

**BendBroadband**

October 4, 2006

**BY HAND DELIVERY**

Federal Communications Commission  
Media Bureau  
P.O. Box 358205  
Pittsburgh, PA 15251-5205

**Re: In the Matter of BendBroadband's Request for Waiver of 47 C.F.R. §  
76.1204(a)(1)**

Dear Sir or Madam:

Bend Cable Communications, LLC d/b/a BendBroadband ("BendBroadband") hereby transmits an original and four (4) copies of the above-referenced Request for Waiver. Also enclosed is FCC Form 159 authorizing credit card payment in the amount \$1,160 for the required filing fee. We have also filed a copy of this Request in CS Docket 97-80.

Please contact me if you have any questions regarding this matter.

Sincerely,



Amy C. Tykeson  
President/CEO  
BendBroadband

cc: Heather Dixon  
Rudy Brioché  
Cristina Chou Pauzé  
Chris Robbins  
Jessica Rosenworcel  
Donna Gregg  
Andrew Long  
Brendan Murray

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

BendBroadband's Request for Waiver  
of 47 C.F.R. § 76.1204(a)(1)

CSR-

To: Chief, Media Bureau

**REQUEST FOR WAIVER**

Pursuant to Sections 629(c) and 706 of the Telecommunications Act of 1996 and Sections 1.3, 76.7 and 76.1207 of the Commission's rules, Bend Cable Communications, LLC d/b/a BendBroadband ("BendBroadband") respectfully requests the Commission to grant a waiver of the "integration ban" set forth in the second sentence of Section 76.1204(a)(1) of the Commission's rules to allow BendBroadband to continue to place into service new, low-cost, limited-function Motorola DCT-700 integrated digital set-top boxes to its consumers after July 1, 2007.

**Introduction**

In the 12 months since BendBroadband started leasing its lowest-cost set-top box, the Motorola DCT-700, for \$1.95/month, it has experienced a dramatic 33% increase in digital penetration. But the integration ban would pull the rug out from under the digital transition in small and rural markets by taking this low-cost option away from new customers right when it is most needed. Without a waiver for a low-cost device, it would be virtually impossible for BendBroadband to complete its planned conversion to an all-digital network by 2008. Accordingly, BendBroadband is asking for exactly the waiver

the Commission indicated it would be favorably inclined to grant, and for exactly the reasons why the Commission stated a waiver might be needed. If the Commission fails to grant such a waiver, it would delay and deny the benefits of the digital revolution to small-town and rural America.

BendBroadband's share of the American MVPD market is approximately 0.036%, while the Top 24 MVPDs hold a 94% share. BendBroadband and other smaller operators will not determine the success of the multi-billion dollar consumer electronics industry or the retail market for navigation devices.

Finally, BendBroadband submits new record evidence (including a copy of DirecTV's new set-top lease agreement) that makes clear that the Commission can no longer exempt DirecTV but not cable from the integration ban. It would be contrary to Section 629 and the broader goals of the Act to create an artificial regulatory imbalance that would prevent BendBroadband's customers from obtaining the types of low-cost devices that are leased by DirecTV, given that BendBroadband now supports more retail choices for consumers than does DBS.

Because the overriding goal of Section 629 was to bring about "innovation, lower prices and higher quality for consumers,"<sup>1</sup> Congress required the Commission to grant waivers where "necessary to assist the development or introduction of a new or improved" MVPD service.<sup>2</sup> In addition, the Commission is also obligated to grant waivers where the application of a general rule to a specific situation would not serve the

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<sup>1</sup> H.R. Rep. No. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 112 (1995).

<sup>2</sup> 47 U.S.C. § 549(c) ("The Commission shall waive a regulation adopted under subsection (a) for a limited time upon an appropriate showing ... 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. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection ....").

public interest underlying the rule.<sup>3</sup> Because application of the integration ban to low-cost devices offered by small cable operators would deal a severe blow to the transition of small and rural cable systems to all-digital networks, without providing any incremental material benefit to consumers, the requested waiver must be granted.

## **I. A LOW-COST WAIVER IS MISSION CRITICAL FOR SMALL AND RURAL CABLE OPERATORS**

BendBroadband's share of the American MVPD market is approximately **0.036%** – one-third of one-tenth of one percent. BendBroadband has no ability to make or break the success of multinational consumer electronics manufactures or their success in producing digital cable ready navigation devices for the U.S. market. BendBroadband similarly has no ability to control the market decisions of set-top box manufacturers, such as Motorola, or the price increases that Motorola will charge for CableCARD-equipped set-top boxes if BendBroadband is given no other choice but to buy them. What BendBroadband has had the ability to control, at least until now, is the opportunity to make substantial investments to bring all of the benefits of the digital revolution enjoyed by residents of large cities to its own customers in small-town and rural communities in Deschutes County in Central Oregon.

