

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

In the Matter of)	
)	
Orange Broadband Operating Company, LLC and Carolina Broadband, LLC)	CSR-7111-Z
Request for Waiver of 47 C.F.R. § 76.1204(a)(1))	CS Docket No. 97-80
)	

**Opposition of the Consumer Electronics Association to the First Amended Request
for Waiver of 47 C.F.R. § 76.1204(a)(1) of Orange Broadband Operating Company,
LLC and Carolina Broadband, LLC**

August 20, 2009

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Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC) and Carolina Broadband, LLC (collectively “Baja”) have audaciously asked the Commission to protect them from competition in the set-top box market by waiving the very rule that was intended to create such competition. In support of its plea to maintain its device monopoly, Baja raises a host of arguments that have long and wisely been rejected by the Commission and the courts. Baja’s First Amended Request for Waiver of the common reliance rule, 47 C.F.R. § 76.1204(a)(1), is in fact a motion to rewrite the rule and to reconsider a host of sound and settled decisions. The Commission should deny this request to use the waiver process to rewrite the rule, especially as Baja’s petition illustrates that competition in navigation devices in Baja’s coverage area is now becoming viable. Accordingly, the Consumer Electronics Association (“CEA”) respectfully opposes Baja’s Request.

A. The Commission and Bureau Have Never Granted Waivers Based On An Operator’s Unwillingness To Bear the Costs of Compliance.

Baja’s principal argument for a waiver is that it “needs to conserve capital” and that a waiver would “free up more capital for cable operators to spend on expanding broadband services and building new plant.”¹ The Commission and the Media Bureau have rejected this facile “diversion of resources” argument so many times that raising it again borders on the frivolous. Baja (then called Orange Broadband) raised the same argument in 2006 and was denied by the Bureau:

While it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, as we stated in the BendBroadband Order, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).²

¹ Baja Request at 4, 8.

² In the Matter of Armstrong Utilities, Inc., Atlantic Broadband Finance, LLC, Bresnan Communications, LLC, Cable & Communications Corp. and Mid-Rivers Telephone Cooperative, Inc., Cequel Communications, LLC, D/B/A Suddenlink Communications, Knology, Inc., NPG Cable, Inc., Orange Broadband Operating Company, LLC and Carolina Broadband, LLC, The World Company D/B/A Sunflower Broadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CS Dkt. No. 97-80, Memorandum Opinion and Order ¶¶ 43-45 (rel. June 29, 2007) (emphasis added); *see also* In the Matter of Innovative Cable TV St. Thomas-St. John & St. Croix Petition for Waiver of 47 C.F.R. § 1204(a)(1), CS Dkt. No. 97-80, CSR-7224-Z, Memorandum Opinion and Order ¶¶ 11-12 (rel. July 23, 2007); In the Matter of Comsouth Telesys, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CS Dkt. No. 97-80, CSR-7223-Z, Memorandum Opinion and Order ¶¶ 10-11 (rel. July 23, 2007); In the Matter of Colo Telephone Co., Griswold Cooperative Telephone Co., Coon Creek Telephone Co. and Coon Creek Telecommunication Corp., Wellman Cooperative Telephone Assoc., Interstate Cablevision Co., NTS Communications, Inc., XIT Telecommunications, Inc., CS Dkt. No. 97-80, CSR-7218 – 7222-Z, CSR-7227 – 7228-Z, Memorandum Opinion and Order ¶¶ 11-12 (rel. July 23, 2007); *In the Matter of Massillon Cable TV, Inc., Request for Waiver of Section 76.1204*, CS Dkt. No. 97-80, DA 07-2919, Memorandum Opinion and Order ¶¶ 11-13 (rel. June 29, 2007); In the Matter of Comcast Corp. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CS Dkt. No. 97-80, CSR-7012-Z, Memorandum Opinion and Order ¶¶ 15-17 (rel. Jan. 10, 2007); In the Matter of Cablevision Systems Corp.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CS Dkt. No. 97-80, CSR-7078-Z, Memorandum Opinion and Order ¶¶ 12-14 (rel. Jan. 10, 2007).

Moreover, the Court of Appeals for the District of Columbia Circuit has upheld the Commission's rejection of this argument.³ Yet Baja attempts, once again, to interpret the waiver provision of Section 629 of the Telecommunications Act so broadly as to eviscerate the general rule – exactly the argument the Bureau rejected when Baja raised it in 2006.⁴

To the extent that Baja claims to be experiencing special financial hardship, it should be subject to the same conditions and limitations as other petitioners who have requested waivers on hardship grounds. The Bureau has granted “hardship waivers” of several months on the condition that petitioners “must file with the Media Bureau specific plans that will allow them to come into compliance” with the common reliance rule.⁵ Moreover, the Commission has *not* granted hardship waivers for the deployment of DVR devices, which are widely available at retail. Baja seeks a general waiver for any boxes it chooses to deploy, with no time limit and no commitment to comply with the rule at a later date. Accordingly, Baja's request goes far beyond the narrow criteria of a financial hardship waiver.

