are "low-cost, limited capability boxes" that the Commission committed to exempt from the integration ban in the *2005 Deferral Order*.³⁹ Innovative states that the DCT-1000 costs between \$60 and \$80 per box and the DCT-2000 costs between \$95 and \$100 per box.⁴⁰ Conversely, Innovative claims that compliant set-top boxes, such as the Motorola DCH-100 ("DCH-100") and the Motorola DCH-200 ("DCH-200"), cost \$169 and \$215 respectively.⁴¹ Moreover, Innovative states that, "in the context of its system," the DCT-1000 and the DCT-2000 set-top boxes are not capable of (i) outputting high definition signals; (ii) storing recorded programs; (iii) tuning multiple channels simultaneously; (iv) accessing the Internet; or (v) supporting an electronic programming guide, video-on-demand, pay-per-view services, or other interactive television capabilities.⁴² Innovative provides information sheets for these devices allegedly supporting these claims.⁴³ Citing the *Comcast Order*, Innovative states that these devices "are limited to making digital signals available on analog sets."⁴⁴

9. Innovative's Waiver Request was placed on Public Notice on June 15, 2007.⁴⁵ The Consumer Electronics Association ("CEA") filed Comments urging the Bureau to continue to deny requests for waiver of the integration ban outside of the narrow criteria deemed sufficient to justify waivers in previous decisions.⁴⁶

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 6.

³⁸ *Id.* at 3 n.8 and 7.

³⁹ *Id.* at 7-9 (citing *2005 Deferral Order*).

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 8-9.

⁴² *Id.* at 8.

⁴³ *Id.* at Exhibit 1.

⁴⁴ *Id.* at 8 (citing *Comcast Order*, 22 FCC Rcd 228, ¶ 26).

⁴⁵ See *Public Notice*, Report No. 0212 (June 15, 2007).

⁴⁶ Comments of the Consumer Electronics Association, CSR-7224-Z, CS Docket No. 97-80 (July 5, 2007).

III. DISCUSSION

A. Waiver Request

10. Innovative filed its Waiver Request pursuant to Section 629(c) of the Communications Act and Section 76.1207 of the Commission's rules,⁴⁷ the general waiver provisions of Sections 1.3 and 76.7 of the Commission's rules, the *2005 Deferral Order*, and Section 706 of the Telecommunications Act of 1996.⁴⁸ For the reasons set forth in previous decisions, we decline to grant the Waiver Request under the standard set forth in Section 629(c) of the Communications Act and Section 76.1207 of the Commission's rules. We also deny Innovative's Waiver Request under the general waiver provisions of Sections 1.3 and 76.7 of the Commission's rules, the *2005 Deferral Order*, and Section 706 of the Telecommunications Act of 1996.⁴⁹

A. Section 629(c) of the Act

11. 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.⁵⁰

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.

12. While Innovative asserts that grant of its Waiver Request is necessary to assist in the development and introduction of new and improved services, it does not demonstrate how grant of its Waiver Request is "necessary" to further these goals.⁵¹ In fact, Innovative states that it has already introduced digital services to its customers.⁵² Thus, the waiver could hardly be "necessary" for the "introduction" of these services, as they already exist. Moreover, 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). We conclude, therefore, that grant of the Waiver Request is not "necessary" to assist in the development or introduction of new or improved services.

⁴⁷ 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.

⁴⁸ Waiver Request at 1.

⁴⁹ Waiver Request at 1. Section 706 of the Telecommunications Act of 1996 provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 157 nt. Innovative makes no attempt to demonstrate that grant of its Waiver Request would further the goals of Section 706. Accordingly, we deny Innovative's request for waiver under Section 706.

⁵⁰ 47 U.S.C. § 549(c).

⁵¹ See *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 13-14 (citing Congressional intent for a narrow reading of the waiver provisions of Section 629(c)); *Comcast Order*, 22 FCC Rcd at 236-237, ¶¶ 17-18.

⁵² Waiver Request at 3-4.

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

13. Innovative argues that it is entitled to a waiver pursuant to Sections 1.3 and 76.7 of the Commission's rules based on its commitment to transition to an all-digital network by December 31, 2009.⁵³ We disagree. In the *BendBroadband Order*, the Bureau "recognize[d] that the ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits," particularly when considered in the context of the Commission's goal of promoting the broadcast television digital transition.⁵⁴ The Bureau conditionally granted BendBroadband's waiver request pursuant to Sections 1.3 and 76.7 of the Commission's rules,⁵⁵ subject to BendBroadband's submission of a sworn declaration stating that it would take specific steps, as outlined in the *BendBroadband Order*, to demonstrate its commitment to an all-digital network within its stated timeframe. More recently, the Bureau conditionally granted similar waivers to GCI, Millennium, and 129 other operators.⁵⁶ In these decisions, we explained that all-digital networks produce clear, non-speculative public interest benefits that, on balance, warrant a limited grant of a waiver of the integration ban. In all of these cases, the operators seeking a waiver of the integration ban were either currently operating, or had committed to operate before February 17, 2009, all-digital video distribution networks comparable to the all-digital networks to which BendBroadband, GCI, and Millennium committed to migrate.

