

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

In the Matter of)
Great Plains Cable Television, Inc.) CSR-7212-Z
James Cable, LLC) CSR-7216-Z
RCN Corporation) CSR-7113-Z
WideOpenWest Finance, LLC d/b/a WOW!) CSR-7139-Z
Internet, Cable and Phone)
Requests for Waiver of Section 76.1204(a)(1) of)
the Commission’s Rules)
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. 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 rules¹ 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 grant limited waivers to Great Plains Cable Television, Inc. (“Great Plains”), James Cable, LLC (“James Cable”), RCN Corporation (“RCN”), and WideOpenWest Finance, LLC d/b/a WOW! Internet, Cable and Phone (“WOW”) until July 1, 2008.

¹ 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the basic navigation 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.²

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

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000 a security element separate from the basic navigation device (the “host device”).⁸ The 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

² 47 U.S.C. § 549(a).

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) (“*BellSouth Waiver Order*”).

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

⁵ *Id.*

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

⁷ 47 U.S.C. § 549(c).

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

⁹ For marketing purposes, PODs are referred to as “CableCARDS.”

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

extended that date until July 1, 2007.¹² In that decision, the Commission also stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”¹³

4. On January 10, 2007, the Media Bureau acted upon three requests for waiver of Section 76.1204(a)(1) of the Commission’s rules.¹⁴ 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.¹⁵ 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.¹⁶

5. On May 4, 2007, the Media Bureau acted upon another three requests for waiver of Section 76.1204(a)(1) of the Commission’s rules.¹⁷ The Bureau conditionally granted waivers to Millennium Telecom, LLC d/b/a OneSource Communications (“OneSource”)¹⁸ and GCI Cable, Inc. (“GCI”)¹⁹ similar to the waiver granted to BendBroadband, and granted a waiver to Charter Communications due to its demonstrated financial hardship.²⁰

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 BendBroadband, GCI, and Millennium committed to migrate.²¹ 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

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*”). Collectively, these orders are referred to as the “*January 10 Orders*.”

¹⁵ *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.

¹⁶ *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30.

¹⁷ See *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2008 (2007) (“*Charter Order*”); *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2010 (2007) (“*GCI 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 (2007) (“*Millennium Order*”). Collectively, these orders are referred to as the “*May 4 Orders*.”

¹⁸ *Millennium Order* at ¶ 16.

¹⁹ *GCI Order* at ¶¶ 15, 17.

²⁰ *Charter Order* at ¶ 12.

²¹ See *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2921 (MB rel. June 29, 2007).

placed orders for compliant set-top boxes that will not be filled by the July 1st deadline.²² 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.²³ 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.²⁴ 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.²⁵ 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*.²⁶

B. The Waiver Requests and Comments

1. Great Plains

7. On May 9, 2007, Great Plains filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,²⁷ and Sections 1.3, 76.7, and 76.1207 of the Commission's rules,²⁸ for waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission's rules on offering integrated digital cable set-top boxes after July 1, 2007.²⁹ Great Plains limits its request to boxes that it deploys to its subscribers who receive one-way service, and seeks waiver until the earlier of: (i) the commercial availability of non-integrated set-top boxes compatible with one-way cable plants and Comcast's HITS service, or (ii) Great Plains' upgrade of its systems to a two-way cable plant.³⁰

8. Great Plains states that grant of the Waiver Request is necessary because without it, the company would have to stop deploying digital services to upgrading and new digital subscribers due to increased costs that would come with compliance.³¹ According to Great Plains, this would result in "a widening of the digital divide in rural Nebraska—a highly undesirable outcome."³² Great Plains also relies on the *BellSouth Waiver Order*, asserting that similarities exist between the companies' Waiver

²² 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).

²³ 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).

²⁴ 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).

²⁵ 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).

²⁶ 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).

²⁷ 47 U.S.C. § 549(c).

²⁸ 47 C.F.R. §§ 1.3, 76.7, 76.1207.

²⁹ See Great Plains Waiver Request at 1.

³⁰ *Id.*

³¹ *Id.* at 4-5.

