

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

In the Matter of
Puerto Rico Cable Acquisition Corp.
Request for Waiver of 47 C.F.R. 76.1204(a)(1)

CSR-7201-Z

APPLICATION FOR REVIEW

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Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Puerto Rico Cable Acquisition Corp. d/b/a Choice Cable T.V. (hereinafter "Choice") hereby seeks review of the Media Bureau's decision regarding its request for a waiver of the integration ban.¹ On June 29, 2007, the Bureau issued a *Consolidated Order*² that granted Choice at least a partial waiver from the ban. However, certain statements within the order could be read to express an intent to deny a portion of the relief requested by Choice for high-definition (HD) and Digital Video Recorder (DVR) set-top boxes. For avoidance of doubt, Choice requests that the Commission grant Choice a waiver for HD and DVR devices for a temporary period of three years.

Summary

A waiver for HD and DVR devices is the *only* way that Choice's customers will have access to these functionalities, because neither TiVo HD/DVRs nor any other HD/DVR is available at retail in Puerto Rico, and because Choice cannot order any new

¹ Puerto Rico Cable Acquisition Corp. Request for Waiver of 47 C.F.R. 76.1204(a)(1), CSR-7201-Z, Request for Waiver (Apr. 24, 2007) (seeking waiver from the integration ban set forth in the second sentence of 47 C.F.R. § 76.1204(a)(1)) ("Request for Waiver").

² *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CS Docket No. 97-80, Memorandum Opinion and Order, DA 07-2921 (rel. June 29, 2007) ("*Consolidated Order*").

CableCARD HD or DVR devices, which are not economically viable in its low-income service area. Choice's Request for Waiver presented a detailed argument supported by substantial evidence that application of the integration ban in rural Puerto Rico over the near term would only be harmful to consumers because of unique market circumstances that distinguish rural Puerto Rico from the continental United States. The *Consolidated Order* entirely failed to analyze the evidence submitted by Choice in support of this independent basis for waiver. The Bureau's action is subject to Commission review and reversal for three reasons:

- The Bureau's complete failure to address Choice's unique arguments and evidence constitutes prejudicial procedural error;³
- A denial of Choice's request for relief for HD/DVR devices would necessarily depend on an erroneous finding as to an important or material fact: namely, that imposition of the ban on Choice's HD and DVR devices would convey a benefit to Choice's customers at this time;⁴ and
- The Commission has never analyzed or addressed whether the imposition of the integration ban in insular areas such as rural Puerto Rico concurrently with the continental United States, rather than later or not at all, will serve the public interest.⁵

The Bureau completely ignored the uncontested evidence that the integration ban would shut down Choice's offering of new HD and DVR devices altogether, and evidence that the integration ban makes no sense in a rural, insular market where the CE

³ 47 C.F.R. § 1.115(b)(2)(v).

⁴ 47 C.F.R. § 1.115(b)(2)(iv).

⁵ 47 C.F.R. § 1.115(b)(2)(ii).

industry does not sell CableCARD devices at retail because most consumers have too little money to buy them. It would be especially contrary to the public interest to effectively prohibit Choice customers from obtaining new HD devices during the final 18 months of the DTV transition. Instead, rural Puerto Ricans should not be subjected to the costs of the integration ban at least until there is a reasonable basis to conclude that they will be able to receive comparable offsetting benefits. Because that conclusion cannot be supported on the existing record, the requested waiver should be granted.

I. Choice’s Request Clearly Presented Two Independent Requests for Relief, Supported by Two Independent Rationales.

Choice’s Request for Waiver presented two requests for relief in two separate sections of its pleading. In the first section, Choice requested a permanent waiver for low-cost set-top boxes that it needed to sustain its transition to an all-digital network, which it recently had completed.⁶ The Bureau has determined that such a waiver would serve the public interest for any MVPD of any size, anywhere in the country that commits to transition to all-digital by the date of the DTV transition in February 2009. This portion of Choice’s request was unquestionably granted by the Bureau in the *Consolidated Order* and is not at issue in this Application for Review.

