

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

In the Matter of)	
)	
Petitions for Declaratory Ruling Regarding)	MB Docket No. 09-13
Public, Educational and Governmental)	
Programming)	
)	
Alliance for Community Media <i>et al.</i>)	CSR-8126
)	
City of Lansing, Michigan)	CSR-8127
)	
City of Dearborn, Michigan <i>et al.</i>)	CSR-8128
)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

Michael Olsen
Paul Jamieson
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Christopher J. Harvie
Stefanie A. Zalewski
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

March 9, 2009

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

DISCUSSION 4

**I. CABLEVISION IMPLEMENTED ITS PEG DIGITIZATION INITIATIVE IN A
LAWFUL AND SUBSCRIBER-FRIENDLY MANNER THAT ENABLED ALL
ANALOG HOUSEHOLDS TO CONTINUE TO RECEIVE PEG CHANNELS AT
NO ADDITIONAL COST..... 4**

**II. THE LEGAL ARGUMENTS PROFFERED IN OPPOSITION TO PEG
DIGITIZATION ARE WITHOUT MERIT 9**

CONCLUSION 18

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

In the Matter of)	
)	
Petitions for Declaratory Ruling Regarding)	MB Docket No. 09-13
Public, Educational and Governmental)	
Programming)	
)	
Alliance for Community Media <i>et al.</i>)	CSR-8126
)	
City of Lansing, Michigan)	CSR-8127
)	
City of Dearborn, Michigan <i>et al.</i>)	CSR-8128
)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

Pursuant to the Public Notice issued by the Federal Communications Commission (“Commission” or “FCC”),^{1/} Cablevision Systems Corp. (“Cablevision” or the “Company”) hereby submits the following comments in the above-captioned proceedings.

INTRODUCTION AND SUMMARY

To facilitate the migration to more efficient, higher-quality digital transmission, and compete more effectively with all digital video offerings from DBS and telephone companies, cable operators are reclaiming bandwidth previously used to simulcast programming in analog format. As part of this migration, Cablevision completed the migration of the public, educational and governmental (“PEG”) access channels in September and October 2008 to digital-only format throughout its service area. Over 90% of Cablevision’s customers already take a digital

^{1/} *Entities File Petitions for Declaratory Ruling Regarding Public Educational, and Governmental Programming*, Public Notice, MB Docket No. 09-13, CSR-8126, CSR-8127, CSR-8128, DA 08-2486 (rel. February 6, 2009).

service from Cablevision, so they are largely unaffected by this change. As an accommodation for the less than 10% of its customers who continue to enjoy analog-only services^{2/} (and who, as a result, may not see the PEG channels unless they have a QAM-capable television), Cablevision offered a free digital set-top box for life, so that these customers could continue watching PEG programming in their home on analog equipment without incurring any additional cost. Cablevision's successful migration of PEG channels, combined with its generous "for-life" offer of a set top box to view PEG channels, ensures *both* that every customer who wishes to view PEG can do so at no additional charge, and that its digital customers will continue to enjoy an expansion of digital services including more high-definition, interactive, and similar programming that such migrations facilitate.

Federal law permits operators to digitize PEG programming. Section 623(b)(7) requires PEG channels to be on the Basic service tier, but does not specify how that programming is to be formatted (indeed, Section 624(e) specifically prohibits franchising authorities from regulating an operator's transmission format).^{3/} PEG channels provided by Cablevision continue to be available to all Basic subscribers for a single tier charge. Further, Cablevision's PEG channels are transmitted in the clear and are viewable on all digital television sets equipped with QAM tuners, as well as via other digital reception devices such as TiVo units.

^{2/} In contrast to some of its competitors, Cablevision, as it phases out its analog services, will continue to offer a small package of analog broadcast and other programming channels to its customers. In some Cablevision systems, the transition to an all-digital expanded basic tier is already complete; in others, it continues to advance.

^{3/} The issue of whether the PEG tiering requirements of Section 623(b)(7) permit digitization of PEG channels is moot in most of Cablevision's systems due to effective competition from satellite and telephone companies offering video. Over 70% of Cablevision's franchise areas (comprising 86% of its subscribers) face "effective competition" as that term is defined in Section 623 of the Cable Act. *See infra* Section II.

