

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

In the Matter of)	
)	
Bend Cable Communications, LLC)	CSR-7057-Z
d/b/a BendBroadband)	
)	
Request 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: January 10, 2007

Released: January 10, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. Bend Cable Communications, LLC d/b/a BendBroadband ("BendBroadband") has filed with the Chief of the Media Bureau the above-captioned request for waiver (the "Waiver Request") of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules for the Motorola DCT-700 integrated digital cable set-top box, a sub-\$100 device that BendBroadband argues is critical to its plans to migrate to an all-digital network by 2008. For the reasons stated below, we conditionally grant BendBroadband a waiver pursuant to Sections 1.3 and 76.7 of the Commission's rules.

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.¹

¹ 47 U.S.C. § 549(a).

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”).² 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.”³ 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.”⁴ Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”⁵ 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.⁶

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”).⁷ The separation of the security element from the host device required by this rule (referred to as 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”),⁸ 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, 2006.⁹ Then, in 2005, again at the urging of cable operators,¹⁰ the Commission further extended that date until July 1, 2007.¹¹ In that decision, the Commission stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”¹²

B. The Waiver Request

4. On October 4, 2006, BendBroadband filed a request for waiver of the integration ban to allow it to continue to place into service new Motorola DCT-700 integrated digital cable set-top boxes after July 1, 2007. BendBroadband argues that the DCT-700 is the only set-top box available for under \$100,¹³ and that “the elimination of sub-\$100 boxes would lay a severe blow to [its] plan to move to an

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

³ H.R. REP. NO. 104-204, at 112 (1995).

⁴ *Id.*

⁵ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

⁶ 47 U.S.C. § 549(c).

⁷ *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).

⁸ For marketing purposes, PODs are referred to as “CableCARDS.”

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003).

¹⁰ *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).

¹¹ *Id.* at 6814, ¶ 31.

¹² *Id.*

¹³ Waiver Request at 8.

all-digital network, and indeed could postpone that transition indefinitely.”¹⁴ If its Waiver Request is granted, however, BendBroadband states that it “plans to move to an entirely all-digital network by 2008 and reclaim the spectrum now used for analog channels for even more HD and VOD, increased broadband capacity, and other new digital services.”¹⁵

5. BendBroadband also contends that the Motorola DCT-700 constitutes a “low-cost, limited capability” set-top box as envisioned by the Commission in the *2005 Deferral Order*.¹⁶ It states that the DCT-700 cannot be used to output high-definition (“HD”) signals, store recorded programs, tune multiple channels simultaneously, or access the Internet.¹⁷ According to BendBroadband, however, the DCT-700’s features do include an electronic programming guide (“EPG”), video-on-demand (“VOD”), pay-per-view (“PPV”) services, and other limited interactive television (“ITV”) capabilities.¹⁸

6. In addition, BendBroadband asserts that grant of the Waiver Request would serve the public interest by allowing it to focus its capital on additional digital services “such as more HD and VOD content, wireless, business services, and other advanced services.”¹⁹ Finally, BendBroadband argues that direct broadcast satellite (“DBS”) providers DIRECTV and Echostar have changed their policies to remove competition from the DBS navigation device market, and therefore the Commission should grant the Waiver Request in the interest of regulatory parity.²⁰

C. Comments

7. The Waiver Request was placed on public notice for comment on October 31, 2006.²¹ Five parties filed comments in response to the Waiver Request. BendBroadband also filed a reply to these comments. The comments filed in response to the Waiver Request generally supported grant of a waiver for BendBroadband. The American Cable Association (“ACA”) and two cable operators in Puerto Rico – Liberty Cablevision of Puerto Rico (“Liberty”) and Choice Cable Television (“Choice”) – fully support a waiver request in this circumstance.²² Choice echoes BendBroadband’s assertion that “failure to grant the requested waiver will have a negative impact on the consumer and [BendBroadband’s] operations and financial viability.”²³ Liberty states that using the DCH-100, Motorola’s nonintegrated replacement to the DCT-700, will cost \$135 more – about three times the cost of the DCT-700.²⁴ ACA posits that “banning the DCT-700 or requiring the addition of CableCARD slots in these boxes will raise the price of all-digital services beyond the reach of many subscribers and significantly slow the digital transition.”²⁵ ACA adds that the DCT-700 allows smaller cable operators to “provide all-digital services to their subscribers at such attractive prices that they are experiencing unprecedented gains in digital

