

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

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| In the Matter of |) | |
| |) | |
| Evolution Broadband, LLC's |) | CSR-7902-Z |
| |) | |
| Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules |) | |
| |) | |
| Implementation of Section 304 of the Telecommunications Act of 1996 |) | CS Docket No. 97-80 |
| |) | |
| Commercial Availability of Navigation Devices |) | |

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 2009

Released: June 1, 2009

By the Commission:

I. INTRODUCTION

1. Evolution Broadband, LLC ("Evolution") has filed the above-captioned waiver request (the "Waiver Request"), seeking a three-year waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. The American Cable Association ("ACA"), Baja Broadband, Cable One, the Consumer Electronics Association ("CEA"), the Electric and Water Plant Board of the City of Frankfort, and TVMAX each filed comments in response to Evolution's request, and Evolution filed reply comments. For the reasons stated below, we grant Evolution's request.

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 1996.¹ 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.² Originally, the Commission established January 1, 2005 as the deadline for

¹ 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).

² 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 (continued....))

compliance with the integration ban.³ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁴ 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 forcing the cable operator and consumers to incur costs associated with the separation of hardware.⁵

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.⁶ 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.⁷ 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.⁸ In limited circumstances, however, operators may be eligible for waiver of the integration ban.⁹

B. The Waiver Request

4. On May 12, 2008, Evolution filed a petition seeking waiver of the integration ban for a period of three years for two set-top boxes that it manufactures, the DMS-1002 and DMS-1002-CA (the “Subject Boxes”).¹⁰ Evolution plans to sell the Subject Boxes to cable operators, who will lease the

(...continued from previous page)

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).

³ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁴ 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*”).

⁵ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

⁶ *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”).

⁷ *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.”

⁸ *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.”).

⁹ 47 U.S.C § 549(c); *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

¹⁰ Waiver Request at 3, 5.

Subject Boxes to their subscribers. The Subject Boxes are one-way devices, so they do not have interactive program guides, video-on-demand, pay-per-view, or other interactive television capabilities, nor do they have high definition, video recording, broadband internet, or dual tuner capabilities.¹¹ Evolution seeks a waiver pursuant to Section 629(c) of the Communications Act,¹² which provides that upon an appropriate showing by an MVPD or equipment manufacturer, the Commission should waive rules adopted pursuant to Section 629(a) when such a waiver is necessary to assist in the introduction or development of a new or improved MVPD service.

5. Alternatively, Evolution asserts that these devices meet the “low-cost, limited capability” standard and that therefore the Commission has good cause to grant waiver of the integration ban with respect to the devices under the *2005 Deferral Order*.¹³ Evolution argues that deployment of these devices would serve the public interest because at the price that Evolution plans to offer the devices for sale to cable operators (\$45-\$55), reviewed in light of the large number of devices that cable operators need to purchase before offering a popular digital tier, presents a cost-effective way for cable operators to move more channels to a digital tier. This digital migration allows cable operators to deliver the same number of channels using less spectrum capacity than analog, and that reclaimed spectrum can be used to deploy advanced services, including broadband Internet access.¹⁴

6. CEA asserts that granting Evolution’s request would undermine the goal of a competitive market for navigation devices at a critical time. CEA argues that as cable operators are deploying an increasing number of digital set-top boxes, allowing them to rely on a security technology that is not available to competitive set-top box manufacturers would remove the market and regulatory incentives that cable operators have to support competitive CableCARD devices.¹⁵ CEA also asserts that the fact that Evolution will be able to offer its devices to cable operators nationwide will also have a detrimental effect on the retail market for navigation devices. CEA believes that the proper way to encourage the development of low-cost set-boxes is to create the competitive market that Congress envisioned when drafting Section 629 of the Act, as evidenced by the wide array of low-cost boxes available for viewing digital broadcast signals on analog television sets.¹⁶ In CEA’s opinion, granting Evolution’s request will only serve to weaken the development of a market for low-cost navigation devices for use with digital cable systems.¹⁷

7. ACA, Baja Broadband, Cable One, the Electric and Water Plant Board of the City of Frankfort, and TVMAX each filed comments in support of Evolution’s request, and asserted that waiver of the integration ban for the Subject Boxes would allow cable operators to increase digital penetration in small, rural markets because cable operators will be able to offer digital service at more attractive prices.¹⁸

¹¹ *Id.* at 4-5.

