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

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In the Matter of	)	
	)	
National Cable & Telecommunications Association	)	CSR-7056-Z
	)	
Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules	)	
	)	CS Docket No. 97-80
Implementation of Section 304 of the Telecommunications Act of 1996	)	
	)	
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 National Cable & Telecommunications Association ("NCTA") has filed with the Chief of the Media Bureau the above-captioned waiver request (the "Waiver Request"), seeking a waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules until cable operators' deployment of downloadable security or December 31, 2009, whichever is earlier.[1] For the reasons stated below, we deny NCTA's waiver request.

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

[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."

> 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, ag[illegible]t the urging of cable operators,[11] the Commission further extended that date until July 1, 20[illegible] in that decision, the Commission stated that it would "entertain certain requests for waiver of the prohibition on integrated devices for limited capability

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[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).

[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.

integrated digital cable boxes."[13]

B. The Waiver Request

4. On August 16, 2006, NCTA filed a request for a waiver of the integration ban for all cable operators until their deployment of downloadable security or December 31, 2009, whichever is earlier.[14]

5. NCTA makes three substantive arguments in favor of its Waiver Request: first, that the requested waiver would spare consumers from unnecessary costs associated with an interim transition to CableCARD-based devices – particularly given the cable industry's plans to migrate to a downloadable security solution; second, that a waiver is necessary to assist in the development of new and improved services; and third, that a waiver is necessary so the Commission can reassess whether the rule can be implemented in a way that does not arbitrarily skew competition in the multichannel video market.[15] NCTA also asserts that grant of a waiver would not adversely impact the retail market for digital cable ready devices.[16]

6. In support of the argument that the requested waiver would spare consumers unnecessary costs, NCTA estimates that the re-engineering required to enable their leased devices to work with CableCARDs would cost approximately $72-93 per box, translating to an additional $2-3 in monthly lease charges to consumers.[17] NCTA states that the cable industry is committed to the downloadable security concept that it introduced at the time of the *2005 Deferral Order*, which later became known as Downloadable Conditional Access System ("DCAS").[18] According to the Waiver Request, much remains to be done before DCAS can be deployed to consumers nationwide.[19] NCTA asserts that denial of the waiver would delay implementation of DCAS because the cable industry relies on many of the same employees and testing facilities for a range of technology projects, including DCAS, CableCARD implementation, the OpenCable Applications Platform ("OCAP"), and development of new and innovative services and software.[20]

7. NCTA's second argument, that the requested waiver is necessary to assist in the development of new and improved services, focuses on enhancements to digital video, voice, and data services. According to NCTA, digital cable delivers numerous value-added services to consumers, including high-definition programming, video-on-demand ("VOD"), parental control, interactive program guides, and specialized programming packages.[21] NCTA asserts that the cost of the integration ban to cable operators and consumers will discourage many consumers from

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[13] *Id.*

[14] Waiver Request at 1.

[15] *Id.* at 4.

[16] *Id.* at 33.

[17] *Id.* at 7 (citing Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising from the 2005 Ban on Integrated Set-Top Boxes, CS Docket 97-80 at 3-7 (filed Aug. 2, 2002)).

[18] Waiver Request at 9.

[19] *Id.* at 11.

[20] *Id.*

[21] *Id.* at 14.

switching from analog to digital service.[22] NCTA also argues that it would be counterproductive to impose new costs on cable operators deploying digital services while Congress has authorized up to $1.5 billion to subsidize over-the-air set-top boxes to facilitate the 2009 analog cut-off.[23] In addition, NCTA argues that the cost of implementation may divert funds from capital expenditures in the voice and broadband data markets.[24]

8. NCTA's third argument is that a waiver is necessary to preserve regulatory parity. First it cites the exemption in the Commission's rules for "a multichannel video programming distributor that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system."[25] In 1998, the Commission found that direct broadcast satellite ("DBS") operators DIRECTV and EchoStar met these criteria, but NCTA asserts that the current state of the market is substantially changed and, as a result, either the DBS operators no longer meet the exemption or all cable operators do.[26] NCTA bases this assertion on the fact that DIRECTV appears to have changed its business model with respect to set-top boxes.[27] Second, NCTA states that the waiver Verizon requests, which would be limited to service providers who are providing service using a hybrid QAM/IP system over FTTP architecture, would be in contradiction to the Section 629(c) requirement that any waiver of Section 629 rules "shall be effective for all service providers and products in that category and for all providers of such services and products."[28]

