

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Consolidated Requests for Waiver of Section)	
76.1204(a) of the Commission's Rules)	CSR-7042-Z
)	
Verizon's Petition for Waiver of the Set-Top)	
Box Integration Ban, 47 C.F.R.)	CS Docket No. 97-80
§ 76.1204(a)(1))	
)	
Commercial Availability of Navigation Devices)	
_____)	

**OPPOSITION OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
TO VERIZON'S APPLICATION FOR REVIEW AND PETITION
FOR CLARIFICATION OF THE MEDIA BUREAU'S
MEMORANDUM OPINION AND ORDER**

William A. Check, Ph.D.
Senior Vice President
Science & Technology

Andy Scott
Vice President
Science & Technology

Daniel L. Brenner
Neal M. Goldberg
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, NW - Suite 100
Washington, D.C. 20001
(202) 222-2445

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MEMORANDUM OPINION AND ORDER**

Pursuant to Section 1.115(d) of the Commission's rules, NCTA files this Opposition to Verizon's Application for Review and Petition for Clarification of the Media Bureau partial grant of Sec. 76.1204(a) of the Commission's rules regarding the set-top box integration ban.¹

On June 29, 2007, the Media Bureau granted two waivers to Verizon under the FCC's general waiver provisions, Sections 1.3 and 76.7 of its rules.² The first waiver allows Verizon to deploy non-HD, non-DVR lower end set-top boxes with integrated security based on Verizon's commitment to transition to an all-digital network by Feb. 17, 2009. This waiver might be referred to as a "dry-cleaner special": it was based on an *ex parte* letter filed with the

¹ Verizon's Application for Review and Petition for Clarification of the Media Bureau's Memorandum Opinion and Order, CSR-7042-Z, CS Docket No. 97-80, filed July 30, 2007 ("Verizon Application").

² It denied waivers under the more directly applicable standard established by Congress in Section 629(c) of the Act, 47 U.S.C. § 549(c), which addresses waivers of rules promulgated by the Commission pursuant to Section 629(a). 47 U.S.C. § 549(a).

Commission on the same day as it received its waiver grant. This “in by 9, out by 5” one-day special treatment of Verizon by the Bureau stands in stark and regrettable contrast to the Bureau’s consideration of waivers by other cable operators for similar non-HD, non-DVR low-cost boxes, particularly NCTA’s waiver request, which was acted on by the Bureau more than 300 days after filing.

Verizon is not seeking review of this permanent waiver for low-end boxes.³ Instead, it seeks Commission review of the Bureau’s grant of a one-year waiver for HD and DVR devices for use with hybrid QAM/IP systems. It had asked for a waiver of the integration ban until the earlier of the implementation of a common downloadable conditional access system (“DCAS”) solution or July 1, 2010. The Application for Review claims “unique difficulties faced by Verizon, unlike traditional cable operators, in attempting to comply with a one-year waiver.”

There is simply no factual support for Verizon’s claim that it faces *unique* difficulties in complying with the integration ban. NCTA agrees with Verizon that it disserves the public interest to require the deployment of expensive separated-security devices just shortly before less costly, technologically superior downloadable solutions are available. However this is equally true for other cable operators as it is for Verizon. To the extent that Verizon can claim any difficulties peculiar to its own circumstances, they can be traced directly to Verizon’s own business decisions not to take action to prepare for the integration ban.

³ It does, however, seek clarification that providers switching to all-digital service need not give a subscriber a full one-year’s notice if it wishes to switch in less time but be required only to give reasonable notice of the switch. NCTA believes this is a reasonable request and supports it. However, as we and others have previously expressed, the basis for waivers for going all-digital is not apparent in the statute; nor has the FCC adequately explained its basis in the statute for tying a waiver to this promise. See Letter to Marlene Dortch from Jonathan Friedman, Counsel for Comcast Corp., filed in CSR-7012-Z, CS Dkt. No. 97-80 (July 3, 2007) (“Comcast Letter”).