But Choice made an additional, separate argument for different relief that had nothing to do with its conversion to all-digital, but instead was premised entirely on the unique market conditions in rural Puerto Rico. In its second request for relief, Choice requested a *temporary* waiver for HD, DVR and other devices not covered by any grant of a permanent “all-digital” waiver for low-cost devices.⁷ The basis for this separate

⁶ Choice Request for Waiver at 2-5.

⁷ Choice Request for Waiver at 5-10.

request had nothing to do with enabling Choice to sustain its all-digital network. Instead, Choice argued that because of unique circumstances in rural Puerto Rico, application of the integration ban there during the limited period of its requested temporary waiver could not produce sufficient benefits for Puerto Rican consumers to offset the unquestionable cost that the Commission has recognized the ban will impose.⁸

In the first place, at least for some initial period of time, there would be only costs, and no benefits at all. The only retail HD/DVR CableCARD device now offered in the continental United States (the Series 3 TiVo) is not offered in Puerto Rico, because TiVo does not support its service in the Caribbean, including Puerto Rico.⁹ There are therefore not any retail HD/DVR devices available to Choice's customers against which Choice could possibly discriminate. In addition, the CableCARD DTVs offered in the continental United States are barely even available in rural Puerto Rico,¹⁰ and the few devices that do reach the island are too expensive (\$1700-\$7000)¹¹ for most rural Puerto Ricans to afford, given that the median household income in Choice's service area is \$12,960,¹² barely one-quarter of the national median of \$46,242.¹³

Choice further explained that given the lack of availability and enormous expense

⁸ *Id.*

⁹ See <http://www.tivo.com/whatistivo/faqs/mostpopular/index.html> (viewed July 27, 2007) ("The TiVo service is currently not supported in Mexico, or any U.S. territories including Puerto Rico.").

¹⁰ See Liberty Cablevision of Puerto Rico Request for Waiver at 9-10. ("An LCPR employee recently visited one of the larger electronics retailers in its service area to search for CableCARD-ready devices; he found only one CableCARD set out of twenty different digital models available. Even for the small number of consumers willing to buy a digital television without seeing it, Amazon.com and many other on-line retailers will not ship DTVs to Puerto Rico.")

¹¹ See CS Docket 97-80, Reply Comments of Charter, at Exhibit A (Sept. 28, 2006) (showing that the only CableCARD-ready devices from Best Buy and Circuit City in September 2006 were DTVs priced from \$1700-7000 and a Tivo Series 3 priced at \$800 plus more than \$150/year in TiVo subscription fees).

¹² See Request for Waiver at Exhibit 2 (showing US Census Bureau data for Mayaguez-San German-Cabo Rojo, PR Combined Statistical Area).

¹³ See U.S. Census, *Income, Earnings, and Poverty Data From the 2005 American Community Survey at 2*, available at <http://www.census.gov/prod/2006pubs/acs-02.pdf>.

of CableCARD devices in rural Puerto Rico, not a single customer has ever asked Choice to provide a CableCARD.¹⁴ There is simply no compelling consumer benefit in imposing the significant costs of the integration ban on Choice’s customers for the supposed benefit of high-end retail CableCARD products at least for so long as products are not in demand by Choice’s customers and when they are barely even available in Puerto Rico for Choice to support.

In addition, Choice’s Request explained that a prohibition on Choice from offering integrated HD/DVR devices would prevent its customers from obtaining such functionality altogether, from any source. Because of the significant price increase for CableCARD HD/DVRs and the low-income demographics of its service area, Choice has decided not to order any such devices at this time. Because such devices (such as Series 3 TiVos) are also not available at retail in Puerto Rico, *denial of Choice’s request for waiver for its HD and DVR devices would therefore mean that cable customers in Choice’s service area would not be able to obtain HD/DVR functionality at all.*¹⁵ This consequence would flatly contradict the goal of the 1996 Act to deliver advanced services to rural Puerto Rico;¹⁶ Congress’ goal of encouraging the transition to high-definition digital television;¹⁷ and Congress’ explicit direction to the Commission that in implementing Section 629 it “avoid actions which would have the effect of freezing or

¹⁴ Choice Request for Waiver at 8.

¹⁵ Choice Request for Waiver at 8.