9. Finally, NCTA asserts that grant of a waiver would not adversely impact retail digital cable ready devices.[29] Cable operators are already required to support CableCARDs and NCTA argues that the cable industry has "stepped up to the plate in furtherance of the Commission's goal to support innovative one-way digital cable ready CE products and to have two-way digital cable-ready products brought to market as soon as possible."[30] NCTA argues that if there were problems with a cable operator's support for CableCARDs at any time, the Commission has the ability to investigate such allegations and take appropriate action as necessary.[31] NCTA states that CE manufacturers have already demonstrated their ability to innovate even without the integration ban in effect, including TiVo's digital cable ready DVR, Samsung's two-way digital cable ready HDTV set, and other two-way products under development.[32]

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[22] *Id.* at 15-16.

[23] *Id.* at 17 (citing 2005 Budget Act, § 3005).

[24] Waiver Request at 18-24.

[25] *Id.* at 25 (citing 47 C.F.R. § 76.1204(a)(2)).

[26] Waiver Request at 25.

[27] *Id.* at 26 (citing Linda Moss, *DirecTV Opts for a Leasing Model*, MULTICHANNEL NEWS, Jan. 23, 2006).

[28] Waiver Request at 32 (citing 47 U.S.C. § 547(c)). *See also Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)*, CSR-7042Z (filed July 10, 2006).

[29] Waiver Request at 33.

[30] *Id.* at 34, 47 C.F.R. § 76.640.

[31] Waiver Request at 35-36 (citing *2005 Deferral Order*, 20 FCC Rcd. At 6814-15, ¶ 39).

[32] Waiver Request at 36-37.

C. Comments

10. The Waiver Request was placed on public notice on October 31, 2006.[33] A number of parties filed comments in response to the Waiver Request. The American Cable Association, Harmonic, Inc., Terayon Communications Systems, Inc., Motorola, Inc., and Cisco Systems, Inc. supported the Waiver Request. The Consumer Electronics Association and TiVo, Inc. opposed the waiver request. Verizon took no position on the Waiver Request, but wrote to distinguish its own request for waiver from the NCTA petition. NCTA, along with the American Cable Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies, filed reply comments. We also received late-filed ex parte letters, including one from BigBand Networks, Inc.

11. The American Cable Association ("ACA") echoes NCTA's concerns about the costs of the integration ban, and states that it harms ACA members' competitive position relative to DBS.[34] Cisco and Motorola, suppliers of set-top boxes to the cable industry, support the Request, as do headend equipment suppliers Terayon and Harmonic and cable-platform provider BigBand Networks. Cisco and Motorola herald DCAS as a suitable and less expensive alternative to CableCARDs.[35] Motorola and BigBand Networks state that reallocating resources to accelerate work for CableCARD-related initiatives would slow progress on downloadable security.[36] Terayon supports the petition because "the migration to digital programming is essential to support Terayon's line of 'digital video solutions' products."[37]

12. CEA and TiVo oppose the waiver requested by NCTA.[38] CEA asserts that plug-and-play devices are not receiving adequate support and the integration ban is essential to assuring future support of plug-and-play devices.[39] CEA also refutes the assertion that DCAS will be implemented by the end of 2009, citing previous delays and NCTA's warning that "much remains to be done."[40] TiVo states that "[b]y granting yet another extension of the implementation of the integration ban – this time for up to an additional two-and-a-half years – the Commission would be turning its back on the critical policy goal of promoting competition in the market for and ensuring the commercial availability of navigation devices."[41] NCTA replies that its DCAS system "continues its rapid evolution from the conceptual to a working technology that will replace CableCARDs" and outlines those steps in its reply.[42] Even if the timeline were reasonable, CEA asserts that the DCAS proposal presented by NCTA is not a suitable alternative

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[33] *Request for Waiver of 47 C.F.R. § 76.1204(a)(1) Filed with the Commission*, DA 06-2557 (MB rel. Oct. 31, 2006) (Public Notice).