Many businesses face difficulties in a bad economy, but general financial difficulty is no justification for avoiding compliance with a specific rule – especially without a commitment to come into compliance when the difficulty ends. Even regulated entities are responsible for the outcome of their own business decisions, and there is no

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

⁴ Baja claims that “a waiver is therefore *warranted* to assist the development of a new and improved services [sic].” Baja Request at 5 (emphasis added). The statute requires that a waiver be “*necessary* to assist the development of new and improved services.” 47 U.S.C. § 549(c).

⁵ *See In the Matter of Alabama Broadband, LLC, Great Plains Cable Television, Inc., Millennium Digital Media Systems, Inc., d/b/a Broadstripe, Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CS Dkt. No. 97-80, CSR-7819-Z, CSR-7212-Z, CSR-7625-Z, Memorandum Opinion and Order ¶ 9 (rel. Nov. 14, 2008).

justification for subsidizing Baja's business at the cost of set-top box competition – especially since, as described below, Baja has lower-cost options available without a waiver.

B. Baja Should Not Be Protected From Price Competition.

Baja bases its request for a waiver on cost claims that are highly questionable, and that, even if true, would gravitate *against* a waiver. Contrary to Baja's claims, the price of a CableCARD-compliant HD/DVR is likely to be lower than that of an integrated DVR. Consumers can obtain compliant DVRs at retail, or Baja could provide them without a waiver. In other words, competition has begun to work. Baja should not receive a waiver to deploy *more expensive* devices simply to undermine competition from retail devices.

Baja claims that “[n]ew CableCARD HD/DVRs cost more than \$450”⁶ without citing any source for that figure. Elsewhere, Baja cites to a letter written by Baja's counsel on behalf of another cable operator stating that compliant HD/DVRs “*could* ‘cost more than \$500.’”⁷ That letter pertained to “rural Puerto Rico,” where costs are “much greater.”⁸ Again, the letter cited no source for its pricing claim. Finally, Baja quotes an unnamed “leading seller of refurbished devices” who allegedly stated that “a refurbished, integrated HD or DVR device typically would cost less than half of the price of a new CableCARD HD or DVR device.”⁹ Notably, this anonymous source had nothing to say about the difference in cost between a new CableCARD-compliant HD or DVR device

⁶ Baja Request at 4.

⁷ Baja Request at 5 (emphasis added).

⁸ CS Docket No. 97-80, Letter from Paul Hudson, Counsel to Choice Cable T.V., to Marlene H. Dortch, May 29, 2008, at Attachment p. 1.

⁹ *Id.*

and a *new* device that does not comply with the Commission's rule – thus, the anonymous source sheds no light on the cost of compliance with the rule.

In fact, CableCARD-compliant HD/DVR devices cost much less than Baja claims, and probably even less than new noncompliant devices. A TiVo HD-DVR, which accepts *two* CableCARDS, retails for between \$259 and \$299, including a retail markup that a cable operator would not pay.¹⁰ In addition, cable operators including Comcast, Cox, and RCN have announced agreements to lease TiVo devices to their subscribers.¹¹ RCN's executive vice president has stated that the TiVo Series 3, which requires no waiver, is *less expensive* to RCN than a noncompliant Motorola DVR.¹²

If Baja can purchase compliant HD/DVR devices that are less expensive than noncompliant ones, then it does not require a waiver. On the other hand, if Baja's cost figures are correct, customers can purchase a competitive DVR at retail for less than Baja can provide them. Under those circumstances, granting a waiver would simply insulate Baja from the need to compete with retail devices on the basis of price. This would be a perverse result, as the common reliance rule was intended to promote just such competition.¹³

¹⁰ Fry's Electronics, a chain in Baja's region, offers the TiVo HD for \$259.99 as of the date of this opposition. http://www.frys.com/product/5343178?site=sr:SEARCH:MAIN_RSLT_PG; *see also* Tivo.com, <https://www3.tivo.com/store/boxes.do> (\$299); Best Buy, <http://www.bestbuy.com/site/olspage.jsp?skuId=8386999&st=tivo+series+3&type=product&id=1180743545252> (\$299). Moreover, despite Baja's suggestions to the contrary, DVRs are available at retail within or very near its service areas, including in Washington, Utah, which is just five miles from St. George, and throughout Baja's service area by phone or Internet order.

