

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

In the Matter of)
Cablevision Systems Corporation's)
Request for Waiver of Section 76.1204(a)(1)) CSR-7078-Z
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: January 16, 2009

Released: January 16, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. Cablevision Systems Corporation ("Cablevision") has filed with the Chief of the Media Bureau the above-captioned request for extension of its waiver (the "Extension Request") of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules.1 In January 2007, the Media Bureau found good cause to temporarily grandfather Cablevision's SmartCard-based approach to separated security and issue a two-year waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to use its separated security SmartCard solution until July 1, 2009. Cablevision now seeks a limited extension of that waiver until December 31, 2010 so that it can concentrate its efforts on deploying an open-standard downloadable security solution. For the reasons stated below, we grant the Extension 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 1996.2 The Commission implemented this directive in 1998 through the adoption of the "integration

1 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."

2 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

(continued...)

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.³ Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.⁴ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁵ 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.⁶

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.⁷ 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.⁸ 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

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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).

³ *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).

⁴ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁵ 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*”).

⁶ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

⁷ *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) (“*Cablevision Order*”) (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”).

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

B. The Waiver Request

4. On November 26, 2008, Cablevision filed a request pursuant to Sections 1.3 and 76.7 of the Commission's rules,¹¹ for a limited 18-month extension of its waiver of the prohibition on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. Cablevision's current limited waiver is set to expire on July 1, 2009. Securing an 18-month extension of the waiver of the integration ban would allow Cablevision to use its Smartcard until it is able to complete the deployment of its open-standard downloadable security system.¹² In the Waiver Request, Cablevision represents that this "downloadable security system will meet the criteria laid out by the Commission in its orders regarding separable security and common reliance."¹³ Cablevision further states that "[t]his downloadable security solution also harmonizes with CableCARDs and tru2way technology."¹⁴ Finally, Cablevision states that it is a party to the binding two-way Memorandum of Understanding on tru2way.¹⁵

C. Comments

5. The Consumer Electronics Association ("CEA") filed comments in response to the Extension Request. In their opposition to the Waiver Request, CEA argues that the SmartCard-based approach used by Cablevision is not a truly separate conditional access solution and would be inconsistent with the goal of common reliance.¹⁶ But Cablevision does not request the Commission to issue a finding that the SmartCard provides for common reliance in compliance with the Commission's rules. Cablevision simply asks for an 18-month extension in which to fully deploy its new open-standard downloadable security solution. CEA further argues that Cablevision's new downloadable security solution will not meet the Commission's rules for common reliance,¹⁷ but CEA does not provide specific objections and even acknowledges that it does not have specific information on this new downloadable system.

⁹ *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.'").

¹⁰ 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 *Cablevision Order*, 22 FCC Rcd at 226-7, ¶ 20.

¹¹ 47 C.F.R. §§ 1.3 & 76.7.

¹² Extension Request at 1.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at note 6.

¹⁶ CEA Opposition at 2.

¹⁷ *Id.* at 2-3.

III. DISCUSSION

6. Cablevision makes its request for waiver “[p]ursuant to Sections 1.3 and 76.7 of the Commission’s rules.”¹⁸ Accordingly, we analyze its request pursuant to the general waiver standards set forth in Sections 1.3 and 76.7 of the Commission’s rules. As described below, we believe that Cablevision has demonstrated extraordinary efforts stretching back to 2001 to implement the integration ban¹⁹ and to ensure the compatibility of SmartCard technology with CableCARD devices.²⁰ We therefore believe that a limited waiver under Sections 1.3 and 76.7 of the Commission’s rules is appropriate in this instance.

7. Cablevision was the first cable operator to actively invest in new technology to come into compliance with the Commission’s new rules and, as a result, was able to begin to deploy the SmartCard separable-security conditional access solution in the fall of 2001. In contrast, other cable operators waited until 2007 even to begin to place orders for compliant set-top boxes in order to meet the July 1, 2007 deadline for compliance with the integration ban. We find it particularly persuasive that when Cablevision began implementing its SmartCard-based approach in 2001, it was more than three years before the Commission issued its clarification that the integration ban would require reliance on an identical security function. To require Cablevision to modify devices that it brought to market three years before the rule was changed to require an identical security function would only serve to punish Cablevision for seeking to comply with the Commission’s rules in a timely manner.

