

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**Comments of BendBroadband
in Support of Cablevision’s Request for Waiver**

Bend Cable Communications, LLC d/b/a BendBroadband (“BendBroadband”) submits these comments in support of Cablevision’s request for waiver of Section 76.630(a) of the Commission’s rules in systems where it has an all-digital network.

BendBroadband is a small, locally-run, family-owned cable operator that has served central Oregon since 1955. The company provides service to approximately 35,000 customers in its three franchised service areas in Deschutes County. This is a small market, ranked 192nd in population out of the 210 markets measured by Nielsen.¹

Although small in size, BendBroadband seeks to provide its customers with the latest and best services that can be delivered. In 1997, Bend became one of the first cable operators in the nation to deploy broadband Internet services to consumers. At the beginning of this year, BendBroadband became the first traditional cable operator in the continental United States to eliminate analog transmission and transition to a fully digital network. And later this year, it will become the first communications company in the country to deploy the fastest wireless broadband technology on the planet – the HSPA+ wireless protocol with demonstrated lab

¹ 2009 *Television & Cable Factbook*, p. A-7 (Nielsen DMA TV Households Ranking).

speeds of up to 21 mbps downstream and 5.6 mbps upstream, using AWS and 700 MHz spectrum purchased in Commission auctions. In all of these endeavors, BendBroadband seeks to deliver the services of tomorrow, today.

But a regulation from yesterday stands in the way of delivering all of the new benefits of an all-digital network to consumers. As Cablevision explained in its request, the deployment of an all-digital network enables a cable operator to offer customers “an easier and more efficient way to activate and terminate service -- without appointments, without delay” – but only if the cable operator receives a waiver from the Commission to permit it to encrypt its digital programming. As long as digital programming is sent without encryption, BendBroadband must deploy traps at the premises of customers who subscribe to broadband service without video service. The company must remove those traps when video service is activated, which requires disconnection and installation each time service is activated or deactivated. This burden costs money, delays service, and inconveniences customers.

In addition, traps are comprised of old analog technology which the company had hoped to move past with its all-digital conversion. Adding such components to the cable plant increases the risk of service failures and degradation of the customer experience. Traps also greatly reduce the cable provider’s flexibility to make changes to its spectrum management plans, channel lineups, and service offerings. Traps have to be custom made to fit the requirements of the system at a specific point in time. Each trap has to be physically replaced when the provider reallocates spectrum to accommodate, for example, channel bonding for faster internet speeds. This inflexibility will prevent an operator from being able to adapt to changing consumer preferences or deploy more efficient spectrum allocations unless all traps are replaced or removed.

The inability of Cablevision and BendBroadband to make service changes without a physical truck roll increases cost and is a competitive disadvantage because DirecTV and DISH are not subject to the same constraints. The DBS providers are permitted to, and do, encrypt all programming, and all of their customers already have set-top boxes because they are all-digital. A DBS customer service representative can make service changes in real time while on the phone with a customer, which customers no doubt appreciate. All-digital cable operators should be able to do the same.

The Commission has proclaimed that “we should regulate like services in a similar manner”² and emphasized the importance of creating a “regulatory regime that is technology and competitively neutral.”³ It has affirmed this principle specifically in the context of its Section 624A regulations. The Commission found that it should implement Section 624A in a manner that would “avoid the creation of a regulatory and marketplace imbalance between cable and DBS,” and that “[a]bsent this approach, we believe that cable operators would be at a significant competitive disadvantage....”⁴ Because the Commission allows all-digital DBS providers to encrypt all programming, it should likewise permit all-digital cable operators to do the same.

The fact the Cablevision’s transition to all-digital would require customers to obtain set-top boxes or CableCARD devices should not be considered a negative to its request for waiver. BendBroadband’s customers readily accepted this change in its own transition. Only 55% of its customers subscribed to digital service in early 2007 when BendBroadband announced its plan to

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853, 14878 ¶ 45 (2005).

³ *Id.* at 14857, ¶ 4.

⁴ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second FNPRM, 18 FCC Rcd. 20885, 20910, ¶ 57 (2003).

transition. By the fall of 2008, still several months before the transition, 97% of customers had obtained set-top boxes. By the time analog programming was turned off, more than 99.5% of subscribers were in possession of a digital set-top box or CableCARD, and the few remaining homes that did not included resort properties that may have been unoccupied at the time of the transition. Customer response was overwhelmingly positive, with few complaints about the need for a set-top box. BendBroadband's monthly surveys of its customers have shown a significant increase in overall customer satisfaction over the past year, covering the time of the elimination of analog service. New digital customers quickly found that they enjoyed the benefits of digital cable, including VOD, parental controls, enhanced programming guides, and improved pictures made possible by the set-top box, all of which made having it worthwhile.

Cablevision is already well ahead of the position that BendBroadband was in when it announced its transition, as Cablevision reports that "99% of subscribers already have a digital set-top box or cable card" in its New York City system. Unlike the mid-1990s when § 76.630(a) was adopted, consumers are now widely accustomed to set-top boxes. All subscribers of the video services provided by the satellite providers and telephone companies must have set-top boxes. The millions of over-the-air viewers with analog televisions must have the DTV-converter set-top boxes.

Indeed, the Commission has already determined that the benefits of an all-digital network outweigh any concern about the result that customers must have set-top boxes or CableCARD devices. The Bureau required BendBroadband to transition to all-digital as a condition of its partial waiver from the integration ban, upon finding that BendBroadband's transition to an all-digital network "would allow it to reclaim a considerable amount of spectrum within a clearly defined timeframe, which would enable it to provide consumers with advanced

telecommunication capabilities, thereby furthering the goals of Section 706.”⁵ BendBroadband continues to deliver on its commitment to advanced telecommunications capabilities made possible by its all-digital spectrum reclamation effort and offers 92 HD channels today and DOCSIS 3.0 internet services.

Cablevision has demonstrated that the Commission’s adoption of the encryption prohibition was premised on many customers not otherwise having a set-top box, which is not the case today in an all-digital system. The courts have held that when the premise of a rule has been shown not to apply, as is the case here, the “logic of applying [the rule] collapses” and it would be arbitrary for the Commission to deny a waiver.⁶ The Commission is also required to “take a ‘hard look’ at meritorious applications for waiver”⁷ and waive a regulation when an applicant is offering “a new service that will not undermine the policy” supported by the rule.⁸ Cablevision has clearly made this showing, and it has demonstrated that the benefits from the waiver exceed the very small incremental cost of requiring subscribers of an all-digital cable system to have set-top boxes or CableCARD devices for each television to watch basic tier, just as they would have to do if they purchased video service from cable’s satellite competitors. The Commission should therefore grant the requested waiver.

⁵ *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, CSR-7057-Z, Memorandum Opinion and Order, DA 07-47, ¶¶ 24-25 (rel. Jan. 10, 2007) (“BendBroadband Waiver Order”).*

⁶ *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192, 1195 (D.C. Cir. 1983) (vacating FCC denial of waiver request, holding that once the premise of the rule had been shown not to apply).

⁷ *Id.* at 1191-1192.

⁸ *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.”).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "PBH", written in a cursive style.

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