But that opportunity would be imperiled, especially in small and rural markets, if the Commission were to now turn its back to the continued importance of low-cost set-

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<sup>3</sup> 47 C.F.R. § 76.7(i) (“The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request . . . .”); *see also id.* § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192, 1195 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply, the “logic of applying [the rule] collapses,” and it was arbitrary to apply the rule); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“[A] general rule, deemed valid because the overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

top boxes to the digital transition. For the reasons demonstrated below, it is absolutely critical for the public interest that the Commission grant a low-cost waiver for small systems.<sup>4</sup>

**A. BendBroadband**

BendBroadband is a small, locally-run, family-owned cable operator that has served central Oregon since 1955. The company now provides service to approximately 34,000 customers in its three franchised service areas in Deschutes County, covering the communities of Bend, Redmond, Sisters, Black Butte, Tumalo, and Terrebonne. This is a small market, ranked 197<sup>th</sup> in population out of the 210 markets measured by Nielsen.<sup>5</sup>

BendBroadband also operates and carries a local origination cable channel, Central Oregon Television (COTV), which produces unique local programming for these communities, such as Good Morning Central Oregon, live coverage of city council meetings and high school sporting events, news magazine stories and information about community and civic programs, and a Spanish-language public affairs program.

BendBroadband has a long history of dedicating substantial investments to bringing its customers the highest quality services available anywhere in the nation. In 1997, Bend became one of the first cable operators in the nation (small market or otherwise) to deploy broadband Internet services to consumers. In 1999, Bend began a network-wide multi-million dollar, 1100-mile hybrid fiber-coax deployment that enabled

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<sup>4</sup> BendBroadband believes that low-end set-top box waiver requests by larger cable operators should also be granted. As a practical matter, relief for small, rural operators is dependent on the relief granted to larger MSOs. This is because the availability and pricing of set-top boxes to small MSOs is largely driven by the demands vendors receive from the large MSOs. If only small MSOs are permitted to offer a certain type of set-top box, it is likely that vendors will not find it economic to make them, at least at the low prices now available. Comcast and Charter have presented a clear case that their requests for waiver are consistent with Section 629(c) of the Act and paragraph 37 of the *Second Report and Order*. Their waivers should therefore be granted.

<sup>5</sup> 2005 *Television & Cable Factbook*, p. A-7 (Nielsen DMA TV Households Ranking).

it to offer high-definition (HD) channels, regional fiber connectivity, video-on-demand (VOD), digital video recorders, Digeo's Moxi Media Center (which allows cable subscribers view recorded programs, music, photos and other digital content on two TVs within the same household), and, most recently, and telephone services. BendBroadband now delivers 19 HD channels and its InstaNet consumer broadband service offers download speeds of up to 6 mbps.

In 2005, BendBroadband became one of the first cable operators in the nation to complete a network-wide transition to digital simulcast, allowing it to provide 100% all-digital services to all of its digital cable customers. And if this waiver request is granted, the company plans to move to an entirely all-digital network by 2008 and reclaim the spectrum now used for analog channels for even more HD and VOD, increased broadband capacity, and other new digital services.

As a leader in bringing the benefits of the latest digital technologies to a smaller market, CableWORLD Magazine recognized BendBroadband as the first recipient of its Small Operator of the Year award.<sup>6</sup>

**B. Low-Cost Set-Top Boxes Are Critical to BendBroadband's Digital Transition.**

As demonstrated above, BendBroadband is committed to bringing the full benefits of the digital revolution to the citizens of Central Oregon. But the elimination of sub-\$100 boxes would lay a severe blow to BendBroadband's plan to move to an all-digital network by 2008, and indeed could postpone that transition indefinitely.

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<sup>6</sup> Small Operator of the Year, CABLEWORLD MAGAZINE (Aug. 2, 2004).

In March 2005, the Commission recognized that a low-cost waiver would be vital consumers and the digital transition if it were necessary to preserve a low-cost set-top box option:

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. 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.<sup>7</sup>

The Commission then proceeded to describe the type of box that would be most suitable for such a low-cost waiver – devices that do not “contain personal video recording (“PVR”), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities.”<sup>8</sup> BendBroadband was familiar with a device that met exactly this description: the Motorola DCT-700.<sup>9</sup>

It was at precisely this time that BendBroadband was focusing on the potential of the DCT-700 to be the catalyst for its transition to an all-digital network. The DCT-700 is the least-expensive cable set-top box available today. BendBroadband can purchase

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<sup>7</sup> *Implementation of Section 304 of the Telecommunications Act of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, CS Docket 97-80, Second Report and Order, 20 FCC Rcd 6794, ¶ 37 (2005) (“*Second Report and Order*”).

<sup>8</sup> *Id.*

<sup>9</sup> BendBroadband has provided detailed specifications for this device in Exhibit A. Because the most important feature of this device is its low cost, it by design excludes features that add significant cost: it does not include DVR (PVR) recording or storage capability or broadband Internet access capability; does not produce any High Definition (HD) output, and is not capable of simultaneously tuning multiple channels of video programming. These excluded features are precisely the same as those the Commission described in paragraph 37 of the *Second Report and Order*.

these devices from Motorola for \$79, compared to the approximately \$225 it was paying for hybrid analog/digital boxes. BendBroadband determined that at this \$79 price, it was able to lease DCT-700s to customers for \$1.95 per month without any term commitment,<sup>10</sup> which in turn allowed it to offer digital cable for just \$4.90/month more than analog cable (including the set-top device). BendBroadband believed – correctly, as it turned out – that reducing the price differential between analog and digital cable to less than \$5 would be a major tipping point in encouraging price-sensitive analog cable customers to switch to digital cable. But first, for its customers to be able to use DCT-700s (which do not have an analog tuner), BendBroadband had to make all of its programming available in digital.

