

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

In the Matter of)
)
)
Baja Broadband Operating Company, LLC) CSR-7111-Z
(f/k/a Orange Broadband Operating Company,)
LLC and Carolina Broadband, LLC)
)
Request for Waiver of Section 76.1204(a)(1) of)
the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 2011

Released: April 6, 2011

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we grant Baja Broadband Operating Company, LLC's ("Baja" or "Petitioner") request for an extension of the waiver of the ban on integrated set top boxes set forth in Section 76.1204(a)(1) of the Commission's rules due to Baja's financial hardship. Waiver with respect to new devices is granted for one year from the release date of this Order.

II. BACKGROUND

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices such as set top boxes 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 ban," which established a date after which cable operators no longer may place into service new navigation devices that perform both conditional access and other functions in a

1 Baja Broadband's Report of Updated Financial Information and Request for Clarification, CSR-7111-Z (filed January 11, 2011) ("Renewal Request").

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."

3 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).

single integrated device.⁴ Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.⁵ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁶ 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.⁷

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.⁸ 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.⁹ 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.¹⁰ In limited circumstances, however, operators may be eligible for waiver of the integration ban.¹¹

⁴ 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).

⁵ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁶ 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*”).

⁷ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31. Last year the Commission adopted rules to make the integration ban more lenient by exempting all one-way, non-recording set top boxes from the integration ban. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 25 FCC Rcd 14657, 14679-14682, 14701 ¶¶ 45-51 (2010) (“*Third Report and Order and Order on Reconsideration*”) (amending Section 76.1204 of the Commission’s rules).

⁸ 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”).

⁹ 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.”

¹⁰ *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.’”).

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

4. On December 27, 2006, Baja filed a request for waiver from the integration ban. The Bureau denied that request on June 29, 2007, but granted Baja leave to amend.¹² On June 24, 2009, Baja Broadband filed an amended request for waiver from the integration ban. As justification for its request, Baja submitted updated financial data to demonstrate that it is in financial difficulty and is, therefore, unable to comply with the integration ban at this time. On March 4, 2010, the Media Bureau granted Baja's request, stating that extreme financial hardship and a willingness to purchase devices from refurbishing companies that will sell integrated set top boxes to subscribers at retail justified a conditional waiver.¹³ The waiver for refurbished integrated devices was permanent subject to certain conditions, while the waiver for new navigation devices with integrated security was limited to one year.

III. DISCUSSION

5. Baja seeks an extension of at least one year for the time-limited portion of the waiver, and a clarification that the waiver for refurbished devices applies to all refurbished devices, and is not limited to high-definition ("HD") set top boxes and digital video recorder ("DVR") devices.¹⁴ Baja filed its request pursuant to Sections 1.3 and 76.7 of the Commission's rules. The Bureau has granted waiver of the integration ban pursuant to those rule sections in cases of non-speculative, extraordinary financial hardship.¹⁵ In light of Baja's demonstrated financial hardship, and consistent with Bureau precedent, we conclude that a limited extension of Baja's request for waiver of the integration ban for new non-HD, non-DVR set top boxes is justified under Sections 1.3 and 76.7 of the Commission's rules. We therefore grant Baja a one-year waiver extension. As we concluded in the *Baja Waiver Order*, we find that granting an additional waiver to Baja under Sections 1.3 and 76.7 of our rules is justified in order to enable Baja to continue offering competitive HD and DVR service and to provide Baja's subscribers with another retail alternative to leasing a set top box from Baja. In addition, as requested by Baja, we clarify that the waiver we granted last year with respect to refurbished devices includes non-HD and non-DVR devices, subject to the same conditions set forth in the *Baja Waiver Order*.

6. In the Renewal Request, Baja states waiver of the integration ban allowed Baja to cut its lease price for basic set top boxes in half and add more than 2,000 new digital customers, thus laying the groundwork for Baja's transition to all-digital systems.¹⁶ It adds that as a direct result of the waiver, it was able to deploy digital cable and broadband for the first time in two New Mexico systems that previously had been one-way analog only.¹⁷ Baja also notes that it activated 122 customer-purchased set top boxes, enabling those customers to receive digital cable without leasing a set top box from Baja and expects that number to increase as its digital penetration increases.¹⁸

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 *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 8557, 8564-5, ¶¶ 18-19 (2007) ("*Financial Hardship Order*").

¹² *Armstrong Utilities, Inc., et al*, 22 FCC Rcd 11725, 11745, ¶ 57 (2007).

¹³ *Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC and Carolina Broadband, LLC)*, 25 FCC Rcd 2200, 2204-2206, ¶¶ 11-14 (2010) ("*Baja Waiver Order*").

¹⁴ Renewal Request at 1.

¹⁵ See, e.g., *2007 Financial Hardship Order*, 22 FCC Rcd at 13426-7, ¶¶ 39-40.

¹⁶ Renewal Request at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 2.

7. To demonstrate its extraordinary financial hardship, Baja submitted financial statements that demonstrate that the company continues to be in a precarious financial position. Although its operating cash flow has changed from negative to positive, there are other financial indicators that, although they too show improvement, continue to indicate financial distress.¹⁹ Baja's operating expenses exceed its operating income, and it continues to suffer a net loss, meaning that Baja is not making enough money to cover its expenses.²⁰ Furthermore, Baja's overall debt has increased and Baja does not have the resources necessary to pay its current financial obligations. Accordingly, Baja has met the standard for waiver of the integration ban for new non-HD, non-DVR two-way set top boxes under Sections 1.3 and 76.7 of the Commission's rules for a period of one year from the release date of this Order.

8. We conclude that an additional waiver of the integration ban for one year would be in the public interest, and that Petitioner has met the standard for waiver under Sections 1.3 and 76.7 of the Commission's rules. We note, however, that when the rules adopted in the *Third Report and Order and Order on Reconsideration* become effective, the integration ban will no longer apply to one-way set top boxes without recording capability,²¹ and the financial burden of integration ban compliance will decrease significantly. We believe that once the rule becomes effective, the integration ban will no longer impose an unmanageable cost even on operators who demonstrate extraordinary financial hardship.

IV. ORDERING CLAUSES

9. 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 Baja Broadband Operating Company, LLC with respect to new non-HD, non-DVR set top boxes for a period of one year from the date this Order is released.

10. 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

Michelle M. Carey
Deputy Chief, Media Bureau

¹⁹ *Id.*

²⁰ *Id.* at Exhibit 1.

²¹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 25 FCC Rcd 14657, 14679-14682, 14701 ¶¶ 45-51 (2010) (amending Section 76.1204 of the Commission's rules).