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

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| In the Matter of | ) | |
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| James Cable, LLC | ) | CSR-7216-Z |
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| Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules | ) | |
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**MEMORANDUM OPINION AND ORDER**

**Adopted: July 12, 2010** **Released: July 12, 2010**

By the Chief, Media Bureau:

## I. INTRODUCTION

1. James Cable, LLC ("James Cable" or "Petitioner") filed with the Media Bureau a request for extension of waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules.[1] Petitioner further filed for a modification to the waiver to include permanent conditional waiver for previously-used, refurbished integrated devices. We grant James Cable's request given its extraordinary financial hardship and the company's willingness to purchase integrated devices from refurbishing companies that will sell integrated set-top boxes to subscribers at retail.

## II. BACKGROUND

### A. Section 629 of the Act

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices more than ten years ago as part of the Telecommunications Act of 1996.[2] The Commission implemented this directive in 1998 through the adoption of the "integration ban," which established a date after which cable operators no longer may place into service new navigation devices (*e.g.*, set-top boxes) that perform both conditional access and other functions in a

[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." *See James Cable, LLC et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 23 FCC Rcd 10592 (2008) ("*July 2008 Financial Hardship Order*").

[2] *See* 47 U.S.C. § 549(a) (requiring the FCC "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"); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996).

single integrated device.[3] Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.[4] On two occasions, the National Cable and Telecommunications Association ("NCTA"), on behalf of all cable operators, sought – and obtained – extensions of that deadline.[5] The Commission ultimately fixed July 1, 2007 as the deadline in order to afford cable operators additional time to determine the feasibility of developing a downloadable security function that would permit compliance with the Commission's rules without incurring the cable operator and consumer costs associated with the separation of hardware.[6]

3. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.[7] 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.[8] Although the cable industry has challenged the lawfulness of the integration ban on three separate occasions, in each of those cases the D.C. Circuit denied those petitions.[9] The Commission currently is considering changes to the integration ban rule,[10] however, and in certain circumstances operators may be eligible for waiver of the integration ban.[11]

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[3] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14803, ¶ 69 (1998) ("*First Report and Order*") (adopting Section 76.1204 of the Commission's rules, subsection (a)(1) of which (1) required multichannel video programming distributors ("MVPDs") to make available by July 1, 2000 a security element separate from the basic navigation device (*i.e.*, the CableCARD), and, in its original form, (2) prohibited MVPDs covered by this subsection from "plac[ing] in service new navigation devices … that perform both conditional access and other functions in a single integrated device" after January 1, 2005); *see also* 47 C.F.R. § 76.1204(a)(1) (1998).

[4] *First Report and Order,* 13 FCC Rcd at 14803, ¶ 69.

[5] In April 2003, the Commission extended the effective date of the integration ban until July 1, 2006. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) ("*Extension Order*"). Then, in 2005, the Commission further extended that date until July 1, 2007. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6810, ¶ 31 ("*2005 Deferral Order*").

[6] *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

[7] *See 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) (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").

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

[9] *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008); *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.'").

[10] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipments*, 24 FCC Rcd 4303, 4311-12, ¶ 22 (2010).

[11] For example, 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

### B. The Waiver Request

4. On April 2, 2010, James Cable submitted a request that the Commission modify the *July 2009 Financial Hardship Order*, in which we extended James Cable's limited waiver of the integration ban for a second time.[12] In light of its continued financial shortfalls, James Cable asked that its limited waiver be extended at least one additional year.[13] Since 2007, James Cable has maintained a negative free cash flow, despite a limited waiver of its obligations under the integration ban and a reduction in capital expenses. James Cable argues that this is due in part to the continuing high capital cost of non-integrated high definition ("HD") and digital video recorder ("DVR") set-top boxes that are not covered by its existing waiver.[14] Moreover, James Cable submits that its systems still need substantial capital investment to be able to offer Video on Demand ("VoD"), competitive telephone services and faster broadband. As a result, it requests that its waiver be extended to cover devices that have HD and/or DVR functionality, similar to that which was granted Baja Broadband Operating Company, LLC ("Baja").[15] The waiver sought would allow it to place in service refurbished HD, standard definition ("SD") and DVR devices with integrated services.[16]

5. James Cable states that it would be willing to commit to the same conditions the Commission required of Baja: it would only purchase refurbished set-top devices from companies that also commit to sell identical devices directly to James Cable subscribers, and it would notify all of its subscribers of the opportunity to purchase such previously used devices from the refurbished company within 30 days of the devices becoming commercially available.[17] James Cable submits that such a waiver for refurbished devices would benefit the public interest because it would provide James Cable subscribers with an additional retail option for navigation devices and would provide a less expensive alternative to new devices.[18] James Cable adds that this lower cost option would enable it to devote additional investment to digital and telephone upgrades and to pass savings on to consumers.[19]

