

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

In the Matter of)	
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	PP Docket No. 00-67
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	
)	

COMMENTS



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September 16, 2013

The American Cable Association (“ACA”) submits these brief comments in response to TiVo’s Petition for Rulemaking (“Petition”) asking that the Commission initiate a rulemaking for the purpose of reinstating, with one revision, the encoding and related rules for cable operators recently vacated by the D.C. Circuit in *EchoStar Satellite L.L.C. v. FCC*.¹ This proceeding, in which a manufacturer of cable set-top boxes requests action by the Commission, presents an appropriate opportunity for the Commission to also consider a request from small cable operators. Specifically, should the Commission either grant TiVo’s Petition to initiate TiVo’s requested rulemaking, or release a Notice of Proposed Rulemaking to consider its navigation rules in light of the *EchoStar* decision, on its own accord, ACA requests that the Commission include as part of such a rulemaking consideration of an exemption from its “integration ban” for small cable systems that are operated by small cable operators.

I. INTRODUCTION AND BACKGROUND

In 1996, Congress believed that consumers had no option other than to lease set-top boxes from their cable operators, and therefore included in the Telecommunications Act of 1996 a provision giving the Commission the authority to adopt rules to promote the development of a commercial retail market for such “navigation devices.” In response, the Commission adopted a two-part program intended to foster a retail market in set-top boxes. First, the Commission required cable operators to implement a solution that separated video content security functions from other navigation functions in the navigation device, typically the cable set-top box, such as channel changing.² With “separate security,” manufacturers could develop set-top boxes that could be sold at retail and used by any cable customer on any cable system once the consumer obtained the appropriate modular security

¹ See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Petition for Rulemaking (filed July 16, 2013) (“Petition”).

² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775 ¶ 80 (1998) (“First Navigation Device Order”).

component (now known as “CableCARDS”) from their cable operator.³ CableCARDS can be installed by consumers in a cable set-top box purchased at retail (as opposed to leased by their operator) to allow the consumer’s television to display video programming encrypted by their cable operator. Second, to ensure adequate support for CableCARDS, the Commission imposed an additional rule on cable operators that prohibited their leasing set-top boxes with integrated security (an “integration ban”) to their customers. The goal was to create “common reliance” by cable operators, consumers and equipment manufacturers on the same security technology, in this case the CableCARD, that could be used in third-party devices purchased at retail.⁴ The obligation to support CableCARDS and the integration ban went into effect in 2004 and 2007, respectively, and applied to all cable operators regardless of the number of subscribers served by an operator or a particular cable system.⁵

Pursuant to the integration ban, cable operators, large and small, have purchased and deployed to their subscribers tens of millions of CableCARDS and non-integrated set-top boxes.⁶ Thus, Commission’s goal of requiring common reliance on CableCARD for the purpose of creating the *opportunity* for a retail set-top box market to emerge has been achieved. However, in the six years since the integration ban became effective, a vibrant retail set-top box market has not

³ See Petition at 3-4.

⁴ First Navigation Device Order, ¶ 69.

⁵ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, 18 FCC Rcd 20885 ¶ 19 (2003) (setting July 1, 2004 as the date when CableCARD support will go into effect); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, 20 FCC Rcd 6794 ¶ 31 (2005) (extending integration ban implementation deadline to July 1, 2007).

⁶ Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC at 1 (filed in Docket 97-80, July 31, 2013) (nine largest cable operators have deployed more than 42,000,000 operator-supplied set-top boxes with CableCARDS). Large cable multiple system operators report the number of CableCARDS deployed, but small cable have also deployed set-top boxes and CableCARDS as well.

emerged, as the Commission itself has recognized.⁷ This calls into serious question whether the Commission's implementation of the integration ban has best served the public interest.

Instead of creating a vibrant retail set-top box market for consumers, the ban has increased the cost of purchasing and deploying boxes for cable operators and the cost for leased boxes for their customers. The ban has resulted in significantly higher costs to operators to purchase non-integrated set-top boxes that, other than separating out the security function, provide no greater consumer functionality. Moreover, cable operators have had to purchase CableCARDS for each non-integrated set-top box, further adding to their costs to provide set-top boxes to their customers. NCTA estimates that more than \$1 billion in cost was added to the price of set-top boxes leased to subscribers since the date the ban went into effect.⁸

Not only did the operator's cost of purchasing and deploying set-top boxes increase (a cost that was largely passed through to consumers), but making matters worse, the ban imposed costs on cable operators but not on their competitors. DBS providers, and non-cable Internet Protocol television providers, like AT&T, who compete against cable operators, are permitted to offer integrated set-top boxes to their subscribers for lease, giving them a regulatory advantage.