¹² *Id.* at 3.

¹³ *Id.* at 7-8.

¹⁴ *Id.* at 9-10.

¹⁵ CEA Comments at 6-7.

¹⁶ *Id.* at 4-6.

¹⁷ *Id.*

¹⁸ Letter from Hance Price, General Counsel, Frankfort Plant Board, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 11, 2008); Letter from Steve Delgado, Chief Operating Officer, Baja Broadband, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 11, 2008); Letter from Matthew M. Polka, President, American Cable Association, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 11, 2008); Cable One Comments at 1; Letter from David J. Curtin, Chief Operating Officer and EVP, TVMAX, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 13, 2008).

Evolution also filed reply comments, refuting CEA's claims that the Subject Boxes will retard the retail market for navigation devices. Evolution argues that the retail market for navigation devices is nearly non-existent, and therefore there is no market to affect.¹⁹ Evolution also asserts that the deployment of the Subject Boxes will have no effect on cable operators' obligation to support CableCARD technology.²⁰ Finally, Evolution states that its waiver request is time-limited as required by Section 629(c) of the Act.²¹

III. DISCUSSION

8. Evolution makes its request for waiver pursuant to Section 629(c) of the Communications Act, Section 706 of the Telecommunications Act of 1996, and Section 76.1207 of the Commission's rules.²² Alternatively, Evolution seeks waiver pursuant to Sections 1.3 and 76.7 of the Commission's rules as clarified by the *2005 Deferral Order*.²³ Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c) and under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules as clarified by the low-cost, limited-capability standard set forth in the Commission's *2005 Deferral Order*. As discussed below, we find that the request justifies the grant of a waiver under Sections 1.3 and 76.7 of the Commission's rules. We therefore grant Evolution's request.

A. Section 629(c) of the Act

9. Evolution argues that its request for waiver satisfies the waiver provision in Section 629(c) of the Act and 76.1207 of the Commission's rules.²⁴ 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 by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, 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.²⁵

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."²⁶ Accordingly, waivers of those regulations are granted when doing so "is necessary to assist the development or introduction of a new or improved" service.

¹⁹ Evolution Reply at 3-5, 10-11.

²⁰ *Id.* at 7-9.

²¹ Evolution Reply at 7.

²² Waiver Request at 3 (citing 47 U.S.C. § 549(c); 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157; and 47 C.F.R. § 76.1207).

²³ Waiver Request at 3 (citing 47 C.F.R. §§ 1.3 & 76.7). *See also 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

²⁴ Waiver Request at 3.

²⁵ 47 U.S.C. § 549(c). Section 76.1207 of the Commission's rules implements Section 629(c) of the Act and tracks the text of the statute nearly verbatim. 47 C.F.R. § 76.1207.

²⁶ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

10. In the *Comcast Order*, the Commission concluded that Section 629(c) does not provide for waiver of low-cost, limited-capability devices:

While cable operators are not barred from filing waiver requests for low-cost, limited-capability set top boxes pursuant to Section 629(c), we believe generally that waivers sought for such devices are more appropriately requested under the waiver policy articulated in the *2005 Deferral Order*. Specifically, the purpose of Section 629(c) is to provide waivers where “necessary to assist the development or introduction of a new or improved ... service,” whereas the waiver policy established in the *2005 Deferral Order* is directed at devices that provide solely the ability to view digital cable signals on analog television displays. Thus, we cannot envision a device that would satisfy our *2005 Deferral Order’s* waiver policy and at the same time meet the waiver standards of Section 629(c).²⁷

