

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

FILED/ACCEPTED
APR 16 2007
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
JetBroadband VA, LLC)
JetBroadband WV, LLC)
)
Emergency Petition for Deferral of)
Enforcement of July 1,2007 Deadline)
47 C.F.R. § 76.1204(a)(1))
)
To: Chief, Media Bureau)

CS Docket No. 97-80
CSR-7131-Z

REPLY COMMENTS OF BEYOND BROADBAND TECHNOLOGY, LLC

Beyond Broadband Technology, LLC (“BBT”) hereby submits reply comments in support of the above-referenced emergency petition of JetBroadband VA, LLC and JetBroadband WV, LLC (collectively “JetBroadband”) and in response to the comments filed by the Consumer Electronics Association (“CEA”) in opposition thereto. BBT is the developer of a downloadable security solution (the “BBT Solution™”) recognized by the Commission as compliant with the requirements of Section 76.1204 of the Commission’s rules.’

JetBroadband’s Petition. JetBroadband’s petition requests deferral of the Commission’s set-top integration ban rule. In support of its request, JetBroadband relies on the *BendBroadband Waiver Order*, wherein the Media Bureau, recognizing the

¹ Public Notice, “*Commission Reiterates That Downloadable Security Technology Satisfies the Commission’s Rules on Set-Top Boxes and Notes Beyond Broadband Technology’s Development of a Downloadable Security Solution,*” 22 FCC Rcd 244 (2007). See also *In the Matter of Comcast Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 228, ¶ 34 (2007) (indicating that an operator deploying BBT’s downloadable security solution would not need a waiver of the integration ban).

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difficulties that some cable operators may face in complying with the July 1, 2007 integration ban deadline, stated that deferral of the deadline would be available to an operator that could “demonstrate that it has placed orders for set-top boxes that comply with the integration ban but that its orders will not be fulfilled in time for it to comply with the deadline.”

Specifically, JetBroadband has provided evidence establishing that it has placed an order for set-top boxes enabled with the BBT downloadable security solution but that such boxes will not be available for delivery any earlier than the fourth quarter of 2007 (after the July 1, 2007 integration ban deadline). BBT hereby confirms JetBroadband’s representations with respect to its order for BBT-enabled boxes and the planned availability of such boxes.’ Under the circumstances, therefore, the Commission should grant JetBroadband’s petition.

Comments on JetBroadband’s Petition. Comments in support of JetBroadband’s petition were filed by the American Cable Association (“ACA”) and by Motorola, Inc. However, the comments filed by the CEA oppose JetBroadband’s petition. CEA’s comments do not question the sworn declarations made by JetBroadband regarding the order it has placed for BBT-enabled equipment. Rather, CEA’s comments mount a

² *In the Matter of BendBroadband Communications. LCC d/b/a BendBroadband, Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Memorandum Opinion and Order, 22 FCC Rcd 209, ¶ 10 (2007) (“Bend Broadband Waiver Order”).*

³ BBT informed the Commission last December that while it has successfully developed a highly secure, portable downloadable security solution, full production of the first low cost set-top boxes was not expected to commence until the fourth quarter of 2007. BBT’s timeline objectives have not significantly changed. While there always is the possibility of unforeseen difficulties once prototypes and beta models are put into tests (which should commence within the next two months), current plans still anticipate the commencement of commercial production by December 2007.

collateral attack on the Commission’s previously-announced determination that devices incorporating the BBT downloadable security solution will be deemed compliant with the set-top integration ban.

In particular, CEA claims that the BBT downloadable security solution “is not suitable for common reliance” and thus cannot properly provide the basis for a deferral of the integration ban under the *BendBroadband Waiver Order* precedent. As discussed below, CEA’s position is not supported by either the facts or the law.

The BBT Downloadable Security Solution. BBT’s development of a downloadable security solution was made public last December in a letter to Chairman Martin.⁴ In that letter, BBT discussed its founders’ multi-year effort to design a low cost set-top box for the cable television industry that would allow operators “to quickly and inexpensively migrate from analog to digital transmission, including high definition.” As part of the design of this new box, BBT has developed a highly secure downloadable key management and conditional access system capable of being used on both one-way and two-way cable systems. Most significantly, BBT announced that, consistent with the Commission’s goal of “common reliance,” BBT would be offering its technology on an “open standard” basis (similar to DOCSIS modems) to all consumer electronics and set-top box manufacturers.

