

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket 97-80
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 Of the Telecommunications Act of 1996, as Amended By the Broadband Data Improvement Act	)	GN Docket No. 09-137
	)	

**Comments – NBP Public Notice #27  
Baja Broadband Operating Company, LLC**

Public Notice #27 seeks comment on how customers can use navigation devices with the broadband that they already have or could buy. But the Commission must also investigate how its existing navigation device rules have prevented some consumers from being able to purchase broadband in the first place. The Commission’s integration ban<sup>1</sup> has unnecessarily imposed extraordinary costs and perverse incentives on small, rural cable operators such as Baja. These costs are among the major reasons that Baja still cannot not provide high-speed broadband

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<sup>1</sup> 47 C.F.R. § 76.1204(a)(1) (second sentence).

services or phone service to any of its customers in 12 systems, which pass more than 20,000 homes.<sup>2</sup>

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 digital services. But these rural (and in many cases lower-income) markets are extremely challenging for a cable operator, and Baja's penetration rate is less than half of many cable operators.

More than five months ago, Baja petitioned the Commission for a limited waiver of the integration ban to allow it to use refurbished set-top boxes purchased from third parties on the condition that it also maintained a specified level of common reliance on CableCARDs in many of its own set-top boxes. Refurbished integrated devices are available for half or less than the cost of new CableCARD devices.<sup>3</sup> The prohibition on these low-cost refurbished devices has caused Baja to stop ordering CableCARD devices, which means that it has run out of HD and DVRs for consumers in most of its markets. The increase in cost has also deprived Baja of funds that it would prefer to be able to use to deploy broadband to its 12 systems where it does not currently offer it. In addition, Baja has also had to reduce its marketing of digital services and

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<sup>2</sup> These markets are Battle Mountain, Carlin, Elko, and Logandale, Nevada; Burlington, Las Animas, and Springfield, Colorado; Carrizozo, Clayton, and Logan, New Mexico; Texline, Texas; and Rockville, Utah.

<sup>3</sup> 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 (Reporting that refurbished HD/DVRs "may cost less than \$200" while new CableCARD HD/DVRs could "cost more than \$500."); CS Docket 97-80, Letter from Michael Adams, Adams Cable Equipment, to Hon. Kevin J. Martin, Chairman, FCC (Apr. 18, 2007) ("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.")

defer upgrading its four analog-only systems<sup>4</sup> 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. And where Baja has not upgraded to offer digital service, it also does not offer broadband or telephone service. The integration ban is directly depriving thousands of consumers of access to broadband from their cable operator.

And in Baja's case, this deprivation is entirely unnecessary. Baja's waiver demonstrates that 40% of its set-top inventory includes CableCARDS and that it will have substantial common reliance throughout the period of its requested waiver. 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.

Notice #27 also asks about application of the Section 629 rules on a neutral basis to all MVPD platforms. It is 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 its waiver request is granted, Baja will still continue to provide substantial support for interoperable

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<sup>4</sup> Baja does not offer any digital services in its systems in Logandale, Nevada; Rockville, Utah; Carrizozo, New Mexico, and Texline, Texas.

retail navigation devices and commonly rely on the same security in thousands of its set-top boxes. DBS, meanwhile, offers none.<sup>5</sup> 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.<sup>6</sup> 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 – and away from cable operators who are capable of offering wireline broadband to satellite providers that are not. Baja has lost many customers to DBS since the effective date of the integration 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.<sup>7</sup> 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. The National Broadband Plan should include a recommendation that waivers be granted to small cable operators such as Baja to use refurbished devices if they commit to a reasonable level of common reliance. This relief would directly contribute to Baja's ability to reduce prices, expand services, resume offering HD and DVRs, upgrade systems to digital, and offer broadband and telephone service to more than 20,000 homes where it cannot currently offer such services.

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<sup>5</sup> See CS Docket 97-80, BendBroadband Request for Waiver (Oct. 4, 2006) at 13-18 and Reply Comments (Dec. 15, 2006) at 5-8.

<sup>6</sup> *Id.*

<sup>7</sup> *Second Report and Order*, ¶ 38.