For the same reasons articulated in the *Comcast Order*, Evolution’s waiver request does not meet the waiver standards of Section 629(c) because it is not “necessary to assist the development or introduction of a new or improved ... service.”²⁸ As we explained in the *Comcast Order*, a party seeking waiver under Section 629(c) must show that a waiver is “necessary” to assist in the development or introduction of new or improved services. Evolution made no such showing. As discussed more fully below, however, we conclude that the Subject Boxes satisfy the *2005 Deferral Order’s* waiver policy.

B. Sections 1.3 and 76.7 of the Commission’s Rules and the 2005 Deferral Order

11. In the *2005 Deferral Order* and the *Comcast Order*, the Commission stated that, as a narrow application of the Commission’s general waiver authority under Sections 1.3 and 76.7 of the Commission’s rules,²⁹ it would entertain requests for waiver of the integration ban for low-cost, limited-capability cable boxes:

We are also in agreement with NCTA’s assertion that achieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. 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.

²⁷ *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 17113, 17120, ¶ 11 (2007) (“*Comcast Order*”).

²⁸ Several commenters indicated that they already offer digital services to their customers. *See, e.g.*, Letter from Hance Price, General Counsel, Frankfort Plant Board, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 11, 2008) (“30% of Frankfort Plant Board’s customers subscribe to digital services”); Letter from Steve Delgado, Chief Operating Officer, Baja Broadband, to Kevin J. Martin, Chairman, Federal Communications Commission at 1 (June 11, 2008) (“30% of Baja Broadband’s subscribers take digital services”). Thus, these services already are utilized by many of Petitioner’s potential customers and the waiver could hardly be “necessary” for the “development or introduction” of these services, as they already exist, and cable operators have an incentive to deploy them. *See Comcast Corp. v. FCC*, 526 F.3d 763, 767 (D.C. Cir. 2008) (“Cable companies do not give away their services for free; as every cable customer knows, the more services and features you purchase, the higher your monthly bill will be. Thus, with or without a waiver, Comcast has a strong incentive to make as many services available as possible, and to continue introducing new high-value (and high-cost) features.”). *See also* CEA Comments at 3-4.

²⁹ *Comcast Order*, 22 FCC Rcd at 17121, n.66.

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. We are inclined to believe that provision of such devices by cable operators will not endanger the development of the competitive marketplace envisioned in Section 629, particularly because the more advanced devices offered by cable operators for primary home use will be required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers. In the interim, we will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes. We do not believe that waiver will be warranted for devices that contain personal video recording (“PVR”), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities. Any request for waiver in this regard should include the full specifications for any device(s) for which waiver is sought.³⁰

Evolution asserts that the Waiver Request is consistent with this language from the *2005 Deferral Order* regarding waivers of the integration ban for low-cost, limited-capability set-top boxes.³¹ Specifically, Evolution states that the Subject Boxes are low-cost because they cost \$45-\$55 each, compared to full-function, non-integrated set-top boxes that are available to cable operators for the wholesale price of several hundred dollars per box.³² According to Evolution, the Subject Boxes also are limited-capability devices because they are one-way devices, they do not support output of HD signals, they cannot function as PVRs, they are not designed for broadband Internet access, and they do not enable simultaneous tuning of multiple channels.³³

12. We conclude that the Subject Boxes meet the limited-capability standard announced in the *2005 Deferral Order*. With the low-cost, limited-capability waiver policy articulated in the *2005 Deferral Order*, the Commission intended to strike the proper public interest balance by narrowly tailoring the waiver standard to address a specific governmental interest: preserving a low-cost set-top box option for subscribers that allows them to view digital cable programming on analog television sets.³⁴ The Commission reasoned that the availability of these low-cost, limited-capability boxes would “further

³⁰ *2005 Deferral Order*, 20 FCC Rcd at 6814-15, ¶ 37.

