

BEFORE THE
Federal Communications Commission RECEIVED

WASHINGTON, D.C.

FEB 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 17 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)
)
Compatibility between Cable Systems)
and Consumer Electronics Equipment)

ET Docket No. 93-7

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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SUMMARY

While most commenters support TCI's circumspect approach for achieving compatibility, a few parties urge the Commission to impose significant burdens on cable operators and/or exempt a substantial number of TVs/VCRs from "cable ready" requirements. Such proposals overstep the Commission's statutory authority and imperil overriding congressional and Commission objectives, including the promotion of technological expansion, increased programming diversity, and enhanced consumer choice.

TCI limits its reply to the most notable of these improvident proposals in the areas of (1) cost recovery for cable-provided subscriber equipment, (2) consumer education programs, and (3) the scope of the "cable ready" requirements. Specifically, the Commission should:

- allow cable operators to recover their costs for component descramblers/decoders directly from the subscribers who use this equipment;
- reject the proposal of the New York City Department of Telecommunications and Energy to prohibit cable operators from recovering their installation costs for supplementary equipment;
- recognize that the Notice's consumer notification goals can be met most effectively without the burdensome and unnecessary requirements that cable operators list specific makes and model numbers of set-top boxes or specific compatible remotes and local retailers;
- rely on the consumer education mailings recommended in the Notice and reject the unworkable and unnecessary proposal to require cable operators to produce and carry compatibility educational programs on their systems; and
- require all consumer electronics equipment which tunes cable frequencies to comply with the commission's "cable ready" specifications.

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Tele-Communications, Inc. ("TCI") hereby files its reply comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. EQUIPMENT CHARGES

A. Virtually All Commenters Support Cable Operators' Right to Recover Costs For Component Descramblers/Decoders From the Subscribers Who Use This Equipment

Virtually all commenters addressing the issue support cable operators' right to recover the costs of component descramblers/decoders directly from those subscribers using this equipment rather than forcing all subscribers to subsidize this

¹ Implementation of Section 17 of the Cable Television Consumer Protection, Compatibility between Cable Systems and Consumer Electronics Equipment, Notice of Proposed Rulemaking, ET Docket No. 93-7, FCC 93-495 (released December 1, 1993) ("Notice").

equipment through higher regulated service rates.² These commenters, representing a broad range of interests across the cable and consumer electronics industries, advance cogent legal, economic, and public policy rationales to support direct cost recovery.

The lone dissenter on this issue, New York City Department of Telecommunications and Energy ("NYC"), proposes to disallow separate charges for component equipment because "[t]he need for and functions of this equipment are dictated by cable system security and operations. ... [and] imposing additional charges on subscribers for equipment that is needed due to the operator's independent conduct, and which the operator undertakes for its own benefit, is fundamentally unfair."³

NYC is wrong on both counts. First, as the record in this proceeding amply demonstrates, the compatibility problem is not rooted in the scrambling of cable signals, but in the disparate and unsynchronized technology cycles of the cable and consumer

² See, e.g., Cablevision Industries Comments at 11-13; Cablevision Systems Comments at 14-16; Cable-Consumer Electronics Compatibility Advisory Group Comments at 16-19 ("C3AG"); Cable Telecommunications Association Comments at 2-5 ("CATA"); Continental Cablevision Comments at 4-9; Cox Cable Communications and Newhouse Broadcasting Corporation Comments at 4-12; General Instrument Corporation Comments at 23-30; Greater Media, Inc. Comments at 9-10; Intermedia Partners Comments at 15-16; Media General Cable of Fairfax County Comments at 2-4; TCI Comments at 24-31; Time Warner Entertainment Co., L.P. Comments at 15-17 ("Time Warner"); Zenith Comments at 4 (Prohibiting direct charges for component descramblers/decoders would create a disincentive for cable operators to promote the Decoder Interface, thereby undermining Congress' and the Commission's compatibility goals).