Accordingly, if the Commission sees fit to grant Verizon's Application for Review, NCTA respectfully requests that the Commission grant the same relief to all cable operators or, in the alternative, grant all cable operators a waiver until the earlier of the deployment of DCAS or at least until Dec. 31, 2009, the date sought in NCTA's Request for Waiver. There is no rational basis upon which the Commission should grant Verizon greater relief than it is willing to provide to any other cable operator.

I. THE BUREAU ERRED IN BASING ITS ONE-YEAR WAIVER ON THE LACK OF DEVELOPMENT OF NON-INTEGRATED HD AND DVR DEVICES FOR USE WITH VERIZON'S SYSTEM

The Bureau granted Verizon a one-year waiver of the rule for non-integrated HD or DVR devices for use with Internet Protocol ("IP"), Asynchronous Transfer Mode ("ATM"), or hybrid QAM/IP systems. It did so based on its "understanding" that set-top box manufacturers have not developed any devices that use these three transmission modes.⁴ The Bureau's decision to distinguish Verizon's waiver request from other cable operators' requests on this ground was erroneous, and it cannot form the basis of a waiver under its Application for Review.

First, as a procedural matter, the Media Bureau decision is a conditional waiver because it is based on a set of facts that it did not find with certainty. The Bureau order reads in pertinent part:

It is our understanding that set-top box manufacturers have not developed any integrated HD or DVR devices for use with [IP, ATM] or hybrid QAM/IP systems. *To the extent that this understanding is correct*, we will allow operators to deploy HD and DVR devices with integrated security elements for use on such systems until July 1, 2008.⁵

⁴ *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, DA 07-2921 ¶ 61 (Media Bur. June 29, 2007).

⁵ *Id.* (emphasis added; footnote omitted).

Accordingly, to the extent that such devices have been developed, the waiver does not become effective.

The relevant fact -- whether such equipment had been developed at the time of the waiver request -- is something that is within Verizon's control. But in repeating the claim made in its original waiver request, Verizon attempts to leave a different impression::

Because Verizon's network architecture creates technical issues not experienced by traditional cable operators, Verizon Reply Comments at 8-10, Verizon does not have off-the-shelf access to cable boxes that could be used as a temporary measure to comply with the integration ban while the standard for DCAS is being developed.

The claim rests on the preposterous assumption that Verizon's equipment vendors act as independent force in the universe, uninfluenced by the needs and requests of the nation's second largest telecommunications entity.

Might Verizon's own conduct bear on its integrated set-top box cupboard being so empty?

Consider these facts. Verizon began the planning of and constructed its video service business with full knowledge that the FCC's integration ban was in effect. It has had several years to make sure that equipment vendors could deliver compliant equipment before the July 1, 2007 deadline. Its systems do in fact support Cable-CARD enabled retail devices⁶, so it is completely familiar with making CableCARDS work on one-way digital TV sets on a day-to-day basis. And Verizon relies on the same major manufacturers that traditional cable companies do for its integrated set-top boxes. Responding to demand from cable operators who placed purchase orders, those vendors were able to produce a large quantity of CableCARD-enabled boxes for lease in time to comply with the FCC's rules.

⁶ Verizon Comments, CSR-7042-Z, CS Docket No. 97-80 at 22-23 (Aug. 8, 2006).

With over a half million video customers already, and a huge service area that covers tens of millions of customers with wireline, wireless and data services, all of whom are potential video customers, Verizon readily commands the attention of these major manufacturers, some of whom already have long-standing vendor relationships with Verizon.

But nowhere on the record is there any reliable indication that Verizon took any steps to ensure that its vendors would develop boxes with separate security in time for the July 1, 2007 deadline. There is no evidence of purchase orders that were refused, nor is there any evidence that Verizon ever even issued specifications and requests for bids. Meanwhile, cable multiple system operators of all sizes spent huge amounts of time, money, and effort to work with vendors to develop set-top boxes that comply with the FCC's integration ban, even as they were expending additional substantial resources to expedite deployment of DCAS and thereby justify a limited waiver to complete the work.