³¹ Waiver Request at 3, 8-9; Reply at 2-3. In the *2005 Deferral Order*, the Commission stated that it would “entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.” 20 FCC Rcd at 6814, ¶ 37. Requests for limited-capability waivers must include “the full specifications for any device(s) for which waiver is sought.” *Id.* Accordingly, while we grant the Waiver Request to the extent that Evolution seeks waiver of the Subject Boxes, we do not grant waiver for any successor devices, as Evolution must first seek waiver and provide the full specifications of any successor devices before such device can be deployed.

³² Waiver Request at 7; Evolution Reply at 5-6.

³³ Waiver Request at 7.

³⁴ Filings from the cable industry in late 2004 indicate that the industry’s main concern was that existing analog devices would require simple “digital-to-analog converters” as cable providers transitioned to all-digital systems, and that requiring those devices to include a CableCARD interface would “present a serious impediment to the discontinuance of analog transmission.” Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission at 7-8 (Dec. 20, 2004). *See also* Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachment at 4 (Nov. 23, 2004) (explaining the need for an inexpensive “\$35-\$50” digital set-top box that will “permit the viewing of digital programming on analog TV sets”).

the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television," and would "not endanger the development of the competitive marketplace envisioned in Section 629, particularly because the more advanced devices offered by cable operators for primary home use will be required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers."³⁵

13. As the Commission stated in the *Comcast Order*, requests for waiver under the existing low-cost, limited-capability standard are considered within the context of facilitating the digital broadcast transition and the cable industry's migration to digital.³⁶ Any device with advanced functionality (including the ability to engage in two-way communication over the cable system) is ineligible for waiver under the *2005 Deferral Order's* low-cost, limited-capability standard.³⁷ We have reviewed the specifications of the Subject Boxes,³⁸ and we conclude that they do not include two-way functionality or any other capabilities that would preclude waiver under the low-cost, limited-capability standard.

14. We disagree with CEA's assertion that granting Evolution's waiver request "will undermine common reliance in a way that the Media Bureau's prior geographically limited and time-limited waivers will not."³⁹ CEA's main complaint regarding common reliance is that the Subject Boxes "use a conditional access technology [Conax] that is *not* available, under any circumstances, to competitive entrants."⁴⁰ This argument fails to recognize that Section 76.1204(a)(1) imposes two requirements on cable operators. First, cable operators are required to make available a separated security element: the CableCARD. Secondly, as of July 1, 2007, cable operators are required to separate the security from the navigation functions in the boxes that they deploy to their subscribers; the Commission commonly refers to this requirement as the "integration ban." The waiver granted pursuant to this order is a limited waiver of the integration ban, under which cable operators may deploy the Subject Boxes despite the fact that they contain integrated security elements. As CEA points out, however, the Commission's rules require those operators to continue to offer and support CableCARDS in their advanced functionality set-top boxes, as well as to make them available for use in digital cable ready devices purchased at retail.⁴¹ One of the overriding purposes of the Commission's navigation device rules is to allow for national portability of consumer electronics devices purchased at retail regardless of the security standard that any specific cable operator uses.⁴² The fact that this is a waiver of the integration ban only and it is limited to apply only to the most basic of devices – one-way, non-HD, non-DVR devices – ensures that cable operators who choose to deploy the Subject Boxes will not frustrate this

³⁵ *2005 Deferral Order*, 20 FCC Rcd at 6813-6814, ¶ 37.

³⁶ *Comcast Order*, 22 FCC Rcd at 17121, ¶ 13.

³⁷ *2005 Deferral Order*, 20 FCC Rcd at 6813-6814, ¶ 37; *Comcast Order*, 22 FCC Rcd at 17120-17123, ¶ 12-15.

³⁸ Waiver Request at Exhibit 1.