¹⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157) (directing Commission “to encourage the deployment ...of advanced telecommunications capability to *all* Americans”) (emphasis added).

¹⁷ See, e.g., Title III of the Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4, 21 (Feb. 8, 2006) (requiring termination of analog broadcasting by February 18, 2009 and establishing subsidy program to encourage digital transition).

chilling the development of new technologies and services”¹⁸ and “regulations [that] prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access” MVPD programming to consumers.¹⁹

Not a single person or party filed comments in opposition to Choice’s request for waiver,²⁰ and every comment from residents of Puerto Rico filed in the various waiver proceedings vigorously supported waivers.²¹ For example, the Honorable Luis Fortuño, the Member of Congress from Puerto Rico, wrote to Chairman Martin that the integration ban “appears to have been designed primarily with the markets in the continental United States in mind,” and “would have a disproportionately severe impact on Puerto Rican consumers given the demographics of the Commonwealth.”²² In addition, Choice noted that the Telecommunications Regulatory Board of Puerto Rico concluded that the

¹⁸ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 181 (1996) (“1996 Act Conference Report”).

¹⁹ 47 U.S.C. § 549(a) (second sentence) (“Such regulations shall not prohibit any [MVPD] from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.”) HD and DVR set-top boxes are clearly either “converter boxes” or “other equipment.” If they were not, they would not be navigation devices subject to the integration ban in the first place. Compare 47 C.F.R. §76.1204(a)(1), § 76.1200(c). In addition, the Commission has previously found that “the statutory language of Section 629 indicates that its reach is to be expansive and that Section 629 neither exempts nor limits any category of equipment used to access multichannel video programming or services offered over such systems from its coverage.” *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd. 14775, ¶ 25 (rel. June 24, 1998).

²⁰ The Consumer Electronics Association (CEA) did not oppose Choice’s request, but asked the Commission to “bear in mind that too many or too liberal exceptions would serve to ratify the nullification of FCC regulations by larger MSOs and their vendors.” CEA Comments at 2. In its reply comments, Choice explained that “Choice serves only 72,000 customers, 1000 miles from the shore of continental United States. Given that U.S. cable operators deploy millions of new set-top boxes per year, the impact of any waiver for Choice would clearly be *de minimis*.” Choice Reply Comments at 2.

²¹ None of the form-letter comments filed by consumers supporting the ban in other waiver proceedings have come from residents of Puerto Rico.

²² See Request for Waiver at Exhibit 1 (Letter from Hon. Luis Fortuño, Member of Congress from Puerto Rico, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, March 15, 2007).

integration ban would not and could not benefit its constituents in rural Puerto Rico at this time:

It is far from clear that these extraordinary new costs [imposed by the integration ban] would be worth it for consumers in Puerto Rico, at least at this time. Far fewer consumers in Puerto Rico, especially in the [rural] areas outside of San Juan ..., can afford the expensive CableCARD devices now offered at retail by the consumer electronics industry. As a result, fewer of these devices are even available in Puerto Rico. There are no Circuit City or Best Buy stores anywhere in Puerto Rico, and TiVo does not support its service in Puerto Rico at this time. Because there is comparably little demand for retail CableCARD devices in Puerto Rico, [the integration ban] is a solution for a problem that does not clearly exist in Puerto Rico.²³

Choice therefore concluded in its reply comments that “Given such support for relief, and given the lack of any opposition, the Commission should grant the requested waiver promptly.”²⁴

II. The Bureau’s Order Entirely Failed to Address Choice’s Puerto Rico-Specific Evidence.

The *Consolidated Order* clearly acknowledged Choice’s unique argument in its summary of the waiver requests covered by the order,²⁵ but then entirely failed to address it. This fact would cause no prejudice to Choice if the ordering paragraph of the Bureau’s Order means what it says:

“IT IS ORDERED that, pursuant to Sections 1.3 and 76.7 of the Commission’s rules, 47 C.F.R. §§ 1.3, 76.7, a waiver of Section 76.1204(a)(1) of the Commission’s rules, 47 C.F.R. § 76.1204(a)(1) **IS**

²³ CSR-7124-Z, Comments of the Telecommunications Regulatory Board of Puerto Rico (Mar. 19, 2007).