³² *Id.* at 7.

Requests.³³

9. Finally, Great Plains relies on the *Charter Order* to argue that its dire financial straits warrant a waiver.³⁴ Great Plains has demonstrated negative free cash flow for 2005 and increasing net losses over the last three years.³⁵ Great Plains claims that a waiver is even more appropriate in this case because along with having similar financial difficulties, its customer base is actually more rural than Charter's.³⁶ Further, Great Plains argues that the Commission has previously granted waivers of its regulations to Great Plains based on the company's continuing financial hardship.³⁷

10. Three parties filed comments in response to the Waiver Request. Motorola, Inc. ("Motorola") and the American Cable Association ("ACA") fully support a waiver in this circumstance.³⁸ Motorola believes that based on the *Charter Order*, the increased cost associated with complying with the integration ban combined with Great Plains' current financial situation more than justifies a waiver.³⁹ The ACA also echoes Great Plains' concern for its financial situation, claiming that Great Plains' financial hardship is even more severe than Charter's and thus justifies a waiver.⁴⁰ The ACA also states that all of Great Plains' systems are rural as opposed to only 57% of Charter's.⁴¹

11. The Consumer Electronics Association ("CEA") asserts that Great Plains is dependent on the product decisions of a single vendor (contrary to Congress' instruction to create a competitive market for navigation devices), and that a waiver will not give Great Plains any additional influence over monopoly vendors.⁴² In addition CEA states that in order for the Commission to consider a waiver based on financial hardship, it should bear in mind that too many, or too liberal exceptions would "serve to ratify the nullification of FCC regulations by larger [multiple system operators] and their vendors."⁴³ Finally, CEA asserts that exempting refurbished boxes would keep them deployed for "many years to come" rather than phasing them out.⁴⁴

2. James Cable

12. On May 11, 2007, James Cable filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,⁴⁵ and Sections 1.3 and 76.7 of the Commission's rules,⁴⁶ for

³³ See *id.* at 8-10.

³⁴ *Id.* at 5-6.

³⁵ See Letter from Emily A. Denney, Counsel, Great Plains Cable Television, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at Attachment (June 27, 2007).

³⁶ Waiver Request at 6.

³⁷ *Id.* at 6.

³⁸ Motorola Comments in CSR-7212-Z at 1; ACA Comments in CSR-7212-Z at 2.

³⁹ Motorola Comments in CSR-7212-Z at 4-6.

⁴⁰ ACA Comments in CSR-7212-Z at 3-4.

⁴¹ *Id.* at 3.

⁴² CEA Comments in CSR-7212-Z at 2.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 2.

⁴⁵ 47 U.S.C. § 549(c).

⁴⁶ 47 C.F.R. §§ 1.3, 76.7, 76.1207.

waiver of the prohibition set forth in Section 76.1204(a)(1) of the Commission's rules on offering integrated digital cable set-top boxes after July 1, 2007.⁴⁷

13. James Cable asserts that grant of the Waiver Request is necessary because without it, the integration ban would impose significantly increased costs which would force James Cable to suspend important upgrades in its system.⁴⁸ James Cable claims that none of its consumers have ever requested a CableCARD because of the nature of its cost-sensitive, rural markets.⁴⁹ James Cable does say that it will provide and support CableCARDS when asked, but emphasizes that "it would grossly disserve federal priorities, and consumers to force James Cable to delay the deployment of [high definition programming], competitive telephone and advanced services to rural America just for the purpose of back-stopping its support for retail products that none of its customers are asking it to support."⁵⁰

14. In addition, James Cable relies on the *Charter Order* to argue that its dire financial straits, evidenced by the company's negative free cash flow in three of the past five years, warrant a waiver so it will be able to sustain its investments in network upgrades.⁵¹ James Cable claims that a waiver is even more appropriate in this case because along with having similar financial problems and being more rural than Charter, it has 100 times fewer cable customers as Charter, and so cannot get CableCARD set-top boxes at the "lower volume-discount prices" that Charter can.⁵²

