

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

In the Matter of)
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Millennium Digital Media Systems, L.L.C.,) CSR-7625-Z
d/b/a Broadstripe)
)
Petition for a Limited Waiver of 47 C.F.R.)
Section 76.1204(a)(1) of the Commission's Rules)
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_____)

**Opposition of the Consumer Electronics Association
to Broadstripe, L.L.C. Petition
for Reconsideration**

January 27, 2009

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The Consumer Electronics Association (“CEA”) respectfully submits these comments in opposition to a request by Broadstripe, L.L.C. (“Broadstripe”) (formerly Millennium Digital Media Systems, L.L.C.), for an extended waiver of Section 76.1204(a)(1) of the Commission’s rules.¹ Broadstripe previously requested a waiver, citing financial difficulties, in order to continue deploying set-top boxes with integrated security. On November 14, 2008, the Commission’s Media Bureau granted Broadstripe a waiver until January 31, 2009 and required Broadstripe to detail its plan for complying with the rule by that date.² The Bureau stated that “[w]e do not expect to grant further waivers unless a Petitioner presents an exceptional reason that it will be unable to comply

¹ 47 C.F.R. § 76.1204(a)(1) (2007).

² *In the Matter of Millennium Digital Media Systems, L.L.C., d/b/a Broadstripe, et al.*, Memorandum Opinion and Order, CSR-7625-Z, 2008 WL 4899053 (rel. Nov. 18, 2008).

with the integration ban after January 31, 2009.”³ Broadstripe now seeks “reconsideration” of the Bureau’s order – in fact a request for a further waiver through June 30, 2009.

Eleven years ago, the Commission promulgated regulations implementing Congress’s directive to “ensure the availability” of video navigation devices at retail from competitive sources.⁴ As amended, the regulations required multichannel video programming distributors (“MVPDs”) to make available to consumers equipment implementing a separable security function for use in competitive navigation devices, and by July 1, 2007, to rely on the same separable security function in their own leased navigation devices, such as set-top boxes.⁵ Throughout this period, the Commission and the Bureau have consistently rejected the very argument raised by Broadstripe in its petition for a waiver extension: that cable operators should be able to disregard the common reliance rule simply because complying with the rule would require diverting funds that had been “earmarked for other projects”⁶ – in other words, that complying with the rule is not a *business priority* for cable operators. The cable industry has appealed this decision to the Court of Appeals for the District of Columbia Circuit three times, and that Court has upheld the Commission’s decision three times.⁷ Broadstripe presents no “consumer benefits” that were not known to and rejected by the Commission, and the Court, at the time of those decisions. Therefore, Broadstripe has presented no “consumer benefit” grounds for a waiver extension.

³ *Id.* ¶ 9.

⁴ 47 C.F.R. § 76.1204; *see* 47 U.S.C. ¶ 549(c).

⁵ *Id.*

⁶ *See In the Matter of Millennium Digital Media Systems, L.L.C., d/b/a Broadstripe, et al.*, Petition for Reconsideration and Report of Compliance Plan, CSR-7625-Z at 5 (filed Dec. 15, 2008) (“Waiver Extension Petition”).

⁷ *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *Comcast Corp. v. FCC*, 526 F.3d 763 (2008).

Nor does the impending digital broadcast transition provide an “exceptional reason” for a further waiver. As the Commission well knows, unlike broadcasters, cable operators are under no obligation to end analog transmissions on a date certain. Nonetheless, cable operators have used the occasion of the mandatory digital broadcast transition to generate demand for new cable subscriptions. Some operators have even run advertisements suggesting that cable subscribers must obtain cable set-top boxes for every set at the time of the broadcast transition. Broadstripe’s petition seeks to use the demand generated by cable industry advertising as a justification for continuing to deploy integrated set-top boxes. A waiver extension on that basis would be improper.

More broadly, the supply problems Broadstripe claims to be facing could have been prevented by earlier adoption of the common reliance rule, and will be perpetuated if waivers are granted and extended freely. As the Commission has found, requiring cable operators to rely on a security interface identical to that used by competitive navigation device manufacturers creates a business incentive to fully support competitive devices.⁸ A lack of such support has largely kept competitive suppliers out of the market for cable navigation devices. Conversely, if basic navigation devices (whether built into television sets or otherwise) were readily available to cable subscribers through retail channels, operators like Broadstripe would not now be dependent on the navigation device duopoly they have nurtured to supply set-top boxes. Additional waivers of the common reliance rule, whether on terms applicable to all cable operators or even to

⁸ See *In the Matter of Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, CSR-7078-Z, CS Docket No. 97-80 at ¶ 3 (rel. Jan. 16 2009) (“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.”).

“rural” operators alone, will perpetuate the status quo and the very supply problems Broadstripe predicts.

Broadstripe’s “compliance plan” demonstrates why a waiver extension should not be granted. According to Broadstripe’s disclosures, it has not yet taken *any* action to come into compliance with the Commission’s common reliance rule. Instead, it “expects to purchase CableCARD compliant set-top boxes *“if and when its waiver expires.”*”⁹ Should Broadstripe in fact run out of set-top boxes before receiving compliant boxes because of an inability to estimate demand near the time of the digital broadcast transition, it could have avoided that problem by ordering compliant boxes *before* its waiver expired. Rather than taking proactive steps to comply with the Commission’s rule, Broadstripe has put *itself* in the position of being unready to comply on the date the Bureau ordered. The Bureau should take this lack of diligence into account when deciding Broadstripe’s request for an extended waiver.

In addition, CEA notes that Broadstripe apparently made no effort to provide the Commission with the information requested in the November 14 Order concerning price trends for compliant set-top boxes. Broadstripe simply states, without citation, that *current* prices for compliant set-top boxes are “more than three times what it pays for a integrated set-top box.”¹⁰ It provides no basis for that estimate, and no projections of future prices. Obviously, the Bureau was aware that “projected prices for those boxes” is a “speculative” request by nature. Yet Broadstripe gives no indication that it even requested such projections from its suppliers or trade associations. Without such data, the Bureau is less able to verify Broadstripe’s claim that complying with the common

⁹ Waiver Extension Petition at 5 (emphasis added).

¹⁰ *Id.*

reliance rule presents a true financial hardship (rather than simply running counter to Broadstripe's current business priorities).

The Bureau and the Commission should take caution in their response to requests for additional waivers such as Broadstripe's, and should avoid undermining the competitive market in navigation devices that Congress ordered the Commission to "assure" over a decade ago.¹¹ For this reason, and the other reasons described above, the Commission should deny Broadstripe's request for an extension.

Respectfully submitted,

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¹¹ 47 U.S.C. § 549(c).

CERTIFICATE OF SERVICE

I do hereby certify that on January 27, 2008 I caused a true and correct copy of the foregoing Opposition of the Consumer Electronics Association to Broadstripe, LLC Petition for Reconsideration to be served via first-class mail on the following:

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