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996*, etc., CS Docket No. 97-80, etc., Navigation Device Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657 ¶ 4 (2010) ("Third Report and Order") (out of the 22.75 million devices leased by cable operators containing CableCARDS, only 531,000 CableCARDS had been installed in retail devices connected to cable networks; evidence indicates retail device manufacturers had abandoned CableCARD before any substantial benefits of the integration ban could be realized); *Adams Cable Equipment, Inc., Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-8537-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 28 FCC Rcd 11011 ¶ 6 (2013) ("the retail market for devices based on separated-security standards has not flourished as the Commission envisioned"); *Video Device Competition*, etc., MB Docket No. 10-91, etc., Notice of Inquiry, 25 FCC Rcd 4275 ¶ 10 (2010) ("the Commission's efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services" and "Most cable subscribers continue to use the traditional set-top boxes leased from their cable operator"); National Broadband Plan, at 50 (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("Despite Congressional and FCC intentions, CableCARDS have failed to stimulate a competitive retail market for set-top boxes").

⁸ See Rob Pegoraro, *TiVo, media center PC makers alarmed by CableCard-cutting bill*, Arstechnica, Aug. 2, 2013, <http://arstechnica.com/tech-policy/2013/08/tivo-media-center-pc-makers-alarmed-by-cablecard-cutting-bill/>.

For small cable systems operated by small cable operators, the integration ban has had a disproportionate impact. It is well known that small and rural cable operators face higher costs of service due to the lack of scale economies, low density and higher infrastructure deployment costs involved in serving a small and dispersed customer base.⁹ The higher costs associated with acquiring and deploying non-integrated set-top boxes as a result of the ban raised prices beginning in 2007, and continues to inflate the cost of set-top boxes today. Moreover, since small cable operators often have fewer available resources to absorb increased costs, the increased cost of cable set-top boxes slowed the plans of many of these operators to transition from offering analog services to more efficient and innovative digital services. Accordingly, consumers served by these cable systems have not benefited from the advanced services that operators otherwise would have been able to provide.

ACA notes that in spite of the harm to small cable operators and the fact that consumers have yet to benefit from the emergence of a robust retail set-top box market, the Commission has yet to provide any form of blanket relief for the small cable systems operated by small operators from the integration ban. ACA has reviewed the record, and of the approximately 170 waivers of the integration ban granted to cable operators, not one was granted on the grounds the operator was small or rural and therefore unnecessarily and disproportionately burdened by the general requirement.¹⁰ The majority of the waivers granted were conditional on cable operators transitioning

⁹ See, e.g., Reply Comments of American Cable Association, MB Docket No. 11-169, etc., at 5-7 (filed Dec. 12, 2011) (describing how small operators pay more per box due to lack of volume discounts and face added monthly costs of deploying digital boxes for operators too small to purchase the equipment to control the boxes used on their systems); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496 ¶ 78 (2012) ("Fifteenth Report") (noting cable system closures in small and rural communities due to these systems' relatively higher costs).

¹⁰ See, e.g., *BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC; Petition for Permanent Relief*, CSR-6355-Z, Memorandum Opinion and Order, 19 FCC Rcd 15607 (2004); *Cablevision Systems Corporation's 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*, CSR-7078-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 220 (2007); *Bend Cable Communications, LLC d/b/a BendBroadband; 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*, CSR-7057-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 209

(at their own cost) to all-digital systems.¹¹ For some cable operators, incurring this expenditure to avoid having to comply with the integration ban made sense. However, at least 600 small operators could not afford to go all-digital in 2007 or since, and have been left saddled with the higher costs of deploying set-top boxes with non-integrated security. A small number of waivers (nine) were granted because the operator was in financial hardship (bankrupt or experiencing negative cash flow)¹² and three waivers have been granted based upon the operator's alternate separate security technology.¹³

(2007); *Evolution Broadband, LLC's; 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*, CSR-7902-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 24 FCC Rcd 7890 (2009).

¹¹ Our research found that 162 cable operators received waivers based on the operator being or committing to going all-digital. See, e.g., *Bend Cable Communications, LLC d/b/a BendBroadband; 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*, CSR-7057-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 209 (2007); *GCI Cable, 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*, CSR-7130-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 8576 (2007).