³ NYC Comments at 12.

electronics industries that evolve at different paces.⁴ It would be wrong to penalize the cable industry for this technological disjunction by disallowing equipment charges, just as it would be wrong for the Commission to prohibit consumer electronics manufacturers from directly recovering the additional costs of Decoder Interface connectors from those consumers who purchase new "cable ready" sets.

Second, contrary to NYC's assertion, cable operators do not engage in scrambling solely for their "own benefit." Once again as the record overwhelmingly demonstrates, scrambling is the best conditional access technology for protecting the intellectual property of video programmers and for minimizing the extent to which law-abiding subscribers are forced, through higher rates, to subsidize the "free" cable service of signal pirates.⁵ In fact, NYC's proposal is especially confounding given its previous recognition of the numerous benefits of scrambling. In its 1991 report on equipment compatibility (which the Commission included

⁴ See CATA Comments on NPRM at 2; GIC Comments on NPRM at 19-20; TCI Comments on NOI at 1-2; Time Warner Comments on NOI at 56-57.

⁵ Importantly, no party commenting on the Notice suggested that "in the clear" technologies should replace scrambling. For example, the C3AG reiterated its earlier position on "in the clear" techniques, stating that "nothing in the past six months has changed our view [that] ... none of [the 'in the clear' techniques] is suitable for universal deployment." C3AG Comments at 21-22. See also Notice at ¶ 33 where the Commission acknowledges that the supplemental equipment/Decoder Interface approach, rather than the imposition of "in the clear" technologies on cable operators, is "the most practical solution for resolving the major problems of compatibility."

as Appendix I to its October 1993 Compatibility Report to Congress), NYC correctly observed:

[T]he use of converter boxes to descramble signals represents state-of-the-art technology in the cable industry. The signal scrambling and converter box technology will protect law-abiding cable consumers from the financial and operational harm inflicted by cable pirates. More specifically, cable subscribers will not experience reception difficulties caused by thieves tapping into lines to appropriate unscrambled channels and will not subsidize the unlawful reception of cable service. Moreover, reducing theft of service will assure the level of revenue properly due New York City from cable television franchise fees.⁶

Likewise, NYC concluded that

[c]onverter box technology also offers consumers the convenience of upgrading or downgrading their service options (such as HBO or Showtime) without having to wait for a technician to make a home visit. In addition, it will facilitate the ordering of pay-per-view programs for subscribers interested in that capability.⁷

Seen in this light, what would be "fundamentally unfair" would be to penalize cable operators for implementing a superior security technology that saves subscribers from "financial and operational harm" in addition to enhancing consumer choice and operator flexibility.

Accordingly, TCI reiterates its support for the C3AG's reasonable and equitable proposal to allow cable operators to apply separate monthly charges for component descramblers/decoders, but to require them to provide free

⁶ "Cable Television: Equipment Compatibility Hearing," The Department of Telecommunications and Energy, New York City, November, 1991, at 19-20 (emphasis added).

⁷ Id. at 20.

installation of the first component descrambler/decoder in each home.⁸

B. The Commission Should Reject NYC's Proposal to Prohibit Cable Operator's From Recovering Their Installation Costs for Supplementary Equipment Used to Achieve Compatibility

NYC's proposal to prohibit cable operators from charging for the installation of supplementary equipment used to achieve compatibility is similarly flawed. Once again, NYC's proposal is based on the mistaken premise that the compatibility problem is caused solely by the "operator's choice of a security system."⁹ The reality is that incompatibility between cable systems and consumer electronics equipment may result from any one of several discrete causes, and often scrambling is not even a factor. The logic of NYC's position suggests that in situations where supplementary equipment is required to compensate for technical deficiencies in non-cable-ready TVs or VCRs (such as excessive DPU leakage), or to enhance the functions of the subscriber's equipment (for example by extending the receiver's tuning capacity or offering new interactive services), the costs of such supplementary equipment should be borne by the TV/VCR manufacturer, the originator of these compatibility problems. Of course, NYC would be hardpressed to insist that the TV/VCR manufacturer should bear the cost of implementing supplementary equipment to perform these corrective/enhancement functions on

⁸ See C3AG Comments at 17-18; TCI Comments at 27.