[34] ACA Comments at 5.

[35] Cisco Comments at 3, Motorola Comments at 4.

[36] Motorola Comments at 4, Letter from Rob Horton, General Counsel, BigBand Networks, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission at 3-4 (Jan. 5, 2007).

[37] Terayon Comments at 2.

[38] CEA Comments at 11, TiVo Comments at 1.

[39] CEA Comments at 2-3.

[40] CEA Comments at 7 (citing NCTA Request at 11).

[41] TiVo Comments at 7.

[42] NCTA reply at 3.

to CableCARDs becau[illegible]e lack of transparency and reasonable license terms.[43] Specifically, CEA expresses concer[illegible]ne DCAS license overreaches by prohibiting "harm to cable service," in contrast t[illegible]ction 76.1202 prohibition on system operator-imposed restrictions other than those rea[illegible]prevent electri[illegible] or physical harm or theft of service.[44] CEA argues that this small varia[illegible]language results in cable operators exercising significantly more control over the functionality of their boxes than allowed in the rule.[45]

13. C[illegible] and TiVo also refute the cost estimates provided by NCTA in support of the Request.[46] CEA [illegible] out that NCTA cites its own calculations of cost, made four years ago in defense of its wai[illegible]equest.[47] TiVo states that its own experience with CableCARD imp[illegible]mentation suggests that the actual cost of separating security is in the range of $20 per de[illegible], which, if amortized over a three year term is less than $0.50 per month.[48] NCTA refutes these arguments, stating that its projections are based on vendors' projections of cost, taking into account significar[illegible]ncreased volumes.[49] It further explains that cable operators do not make set-top boxes an[illegible] "[t]he prices of CableCARD-enabled boxes are set by the free market based on the off[illegible]CE companies that commit to make the devices, not by those on the sidelines who will not."[50]

14. Verizon does not state a position on the Request, but writes to clarify the record and distinguish its own petition for waiver.[51] It states that "NCTA's waiver request improperly attempts to draw parallels or invent similarities between Verizon and NCTA's members to show that the incumbe[illegible]erators are deserving of a waiver of these rules."[52] Verizon further states that the differenc[illegible]tween NCTA and Verizon, namely that Verizon is a new entrant and that it uses a different technological approach, are the basis for Verizon's petition.[53] In its reply, NCTA refutes these claims and states that Verizon is misinterpreting the meaning of "category" in Section 629(c).[54]

15. The Organization for Promotion and Advancement of Small Telecommunications C[illegible]anies ("OPASTCO") supports the waiver insofar as it would apply to its members, rural telephone companies.[55] OPASTCO stresses that "grant of the waiver may be especially appropriate for the increasing number of small MVPDs that provide Internet Protocol television

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[43] CEA Comments at 5-6.

[44] *Id.* (citing 47 C.F.R. § 76.1202).

[45] *Id.*

[46] CEA Comments at [illegible], TiVo Comments at 5-6.

[47] CEA Comments at 7.

[48] TiVo Comments at 5-6.

[49] NCTA Reply at 11.

[50] *Id.* at 12.

[51] Verizon Comments at 1.

[52] *Id.*

[53] *Id.* at 3.

[54] NCTA Reply at 28.

[55] OPASTCO Comments at 2.

("IPTV") utilizing fiber or copper-based digital subscriber line ("DSL") technology.[56]

III. DISCUSSION

16. NCTA argues that its request "satisfies the special waiver provision in Section 629(c) of the Communications Act and Section 76.1207 of the Commission's rules, as well as the general standards of Sections 1.3 and 76.7 of the Commission's rules."[57] Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c)[58] as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules. As discussed below, we find that the request does not justify the grant of a waiver under either of these standards. We therefore deny NCTA's request.

17. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.[59] This "common reliance" is necessary to achieve the broader goal of Section 629 – *i.e.*, to allow consumers the option of purchasing navigation devices from sources other than their MVPD.[60] Although the cable industry has twice challenged the lawfulness of the integration ban, in both cases the D.C. Circuit denied those petitions.[61] While operators may be eligible for waiver of the integration ban in limited circumstances under Section 629(c),[62] the waiver policy covering low-cost limited-capability set-top boxes,[63] or for other good cause in the public interest,[64] this Waiver

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[56] OPASTCO Comments at 3.

[57] Waiver Request at 1 (citing *BellSouth Waiver Order*; *Pace Micro Technology PLC Petition for Permanent Relief*, 19 FCC Rcd 1945, 1947, ¶ 8 (2004); *GCI Cable, Inc. Petition for Special Relief*, 15 FCC Rcd 10843, 10846, ¶ 9 (2000); *Media General Cable of Fairfax County, Inc. Petition for Special Relief*, 14 FCC Rcd 9568, 9570-71, ¶ 8 (1999).

[58] 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.

[59] *See Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 228, 240, ¶ 30, n.105.(2007) ("*Comcast Order*") *See also Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 220, 226, ¶ 19 (2007) ("*Cablevision Order*") (citing the *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30) (explaining why the Commission "require[d] MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions").

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

[61] *Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000). The Commission argued, and the D.C. Circuit agreed, that the integration ban was a reasonable means to meet Section 629's directive. *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) ("this court is bound to defer to the FCC's predictive judgment that, '[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.'").

[62] Section 629(c) provides that the Commission shall grant a waiver of its regulations implementing Section 629(a) upon an appropriate showing that such waiver is necessary to assist the development or introduction of new or improved services. 47 U.S.C § 549(c). *See* discussion *supra* ¶¶ 16-19.

[63] *See 2005 Deferral Order*, 20 FCC Rcd 6794, 6813-14, ¶ 37. As explained in the *Comcast Order*, this relief is "confined to those devices whose functionality is limited to making digital cable signals available on analog sets." *Comcast Order*, 22 FCC Rcd 239, ¶ 26.

[64] *See, e.g., 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*

Request does not provide an adequate justification under any of these standards. To the contrary, we find that the bases offered by NCTA for yet another extension of the deadline for compliance with the integration ban either are (1) with respect to the claim that additional time is needed to develop a downloadable conditional access solution, not sufficiently certain in terms of implementation timeline and inconsistent with marketplace developments; or (2) with respect to NCTA's other arguments, not adequately novel or changed from assertions that it has made to support previous extension requests to justify further relief.

A. Section 629(c) of the Act[65]

1. Issues Addressed in the *2005 Deferral Order*

18. At the outset, we note that the vast majority of NCTA's arguments are not new – and in fact have been offered in the past to justify prior limited extensions of the deadline for compliance with the integration ban. Given the extensions of the integration ban deadline that already have been granted, we believe that additional requests for waivers of that deadline appropriately have a heavy burden to overcome and that NCTA has failed to meet that burden for the reasons explained below.[66]

19. The Commission already has acknowledged the cost of separating security in the *2005 Deferral Order*, and concluded that the benefits outweighed any potential harms:

> [T]he 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. In particular, it seems likely that the potential savings to consumers from greater choice among navigation devices will offset some of the costs from separating the security and non-security functions of either MVPD-supplied devices or those that might otherwise be made available through retail outlets. In addition, except as discussed below, we generally do not believe that maintenance of the prohibition on integrated navigation devices will delay the DTV transition. We believe that the incentive provided by the separate security requirement will spur cable operators to meet their obligations and promote the timely development of a competitive market in host devices. Accordingly, we

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Order, 22 FCC Rcd at 226, ¶ 19; *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2008; *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2010 (2007) *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).

[65] 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." 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.