Thus, BendBroadband invested three-quarters of a million dollars in its headend and other equipment to launch digital simulcast in all of its markets, premised upon the continued availability of the DCT-700 that would be needed to drive digital adoption among its customers. This launch made BendBroadband one of the first cable operators in the nation to achieve all-digital availability. Digital cable offers consumers numerous new and improved capabilities, including more advanced parental controls, an interactive program guide, video-on-demand, greater channel capacity, and specialized programming and packages. With simulcast, customers who have set-top boxes are able to receive 100% digital service, including superior picture quality, which in turn makes its digital product even more compelling for existing analog customers to buy. As a result of the launch of simulcast and the availability of the \$1.95/month DCT-700s, BendBroadband has boosted its digital penetration rate by 33% in just twelve months.

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<sup>10</sup> Because BendBroadband does not require term commitments for its leased set-top boxes, consumers can return a box or upgrade to one with more features at any time with no penalty.

This success is proof of the importance of a sub-\$100 set-top box such as the DCT-700 to the digital transition. But the vital role these boxes must play in the digital transition is far from over, even for operators such as BendBroadband that have launched simulcast. This is because until *all* of its customers have a set-top box or CableCARD-equipped device for each analog television in their homes, BendBroadband must still continue to transmit analog programming.<sup>11</sup> BendBroadband is therefore eager to get these digital devices into every home so that it can transition to an entirely all-digital network, which would allow it to reclaim spectrum now used for analog transmission for advanced services, such as more HD and VOD, wireless, business services, and higher broadband speeds. In order to get a set-top box in every one of these homes, BendBroadband must be able to continue to offer a very low-cost device such as the \$1.95/month DCT-700 to its budget-sensitive customers.

But if the Commission fails to grant a low-cost waiver, these essential sub-\$100 devices will become unavailable to consumers. This is because not one consumer electronics manufacturer in the world – Motorola or anyone else – has committed to make CableCARD-equipped set-top boxes at a price anywhere near the \$79 price BendBroadband pays today for DCT-700s. Armstrong has reported to the Commission that the cheapest CableCARD-equipped set-top box from Motorola will cost \$190, almost two and one-half times as much as the DCT-700.<sup>12</sup>

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<sup>11</sup> Analog cable subscribers do not need a set-top box, and so most cable subscribers do not have a set-top box of any kind. However, all customers must have a set-top box or a CableCARD before a cable system can be converted to all-digital.

<sup>12</sup> See CS Docket No. 97-80, *Ex Parte* Presentation of American Cable Association and Armstrong Cable Services (Aug. 31, 2006), at 2 (explaining that Motorola informed Armstrong that it “will not offer a CableCard-enable[d] DCT-700” and that “unless the DCT-700 receives a CableCard waiver, our only option will be the DCH 100, costing about \$190” – almost two and one-half times as much as Armstrong now pays Motorola for the DCT-700); see also CS Docket 97-80, Charter Communications Inc. Request

Some CE opponents of the Comcast and Charter waivers have suggested that cable operators have overstated the cost of the integration ban on low-cost set-top boxes. But BendBroadband does not set the market for these devices. All it can tell the Commission is what its vendors and potential vendors tell it they will charge. And based on what they have told BendBroadband so far, it is clear that they will charge a lot more; so much so that the new boxes would no longer be “low cost” at all, and could not be leased for the \$1.95 rate that BendBroadband was counting on to drive its digital transition. If any other CE vendor will by July 1, 2007 sell BendBroadband a compliant, compatible set-top box with the same or better features as the DCT-700 at a comparable price, it would gladly buy such devices and withdraw this waiver request. Until that time, however, a waiver is essential for the very reasons the Commission predicted in the *Second Report and Order*.

BendBroadband pays for set-top boxes up-front out of its capital budget. In fact, BendBroadband would be perfectly happy if consumers were able and wanted to buy suitable low-cost set-top boxes from third parties at retail. Set-top boxes already consume 35% of the company’s capital budget, but do not generate profit because BendBroadband’s objective is to deliver such boxes for as low a rate as possible in order to encourage digital penetration.

But the capital burden of set-top boxes would increase significantly if a low-cost waiver is not granted. If the cost of acquiring Motorola’s cheapest box rises from \$79 to \$190, BendBroadband anticipates additional expenses of \$1.5-2 million to keep up with

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for Waiver (July 14, 2006) at 12 (“the reengineering required to enable these devices to work with CableCARDS would add approximately \$72-93 per box, increasing the cost of these boxes by 75%-100% or more. ... Thus, without a waiver, there would no longer be any such thing as a ‘low-cost’ set-top box available from MVPDs that are subject to the integration ban.”) (“Charter Waiver Request”).

normal demand for digital cable. This amount may sound small to a larger operator, but it represents 15-20% of BendBroadband's entire capital budget, and it would drain resources from the rollout of additional digital services eagerly anticipated by consumers and the Commission, such as more HD and VOD content, wireless, business services, and other advanced services.<sup>13</sup> Worse, the company would have to abandon its goal of going all-digital in 2008, because putting higher-cost CableCARD-equipped devices in all of its analog customers' homes would consume approximately two-thirds of BendBroadband's capital budget, which would leave too little for essential projects. And even if the company could afford this up-front expense, it is doubtful that existing analog customers would receive as warmly such a transition if the lease cost of the set-top boxes they would have to have more than doubled without the addition of any functionality.

