Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Orange Broadband Operating Company,	)	CSR-7111-Z
LLC and Carolina Broadband, LLC	)	
Request for Waiver of	)	
47 C.F.R. § 76.1204(a)(1)	)	

To: Chief, Media Bureau

FIRST AMENDED REQUEST FOR WAIVER

Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC) and Carolina Broadband, LLC (collectively "Baja Broadband" or "Baja") respectfully submit this First Amended Request for Waiver from the integration ban[1] as described herein.[2] Specifically, pursuant to Sections 1.3 and 76.7 of the Commission's rules, in light of its extraordinary financial circumstances, Baja seeks (1) the same limited relief the Bureau has granted to other similarly financially-distressed operators such as James Cable, LLC, and (2) the right to acquire and deploy *previously-used, refurbished* integrated devices (including HD/DVR devices) in rural systems where it has also deployed CableCARDs in its leased devices.

Baja Broadband was founded in 2006 to purchase outmoded rural systems from another operator, and today it provides cable services to approximately 67,000 subscribers in lower-density markets in New Mexico, Utah, Nevada, Colorado, and the Texas panhandle. Baja invested millions of dollars to upgrade many of its systems to be able to offer triple play and

[1] 47 C.F.R. § 76.1204(a)(1) (second sentence).

digital services. But these rural (and in many cases lower-income) markets are extremely challenging for a cable operator. Baja's penetration rate is **[REDACTED]**[3] negative free cash flow in excess of **[REDACTED]**.[4] By contrast, at the time the Bureau granted them waivers based upon "dire financial straits,"[5] Charter's negative free cash flow was "only" approximately 15% of its gross revenues,[6] and James Cable's negative free cash flow appeared to be substantially lower than Baja's both in terms of gross dollars and as a percentage of revenue.[7] As the Commission found in granting those prior waivers, positive free cash flow is critical to enable an operator to make the necessary investments to deliver next-generation broadband, telephone, HD, VOD, and other advanced services.[8]

Baja's negative cash flow path was unsustainable in any case, but a change in course became essential in the fall of 2008. The slowing economy and tightening capital markets **[REDACTED]**.

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[2] On December 27, 2006, Baja Broadband filed a request for waiver from the integration ban. The Bureau denied that request on June 29, 2007, but granted Baja leave to amend. *Bresnan Communications, LLC, et al*., CSR-7117-Z, Memorandum Opinion and Order, DA 07-2916, ¶ 1 (rel. June 29, 2007).

[3] *See* Bresnan Request for Waiver at 5 ("Bresnan's penetration rate of homes passed is less than 50%. By comparison, larger MSOs serving larger, denser markets typically have penetration rates of more than two-thirds of homes passed.").

[4] *See* Confidential Exhibit 1 (summarizing and attaching audited financial statements).

[5] *Charter Waiver Order*, ¶ 18.

[6] *See* CS Docket 97-80, Charter ex parte letter (Feb. 12, 2007) at Exhibit 2.

[7] *See, e.g.*, CS Docket 97-80, James Cable Report of Updated Financial Information at 1-2 (Apr. 25, 2008).

[8] *James Cable Waiver Order*, ¶ 39.

Accordingly, Baja was compelled to make significant cuts in what had become one of its single-largest capital expenses, set-top boxes. Baja's cost for new set-top boxes had soared after mid-2007 as a result of the integration ban. **[REDACTED]**

Thus, in the fall of 2008, Baja stopped ordering new HD and HD/DVR set-top boxes. New CableCARD HD/DVRs cost more than $450, and Baja simply does not have enough capital at this time to tie up that amount of money in a device for which it can only charge a monthly rental of $10-15 under current market conditions. *This means that Baja is now generally unable to provide HD and DVR service to new customers.* The company stopped marketing HD and DVR service and was only able to provide such devices in response to unsolicited customer requests when it happened to have an available device in its inventory as a result of customer churn.[9] Thus, as a result of the higher costs imposed by the integration ban, HD and DVR services remain effectively unavailable from Baja throughout much of its service area.[10]

[9] Baja attempts to keep a reserve of devices available to replace broken devices for existing HD/DVR customers.

