



Federal Communications Commission  
Washington, D.C. 20554

September 4, 2007

Mr. Jonathan Friedman  
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1875 K Street, NW  
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Dear Mr. Friedman:

This letter responds to your letter dated July 3, 2007, in which you allege that we have treated your client, Comcast Corporation (“Comcast”), differently than other multichannel video programming distributors (“MVPDs”) in acting on requests for waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of our rules.<sup>1</sup>

As an initial matter, we reiterate that Congress enacted Section 629 to ensure that consumers have the opportunity to purchase navigation devices from sources other than their MVPD.<sup>2</sup> Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”<sup>3</sup> In acting on requests for waiver of the integration ban, we have attempted to further this goal while also considering the public interest goals of expediting the digital transition and promoting competition in the video marketplace. An MVPD has three options for seeking a waiver of the integration ban. First, the MVPD can make a demonstration pursuant to Section 629(c) of the Communications Act that a waiver is necessary to assist in the development of a new or improved service.<sup>4</sup> Second, the MVPD can demonstrate that the set-top box is a low-cost, limited capability device consistent with the policies established in the *2005 Deferral Order*.<sup>5</sup> Third, the MVPD can demonstrate “good cause” for a waiver pursuant to the general waiver standard set forth in Sections 1.3 and 76.7 of the Commission’s rules.<sup>6</sup>

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<sup>1</sup> See Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Ms. Marlene H. Dortch, FCC, CSR-7012-Z, CS Docket No. 97-80 (July 3, 2007) (“July 3<sup>rd</sup> Letter”).

<sup>2</sup> See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004).

<sup>3</sup> H.R. REP. NO. 104-204, at 112 (1995).

<sup>4</sup> 47 U.S.C. § 549(c).

<sup>5</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) (“2005 Deferral Order”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

<sup>6</sup> 47 C.F.R. §§ 1.3, 76.7.

*Section 629(c)*. Pursuant to Section 629(c) of the Communications Act, an MVPD can seek a waiver of the integration ban by making “an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.”<sup>7</sup> To date, we have not granted any waivers pursuant to Section 629(c) because we have not found that any petitioners have satisfied the statutory criteria for such a waiver. Those entities, including Comcast, that have sought a waiver pursuant to Section 629(c) have not made an appropriate showing that a waiver is *necessary* to assist in the development or introduction of a new or improved service. Rather, it has been clear that the alleged “new or improved services” they claimed would benefit from a waiver were already being provided successfully. Accordingly, in none of these cases was it established that a waiver would be “necessary” for the “introduction or development” of these services.<sup>8</sup>

You state that Section 629(c) requires that any waiver granted to one party “shall be effective for all service providers and products in that category and for all providers of services and products.”<sup>9</sup> Because we have not granted any waivers pursuant to Section 629(c), this provision has not been applicable to any waiver of the integration ban.

You also complain that the Commission did not act on your waiver request within 90 days, as you allege Section 629(c) requires.<sup>10</sup> However, we disagree with your analysis of the statute. Specifically, Section 629(c) provides that the Commission shall “grant” a request for waiver of the integration ban within 90 days of filing if the request makes “an appropriate showing” that such waiver is necessary.<sup>11</sup> The Bureau determined that Comcast’s request did not make the appropriate showing as required under Section 629(c), and thus the requirement to

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<sup>7</sup> 47 U.S.C. § 549(c).

<sup>8</sup> 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*, 22 FCC Rcd 209, ¶¶ 13-14 (rel. Jan. 10, 2007) (“*BendBroadband Order*”); *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 228, ¶¶ 17-19 (rel. Jan. 10, 2007) (“*Comcast Order*”); *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2008, ¶ 15 (rel. May 4, 2007) (“*Charter Order*”); *Millennium Telcom, LLC d/b/a OneSource Communications Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2009, ¶ 13 (MB rel. May 4, 2007) (“*Millennium Order*”); *Armstrong Utilities et al Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2916, ¶¶ 45-46 (MB rel. June 29, 2007) (“*Armstrong Order*”); *Massillon Cable TV, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2919, ¶¶ 12-13 (MB rel. June 29, 2007); *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2920, ¶¶ 26-28 (MB rel. June 29, 2007); *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2921, ¶ 57 (MB rel. June 29, 2007) (“*All-Digital Waiver Order*”); *Guam Cablevision, LLC*, DA 07-2917, ¶¶ 11-12 (rel. June 29, 2007); *Great Plains Cable Television, Inc. et al Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-3316, ¶ 33 (rel. July 23, 2007) (“*Great Plains Order*”); *Colo Telephone Company et al*, DA 07-3317, ¶ 12 (rel. July 23, 2007); *ComSouth Telesys, Inc.*, DA 07-3318, ¶ 12 (rel. July 23, 2007); *Innovative Cable TV St. Thomas-St. John & St. Croix*, DA 07-3319, ¶ 12 (rel. July 23, 2007) (“*Innovative Order*”).