15. Three parties filed comments in response to the Waiver Request. James Cable also filed a reply to these comments. Motorola and ACA fully support a waiver in this circumstance.⁵³ Motorola believes that the increased cost associated with complying with the integration ban combined with James Cable's current financial situation more than justifies a waiver.⁵⁴ The ACA also echoes James Cable's concern for its financial situation, claiming that James Cable's financial hardship is even more severe than Charter's and thus justifies a waiver.⁵⁵ The ACA also states that all of James Cable's systems are rural as opposed to only 57% of Charter's, and that James Cable's facilities pass only 40 homes per mile versus Charter's facilities, most of which pass over 55 homes per mile.⁵⁶

16. CEA asserts that James Cable is essentially saying that "the very rule designed to take away long-acknowledged obstacles to a competitive market in navigation devices should not be enforced until *after* such a market has already arisen."⁵⁷ In addition CEA states that in order for the Commission to consider a waiver based on financial hardship, it should require documentation of the cost of compliance and the effect of that cost on an operator's solvency.⁵⁸ CEA also states that such waiver

⁴⁷ See James Cable Waiver Request.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 7-8.

⁵² *Id.*

⁵³ Motorola Comments in CSR-7216-Z at 1; ACA Comments in CSR-7216-Z at 2.

⁵⁴ Motorola Comments in CSR-7216-Z at 4-6.

⁵⁵ ACA Comments in CSR-7216-Z at 3-4.

⁵⁶ *Id.* at 3.

⁵⁷ CEA Comments in CSR-7216-Z at 3.

⁵⁸ *Id.*

should be “strictly time-limited and conditioned on future compliance with the common reliance rule. . .”⁵⁹

17. In reply, James Cable argues that even if the Commission does not grant all of James Cable’s requested relief, it should at least grant the company’s requested relief based on financial hardship that parallels the *Charter Order*.⁶⁰ James Cable emphasizes that even though CEA filed a comment opposing its request for waiver for advanced devices, CEA “did not oppose James Cable’s ‘constructive’ alternative request for relief similar to that the Commission granted to Charter on the grounds of financial hardship. . .”⁶¹

3. RCN

18. On November 17, 2006, RCN filed a request pursuant to Section 629(c) of the Communications Act of 1934, as amended,⁶² and Sections 76.7 and 76.1207 of the Commission’s rules,⁶³ 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 (the “DCT-700”).⁶⁴

19. RCN claims that grant of the Waiver Request is critical because low-end digital set-top boxes like the DCT-700 are essential to RCN’s digital transition.⁶⁵ RCN asserts that its incentive to develop and introduce new or improved multichannel video programming or services depends on its ability to market them successfully to subscribers, and the cost of the set-top box is an important component of the cost that subscribers must pay for the services.⁶⁶

20. According to RCN, failure to grant the Waiver Request would place the largest burden on those customers using low-end set-top boxes who want and use only the most minimal features and functions without giving them any added value for the services that they want to use.⁶⁷ RCN argues that smaller cable operators will have to bear enormous capital costs to offer new set-top boxes, including costs to update hardware and software, which may not be borne by some larger competitors.⁶⁸

21. Finally, RCN claims that its Waiver Request is limited in scope to the type of device the Commission identified in the *2005 Integration Prohibition 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.⁶⁹

⁵⁹ *Id.*

⁶⁰ James Cable Reply at 1.

⁶¹ *Id.* at 2.

⁶² 47 U.S.C. § 549(c).

⁶³ 47 C.F.R. §§ 76.7, 76.1207.

⁶⁴ *See* RCN Waiver Request.

⁶⁵ *Id.* at 3-6.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 6-7.

⁶⁸ *Id.* at 8.

⁶⁹ *Id.* at 8-9.