14. We conclude that Innovative's commitment to transition to an all-digital network after February 17, 2009 fails to satisfy the criteria for a waiver of the integration ban as set forth in the *BendBroadband Order*. Committing to transition to an all-digital network by or before February 17, 2009 is a critical public interest consideration in our assessment of waivers of the integration ban because this is the deadline for the transition to digital television ("DTV") broadcasting imposed by Congress.⁵⁷ As we stated in the *GCI Order*, the "key to the public interest analysis is that GCI's transition will be complete by the February 17, 2009 deadline for the DTV transition."⁵⁸ We find that Innovative's commitment to have an all-digital network in place ten months after the end of the DTV transition fails to outweigh the significant harm that would result from undermining the integration ban and impeding the development of a competitive market for navigation devices.⁵⁹

⁵³ 47 C.F.R. §§ 1.3, 76.7.

⁵⁴ See, e.g., *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, FCC 07-69, ¶¶ 9-14 (rel. May 3, 2007) (adopting a labeling requirement for analog-only television receivers while noting that "[t]he government has a strong interest in ensuring a timely conclusion of the digital transition"); *Requirements for Digital Television Receiving Capability*, 21 FCC Rcd. 9478, 9480, ¶ 7 (2006) (stating that "consumers must be able to receive digital TV signals for the DTV transition to move forward to a successful completion"); *Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 18607, 18609, ¶ 6 (2005) (stating that consumers' ability to receive digital TV signals is essential to a successful completion of the DTV transition). See also *BendBroadband Order*, 20 FCC Rcd at 217, ¶ 24.

⁵⁵ *BendBroadband Order*, 20 FCC Rcd at 218, ¶ 27.

⁵⁶ See *supra* n.15-29 and accompanying text.

⁵⁷ Section 309(j)(14)(A) of the Communications Act states that "[a] full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009." 47 U.S.C. § 309(j)(14)(A). See also *Comcast Corporation*, 22 FCC Rcd 228, 242, ¶ 34 (2007) ("[G]rant[ing] Comcast leave to file an amended waiver request that ... seeks waiver 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 *GCI Order* at n.54.

⁵⁹ The benefits of the integration ban include the consumer savings and technological advances that will result from a competitive market for navigation devices as well as "the fact that Congress regarded the commercial availability

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15. While Innovative claims that it is unable to commit to deploying an all-digital network by February 17, 2009 because of the significant costs it will incur to make the digital transition, we have no evidence to conclude that these costs are any more substantial than those facing other operators that have committed to deploy all-digital networks on or before February 17, 2009.⁶⁰ Moreover, while Innovative claims that complications caused by pending bankruptcy proceedings involving its parent companies preclude it from committing to an all-digital network by February 17, 2009, Innovative has failed to demonstrate any nexus between these bankruptcy proceedings and Innovative's ability to deploy an all-digital network before February 17, 2009.⁶¹

C. 2005 Deferral Order

16. Innovative also argues that the DCT-1000 and DCT-2000 set-top boxes are "low-cost, limited capability boxes" that the Commission committed to exempt from the integration ban in the *2005 Deferral Order*.⁶² As we explained in the *January 10 Orders* and the *May 4 Orders*,⁶³ 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.⁶⁴ 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."⁶⁵ 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.⁶⁶

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of navigation devices from independent sources as a benefit in and of itself." *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29).

⁶⁰ Waiver Request at 7.

⁶¹ *Id.* Innovative also claims that these bankruptcy proceedings involving its parents companies justify a waiver of the integration ban pursuant to the policies established in the *Charter Order*. *Id.* at 7 n.15. Unlike in the *Charter Order*, however, Innovative has provided no evidence in this proceeding, other than vague references to bankruptcy proceedings involving its parent companies, that amounts to a "specific, unambiguous demonstration of its existing financial hardship." *Charter Order* at ¶ 20.

⁶² Waiver Request at 8-10. In the *2005 Deferral Order*, the Commission stated that it would "entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes." 20 FCC Rcd at 6814, ¶ 36.

⁶³ 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.

⁶⁴ 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>.

⁶⁵ *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.

⁶⁶ See *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶ 17; *Comcast Order*, 22 FCC Rcd at 239, ¶ 26.

17. Moreover, the Commission remained committed to the goal of developing 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*.”⁶⁷ This list of capabilities was not intended to be exhaustive, as demonstrated by the inclusion of the phrase “other similar advanced capabilities.” 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 proceeding⁶⁸ – deals exclusively with defining two-way products as “advanced.”⁶⁹

18. 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.”⁷⁰

19. 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.”⁷¹

20. While Innovative claims that the DCT-1000 and the DCT-2000 do not have two-way or any other advanced capabilities, this is belied by the information sheets pertaining to these devices provided by Innovative which characterize these devices as “interactive” set-top boxes that are capable of supporting two-way communications and other advanced capabilities, such as video-on-demand and Internet access.⁷² Based on this information, we have no basis to conclude that the DCT-1000 and the DCT-2000 meet the limited-capability standard announced in the *2005 Deferral Order*.

