

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

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| In the Matter of |) | |
| |) | |
| Broadstripe, LLC f/k/a Millennium Digital Media Systems, L.L.C. |) | CSR-7625-Z |
| |) | |
| Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules |) | |

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: February 25, 2009

Released: February 25, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. Broadstripe, LLC f/k/a Millennium Digital Media Systems, L.L.C. (“Broadstripe” or “Petitioner”) filed with the Media Bureau a Petition for Reconsideration¹ of a prior Media Bureau decision granting limited waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission’s rules.² CEA filed a response to Broadstripe’s Petition for Reconsideration,³ to which Broadstripe filed a response.⁴ For the reasons stated below, we grant the petition for reconsideration filed by Broadstripe.

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

¹ See Millennium Digital Media Systems, LLC d/b/a Broadstripe Petition for Reconsideration and Report of Compliance Plan, CSR-7625 (filed Dec. 15, 2008).

² 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 *Alabama Broadband, LLC et al Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 23 FCC Rcd 16646 (2008) (“November 2008 Financial Hardship Order”).

³ CEA filed in opposition to Broadstripe’s petition for reconsideration on January 27, 2009, 43 days after Broadstripe filed its petition for reconsideration; the Commission’s rules require parties to file oppositions “within 10 days after the petition is filed.” 47 C.F.R. § 1.106(g). We find no good cause to accept CEA’s late-filed opposition. Thus, pursuant to Section 1.1206 of the Commission’s rules, we will treat the comments filed by CEA on January 27, 2009 as an ex parte presentation. 47 C.F.R. § 1.1206.

⁴ See Broadstripe Reply Comments (filed February 6, 2009).

1996.⁵ 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 single integrated device.⁶ Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.⁷ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁸ 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.⁹

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.¹⁰ 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.¹¹ 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

⁵ 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).

⁶ 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).

⁷ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁸ 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*”).

⁹ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

¹⁰ 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”).

¹¹ 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.”

denied those petitions.¹² In limited circumstances, however, operators may be eligible for waiver of the integration ban.¹³

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.¹⁴ Broadstripe was granted waiver of Section 76.1204(a)(1) of the Commission's rules until January 31, 2009 based on this precedent.¹⁵ In the order granting waiver, the Bureau required Petitioner to file a plan for coming into compliance with the integration ban.¹⁶ Broadstripe filed such a plan,¹⁷ but also asserted that the Bureau's conclusions in the *November 2008 Financial Hardship Order* were based on erroneous factual assumptions. The Bureau also understands that Petitioner's financial condition has weakened in the months since the release of the *November 2008 Financial Hardship Order*.¹⁸ 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, 1.106, and 76.7 of the Commission's rules.

5. Broadstripe argues that the Bureau's decisions (1) failed to take into account the harmful effects of the waiver ending within weeks of the transition to digital broadcast television,¹⁹ (2) failed to take into account that the continued waiver will provide compelling public interest benefits,²⁰ and (3) were based on a material error of fact regarding the price of separated security devices.²¹ We do not find Broadstripe's first two arguments compelling. With respect to the first argument, the broadcast television transition should have little, if any, effect on converter boxes for digital cable television.²² With regard to

¹² *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.'").

¹³ 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 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*").

¹⁴ *2007 Financial Hardship Order*, 22 FCC Rcd 13426-7, ¶¶ 39-40.

¹⁵ *November 2008 Financial Hardship Order*, 23 FCC Rcd at 16648-9, ¶¶ 4-9.

¹⁶ *Id.* at 16649, ¶ 9.

¹⁷ While the petitioner filed a plan to comply with the integration ban after January 31, 2009, the plan relied on extraordinary steps. See Letter from Jeremy M. Kissel, Attorney for Broadstripe, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (January 29, 2009) (relying on debtor-in-possession lenders for financing to purchase compliant set-top boxes).

¹⁸ Letter from Jeremy M. Kissel, Attorney for Broadstripe, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (January 29, 2009); Broadstripe Reply at 2-3.

¹⁹ Broadstripe Petition for Reconsideration at 2-3.

²⁰ *Id.* at 3-4.

²¹ *Id.* at 5-6.

²² See, e.g., Rob Pegoraro, *TV's Digital Transition Doesn't Have to Cause Headaches*, THE WASHINGTON POST, January 22, 2009, at D03, available at

the second point, in a decision upheld by the U.S. Court of Appeals for the D.C. Circuit, the Commission considered and rejected the arguments regarding capital improvements a cable operator could make if it were not required to comply with the integration ban.²³ With respect to the price of separated security devices, however, the Bureau found 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.”²⁴ While we believe this finding remains accurate, Broadstripe has provided sufficient facts to demonstrate that the cost of compliance would impose an undue hardship on Broadstripe²⁵ in light of the fact that its financial situation has deteriorated in the months since the release of the *November 2008 Financial Hardship Order*.²⁶ Accordingly, we conclude that the public interest weighs in favor of reconsidering the waivers’ January 31, 2009 expiration, and extending the expiration of the waiver to August 31, 2009.

6. We agree with CEA that speculative claims that the integration ban may impose a financial burden on cable companies are not persuasive.²⁷ As explained in the *November 2008 Financial Hardship Order*, however, Broadstripe has shown extraordinary financial hardship, including a declaration of bankruptcy on January 2, 2009,²⁸ and the Bureau has found that such hardship presents good cause for waiver of the integration ban rule.²⁹ Furthermore, Broadstripe 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.³⁰ Accordingly, we conclude that a limited waiver of the integration ban until August 31, 2009 or Broadstripe’s emergence from bankruptcy, whichever is earlier, would be in the public interest,³¹ and that Broadstripe has met the standard for waiver under Sections 1.3, 1.106, and 76.7 of the Commission’s rules.

www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012103295.html (“The movement of some cable channels from analog to digital service has nothing to do with over-the-air broadcasts, regardless of what your cable operator might say.”); CEA ex parte in CSR-7625-Z at 3 (“As the Commission well knows, unlike broadcasters, cable operators are under no obligation to end analog transmissions on a date certain.”).

²³ *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 17113, 17124-25, ¶ 17 (2007), *pet. for review denied*, *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

²⁴ *November 2008 Financial Hardship Order*, 23 FCC Rcd at 16649, ¶ 9

²⁵ *See, e.g.*, Broadstripe Petition for Reconsideration at 6.

²⁶ Letter from Jeremy M. Kissel, Attorney for Broadstripe, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (January 29, 2009) (explaining that Broadstripe filed for bankruptcy protection on January 2, 2009); Broadstripe Reply at 2-3.

²⁷ CEA ex parte in CSR-7625-Z at 2. *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 the increased costs associated with the integration ban would slow Comcast’s transitions to all-digital platforms).

²⁸ *See* Letter from Jeremy M. Kissel, Attorney for Broadstripe, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (January 29, 2009).

²⁹ *November 2008 Financial Hardship Order*, 23 FCC Rcd at 16648-9, ¶¶ 4-9.

³⁰ *See, e.g.*, Broadstripe Petition for Reconsideration at 6.

³¹ While Broadstripe has established that a limited waiver is appropriate at this time, CEA is correct that the Commission adopted regulations to develop a competitive retail market for navigation devices more than a decade ago. *See* CEA ex parte in CSR-7625-Z at 2. 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, CEA, and set-top box manufacturers over the coming months to explore ways to bring these systems into compliance, consistent with their financial condition.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3, 1.106, and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.106, & 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 Broadstripe, LLC f/k/a Millennium Digital Media Systems, L.L.C. until August 31, 2009 or Broadstripe's emergence from bankruptcy, whichever is earlier.

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

Monica Shah Desai
Chief, Media Bureau