²⁴ Choice Reply Comments at 1.

²⁵ See *Consolidated Order* at ¶¶ 44-46 (“Choice gives several reasons for the waiver it requests. ... Choice states that without a waiver, it will not be able to offer high definition and personal video recording services to its customers. ... Choice also argues for its waiver on the grounds that its service areas – small and rural communities in Puerto Rico – have weak economic conditions and low subscription to cable service. Choice also claims that the Commission, when it adopted Section 76.1204(a)(1), did not consider conditions in Puerto Rico, and that CableCARD-based devices are not generally available in retail and other outlets in Puerto Rico. ... The effect is especially strong, Motorola asserts, in the poor, rural areas of Puerto Rico served by Choice.”)

GRANTED to the petitioners listed in the Appendix as set forth in this Order.”²⁶

But one of the paragraphs of the order appears to be inconsistent with the unqualified waiver granted by its ordering paragraph. The Order states:

we find that a waiver for certain high-end devices for traditional cable operators would be inconsistent with the narrowly defined goal of the conditional waiver granted to BendBroadband. The purpose of the conditional waiver granted in the *BendBroadband Order* under Sections 1.3 and 76.7 of the Commission’s rules was not meant to provide BendBroadband with a means to avoid the potentially higher short-term costs associated with deployment of non-integrated boxes to be used for other, high-end functions like digital video recorder (“DVR”) and HD capabilities; rather, it was to permit BendBroadband to transition to an all-digital system. ... We are unconvinced that waiver for [HD and DVR] devices ... is necessary to further Petitioners’ migrations to all-digital systems. For the reasons discussed, we limit the relief granted to traditional cable operators in this order to devices that do not have HD or DVR capabilities.²⁷

This language is based upon the *OneSource Waiver Order*²⁸ that was adopted by the Bureau subsequent to Choice’s request. To the extent that the Bureau intended to so limit Choice’s waiver, it ignored the fact that Choice’s reply comments had clearly explained why this reasoning is inapplicable to Choice:

the *OneSource Waiver Order* is not the correct or applicable precedent for consideration of Choice’s request for a temporary waiver for high-definition (HD) and DVR devices. Like Choice, OneSource requested relief for an HD/DVR device (in its case, the Motorola DCT-3416). But OneSource did not offer any independent justification for such a waiver. Instead, OneSource simply suggested that the DCT-3416 is a “low-cost” device that OneSource needed for its digital transition, even though the Commission had previously found HD and DVR devices did not fall into the low-cost, limited-function category for which waivers might be needed for the digital transition. The Commission therefore rejected OneSource’s

²⁶ *Consolidated Order* at ¶ 63 (Choice has removed the phrase “, until December 31, 2009,” pursuant to the Erratum issued by the Bureau on July 6, 2007).

²⁷ *Consolidated Order* at ¶ 60.

²⁸ *Millennium Telcom, LLC d/b/a OneSource Communications Request for Waiver Section 76.1204(a)(1) of the Commission’s Rules, CSR-7129-Z, Memorandum Opinion and Order, DA 07-2009, ¶ 17 (rel. May 4, 2007) (“OneSource Waiver Order”).*

argument: “We are unconvinced that a waiver for the DCT-3416 is necessary to further OneSource’s migration to an all-digital system.” Unlike OneSource, Choice did not argue that a waiver for HD/DVR devices is necessary to its ability to sustain an all-digital system. Instead, Choice’s request for HD/DVR relief was predicated on an entirely different basis, in a separate section of its request for waiver: that a temporary waiver for all devices is warranted because the unique circumstances that distinguish rural Puerto Rico from the continental United States. The *OneSource Waiver Order* has no bearing on the analysis of that issue.²⁹

Choice also detailed additional distinctions between its case and OneSource’s.³⁰ Even though the integration ban has been applied to OneSource’s HD/DVRs, OneSource’s customers will still be able to obtain HD/DVRs from OneSource (at a higher price) or at retail (such as a TiVo Series 3). But Choice’s customers would not have either option, and would not be able to obtain new cable-ready HD/DVRs devices from any source. As explained above and in its waiver request, Choice has determined that it cannot purchase the new, more expensive CableCARD HD/DVRs at this time, and the Series 3 TiVo is not available in Puerto Rico.³¹ Thus, while the social cost of applying the integration ban to OneSource’s HD/DVRs is higher prices for consumers, the costs of applying the ban on Choice’s HD/DVRs are the elimination of a navigation device option for consumers and the suppression of new high-definition and advanced service options to rural Puerto Rican consumers – a result contrary to the core goals of Section 629 and the Act itself.