⁹ NYC Comments at 5.

non-cable-ready receivers. The Commission should be equally wary of forcing cable operators to shoulder the installation expense of restoring compatibility through the use of supplementary equipment. Rather, the Commission should follow its long-endorsed "cost-causative" rate recovery policy and permit cable operators to recover the equipment and installation costs of compatibility-enhancing supplementary devices from those subscribers who actually request and use them.¹⁰

II. CONSUMER EDUCATION PROGRAM

A. Cable Operators Should Not Be Required to Supply Subscribers With the Makes and Model Numbers of Set-top Boxes Used in Their Cable Systems

A few commenters propose that cable operators be required periodically to supply subscribers with the makes and model numbers of set-top boxes used in their cable systems.¹¹ TCI urges the Commission to reject this proposal, since it would invite additional consumer confusion and administrative burdens with no corresponding public benefit.

While such a proposal might make sense if cable operators used only one variation of set-top box in all subscriber homes, the reality is that most MSOs utilize a broader range of set-tops from various manufacturers. In fact, even within a single cable system, operators utilize a range of set-top boxes. This is especially true in cases where a particular cable operator

¹⁰ See TCI Comments at 3-5.

¹¹ See, e.g., Cablevision Industries Comments at 2-3; C3AG Comments at 7; Continental Cablevision Comments at 16.

acquired another cable system which had deployed its own array of subscriber equipment. It is not uncommon in these situations that the cable operator may not be able to produce a complete inventory of all such set-top units in its subscribers' homes and that any comprehensive list the operator endeavored to produce would likely contain inadvertent inaccuracies and omissions. A subscriber whose home contained a set-top box that was unfortunately omitted from the cable operator's list might then purchase a third-party remote only to discover that the remote is incompatible with his/her set-top. It makes little sense to require operators to undertake considerable effort and expense to produce such lists when the inaccuracies which could result would merely increase consumer frustration and confusion.¹²

More importantly, a list of all variations of set-top boxes used by the cable operator is entirely unnecessary since all that is needed to ensure compatibility is the particular model of set-top in each subscriber's home. In this regard, TCI reiterates its suggestion that, as part of their consumer education program, cable operators should be required to: (1) advise their subscribers to identify the make and model of the set-top box connected to the subscriber's TV/VCR (which are usually prominently displayed on the set-top's housing); and (2) purchase a remote control device that is compatible with that make and

¹² Of course, in those cases where the set-top box in the subscriber home was acquired not from the cable operator but from a third-party source, any list of cable-provided set-top boxes would be wholly useless.

model of set-top.¹³ This approach imposes no burden on consumers since they already must identify the makes and model numbers of their TVs, VCRs, and set-top boxes in order to purchase compatible universal remotes.¹⁴

Finally, what has confounded consumers in the past has not been their inability to match up the make and model of their set-top box with the compatibility information provided by third-party remotes, but the fact that cable set-top boxes were often disabled from functioning with third-party remotes. Since Section 17(c)(2)(E) prohibits this practice, the "incompatibility" previously caused by this practice will be removed.

B. Virtually All Commenters Oppose the Notice's Proposal to Require Cable Operators to List Specific Compatible Remotes and Local Retailers

The commenters unanimously oppose the Notice's proposal to require a specific listing of local retail sources of remote control units.¹⁵ All but one commenter support a description of the "types," as opposed to a specific listing of the "models," of

¹³ TCI Comments at 11. Accord Time Warner Comments at 11-12.

¹⁴ See TCI Comments at 11. See also Media General Comments at 7 ("[T]here is no reason to think that consumers will not be able to find system-compatible remotes if they enter the market looking for them").

