

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

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| In the Matter of                                | ) |                      |
|   | ) |                      |
| Cablevision Systems Corporation                 | ) | MB Docket No. 09-168 |
| Petition for Waiver of Section 76.630(a)        | ) |                      |
| Of the Commission’s Rules as Applied to         | ) |                      |
| Cablevision’s New York City All-Digital Systems | ) |                      |

**COMMENTS OF PUBLIC KNOWLEDGE  
AND  
MEDIA ACCESS PROJECT**

**SUMMARY**

Public Knowledge and Media Access Project (collectively “Commenters”) do not oppose the waiver request of Cablevision Systems Corporation (“Cablevision”),<sup>1</sup> subject to certain conditions to protect consumers and businesses that rely upon the current availability of an unencrypted basic tier signal. Cablevision has shown specific facts and circumstances why in the case of New York City it would serve the public interest to grant a waiver – assuming Cablevision mitigates the cost to consumers by providing free set top boxes for some period, and can guarantee that “legacy equipment” such as DVRs without CableCARD will continue to function through the use of the analog output.

While Cablevision is the first major cable system to apply for such a waiver, it certainly will not be the last. To the contrary, this petition marks only the beginning of a “cable digital conversion” that will reshape the industry. Commenters’ qualified support for Cablevision’s unique circumstances does not condone eviscerating a Commission rule by waiver and handling a critical industry transition on a piecemeal basis. It is *critical*

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<sup>1</sup> Cablevision Systems Corporation Petition for Waiver of Section 76.630(a) of the Commission’s Rules As Applied to Cablevisions’s All-Digital Systems [“Petition”].

that the Commission move expeditiously to a general rulemaking so that the broader questions raised by industry stakeholders such as Elgato Systems<sup>2</sup> are addressed in a coherent fashion and consumers do not receive differing and uneven remedies for the expense of the cable digital transition. Grant of this waiver to Cablevision must not become the template for generic “Cablevision waivers” that substitute for a rulemaking.

## **ARGUMENT**

### **I. THE COMMISSION MUST INSTITUTE A FORMAL RULEMAKING TO GOVERN THE CABLE DIGITAL CONVERSION.**

Although Cablevision provides appropriate specific details with regard to its situation in New York City, the overall situation is shared by the industry as a whole. In the coming years, the entire cable industry will move towards all digital signals. As more cable operators seek to reclaim bandwidth for broadband offerings, it is only logical that they will request permission to fully digitize their network. The Commission cannot wait to address this shift as individual waiver requests are filed market by market, company by company.

Instead, the Commission must recognize the shift occurring in the cable industry and initiate a formal rulemaking. The Commission cannot allow policy-by-waiver to become standard procedure. The Cablevision petition may be the first of its kind, but without larger Commission action it will not be the last. These requests are easy to anticipate, and would be well served by a considered, universal policy regarding the transition from analog to digital cable signals.

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<sup>2</sup> Opposition of Elgato Systems, LLC (Oct. 15, 2009).

If the Commission fails to initiate a rulemaking, it will once again find itself forced to deal with an important issue in an inefficient, piecemeal fashion. Catch-as-catch-can policymaking produces inconsistent rules that harm innovators by reducing certainty and undermining competition by destroying a level playing field. Consumers are harmed when providers are granted narrow waivers that undermine their expectations, businesses that rely on Commission rules are harmed when waivers unexpectedly destroy product markets, and the Commission's credibility is harmed when waivers make it clear that no rule is final. Only a formal rulemaking will allow the Commission to develop the type of universal, coherent policy that this issue requires.

## **II. CABLEVISION PRESENTS SPECIFIC REASONS FOR REQUESTING THIS WAIVER, BUT CONSUMERS MAY STILL BE HARMED**

Notwithstanding the urgent need to address the cable digital transition in a formal rulemaking, Cablevision's petition appears to be a reasonable request and a rational response to specific local circumstances. As noted in the petition, full encryption of the basic tier would only occur once the conversion to all-digital programming is complete in the New York City market.<sup>3</sup> The need for encryption is related to concerns specific to the New York City market such as the cost of truck rolls and problems associated with trying to coordinate site access due to the large number of multiple dwelling units in the franchise area. In addition, to the extent Cablevision seeks to expand capacity as a direct consequence of competitive pressure from FIOS, the Commission should encourage such positive pro-consumer responses to competition.

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<sup>3</sup> Petition at 1.

As Cablevision acknowledges in its Petition, the transition will force customers that still rely on unencrypted signals to add a set top box in order to view cable. The transition may also harm businesses that have relied on Commission rules in developing products and services. The Bureau should take notice of the opposition comments filed by current Cablevision customers who enjoy basic analog service.<sup>4</sup> As the Bureau is well aware, any filings by customers in a proceeding of this nature is extraordinary. That these customers find Cablevision's proposal alarming enough to draft and file comments explaining their objections demonstrates the potential for consumer harm is not minimal for those who continue to rely on an unencrypted basic tier, despite their comparatively small number as a percentage of Cablevision's total subscriber count. While Commenters do not suggest that all customers should be denied the benefit of increased bandwidth from an all digital signal, the Bureau should require Cablevision to protect these customers from what amounts to a sudden and an unanticipated rate increase from the need to rent new equipment.