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6. *See also id.* at 11-12 (citing *2005 Deferral Order*, 20 FCC Rcd at 6813-14, ¶ 37).

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at Exhibit A.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 12-13.

²¹ *Request for Waiver of 47 C.F.R. § 76.1204(a)(1) Filed with the Commission*, DA 06-2258 (MB rel. Oct. 31, 2006) (Public Notice).

²² ACA Comments at 2, Liberty Comments at 2, Choice Comments at 3.

²³ Choice Comments at 3.

²⁴ Liberty Comments at 3.

²⁵ ACA Comments at 2.

penetration.”²⁶ Finally, ACA states that “consumers who gain access to digital services through the DCT-700 are not the target market for more expensive, non-integrated boxes.”²⁷

8. The Consumer Electronics Association (“CEA”) states that it is sympathetic to BendBroadband’s outlook and its objectives but does not see how grant of the Waiver Request would address BendBroadband’s concerns. CEA believes that grant of the Waiver Request would not affect the set-top box market, and would not afford BendBroadband the ultimate relief it seeks – namely, an affordable set-top box option.²⁸ In reply, BendBroadband refutes the assertion that a waiver would be futile, stating that Motorola sells the DCT-700 in Canada and other countries, which makes BendBroadband hopeful that it would be able to obtain such devices in the event of a waiver.²⁹

9. EchoStar takes no position on the merits of the Waiver Request,³⁰ but filed comments to refute BendBroadband’s characterization of the EchoStar retail plan, namely that it still sells set-top boxes through third-party retail outlets.³¹ EchoStar asks that the Commission not address the application of its navigation device integration ban to DBS providers within the context of the Waiver Request.³² In its reply, BendBroadband focuses on DIRECTV’s leasing plan and restates its request that the Commission either reconsider its DBS exemption or “clarify that the threshold for qualifying for the § 76.1204(a)(2) exemption is low enough for DirectTV (and therefore BendBroadband) to clear it.”³³

III. DISCUSSION

10. BendBroadband makes its request for waiver “[p]ursuant to Sections 629(c) and 706 of the Telecommunications Act of 1996 and Sections 1.3, 76.7 and 76.1207 of the Commission’s rules.”³⁴ Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c)³⁵ as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission’s rules. In addition, because BendBroadband characterizes its request as one for a “low-cost, limited capability” device as described in the Commission’s *2005 Deferral Order*, we evaluate it under that standard, as well. As discussed below, we find that we cannot grant BendBroadband’s request for relief under either Section 629(c) or the waiver standard established by the *2005 Deferral Order*. At the same time, given BendBroadband’s apparent commitment to move to an all-digital network by 2008 if it is able to continue to deploy DCT-700 set-top boxes after July 1, 2007, we conclude that the grant of a waiver to BendBroadband under Sections 1.3 and 76.7 of our rules is justified in order to enable BendBroadband to complete its migration to an all-digital network. We therefore conditionally grant BendBroadband’s request. The details of that conditional grant are set forth below. Moreover, we understand the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators. Therefore, we note that, if

²⁶ *Id.* at 4.

²⁷ *Id.* at 5.

²⁸ CEA Comments at 4.

²⁹ BendBroadband Reply at 3.

³⁰ EchoStar Comments at 1.

³¹ *Id.* at 1-2.

³² *Id.* at 3.

³³ BendBroadband Reply at 6.

³⁴ Waiver Request at 1.

³⁵ 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.