¹⁵ See, e.g., Continental Cablevision Comments at 16 (the data collection and recordkeeping to list specific local retailers would cost the cable industry over \$60 million per year merely to "provide endless sets of federally-reviewed and approved lists which are destined to be burdensome, incomplete, and largely ignored by consumers").

third-party remotes. Once again, NYC is the only party supporting a more burdensome requirement. However, NYC provides no support for its proposal; it merely asserts that such a detailed listing of remotes is "required by Section 17."¹⁶ As TCI and numerous parties demonstrated in their comments, not only is such an expansive listing not compelled by the narrow statutory directive of Section 17(c)(2)(D)(ii), but it runs counter to congressional intent and would impose substantial burdens on cable operators with little, if any, consumer benefit.¹⁷ In light of the extensive legal, economic, and policy analyses presented by these commenters, as well as NYC's wholesale lack of support for its burdensome proposal, the Commission should not require the specific listings of compatible remotes and local retailers.

Nor should the Commission require operators to provide a list of several compatible remotes and local retailers.¹⁸ Such a requirement would improvidently force cable operators to provide free promotions for certain remote manufacturers and local retailers to the detriment of the listed parties' competitors. The Commission's consumer education rules should not encourage

¹⁶ NYC Comments at 7.

¹⁷ See Cablevision Industries Comments at 2-3; Cablevision Systems Comments at 8-10; C3AG Comments at 6-7; Continental Cablevision Comments at 16; Greater Media Comments at 5-6; Intermedia Partners Comments at 12-13; Media General Cable of Fairfax County Comments at 7-8; Time Warner Comments at 7-11.

¹⁸ See Intermedia Comments at 12-13.

such favoritism by cable operators, especially when the sole result will be the skewing of efficient market outcomes.¹⁹

C. The Commission Should Not Require Cable Operators to Produce and Carry Compatibility Educational Programs on Their Systems

NYC proposes that the Commission "encourage[] or require[] [cable operators] to produce and carry compatibility education programs on their systems, to provide such programs to governmental access operators, and to refer their subscribers to such educational information through announcements in their billing statements."²⁰

TCI opposes such a requirement for several reasons. First, it is unworkable as a practical matter. Since each cable system most likely has unique configurations and requirements, such programming would have to be produced and customized at the system level at no small expense. In addition, the cable system would be forced to forego the revenues that it otherwise could have received from the use of that channel. The Commission should be extremely reluctant to impose additional carriage requirements on cable operators given the onerous obligations and restrictions already mandated by the must carry, PEG, and leased access channel set-asides, as well as the vertical ownership limits.

¹⁹ TCI would not object, however, to an approach under which EIA was responsible for compiling lists of the names and telephone numbers of remote control manufacturers and/or marketers and cable operators were responsible for distributing these lists to their subscribers. See C3AG Comments at 7.

²⁰ NYC Comments at 7.

Also, such a rule would raise serious constitutional issues. Both of the must-carry regimes previously imposed upon cable systems were invalidated under the First Amendment.²¹ Moreover, since NYC's proposed constraint on speech is overtly content-based in that the government would be requiring cable operators to engage in specified speech, such a constraint would, by definition, trigger "strict scrutiny" review. The courts have consistently struck down such content-based constraints on speech.

For example, in its recent review of several provisions of the 1992 Cable Act, the D.C. District Court invalidated on First Amendment grounds Section 25's mandatory carriage requirements on providers of direct broadcast satellite ("DBS") services.²² The court concluded that the DBS educational programming set-aside was content-based and that "to the extent it subsumes a content component at all, even under O'Brien/Ward scrutiny, the DBS provisions must fail."²³ If the DBS educational programming set-aside established by Congress was unable to pass constitutional

²¹ See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988).

²² Daniels Cablevision, Inc. v. U.S., 835 F. Supp. 1, 8 (D.D.C. 1993). As a condition to authorization or renewal of any DBS service license, the invalidated provision of Section 25 required the DBS provider to allocate four to seven percent of its transmission capacity to "noncommercial programming of an educational nature." 1992 Cable Act § 25(b)(1).