Thus, there is no basis in fact or law to have given Verizon a one-year waiver, let alone a three-year waiver under its Application for Review, based on an apparent lack of compliant set-top boxes, while denying the same relief to other cable companies. Indeed, the difficulties of getting ready for the July 1, 2007 integration ban were at least as severe for NCTA member companies as those faced by Verizon. By contrast with the cable industry's major efforts, Verizon chose to do nothing to get ready for July 1 – and the Bureau rewarded that abdication of responsibility by granting Verizon a one-year waiver. Worse, it results in the Commission favoring one technology over another and favoring one competitor over another. It is a competitive disparity, created in regulation, without justification.

II. IF VERIZON IS GRANTED ADDITIONAL TIME TO DEVELOP A DOWNLOADABLE SOLUTION, TRADITIONAL CABLE OPERATORS SHOULD ALSO BE GRANTED ADDITIONAL TIME

In its 2005 order, the FCC granted an NCTA request for deferral of the integration ban to avoid the costly and inefficient interim step of requiring cable operators to supply separate security while specifications for a downloadable security solution are developed.⁷ This precedent formed the basis of Verizon's August 8, 2006 initial waiver request. NCTA filed its own similarly based waiver request eight days later.⁸

As NCTA explained in its Comments on Verizon's Waiver Request, granting *both* Verizon's and NCTA's waiver requests would have furthered the pro-innovation goals of Section 629(c).⁹ And by its terms, Section 629(c) requires that all waivers of regulations under Section 629(a) "shall be effective for *all* service providers and products in that category and for *all* providers of services and products."¹⁰ As we noted in that earlier filing, Verizon was not entitled to differentiated treatment as a new entrant or because of differentiated technology.¹¹

One can read in the Bureau's Waiver Order a substantial agreement with NCTA's comments on Verizon's waiver request. By Verizon's own reckoning, the Bureau did "not address these [new entrant or technology] distinctions or discuss why Verizon does not meet the Section 629(c) standard."¹² While Verizon sought to differentiate itself from other cable systems

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd 6794 (2005).

⁸ NCTA Request for Waiver of 47 C.F.R. Sec. 76.1204(a)(1), CSR-7056-Z (filed Aug. 16, 2006), denied (June 29, 2007), Application for Review filed (July 30, 2007) ("NCTA Waiver Request").

⁹ Comments of NCTA, Verizon's Petition for Waiver, CSR-7042-Z, filed Sept. 18, 2006, at 8 ("NCTA Comments on Verizon").

¹⁰ 47 U.S.C. § 549(e) (emphasis added).

¹¹ See NCTA Comments on Verizon at 8-18.

¹² Verizon Application at 11-12.

in its request, the Bureau instead “group[ed] Verizon’s claims together with those made by traditional cable operators.”¹³

The Bureau correctly declined to grant Verizon’s request for special regulatory treatment on the basis that it provides a nascent service and is a new entrant to the market. Verizon’s total annual revenues exceed those of the entire cable operator industry. For Q2 2007, its FIOS cable service reported 515,000 subscribers, a customer base far larger than those of many cable operators who were denied any waiver relief whatsoever from the integration ban.¹⁴ By the end of the period for which Verizon has requested an additional waiver, it expects that its fiber-to-the-premises network will reach up to 20 million homes and businesses and that it will be one of the very largest MVPDs in the nation.¹⁵

Moreover, its waiver request was hardly unique in its claim that Verizon alone provides the benefits of wireline competition. As the Commission has recognized in its annual Video Competition reports, traditional telcos and traditional cable operators are competing in each other’s business on a facilities basis for the first time in separate voice, data, and video categories and as bundled service providers. And cable’s investment in providing much-needed residential facilities-based voice service fits squarely within the parameters of Section 629(c)’s waiver standard, namely promoting the introduction of a new “service offered over multichannel video programming systems.” If Verizon deserves a waiver based on its wireline entry then so, too, do the hundreds of cable operators also introducing new services over their platforms.