³⁹ CEA Comments at 5.

⁴⁰ *Id.* at 3.

⁴¹ CEA Comments at 3, n.4. It appears that Conax and Evolution are working with CableLabs to develop a CableCARD that is compatible with the Conax security that the Subject Boxes use. See Jeff Baumgartner, *First Look: Evolution's CableCARD*, CABLE DIGITAL NEWS, Jan. 7, 2009, available at http://www.lightreading.com/document.asp?doc_id=169951&site=cdn. We remind operators that they must rely on the "identical security function" used in retail devices; aside from the Subject Boxes and any other boxes for which they have received a waiver, cable operators must rely on CableCARDS in the devices they deploy. *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30; *Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 220, 225-226, ¶¶ 17-19 (2007).

⁴² See, e.g., 47 C.F.R. §§ 76.1204(a)(2), (b).

purpose because cable operators who choose to deploy the Subject Boxes are still required to support the national CableCARD standard in all other devices that they deploy.

15. We recognize this is the first waiver granted for a low-cost, limited capability navigation device generally rather than for a specific cable operator's deployment of such a device. Thus, the Evolution box can be deployed on any system without need for a further waiver of Section 76.1204(a)(1)'s prohibition on the deployment of navigation devices "that perform both conditional access and other functions in a single integrated device."⁴³ We recognize the potential competitive implications of this outcome and will attempt to ensure that other manufacturers with similar devices can enter and compete as quickly as possible. We therefore intend to act on similar applications expeditiously. If applicants certify that the capabilities of their navigation devices are low-cost, limited-capability devices that are no more advanced than the Subject Boxes and include the full specifications of any devices for which waiver is sought, the Media Bureau will release a public notice seeking comment on those certifications for a period of ten calendar days, after which the Bureau will expeditiously grant a waiver similar to the one granted herein, deny such a waiver, or take other appropriate action.

IV. CONCLUSION

16. For the reasons stated above, we conclude that the Subject Boxes do not qualify for waiver under Section 629(c) of the Act, as waiver for the Subject Boxes is not "necessary to assist the development or introduction of a new or improved" service. We conclude, however, that the Subject Boxes are eligible for waiver under the "low-cost, limited capability" standard articulated in the *2005 Deferral Order* because they are only capable of doing what is necessary to make digital cable programming viewable on analog television sets. For this reason we conclude that, with respect to the Subject Boxes, Evolution has justified a three-year waiver of the integration ban under the standard set forth in the *2005 Deferral Order* and Sections 1.3 or 76.7 of the Commission's rules. Accordingly, we grant the Waiver Request, and, until three years from the release of this order, any cable operator may choose to deploy the Subject Boxes without requesting a waiver of Section 76.1204(a)(1)'s prohibition on the deployment of navigation devices "that perform both conditional access and other functions in a single integrated device."⁴⁴

⁴³ 47 C.F.R. § 76.1204(a)(1). Cable operators that choose to deploy the Subject Boxes are not afforded a waiver of the requirement that they "make available equipment that incorporates only the conditional access functions of such devices." *Id.*

⁴⁴ Our plug-and-play rules apply to cable operators, and we remind cable operators who deploy the Subject Boxes that they ultimately are responsible for compliance with our rules (*e.g.*, making available and supporting CableCARDS; using CableCARDS in all devices except for the Subject Boxes; complying with 76.640 of the Commission's rules; etc.). *See, e.g., Pace Micro Technology PLC*, 19 FCC Rcd 1945, 1947 (MB 2004) (reminding cable operators that despite an equipment-related waiver granted to an equipment manufacturer, cable operators are ultimately responsible for compliance with our rules).

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 629(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(c), Section 706 of the Telecommunications Act of 1996, and Section 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, the request for waiver filed by Evolution Broadband, LLC of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

18. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, the request for waiver filed by Evolution Broadband, LLC of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED** to the extent described above.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary