

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of GTA Services, LLC	)	CSR-[_____]
and Wilkes Communications, Inc. for	)	
Waiver of 47 C.F.R. § 76.1204 (a)(1)	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996;	)	
	)	
Commercial Availability of Navigation	)	
Devices	)	

**PETITION OF GTA SERVICES, LLC AND WILKES COMMUNICATIONS, INC.  
FOR WAIVER OF 47 C.F.R. § 76.1204(a)(1)**

August 22, 2007

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FOR WAIVER OF 47 C.F.R. § 76.1204(a)(1)**

**PETITION FOR WAIVER**

Pursuant to section 629(a) of the Communications Act of 1934, as amended (“Act”),<sup>1</sup> and sections 1.3 and 76.7 of the Commission’s rules,<sup>2</sup> GTA Services, LLC (“GTA”) and Wilkes Communications, Inc. (“Wilkes”) (collectively, the “Petitioners”)<sup>3</sup> respectfully request that the Commission grant a waiver of section 76.1204(a)(1) of the Commission’s rules.<sup>4</sup>

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<sup>1</sup> 47 U.S.C. § 549(a).

<sup>2</sup> 47 C.F.R. § § 1.3 & 76.7.

<sup>3</sup>GTA Services, LLC and Wilkes Communications, Inc. are small cable operators, as that term is defined in section 76.901(e) of the Commission’s rules, that will serve subscribers of video services in rural communities. Petitioners are each an affiliate of a local exchange carrier and utilizing existing small local exchange carrier infrastructure for the provision of video services.

<sup>4</sup>Each of the Petitioners will deploy cable systems that utilize downloadable conditional access security (“DCAS”). Systems utilizing DCAS contain separate security components inherent within the video system. The Commission has not definitively concluded, however, that such systems are compliant with Section 76.1204(a)(1)’s separate

## I. INTRODUCTION

Each of the Petitioners will complete testing and the roll-out of all-digital video services to subscribers over the next 120-160 days.<sup>5</sup> Each will provide video services over broadband networks utilizing existing telecommunications infrastructure. Wilkes will deploy an Internet protocol television (“IPTV”) system substantially similar to that being utilized by the IPTV Operators Group as described in the *IPTV Operators Group Petition for Waiver*.<sup>6</sup> The company is currently serving subscribers in its service area on a trial basis for testing. Once deployed, it expects to initially serve 150 subscribers with an increase of approximately 300 subscribers per year over the next three years.

GTA will deploy a Motorola Next Level video platform that is substantially identical to that being utilized by the Rural ATM Digital Video Providers Group, as described in the *Rural ATM Digital Video Providers Group Petition for Waiver*.<sup>7</sup> Once deployed, GTA expects an initial video subscriber count of 1500 with a growth of approximately 1000 subscribers per year over the next three years.

Waiver is appropriate and warranted under the circumstances described herein because it would allow the Petitioners to deploy video services to their small and rural video service markets in accordance with the public interest and the overall objective of the Act.<sup>8</sup>

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security requirement. In addition, the Petitioners support the Request for Declaratory Ruling filed by OPASTCO and NTCA and strongly urge the FCC to issue a clarification of section 76.1204(b)’s interface requirement.

<sup>5</sup> Wilkes Communications will complete roll-out of its services by November 1. GTA Services, LLC will complete roll-out of its services by December 1.

<sup>6</sup> See *IPTV Operators Group Petition for Waiver of 47 C.F.R. §76.1204(b)*, Petition for Waiver (filed June 1, 2007). Wilkes can provide additional information regarding its IPTV network and services upon request by Commission staff.

<sup>7</sup> See *Rural ATM Digital Video Providers Group Petition for Waiver of 47 C.F.R. § 76.1204(b)*, Petition for Permanent Waiver (filed April 9, 2007). GTA can provide additional information regarding its ATM system and services upon request by Commission staff.

<sup>8</sup> Each of the Petitioners will offer video services in its respective incumbent local exchange carrier (“ILEC”) affiliate’s rural service market. Upon request by Commission staff, Wilkes and GTA can provide the FCC with additional information regarding the Petitioners’ rural video service markets.

That objective is the promotion of the deployment of advanced telecommunications and information technologies and services to all Americans, and the spurring of competition in the provision of video services to rural markets.

In addition, once deployed, the Petitioners will be immediately providing all-digital video services in accordance with the mandatory digital transition, which requires migration by video providers to digital television programming services by February 17, 2009. Accordingly, the FCC should grant the Petitioners a waiver that is consistent with the waivers granted in the *BendBroadband Order*<sup>9</sup> and the *Consolidated Digital Waiver Order*.<sup>10</sup>

## **II. DISCUSSION**

### **A. Standard for Waiver**

Section 629(a) of the Act prescribes that the Commission “adopt regulations to assure the commercial availability” of video navigation devices.<sup>11</sup> The goal of Congress in enacting section 629 was to “ensure that consumers have the opportunity to purchase navigation devices from sources other than their [MVPD].”<sup>12</sup> Congress also sought to avoid Commission actions having “the effect of freezing or chilling the development of new technologies and services.”<sup>13</sup> In order

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<sup>9</sup> *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”).

<sup>10</sup> *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, DA 07-2921 (rel. June 29, 2007) (“*Consolidated Digital Waiver Order*”). In the *Consolidated Digital Waiver Order*, the FCC granted a waiver until July 1, 2008 for high definition and digital video recording devices “for use with [IP], [ATM], or hybrid QAM/IP systems” and indefinitely for other ‘basic’ function set top boxes for use with such systems. See *Consolidated Digital Waiver Order* at ¶61; see also *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Erratum, CS Docket 97-80 (rel. Jul. 6, 2007). The FCC has also granted similar relief in other instances where providers demonstrated substantially similar circumstances to that of BendBroadband and Petitioners in the *Consolidated Digital Waiver Order*. See, e.g., *In the Matter of Colo Telephone Company, et seq*, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices., Memorandum Opinion & Order, CS Docket 97-80 (rel. Jul. 23, 2007).

<sup>11</sup> 47 U.S.C. § 549 (a).

<sup>12</sup> See *Charter Communications, Inc., Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, ¶ 2 (rel. May 4, 2007) citing S. Rep. 104-230, at 181 (1996)(Conf. Rep.).

<sup>13</sup> *Consolidated Digital Waiver Order* at ¶ 2 citing S. Rep. 104-230, at 181 (1996) (Conf. Rep.).

“to carry out the directives of section 629,” the FCC promulgated section 76.1204’s separate security requirements.<sup>14</sup>

The FCC may generally waive its rules for good cause shown.<sup>15</sup> Under section 1.3 of the rules, a waiver is appropriate where the “particular facts would make strict compliance inconsistent with the public interest.”<sup>16</sup> Furthermore, the District of Columbia Circuit Court of Appeals has held that the Commission is always required to “take a ‘hard look’ at meritorious applications for waiver, and must consider all relevant factors,” especially where the application of a general rule under particular circumstances would not serve the public interest underlying that rule.<sup>17</sup>

With this Petition for Waiver, the Petitioners demonstrate how they satisfy the waiver standards pursuant to sections 1.3 and 76.7<sup>18</sup> of the Commission’s rules. The Petitioners demonstrate why waiver in this instance is in the public interest.

### **B. Grant of Waiver Is In the Public Interest**

In the *BendBroadband Order*, the FCC “recognize[d] that the ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits.”<sup>19</sup> In the *Consolidated Digital Waiver Order*, the FCC also recognized this and stated further that such

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<sup>14</sup> See *Consolidated Waiver Order* at ¶ 3; see also 47 C.F.R. § 76.1204 (a)(1) & (b).

<sup>15</sup> 47 C.F.R. § 1.3.

<sup>16</sup> *AT&T Wireless Services, Inc. et al. v. Federal Communications Commission*, No. 00-1304 (D.C. Cir. 2001), citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>17</sup> *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191, 1192 & 1195 (D.C. Cir. 1983) (vacating FCC denial of a 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). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-1159 (D.C. Cir. 1969) (stating, “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.”).

<sup>18</sup> 47 C.F.R. § 76.7. That section provides: “On petition by any interested party, . . . [or] a multichannel video programming distributor, . . . the Commission may waive any provision of . . . part 76. . . .”

<sup>19</sup> *BendBroadband Order*, 22 FCC Rcd 209 at 218, ¶ 27.

benefits would occur “particularly when considered in the context of the Commission’s goal of promoting the broadcast television digital transition.”<sup>20</sup>

As previously stated, the Petitioners, Wilkes and GTA, will complete the testing and roll-out of IPTV services and video over ATM technology, respectively, over the next 120-160 days. Each of these video deployments is substantially similar to video services and technologies for which the FCC has previously granted waivers based on a finding that such services are already “all-digital video distribution networks,”<sup>21</sup> and as such, strict enforcement of section 76.1204 would in effect punish the Petitioners for rolling-out services over all-digital networks.<sup>22</sup>

If waiver is granted, the Petitioners’ will be able to rapidly and efficiently offer new competitive digital video services in their respective rural service markets. The Commission has recognized that video deployment in such markets is in the public interest. In the *Consolidated Digital Waiver Order*, the Commission acknowledged specifically, that “many of the Petitioners are providing, or will provide, all-digital service to *rural customer bases*.”<sup>23</sup>

If the Commission declines to grant waiver to the Petitioners, it would be contrary to the public interest because the deployment of digital video services in the Petitioners’ rural service areas would be halted. If waiver is not granted, the Petitioners’ would be forced to abandon the offering of video services and thus competition in their rural markets would be compromised. In addition, consumers would be severely limited in their choices of service providers and the types of available video services and technologies being offered in Petitioners’ rural markets. Indeed

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<sup>20</sup> *Consolidated Digital Waiver Order* at ¶ 58.

<sup>21</sup> See *BendBroadband Order*; *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2010 (2007); *Millennium Telcom, LLC d/b/a/ OneSource Communications Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2009 (2007).

<sup>22</sup> See *Consolidated Digital Waiver Order* at ¶ 59 (stating that strict enforcement of 76.1204 would, in effect, punish Petitioners *transitioning* to all-digital networks). The Petitioners herein argue, however, that strict enforcement would also punish providers that have already deployed all-digital services.

<sup>23</sup> *Id.* at ¶59 [emphasis added].

such consumers would be denied competitive video services or even video services altogether.<sup>24</sup> Such consequences are contrary, not only to the public interest, but also to the overall objective of the Act, the deployment of advanced telecommunications to all Americans.

The Commission has stated that the “deployment of advanced video services is a recognized public interest benefit.”<sup>25</sup> It has also recognized that digital video services are advanced video services.<sup>26</sup> In contravention of the Act’s objective of deploying advanced telecommunications to all Americans, strict application of section 76.1204 would force the Petitioners to cease the deployment of such advanced digital video services as IPTV and video over ATM technologies. The Commission should thus grant waiver to the Petitioners to ensure the speedy deployment of competitive digital video services to Petitioners’ rural markets in promotion of the Act’s objective and the public interest.

**C. The Petitioner’s Circumstances Are Consistent with FCC’s Grant of Waiver in the Consolidated Digital Waiver Order and the BendBroadband Order, as well as Other FCC Policy Demonstrated In Other Proceedings**

The Petitioners’ circumstances are substantially similar to the circumstances of the ATM and IPTV video service providers that were considered by the Commission in the *Consolidated Digital Waiver Order*.<sup>27</sup> For example, in granting waivers of section 76.1204(a)(1) for the Rural ATM Digital Video Providers Group and the IPTV Operators Group, the FCC considered and factored into its rationale that members of each group were utilizing existing telecommunications infrastructure in the provision of video services and that the Act’s overall objective of deploying advanced telecommunications and information technologies and services

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<sup>24</sup> The Commission acknowledged this point emphasized by the ATM and IPTV providers in the *Consolidated Digital Waiver Order*. See *Consolidated Digital Waiver Order* at ¶ 53.

<sup>25</sup> See *id.* at ¶ 256 (footnote omitted).