The League of Rural Voters, the American Cable Association,<sup>14</sup> and Charter<sup>15</sup> have concurred with BendBroadband's analysis above that a low-cost waiver is critical to the digital transition and the deployment of advanced services throughout rural America. As the Executive Director of the League of Rural Voters explained in representing the needs of its constituents, which includes BendBroadband's customers:

On behalf of the League of Rural Voters, I write to ask the Federal Communications Commission to grant a temporary waiver of the pending cable set-top box integration ban, which would adversely impact consumers, particularly rural America, by placing an effective monthly "tax" on their set-top boxes. ... increasing the cost of digital set-top boxes

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<sup>13</sup> In addition, a conversion to CableCARD-equipped devices for all low-cost set-top boxes would require BendBroadband to add new personnel and make significant changes to its existing provisioning and inventory systems.

<sup>14</sup> CS Docket 97-80, Comments of the American Cable Association (in support of the Charter Waiver Request) (Sept. 18, 2006) at 2 (explaining that the "impact of the integration ban will be even worse than previously believed" for smaller systems).

<sup>15</sup> CS Docket 97-80, Reply Comments of Charter Communications, Inc. (Sept. 28, 2006) at 16 ("denial of the waiver would dramatically slow and in some cases derail [Charter's transition to all-digital networks], especially in Charter's many small and rural systems.")

would make America's digital transition goals even more challenging to achieve. It would dampen the incentive for rural Americans to switch from analog to digital services that offer premium content and help keep rural areas connected. By reducing the ability of rural Americans to afford digital cable boxes, the FCC will also reduce the incentive for network operators to spread their digital networks far and wide throughout rural America.<sup>16</sup>

For all of the foregoing reasons, grant of the requested waiver is necessary to assist in the development of BendBroadband's new and improved digital cable, voice and broadband services. By contrast, denial would make it virtually impossible for BendBroadband to complete its planned conversion to an all-digital network by 2008 and would impose significant new costs on its customers. It is, unfortunately, this simple – failure to grant the requested waiver would be a vote to delay if not derail the further launch of all-digital cable networks to consumers in small-town and rural America.

## **II. Grant of a Low-Cost Waiver to Small Operators Will Not Undermine the Commission's Objectives.**

The Commission's stated rationale for imposing on consumers the costs of the integration ban is to secure the benefits that would supposedly result from a common "reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices."<sup>17</sup> The Commission previously recognized that a waiver applied only to low-end devices would not undermine this objective of common reliance:

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

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<sup>16</sup> CS Docket 97-80, Letter from Niel Ritchie, Executive Director, League of Rural Voters, to Hon. Kevin Martin, Chairman, Federal Communications Commission (Oct. 2, 2006) at 1-2.

<sup>17</sup> *Second Report and Order*, ¶ 27.

required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers.<sup>18</sup>

That is certainly the case with respect to BendBroadband and its request for this waiver. BendBroadband places into service more advanced set-top boxes not covered by this waiver request *each month* than it has customers who have requested CableCARDS since they first became available. The company's desire to satisfy its HD and DVR customers provides far more than enough incentive to make sure CableCARDS are available and function properly.

Nor will grant of a low-cost waiver to small operators have any material effect on the macroeconomics of CableCARDS. Elsewhere, certain CE interests have suggested that cable operators should be required to use CableCARDS in order to drive economies of scale that might lower the costs of the cards. But BendBroadband's use or non-use of CableCARDS for the 300 low-cost devices it places into service each month will have no impact on this market; as a point of reference, the cable industry as a whole places into service approximately one million new devices every 45 days. If the Commission is driven by an objective to force MVPDs to use CableCARDS simply to drive down their unit cost, then the obvious answer is that it should require their use at least in high-end devices used by DirecTV and EchoStar (which have a combined U.S. subscribership of more than 26 million digital customers) before extracting what little such benefit could be obtained from the low-volume use of CableCARDS in the low-end devices leased by a comparatively small cable operator such as BendBroadband, which has 34,000 customers.<sup>19</sup>

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<sup>18</sup> *Second Report and Order*, ¶ 37.

<sup>19</sup> Twelfth Annual Report to Congress on Video Competition, FCC 06-11, ¶ 72.

The success of the CE industry does not depend on the markets of small operators such as BendBroadband. Even in the aggregate, small operators hold only a negligible share of the national market. In 2005, the ten largest MVPDs held 88% market share, and the Top 25 MVPDs held a 94% share (and these figures predate the acquisition of Adelphia's customers by Comcast and Time Warner).<sup>20</sup> The CE industry enjoyed record revenue of \$125.9 billion last year,<sup>21</sup> and does not need to have its \$2000+ HDTVs subsidized by a small cable operator or individual consumers who use low-cost set-top boxes.

Accordingly, imposition of the integration ban on the low-cost devices used by small cable operators is not necessary to achieve the purpose of Section 629 or the Commission's regulations. Instead, it would do nothing more (above and beyond the application of the ban on higher-end devices) than take money out of consumers' pockets and keep new and improved digital services out of their living rooms.

**III. On the Updated Record, it is No Longer Reasonable for the Commission to Prohibit BendBroadband from Leasing Low-Cost Integrated Set-top Boxes While Allowing DBS to do the Same.**

Another important reason why a waiver is warranted is to allow the Commission to revisit the adverse consumer consequences if small cable operators were unable to offer "low-cost" devices (integrated or not) but their much larger competitors, DirecTV and EchoStar, were allowed to continue to offer and lease their own proprietary integrated low-cost boxes. The *Second Report and Order* briefly recognized the danger

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<sup>20</sup> Twelfth Annual Video Competition Report, Table 9.

