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FCC Grants Limited Set-Top Box Waivers

The FCC has granted two waivers of its ban on integrated home cable converter boxes (that is, boxes that combine security elements with the basic navigation device). The underlying purpose of the ban is to enable consumers to purchase navigation devices from sources other than their cable operator or other multichannel video program distributor. Although both waivers are dependent upon their unusual facts, they represent the first indication that the Commission may be willing to soften its generally restrictive attitude toward enforcing the policy, and thus may suggest opportunities for relief that others might seek.

Under a Congressional mandate to assure independent sources of navigation devices, the Commission generally has tended to waive its ban only for cable operators who commit to convert to all-digital systems by February 17, 2009, the date upon which over-the-air analog telecasting is to cease. It has rejected waivers based upon other claims such as financial hardship, deployment logistics or marketing factors, on the ground that such waivers would not promote the development of new or improved (ie: digital) services. The two recent grants, while based upon other grounds, are for systems serving Guam and rural areas of Puerto Rico, and stem from circumstances unlikely to arise in the continental US.

Guam Cablevision had already obtained a waiver one year ago. It had argued that its geographical separation from the mainland created a unique market, 15 hours ahead of the Eastern time zone; that typhoons in recent years require it to maintain an abnormally large inventory of equipment to restore service following disasters; that digital receivers are not yet widely available in Guam, thus requiring customers to rely on converters to display digital signals on existing analog equipment; and that its immature electronics retail environment diminishes the prospect of competitive set-top boxes. The Commission granted a waiver to deploy a single device – the Scientific Atlanta Explorer 1850 – through 2009 on the ground of Guam Cablevision’s “unique circumstances stemming from delivering cable service in a typhoon-prone underdeveloped market far from the contiguous 48 states,” citing in particular “the extraordinary devastation the island has faced over the past ten years.”

Guam Cablevision sought to expand its waiver to include two other Scientific Atlanta Explorer models (2200 and 8300) because manufacture of the 1850 box is being discontinued. It also noted a further factor to distinguish Guam from other US markets – CableCARD and competitive DVR devices are unavailable there. The Commission repeated its prior analysis and again characterized Guam as facing “an idiosyncratic factual situation” that warranted relief. In addition, in a rather unusual gesture, the FCC invited Guam Cablevision to seek an extension beyond 2009 if it faces continuing, non-speculative financial difficulties (thus distinguishing its routine rejection of waiver requests based largely upon financial claims that the Commission regards as largely speculative.)

The waiver granted to Puerto Rico Cable Acquisition Corp. was also based upon a finding that “it faces an idiosyncratic factual situation in its market area.” Specifically, the cable operator had asserted that it serves the most rural areas of Puerto Rico where CableCARD devices are not available at all, that its customers have median yearly income of \$13,000 and cannot afford to lease or buy high-definition and digital boxes or receivers, and that in any event there are no competing sources for HD service. The Commission agreed that

this constituted “compelling evidence” that “rural Puerto Rico’s retail market for navigation devices is unlike nearly every other market in the continental United States” and therefore warranted the requested relief.

The Puerto Rican system had also obtained a prior waiver of the integrated box ban along more traditional lines – it covered only certain models and was based upon having already transitioned to an all-digital system (thereby having fulfilled the underlying policy of the rule). Notably, though, the scope of the new waiver is unusually expansive in at least two aspects – it is for a period of three years and it covers all set-top boxes rather than only a few specified models.

Given the specific factual bases that are unlikely to be encountered in most situations, these waivers do not appear to set a precedent upon which other requests can rely. Even so, they do serve to indicate some degree of flexibility in the Commission’s evolving application of its integration ban and may even herald a trend toward recognizing unusual, if not utterly unique, situations that might warrant relief. If you wish to explore the possibility of obtaining a waiver on the basis of atypical conditions you are encountering, please let us know.

If you have any questions regarding this client alert, please contact [Peter Gutmann](mailto:pgutmann@wcsr.com) at (202) 857-4532 or <mailto:pgutmann@wcsr.com>, or one of our other Womble Carlyle [Telecommunications professionals](#).

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