6. James Cable argues that its negative free cash flow has inhibited its ability to provide VoD, competitive television services, faster broadband, and other services to its customers.[20] James Cable asserts that an ever increasing percentage of its consumers desire HD and/or DVR functionality, despite the fact that James Cable has not marketed these services aggressively due to the exclusion of

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of new or improved services. 47 U.S.C § 549(c). Furthermore, petitioners who have shown good cause have received waivers of the integration ban pursuant to Sections 1.3 and 76.7 of the Commission's rules. *See Great Plains Cable Television, Inc. et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 13414, 13426-7, ¶¶ 39-40 (2007) ("*2007 Financial Hardship Order*").

[12] James Cable, LLC's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), Report of Updated Financial Information, CSR 7216-Z (filed April 2, 2010) ("James Cable Petition"); *James Cable, LLC Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, 24 FCC Rcd 9269 (2009) ("*July 2009 Financial Hardship Order*").

[13] James Cable Petition at 2-3.

[14] *Id*. at 2.

[15] In the *Baja Broadband Order*, the Commission granted Baja a permanent conditional waiver for previously-used, refurbished integrated devices. *Baja Broadband Operating Company, LLC's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 25 FCC Rcd 2200, 2205-6, ¶ 13-14 (2010) ("*Baja Broadband Order*").

[16] *See* James Cable Petition at 2-3.

[17] *Id.*

[18] *Id.* at 3.

[19] *Id.*

[20] *Id*. at 2.

these higher-cost set-top boxes from its waiver.[21] James Cable further provides that in 2009, CableCARD devices represented the significant majority of its set-top box expenditures[22], notwithstanding the limited waivers of the integration ban that it has received since 2007.[23]

7. James Cable also argues that amendment of the *James Cable Waiver* [24] to cover low-cost refurbished devices, including SD devices, would not conflict with Bureau policy.[25] James Cable claims that it already satisfies the objective of the integration ban through its deployment of more than 2,500 CableCARD HD and DVR devices.[26] Moreover, James Cable argues that the Commission has never argued that "common reliance" requires that all of an operator's devices use CableCARDS.[27] Finally, James Cable argues that there is no evidence in the record that James Cable's use of integrated devices has or would cause it to provide inferior support for retail devices.[28]

## III. DISCUSSION

8. James Cable filed its request pursuant to sections 1.3 and 76.7 of the Commission's Rules. In the *2007 Financial Hardship Order*, the Bureau found that extraordinary financial hardships present good cause for limited waiver of the integration ban.[29] On four separate occasions, the Bureau has granted James Cable waiver of Section 76.1204(a)(1) of the Commission's rules based on the *2007 Financial Hardship Order* precedent,[30] most recently extending the waiver until July 1, 2010.[31] As explained more fully below, we again extend the *James Cable Waiver* of Section 76.1204(a)(1) of our rules for new SD devices until July 1, 2011. We also amend the *James Cable Waiver* of Section 76.1204(a)(1) to include refurbished HD and DVR devices.

### A. Waiver of Section 76.1204(a)(1) with Respect to New, Standard-Definition Devices

9. On April 2, 2010, James Cable submitted updated financial information to demonstrate that it remains in poor financial condition.[32] In order to demonstrate its financial condition, James Cable submitted a Cash Flow Statement to demonstrate its negative cash flows for 2009, indicating that the company is spending more cash than it is earning. James Cable's Cash Flow Statement reveals that the

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[21] *Id*. at 2.

[22] *Id*. at 2.

[23] *See 2007 Financial Hardship Order*, 22 FCC Rcd at 13426-7, ¶¶ 39-40; *James Cable, LLC et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 23 FCC Rcd 10592 (2008) ("*July 2008 Financial Hardship Order*"); *James Cable, LLC Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, 24 FCC Rcd 2439 (2009); *July 2009 Financial Hardship Order*, 24 FCC Rcd 9269, collectively referred to as "*James Cable Waiver*"..

[24] *Id.*

[25] James Cable Petition at 1, 3-4.

[26] *Id*. at 4.

[27] *Id*. at 4.

[28] *Id.* at 4.

[29] *2007 Financial Hardship Order*, 22 FCC Rcd at 13426-7, ¶¶ 39-40.

[30] *2007 Financial Hardship Order*, 22 FCC Rcd at 13426-7, ¶¶ 39-40; *July 2008 Financial Hardship Order*, 23 FCC Rcd at 10594-6, ¶¶ 4-9; *James Cable, LLC Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 24 FCC Rcd 2439, 2442, ¶ 6 (2009).