BendBroadband chooses not to accept this conditional waiver, it can request that we defer enforcement of the July 1, 2007 deadline so long as it can demonstrate that it has placed orders for set-top boxes that comply with the integration ban but that its orders will not be fulfilled in time for it to comply with the deadline.

A. Section 629(c) of the Act

11. Section 629(c) states in relevant part that:

[t]he Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.³⁶

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. Section 629(a) thus charges the Commission with adopting regulations that further that goal. At the same time, however, Congress intended “that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”³⁷ Accordingly, waivers of those regulations are granted when doing so “is necessary to assist the development or introduction of a new or improved” service, such as, for example, a nascent MVPD offering from a new competitor.³⁸

12. In its Waiver Request, BendBroadband argues that grant of the Waiver Request is necessary to assist in the development of BendBroadband’s new and improved digital cable services.³⁹ According to BendBroadband, those services include “more advanced parental controls, an interactive program guide, video-on-demand, greater channel capacity, and specialized programming and packages.”⁴⁰ In addition, BendBroadband states that grant of its Waiver Request would enable it to move to an all-digital network by 2008, which in turn “would allow it to reclaim spectrum now used for analog transmission for advanced services, such as more HD and VOD, wireless, business services, and higher broadband speeds.”⁴¹

13. As a general matter, however, we do not find compelling BendBroadband’s argument that grant of the Waiver Request is necessary to assist the development or introduction of the majority of these services. First, as BendBroadband notes, in 2005 it “became one of the first cable operators in the nation to complete a network-wide transition to digital simulcast, allowing it to provide 100% all-digital services to all of its digital cable subscribers.”⁴² Thus, many of these services already are available to all of BendBroadband’s cable subscribers. The waiver could hardly be “necessary” for the “introduction” of these services as they already exist.

³⁶ 47 U.S.C. § 549(c).

³⁷ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

³⁸ See *First Report and Order*, 13 FCC Rcd at 14801, ¶ 65 (declining to apply the integration ban to DBS providers and noting that “in many instances, the Commission refrains from imposing regulations on new entrants”) (citation omitted).

³⁹ Waiver Request at 6-11.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8.

⁴² *Id.* at 5.

14. Second, it appears that a number of those services have already achieved success in the marketplace. According to the Waiver Request, BendBroadband's digital penetration has increased 33 percent in twelve months.⁴³ We conclude, therefore, that grant of the Waiver Request is not "necessary" to assist in the development or introduction of new or improved services. While it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).

15. In addition, we note that BendBroadband failed to request a waiver "for a limited time," as required by Section 629(c).⁴⁴ This limit helps to ensure that the Commission progresses toward furthering the goal of a competitive market for navigation devices. Thus, on its very face, BendBroadband's waiver request fails to meet the requirements envisioned by Congress.

B. The 2005 Deferral Order

16. Because BendBroadband characterizes its Waiver Request as one for a "low-cost, limited capability" device consistent with the waiver standard established in the Commission's *2005 Deferral Order*, we evaluate it under that standard, as well. BendBroadband contends that the Motorola DCT-700 exactly matches the description of a low-cost, limited capability set-top box set forth in the *2005 Deferral Order*.⁴⁵ Specifically, it states that the DCT-700 "does not include DVR (PVR) recording or storage capability or broadband Internet access capability; does not produce any High Definition (HD) output, and is not capable of simultaneously tuning multiple channels of video programming."⁴⁶ As described above, however, the DCT-700 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.

17. Accordingly, we conclude that the DCT-700 does not meet the limited-capability standard announced in the *2005 Deferral Order*. The Commission never contemplated that "limited capability integrated digital cable boxes" would include devices with two-way functionality or the ability to act as functional PVRs. Rather, this category of boxes is confined to those devices whose functionality is limited to making digital cable signals available on analog sets.⁴⁷ 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."⁴⁸ In other words, the

⁴³ *Id.* at 7.