22. Two parties filed comments in response to the Waiver Request. RCN also filed a reply to these comments. Motorola fully supports a waiver in this circumstance.⁷⁰ 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."⁷¹ 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."⁷²

23. CEA states that it is sympathetic to outlook and its objectives but believes that RCN's request for a waiver "demonstrates that delays in implementing Section 629 have increasingly undermined Congress's basic intention, as expressed in that statute, of introducing open-market competition for devices."⁷³ In reply, RCN refutes the assertion that a waiver would undermine the objective of Congress. According to RCN, its Waiver Request meets the standards set forth in the *BendBroadband Waiver Order*.⁷⁴

24. RCN has made additional arguments in *ex parte* communications that it is uniquely burdened because of financial difficulties combined with its status as a small, competitive overbuilder.⁷⁵ Specifically, RCN states that it has had a history of net losses and expects to continue to report net losses for the foreseeable future.⁷⁶ RCN also points out the Commission's granting of a waiver for Charter Communications because of similar financial straits, and argues that "to the extent that a waiver is appropriate for Charter on the grounds of financial hardship, a waiver is equally—if not more—justified for a much smaller, competitive company such as RCN, which was forced in 2004 to undergo a Chapter 11 restructuring. . . ."⁷⁷

4. WOW

25. On February 28, 2007, WOW filed a request for 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. WOW states that as a relatively new entrant into its markets offering nascent MVPD services, there is a significant public interest involved in granting WOW a waiver because it will preserve and advance competition in the those markets.⁷⁸

26. Further, WOW asserts that enforcement of the integration ban will impede its ability to "timely transition to a digital solution to effectively compete with Comcast and Time Warner, the established incumbent operators in its markets, and to sustain and expand upon WOW's competitive

⁷⁰ ACA Comments in CSR-7113-Z at 3, Motorola Comments in CSR-7113-Z at 1-2, Representative Tom Lantos Comments in CSR-7113-Z at 1.

⁷¹ Motorola Comments in CSR-7113-Z at 4.

⁷² *Id.* at 5.

⁷³ CEA Comments in CSR-7113-Z at 2.

⁷⁴ RCN Reply at 1-4.

⁷⁵ Letter from Richard Ramlall, Senior Vice President, Strategic and External Affairs, RCN Corporation, to Monica Desai, Chief, Media Bureau, Federal Communications Commission, at 3-7 (June 12, 2007) ("*RCN June 12 ex parte letter*").

⁷⁶ *Id.* at 4 (citing RCN Corporation Form 10-K (Annual Report), <http://investor.rcn.com/edgar/cfm>, at 16 (filed Mar. 15, 2007 for the period ending Dec. 31, 2006) ("*RCN 2006 Form 10-K*").

⁷⁷ *RCN June 12 ex parte letter* at 3 (citing *Charter Order* at 9, ¶¶19-20).

⁷⁸ WOW Waiver Request at 4, 11-12.

position within its markets by diverting resources away from introducing new products and delivering exemplary service to its customers.”⁷⁹ WOW also believes that because it is among the few overbuilders left in the country, a waiver is necessary to assist it in the development of new or improved services to its customers.⁸⁰

27. Finally, WOW argues that it will not be able to compete effectively in its markets without a waiver.⁸¹ Specifically, WOW states that the integration ban not only increases the costs that it will have to pay for new boxes, but it will also dramatically increase the costs of replacing its 200,000+ analog-only boxes.⁸² Also, WOW claims that the benefits that come to consumers as a result of the competitive market that WOW creates produce considerable costs on competitive providers like WOW “due to a combination of high entry costs, considerable pricing constraints . . . and less purchasing power with respect to equipment and programming.”⁸³ Finally, WOW argues that it does not possess the economic resources of incumbent providers Comcast and Time Warner, and therefore a denial of the waiver would result in “significant price increases for WOW subscribers receiving basic digital services.”⁸⁴

28. Two parties filed comments in response to the Waiver Request. WOW also filed a reply to these comments. Motorola fully supports grant of the waiver for reasons set forth in the Waiver Request.⁸⁵ CEA feels that the Waiver Request “seems grounded in contradictions and uncertainties.”⁸⁶ Specifically, CEA has a problem with WOW claiming to operate only an analog cable system, but at the same time purporting to be providing digital CableCARDs to its customers.⁸⁷ Also, CEA claims that WOW should not be afforded a waiver because it has not yet specified when it will be moving to a downloadable conditional access solution (“DCAS”).⁸⁸ Finally, because WOW has not stated that it is privy to the proprietary information about DCAS, CEA thinks that WOW is not in a position to “represent to the Commission that its projected implementation of DCAS will comply with this or the other relevant Commission rules.”⁸⁹