[66] *See Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (applicant bears heavy burden to demonstrate that his arguments for waiver are substantially different from those that have been carefully considered in rulemaking proceeding).

find that there are sufficient competitive and consumer benefits to justify the costs of the ban.[67]

Moreover, both the Commission and the D.C. Circuit also have noted that "Congress regarded the commercial availability of navigation devices from independent sources as a benefit in and of itself."[68] Until and unless MVPDs subject to the integration ban actually begin relying upon the same separated security solution made available to consumer electronics manufacturers – whether that is a hardware-based solution (*i.e.*, CableCARDs) or a software-based solution – the objective of Section 629 will not be achieved.

20. This Waiver Request raises the same issues of cost and diversion of resources that were raised and addressed in the context of the *2005 Deferral Order*. While the Commission rejected these arguments,[69] the *2005 Deferral Order* recognized that "development of set-top boxes and other devices utilizing downloadable security is likely to facilitate the development of a competitive navigation device market," and therefore provided the cable industry with another year, until July 1, 2007, to come into compliance with the integration ban. In order to determine whether downloadable security in fact could be implemented in a timely fashion, the Commission required the cable industry to submit a timeline for the deployment of downloadable security, if feasible, by December 1, 2005.[70]

21. In November 2005, NCTA submitted a timeline pursuant to that requirement, stating that it expected deployment on "digital cable systems with a activated channel capacity of 750 MHz or greater serving 5,000 or more subscribers" by July 1, 2008.[71] In this Waiver Request, however, NCTA requests an *additional* year and a half beyond its own prior estimated date of deployment, to December 31, 2009. Given the history of delays that has undermined our efforts to encourage an industry driven approach to achievement of the goals of Section 629, this substantial postponement of the date by which cable operators might deploy downloadable security gives us great concern.

22. NCTA asserts that compliance with the integration ban will result in an expensive interim solution between now and cable operators' deployment of DCAS that would lead to higher prices for consumers without providing any benefit.[72] As noted above, however, based on past experience, we are not convinced that cable operators in fact will deploy DCAS within the specified timeframe. Indeed, in November 2005, NCTA represented that expected

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[67] *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29. *See also* Delta Radio, Inc. v. FCC, 387 F.3d 897, 901(D.C. Cir. 2004) (holding that although an agency must give a waiver request a hard look to ensure that the agency is not rigidly applying a rule where it is not in the public interest, strict application of a rule may be justified by the gain in certainty and administrative ease, even if it results in some hardship).

[68] *Charter Communications, Inc. v. FCC*, 460 F.3d at 42 (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29).

[69] *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29 (concluding that, "the costs that this requirement will implose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market").

[70] *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31-32.

[71] Letter from Daniel L. Brenner, Senior Vice President for Law & Regulatory Policy, NCTA to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 30, 2005) at 5.

[72] Waiver Request at 7-13.

national deployment of DCAS at that point was approximately two-and-a-half years away, but in its August 2006 Waiver Request, it represented that expected nationwide deployment at that point was more than three years away. 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 NCTA's Waiver Request implied that DCAS would take longer than three years to deploy,[73] evidence on the record in the commercial availability of navigation devices proceeding suggests that the amount of time that NCTA has requested may be more than is necessary.[74]

23. We recognized in the *2005 Deferral Order* that a software-based security system can significantly reduce costs compared to physical separation of security.[75] 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."[76] We do not believe, however, that NCTA should be able to shield itself from the clear directives in the Commission's rules implementing Section 629 by continuing to assert that a better approach is on the ever-expanding horizon.

24. Finally, NCTA asserts that the absence of a waiver would artificially skew video competition.[77] While NCTA correctly observes that Section 629 applies to all MVPDs, the Commission has decided not to apply Section 76.1204(a)(1) to MVPDs that support "the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the [MVPD]."[78] The argument that the Commission "arbitrarily applied different decisional criteria in imposing the integration ban on cable but not DBS" was addressed in the *2005 Deferral Order* and challenged in *Charter Comm., Inc. v. FCC*.[79] The D.C. Circuit found that the Commission was correct that the proceeding upon which the *2005 Deferral Order* was based did not provide a sufficient record to resolve that issue and concluded that the Commission "has discretion 'to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice.'"[80] The present waiver proceedings similarly present an insufficient record on which to reconsider the exemption in Section 76.1204(a)(2) or its applicability to DBS providers.