[31] *July 2009 Financial Hardship Order*, 24 FCC Rcd at 9269, ¶¶ 4-6.

[32] *Id*.

company has invested an almost equal amount of money in service and customer retention than it has received from operations and financing.[33] Its cash flow from financing has decreased since 2008 but is still dramatically higher than it was in 2007, which illustrates that James Cable remains further in debt than it was in 2007.[34] Accordingly, we conclude that James Cable faces extraordinary financial hardship. We have concluded that speculative claims that the integration ban may impose a financial burden on cable companies are not persuasive.[35] As explained in the *July 2008 Financial Hardship Order*, however, James Cable has made a specific and unambiguous showing of extraordinary financial hardship, which the Bureau has found presents good cause for waiver of the integration ban.[36] Furthermore, James Cable has demonstrated that the costs associated with the integration ban's imposition continue to impose an undue hardship on financially distressed cable operators such as the Petitioner.[37] In light of James Cable's demonstration of continued financial hardship, and consistent with Bureau precedent and prior orders in this case, we conclude that a limited extension until July 1, 2011 of James Cable's integration ban waiver for non-HD, non-DVR set-top boxes is justified under Sections 1.3 and 76.7 of the Commission's rules.

### B. Waiver of Section 76.1204(a)(1) with Respect to Refurbished Devices

10. James Cable has demonstrated that its extreme financial hardship makes it nearly impossible for the company to purchase compliant HD/DVR devices and provide competitive HD and DVR services to its subscribers. In it's request for permission to place into service refurbished integrated HD/DVR devices, James Cable has committed to purchase its devices from companies that would also sell such devices directly to consumers; the same commitment made by Baja.[38] For the same reasons articulated in the *Baja Broadband Order*, we believe that James Cable's commitment to purchase refurbished HD, SD and DVR devices from set-top box refurbishing companies that commit to sell integrated set-top boxes at retail will serve the public interest,[39] and therefore we conclude that a waiver for refurbished devices is justified under Sections 1.3 and 76.7 of our rules. This waiver will enable James Cable to offer competitive HD and DVR services and to provide its subscribers with another retail alternative to leasing a set-top box from James Cable. The waiver also will reduce James Cable's costs such that the differential can be invested in providing improved broadband service, digital cable, and telephone service in a manner that allows the savings to be passed on to the customer.[40]

11. Accordingly, we grant James Cable's request for waiver conditioned on (1) James Cable publicly committing to purchase refurbished devices only from companies that also commit to sell the same devices directly to James Cable's subscribers by filing an affidavit with the Commission within 15 days of the release of this order; and (2) James Cable notifying all of its subscribers within 30 days of the retail availability of refurbished devices that they may purchase directly from James Cable's supplier, and

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[33] *Id*.

[34] *Id*.

[35] *See* 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).

[36] *July 2008 Financial Hardship Order*, 23 FCC Rcd at 10594-6, ¶¶ 4-9.

[37] Letter from Paul Hudson, Counsel, James Cable, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission at Exhibit 1 (January 23, 2009).

[38] *See Baja Broadband Order*, 25 FCC Rcd at 2205-6, ¶ 13.

[39] *Baja Broadband Order*, 25 FCC Rcd at 2205-6, ¶ 13.

[40] James Cable Petition at 3.

providing contact information for that company. Such notification must expressly alert subscribers that the devices offered for sale may not work if they change providers, that the devices may not be nationally portable, and that the retail transaction will be with a third party and therefore James Cable does not warranty the devices. The notice must also inform subscribers about whether the devices will work across James Cable's entire footprint, and must include any other information James Cable deems necessary to prevent consumer confusion. In the *Baja Broadband Order*,[41] we concluded that the refurbished device waiver should have no expiration date because the availability of refurbished, integrated set-top boxes will diminish over time and, in the future, more of the refurbished boxes will be compliant devices. For these reasons, we believe that a term limit is unnecessary with respect to the James *Cable Waiver* for refurbished set-top boxes.

## IV. CONCLUSION

12. Due to James Cable's continued financial hardship and its commitment to purchase its refurbished HD/DVR devices from companies that would also sell such devices directly to consumers, we find good cause to extend James Cable's integration ban waiver with respect to new non-HD, non-DVR devices and to allow James Cable to deploy refurbished HD/DVR devices with integrated security. With respect to the new integrated devices that James Cable seeks to deploy, this waiver will expire on July 1, 2011.

## V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3 & 76.7, waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED** to James Cable, LLC as set forth in this order.

14. 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

William T. Lake
Chief, Media Bureau

[41] *Baja Broadband Order*, 25 FCC Rcd at 2206, ¶ 14.