<sup>9</sup> July 3<sup>rd</sup> Letter at 6 (citing 47 U.S.C. 549(c)).

<sup>10</sup> *Id.* at 2 n.3.

<sup>11</sup> 47 U.S.C. § 549(c).

“grant” the request within 90 days of filing does not apply.<sup>12</sup> Moreover, Section 629(c) applies to an initial waiver request, not to an Application for Review of a denial of a waiver request.<sup>13</sup>

*2005 Deferral Order.* Pursuant to the policies established in the *2005 Deferral Order*, an MVPD can seek a waiver of the integration ban by demonstrating that the subject box is a low-cost, limited capability device.<sup>14</sup> The Commission explained that it is “critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition.”<sup>15</sup> The Commission cautioned, however, that waiver requests would not be warranted “for boxes that contain personal video recording (‘PVR’), high-definition, broadband Internet access, multiple tuner, or *other similar advanced capabilities*.”<sup>16</sup> To date, no applicant has demonstrated that it will offer the type of low-cost, limited capability device envisioned in the *2005 Deferral Order*, and accordingly, we have not granted any waivers under this standard.<sup>17</sup>

In your letter, you repeat arguments that the Motorola DCT-700 (“DCT-700”) is a low-cost, limited-capability set-top box that is the type of device that the Commission committed to exempt from the integration ban in the *2005 Deferral Order*.<sup>18</sup> As we concluded previously, the DCT-700 is an “advanced” set-top box that is beyond the scope of the exemption for limited capability devices contemplated in the *2005 Deferral Order*.<sup>19</sup> The “advanced” capabilities of the DCT-700 include an electronic programming guide (“EPG”), video-on-demand (“VOD”), pay-per-view (“PPV”) services, and other interactive television (“ITV”) capabilities.<sup>20</sup> Indeed, cable operators and the consumer electronics industry have specifically referred to two-way capability as “advanced.”<sup>21</sup> Your letter presents no new evidence to revisit the scope of the exemption for low-cost, limited capability devices. Our actions are also consistent with the Commission’s previous statements before the D.C. Circuit that cable operators would be permitted to offer low-cost, limited capability, integrated set-top boxes to cable consumers.<sup>22</sup> The DCT-700 and other set-top boxes with two-way capability are not the type of set-top boxes

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<sup>12</sup> See *Comcast Order*, 22 FCC Rcd at 238, n.92.

<sup>13</sup> 47 U.S.C. § 549(c) (“Upon an appropriate showing, the Commission shall grant any such *waiver request* within 90 days of any application filed under this subsection . . . .”) (emphasis added); see also 47 C.F.R. § 1.115 (pertaining to Applications for Review and containing no deadline for decisions).

<sup>14</sup> *2005 Deferral Order*, 20 FCC Rcd 6794, ¶ 37.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> See *Armstrong Order* ¶¶ 47-51; *BendBroadband Order* ¶¶ 16-20; *Comcast Order* ¶¶ 24-30; *Charter Order* ¶ 17; *Millennium Order* ¶¶ 12-17; *Great Plains Order* ¶¶ 34-38; *Innovative Order* ¶¶ 16-20.

<sup>18</sup> *July 3<sup>rd</sup> Letter* at 1 n.2.

<sup>19</sup> See *Comcast Order*, 22 FCC Rcd at 238-40, ¶¶ 24-30 (2007).

<sup>20</sup> See *id.* at 229-30, ¶ 4.

<sup>21</sup> *Id.* at 240, ¶ 28.

<sup>22</sup> See *July 3<sup>rd</sup> Letter* at 6.

that the Commission envisioned in making these statements, as evidenced by cable industry filings that the Commission relied upon in developing the low-cost, limited-capability waiver policy.<sup>23</sup> The Commission intended that this exemption would apply to limited-capability devices -- "those devices whose functionality is limited to making digital cable signals available on analog sets."<sup>24</sup> Comcast has not sought a waiver to make this type of set-top box available to consumers.