It is clear that an operator may convert entirely to digital transmission consistent with the tiering requirements of the Cable Act, even if – as in the case of Verizon’s recent switch to digital – it means that customers who do not acquire a digital set top box or tuner cannot see any programming on any set. The fact that Cablevision and other operators, as a convenience for analog households, may continue for a limited period of time to provide a package of channels in analog format cannot, in this context, present a *more* troublesome issue under federal law. This is especially so in Cablevision’s case, insofar as any analog-only customers who wished to continue to view PEG have been offered (and have taken) a free digital set top box for life.^{4/}

Cable operators should be permitted to continue to transition their subscriber base to digital television technology in a seamless, cost-effective and subscriber-friendly manner. To that end, the Commission should make clear that digitizing PEG channels does not violate the Cable Act or the Commission’s rules; reiterate its prior guidance that the requirements of Section 623(b)(7) do not apply where an operator faces effective competition; and affirm that franchising authorities lack the authority to condition or restrict an operator’s digitization of its PEG offerings.

^{4/} The fact that some Basic tier subscribers may need to obtain additional equipment to view some channels included on that tier has never been held to violate the tiering requirements, or viewed as a change in the composition of that tier. In the early 1990s, some subscribers lacked television sets that were fully cable-ready and therefore could not view some channels included on the Basic tier without a cable box or other consumer equipment such as a VCR. Analog-only customers also cannot watch digital broadcast signals, such as multicast signals, carried on Basic without a converter. Neither of these common-place circumstances was ever held to constitute a removal of services from a tier or otherwise violate the Commission’s rules.

DISCUSSION

I. CABLEVISION IMPLEMENTED ITS PEG DIGITIZATION INITIATIVE IN A LAWFUL AND SUBSCRIBER-FRIENDLY MANNER THAT ENABLED ALL ANALOG HOUSEHOLDS TO CONTINUE TO RECEIVE PEG CHANNELS AT NO ADDITIONAL COST

Nearly seven months ago, Cablevision informed its local franchise officials and all affected subscribers that, beginning September 16, 2008, the Company would transmit PEG channels in digital format to all subscribers of the Basic service tier, the lowest-priced tier of service offered on its system. This decision arose from several circumstances in the cable television marketplace. First, it reflected Cablevision's uniquely high and steadily growing digital penetration -- approximately 90% of Cablevision's customers currently subscribe to the Company's digital television offerings, the highest digital penetration of any operator in the country. Second, by freeing-up additional bandwidth, it enabled the Company to compete effectively in today's video marketplace by providing the additional HD and on-demand video services demanded by the vast majority of its customers.^{5/} Third, it reflected the ongoing nationwide migration to digital television technology.^{6/}

Because of the Company's high digital penetration, nearly all of Cablevision households continued to be able to view PEG channels following their digitization. Nonetheless, although under no legal obligation to do so, Cablevision took special steps to make the transition as

^{5/} Cf. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, ¶ 3 (2004) (observing that "[d]igital technology furthers the ability of cable operators to offer more service options"); *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 115 (2003) (noting that "digital technology expanded the channel capacity of the [cable] networks, enabling cable operators to provide vastly more channels of video programming").

^{6/} See *City of St. Petersburg Florida v. Bright House Networks, LLC*, Case Nos. 8:07-cv-02105-T-24-MSS, 8:07-cv-02106-T-23-TBM., 2008 WL 5231861, at 5 (M.D. Fla. 2008) (stating that the "court notes that [the cable operator's] realignment of the PEG channels is an inevitable step in the transition from video signals delivered in analog form to ones delivered in digital form").

seamless as possible for the small fraction of households it serves that remain completely dependent on analog television equipment.

Specifically, the Company provided written notice of the PEG digitization initiative to all customers and provided a separate notice to all affected analog subscribers, informing them of an opportunity to continue to view PEG channels without additional cost. Analog-only customers could receive a free digital set-top box at no charge for as long as they continued to remain at their current address and service level simply by placing a call to the telephone number provided in the notice.^{7/} Cablevision voluntarily extended that offer until December 31, 2008, so that any eligible household that did not take advantage of the offer when it was first extended, was afforded an additional opportunity to do so. As a result of the extension, analog-only customers had nearly *five months* from the date of the original notice to take advantage of the opportunity.

It is beyond dispute that operators are permitted to transmit Basic service channels -- including PEG channels -- in digital form. The Commission itself has encouraged cable operators to transition to "all-digital" networks,^{8/} and for the past eight years it has permitted cable operators to include digital versions of local broadcast signals -- which must be carried on the Basic service tier -- in their service packages.^{9/} By digitizing its PEG channels, Cablevision

^{7/} Customers could also obtain free installation of the digital set top box.