It would be especially confounding for the Commission to shut down Choice’s ability to offer any new HD converter boxes right as the nation is barreling toward the DTV conversion barely eighteen months from now. To effectively prohibit Choice from

²⁹ Choice Reply Comments at 2-3, citing *OneSource Waiver Order* at ¶ 17, the OneSource Request for Waiver at 7-8, and the Choice Request for Waiver at 5-10.

³⁰ Choice Reply Comments at 4.

³¹ Choice Request for Waiver at 8-10.

offering any new HD devices would contravene Congress' explicit direction to the Commission that, in implementing Section 629, it should "avoid actions which would have the effect of freezing or chilling the development of new technologies and services."³² Instead, in Section 629(c) of the Act, Congress required the Commission to grant waivers of its Section 629 regulations where "necessary to assist the development or introduction of [any] new or improved" MVPD service.³³

The *Consolidated Order* did not address at all Choice's sworn testimony that denial of a waiver for HD devices would shut down its offering of new HD devices. Instead, the Bureau only stated generically that:

Certain Petitioners argue that Waiver Request grants are necessary to assist in the development of new and improved digital cable services As we stated in the *January 10 Orders*, we do not find that such arguments generally justify a waiver under Section 629(c) of the Act. While it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, as we stated in the *BendBroadband Order*, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).³⁴

But blindly applying this conclusion no matter what the evidence that a new service would be affected (such as Choice's HD and DVR services) would effectively negate Section 629(c). The logic of the "January 10 Orders" was that the Commission was not required to grant waivers under Section 629(c) in the name of facilitating a "new or improved" service that an MVPD already offered and would continue to offer regardless of a waiver.³⁵ The Bureau accordingly held that such mandatory waivers should be

³² *1996 Act Conference Report* at 181.

³³ 47 U.S.C. § 549(c).

³⁴ *Consolidated Order* at ¶ 57.

³⁵ *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7012-Z, Memorandum Opinion and Order, DA 07-49, ¶¶ 17-19 (rel. Jan. 10, 2007) ("*Comcast Order*").

reserved “where necessary to assist the development or introduction of new or improved services that otherwise would be prohibited.”³⁶ But under that precedent, the Bureau should have granted Choice a waiver for HD and DVR devices – without which Choice is effectively prohibited from offering new HD and DVR services.

Thus, the *Consolidated Order* does not address any of Choice’s individualized circumstances, at all. Such individualized consideration is required by law. As the D.C. Circuit explained in *WAIT Radio v. FCC*:

The Commission is charged with administration in the “public interest.” That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to seek out the “public interest” in particular, individualized cases.³⁷

Therefore, the Bureau clearly committed prejudicial procedural error in (apparently) failing to grant an important part of Choice’s requested relief without considering and explaining the reasons for rejecting well-pled arguments supported by detailed evidence. The Bureau’s failure to address Choice’s arguments is particularly remarkable given that on the same day it granted a waiver to Guam Cablevision, holding that: “In light of GCL’s unique circumstances stemming from delivering cable service in a typhoon-prone, *underdeveloped market far from the contiguous 48 states*, we conclude that good cause exists for a limited waiver until December 31, 2009, and that such a waiver will serve the public interest in this specific instance.”³⁸

³⁶ *Comcast Order* at ¶ 19.

³⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³⁸ *Guam Cablevision, LLC Request for Waiver*, CSR-7193-Z, Memorandum Opinion and Order, DA 07-2917, ¶ 13 (rel. June 29, 2007) (emphasis added). Puerto Rico is also in a hurricane-prone region. See U.S. National Oceanic and Atmospheric Administration, <http://www.srh.noaa.gov/sju/hrcnhist.html> (listing more than 120 hurricanes and tropical storms that have passed over or near Puerto Rico and the Virgin Islands). Although Guam Cablevision did not request a waiver for HD or DVR devices, and therefore did not receive one, the record does not indicate that it has ordered any CableCARD HD/DVRs, and the Bureau did not hold that it would deny such a request.

Moreover, the Bureau’s general conclusion in support of imposing the ban on HD and DVR devices – that “the costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market”³⁹ – may be true nationally, but the uncontroverted record of evidence in this case shows that it is not true in Choice’s service area in Puerto Rico for the reasonably foreseeable future. The record includes no commitments of any kind by a consumer electronics manufacturer to immediately offer a retail HD/DVR device in Puerto Rico as a result of the integration ban, a rule that has now taken effect with no such entry by TiVo or others. Moreover, the record includes no commitments of any kind by any consumer electronics manufacturer to soon offer any type of retail CableCARD device that is generally suited to the demographics of the rural Puerto Rican market, which they have so far almost entirely ignored. And even if the CE industry suddenly offered all of the navigation choice options that they now offer in the continental United States in Puerto Rico, the Puerto Rico Telecommunications Regulatory Board explained that Puerto Rican cable consumers “on average have lower incomes and [are therefore] less likely to purchase a high-end set-top than consumers in the mainland United States.”⁴⁰

On this record, it would be unreasonable to justify denial of Choice’s waiver on a theory that the ban itself will lead to new low-cost navigation devices at retail that will help consumers. Even if this theory has merit with respect to the continental United States, it could and should be tested first only there, and not in rural Puerto Rico where its intervening impact is only to completely shut down Choice’s offering of HD and DVR

³⁹ *Consolidated Order* at fn. 247.

⁴⁰ CSR-7124-Z, Comments of the Telecomm. Regulatory Board of Puerto Rico at 2 (Mar. 19, 2007).

services. As the Puerto Rico Telecommunications Regulatory Board explained:

The Board understands that some proponents of the integration ban contend that the integration ban will help to create both a supply of and demand for competitive, low-cost navigation devices that could benefit lower-income consumers. But that experiment can and should first be played out in the mainland United States, where consumers are better able to afford the costs of the ban. *If* application of the integration ban in the mainland eventually proves to have stimulated the development and adoption of retail navigation devices, and *if* consumer electronics companies begin to sell more CableCARD-ready devices that are suitable for and available in the Puerto Rican market, and *if* [a Puerto Rican operator] fails to provide adequate support for such devices, the Commission could revisit whether to apply the rule [in Puerto Rico]. A waiver for consumers in Puerto Rico will not undermine the potential success of the integration ban in the mainland any more so than will its non-application in other parts of the Caribbean. By contrast, denial of the waiver would unnecessarily saddle Puerto Rican consumers with significant costs that many cannot afford to bear, pushing digital services out of reach for many.⁴¹

Therefore, to the extent that any party argues that the Bureau answered Choice's Puerto Rico-specific arguments with its footnote that "the costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market," such a conclusion by the Bureau would be an erroneous finding as to an important or material fact, contrary to the record evidence of the market and demographics of rural Puerto Rico.

Whatever the Bureau's ultimate view would be of Choice's arguments had it addressed them, Choice's Request for Waiver presents an important question of public policy that has never been addressed by the Commission. Both the MVPD and navigation device markets in rural Puerto Rico are entirely different from the continental United States, and the Commission has never publicly considered whether the ban makes any sense for Puerto Rican consumers in light of these differences. As Liberty

⁴¹ *Id.* at 3-4.