Finally, Baja understands that some parties have asked the Commission to freeze all separable security waiver requests until the rules are updated.<sup>8</sup> In the first place, such a freeze would be patently unlawful. Congress expressly required the Commission to act within 90 days of a showing that a party is entitled to a waiver under the standards of Section 629.<sup>9</sup> Second, the D.C. Circuit has repeatedly held that the Commission has a legal obligation to “take a ‘hard look’ at meritorious applications for waiver,” and must grant waivers where the application of a general rule to a specific situation would not serve the public interest, such as where the public interest benefits of a waiver exceed its costs.<sup>10</sup> This is undoubtedly so in Baja’s case, since the requested waiver would not undermine Baja’s existing common reliance and would enable it to offer more and better services to consumers.

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<sup>8</sup> GN Docket 09-51 *et al.*, Petition for Rulemaking of Public Knowledge, Free Press, Media Access Project, Consumers Union, CCTV Center For Media & Democracy, Open Technology Initiative Of New America Foundation (Dec. 18, 2009).

<sup>9</sup> 47 U.S.C. § 549(c). Baja understands that the Bureau may believe that this 90-day requirement only applies to waivers that are “necessary to assist the development or introduction of a new or improved” service, as contemplated by Section 629(c), and not to the Commission’s waiver decisions undertaken pursuant to its general authority under Section 1.3 of its rules. However, Baja specifically cited to Section 629(c) and pled unambiguously that grant *is necessary* to be able to offer HD/DVRs to additional customers in most of its markets, and digital service to any customer in other markets. Baja First Amended Waiver Request at 5-6 (concluding that “A waiver is therefore warranted to assist the development or introduction of a new and improved services offered over Baja’s systems” and citing to 47 U.S.C. § 549(c).) In the case of other requests under Section 629(c) that have been denied, the cable operators were offering HD and DVRs in any case, and so the Bureau found that waivers were not “necessary” for such services to be offered. But in this case, HD and DVRs cannot be offered without a waiver, and with a waiver, they will be. That is a plain showing that the waiver is “necessary.” Whatever the correct literal interpretation of the 90-day requirement, Baja urges the Commission to follow the position of Commissioner Copps that to be “consistent with its spirit,” the Commission should act on all Section 629(c) waiver requests within 90 days. *See Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, FCC 07-127, Statement of Commissioner Michael J. Copps.

<sup>10</sup> *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.”).

Baja's request is therefore consistent with the Commission's purpose in granting other waivers, such as its waivers for financial hardship to other operators whose financial condition is actually better than Baja's, or its waiver to Choice Cable of Puerto Rico, which, like Baja, had become unable to offer HD/DVRs to new customers without a waiver. Even the parties that have asked the Commission to generally freeze waiver grants have acknowledged that, "While the FCC's motivations in granting these waivers may be sound, the fact that the waivers were necessary in the first place points to a systematic failure of current Section 629 implementation."<sup>11</sup> That may be true in part, but then it would clearly be contrary to the public interest to freeze in place a "systematic failure" for another month, or year, or more. Baja currently has customers who have wanted HD and/or DVRs for months and the company cannot provide them. Meanwhile, there are integrated HD and DVR devices that Baja could afford to buy sitting in warehouses collecting dust. Had the waiver been granted within the required 90 days, these customers could be watching HD and recording shows right now.

Instead, Baja remains legally precluded from using refurbished HD/DVRs even though other cable operators are free to re-use their own used, integrated devices; even though Baja's two largest competitors, DirecTV and DISH, and the largest communications company in America, AT&T, do not support independent retail devices and yet have been allowed to get away with simply ignoring the ban; and even though Baja has committed in any case to maintain more than sufficient common reliance, which is the sole purpose of the ban. Denial or continued inaction on Baja's waiver does not provide greater common reliance to support the retail market; instead, it only reduces the choices available to consumers, which is the opposite of what

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<sup>11</sup> GN Docket 09-51 *et al.*, Petition for Rulemaking of Public Knowledge, Free Press, Media Access Project, Consumers Union, CCTV Center For Media & Democracy, Open Technology Initiative of New America Foundation, at fn. 10 (Dec. 18, 2009).

Congress intended Section 629 to do. And denial or continued inaction on Baja's waiver will continue to delay Baja's ability to deliver broadband service to more than 20,000 homes, which is the opposite of what Congress intended for the National Broadband Plan. For these reasons, Baja's request for waiver should be granted immediately and the Commission should consider extending relief for refurbished devices as part of the National Broadband Plan.

Respectfully submitted,



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