Additionally, the comments of Elgato Systems, LLC provide an example of a consumer product developed to fully comply with Commission rules that will be severely crippled if the waiver is granted.<sup>5</sup> Cablevision does not address the potential impact on services such as Elgato's. Nor does it address the potential concern for "legacy equipment" that relies on the so-called "analog hole." The Bureau should require that Cablevision address these concerns, and ensure adequate protection to consumers and service providers.

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<sup>4</sup> *See, e.g.* Comments of Gerald Boehme (Oct. 6, 2009).

<sup>5</sup> *See* Opposition of Elgato Systems, LLC (Oct. 15, 2009).

Commenters do not believe that Cablevision failed to address these concerns through bad intent. To the contrary, Cablevision has made a laudable effort to provide a detailed analysis of how grant of the waiver would serve the public interest. But the failure of Cablevision to address these concerns in its application only underscores the need for a general rulemaking. Such a proceeding would allow all potentially impacted parties to air their concerns in one proceeding and allow the Commission to set governing rules based on a thorough understanding of the implications for the industry and consumers.

Commenters do not dispute the public interest benefits described by Cablevision, particularly given the unique circumstances of the New York City market. Furthermore, although Cablevision does not specifically mention the power of competition in promoting the cable digital conversion, Commenters note that New York City currently benefits from competition between Cablevision and Verizon's FiOS service. FiOS has advertised heavily, with a focus on its high-speed Internet offerings. Cablevision's attempt to increase its own bandwidth in order to compete with Verizon is the positive response to competition between cable and traditional telephone providers that the Commission should encourage. While this does not mean the New York City market is fully competitive by any means, the Commission should certainly welcome such responses and facilitate them.

### **III. THE COMMISSION MUST IMPOSE CONDITIONS ON THE WAIVER**

Although Cablevision provides adequate evidence both of public interest benefits and of the unique circumstances in New York City, the Bureau cannot grant the waiver

request without imposing conditions to adequately protect consumers. This includes both consumers who subscribe to the unencrypted basic tier and consumers who use products or services dependent on an analog or unencrypted output.

*Protect consumers from an unanticipated new cost.* Although an overwhelming percentage of Cablevision customers already use set top boxes, there remain a significant number of individuals who will require a set top box for the first time. That these customers subscribe to only the basic tier of service suggests they have limited means.<sup>6</sup> These most vulnerable consumers should not be suddenly required to pay for set top boxes merely to continue accessing the basic channel lineup. The Bureau should require Cablevision to make set top boxes available for free for these basic tier subscribers for some reasonable transition period.

*Protect Legacy Devices and Services.* While a number of Cablevision's arguments are compelling in regard to switching to an all-digital network, they present no compelling motivation for moving towards an all digital home. As Commenters have pointed out in a number of different contexts,<sup>7</sup> consumers have invested in many devices that rely on analog protocols in order to function. Additionally, the availability of analog outputs unencumbered by restrictive licensing terms drives innovation in consumer use of content in their homes. Neither Cablevision nor any other cable company should be able to use the conversion of its network to digital as an excuse to close the "analog hole."

This is especially true in the context of basic cable. It is unlikely that most current basic tier only subscribers have televisions with digital inputs. Giving them set

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<sup>6</sup> See, e.g. Comments of Paresh Parikh (Oct. 15, 2009).

<sup>7</sup> See, e.g., Public Knowledge's continued opposition to Selectable Output Control, at <http://www.publicknowledge.org/issues/soc>.

top boxes without analog outputs would amount to a requirement to purchase a new television set. By the same token, the cable digital conversion must not deprive consumers of services that rely on the presence of an unencrypted output.

*Waiver to expire after completion of a general rulemaking.* Commenters anticipate that the issues raised by Cablevision will be addressed more completely in a formal rulemaking. A formal rulemaking may impose a different set of conditions or impose different obligations on cable operators than the conditions suggested here. Because the purpose of a rulemaking would be to set appropriate rules for the industry, the Bureau should avoid any possible ambiguity that a waiver from the existing rule would automatically convey a waiver from any future industry-wide rules the Commission might adopt. Accordingly, the Bureau should make clear that any waiver granted will expire in the event the Commission modifies the existing rule.

## CONCLUSION

The Commission must recognize that Cablevision's petition is a signal that existing rules may require significant revision in order to address the looming digital cable transition. If the Bureau does grant Cablevision's petition, it must do so as a first step towards a formal rulemaking designed to develop a set of universal rules to provide stability and guarantee consumer protection during the digital cable transition.

Respectfully submitted,

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