^{8/} See, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803, ¶ 18 (2007) (the FCC is "cognizant that the ultimate goal of Congress is that every customer should enjoy the benefits of the digital transition. That is, our policies should advance the goal of transitioning all consumers--including cable consumers--to digital"); *Millennium Telcom, LLC d/b/a OneSource Communications Request for Waiver Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, 22 FCC Rcd 8567, ¶ 10 (2007) (cable operator's "transition to an all-digital network . . . would produce clear, nonspeculative public interest benefits, particularly when considered in the context of the Commission's goal of promoting the broadcast television digital transition").

^{9/} See *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 7 (2001) ("*2001 DTV Carriage Order*"); *Carriage of*

merely placed itself on the same footing as its principal wireline competitors, AT&T and Verizon, neither of which offer PEG channels in analog. Verizon and AT&T both include PEG services in their lowest price service package and subscribers to both companies need a converter box or some other form of digital reception equipment in order to view those channels.^{10/}

Thus, the core issue raised by the Dearborn Petition is not whether PEG channels can be digitized -- they clearly can be. Instead, the fundamental issue is whether Federal law authorizes local franchising authorities ("LFAs") to condition or restrict the circumstances under which a cable operator may digitize PEG channels carried on the Basic service tier. The answer to that core question is clearly no.

Section 623(b)(7)(A) of the Cable Act specifies that the Basic service tier must include "any public, educational and governmental [PEG] access programming required by the franchise of the cable system to be provided to subscribers."^{11/} Cablevision complies with this requirement by including its PEG channels on the Basic service tier ("BST" or "Basic tier"), which is the lowest level of service offered by the Company.

Nothing in Federal law dictates the format of that programming -- channels on the BST may be carried in analog format, digital format, or both. To the contrary, Federal law expressly precludes State and local governments from conditioning or restricting a cable operator's

Digital Television Broadcast Signals, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, ¶¶ 23-25 (2005).

^{10/} See, e.g., *Verizon To Start Shutting Down FiOS TV Analog Channels*, MULTICHANNEL NEWS (Apr. 7, 2008) (noting that Verizon "will phase out all the local analog channels offered on FiOS TV on a regional basis, starting in New York on April 21" and that "for FiOS TV customers, the only apparent difference will be that they're required to have a set-top box or digital converter for every TV set in the house").

^{11/} 47 U.S.C. § 543(b)(7)(A).

decision to transmit channels in digital format.^{12/} Cablevision's sole obligation is to carry the PEG channels on its BST, and there is no basis for concluding that Cablevision's transmission of PEG channels solely in digital format violates that requirement. Two Federal judges that have examined this issue have found that Federal law does not preclude cable operators from offering digital channels on the Basic tier.^{13/}

As reflected by its channel line-up and marketing materials, Cablevision's BST is composed of both digital and analog channels, and all such channels are transmitted to every Basic service subscriber for a single tier price. Section 623(b)(7)(A) of the Cable Act does not require anything more. The digitized PEG channels are part of the Basic tier and can be viewed by any Basic subscriber at no additional charge for that tier. Further, subscribers with newer digital television sets equipped with a QAM tuner (the vast majority of digital television sets on the market today contain such a tuner) or other equipment capable of receiving digital television signals (*e.g.*, a TiVo box) are able to watch all channels carried on the Basic tier -- both digital and analog -- without obtaining a converter box. Subscribers with analog television sets, however, need a converter box to watch the digital channels carried on the Basic tier.

That some subscribers need additional equipment -- such as a converter box or digital TV with a QAM tuner -- to view some or all channels in the BST does not, as a legal matter, change the composition of that tier or otherwise imply that such signals are not carried on the Basic service tier. The impact of Cablevision's digitization of PEG channels is similar to circumstances prevalent in the late 1980s and early 1990s when "cable-ready" television sets

^{12/} 47 U.S.C. § 544(e) ("No state or franchising may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology").

^{13/} See *City of Dearborn v. Comcast of Michigan*, 558 F.Supp.2d 750, 756 (E.D. Mich. 2008) (finding that "[n]othing in the statute or legislative history prohibits a cable provider from including both digital and analog channels on the basic service tier, or from providing PEGs in one format and broadcast channels in a different format."); see also *City of St. Petersburg v. Bright House*, 2008 WL 5231861, at 3.

began to come onto the market. At the time the 1992 Cable Act was enacted, over 40% of all television sets in American households were not fully “cable-ready” and therefore could not display all cable-provided channels carried on the Basic service tier without a converter box.^{14/} These customers needed to rent set top boxes to see the full package of Basic channels, but viewers with “cable-ready” televisions did not.^{15/} The channels on the increment -- that is, those viewable only with cable ready televisions -- were never considered to have been removed from the Basic service tier.^{16/} Thus, no cable operator was considered to be in violation of Section 623(b)(7)(A) simply because some Basic tier channels were carried on cable channels to which some subscriber sets could not tune without a converter box or another consumer product such as a VCR.

More recently, at the outset of the transition to digital broadcast television, the FCC noted that all channels carried in fulfillment of the requirements of Section 623(b)(7)(A) must be “available to all cable subscribers at the lowest priced tier of service, as Congress envisioned.”^{17/} Since that time, cable operators have been providing both analog and digital broadcast signals (including some broadcast signals transmitted *only* in a digital format) on the Basic tier to their subscribers. While analog-only subscribers have not been able to watch the digital signals carried on the Basic tier, that circumstance has not been deemed to remove those channels from

^{14/} See S. REP. NO. 102-92, at 44 (1991) (“The first twelve channels (2-13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not viewable on cable-connected sets that are not ‘cable ready’”).

^{15/} *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 5631, ¶ 275, n.641 (1993) (“*Rate Regulation First Report and Order*”) (noting that “[c]onverter boxes . . . act as an extended tuner for subscribers that do not have a cable-ready television”).

^{16/} See *infra* at nn.34-35.

^{17/} *2001 DTV Carriage Order* ¶ 102.

the Basic tier or otherwise violate Section 623(b)(7)(A), even as the Commission reiterated the obligation of cable operators to carry simulcasted digital broadcast signals on the BST.^{18/}

II. THE LEGAL ARGUMENTS PROFFERED IN OPPOSITION TO PEG DIGITIZATION ARE WITHOUT MERIT

The Petition giving rise to this proceeding argues that digitization of PEG channels by cable operators is prohibited by the federal Cable Act or may be restricted by local franchising authorities. These arguments are without legal merit for the following reasons.^{19/}

First, the Cable Act makes clear that the PEG tiering requirements of Section 623(b)(7)(A) apply only in cable franchise areas subject to effective competition. Both the courts and the Commission have ruled that the obligations delineated in Section 623(b)(7) of the Cable Act are not operative where a cable operator faces effective competition.^{20/} The Commission based this conclusion upon its view that “Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area.”^{21/} Thus, the Commission already has determined that the BST carriage requirements of Section

^{18/} See FEDERAL COMMUNICATIONS COMMISSION, *Report on the Packaging and Sale of Video Programming Services to the Public*, at 17 (Nov. 18, 2004) (“*FCC Report on Packaging and Sale of Video Programming*”) (“It has been the Commission’s view that the Act contemplates a single basic service tier. When analyzing the basic service tier requirement in the context of a cable operator’s digital broadcast signal carriage obligations, the Commission held that it is consistent with the statutory language to require that a broadcaster’s digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service”).

^{19/} In November 2008, U.S. District Judge Victoria A. Roberts from the Eastern District of Michigan, after noting the FCC’s “special competency” in this particular area of Federal law, referred seven issues implicated by PEG digitization to the Commission for resolution. *City of Dearborn v. Comcast of Michigan*, No. 08-10156 (E.D. Mich.) (Nov. 26, 2008). These questions were included in the Petition filed in this proceeding by the City of Dearborn, and this section reflects Cablevision’s response to each of the referred questions.

^{20/} See *Time Warner v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995) (stating that Section 623(b)(7) “applies only to regulated systems” and “cannot apply to systems that face effective competition”); *2001 DTV Carriage Order* ¶¶ 101-02 (noting that Section 623(b)(7) of the Cable Act is “one of the Act’s rate regulation provisions”).

^{21/} *2001 DTV Carriage Order* ¶ 102.

623(b)(7) only apply in franchise areas where cable operators are subject to rate regulation.^{22/}

Indeed, this is the only tenable construction of the statute, since application of the PEG tiering requirement of Section 623(b)(7) to systems subject to effective competition would conflict directly with Section 625(d) of the Cable Act.^{23/}

A Federal court in Florida recently affirmed that, in any franchise area subject to effective competition, the Cable Act bars a local government from restricting or prohibiting a cable operator from digitizing PEG channels.^{24/} The court ruled that “under the plain terms of the statute,” the Federal requirement to place PEG channels on the Basic tier of service does not apply where a cable operator faces effective competition.^{25/}

Second, even in franchise areas where PEG tiering requirements do apply, there is no basis for concluding that the mere digitization of PEG channels constitutes a removal of those channels from the Basic service tier in violation of Section 623(b)(7). The fundamental criteria for determining whether a channel is included in the BST are whether it is available to

^{22/} See *id*; see also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation Uniform Rate-Setting Methodology*, Notice of Proposed Rulemaking, 11 FCC Rcd 3791, ¶ 3 (1995) (“Every cable operator *subject to rate regulation* must offer a BST that includes all local broadcast stations that the operator carries on its system, plus all [PEG] access channels required by the operator’s franchise agreement with its local franchising authority. . . . Subscribers to a *rate-regulated cable system* must purchase the BST in order to have access to any other tier of service.”) (emphasis added); *Altrio Communications, Inc. v. Adelpia Communications Corp., Complaint Regarding Rate Uniformity and Predatory Pricing*, 17 FCC Rcd 22955, ¶ 6 n.22 (2002) (noting that “all rate regulation-related rules . . . cease to apply” when deregulation takes effect); *Coxcom, Inc.*, 14 FCC Rcd 7134, ¶ 24 (1999).

^{23/} 47 U.S.C. § 545(d) (“[a] cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623”). See, e.g., *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 100-01 (1992) (indicating that courts should avoid interpreting the text of a provision inconsistently with the necessary assumptions of another statutory provision); *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996).

^{24/} See *City of St. Petersburg v. Bright House*, 2008 WL 5231861, at 5.

^{25/} *Id.*

subscribers who pay the BST package price and whether it is identified in the operator's rate card, channel lineup and marketing materials as being part of Basic service. A channel is part of the Basic service tier if it is made available to a subscriber as part of the price for that tier.

The fact that some subscribers may need to obtain additional equipment in order to view some channels on the BST, has never been held to demonstrate that those channels are not actually carried on that tier.^{26/} To the contrary, the Cable Act specifically contemplates that there may be circumstances in which broadcast signals carried on the Basic service tier cannot be viewed without a converter.^{27/} Further, in the rate regulation context, the Commission specifically ruled that even though some channels carried as part of an operator's Basic tier could not be viewed without a converter box, those channels should nonetheless be included in that operator's BST "channel count" for purposes of calculating its maximum-permitted rate.^{28/}

There is no basis for classifying as a "separate tier" of service channels included as part of a tier that may require additional equipment in order to be viewed by subscribers purchasing that level of service.^{29/} Under Federal law, a tier of service denotes a package or bundle of

^{26/} See *supra* at pp. 7-8.

^{27/} 47 U.S.C. § 534(b)(7) (specifying cable operator's obligations in circumstances in which broadcast stations "carried on the cable system" cannot be viewed without a converter); see also *WLTG-TV, Inc. v. Cablevision Systems Corporation; Request for Carriage*, 74 RR2d 208 (1993) ("cable operators are not required to provide converter boxes to their subscribers, or to provide all cable connections for their subscribers, but they must notify all their subscribers of the broadcast stations they cannot receive without a converter box").

^{28/} *TCI of Southeast Mississippi*, 10 FCC Rcd 8728, ¶¶ 11-12, 15 (1995) (rejecting LFA's attempt to reduce operator's per-channel rate for Basic service by excluding C-SPAN and C-SPAN II due to fact that those channels were not available to BST subscribers without the use of a converter). Likewise, the Commission rejected a suggestion that an operator's channel count for must-carry purposes "should include only channels that can be delivered without additional equipment and expense." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, ¶ 13 (1993).

^{29/} There is no statutory support for a reading of the Cable Act which effectively holds that a channel can be deemed to be part of the Basic service tier if all subscribers own television sets with QAM tuners or digital cable boxes, but that such channel is not part of that tier if a handful of subscribers lack such

programming channels offered by a cable operator to subscribers for a single rate.^{30/} No channel included as part of a Cablevision's Basic service tier -- including channels that require some form of digital reception equipment -- is offered to subscribers separate and apart from the BST package. Accordingly, there is no basis for categorizing such channels as a "separate tier."^{31/} Indeed, if it were the case that digital and analog channels carried on the Basic service tier actually constituted two separate tiers, then the Commission's endorsement of voluntary efforts by cable operators to carry digital versions of local broadcast signals during the digital transition would have been sanctioning an ongoing violation of the "single Basic service tier" requirement set forth in the Act and the Commission's rules.^{32/} Further, in many local communities cable operators may be obligated to provide only one PEG channel by their franchise agreement. If a single digitized PEG channel could be regarded as a separate tier, it would violate the Commission's express rejection of the position that a single channel can be considered to be a tier.^{33/}

Third, digitizing PEG channels while continuing to provide some Basic channels in analog does not constitute a prohibited evasion in violation of Section 623(h). More than 15 years ago, the Commission defined a "prohibited evasion as any practice or action which avoids

equipment. A cable channel's tier status is not variable and that the composition of a tier cannot be deemed to be determined by the equipment subscribers choose to own.

^{30/} See, e.g., 47 U.S.C. § 522(17); *FCC Report on Packaging and Sale of Video Programming*, at 18 (stating that "[t]iering involves the bundling (packaging) and sale of channels of programming for separate or incremental charges.").

^{31/} See 47 U.S.C. § 522(17) (defining service tier as "a category of cable service or other services provided by a cable operator and for which a separate rate is charged").

^{32/} See *supra* at pp. 8-9; see also *Rate Regulation First Report and Order* ¶ 170 ("the operator may not place the required basic tier services in one tier and also include them in another expanded tier, since this would thwart Congress' intent that there be a single basic tier").

^{33/} *Rate Regulation First Report and Order* ¶ 165, n.435 (noting that the "New York State Commission on Cable Television argues that one channel can be a 'tier.' . . . We disagree").

the rate regulation provisions of the Act or our rules contrary to the intent of the Act or its underlying policies.”^{34/} Cable operators are digitizing PEG channels in response to consumer demand and competitive circumstances, and not because of anything related to the avoidance or impact of rate regulation. Where digitized PEG channels continued to be made available to all subscribers as part of the price for the Basic service tier, and no subscriber is required to lease a digital box in order to receive the PEG channels,^{35/} there is no basis for concluding that there is *any* rate impact -- let alone evasive conduct -- associated with digitizing PEG channels. This is particularly true where, as with Cablevision, all affected analog households were offered a free converter box. These circumstances do not constitute the sort of rate-related “attempt[s] to elude scrutiny” designed to be captured by the anti-evasion provision of Section 623(h).^{36/}

Rate regulation of the Basic service tier is conducted by local franchising authorities at the State or municipal level. The Commission expressly directed that that “specific instances of evasive behavior” should be addressed “in rate regulation proceedings.”^{37/} Nothing in Section 623, or the Commission’s rate regulation rules, authorizes a State or LFA to dictate the format in which any particular BST channel must be transmitted to subscribers. To the contrary, allowing local governments to restrict digitization of PEG channels would squarely contravene the prohibition against local regulation of cable service transmission formats included in Section

^{34/} *Rate Regulation First Report and Order* ¶ 451 (emphasis added).

^{35/} On Cablevision’s systems, no subscriber is “required” to lease any digital equipment from Cablevision in order to view channels carried on the BST. Any subscriber with a digital television set equipped with a QAM tuner or other devices capable of receiving digital television signals, such as a TiVo box can view all channels provided on Basic for no additional charge other than the BST package price.

^{36/} *Rate Regulation First Report and Order* ¶ 451.

^{37/} *Id.* ¶ 452.

624(e) of the Cable Act.^{38/} The Commission has stated expressly that the effect of Section 624(e) is that “local authorities may not control whether a cable operator uses digital or analog transmissions.”^{39/} As a matter of logic and statutory construction, Congress could not have intended to allow States and LFA to condition or restrict an operator’s digitization of PEG channels pursuant to their rate regulation authority under Section 623, when Section 624(e) expressly bars them from taking such steps.^{40/}

Fourth, there is no basis in Federal law for restricting the ability of cable operators to charge for converter boxes used by subscribers to view digital channels -- including PEG channels -- carried on the Basic service tier. A Federal court that recently examined many of the issues raised by the Dearborn Petition concluded that Federal law “does not prohibit [a cable operator] from *placing PEG programming in a digital format and charging subscribers to rent digital-to-analog converter boxes.*”^{41/}

Section 623 of the Cable Act expressly contemplates that converter boxes may be used by Basic service tier subscribers, and that operators may charge for those boxes. The Act subjects “equipment used by subscribers to receive the Basic service tier, *including a converter box,*” to

^{38/} 47 U.S.C. § 544(e). The House Report accompanying Committee enactment of the provision states that: “The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today’s intensely dynamic technological environment.” H.R. REP. NO. 104-204, at 110 (1995).

^{39/} See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 7609, ¶ 12 (2002).