⁴⁴ 47 U.S.C. § 549(c).

⁴⁵ Waiver Request at 6.

⁴⁶ *Id.* at 6 n.9.

⁴⁷ 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>.

⁴⁸ *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.

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

18. Moreover, the Commission remained aware of the goal to develop a competitive marketplace for navigation devices. Accordingly, the Commission stated that waiver requests would not be warranted “for boxes that contain personal video recording (‘PVR’), high-definition, broadband Internet access, multiple tuner, or *other similar advanced capabilities*.”⁴⁹ This list of capabilities was not intended to be exhaustive, as demonstrated by the inclusion of the phrase “other similar advanced capabilities.” Throughout the navigation device and plug and play negotiations, all parties have understood the term “advanced” to include two-way capability. Indeed, an entire section of the Memorandum of Understanding signed by major cable and consumer electronics manufacturers – which helped to shape the Commission’s understanding of the topic during the unidirectional plug-and-play rulemaking proceeding⁵⁰ – deals exclusively with defining two-way products as “advanced.”⁵¹

19. 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.”⁵² The DCT-700 contains precisely these advanced functions, as well as PPV capabilities.

20. In addition, we note that 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.”⁵³ Here, while BendBroadband indicates that grant of its Waiver Request would allow it to move to an all-digital network by 2008, the box for which it seeks waiver is not a “limited capability” set-top box. Therefore, we cannot grant 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”⁵⁴ limited-capability set-top boxes, and therefore will entertain and grant future requests that satisfy the criteria set forth in the *2005 Deferral Order*.

⁴⁹ *Id.* (emphasis added).

⁵⁰ 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).

⁵¹ 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.*

⁵² 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) (describing VOD and EPGs as “advanced services”).

⁵³ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

⁵⁴ See *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

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

21. BendBroadband also argues that it is entitled to waiver pursuant to the waiver authority found in Sections 1.3 and 76.7 of the Commission's rules.⁵⁵ Specifically, it claims that "if this waiver request is granted, [it] plans to move to an entirely all-digital network by 2008 and reclaim the spectrum now used for analog channels for even more HD and VOD, increased broadband capacity, and other new digital services."⁵⁶ We conclude that absent a sworn declaration from BendBroadband stating that it will complete its all-digital migration by 2008, the public interest benefits it asserts would be too speculative to show good cause for a waiver under Sections 1.3 and 76.7. However, if BendBroadband takes the specific steps outlined below in order to demonstrate its commitment to move to an all-digital network, we believe that grant of the Waiver Request would be warranted, particularly when considered in the context of the Commission's goal in the 2005 *Deferral Order* of promoting the digital transition and in light of its potential to further the objectives of Section 706 of the Telecommunications Act of 1996. BendBroadband must notify all of its analog customers of its plans to go all digital at least six months in advance of that event and submit an affidavit to the Commission confirming that such notice has been provided, and ensure that, at least six months prior to its migration to all digital, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view BendBroadband's video programming on their television sets and submit an affidavit to the Commission confirming that this is the case.

22. BendBroadband states that the availability of a sub-\$100 device is "critical" to its plan to move to an all-digital network by 2008,⁵⁷ and that, to date, "not one consumer electronics manufacturer in the world – Motorola or anyone else – has committed to make CableCARD-equipped set-top boxes at a price anywhere near the \$79 price BendBroadband pays today for DCT-700s."⁵⁸ Citing a filing by Armstrong Cable Services,⁵⁹ BendBroadband reports that the lowest-cost CableCARD-equipped device available from Motorola sells for \$190.⁶⁰ Further, BendBroadband asserts that "[i]f any other CE vendor will by July 1, 2007 sell BendBroadband a compliant, compatible set-top box with the same or better features as the DCT-700 at a comparable price, it would gladly buy such devices and withdraw this waiver request."⁶¹

23. As BendBroadband points out, the transition to an all-digital network requires every analog device in a cable subscriber's home to have a set-top box or CableCARD.⁶² BendBroadband

⁵⁵ 47 C.F.R. §§ 1.3, 76.7.