[10] Because of continuing subscriber losses, Baja's device inventory increased, and it recently decided to use this inventory and a small additional order of new devices to resume limited advertising of HD/DVR service in its two largest markets, St. George, Utah and Alamogordo, New Mexico, at least for a limited time.

Baja has also had to reduce its marketing of digital services and defer upgrading its five analog-only systems[11] to digital in order to reduce demand for CableCARD set-top boxes that it cannot afford to buy. Although the integration ban does not apply to its analog-only systems, the ban's application to Baja's digital systems deprives it of capital that could be used to upgrade its systems to digital. In addition, Baja is deterred from upgrading these systems to digital because those systems would then become subject to the costs of the ban.

Even if Baja could increase its capital budget, the public interest would be much better served if Baja could use its extremely limited funds on investments that deliver more return for consumers than does the excessive common reliance demanded by the integration ban. *Baja still cannot not provide high-speed broadband services or phone service to any of its customers in 13 systems*, which pass approximately 22,000 homes.[12] Many of these consumers cannot receive any form of wireline broadband service from any operator. Baja also needs to conserve capital to be able to launch video-on-demand (VOD) service, which it currently does not offer in any market, and also to launch HD and DVR service in its Nevada markets, where they remain unavailable. It of course makes no sense for Baja to launch HD and DVR service in these markets when it cannot afford to purchase the only HD/DVR devices that the Commission currently will allow it to use.

The effect of Baja's cutbacks in set-top boxes is perverse in the long run, because the unavailability of digital, HD and DVR services disappoints consumers and results in additional subscriber losses (and of course it frustrates the goals of the Act). The purpose of this waiver

[11] Baja does not offer any digital services in its systems in Logandale, Nevada; Rockville, Utah; Carrizozo and High Rolls, New Mexico, and Texline, Texas.

request is to seek relief that is narrowly tailored to enable Baja to address this problem without undermining the goals of Section 629 and while enabling it to invest in delivering broadband and telephone services to new areas. That relief is permission to deploy previously-used refurbished set-top boxes obtained from third parties.[13]

The reason that refurbished devices are the key to relief is because they are so much less expensive than new devices. Refurbished integrated devices are available for half or less than the cost of new CableCARD devices. For example, Choice Cable reported that refurbished HD/DVRs "may cost less than $200" while new CableCARD HD/DVRs could "cost more than $500."[14] A leading seller of refurbished devices similarly explained:

> Because refurbished boxes are older models that have previously been used, we purchase them at a discount and are able to offer the boxes for much less than the price of new models available from the manufacturers. For example, a refurbished, integrated HD or DVR device typically would cost roughly half of the price of a new CableCARD HD or DVR device, and sometimes significantly less than half.

Access to these dramatically cheaper devices is necessary to enable Baja to resume active offering of HD and DVR services in all of its markets, without depriving the company of money needed to fund ongoing maintenance and operations, and without further delaying needed investments to expand its broadband and telephone service footprints. A waiver is therefore warranted to assist the development or introduction of a new and improved services offered over

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[12] These markets are Battle Mountain, Carlin, Elko, and Logandale, Nevada; Burlington, Las Animas, and Springfield, Colorado; Carrizozo, Clayton, High Rolls, and Logan, New Mexico; Texline, Texas; and Rockville, Utah.

[13] The refurbishment may include cleaning, replacement of batteries, restoration or replacement of the exterior, and replacement of the lens or resonator. Small operators such as Baja do not have the expertise or scale to refurbish devices on their own, and historically relied on third parties to perform this service and provide an efficient market for the resale and reuse of devices.

[14] CS Docket 97-80, Letter from Paul Hudson, Counsel to Choice Cable T.V., to Marlene H. Dortch, May 29, 2008, at Attachment p. 1.

Baja's systems.[15] In addition, Baja would pass these savings on to its customers,[16] which is more important than ever in the current economic downturn.