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[73] *See* Waiver Request at 1 (by requesting waiver until cable operators deploy downloadable security "or December 31, 2009, whichever is earlier," NCTA suggests that this deployment may occur in 2010 or beyond).

[74] *See, e.g., Commission Concludes that Downloadable Security Technology Satisfies the Commission's Rules on Set-Top Boxes and Notes Beyond Broadband Technology Development of Downloadable Security Solution*, DA 07-51 (MB rel. Jan. 2007) (Public Notice); Letter from Brian Baker, CEO, Widevine Technologies, to Kevin Martin, Chairman, Federal Communications Commission (March 22, 2007), at 1 (stating that Widevine's "Cypher suite of security solutions have delivered 'downloadable security' for numerous multimedia service providers since 2001").

[75] *2005 Deferral Order*, 2 FCC Rcd at 6794, ¶ 31.

[76] *2005 Deferral Order*, 20 FCC Rcd at 6794, ¶ 31.

[77] Waiver Request at 25.

[78] 47 C.F.R. § 76.1204. *See also First Report and Order*, 13 FCC Rcd. at 14783.

[79] *2005 Deferral Order*, 20 FCC Rcd at 6814, ¶ 38; *Charter Comm., Inc. v. FCC*, 460 F.3d at 43 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004))

[80] *Charter Comm., Inc. v. FCC*, 460 F.3d at 43 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004)).

2. New Issues Raised Under Section 629(c)

25. As described in detail above, NCTA argues that grant of the Waiver Request "will help accelerate the cable industry's migration to digital networks."[81] Specifically, it claims that deferral of the integration ban would (1) allow set-top box manufacturers to concentrate their financial resources on "innovative and competitive new features for digital set-top boxes," (2) allow cable operators to work with content providers "on technology needed to facilitate new and exciting business models," and (3) not artificially increase the cost of digital set-top boxes, thereby discouraging consumers from switching from analog to digital cable service.[82] In addition, NCTA asserts that a waiver would facilitate the transition to digital television, providing more cost-effective options for consumers to receive digital broadcast programming with analog televisions.[83] Finally, NCTA argues that deferral of the integration ban is necessary to assist cable operators' continued entry into the voice and data services markets.[84]

26. We are not convinced by NCTA's argument that grant of the Waiver Request is "necessary" to assist the development or introduction of these services. First, we note that NCTA reports that as of September 2006, 47.9 percent of cable television's subscribers already are digital cable subscribers.[85] Also as of September 2006, 8.5 million homes use cable telephony service, and nearly 30 million residences and businesses subscribe to cable's high-speed data service.[86] Thus, a significant portion of cable subscribers already receive many of the services described in the Waiver Request. Further, to consider whether the integration ban may interfere with the deployment of these services, it is more important to look at deployment numbers rather than subscriber figures. It appears that a number of those services have achieved success in the marketplace. According to the Waiver Request, "VOD has been enormously popular with digital cable customers" and cable operators have seen significant consumer adoption over the past year.[87] Data submitted to the Commission by cable operators at the end of 2005 indicate that

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[81] Waiver Request at 10.

[82] *Id.* at 15-16.

[83] *Id.* at 16-17.

[84] *Id.* at 18-24.

[85] *See* NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION, INDUSTRY STATISTICS (2006), http://www.ncta.com/ContentView.aspx?contentId=54.

[86] *See id.* By contrast, at the end of the third quarter in 2006, Verizon's FiOS video service offering had only 118, 000 subscribers and AT&T's U-Verse offering had only 3,000 subscribers. *See* Press Release, Verizon, *Verizon Communications Posts Strong Third-Quarter Results as Organic Growth Initiatives Gain Momentum* (Oct. 30, 2006), *available at* http://investor.verizon.com/news/view.aspx?NewsID=784; Press Release, AT&T, *AT&T Posts Strong Third-Quarter Earnings Growth* (Oct. 23, 2006), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22969.]