*Sections 1.3 and 76.7 of the Commission's Rules.* The Commission is obligated to give a "hard look" to requests for waiver of any Commission rule to determine whether application of the rule in particular circumstances would not serve the public interest.<sup>25</sup> This obligation is reflected in Sections 1.3 and 76.7 of the Commission's Rules. Under those provisions, an MVPD can seek a waiver of the integration ban by demonstrating "good cause."<sup>26</sup> Our analysis of waiver requests pursuant to the "good cause" standard is an inherently individualized assessment of the facts presented in each case. Unlike waivers considered under the *2005 Deferral Order* policy, which narrowly focuses on the set-top box at issue and whether it is low cost and of limited-capability, our review under the general waiver standard is broader and includes consideration of all of the circumstances that may justify waiver in a particular case. And unlike waivers considered under Section 629(c), waivers issued under this standard do not extend to all operators utilizing the same type of box.<sup>27</sup>

We disagree with your claim that our decisions acting on requests for waiver of the integration ban are inconsistent and discriminate against Comcast.<sup>28</sup> Each decision reflects the distinct facts presented by each waiver request and demonstrates a careful balancing of the various public interest goals noted above. For example, in the cases in which we allowed MVPDs to continue to deploy the DCT-700 and other integrated two-way devices pursuant to Sections 1.3 and 76.7, the applicants committed to operate all-digital networks no later than February 17, 2009. Comcast and others that did not commit to operating an all-digital network

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<sup>23</sup> See *Comcast Order*, 22 FCC Rcd at 239, ¶ 26; Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission at 7-8 (filed Dec. 20, 2004) (stating that if "a cable operator is able to convert its system to all-digital, cable operators will need to be able to deploy digital-to-analog converters to sustain the many legacy analog devices that remain in customers' homes.").

<sup>24</sup> *Comcast Order*, 22 FCC Rcd at 239, ¶ 26.

<sup>25</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

<sup>26</sup> 47 C.F.R. §§ 1.3, 76.7.

<sup>27</sup> Any suggestion that the Bureau is precluded from granting waivers to particular operators and instead must grant waivers to all operators that utilize a particular box is erroneous and is based on the mistaken assumption that Section 629(c) represents the exclusive route by which regulations promulgated pursuant to Section 629(a) may be waived. While Section 629(c) represents one standard for waiving such regulations, there is no indication in the statutory text that Congress intended for that standard to be the exclusive means for doing so. In particular, there is no indication that Congress intended to displace the Commission's ability to use its general waiver authority in appropriate cases, such as those involving operator-specific hardship.

<sup>28</sup> *July 3<sup>rd</sup> Letter* at 2-3, 6.

on or before the nation's transition to digital television did not receive a waiver for the DCT-700.<sup>29</sup> As we concluded in the *BendBroadband Order*, all-digital networks produce clear, non-speculative benefits that, on balance, warrant limited waivers of the integration ban.<sup>30</sup> In contrast, Comcast did not present any compelling countervailing public interest benefits like those present in the cases you cite, such as operation of an all-digital network, that outweighed the public interest harm from waiving the integration ban.

As you note, other waiver requests have presented such facts as financial hardship,<sup>31</sup> extraordinary devastation from typhoons that has resulted in financial difficulties,<sup>32</sup> and an early commitment to deploy non-integrated set-top boxes.<sup>33</sup> Accordingly, our decisions acting on these requests for waiver of the integration ban take into account the unique and specific factual circumstances presented by individual cable operators, and thus we see no basis for your claim that we have acted inconsistently.<sup>34</sup> As instructed by the courts,<sup>35</sup> we have taken a "hard look" at the facts presented in each of these cases and have made our decisions based on these facts as well as the public interest goals Congress has instructed us to promote. In some cases, our review of the facts and careful balancing of public interest considerations have resulted in grant of a waiver. In other cases, such as Comcast's waiver request, we have conducted the same kind of analysis but have concluded for the reasons stated in the decisions that the facts presented do not justify a waiver.

In issuing our decisions on the integration ban, we have not "favored" telco video providers, as you allege.<sup>36</sup> Unlike Comcast, each of these entities either has already deployed or has committed to deploy an all-digital network. This is a critical public interest benefit that was lacking in the facts presented in the Comcast waiver request. You also take issue with our decision to grant the telco video providers a one-year waiver for HD and digital video recorder

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<sup>29</sup> *Id.* at 2 and 2 n.4.

<sup>30</sup> See *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 209, 216-218, ¶¶ 23-26 (2007) ("*BendBroadband Order*").

<sup>31</sup> See *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2008 (2007) (finding good cause exists for a limited one-year waiver of the integration ban based on Charter's specific, unambiguous demonstration of its existing financial hardship).

<sup>32</sup> See *Guam Cablevision, LLC Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2917 (2007) (finding good cause exists for a limited waiver of the integration ban based on applicant's unique circumstances stemming from delivering cable service in a typhoon-prone, underdeveloped market far from the contiguous 48 states).

<sup>33</sup> See *Cablevision Systems Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 220 (2007) (finding good cause exists for a limited waiver of the integration ban based on Cablevision's longstanding use of the SmartCard separated security solution).

<sup>34</sup> July 3<sup>rd</sup> Letter at 3.