While Baja believes that the Bureau erred in deciding that refurbished devices are "new" for purposes of the integration ban,[17] this request can be granted in harmony with that prior decision. The Bureau based its decision on its concern that permitting cable operators to use refurbished devices obtained from third parties "could essentially defeat the Commission's integration ban,"[18] presumably because it could perhaps have enabled an operator to use refurbished devices exclusively without using any new CableCARD devices. However, that would not true today of Baja because Baja has already purchased more than 7000 CableCARD devices, which are operational in each of its digital systems. This is 160 times more than the 44 CableCARDs that it currently has provided to customers for their use in retail devices, and is far more than is needed to give Baja all of the incentive it needs to assure that CableCARDs work for retail and leased devices in all of its digital systems. Indeed, even if it were not legally required, Baja would remain happy to continue to provide CableCARDs for use in retail devices – given Baja's capital constraints, it would prefer if all of its customers obtained their own cable-

[15] *See* 47 U.S.C. § 549(c).

[16] *See* 47 C.F.R. § 76.923.

[17] Refurbished devices have been previously used and are not "new" under the plain meaning of the Commission's published regulation or relevant precedent. Congress and the Commission have recognized in other transitional contexts that it would hurt consumers more than it would help them to apply new equipment rules to previously manufactured, refurbished equipment. For example, when the Commission established its phased-in requirement that new mobile phones include Automatic Location Identification functionality for E-911, it exempted activations of refurbished handsets. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd. 17,442, fn. 62 (rel. Sept. 8, 2000). In addition, the Federal Trade Commission's long-standing precedent and policies generally prohibit refurbished consumer electronics equipment from being offered or marketed as "new." *See e.g., Eastman Kodak Company Consent Order, Etc., In Regard To The Alleged Violation of the Federal Trade Commission Act*, Docket C-2291, Decision, 81 F.T.C. 539 (1972); see also *Enforcement Policy on Merchandise Which Has Been Subjected to Previous Use on Trial Basis and Subsequently Resold as New*, F.T.C., 34 Fed. Reg. 176-7 (1969).

[18] *Bresnan Communications, LLC, et al*., CSR-7117-Z, Memorandum Opinion and Order, DA 07-2916, ¶ 56 (rel. June 29, 2007).

ready devices.[19] In any case, Baja will have substantial common reliance for years even if it never purchases another new CableCARD device again.

Because Baja already has more than sufficient common reliance, its request to use refurbished devices is different from those reviewed by the Bureau prior to the effective date of the integration ban. The Commission could allow operators that have "demonstrated dire financial straits"[20] through negative free cash flow to use refurbished integrated devices so long as they also deploy at least twice as many CableCARDs in their own devices as they have deployed for use in retail devices. Above and beyond that two-fold amount, Baja's customers receive no benefit from any further costs imposed by the integration ban for the purpose of encouraging additional, and unnecessarily excessive, common reliance. This is especially so since the result of the integration ban in Baja's case is not to cause Baja to purchase more CableCARD devices but instead is to cause it to offer fewer devices of any kind. Instead of more common reliance, there are simply fewer devices and fewer services available to consumers, the opposite of what Section 629 is intended to achieve.

Baja's request provides the Commission with an opportunity to remedy the consumer harm that has occurred as a byproduct of the Bureau's 2007 decision to prohibit refurbished devices. In 1999, the full Commission held that the integration ban "is not … intended to render equipment obsolete that has already been manufactured and deployed and still has a useful

[19] Unfortunately, retail devices have not been widely adopted by consumers, especially in rural areas, even after nearly two years of the integration ban. Retail CableCARD devices are often not widely available in Baja's markets. For example, the closest Best Buy to Baja's Elko system is 165 miles away in Idaho, and it no longer stocks any CableCARD-ready televisions. No CE manufacturer has produced a non-DVR, HD set-top box for the retail market, and rural consumers unfamiliar with the benefits of a DVR are often put off by the high up-front costs of a TiVo HD/DVR.

[20] *James Cable, LLC's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7216-Z, Memorandum Opinion and Order, DA 07-3316, ¶ 39 (rel. July 23, 2007) ("*Waiver Order*").

life."[21] But many refurbished devices stuck in warehouses today still have many years of useful life ahead of them.[22] Because these devices could now be deployed by companies that would also commonly rely on CableCARDs, the Commission can deliver a win-win for everyone by unlocking these stranded refurbished devices that hold the key to enabling financially-distressed rural operators to deploy more broadband, telephone and other services, without undermining the integration ban.