⁵⁶ Waiver Request at 5. *See also id.* at 10 (stating that compliance with the integration ban "would drain resources from the rollout of additional digital services eagerly anticipated by consumers and the Commission, such as more HD and VOD content, wireless, business services, and other advanced services").

⁵⁷ *Id.* at 5. *See also id.* at 8 (noting that "until *all* of its customers have a set-top box or CableCARD-equipped device for each analog television in their homes, BendBroadband must still continue to transmit analog programming," stating that it "is therefore eager to get these digital devices into every home so that it can transition to an entirely all-digital network," and arguing that, in order to do so, it "must be able to continue to offer a very low-cost device such as the \$1.95/month DCT-700 to its budget-sensitive customers").

⁵⁸ *Id.* at 8.

⁵⁹ CS Docket No. 97-80, *Ex Parte* Presentation of American Cable Association and Armstrong Cable Services (Aug. 31, 2006), at 2.

⁶⁰ Waiver Request at 8.

⁶¹ *Id.* at 9. *See also id.* at 6 (describing the DCT-700 as the "catalyst for its transition to an all-digital network" stating that it "is the least-expensive cable set-top box available today") and *id.* at n.9 (asserting that "the most important feature of this device is its low cost").

⁶² *Id.* at 8.

claims that the DCT-700 allows it to offer digital service at a price-point that is very attractive to its consumers, and that a waiver is necessary to ensure that every analog device in its subscribers' homes is compatible with an all-digital system.⁶³ BendBroadband contends that this was the Commission's rationale for stating in the *2005 Deferral Order* that waiver requests for low-cost, limited-capability boxes would be entertained.⁶⁴ It also asserts that waiver for the low-end boxes would not undermine the goal of a competitive navigation device market.⁶⁵

24. We conclude that BendBroadband's plan to migrate to an all-digital network, if accomplished within the timeframe set forth in the Waiver Request (*i.e.*, by 2008), would be sufficient to show good cause for a waiver under Sections 1.3 and 76.7. First, in the *2005 Deferral Order*, the Commission's basis for developing the low-end, limited capability waiver was the impending DTV transition:

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. The availability of low-cost boxes will further the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television. Accordingly, 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.⁶⁶

BendBroadband has indicated that the waiver it seeks would have a direct and immediate impact on its migration to an all-digital network prior to the end of analog, over-the-air broadcasts by full-power television stations on February 17, 2009.⁶⁷ That migration, in turn, would enable it to ensure that its cable subscribers will be able to view digital broadcast signals after the end of the DTV transition. It also may enable BendBroadband to provide additional HD content, which may facilitate the DTV transition by creating greater incentives for its subscribers to acquire digital television sets. Therefore, although the DCT-700, as discussed above, is not the type of "limited capability" device that the Commission contemplated in drafting the *2005 Deferral Order*, we nevertheless recognize that a conditioned grant of the Waiver Request would facilitate BendBroadband's rapid transition to an all-digital network (*i.e.*, by 2008), which was a critical factor in the Commission's decision to consider waiver requests at all.

25. BendBroadband also asserts that grant of the Waiver Request would allow it to focus its capital on other new digital services such as wireless, business services, and other advanced services. Section 706 of the Telecommunications Act of 1996 charges the Commission with encouraging the deployment of advanced telecommunications capabilities.⁶⁸ Section 706 goes on to define advanced telecommunications capabilities as high-speed broadband capabilities that enable users to send and receive voice, data, graphics and video.⁶⁹ We believe that BendBroadband's migration to an all-digital

⁶³ *Id.* at 7-8.

⁶⁴ *Id.* at 6-7.

⁶⁵ *Id.* at 11-13 (citing *2005 Deferral Order*, 20 FCC Rcd at 6813-14, ¶ 37).

⁶⁶ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

⁶⁷ Waiver Request at 1, 5-8.