<sup>21</sup> See *Consumer Electronics Wholesale Revenue Will Reach \$135.4 Billion in 2006*, CEA Projects, CEA Press Release (Jan. 2, 2006), [http://www.ce.org/Press/CurrentNews/press\\_release\\_detail.asp?id=10910](http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=10910). Almost \$2.7 billion of that revenue came from their continued sale of analog TVs to American consumers, the very devices for which consumers need low-cost device such as the DCT-700 to keep using after the termination of analog broadcasting on February 17, 2009. [http://www.ce.org/Press/CEA\\_Pubs/2007.asp](http://www.ce.org/Press/CEA_Pubs/2007.asp) (showing sale of 17.4 million analog TVs at an average price of \$157).

to the public interest from disparate imposition of the integration ban, noting that “avoiding market-based distortions with respect to DBS as a competitor to cable is ... an important consideration” for some future proceeding.<sup>22</sup> But more than a year and a half later, the Commission still has not initiated such a proceeding.

DirecTV and EchoStar are now the second and fourth largest MVPDs in the nation. DirecTV has *428 times* as many U.S. customers as BendBroadband. DirecTV has annual revenues of more than \$3 billion, and a market capitalization of \$23 billion – enough to buy every square inch of taxable private property and every home in Deschutes County, and still have more than \$7 billion to spare.<sup>23</sup>

Because the DBS providers often emphasize low retail prices and promotions to try to attract customers from cable, especially in small and rural markets, BendBroadband must continually make sure that its own retail prices (including the cost of navigation devices) are attractive to consumers for the value of the services delivered. BendBroadband has greater incentive than ever for consumers to spend as little as possible on navigation devices, so that they have a greater appetite remaining to buy more profitable services before reaching the total price point at which they would consider switching to a competitor’s MVPD service. Thus, anything that raises the cost of set-top boxes hurts BendBroadband’s competitive position, and BendBroadband therefore is eager for its customers to have access to the lowest-possible cost devices that support their desired services, whether leased or obtained from a third-party provider.

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<sup>22</sup> *Second Report and Order*, ¶ 38.

<sup>23</sup> Deschutes County Summary of Assessment Roll 2003-04 (showing total real market valuation of all property in the county at \$15.9 billion), <http://www.co.deschutes.or.us/download.cfm?DownloadFile=4B1574C0-BDBD-57C1-9D7A4D629E9F66D7>.

That is why BendBroadband leases the DCT-700 for only \$1.95 per month, and why it hopes that set-top vendors will be able to offer even cheaper devices in the future.

If BendBroadband were forced to more than double its lease cost for the DCT-700, that price increase would not only discourage price-sensitive consumers from buying digital cable from BendBroadband, it might prompt them to buy digital service from its DBS competitors.

The creation of such an artificial regulatory disparity between competitors would be particularly unjustified given that the facts underlying the Commission's initial reasons for applying the ban to cable but not DBS have dramatically changed. When the integration ban was adopted in 1998, multiple options for DBS equipment were available at retail, while digital cable operators relied exclusively on leased devices. For that reason, although Congress intended Section 629 to apply to all MVPDs,<sup>24</sup> the Commission found that DBS on then-current facts did not need to do more to assure commercial availability. But the Commission did not exempt DBS from the ban; instead, the FCC rules provide that the integration ban shall not apply to "a multichannel video programming distributor that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system."<sup>25</sup> Because of significant changes in both cable operator and DBS navigation device strategies, it is now

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<sup>24</sup> *Commercial Availability of Navigation Devices*, Report and Order, CS Docket No. 97-80, 13 F.C.C.R. 14775, ¶ 22 (rel. June 24, 1998) ("We disagree with the comments of several parties that Section 629 should apply only to cable television systems. There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems.).

<sup>25</sup> 47 C.F.R. § 76.1204(a)(2).

clear based on the evidence discussed below that if both DBS operators still meet this standard, then so does BendBroadband.

On March 1, 2006, DirecTV initiated a new equipment policy that effectively eliminates the ability of most new customers to access its service by any other means than a proprietary set-top box leased from DirecTV.<sup>26</sup> If a consumer now goes to a retailer to “purchase” a “retail” low-cost receiver to use DirecTV’s service, their only options are a few models of DirecTV’s own proprietary boxes under the DirecTV brand. But retailers do not “sell” these boxes in the traditional sense; instead, they hand over these boxes *only* after the consumer has signed an agreement to lease the box from DirecTV.<sup>27</sup> The consumer cannot choose to use non-DirecTV devices; they do not own their device even though they paid the retailer an upfront fee of as much as \$500; nor can they use this equipment if they later decide to switch to another MVPD’s service; and they must pay to lease the device at rates and terms prescribed by DirecTV.<sup>28</sup>

Consider the example of a consumer who goes to Best Buy or Circuit City to buy a new high-definition television. Before going to the store, they have decided that they want to subscribe to DirecTV service because it has exclusive rights through 2010 to the popular “NFL Sunday Ticket” package, which allows them to watch out-of-region games. At the store, they would find out that there are no large-screen HD televisions

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<sup>26</sup> *DirecTV Opts for a Leasing Model*, MULTICHANNEL NEWS, Jan. 23, 2006 (describing DirecTV’s decision to lease, rather than sell, its set-top boxes).