Grant of the waiver would also further the Obama Administration's and Congress' economic stimulus goals. There are currently millions of dollars worth of stranded, refurbished set-top boxes collecting dust in warehouses across the country. If Baja and similarly-situated small and rural cable operators were permitted to use these devices, there would be an immediate surge in spending to by companies to purchase these heavily-discounted devices. Cable operators could lower the prices of set-tops offered to their customers, which in turn would lead to increased consumer demand for digital, HD and DVR services. This would stimulate even more spending by cable operators to upgrade analog systems to digital, move to all-digital systems to free up capacity to carry more HD channels, and build headend support for the additional HD and DVR services that would be made possible by the Commission relief. It would also free up more capital for cable operators to spend on expanding broadband services and building new plant.

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[21] *Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd. 7,596 ¶ 35 (1999). *See also Midcontinent Cable Co*., CSR-5462-Z, MO&O, DA 00-840, 15 FCC Rcd. 6244 (2000) (extending deadline to measure cable systems amplitude characteristic at the subscriber terminal, where it would have required replacement of existing set-top boxes, because "It is clear from the legislative history that cable operators, and ultimately subscribers, were not intended to bear the costs of replacing equipment prior to the end of its useful life.")

[22] *See* CS Docket 97-80, Letter from Christy Adams, CEO, Adams Cable Equipment, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission (Apr. 18, 2007) at 2 ("ACE *Ex Parte*").

If the Commission extended permission to use refurbished devices to a larger number of small operators, it would also bring back to life the small businesses that made their living refurbishing and selling used set-top boxes. Some of these companies have laid off most or all of their employees and closed large warehouses. One company indicated that it has now been reduced to buying integrated DVRs from cable operators for approximately $1-2 to salvage the hard drive and scrap the rest. It is harmful to consumers, cable operators and the environment that these otherwise fixable devices are ending up in landfills rather than being used to deliver lower-cost advanced services to consumers.

With the stroke of a pen in granting a waiver for refurbished devices, the Commission could generate substantial economic activity and growth, much of which could occur within days and weeks of its order (much faster than the broadband stimulus projects being funded under ARRA). Meanwhile, even if all of the stranded refurbished devices were put back into the market, their number is too few to have any adverse national impact on the market for retail cable-ready devices. Even at their peak prior to the integration ban, refurbished devices represented only about 5% of the national market for set-top boxes.[23] That share would likely be lower today because refurbishing companies have been able to offload some of their inventory to cable operators in other countries, and have reduced their purchase of old boxes to refurbish since their primary market in the US was effectively eliminated. In addition, many cable operators are not as interested in selling their used devices to refurbishers, preferring instead to stick with older models rather than replace them with much more expensive CableCARD devices. Thus, any relief given to Baja or other similarly-situated small operators would involve only a relatively small and shrinking number of set-top boxes, and would provide the

Commission "with an opportunity to examine the effect of a waiver" that provided for partial common reliance through a mix of integrated and non-integrated devices "without the potential for disrupting the national retail market for navigation devices."[24] This information would be valuable to the Commission in future proceedings to reevaluate the overall effectiveness of its Section 629 rules.

Baja's request is not limited to the use of refurbished devices that do not have HD or DVR functionality. The Commission has previously excluded these types of devices from the financial-distress waivers as a means of assuring that operators would still have to purchase some CableCARD devices. This is unnecessary in Baja's case since it already commonly relies on CableCARDs through devices it has purchased and deployed under the integration ban. Moreover, because Baja is generally unable to afford to buy new CableCARD HD/DVRs to keep pace with demand, the result of excluding these boxes from Baja's waiver would not be to increase common reliance, but only to deny HD and DVR services to consumers and leave them only with fewer, less advanced service options. Such a result would stand on its head the Congressional mandate to the Commission to encourage "the deployment …of advanced telecommunications capability to all Americans."[25]

No expiration date for a refurbished device waiver is needed, because the availability of refurbished integrated devices will diminish over time in any case. In the future, more and more of these refurbished devices will themselves be separated-security devices. In a similar context, in implementing the hearing aid compatibility (HAC) requirements applicable to new telephones,

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[23] ACE *Ex Parte* at 3.