⁶⁸ Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157(a).

⁶⁹ Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157(c).

system by 2008 would allow it to reclaim a considerable amount of spectrum within a clearly defined timeframe, which would enable it to provide consumers with advanced telecommunication capabilities, thereby furthering the goals of Section 706.

26. Accordingly, if BendBroadband (1) notifies all of its analog customers of its plans to go all digital at least six months in advance of that event and submits a sworn declaration to the Commission confirming that such notice has been provided, and (2) ensures that, at least six months prior to its migration to all digital, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view BendBroadband's video programming on their television sets and submits a sworn declaration to the Commission confirming that this is the case, and (3) publicly commits to this plan by sworn declaration, we believe that BendBroadband will have met the standard for waiver under Sections 1.3 and 76.7 of the Commission's rules.

IV. CONCLUSION

27. For these reasons, we conclude that grant of a conditional waiver of the integration ban to BendBroadband is justified under Sections 1.3 and 76.7 of the Commission's rules. As noted above, we do not find a waiver pursuant to Section 629(c) appropriate. Nor do we believe that the DCT-700 qualifies for waiver as a "low-cost, limited capability" device under the *2005 Deferral Order* because it includes two-way functionality that places it outside of the scope of what the Commission intended when it was considering a waiver for "limited capability integrated digital cable boxes." Nevertheless, we do recognize that the ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits. Accordingly, we grant the Waiver Request, conditioned upon (1) BendBroadband's filing with the Media Bureau a sworn declaration in which it commits to move to an all-digital network by 2008, (2) BendBroadband's notifying all of its analog customers of its plans to go all digital at least six months in advance of that event and submitting an affidavit to the Commission confirming that such notice has been provided, and (3) BendBroadband's assurance that, at least six months prior to its migration to all digital, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view BendBroadband's video programming on their television sets and submitting an affidavit to the Commission confirming that this is the case.⁷⁰

⁷⁰ In both its Waiver Request and Reply Comments, BendBroadband asks for clarification regarding the current status of the exemption from the integration ban set forth in Section 76.1204(a)(2) of the Commission's rules, 47 C.F.R. § 76.1204(a)(2), with respect not only to DBS operators, but to BendBroadband, as well. See Waiver Request at 13-18, BendBroadband Reply at 5-7. In the *2005 Deferral Order*, the Commission recognized "that DBS is not immune from some of the same concerns regarding constraints on independent innovation and competition that arise in the cable context" and that "[a]voiding rule based market distortions with respect to DBS as a competitor to cable also is an important consideration." *2005 Deferral Order*, 20 FCC Rcd at 6814, ¶ 38. At the same time, however, the full Commission recognized that that proceeding did not provide a sufficient record for it to resolve those issues. Likewise, the instant Waiver Request, which is being considered at the bureau level, is not the appropriate forum to consider whether marketplace developments warrant any changes to our existing understanding and application of the exemption set forth in Section 76.1204(a)(2), which currently is limited to DBS and direct-to-home service providers. Accord EchoStar Comments at 2 n.7 (arguing that "to the extent BendBroadband seeks to modify the FCC's treatment of DBS navigation devices, a waiver request is an inappropriate vehicle" and that, in order to properly raise this issue, "[a] petition for rulemaking would need to be filed with the Commission"). Accordingly, we deny BendBroadband's request for clarification.

V. ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED** that, pursuant to Section 629 of the Communications Act of 1934, as amended, 47 U.S.C. § 549, and Section 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, the request for waiver filed by Bend Cable Communications, LLC d/b/a BendBroadband of Section 76.1204(a)(1) of the Commissions rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

29. **IT IS FURTHER ORDERED** that, pursuant to Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157nt, and Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, a conditional waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1) **IS GRANTED** to Bend Cable Communications, LLC d/b/a BendBroadband, conditioned as set forth in this Order.

30. 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

Donna C. Gregg
Chief, Media Bureau