⁶⁷ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37 (emphasis added).

⁶⁸ 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).

⁶⁹ 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.*

⁷⁰ 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”).

⁷¹ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

⁷² Waiver Request at Exhibit 1.

IV. CONCLUSION

21. For the reasons stated herein, we conclude that the Waiver Request, as submitted, does not justify waiver under Section 629(c) of the Act, Sections 1.3 or 76.7 of the Commission's rules, the 2005 *Deferral Order* policy, or Section 706 of the Telecommunications Act of 1996. Accordingly, we deny the Waiver Request. However, we grant Innovative leave to file an amended waiver request that seeks waiver for truly low-cost, limited capability set-top boxes, or seeks waiver 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.

22. While we deny the Waiver Request for the reasons stated above, we are cognizant of the difficulties that Innovative may face in complying with the July 1, 2007 deadline in Section 76.1204(a)(1) of the Commission's rules. In the *Armstrong Order*, we denied ten separate waiver requests but deferred enforcement of the rule for these operators for two reasons.⁷³ First, the operators filed their waiver requests prior to the July 1st deadline, but their waiver requests were not acted on until June 29th.⁷⁴ The unresolved status of these waiver requests may have created uncertainty for these operators as to whether and when they should place orders for compliant devices. Second, we noted that the operators that were seeking waivers were small cable operators with limited subscriber bases.⁷⁵ In other cases involving requests for waiver of Section 76.1204(a)(1), we noted "the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators."⁷⁶ Thus, even if these operators had placed orders for compliant set-top boxes prior to the July 1st deadline despite the unresolved status of their waiver applications, it is unlikely that these orders would have been filled prior to the July 1st deadline.⁷⁷ Similar to the waiver applicants in the *Armstrong Order*, Innovative filed its waiver request prior to the July 1st deadline, but it was not acted on until after the deadline. Moreover, Innovative is a small cable operator, as demonstrated by its subscriber base of 26,013 subscribers.⁷⁸ Therefore, consistent with the deferral afforded the waiver applicants in the *Armstrong Order*, we will defer enforcement of the rule with respect to Innovative until September 1, 2007. We encourage Innovative to use this time to take all steps possible to come into compliance with the separated security requirement. Starting from the date of this order, Innovative must place orders only for compliant devices.⁷⁹ If Innovative is able to document that its vendor will be unable to fill its order for compliant devices by September 1, 2007, Innovative may file for a limited extension of

⁷³ *Armstrong Order* at ¶ 58

⁷⁴ *Id.*

⁷⁵ All but one of the operators that sought a waiver that was addressed in the *Armstrong Order* had fewer than one million subscribers. *See id.*

⁷⁶ *BendBroadband Order*, 22 FCC Rcd 209, 212, ¶ 10.

⁷⁷ *See, e.g.*, GCI Cable, Inc., Request for Waiver, CSR-7130-Z, CS Docket No. 97-80 (February 16, 2007), at 16 ("A cable operator of GCI's size has no ability to affect manufacturing priorities or schedules. Based on experience, GCI typically waits an average of up to six months longer than large companies for its orders to be filled for existing product lines. The delay for a new product like CableCARD-enabled set-top boxes is unknown. . . . [M]anufacturers typically fulfill large company orders on a first priority basis."); *see also BendBroadband Order*, 22 FCC Rcd 209, 212, ¶ 10 ("manufacturers may prioritize orders from the largest cable operators"); *GCI Order* at ¶ 18.

⁷⁸ Waiver Request at 3.

⁷⁹ Innovative may deploy devices with integrated security during this limited period.

that date,⁸⁰ but as we stated in the *Armstrong Order*, “we do not expect to routinely grant such requests.”⁸¹

V. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED** that, pursuant to Section 629(c) of the Communications Act (47 U.S.C. § 549(c)) and Section 76.1207 of the Commission’s rules (47 C.F.R. § 76.1207), the request of Innovative Cable TV St. Thomas-St. John & St. Croix for a waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**, to the extent described above.

24. **IT IS ORDERED** that, pursuant to Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 157 nt), the request of Innovative Cable TV St. Thomas-St. John & St. Croix for a waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**, to the extent described above.

25. **IT IS 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 of Innovative Cable TV St. Thomas-St. John & St. Croix for a waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**, to the extent described above.

26. **IT IS ORDERED** that, pursuant to the policies set forth in the *2005 Deferral Order*, the request of Innovative Cable TV St. Thomas-St. John & St. Croix for a waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**, to the extent described above.

27. 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

⁸⁰ If this situation does arise, we expect Innovative to file its request as soon as it receives notification from its vendor. We expect the request to include specific information as to the reason for the extension, and that the request would, at the very least: (1) state that Innovative 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 Innovative 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 Innovative 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.

⁸¹ *Armstrong Order* at ¶ 58.