<sup>26</sup> See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation*, MB Docket No. 05-192, 21 FCC Rcd 8203 (2006) at para. 246.

<sup>27</sup> See generally *Consolidated Digital Waiver Order*.

to all Americans would be undermined if waiver was not granted.<sup>28</sup> The FCC also concluded that waiver was warranted since the Petitioners in that proceeding, including the ATM and IPTV Groups, were already providing video services over all-digital networks.<sup>29</sup>

The Petitioners herein request that the FCC consider that substantially similar circumstances have been demonstrated by the Petitioners in the current petition for waiver. Accordingly, Petitioners respectfully request that the FCC grant substantially similar relief under the same rationale that it utilized in the *Consolidated Requests for Waiver Order*.<sup>30</sup>

In the *BendBroadband Order*,<sup>31</sup> the Commission granted a waiver of section 76.1204(a)(1) and, in doing so, considered BendBroadband's commitment to migration to an all-digital system by 2008 and the obstacles it would face if it were forced to discontinue the use of the Motorola DCT-700 set-top box after July 1, 2007.<sup>32</sup>

The Petitioners are utilizing technology, which is already all-digital. Thus, upon launch of video services to the public, the Petitioners will have already met the 2009 digital transition requirement. Furthermore, the Petitioners would face significant financial obstacles, such as the loss of significant start-up costs, if waiver is not granted.<sup>33</sup>

In addition, other policy objectives providing the basis for previous grants of waiver have also been demonstrated by the Petitioners in the instant petition. In the *2004 BellSouth MO&O*,<sup>34</sup> the Commission granted BellSouth a permanent waiver from the technical standards of sections

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<sup>28</sup> See *id.* at ¶ 53.

<sup>29</sup> See *id.* at ¶ 55.

<sup>30</sup> See generally *id.*

<sup>31</sup> *Bend Cable Communications, LLC d/b/a BendBroadband*, Memorandum Opinion and Order, CSR-7057-Z (rel. Jan 10, 2007).

<sup>32</sup> See *2007 BendBroadband MO&O*, ¶ 10.

<sup>33</sup> For example, Wilkes has endured start-up costs of approximately \$1.4 million and would face losing a significant investment if it is forced to cease the deployment of video services. Wilkes can provide the Commission additional information regarding its start-up investment upon request.

<sup>34</sup> *BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC*, Memorandum Opinion and Order, DA 04-2544 (rel. Aug. 18, 2004).

76.602 and 76.640 of the Commission's rules associated with non-integrated security.<sup>35</sup> In granting a waiver to BellSouth, the Commission considered BellSouth's status as a "small cable company," serving a very small percentage of the MVPD market.<sup>36</sup> The Commission also found that waiver was in the public interest because "grant of a waiver will allow BellSouth to continue to deliver digital services to its subscribers and remain a viable competitor in the MVPD marketplace."<sup>37</sup>

In this instance, based on each Petitioner's initial subscriber forecast upon deployment and for the three years following, as previously discussed, each Petitioner qualifies as a "small cable company" as that term is defined for purposes of section 76.901(e).<sup>38</sup> Under this section a small cable company is one serving 400,000 subscribers or less. Collectively, the Petitioners forecast initially serving approximately 1650 subscribers upon start-up in total. Thus, Petitioners give special emphasis to the fact that the overall video services market would be minimally impacted by the grant of a waiver to the Petitioners. Just as with BellSouth, grant of a waiver would also allow the Petitioners to deliver digital video services as viable competitors in their rural markets.

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<sup>35</sup> See 2007 BellSouth MO&O, ¶ 8.

<sup>36</sup> See *id.*, ¶ 5.

<sup>37</sup> See *id.*, ¶ 8.

<sup>38</sup> 47 C.F.R. § 76.901(e); See also 2005 Second Report and Order, App. C & fn 185.

**III. CONCLUSION**

WHEREFORE, for the reasons stated herein, Petitioner requests that the Commission grant this Petition for Waiver of in section 76.1204(a)(1) and (b) of the Commission's rules.

Respectfully submitted,

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