[24] *See Cable One Waiver Order*, ¶ 14.

the Commission found that it would be unnecessarily expensive to apply such rules to refurbished telephones, and that Congress had noted that "the issue [of refurbished legacy equipment] would disappear as old telephones are replaced by new ones."[26] If the Commission believes that an expiration date is nonetheless needed, Baja proposes a term of at least three years, which is the length of the waivers it granted to Choice Cable and Liberty Cablevision of Puerto Rico, whose HD and DVR offerings were similarly impaired by the integration ban.

Finally, Baja notes that it would be profoundly unfair and unsound for the Commission to continue to impose excessive common reliance requirements on Baja under these circumstances while continuing to give a free ride to Baja's two much-larger DBS competitors, DirecTV and DISH. Even if this waiver request is granted in full, Baja will still continue to provide substantial support for interoperable retail navigation devices and commonly rely on the same security in thousands of its set-top boxes. DBS, meanwhile, offers none.[27] The DBS operators now rely nearly exclusively on proprietary, leased devices, and do not support the use of third-party retail devices such as HD TiVos or cable-ready DTVs for new customers without a DBS-owned set-top box.[28] But even though Baja provides much greater support for Commission's Section 629 goals than does DBS, the Commission's rules are pushing consumers away from Baja to DBS. Baja has lost many customers to DBS since the effective date of the integration

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[25] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157).

[26] *See Access to Telecommunications Equipment and Services by the Hearing Impaired and other Disabled Persons*, First Report and Order, 4 FCC Rcd 4,596 (May 11, 1989). *See also Amendment of Section 64.702 of the Commission's Rules and Regulations* (Second Computer Inquiry), Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512, ¶ 40 (rel. Oct. 30, 1981) (determining that refurbished CPE should not be treated as new for the purpose of complying with the FCC's bifurcation schedule and explaining that "bifurcation should not affect the customary manner in which a carrier refurbishes, maintains, or recycles its regulated equipment.").

[27] *See* CS Docket 97-80, BendBroadband Request for Waiver (Oct. 4, 2006) at 13-18 and Reply Comments (Dec. 15, 2006) at 5-8.

ban, and its losses have accelerated where Baja has generally stopped offering and marketing HD devices.

In 2005, the Commission acknowledged the danger 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.[29] The DBS companies aggressively market their HD services that Baja is now severely impaired in trying to match, and DirecTV and DISH collectively have a majority of the MVPD market in Baja's service areas. Grant of the requested waiver is warranted to partially remedy this competitive disadvantage, especially in light of Baja's extraordinary financial condition and low penetration rate.

CONCLUSION

The Commission is obliged to grant waivers where the application of a general rule to a specific situation would not serve the public interest underlying the rule, such as where the public interest benefits of a waiver exceed its costs.[30] This is undoubtedly so in this case, since

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[28] *Id*.

[29] *Second Report and Order*, ¶ 38.

[30] *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.").

the requested waiver would not undermine Baja's existing common reliance and would enable it to offer more and better services to consumers. Baja therefore respectfully requests that the Commission grant its amended request for a partial waiver from the integration ban.

Respectfully submitted,

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June 24, 2009

Before the
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LLC and Carolina Broadband, LLC	)	
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47 C.F.R. § 76.1204(a)(1)	)	

DECLARATION OF PETER KAHELIN

My name is Peter Kahelin. I am Chief Executive Officer of Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC) and Carolina Broadband, LLC (collectively "Baja Broadband"). I am familiar with Baja Broadband's network, set-top box deployments, capital budget and long-term strategies. I have read the foregoing First Amended Request for Waiver and I am familiar with the contents thereof, and declare under penalty of perjury that the facts contained therein are true and correct to the best of my knowledge, information, and belief.

Peter Kahelin
Chief Executive Officer
Baja Broadband Operating Company, LLC
Carolina Broadband, LLC

Executed on: June 22, 2009

Exhibit 1
Baja Broadband Integration Ban Waiver
Demonstration of Negative Free Cash Flow from Audited Financial Statements

Over the past two years, the Media Bureau has granted waivers to several cable operators that have demonstrated negative free cash flow. The figures below are from Baja Broadband's audited 2008 financial statements, which are provided in the following pages.

[REDACTED]