29. In reply, WOW states that many of the CEA’s claims are unfounded and “largely inaccurate.”⁹⁰ In particular, WOW asserts that nowhere in its Waiver Request did it state that it runs an analog-only system.⁹¹ WOW also states that although they have not committed to go all-digital, that commitment is not the only basis for waiver of the integration ban.⁹² Further, WOW asserts that CEA

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 23-24.

⁸¹ *Id.* at 12, 15-19.

⁸² *Id.* at 19.

⁸³ *Id.* at 12.

⁸⁴ *Id.* at 9, 12.

⁸⁵ Motorola Comments in CSR-7139-Z at 1-2.

⁸⁶ CEA Comments in CSR-7139-Z at 2.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.*

⁹⁰ WOW Reply at 2, 8.

⁹¹ *Id.* at 4.

⁹² *Id.* at 5-6.

fails to recognize the important distinctions between incumbent cable providers and new, competitive providers such as WOW.⁹³

30. WOW has made additional arguments in *ex parte* communications that it is uniquely burdened because of financial difficulties and its status as a competitive terrestrial-based MVPD provider.⁹⁴ Specifically, WOW states that without a waiver it will have to spend over \$20 million to migrate its analog customer base to digital service, an added cost which puts its projected free cash flow in the negative for both 2007 and 2008.⁹⁵ WOW also points out the Commission's granting of a waiver for Charter Communications because of similar financial straits and its "contrast[ing] markedly from other public [multiple system operators], both large and small."⁹⁶

III. DISCUSSION

31. Petitioners make their requests for waiver pursuant to Section 629(c) of the Act and Sections 76.7 and 76.1207 of the Commission's rules. Accordingly, we analyze their requests pursuant to the waiver standards set forth in Section 629(c)⁹⁷ as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules. In addition, because RCN characterizes the device for which it seeks waiver as a "low-cost" device, we will evaluate that request under the waiver policy announced in the *2005 Deferral Order* as well.⁹⁸ As discussed below, and consistent with the Bureau's conclusions in the *January 10 Orders* and the *May 4 Orders*, we find that we cannot grant Petitioners' requests for relief under Section 629(c). In light of Petitioners' demonstrated financial hardships, however, and consistent with the *Charter Order*, we conclude that a limited, one-year grant of their waiver requests is justified under Sections 1.3 and 76.7 of the Commission's rules. We therefore grant Petitioners limited, one-year waivers of the integration ban.

A. Section 629(c) of the Act

32. 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.⁹⁹

⁹³ *Id.* at 8.

⁹⁴ Letter from D. Craig Martin, General Counsel, WOW! Internet, Cable and Phone, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 10, 2007) ("*WOW May 10 ex parte letter*"); Letter from D. Craig Martin, General Counsel, WOW! Internet, Cable and Phone, to Michelle M. Carey, Senior Legal Advisor, Office of Chairman Kevin J. Martin, Federal Communications Commission (June 1, 2007) ("*WOW June 1 ex parte letter*"); Letter from D. Craig Martin, General Counsel, WOW! Internet, Cable and Phone, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 14, 2007) ("*WOW June 14 ex parte letter*").

⁹⁵ *WOW June 1 ex parte letter* at 3; *WOW June 14 ex parte letter* at 2.

⁹⁶ *Id.* at 2 (citing *Charter Order* at 9, ¶19)

⁹⁷ 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.

⁹⁸ *2005 Deferral Order*, 20 FCC Rcd at 6813-6814, ¶ 37.

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

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.