<sup>27</sup> See DirecTV’s HD/DVR receiver at Circuit City’s website, showing “An upfront equipment upgrade fee of \$499.99 -PLUS- a monthly lease fee of \$4.99,” <http://www.circuitcity.com/ssm/Satellite-and-Digital-Cable/sem/rpsm/catOid/-12877/N/20012866+20012877+312877004/link/ref/rpem/ccd/categorylist.do>. When the receiver is placed in the website’s Shopping Cart and the consumer proceeds to Checkout, a DIRECTV EQUIPMENT LEASE ADDENDUM appears, and the consumer must click their agreement to “purchase” the receiver. The Lease Addendum obtained from Circuit City’s website on August 1, 2006 is attached hereto as Exhibit B.

<sup>28</sup> *Id.*

available that can connect to DirecTV without a separate receiver. Upon learning this, the consumer decides that they would also like to have a Digital Video Recorder with their high-definition receiver, and the salesperson would lead them to their one and only “choice” – the “DIRECTV® HD Receiver/DVR (HR10-250),” which is manufactured by DirecTV’s affiliate Hughes to DirecTV’s specifications and “sold” under the DirecTV brand. To take this receiver home, the consumer would have to pay an “upfront equipment fee” of approximately \$399-499 (depending on the current promotions), and, before leaving the store, sign a “DIRECTV EQUIPMENT LEASE ADDENDUM” with numerous terms designed to lock the customer in to using DirecTV’s service and equipment for an extended period and to discourage the use of any third-party navigation devices.<sup>29</sup> DirecTV’s level of support for third-party navigation devices is plainly not what it was in 1998, or even 2005.<sup>30</sup>

By contrast, BendBroadband now supports the active use of navigation devices that operate throughout the continental United States and that are available from unaffiliated retail outlets. BendBroadband customers can purchase at retail CableCARD-

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<sup>29</sup> See Exhibit B (DirecTV’s current Leasing Agreement which the consumer must accept to order DirecTV equipment from the Circuit City website). The lease agreement provides, among other things, (1) a commitment to purchase DirecTV service (plus the extra monthly charge for DVR service) for at least 24 months, during which time DirecTV reserves the right to increase its rates by any amount at any time; (2) a termination penalty of up to \$300 per HD/DVR if the customer terminates service prior to this 24-month period; (3) that, notwithstanding the customer’s payment of up to \$500 for an equipment fee, that the receiver “belongs to DIRECTV and the DIRECTV equipment, including the access card inserted into each receiver, must be returned to DIRECTV in good working order;” (4) a requirement that customer will pay DirecTV \$470 more (on top of the other charges described herein) if they do not return the HD/DVR in good working order to DirecTV within 30 days of termination of DirecTV or DirecTV DVR service, even if they had already satisfied the term commitment; and (5) a commitment to pay a \$5 per month lease fee to use the receiver, unless the customer will “replace all of [their] owned-equipment with leased equipment, in which case, the monthly lease fee will be waived for the 1st receiver.”

<sup>30</sup> The “retail” EchoStar devices available today are only the proprietary devices that EchoStar has contracted with selected vendors to build to be sold under EchoStar’s DISH Networks brand name. The DISH receivers available at Radio Shack, for example, are the same DISH-branded devices offered EchoStar directly. See <http://www.radioshack.com/family/index.jsp?categoryId=2032174&cp=2032057>, <http://www.dishnetwork.com/content/products/receivers/standard/index.shtml>.

enabled navigation devices produced by 26 fully independent CE manufacturers,<sup>31</sup> which can be used anywhere in the United States to receive cable services from any operator that supports CableCARDS. In addition, BendBroadband is legally obligated,<sup>32</sup> and financially incented (to keep its customers happy rather than risk losing them to DBS), to support these third-party devices.

Based upon the above facts, it is now clear that BendBroadband is more entitled to the Section 76.1204(a)(2) exemption than is DirecTV. Thus, unless the Commission holds that DirecTV has lost its exemption, BendBroadband should reasonably be able to assume that it has attained it. If instead the Commission decides that DirecTV has lost its exemption, it would be appropriate to defer the ban as applied to *all* MVPDs for at least three years, (1) to give DirecTV time to complete the development and production cycle needed to comply, and (2) so that as a matter of competitive neutrality all MVPDs would begin compliance at the same time.<sup>33</sup>

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<sup>31</sup> See CS Docket 97-80, NCTA CableCARD Report (Sept. 25, 2006) at 1.

<sup>32</sup> BendBroadband is legally obligated to support CableCARDS under the Commission's "plug and play" rules adopted in 2003. See 47 C.F.R. § 76.640. DBS providers are not subject to these rules.

<sup>33</sup> See, e.g., *First Report and Order*, ¶ 80 (discussing the integration ban, the Commission "note[d] that an 18-24 month development and production cycle is typically cited as necessary for significant changes to be incorporated into the manufacture of television receivers and other similar consumer electronic devices.")

## CONCLUSION

For the foregoing reasons, the Commission should grant BendBroadband's request for a waiver from the integration ban for the low-cost DCT-700 set-top box.