8. In its current Extension Request, Cablevision states that it is committed to adopting a downloadable security solution that will achieve compliance with the integration ban in a way that furthers the goals of Section 629.²¹ In this regard, Cablevision has provided concrete milestones that it will achieve in the deployment of this solution, and has also committed to pay penalties of \$5,000 per day in the event that it misses any of those milestones.²² These commitments demonstrate Cablevision’s effort to comply with the integration ban,²³ and the Commission will assess this \$5,000 per day penalty in addition to any forfeiture assessed for violation of the Commission’s rules.

¹⁸ Extension Request at 1 (citing 47 C.F.R. §§ 1.3 & 76.7(i)).

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 4-5.

²¹ Extension Request at 2-5; *2005 Deferral Order*, 20 FCC Rcd at 6812, ¶ 35 (“[W]e believe that the rule should be interpreted to require the physical separation of conditional access and other navigation functions only in the case of hardware-oriented conditional access solutions or other approaches that may preclude common reliance on the same security technology and conditional access interface. Downloadable security comports with the rule’s ban on the inclusion of conditional access and other functions in a “single integrated device” because, by definition, the conditional access functionality of a device with downloadable security is not activated until it is downloaded to the box by the cable operator. Thus, at the time the consumer purchases the device, the conditional access and other functions are not ‘integrated.’”). See also *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 11780, 11804, ¶ 61 (2007) (expressing a preference for downloadable security solutions).

²² *Id.* at Attachment B.

²³ See *Commission Reiterates that Downloadable Security Technology Satisfies the Commission’s Rules on Set-Top Boxes and Notes Beyond Broadband Technology’s Development of Downloadable Security Solution*, 22 FCC Rcd 244 (2007) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6812, ¶ 35). We expect that Cablevision has heeded the warning set forth in the *Cablevision Order* that the Commission will not tolerate a solution that does not fully comply with the integration ban rules. 22 FCC Rcd at 226, ¶ 19. Cablevision must assure that its downloadable security devices commonly rely on an *identical* separated security element that commercially available consumer electronics devices rely upon, as required by Section 76.1204 of the Commission’s rules.

9. Cablevision did not request the Commission to approve, nor did it provide specific details of its downloadable security solution. Accordingly, the Commission will not address this matter in the context of this order.

10. As a result of Cablevision's swift compliance with and early adoption of technology that they believed would meet the Commission's regulations, and their further commitment to meet certain milestones in the deployment of a compliant downloadable security solution, we find good cause to grant an 18-month extension of Cablevision's current waiver of Section 76.1204(a)(1) of the Commission's rules and allow Cablevision to use its SmartCard until December 31, 2010 pursuant to the general waiver authority in Sections 1.3 and 76.7 of the Commission's rules.²⁴

IV. CONCLUSION

11. For the reasons stated herein, we conclude that Cablevision has shown good cause for a temporary extension of its waiver of Section 76.1204(a)(1) of the Commission's rules to allow Cablevision to use its SmartCard solution until December 31, 2010, subject to its commitment to deploy an open downloadable security solution by December 31, 2010.

V. ORDERING CLAUSES

12. 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, the request for extension of waiver filed by Cablevision Systems Corporation of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED** to allow Cablevision to use its separated security SmartCard solution until December 31, 2010.

13. **IT IS FURTHER ORDERED** that Cablevision Systems Corporation **SHALL FILE** with the Media Bureau an affidavit confirming its intent to complete the required actions set forth in the Attachment to this order 15 days before each deadline and an affidavit confirming completion of the required action within 15 days after each deadline. In the event that Cablevision Systems Corporation does not comply with any deadline, it shall pay a penalty to the Commission of \$5,000 per day of non-compliance in addition to any forfeiture assessed for violation of the Commission's rules.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

²⁴ 47 C.F.R. §§ 1.3, 76.7.

²⁵ 47 C.F.R. § 0.283.

ATTACHMENT

Downloadable Security Deployment Schedule

Action	Deadline
1. Cablevision must place orders for set-top boxes (“STBs”) incorporating NDS K-Lad for deployment in systems designated in the Extension Request as Phase I areas.	April 1, 2009
2. Cablevision must commence commercial use of downloadable security in those Phase I areas.	July 1, 2009
3. All new STBs deployed in those Phase I areas must incorporate downloadable security.	December 31, 2009
4. Cablevision must place orders for STBs incorporating NDS K-Lad for deployment in systems designated in the Extension Request as Phase II areas.	June 1, 2010
5. Cablevision to must commence commercial use of downloadable security in those Phase II areas.	September 1, 2010
6. All new STBs deployed in Cablevision’s footprint must incorporate downloadable security that commonly relies on an <i>identical</i> separated security element that commercially available consumer electronics devices may rely upon.	December 31, 2010