33. Petitioners argue that grant of the Waiver Requests is necessary to assist in the development of its new and improved digital cable services.¹⁰⁰ As a general matter, we do not find compelling Petitioners' arguments that grant of the Waiver Requests is necessary to assist the development or introduction of these services. First, as Petitioners note, they have already launched digital services in their markets and so it cannot be said that a waiver is necessary to assist in the "introduction" of these services, as they already exist. Second, while it could be argued that waivers 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. Based on the facts presented, Petitioners have failed to show that waivers are "necessary" here to assist in the "development or introduction" of new or improved services.¹⁰¹ Indeed, as we stated in the *January 10 Orders*, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).¹⁰²

B. The 2005 Deferral Order

34. Because RCN characterizes its Waiver Request as a request for a "low-cost" and "limited capability" device,¹⁰³ we evaluate RCN's Waiver Request under the waiver policy established in the Commission's *2005 Deferral Order*, as well.

35. We conclude that the DCT-700 does 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*,¹⁰⁴ 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.¹⁰⁵ 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."¹⁰⁶ In other

¹⁰⁰ See, e.g., James Cable Waiver Request at 3-4.

¹⁰¹ See *BendBroadband Order*, 22 FCC Rcd at 213, ¶ 13; *Cablevision Order*, 22 FCC Rcd at 225, ¶ 14; *Comcast Order*, 22 FCC Rcd at 237, ¶ 19.

¹⁰² See *BendBroadband Order*, 22 FCC Rcd at 214, ¶ 14; *Cablevision Order*, 22 FCC Rcd at 225, ¶ 15; *Comcast Order*, 22 FCC Rcd at 236, ¶ 17.

¹⁰³ See RCN Waiver Request at 2-3.

¹⁰⁴ 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.

¹⁰⁵ 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>.

¹⁰⁶ *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.

words, the low-cost, limited-capability waiver standard that the Commission created in the *2005 Deferral Order* is, first and foremost, a narrow one.¹⁰⁷

36. 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*.”¹⁰⁸ This list of capabilities was not intended to be exhaustive, as demonstrated by the inclusion of the phrase “other similar advanced capabilities.”¹⁰⁹ 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 proceeding¹¹⁰ – deals exclusively with defining two-way products as “advanced.”¹¹¹

37. 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.”¹¹² 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.

38. 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.”¹¹³ Here, while RCN indicates that grant of its Waiver Request would allow it to offer digital services at an attractive price point,¹¹⁴ the device for which it seeks waiver is not a “limited capability” set-top box.

¹⁰⁷ See *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶ 17; *Comcast Order*, 22 FCC Rcd at 239, ¶ 26.

¹⁰⁸ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37 (emphasis added).

¹⁰⁹ 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.

¹¹⁰ 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).

¹¹¹ 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.*

¹¹² 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”).

¹¹³ *Id.* at 6813, ¶ 37.

¹¹⁴ RCN Waiver Request at 6-7.

Therefore, we cannot grant RCN a waiver 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”¹¹⁵ limited-capability set-top boxes, and therefore will entertain and grant future requests that satisfy the criteria set forth in the *2005 Deferral Order*.

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

39. Petitioners also submitted their Waiver Requests under the general waiver provision found in Section 76.7¹¹⁶ of the Commission’s rules.¹¹⁷ In light of Petitioners’ demonstrated dire financial straits,¹¹⁸ we conclude that good cause exists to grant the Petitioners limited, one-year waivers for the devices for which they seek waiver,¹¹⁹ and that such waivers would serve the public interest in this specific instance. Specifically, we note that in addition to demonstrating negative free cash flow for 2005, Great Plains has demonstrated increasing net losses over the last three years, indicating worsening financial health. James Cable has demonstrated negative free cash flow in three out of the last five years, and negative cash flow from financing in 2006. Wide Open West has demonstrated negative free cash flow for the last three consecutive years, a net operating loss in 2006, and increases in necessary capital expenditures for the last three consecutive years. RCN has exhibited significant financial distress. For example, RCN has demonstrated negative free cash flow for two of the last five years, operating losses and net losses for the last three consecutive years, and negative cash flow from financing and decreases in cash on hand for the last three consecutive years. We find good cause for waiver in these narrow, specific cases.

40. While we have not been persuaded by others who have made speculative claims that the integration ban may impose a financial burden on their companies,¹²⁰ we find that Petitioners’ situations are similar to that of Charter, and we are persuaded by Petitioners’ specific demonstrations of their existing financial hardships. While we agree with CEA that common reliance is integral to the development of a competitive navigation device market that Congress mandated through Section 629, we believe that in these specific cases imposition of the integration ban may present a financial burden so great as to drive the Petitioners out of business. Accordingly, we conclude that good cause exists for

¹¹⁵ See *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹¹⁶ See 47 C.F.R. § 76.7 (“On petition by any interested party, ... the Commission may waive any provision of this part 76, ...”).

¹¹⁷ 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.”)

¹¹⁸ See Great Plains Waiver Request at Exhibit 3; Letter from Nicole Paolini-Subramanya, Counsel, Great Plains Cable Television, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission at Attachment 2 (June 22, 2007); Letter from Paul B. Hudson, Counsel, James Cable, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 25, 2007); Letter from Richard Ramlall, Senior Vice President, Strategic & External Affairs, RCN Corporation, to Monica Desai, Chief, Media Bureau, Federal Communications Commission at 4-6 (June 12, 2007); Letter from D. Craig Martin, General Counsel, WideOpenWest Finance, LLC, to Brendan P. Murray, Attorney Advisor, Policy Division, Media Bureau, Federal Communications Commission at Attachment (June 22, 2007).

¹¹⁹ Those devices are the Motorola DCT-700, Motorola DCT-1000, Motorola DCT-2500, Motorola DCT-2000, Motorola DSR-410, Motorola DSR-470, Scientific Atlanta Explorer 2100, Scientific Atlanta Explorer 2200, Scientific Atlanta Explorer 3100, and Scientific Atlanta Explorer 3200.

¹²⁰ See, e.g., Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80 at 17-19 (April 19, 2006) (asserting that that the increased costs associated with the integration ban would slow Comcast’s transitions to all-digital platforms).

limited one-year waivers of the integration ban, and that Petitioners have met the standard for waivers under Sections 1.3 and 76.7 of the Commission's rules. In addition, if Petitioners believe that, as a result of continuing, non-speculative financial difficulties, extensions of the waiver beyond this initial one-year period are warranted, they may submit updated financial and other information for our consideration.

IV. CONCLUSION

41. For the reasons stated herein, we conclude that Petitioners' Waiver Requests, as submitted, do not justify a waiver under Section 629(c) or the *2005 Deferral Order*. Nevertheless, we believe that, in light of Petitioners' extraordinary financial difficulties, good cause exists for limited, one-year grants of the Waiver Requests pursuant to Sections 1.3 and 76.7 of the Commission's rules. Further, if, after one year, Petitioners believe that further extensions are warranted, they may file updated financial and other information for review and request an extension. Upon such a filing, we will review the companies' financial status and situation at that time to determine whether further waiver is warranted.

V. ORDERING CLAUSES

42. 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 Section 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, the requests for waiver filed by Great Plains Cable Television, Inc., James Cable, LLC, RCN Corporation, and WideOpenWest Finance, LLC d/b/a WOW! Internet, Cable and Phone of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **ARE DENIED**.

43. Accordingly, **IT IS ORDERED** that, pursuant to the *2005 Deferral Order*, 22 FCC Rcd 6794, 6813-6814, ¶ 37, the request for waiver filed RCN Corporation of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

44. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3 & 76.7, the requests for waiver filed by Great Plains Cable Television, Inc., James Cable, LLC, RCN Corporation, and WideOpenWest Finance, LLC d/b/a WOW! Internet, Cable and Phone of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **ARE GRANTED** for the Motorola DCT-700, Motorola DCT-1000, Motorola DCT-2500, Motorola DCT-2000, Motorola DSR-410, Motorola DSR-470, Scientific Atlanta 2100, Scientific Atlanta 2200, Scientific Atlanta 3100, and Scientific Atlanta 3200, conditioned as set forth in this Order.

45. 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