Respectfully submitted,



Amy C. Tykeson  
President and CEO  
Bend Cable Communications, LLC  
d/b/a BendBroadband  
63090 Sherman Road  
Bend, Oregon 97701  
(541) 388-5820

October 4, 2006

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

BendBroadband's Request for Waiver  
of 47 C.F.R. § 76.1204(a)(1)

CSR-

**DECLARATION OF AMY C. TYKESON**

1. My name is Amy C. Tykeson. I am President and CEO of Bend Cable Communications, LLC d/b/a BendBroadband. I am familiar with BendBroadband's utilization of the Motorola DCT700 and its need to continue to have access to such a low-cost digital set-top box to transition to an all-digital network.

2. I have read the forgoing Request for Waiver, and declare under penalty of perjury that the facts contained therein and in this Declaration are true and correct to the best of my knowledge, information, and belief.



Amy C Tykeson  
President and CEO  
Bend Cable Communications, LLC d/b/a  
BendBroadband  
Executed on October 4, 2006

**Exhibit A**

Technical Specifications for the Motorola DCT-700



## *DCT700 All-Digital Set-top*

**An interactive digital set-top with small size and big performance.**

Motorola's DCT700 provides versatile interactivity in the all-digital network for expanded information and entertainment services.

The Motorola DCT700 is an all-digital set-top that provides you with the advantages of an all-digital network. Digital channels take up less room on your cable TV network. This results in increased "bandwidth" for more channels and services like high-definition TV (HDTV), electronic program guides (EPGs), pay-per-view (PPV), Video on Demand (VOD), and other on-demand information and entertainment services. The DCT700's capabilities are limited only by what your cable service provider offers. If your cable service provider eliminated analog channels in your area and replaced them with "all digital" channels, there would be even more room on the cable network system for additional services such as high-speed data, VOD, and high-definition content.

To decode the data used to transmit the digital channels, a separate set-top is required for each television in the home. The DCT700 provides digital channels to all your TVs through coaxial cable or analog (RCA-type) audio/video jacks.

Check with your local cable service provider for availability of the DCT700 in your area.

### **HIGHLIGHTS**

- Supports services such as EPGs, PPV, and VOD
- Reclaims bandwidth allocated to analog channels
- Compatible with Motorola's award-winning secure MediaCipher® conditional access technology
- Two-way capability to enable interactivity
- Motion picture industry standard for coding and decoding video (MPEG-2)
- AC-3 standard for 5.1 Dolby® Digital Surround Sound

# **CONNECTEDMOTO**



**MOTOROLA**  
intelligence everywhere™



# DCT700 All-Digital Set-top



## Technical Specifications

### STANDARD FEATURES

MPEG-2 Digital Video Processor  
ATSC standard Dolby® Digital (AC-3) audio processor  
ITU standard 64/256 QAM/FEC/enhanced adaptive equalizer  
On-board real-time RF return (256 Kbps)  
Bitmapped graphics display (4-/8-bit)  
90–860 MHz tuner  
DES-Based encryption/DCII access control  
Digital diagnostics  
Frequency agile 2.048 Mbps out-of-band data receiver  
Macrovision® copy protection  
IR support for remote control

### STANDARD INTERFACES

RF remodulator output (ch. 3, 4)  
Baseband video and audio outputs

### OPTIONAL FEATURES

Motorola Universal Remote Control (DRC450)

**To view our full line of Connected Home Solutions, visit our Web site at  
[broadband.motorola.com/consumers](http://broadband.motorola.com/consumers)**

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MOTOROLA and the Stylized M Logo are registered in the U.S. Patent and Trademark Office. DOCSIS is a registered trademark of Cable Television Laboratories, Inc. MediaCipher is a registered trademark of General Instrument Corporation. Moxi is a trademark of Digeo, Inc. All other product or service names are the property of their respective owners.



**Exhibit B**

DirecTV Equipment Lease Addendum, from Circuit City website



Order anytime @ 1-800-843-2489

| Cart

| Store Locator

| Help

**Checkout**

### **DIRECTV EQUIPMENT LEASE ADDENDUM**

Thank you for choosing DIRECTV. By signing this Equipment Lease Addendum, you agree to abide by the following terms and conditions.

You wish to lease from DIRECTV, and DIRECTV is willing to lease to you, one or more DIRECTV new or reconditioned receivers, hereinafter collectively referred to as the "equipment", necessary to access DIRECTV's services. **THIS EQUIPMENT LEASE ADDENDUM CONTAINS THE TERMS AND CONDITIONS FOR THE LEASE BY DIRECTV OF THE DIRECTV EQUIPMENT TO YOU, BUT MUST BE READ TOGETHER WITH THE DIRECTV CUSTOMER AGREEMENT (A COPY OF WHICH IS PROVIDED TO YOU WITH YOUR FIRST BILL AND IS AVAILABLE AT WWW.DIRECTV.COM) FOR ALL OF THE TERMS AND CONDITIONS REGARDING THE PROVISION OF THE SERVICES AND YOUR RIGHT TO USE THE DIRECTV EQUIPMENT. YOU UNDERSTAND AND AGREE THAT YOU HAVE NOT PURCHASED THE DIRECTV EQUIPMENT, YOU DO NOT OWN THE DIRECTV EQUIPMENT AND THE DIRECTV EQUIPMENT MUST BE USED AND RETURNED TO DIRECTV STRICTLY IN ACCORDANCE WITH THE TERMS OF THIS EQUIPMENT LEASE ADDENDUM AND THE DIRECTV CUSTOMER AGREEMENT.**