CEA has leveled a number of charges against the BBT set-top solution, characterizing it as “secret,” “not scalable,” “suited only for small MSOs,” and lacking

⁴ A copy of the letter from BBT to Chairman Martin was attached to the Commission’s Public Notice acknowledging that the BBT downloadable security solution was compliant with the integration ban. *See* note 1 *supra*.

“national portability.”⁵ CEA’s claims are utterly without merit. For example, it is particularly disingenuous for CEA to complain that the BBT technology is “secret” given the fact that CEA turned down BBT’s offer to enter into a business-standard non-disclosure agreement with CEA that would have allowed the parties to discuss the full technical details of the BBT Solution™ and the progress that has been made towards the establishment of a royalty-free intellectual property rights pool to further the objective of an open standard.⁶ Such discussions (pursuant to non-disclosure agreements) are currently on-going, both with large and small potential users of the technology and with consumer electronics manufacturers. CEA is aware of these facts.

CEA’s assertion that the BBT Solution™ is “suited only for small MSOs” also is completely baseless. Contrary to what CEA alleges, no BBT representative has ever made such a claim; in fact, the BBT key management and downloadable security design is totally scalable and can be used in any size system by any size operator. The fact that JetBroadband is a small operator that views the BBT Solution™ as a means to intelligently and efficiently move towards a non-integrated security regime within the context of its plans to upgrade its systems for the benefit of its subscribers in no way suggests that only small systems could do so.⁷

⁵ CEA Comments at 1, 3 (filed April 2, 2007).

⁶ It is the very goal of establishing an open standard approach that makes it important for discussions regarding the BBT Solution™ to be protected by non-disclosure agreements at this stage in the development of the BBT product. This is because the creation of an open standard intellectual property rights pool raises more complex issues than merely protecting proprietary secrecy. Indeed, premature disclosure of BBT’s technical details could result in other parties attempting to beat BBT to market with a proprietary version of the technology, thus intentionally blocking an open standard regime.

⁷ BBT notes that the fact that JetBroadband is a small operator does mean that approval of its petition would have no discernible adverse impact on the adoption or development of any other

CEA's characterization of the BBT Solution™ as not nationally portable is similarly misinformed. The BBT key management and downloadable security solution, along with the conditional access system it has developed, all allow for national portability of navigation devices. They are all compatible with CableCARD requirements and discussions are already under way to assure that a CableCARD version of the BBT set-top box technology will be made available. It is important to note that BBT anticipates that different systems, for obvious security reasons, will be using different, constantly evolving conditional access designs. So long as those designs are truly downloadable, they may be written to be fully compatible with the open standard capabilities that will be built into any BBT Solution™ navigation device.'

CEA's mischaracterization of the capabilities of the BBT Solution™ is compounded by its misunderstanding of the concept of "common reliance." The Commission's objective in promoting "common reliance" was not to impose a technology mandate on the marketplace. Such an approach would be sub-rosa industrial policy of the worst kind and is anathema to the Commission's oft-stated preference for marketplace-designed solutions. CEA is simply wrong in assuming that the Commission has mandated a "single, nationwide standard."

To understand what the Commission intended by the concept of "common reliance," it is necessary to start with "the concern that prompted the separated security

type of separable security, including CableCARDs, and could act as a model to significantly further the market rollout of other downloadable security systems.

⁸ NagraVision is an example of such a truly downloadable design that has such flexibility. BBT also notes that Motorola has now announced that its MediaCipher system will soon be available in a downloadable form. Letter from Steve B. Sharkey, Director, Spectrum and Standards Strategy, Motorola, Inc., to FCC Chairman Kevin Martin, dated March 20, 2007 (CS Docket No. 97-80).

rule in the first instance” – namely the threat that the commercial availability of navigation device equipment would be impeded if multichannel video programming distributors “have the advantage of being the only entity offering bundled boxes.”⁹ By offering its downloadable security solution on an open standards basis, BBT has satisfied this concern since cable operators deploying BBT boxes will be deploying devices that use a technology that will be readily available to manufacturers of commercially available devices.”