[87] Waiver Request at 14 n.41 (citing George Winslow, *VOD Scorecard*, MULTICHANNEL NEWS, May 1, 2006). *See also* Press Release, Comcast Corporation, *Comcast Reports Second Quarter 2006 Results* (July 27, 2006), *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=888265; *see also* Press Release, Comcast Corporation, *Comcast Reports First Quarter 2006 Results* (April 27, 2006), *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=848479 ("Driven by ON DEMAND movie and event purchases, pay-per-view revenues increased 29% from the first quarter of 2005. Pay-per-view revenue has shown strong growth with the rollout of ON DEMAND, increasing more than 20% on average over the past two years.").

nearly 96 percent of households passed have access to digital video.[88] Additionally, as of June 30, 2006, approximately 93 percent of households passed by cable systems had access to cable high-speed Internet service[89] and cable telephony service is currently available to 73 percent of households.[90] With these services already deployed to such a large percentage of households, we find that a waiver is not necessary to promote deployment of these services.

27. We note that while NCTA claims that waiver would "help accelerate" cable operators' migration to all-digital networks,[91] it does not claim that cable operators would be unable to achieve that goal absent a waiver. Moreover, we note that cable operators have indicated that the migration to all-digital networks will be gradual regardless of whether their waiver request is granted.[92] Based on this information, we are unable to conclude that the costs of compliance with the integration ban would significantly delay the availability of these services. We note that where specific commitments to go all-digital prior to February 17, 2009, have been made, we have found that a waiver was justified.[93]

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

29. Further, we conclude that the fact that NCTA and CEA have been unable to

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[88] 2[illegible]C Form 325 data. Form 325, the Annual Cable Report is filed each year by cable operators upon notification by the Commission that filing is required. All cable operators with more than 20,000 subscribers must file, along with a sample of smaller cable operators. *See* 47 C.F.R. § 76.403.

[89] FCC, *High-Speed Services for Internet Access: Status as of June 30, 2006*, Jan. 2007, at 3 and Table 14. This report and previous releases of the *High-Speed Services for Internet Access* report are available at http://www.fcc.gov/wcb/iatd/comp.html (visited Feb. 1, 2007).

[90] NCTA Comments, MB Docket No. 06-169 at 45.

[91] Waiver Request at 14.

[92] *See* Paul Kagan, *One Eye on the Street, Another on the All-Digital Rollout*, CABLE WORLD, May 2, 2005 (quoting Time Warner Cable CEO Glenn Britt as saying, "it will take us all a number of years to go all-digital."); *Stick with the Game Plan*, CABLEFAX DAILY, March 3, 2005 (reporting that Comcast Chief Financial Officer John Alchin predicts that "analog service is going to be around for quite some time"); Michael Grebb, *Many Devices, No Boundaries, One Provider*, CABLE WORLD, April 17, 2006, *available at* http://www.cable360.net/cableworld/operators/msos/15946.html (quoting Comcast CTO David Fellows as saying that Comcast will "probably take off everything about the same time the must-carrys go off the air – so in the 2009-ish time frame. But even there, we will leave a set of analog channels on – I'm just guessing for another five years or so. That's so basic-only subscribers or third or fourth TVs in the home can tune a set of 20 or 30 channels. I think that's in place for another decade"). *See also* Letter from Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation, to Honorable Kevin J. Martin, Chairman, Federal Communications Commission at 2 (Aug. 21, 2006).

[93] *See BendBroadband Order*. *See also GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2010 (2007); *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).

negotiate an agreement to provide bidirectional plug-and-play devices at retail compels us to strictly enforce the Commission's rules implementing Section 629(a). NCTA argues that the cable industry has made steps toward bidirectional plug-and-play, pointing toward its November 2005 two-way proposal based on the CableCARD-Host Interface License Agreement ("CHILA") and its arrangements with individual CE manufacturers to develop OpenCable Application Platform ("OCAP")-based digital cable products.[94] While NCTA is correct that several manufacturers have contracted to produce OCAP-based devices, it is our understanding that currently no such devices are available at retail.[95] Additionally, it appears that negotiations between NCTA and CEA to achieve a bidirectional plug-and-play agreement are not progressing.[96] The November 29, 2006, status report on these negotiations indicated that no meetings had been held in the preceding two months.[97] Subsequent status reports indicated that several meetings have occurred,[98] but there has been no evidence of progress as had previously been indicated on the joint status reports.[99] For these reasons, in contrast with NCTA's assertion, we believe that grant of this waiver would adversely impact the achievement of the goal of Section 629 – *i.e.*, ensuring the retail availability of bidirectional digital cable ready devices.