Cablevision of Puerto Rico explained:

There is no evidence in the record that the Commission has considered and determined that the integration ban would produce the same consumer benefits in rural Puerto Rico as in the continental United States. In fact, the Commission's regulations reveal that the Puerto Rican market was not considered to be a relevant part of the Commission's analysis in its prior orders. Section 76.1204(a)(2) of the Commission's rules exempt from the integration ban (in Puerto Rico and otherwise) any MVPD that supports the active use by subscribers of navigation devices that "operate throughout the *continental United States*" 47 C.F.R. § 76.1204(a)(2). In the prior proceedings in which the Commission considered the integration ban, Puerto Rico simply was not even on the Commission's map."⁴²

Likewise, the Honorable Luis Fortuño, the Member of Congress from Puerto Rico, explained that the integration ban "appears to have been designed primarily with the markets in the continental United States in mind," and that the "communications market and the economy in Puerto Rico are very different from the continental United States, and deserve individual consideration with respect to a significant rule such as the integration ban."⁴³

The Commission is required to "take a 'hard look' at meritorious applications for waiver,"⁴⁴ and waive a generally-beneficial regulation in individualized circumstances where application of the rule would result in costs to the public that would outweigh its incremental benefits.⁴⁵ Under those standards, the Commission has frequently granted

⁴² See Liberty Cablevision Request for Waiver at 7-8.

⁴³ CS Docket 97-80, Letter from Hon. Luis Fortuño, Member of Congress from Puerto Rico, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, March 15, 2007

⁴⁴ *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192 (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, *id.* at 1192, 1195). See also *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.").

⁴⁵ See 47 C.F.R. § 76.7(i) ("The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request"); see also

waivers and other forms of individualized treatment to operators in Puerto Rico and other insular areas in light of exceptional circumstances in these areas, such as “weak economic conditions” and the low penetration of MVPD services.⁴⁶ The record clearly shows that the same result is warranted here.

There are no winners from the Bureau’s apparent decision to deny Choice the ability to offer HD and DVR devices for the foreseeable future.⁴⁷ Choice will lose the ability to offer HD and DVR functionality that its customers would otherwise increasingly buy. HD programmers in Puerto Rico will lose because fewer consumers will have HD capability in their homes. Retailers will lose because fewer Choice customers will want to purchase HDTV televisions, even as the DTV transition approaches. And Puerto Rican consumers will lose, denied new and exciting cable HD and DVR services in the cause of a rule that can’t help them.

That there are no winners is reflected in the fact that no party opposed Choice’s waiver. This is not surprising, just as it is not surprising that no one is lobbying for the adoption of an integration ban in Jamaica: in short, it makes no sense for the ban to be implemented prematurely and unnecessarily in a low-income Caribbean market at the same instant that it became effective in the continental United States. A later

⁴⁶ 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

⁴⁶ See, e.g., *Applications for Transfer of Control WAPA-TV, San Juan, PR*, ID No. 52073, Letter Order, DA 07-500 (rel. Feb. 2, 2007) (granting exception from 47 C.F.R. § 73.3555(b) for television stations in Puerto Rico, noting “weak economic conditions” (“The gross national income per capita is only 30% of the U.S.’ average and the average wage earned by island residents is only 54% of that earned by mainland residents. Outside of San Juan, the income differential is even more dramatic”) and low MVPD penetration (“cable subscription on Puerto Rico is limited to approximately 25% of TV households and only 20% of TV households subscribe to DBS. This is substantially below the subscription rate of over 80% for multi-channel video providers in the United States.”). Choice’s penetration is 22%. Request for Waiver at 3.

⁴⁷ The only possible winners are DirecTV and DISH Networks, who continue to offer proprietary, integrated HD and DVR devices to consumers in Puerto Rico. Choice would lose an increasing number of its customers to these much larger competitors if it is unable to do the same.

implementation would not deny Puerto Ricans any of the potential long-term conjectured benefits of the rule, but denial of the waiver in the meantime will deny many Puerto Ricans access to HD and DVR services. The Commission should therefore grant Choice its requested, temporary waiver.

Respectfully Submitted,
Choice Cable T.V.

/s/ Jorge L. Bauermeister

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July 30, 2007

Certificate of Service

I, Gina Lee, hereby certify that on this 30th day of July, 2007, I placed into U.S. Mail, first class postage, a copy of the foregoing Application for Review to the following parties:

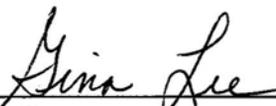
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