

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

In the Matter of )
RCN Corporation ) CSR-7113-Z
Request for Waiver of Section 76.1204(a)(1) of the )
Commission's Rules )

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 2009

Released: June 22, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. RCN Corporation ("RCN" or "Petitioner") filed with the Media Bureau a Request for Extension of the limited waiver of the prohibition on deployment of set-top boxes with integrated security granted in a prior Media Bureau decision. For the reasons stated below, we grant RCN's Request for Extension.

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. The Commission implemented this directive in 1998 through the adoption of the "integration

1 See Letter from Richard Ramlall, Senior Vice President, Strategic, External, & Regulatory Affairs, RCN Corporation, to Brendan Murray, Media Bureau, Federal Communications Commission, CSR-7113-Z (filed Feb. 10, 2009) ("Extension Request").

2 The ban on deployment of set-top boxes with integrated security is set forth in Section 76.1204(a)(1) of the Commission's rules. 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."

3 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").

4 See Section 629(a) of the Communications Act of 1934, as amended, 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).

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 single integrated device.<sup>5</sup> Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.<sup>6</sup> On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> In limited circumstances, however, operators may be eligible for waiver of the integration ban.<sup>12</sup>

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<sup>5</sup> 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).

<sup>6</sup> *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

<sup>7</sup> 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*”).

<sup>8</sup> *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

<sup>9</sup> 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”).

<sup>10</sup> 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.”

<sup>11</sup> *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.”).

<sup>12</sup> 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 of new or improved services. 47 U.S.C. § 549(c). Furthermore, petitioners who have shown good cause have

### III. DISCUSSION

4. In the *2007 Financial Hardship Order*, the Bureau found that extraordinary financial hardships present good cause for limited waiver of the integration ban.<sup>13</sup> RCN was granted waiver of Section 76.1204(a)(1) of the Commission's rules until January 31, 2009 based on this precedent.<sup>14</sup> In the order granting waiver, the Bureau required Petitioner to file a plan for coming into compliance with the integration ban.<sup>15</sup> RCN filed such a plan,<sup>16</sup> but also asserted that a further extension of the waiver would be warranted based on RCN's financial situation.<sup>17</sup> RCN has demonstrated that its financial condition has weakened in the months since the release of the *July 2008 Financial Hardship Order*.<sup>18</sup> In light of the further deterioration of Petitioner's financial condition, we conclude that a limited extension of waiver is justified under Sections 1.3 and 76.7 of the Commission's rules.

5. While we continue to believe that "[i]ncreased demand due to common reliance should reduce the cost of compliant set-top boxes, and the financial burdens Petitioners face should dissipate,"<sup>19</sup> RCN has demonstrated sufficiently that the cost of compliance would impose an undue hardship on RCN in light of the fact that its financial situation has deteriorated in the months since the release of the *July 2008 Financial Hardship Order*.<sup>20</sup> Specifically, RCN's operating expenses exceeded its operating revenue.<sup>21</sup> Although RCN's operating cash flow is positive, its cash flow from financing is negative, and RCN still does not hold enough liquid assets to cover its current debt.<sup>22</sup> RCN's free cash flow remains negative and, of the past four years, only 2006 yielded a return on investment.<sup>23</sup> RCN's total debt remains high, and the amount of interest paid on that debt has continued to escalate.<sup>24</sup> Accordingly, we conclude that the public interest weighs in favor of reconsidering the waiver's January 31, 2009 expiration, and extending the expiration of the waiver to December 31, 2009.

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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*").

<sup>13</sup> *2007 Financial Hardship Order*, 22 FCC Rcd 13426-7, ¶¶ 39-40.

<sup>14</sup> *July 2008 Financial Hardship Order*, 23 FCC Rcd at 10594-6, ¶¶ 4-9.

<sup>15</sup> *Id.* at 10596, ¶ 9.

<sup>16</sup> See Letter from Jean Kiddoo, Attorney for RCN Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (August 11, 2008).

<sup>17</sup> See *Extension Request* at 1-2.

<sup>18</sup> *Id.*

<sup>19</sup> *July 2008 Financial Hardship Order*, 23 FCC Rcd at 10596, ¶ 9.

<sup>20</sup> *Extension Request* at 1-2.

<sup>21</sup> *Id.* See also Letter from Richard Ramlall, Senior Vice President, Strategic, External, & Regulatory Affairs, RCN Corporation, to Brendan Murray, Media Bureau, Federal Communications Commission, CSR-7113-Z at 1 (filed March 3, 2009).

<sup>22</sup> *Extension Request* at 1-2.

<sup>23</sup> Letter from Richard Ramlall, Senior Vice President, Strategic, External, & Regulatory Affairs, RCN Corporation, to Brendan Murray, Media Bureau, Federal Communications Commission, CSR-7113-Z at 1 (filed March 3, 2009); Request for Extension of Waiver at 9-12, CSR-7113-Z (filed April 30, 2008).

<sup>24</sup> *Extension Request* at 1-2; Letter from Richard Ramlall, Senior Vice President, Strategic, External, & Regulatory Affairs, RCN Corporation, to Brendan Murray, Media Bureau, Federal Communications Commission, CSR-7113-Z at 1-2 (filed March 3, 2009).

6. We have concluded that speculative claims that the integration ban may impose a financial burden on cable companies are not persuasive.<sup>25</sup> As explained in the *July 2008 Financial Hardship Order*, however, RCN has shown extraordinary financial hardship, and the Bureau has found that such hardship presents good cause for waiver of the integration ban rule.<sup>26</sup> Furthermore, RCN 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.<sup>27</sup> Accordingly, we conclude that a limited waiver of the integration ban until December 31, 2009 would be in the public interest,<sup>28</sup> and that RCN has met the standard for waiver under Sections 1.3 and 76.7 of the Commission's rules.

#### IV. ORDERING CLAUSES

7. 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** with respect to the Motorola DCT-700 to RCN Corporation until December 31, 2009.

8. 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

Robert H. Ratcliffe  
Acting Chief, Media Bureau

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<sup>25</sup> 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).

<sup>26</sup> *July 2008 Financial Hardship Order*, 23 FCC Rcd at 10594-6, ¶¶ 4-9.

<sup>27</sup> *Extension Request* at 1-2.

<sup>28</sup> While RCN has established that a limited waiver is appropriate at this time, the Commission adopted regulations to develop a competitive retail market for navigation devices more than a decade ago. While we recognize petitioner's financial distress, we believe that we must begin to chart a course to bring it into compliance with the integration ban. Therefore, we will work with Petitioner, the Consumer Electronics Association, and set-top box manufacturers over the coming months to explore ways to bring these systems into compliance, consistent with RCN's financial condition.