¹³ *Id.* at 12.

¹⁴ CableFAX Daily, July 31, 2007. *See* Comcast Letter at n.14 (pointing out that Verizon is larger than nine of the ten operators whose waiver requests were denied in *Armstrong Utilities, Inc., et al. Request for Waiver of § 76,1204(a)(1)*, CSR-7112-Z et al. , CS Docket No. 97-80 (June 29, 2007)).

¹⁵ Testimony before the Senate Commerce Committee, Verizon Chairman and Chief Executive Officer Ivan Seidenberg (Jan. 31, 2006), available at <http://commerce.senate.gov/pdf/seidenberg-021506.pdf#search=%22%2BVerizon%20%2B%22FiOS%20TV%22%20%2B18%20%2B2010%22> (“By 2010, we expect to deliver fiber facilities to around 18-20 million homes and businesses.”).

The Bureau was also correct not to accept Verizon's attempt to cloak itself in the 1998 exemption granted DBS from the integration ban under Verizon's new entrant theory.¹⁶ The Commission should reject the claim in considering this Application for Review. As NCTA explained in its Comments on Verizon's waiver petition, the FCC did not exempt DBS from the integration ban; it exempted any MVPD, new to market or not, that already supported retail devices, which DBS operators were doing in 1998.¹⁷ It did not exempt DBS from the integration ban based on DBS's status as a new entrant.

The Bureau was also correct to reject Verizon's attempt to distinguish itself based on its "innovative offerings." Its offerings are similar to digital innovations offered by incumbent cable operators. This is not to say that all cable companies offering these innovations were not deserving of a waiver of the integration ban under the waiver standard of Section 629(c). As NCTA's Waiver petition detailed, cable operators, including Verizon, are promoting new and improved digital cable programming and services, including VOD, HD and other digital services; the Bureau was wrong to disregard those innovative offerings in denying waiver requests under Section 629(c).

Indeed, the effect of imposing the costly integration ban on the introduction of innovative offerings is even more pronounced for traditional operators than for Verizon. Verizon is constructing a greenfield video network, building on technology advances made by the rest of the cable industry over the last 40 years. Incumbent cable operators need to spend money and devote research resources on their existing networks to upgrade them in order to deliver digital

¹⁶ Verizon Application at 14.

¹⁷ NCTA Comments on Verizon at 12-13. And DirecTV itself may no longer qualify for this exception; as we noted a year ago, DirecTV initiated an equipment policy in March, 2006, that effectively eliminated the ability of most new customers to access its service by means other than a proprietary set-top box leased from DirecTV. NCTA Waiver Request at 24-25.

programming and services, increase digital penetration, and migrate eventually to all-digital networks. Verizon can and does incorporate these features into its initial build-out of its video networks. Based on this added expense to complete these upgrades for traditional cable operators, NCTA has made at least as a compelling showing as Verizon that a “waiver is necessary to assist the development or introduction of a new or improved multichannel video programming.”¹⁸

Because Verizon cannot distinguish its service – or the basis of its waiver request – on its new market entry or differentiated services offering, it was error to treat the NCTA (and other traditional cable) waiver applicants differently from Verizon, as the Bureau eventually did in granting Verizon an HD/DVR waiver that was denied to cable operators.

Furthermore, in its Application for Review, Verizon does not explain how a waiver for it, as opposed to other cable operators, would further the goal of expediting the development and deployment of a separable security solution with the preferred approach of a downloadable solution based on open standards. Verizon’s Application for Review gives no details about how granting that company a longer waiver will lead to faster completion of a downloadable security solution. It presents no milestones or evidence of its own investment in developing downloadable security beyond its naked assertion that it has “been at the forefront of the efforts to establish” a common downloadable security standard.¹⁹

In contrast, past NCTA waiver requests, including the 2006 Waiver request denied earlier by the Bureau, detailed the strides made by the cable industry broadly in implementing its DCAS solution. Because of the efforts to achieve DCAS, NCTA limited its request for waiver to expire

¹⁸ 47 U.S.C. § 549(c).