<sup>35</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

<sup>36</sup> July 3<sup>rd</sup> Letter at 3-4.

(“DVR”) devices.<sup>37</sup> While you claim that Verizon is an “enormous competitor” that is “capable of controlling the design and development of equipment,” you have provided no evidence to rebut our conclusion that set-top box manufacturers have not developed any non-integrated HD or DVR devices for use with Internet Protocol (“IP”), Asynchronous Transfer Mode (“ATM”), or hybrid Quadrature Amplitude Modulation (“QAM”)/IP systems.<sup>38</sup> Nor is there any evidence to conclude that Verizon and other telco video providers have failed to take steps to comply with the integration ban.<sup>39</sup> By contrast, in Comcast’s case, there was ample evidence that non-integrated devices are available for use on traditional cable systems.

You also allege that we acted inconsistently in placing some waiver requests on Public Notice and not others.<sup>40</sup> As an initial matter, neither the Communications Act nor our rules requires that we place the waiver requests on Public Notice.<sup>41</sup> Some waiver requests were filed by companies that are already all-digital or are committed to going all digital prior to February 17, 2009. These particular petitions raised issues essentially identical to issues raised in waiver requests that we had previously placed on Public Notice, and were filed in close proximity to the July 1, 2007 deadline. Because we had already received comment on similar requests, we believe that we had sufficient input from the public to aid in making our decisions. An additional opportunity for public comment would have resulted in substantial delay without any significant benefit to our decision making process. We also note that some waiver requests raise highly particularized factual showings that do not raise broad public interest issues that benefit from public comment.<sup>42</sup>

Furthermore, we fail to see any harm to Comcast resulting from our decision to place its waiver request on Public Notice but not others. The opportunity for public comment provides a chance for interested parties to support or oppose the waiver request. Indeed, in Comcast’s case, the opportunity for public comment resulted in support for its waiver request from the American Cable Association, Motorola, Inc., the National Cable & Telecommunications Association, Pace Micro Technology PLC, Panasonic Corporation, RCN Corporation, Scientific Atlanta, and Thomson.<sup>43</sup>

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<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at 4; *see Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2921, ¶ 61 (June 29, 2007).

<sup>39</sup> *July 3<sup>rd</sup> Letter* at 4.

<sup>40</sup> *July 3<sup>rd</sup> Letter* at 5.

<sup>41</sup> Section 76.7 provides a deadline after Public Notice for an interested party to file comments, but it does not mandate that the Commission place the waiver request on Public Notice. 47 C.F.R. § 76.7.

<sup>42</sup> *See, e.g., Guam Cablevision, LLC Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2917 (2007) (granting Guam Cablevision a waiver based on its unique situation as cable operator rebuilding a typhoon-ravaged cable system).

<sup>43</sup> *Comcast Order*, 22 FCC Red at 232 n.34. We note that comments were also filed in opposition to the Comcast waiver request. *See id.* at 232 n.35.

You also state that we have acted on some waiver requests more expeditiously than others.<sup>44</sup> As an initial matter, we note that the courts have held that the Commission has broad discretion to manage its docket.<sup>45</sup> Our ability to act on some waiver requests more quickly than others reflects the relative complexity and novelty of the facts presented. Furthermore, we note that the Media Bureau considered and denied your waiver request over six months ago, well before dozens of other waiver requests.<sup>46</sup>

You also allege that the treatment of Verizon's waiver request raises "serious questions about the integrity of the waiver process" because Verizon committed to operate an all-digital network on the day its waiver request was granted, which was reflected in an *ex parte* letter filed on the same day.<sup>47</sup> We fail to understand how a grant based on a commitment by a provider to go all-digital raises questions about the integrity of the process. Previous cases have made clear that committing to operate an all-digital network by February 17, 2009 is an important public interest consideration in assessing requests for waiver of the integration ban.<sup>48</sup>

In conclusion, in acting on requests for waiver of the integration ban, we have attempted to carefully assess the facts presented in each case and to carefully balance the public interest considerations presented. The denial of some requests and the grant of others reflect the different facts presented and the different public interest factors weighed in each case. We have not discriminated against any MVPD or group of MVPDs in making these difficult decisions.

Sincerely,



Monica Shah Desai  
Chief, Media Bureau

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<sup>44</sup> July 3<sup>rd</sup> Letter at 5 n.22.

<sup>45</sup> See *ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 755 (D.C. Cir. 1984) (citing *Nader v. FCC*, 520 F.2d 182, 195-97 (D.C. Cir. 1975) (the Commission has "broad discretion to manage its docket").

<sup>46</sup> *Comcast Order*, 22 FCC Rcd at 228.

<sup>47</sup> July 3<sup>rd</sup> Letter at 5-6.

<sup>48</sup> See *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 209 (2007).