¹¹ Todd Spangler, "RCN Picks TiVo As Its Primary DVR," Multichannel News (Aug. 4, 2009), http://www.multichannel.com/article/326400-RCN_Picks_TiVo_As_Its_Primary_DVR.php

¹² Todd Spangler, "RCN Expects To Offer TiVo DVRs For Additional \$3-\$5 Per Month," Multichannel News (Aug. 4, 2009), http://www.multichannel.com/article/print/326471-RCN_Expect_To_Offer_TiVo_DVRs_For_Additional_3_5_Per_Month.php

¹³ In its Request, Baja assumes that DVR service is "unavailable" if Baja itself does not provide devices. Baja Petition at 4. This is obviously incorrect, provided that Baja is complying with its obligation to support retail-purchased devices. 47 C.F.R. §§ 76.640, 76.1204.

Granting cable operators waivers to deploy integrated devices, especially advanced-functionality HD and DVR devices, amounts to a subsidy to the incumbent provider of set-top boxes – the cable operator. This makes no sense at a time when devices sold at retail are beginning to be competitive.

C. Baja Presents No Valid Grounds for Reconsidering the Use of Refurbished Devices.

Baja asserts that it should be permitted to deploy refurbished, noncompliant set-top boxes, including HD and DVR devices, notwithstanding the Bureau’s order including such devices within the integration ban,¹⁴ because it has also purchased some CableCARD-compliant devices and has therefore achieved some level of common reliance. This argument misapprehends the purpose of the common reliance rule and is misleading. The Commission has rejected the position that operators may deploy CableCARD-compliant devices until reaching a certain percentage of their installed base, then revert to deploying integrated devices.¹⁵ Baja states that it has “purchased [but not necessarily deployed] more than 7000 CableCARD devices” – enough for about 10% of its 67,000 subscribers if each receives only one set-top box.¹⁶ If Baja is allowed to begin deploying integrated devices again, this percentage will shrink, and with it, Baja’s business incentive to support retail devices at the same level of service as leased devices will diminish accordingly. The deployment of devices that would otherwise be taken out of service undermines common reliance whether or not the devices are refurbished. Thus, Baja’s request to use integrated devices does no less harm to the purposes of the

¹⁴ *Bresnan Communications, et al.*, CSR-7117-Z, Memorandum Opinion and Order, DA 07-2916, ¶ 56 (rel. June 29, 2007).

¹⁵ Indeed, Comcast raised this argument before the Court of Appeals. The Court concluded that “the Commission’s continued emphasis on common reliance is hardly open to challenge.” *Comcast*, 526 F.3d at 767.

¹⁶ Baja Request at 1, 6.

common reliance rule simply because the proposed devices are refurbished rather than new.

Moreover, Baja's argument that its use of refurbished devices will create an "economic stimulus" are frivolous.¹⁷ Nothing prevents Baja from buying and deploying refurbished devices as long as those devices comply with the common reliance rule and other relevant rules, thus creating business for refurbishers. Baja can reap all of the benefits of refurbished devices that it extols without the need for a waiver. Many hundreds of possible rule changes requested in an operator's self-interest could be called an "economic stimulus" but none justifies abandoning the specific, existing economic stimulus that Congress required and the common reliance rule implements in this narrow area: the stimulation of a competitive market in navigation devices through common reliance on a single conditional access protocol. The existence of healthy price competition between purchased and leased DVRs, described above, is evidence that this *existing* stimulus is working and should not be undermined.

D. The Commission Should Decline Baja's Invitation To Rewrite Its Rules By Waiver.

As Baja observes, a waiver should be granted when an operator's "specific situation" justifies it.¹⁸ However, the only "specific situation" Baja raises is its present financial difficulties, and as explained above, Baja's request far exceeds the bounds of a financial hardship waiver. Therefore, Baja's request is not specific to its unique situation and would be taken to apply to all cable operators if granted. Thus, in the guise of a waiver, Baja has requested a fundamental rewriting of the Commission's rule, which the

¹⁷ Baja Request at 8.

¹⁸ Baja Request at 12.

Commission should not consider without a rulemaking proceeding and a full opportunity for public notice and comment.

In addition to the non-particularized arguments described above, Baja raises the regulatory disparity between cable and DBS operators as a reason for granting extraordinary relief to Baja. The Commission has rejected that argument and was upheld by the D.C. Circuit.¹⁹ While CEA supports the development of a common, nationwide standard for conditional access that will encompass all MVPDs, the solution to this regulatory and technological disparity is not to retreat from the common reliance rule but rather to seek ways to apply it more consistently. Rather than dismantle its competition rules through ever-broader waivers, the Commission should initiate a rulemaking to gather evidence of whether and how an all-MVPD solution might be achieved.

Conclusion

For the reasons stated above, the Commission should deny Baja's waiver request.

Respectfully submitted,

/s/ James W. Hedlund

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¹⁹ *Charter*, 460 F.3d at 42.

CERTIFICATE OF SERVICE

I do hereby certify that on August 20, 2009 I caused a true and correct copy of the foregoing Opposition of the Consumer Electronics Association to the First Amended Request for Waiver of Orange Broadband Operating Company, LLC and Carolina Broadband, LLC to be served via first-class mail on the following:

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