**PROGRAMMING AGREEMENT.** Within 30 days of provision of DIRECTV equipment to you, you agree to activate any DIRECTV TOTAL CHOICE programming package (valued at \$44.99 per mo. or above), or any DIRECTV PARA TODOS programming package (valued at \$29.99 per mo. or above); or any qualifying international services bundle, which bundle shall include either the DIRECTV® BASIC programming package (valued at \$9.99 per mo.) or the DIRECTV PREFERRED CHOICE™ programming package (valued at \$29.99 per mo.) together with any WorldDirect™ international-language service. DVR service activation (\$5.99/mo.) required for DVR and HD DVR system leases. In certain markets, programming and pricing may vary. **DIRECTV PROGRAMMING AND PRICING ARE SUBJECT TO CHANGE AT ANY TIME.**

**PROGRAMMING COMMITMENT.** The programming package(s) must be maintained for a period of not less than (a) twelve (12) consecutive months for accounts with only standard receiver(s), or (b) twenty-four (24) consecutive months for accounts with advanced product(s)/receiver(s)-digital video recorder(DVR), high definition receiver (HD) or high definition digital video recorder (HD DVR), including additional DIRECTV receiver(s). After you have fulfilled your agreement to the required programming package(s), you are not obligated to continue your subscription to DIRECTV programming for any specific duration. Current DIRECTV customers may activate additional receivers with their existing DIRECTV programming package. **THIS PROGRAMMING COMMITMENT IS SEPARATE AND DIFFERENT FROM ANY OTHER PROGRAMMING COMMITMENT YOU MAY HAVE MADE WITH DIRECTV AND IS FULLY ENFORCEABLE UNDER THESE TERMS.**

**MONTHLY LEASE FEE.** For a new DIRECTV customer, you will be charged a monthly lease fee in the amount of \$4.99 per receiver for the 2 nd receiver and each additional receiver leased by you in your household. For a current customer, you will be charged a monthly fee in the amount of \$4.99 for each receiver leased by you in your household, unless you replace all of your owned-equipment with leased equipment, in which case, the monthly lease fee will be waived for the 1st receiver. Applicable taxes will apply. **LEASE FEE SUBJECT TO CHANGE AT ANY TIME.**

**CARE OF EQUIPMENT.** You are responsible for the loss of or any damage to the DIRECTV equipment that you have leased from DIRECTV. You shall have no right to sell, give away, transfer, pledge, mortgage, remove, relocate, alter or tamper with the DIRECTV equipment at any time. **DIRECTV PROVIDES YOU THE DIRECTV EQUIPMENT AS IS, AND MAKES NO WARRANTY, EITHER EXPRESSED OR IMPLIED, REGARDING THE DIRECTV EQUIPMENT PROVIDED TO YOU. ALL SUCH WARRANTIES INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY EXCLUDED. DIRECTV IS NOT RESPONSIBLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES RELATING TO THE DIRECTV EQUIPMENT PROVIDED TO YOU.** In the event the DIRECTV equipment you have leased from DIRECTV does not operate, contact DIRECTV at 1-800-531-5000.

**CONSEQUENCES OF YOUR FAILURE TO ACTIVATE PROGRAMMING OR SATISFY YOUR PROGRAMMING COMMITMENT.** If you fail to activate your DIRECTV equipment within 30 days of DIRECTV's provision of the DIRECTV equipment to you, you agree that DIRECTV or an authorized DIRECTV Retailer may charge you a fee, as liquidated damages, of \$150 for each receiver that is not activated. If you fail to maintain your minimum programming commitment, you agree that DIRECTV may charge you a prorated fee of up to \$150 for standard receivers and up to \$300 for advanced products/receivers (e.g. DVR, HD, DV DVR, etc.).

**RETURN OF DIRECTV EQUIPMENT.** If you cease to be DIRECTV's customer for any reason (whether voluntarily or if you decide to disconnect/cancel terminate your DVR service (if you are leasing a DVR Receiver), you must call DIRECTV within seven (7) days after the termination of your DIRECTV programming services or DVR service, as applicable, to (i) make arrangements for DIRECTV to pick up all of your DIRECTV equipment, or (ii) obtain information from DIRECTV necessary to arrange for a ground or air freight service to pick up and

deliver all of your DIRECTV equipment to DIRECTV. You acknowledge that the DIRECTV equipment belongs to DIRECTV and the DIRECTV equipment, including the access card inserted into each receiver, must be returned to DIRECTV in good working order, normal wear and tear excepted. In the event that all of the DIRECTV equipment is not returned to DIRECTV within thirty (30) days of the termination of your DIRECTV programming services or is damaged when it is returned to DIRECTV, you agree to pay DIRECTV the sum of \$55 for each DIRECTV standard receiver; \$200 for each DIRECTV DVR Receiver; \$240 for each DIRECTV HD Receiver; or \$470 for each DIRECTV HD DVR Receiver that is not returned to DIRECTV or that is damaged when it is returned to DIRECTV as compensation for a portion of the expenses incurred by DIRECTV in establishing your account, and providing you the DIRECTV equipment for your use. Visit [DIRECTV.com](http://DIRECTV.com) or call 1-800-531-5000 for details.

**ARBITRATION.** You and DIRECTV agree that both parties will resolve any dispute arising under this Equipment Lease Addendum, the DIRECTV Customer Agreement or any other addendum thereto, or regarding your DIRECTV programming service, through binding arbitration as fully set forth in the DIRECTV Customer Agreement.