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

30. NCTA also submitted its Waiver Request under the general waiver provisions found in Sections 1.3[100] and 76.7[101] of the Commission's rules. For the same reasons set forth in subsection A. above, we conclude that NCTA is not eligible for a waiver of the integration ban

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[94] Waiver Request at 34.

[95] We note that, although at one time Samsung was producing an OCAP-enabled television set in conjunction with a field trial of OCAP by Time Warner, *see* Press Release, Samsung Electronics Co., Samsung, Time Warner Cable and Advance/Newhouse Join Together to Launch OCAP on Interactive HDTV Sets and HD Set-Top Boxes, (Jan. 19, 2007), it apparently has stopped manufacturing that device. Mark Seavy, *Samsung Drops 56W DLP TV Used in Time Warner Cable OCAP Test*, CONSUMER ELECTRONICS DAILY, Apr. 30, 2007.

[96] CEA and NCTA are required to "file joint status reports and hold joint status meetings with the Commission ... every 60 days... on progress in bidirectional talks and a software-based conditional access agreement." *2005 Deferral Order* 20 FCC Rcd. at 6795.

[97] Letter from Neal M. Goldberg, General Counsel, NCTA and Julie M. Kearney, Senior Director and Regulatory Counsel, CEA to Marlene H. Dortch, Secretary, FCC (Nov. 29, 2006).

[98] Letter from Neal M. Goldberg, General Counsel, NCTA and Julie M. Kearney, Senior Director and Regulatory Counsel, CEA to Marlene H. Dortch, Secretary, FCC (Jan. 30, 2007); Letter from Neal M. Goldberg, General Counsel, NCTA and Julie M. Kearney, Senior Director and Regulatory Counsel, CEA to Marlene H. Dortch, Secretary, FCC (Apr. 2, 2007)

[99] *See, e.g.*, Letter from Neal Goldberg, General Counsel, National Cable and Telecommunications Association and Julie Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed April 2, 2007) (no cited progress in negotiating a bidirectional agreement); Letter from Neal Goldberg, General Counsel, National Cable and Telecommunications Association and Julie Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed June 1, 2007) (same).

[100] *See* 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.").

[101] *See* 47 C.F.R. § 76.7 ("On petition by any interested party, ... the Commission may waive any provision of this part 76 ....").

under these provisions. Despite NCTA's assertion that grant of the Waiver Request would further the digital transition and the deployment of digital services, we do not believe that this waiver will significantly further these public interest benefits. Unlike requests for waiver that other parties have filed,[102] NCTA provides no specific commitment to furthering the digital transition or a competitive navigation device market. 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.[103]

IV. CONCLUSION

31. For the reasons stated herein, we conclude that NCTA's Waiver Request does not justify a waiver under either Section 629(c), the waiver policy articulated in the *2005 Deferral Order*, or Sections 1.3 or 76.7 of the Commission's rules. Accordingly, we deny the Waiver Request. We note that should NCTA's members deploy a downloadable conditional access security solution that is available today such as that developed by Beyond Broadband Technology, no waiver of the ban would be necessary.

V. ORDERING CLAUSES

32. 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 request for waiver filed by National Cable & Telecommunications Association of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

33. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[104]

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

[102] *See BendBroadband Order*, 22 FCC Rcd at 21[illegible] ¶ 10; *Cablevision Order*, 22 FCC Rcd at 226-227, ¶ 20.

[103] 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*, 460 F.3d at 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29).

[104] 47 C.F.R. § 0.283.