¹⁹ Verizon Application at 11.

no later than December 31, 2009. Verizon's original waiver request was for an unlimited time, later capped at three years in Verizon's Reply comments.

The cable industry has invested enormous time and resources in initiating and developing DCAS. It has been demonstrated in TV receiving devices at the NCTA and Consumer Electronics Association shows. If the Commission is inclined to credit Verizon's claim that additional waiver time will allow that company to make better use of its resources to complete work on its downloadable solution, then the Commission should certainly credit NCTA's similar claim in granting NCTA's Application for Review, where the DCAS factual predicate is more than ample and the request for additional time more modest.

In short, if Verizon deserves a waiver or review by the full Commission, then the companies represented by NCTA's waiver application surely do as well. And if there is any basis for a waiver under Sections 1.3 and 76.7 of the Commission's rules, the NCTA waiver request deserves no less a grant.

CONCLUSION

Verizon and NCTA filed waiver requests of the integration ban requirement within eight days of each other. The Media Bureau chose to grant Verizon a one-year waiver of the requirement based on its conditional belief that Verizon had no off-the-shelf compliant set top boxes. NCTA received no waiver. The decision ignores Verizon's failure to take steps to order boxes from vendors. That failure should not have been rewarded with a waiver while NCTA was denied any relief whatsoever.

The other principal ground raised by Verizon's Application for Review and tied to the language for waiver contained in Section 629(c) – innovative digital services – applies with equal validity to all cable operators, not just Verizon. We agree with Verizon that the Bureau failed to apply Section 629(c) properly, to Verizon and to NCTA, in denying waivers on that

basis. NCTA's separately-filed Application for Review renews our own case for waiver. Accordingly, in this proceeding we urge the Commission to grant to all cable operators the same relief as Verizon would receive if the FCC grants its Application for Review, or at least until the earlier of the deployment of DCAS or Dec. 31, 2009.

Respectfully submitted,

/s/ Daniel L. Brenner

William A. Check, Ph.D.
Senior Vice President
Science & Technology

Andy Scott
Vice President
Science & Technology

August 14, 2007

Daniel L. Brenner
Neal M. Goldberg
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, NW - Suite 100
Washington, D.C. 20001
(202) 222-2445

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Opposition were sent by first-class mail this 14th day of August, 2007, to each of the following:

Edward Shakin
William H. Johnson
Michael E. Glover
1515 North Courthouse Road – Suite 500
Arlington, VA 22201

Helgi C. Walker
Joshua S. Turner
Nicholas M. Holland
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Verizon

Steve B. Sharkey
Director, Spectrum and Standards Strategy
Motorla, Inc.
1350 I Street, N.W. – Suite 400
Washington, D.C. 20005-3305

Michael D. Petricone
Julie M Kearney
Consumer Electronics Association
2500 Wilson Boulevard
Arlington, VA 22201

Robert S. Schwartz
Constantine Cannon, P.C.
1627 Eye Street, N.W.
Washington, D.C. 20006

Adam Petruska
Director, Strategic Initiatives
Office of Strategy & Technology
Hewlett-Packard Company
20555 State Highway 249
MS-140302
Houston, TX 77070

Jeffrey T. Lawrence
Director, Content Policy and Architecture
Intel Corporation
JF3-147
2111 N.E. 25th Avenue
Hillsboro, OR 97124-5961

Jim Morgan
Director & Counsel
Government & Industry Affairs
Sony Electronics, Inc.
1667 K Street, N.W., Suite 200
Washington, D.C. 20006

Mike Lazorik
Director, Office of the CTO
Dell, Inc.
Business Development/Public Policy
One Dell Way
Round Rock, TX 78682

Henry Goldberg
Devendra T. Kumar
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036

Matthew P. Zinn
Senior Vice President, General Counsel
Secretary & Chief Privacy Office
TiVo, Inc.
2160 Gold Street
Alviso, CA 95002

/s/ Gretchen M. Lohmann
Gretchen M. Lohmann