Moreover, the Commission plainly stated “[i]t is not our intent to force cable operators to develop and deploy new products and services in tandem with consumer electronics manufacturers.”” For the Commission to now change its earlier position and find that BBT’s open standard downloadable security solution is non-compliant with the integration ban would “slow the development and implementation of a downloadable security solution and actually frustrate the purpose of promoting commercial availability of set-top boxes” – the specific adverse consequences that the Commission indicated it was seeking to avoid.¹²

CEA’s attack on BBT’s downloadable security solution is emblematic of the degree to which the fundamental objectives of Congress in calling for the retail sale of set-top boxes is being lost in the debate over the approaching integration ban deadline.

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, ¶ 35 (2005).

¹⁰ See *id.* at note 136 (“we emphasize that we expect cable operators to deploy navigation devices using the same technologies and standards available to manufacturers of commercially available devices”) (emphasis supplied)

¹¹ *Id.* at ¶ 30.

¹² *Id.* at ¶ 35.

Congress' goal was simple – to promote lower prices, higher quality and innovation.¹³ It believed that this goal could best be achieved by the development of a retail market for set-top boxes.¹⁴ It is in BBT's admittedly self-serving interest for this goal to be met by the development of a low cost technology that reduces the price of set-top boxes and, hopefully, relieves cable operators of the costs of such boxes completely by integrating the functionality of the box (both in terms of access and security) into consumer electronic devices such as television sets.

BBT's founders knew from experience that an open standard would allow for competition that would drive down the cost of set-top boxes. Indeed, as noted above, their model was the development of cable modems through the DOCSIS open standard. The DOCSIS approach has been remarkably successful and has produced precisely the consumer benefits that Congress and the Commission are seeking with regard to set-top boxes.

Ultimately, it is competition, not a governmentally-mandated "national standard" that will reduce prices. Consumers are more than capable of appreciating and navigating a marketplace of multiple options, whether or not the equipment choices are compatible. Indeed, even CEA would have to concede that competition between and among cable operators and the two national DBS operators is flourishing even though the set-top boxes offered by the DBS operators are not compatible with each other or with cable operators. The fact that, in the future, a subscriber who purchases a set-top box at retail

¹³ *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775, ¶ 6 (1998), citing H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

¹⁴ *Id.*

may have to change out that set-top box when they move to a different part of the country is no different from the situation that any consumer faces today when they decide to take advantage of competition in the video marketplace by switching to an alternative provider of video service.”

As noted above, BBT remains on track to commence production of the boxes ordered by JetBroadband by December 2007. However, if the Commission does not allow operators such as Jetsroadband to make the good-faith effort to commit to and use this new technology, financing and development will be hampered and will only result in higher costs to consumers and a slower migration to digital distribution. In short, the loser will be the consumer.

CONCLUSION

The ultimate objective of the integration ban is to comply with the Congressional mandate to achieve retail distribution of cable set-top boxes so that consumers, hopefully, will benefit from lower prices, higher quality, and technological innovation. The BBT open standard downloadable security solution is one of the few current avenues for achieving that goal. It would be counterproductive for the Commission to take any action that would impede the development of an open standard low-cost set-top box. Granting JetBroadband’s petition for deferral of the integration ban deadline will further the

¹⁵ The ready availability of consumer electronics equipment over the Internet and the ability of consumers to buy or sell equipment on sites such as eBay is further evidence that “national portability” can and does exist even in the absence of a governmentally-mandated standard ensuring the universal compatibility of all navigation devices. The extent to which the consumer benefits from Competition, even among incompatible devices, can be seen in the cellular telephone industry (CDMA, TDMA, GSM), the video-game industry (**X-Box**, PlayStation, Wii), the portable audio industry (iPod, Zune), and the like. There is no more need for the government to pick a single “winner” in the set-top box market than there would be for the government to pick a winner in any of these markets.

Commission's objectives and will have no adverse impact on the goals the Commission has articulated

Respectfully submitted,

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Dated: **April** 16, 2007

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CERTIFICATE OF SERVICE

I, Jennifer S. Walker, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify on this 16th day of April 2007, copies of the foregoing "Reply Comments of Beyond Broadband Technology, L.L.C." were sent via first class mail, postage prepaid, to the following:

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