¹² *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*, CSR-7049-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 8557 (2007); *Great Plains Cable Television, Inc., etc., CSR-7212-Z, etc., Memorandum Opinion and Order*, 22 FCC Rcd 13414 (2007); *Matter of Alabama Broadband, LLC; Great Plains Cable Television, Inc.; Millennium Digital Media Systems, L.L.C., d/b/a Broadstripe; Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, CSR-7819-Z, CSR-7212-Z, CSR-7625-Z, 23 FCC Rcd 16646 (2008); *Allegiance Communications, LLC; Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7351-Z, Memorandum Opinion and Order, 24 FCC Rcd 9273 (2009); *Allegiance Communications, LLC; Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, CSR-7351-Z, 26 FCC Rcd 5118 (2009); *Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC and Carolina Broadband, LLC); Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7111-Z, Memorandum Opinion and Order, 25 FCC Rcd 2200 (2010); *Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC and Carolina Broadband, LLC); Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7111-Z, Memorandum Opinion and Order, 26 FCC Rcd 5114 (2011); *Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC and Carolina Broadband, LLC) Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules Implementation of Section 304 of the Telecommunications Act of 1996*, CSR-8537-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 27 FCC Rcd 6105 (2012); and *Guam Cablevision, LLC; 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, CSR-7193-Z, CS Docket No. 97-80, 22 FCC Rcd 11747 (2007).

¹³ *Cablevision Systems Corporation's 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*, CSR-7078-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 220 (2007); *Cablevision Systems Corporation's 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*, CSR-7078-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 24 FCC Rcd 393 (2009);

While the Commission exempted limited capability HD set-top boxes from the integration ban, that relief was directed at all cable operators, without any targeted relief for small operators.¹⁴ Small cable operators remain burdened with the higher costs for advanced set-top boxes with digital video recording (“DVR”) and other advanced functionalities, which are competitively essential for cable operators to provide to their customers.

In light of the foregoing, it is evident that the presumed benefits of rules have not materialized – the marketplace for retail set-top boxes has not developed.¹⁵ At the same time, the rule has been a great burden on all cable operators, but has been most particularly burdensome for the small cable operators of small cable systems.

II. THE COMMISSION’S NEXT NAVIGATION DEVICE RULEMAKING SHOULD SEEK COMMENT ON AN EXEMPTION FOR SMALL CABLE SYSTEMS FROM THE INTEGRATION BAN

As part of this proceeding, or any rulemaking that the Commission may choose to launch to consider its navigation rules in light of the *EchoStar* decision, the Commission should seek comment on whether there is still a need to apply the integration ban on smaller cable operators, and, if not, what is the appropriate level of relief. Given the burden that the integration ban has placed on the small operators and their customers, the fact that extending relief from the ban to such small providers simply would not harm the development of a retail market for navigation devices, and changes in the marketplace, the time has come for relief from the integration ban for small operators of small cable systems.

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, MB Docket No. 12-328, CSR-8740-Z, CS Docket No. 97-80, Memorandum Opinion and Order, 28 FCC Rcd 5212 (2013).

¹⁴ Third Report and Order, ¶ 49.

¹⁵ See *supra* note 7.

The basis for relief for small cable systems owned by small cable operators is obvious. It would permit these systems to more affordably obtain and deploy more advanced set-top boxes with DVR and other advanced functionalities to their customers than is possible today.¹⁶ Moreover, the deployment of more digital set-top boxes would speed the ability of these operators to convert analog services to digital, thereby freeing up channel capacity to offer more services, including more standard and high definition channels, and higher-speed broadband. For customers of small cable systems run by small cable operators, relief from the integration ban would be a benefit.

Relieving small systems operated by small cable providers from the burdens of the integration ban would not have any material impact on the Commission's goal to establish a retail set-top box market. First, regardless of whether the Commission reinstates the encoding and technical rules for cable operators vacated by the court in *EchoStar*, market forces would require these operators to continue to support CableCARDs.¹⁷ Small cable operators have been complying with the Commission's rules since 2007, and they have purchased and deployed millions of non-integrated set-top boxes and CableCARDs to their customers. Given the amount of CableCARDs and non-integrated set-top boxes that small cable operators have deployed over the last six years, these operators have very strong economic incentive to continue to support CableCARDs for many years in the future even without the integration ban applied to them.