^{40/} See, e.g., *Willet v. Appeal of National Capital Management*, 544 F.3d 787, 792 (7th Cir. 2008) (stating that “[c]ourts are obliged to read statutory provisions at issue in such a way as to avoid a conflict between them if such a construction is possible and reasonable”); *Washington Post v. Washington Baltimore Newspaper Guild, Local 35*, 787 F.2d 604, 606-07 (D.C. Cir. 1986)(noting the preference for statutory interpretation that “avoids a conflict in statutory provisions”).

^{41/} *City of St. Petersburg v. Bright House*, at 5 (emphasis added).

rate regulation.^{42/} While recognizing that Basic tier subscribers would be using converter boxes, the Act clearly distinguishes between rates charged for the Basic service tier and rates for converter boxes.^{43/} The FCC's rules expressly direct cable operators to "establish rates for . . . converter boxes . . . separate from rates for Basic tier service."^{44/} Thus, the structure of the Cable Act clearly separates a charge for the Basic service tier from a charge for equipment used to receive that tier, *compare* 47 C.F.R. § 76.922 with 47 C.F.R. § 76.923, and just as clearly grants operators an unconditional right to charge for the lease of such boxes, so long as the lease rate is computed in accordance with the Commission's rate formula.^{45/}

While the Commission has long been aware that there may be instances in which some cable subscribers may require a converter box in order to view certain channels on a tier,^{46/} it has never suggested that this circumstance restricts an operator from charging for the equipment used to receive those otherwise unavailable channels. To the contrary, in addressing the circumstance in which some broadcast stations may not be able to be viewed without a converter box, Congress expressly directed that cable operators "offer to sell or lease such a converter box . . . at rates" that accord with the Commission's rate rules.^{47/} Further, in its "dual carriage" Order adopted just two years ago, the Commission noted that operators implementing all-digital

^{42/} 47 U.S.C. § 543(b)(3)(A) (emphasis added).

^{43/} *Compare* 47 U.S.C. § 543(b)(2) with 47 U.S.C. § 543(b)(3).

^{44/} 47 C.F.R. § 923(b); *Jones Communication, Inc. of Georgia/South Carolina*, 19 FCC Rcd 14814, ¶ 4 (2004) (stating that a "cable operator's rates for remote control units, converter boxes, other customer equipment, installations, and additional connections are separate from its rates for BST programming.").

^{45/} *2001 DTV Carriage Order* ¶ 111 (noting that "regulated cable systems may charge subscribers for customer premises equipment, such as the set-top box, that may likely be necessary for digital subscribers. In communities where there has not been a finding of effective competition, these equipment rates are subject to regulation. Our rules permit cable operators to charge subscribers for set-top boxes and other equipment provided the charges do not exceed actual costs").

^{46/} *See supra* at pp. 7-8.

^{47/} 47 U.S.C. § 534(b)(7).

systems were free to recover from their customers the costs associated with providing subscribers with any converter boxes necessary to view such channels.^{48/}

Neither the rate regulation provisions of the Cable Act, nor the Commission's implementing regulations, allow the government to prohibit a cable operator from exercising its lawful right to charge for converter boxes leased to subscribers.^{49/} Accordingly, there is no legal basis for concluding that Federal law precludes a cable operator from charging for equipment used to view PEG channels on the BST.^{50/}

Fifth, digitization of PEG channels is not discriminatory. All Basic tier subscribers pay the same tier charge, and all are afforded the opportunity to view PEG channels by purchasing the BST and acquiring some form of digital reception capability, such as a converter box or a digital TV set with a QAM tuner. The standard monthly lease rate for a digital converter provided by Cablevision is the same for all BST subscribers. The fact that some customers must obtain a converter box to receive PEG channels, while other subscribers with newer digital television sets need not, does not constitute rate discrimination. If that were the case, a cable operator could be subject to rate discrimination claims based on nothing more than disparities between the tuning capabilities of the television sets owned by its subscriber base.

There is no legal basis for concluding that a cable subscriber suffers discrimination simply because some channels on the Basic tier can be viewed by analog-only customers without

^{48/} See *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064, ¶ 42 n.141 (2007) (“*Viewability Order*”).

^{49/} 47 U.S.C. § 543(a) (“No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612”); see *TCI Cablevision of California*, 15 FCC Rcd 9119 ¶ 6 (2000) (Basic service tier and converter rates are reviewed “on the basis of regulations adopted by the Commission. The rules do not provide any other basis for rate decisions”).

^{50/} Of course, even if Federal law did authorize such a prohibition, it would be inapplicable to Cablevision's digitization of its PEG channels, since the Company provided every analog subscriber with the opportunity to continue to receive those channels without incurring any additional cost.

additional equipment, while others cannot. Those who advocate such an outcome effectively seek an unwarranted expansion of the must-carry viewability requirement to include PEG channels.^{51/} While the Commission has construed the viewability requirement of Section 614(b)(7) to require that, for the next three years, cable operators continuing to provide analog services need also furnish an analog version of must-carry broadcast signals,^{52/} that provision by its terms does not encompass PEG channels. The decision by Congress to designate only a limited subset of channels carried on the Basic service tier as being subject to the viewability requirement, precludes an interpretation of the statute that would apply the protections of that provision to a class of channels not so designated.^{53/} Accordingly, the Cable Act proscribes any government attempt to compel cable operators that continue for the time being to offer analog services to also offer analog versions of PEG channels.^{54/}

The Commission has recognized that, under the policy framework established by Congress, “cable operators are transitioning to digital on a voluntary basis.”^{55/} Thus, while the

^{51/} 47 U.S.C. § 534(b)(7).

^{52/} See *Viewability Order* ¶¶ 15-16.

^{53/} See *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (noting presumption “that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions”); *Independent Ins. Agents of America, Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000); SUTHERLAND STAT. CONST. § 47.23.

^{54/} 47 U.S.C. § 544(f) (“Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter”). As detailed in the Comments of the National Cable and Telecommunications Association (NCTA), which Cablevision hereby incorporates by reference, precluding cable operators’ from digitizing PEG channels or conditioning such a measure on the provision of analog PEG simulcasts, would be unsustainable under the First Amendment. See NCTA Comments, MB Docket No. 09-13, Section IV (filed March 9, 2009). The speech burdens associated with such restrictions would be particularly difficult to justify under the facts of Cablevision’s PEG digitization, which affected access to PEG for only 10% of the Company’s households, and all of those households were offered a free converter box which would enable them to continue to view the PEG channels at no additional cost.

^{55/} *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission’s Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, ¶ 9 (1998).

Commission has adopted policies that encourage cable operators to establish “all-digital” cable systems,^{56/} there are no Federal rules specifying the timing and manner in which cable operators effectuate their subscribers’ transition to digital technology. Cable operators are free to eliminate all analog services on their systems and implement an all-digital network at any time based upon their business judgment -- as Verizon has done -- or they can move gradually to phase-out analog offerings, as Cablevision is doing. As a convenience to households that presently remain dependent upon analog television, Cablevision is for the time being continuing to offer a limited (and steadily decreasing) number of analog channels to its subscribers. The continued temporary provision of a handful of analog channels does not affect or determine the lawfulness of Cablevision’s decision to digitize PEG channels -- particularly in a circumstance in which cable operators are being encouraged to transition their subscribers to an all-digital network. Any interpretation of Federal law that would tie the permissibility of cable operators’ digitization of PEG channels to the continued availability -- or lack thereof -- would likely only accelerate operators’ timetables for complete elimination of analog offerings. The likely result would be to engender far more confusion and disruption among analog households than has arisen as a result of the digitization of PEG channels.

CONCLUSION

For the foregoing reasons, the Commission should make clear that digitizing PEG channels does not violate the Cable Act or the Commission’s rules; reiterate its prior guidance that the requirements of Section 623(b)(7) do not apply where an operator faces effective

^{56/} See, *supra* at n.8; see also *Bend Cable Communications, LLC d/b/a Bend Broadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 22 FCC Rcd 209, ¶ 24 (2007) (waiving the application of the FCC rule banning converter boxes with integrated security for cable operator committing to implementation of an all-digital network).

competition; and affirm that franchising authorities lack the authority to condition or restrict an operator's digitization of its PEG offerings.

Respectfully submitted,

Michael Olsen
Paul Jamieson
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

/s/ Christopher J. Harvie
Christopher J. Harvie
Stefanie A. Zalewski
Mintz, Levin, Cohn, Ferris, Glosky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

March 9, 2009

Certificate of Service

I, Stefanie A. Zalewski, hereby certify that on this 9th day of March 2009, I caused a true and correct copy of the foregoing Comments of Cablevision Systems Corp. to be sent to the following individuals via pre-paid, first class mail.

James N. Horwood
Spiegel & McDiarmid
1333 New Hampshire Avenue, N.W.
Suite 200
Washington, D.C. 20036

Teresa S. Decker
Varnum
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352

Joseph Van Eaton
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036

/s/ Stefanie A. Zalewski