²³ Daniels, 835 F. Supp. at 8.

muster even under the less rigorous O'Brien/Ward standard, a Commission-imposed requirement to air compatibility educational programming is even more tenuous as a constitutional matter.

The consumer education mailings envisioned by the Notice represent the most cost-effective, flexible, and accurate method of informing subscribers regarding compatibility issues.²⁴ Given the effectiveness of these mailings, there is no valid regulatory purpose or legitimate governmental interest to be advanced by so conscripting additional cable channel space.

III. ALL CONSUMER ELECTRONICS EQUIPMENT WHICH TUNES CABLE FREQUENCIES SHOULD BE REQUIRED TO COMPLY WITH THE COMMISSION'S "CABLE READY" SPECIFICATIONS

The Commission should reject proposals to apply the "cable ready" requirements only to TVs/VCRs that are marketed as "cable ready" or its "substantial equivalent."²⁵ These commenters contend that unless manufacturers retain the discretion to determine which of their products meet the Commission's "cable ready standards," consumers will be ill-served. For example, Sharp contends that removal of this discretion "could result in producing unnecessary and unintended requirements for extra interface connectors, special tuners, etc., to be included in such products."²⁶ Similarly, Zenith claims that any rule which directly or effectively prohibits the manufacture of receivers

²⁴ See Notice at ¶ 15.

²⁵ See, e.g., C3AG at 9-10; NYC at 11; Sharp Comments at 4; Zenith Comments at 2.

²⁶ Sharp Comments at 4.

which tune cable channels but which are not "cable ready" would violate the "spirit" of the Act by forcing consumers to absorb extra costs for features they may not want or need.²⁷

What these commenters ignore, however, is that both the spirit and the letter of Section 17 require the Commission to assure compatibility between cable systems and "televisions and video cassette recorders," not between cable systems and those TVs/VCRs which consumer electronics manufacturers designate as "cable ready" or its equivalent. Simply avoiding the use of marketing terms such as "cable ready" cannot justify the sale of products that evade the intent of the Section 17.

Additionally, any rule which stops short of a complete ban on new TVs/VCRs that tune cable channels but which are not "cable ready" will invite serious definitional problems. When disputes arise, the Commission will be forced to determine on a case-by-case basis whether a manufacturer's marketing of a non-cable-ready product constitutes the "equivalent" of the term "cable ready," thereby triggering compliance with the Commission's "cable ready" specifications. TCI respectfully submits that compliance should not turn on such an elusive threshold inquiry.

More importantly, as TCI and other commenters have previously noted, permitting new TVs and VCRs that tune cable signals to avoid compliance with "cable ready" rules will merely

²⁷ Zenith Comments at 2-3.

increase consumer confusion and frustration.²⁸ As Intermedia correctly points out, "the only reason for providing the ability to tune the cable-exclusive channels is to allow direct connection to a cable system."²⁹ Indeed, consumers consider it only logical that if a product tunes cable channels, it should be fully compatible with cable service. Even cable subscribers who purchase sets that are not specifically marketed as "cable ready" will "feel irritated, confused, and deceived if advertised features of their sets that have nothing to do with cable reception are rendered unusable when they subscribe to cable."³⁰ The Commission should not promulgate compatibility rules which portend such undesirable consequences.

Finally, in response to manufacturers' concerns about the higher costs that such a rule would impose on purchasers of new TVs/VCRs that tune cable signals, TCI notes that subscribers would incur these and other costs eventually in the form of additional monthly rental fees and/or purchase prices of supplementary equipment required to compensate for the technical and functional deficiencies of their non-cable-ready sets.

²⁸ See, e.g., Cox Cable and Newhouse Broadcasting Comments at n. 1 ("Cox and Newhouse"); TCI Comments at 17-18.

²⁹ Intermedia Comments at 7.

³⁰ Cox and Newhouse Comments at n. 1.

CONCLUSION

Based on the foregoing, TCI respectfully urges the Commission to adopt compatibility solutions consistent with the reply comments herein and with TCI's initial comments.

Respectfully submitted,

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