Second, to the extent that parties disagree that operators of exempted small cable systems would continue to support CableCARDs, it must be remembered that the size of the market served

¹⁶ Given consumer demand for advanced set-top boxes, the ability to offer integrated-security digital transport adapters alone does not offer a sufficient solution for small cable systems owned by small cable operators wanting to deploy integrated-security set-top boxes. See, e.g., Third Report and Order, ¶ 49 (exempting limited capability HD set-top boxes from the integration ban).

¹⁷ In *EchoStar Satellite L.L.C. v. FCC*, the D.C. Circuit vacated several orders relating to CableCARD support rules, which had the effect of vacating those rules. See *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, etc., MB Docket No. 12-328, Memorandum Opinion and Order, 28 FCC Rcd 5212 ¶ 4 (2013) ("Charter Waiver Order"). Assuming that the Commission reinstates the CableCARD rules, cable systems exempted from integration ban would be required by regulation to support CableCARDs. Thus, manufacturers of retail set-top boxes could continue to market to customers of cable systems exempted from the integration ban, and the operators of these systems would be obligated by rule to support these devices.

by these small cable systems is too insignificant to affect the development of a retail set-top box market in any meaningful way. It would affect at most approximately 13 percent of the marketplace,¹⁸ and likely far less, an amount too small to impact the manufacturing decisions of TiVo or other third-party set-top box manufacturers. The Commission has acknowledged in several proceedings, small operators do not drive equipment development.¹⁹ In view of the fact that applying the “integration ban” to all cable operators has not resulted in the development of the desired retail set-top box market, it is hard to imagine how excluding the small cable systems of small cable operators now could have any appreciable negative impact on the development of this market.

Finally, the Commission must take into account that the market has responded to consumer interest in getting video content on different types of devices, and produced innovations such as Internet-connected television sets, and streaming video services for tablets, mobile telephones and other “smart” video devices. If the goal is for consumers to receive their video programming on commercially available devices, that is happening and the Commission can therefore afford to be less stringent in holding small cable operators to the integration ban.

Should the Commission determine that a rulemaking is necessary to respond to the *EchoStar* decision, it is important that it include in that rulemaking an examination of the impact of the integration ban on the small cable systems operated by small cable operators and consideration of whether relief from the ban is in order. Should the Commission determine that relief from the integration ban is warranted for small systems operated by small cable operators, as ACA believes it

¹⁸ ACA members serve approximately 7.4 million basic video subscribers and the Commission last reported 59.8 million basic cable subscribers, a number which has since decreased. See Fifteenth Report, ¶ 26 n.42; Wayne Friedman, *Cable Operators Continue To Lose Video Subscribers*, MediaDailyNews, <http://www.mediapost.com/publications/article/188932/cable-operators-continue-to-lose-video-subscribers.html> (56 million basic video cable subscribers estimated at end of 2012).

¹⁹ See, e.g., *TiVo Inc.’s Request for Clarification and Waiver of the Audiovisual Output Requirement of Section 76.640(b)(4)(iii)*, etc., MB Docket No. 12-230, etc., Memorandum Opinion and Order, 27 FCC Rcd 14875 ¶ 17 (2012) (“small cable operators have, in the past, experienced difficulty obtaining compliant devices in the same time frame as larger operators”); *Basic Service Tier Encryption*, etc., MB Docket No. 11-169, etc., Report and Order, 27 FCC Rcd 12786 ¶ 21 (2012) (anticipating that “large operators’ demand for ... equipment eventually will lead all equipment to include” certain desired functionality thus making it available commercially thereafter to smaller providers).

is, the Commission should also examine what size system and operator should be considered “small” for purposes of this relief.

It is important to note that ACA does not seek to relieve small cable operators from the obligation to support set-top boxes manufactured by a third-party such as TiVo; consumers will continue to be able to use these devices they purchased at retail outlets, as well as acquire new devices brought to market.²⁰ The Commission can relieve small cable systems from the “integration ban” while still maintaining the requirement that cable operators support their customers’ use of these third-party devices. Once relieved of the burden to purchase more expensive non-integrated set-top boxes, these small cable operators will be able to devote those financial resources to other more productive network and service enhancements.

²⁰ That is, assuming the rules are reinstated by the Commission. See Charter Waiver Order, ¶ 4.

III. CONCLUSION

The time has come for the Commission to end the inequity of the integration ban for small cable systems run by smaller operators. Operators of these systems do not drive the development of equipment so that granting them an exemption from the integration ban will have a negligible, if it has any, impact on the development of a commercial market for navigation devices.

Respectfully submitted,

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