

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

In the Matter of

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)	

REPLY COMMENTS OF ELECTRONIC FRONTIER FOUNDATION

TO THE COMMISSION:

We oppose Cablevision's petition. As Public Knowledge and MAP make clear, this petition reflects a larger issue – the desire of the cable industry as a whole to use the digital TV transition as an opportunity to begin encrypting its digital services.

The issue of scrambling of the digital basic cable tier was briefed at some length in 2003 before the Commission in CS Docket No. 97-80 and PP Docket No. 00-67, where EFF and others urged the Commission to clarify that cable operators continue to have an obligation not to scramble the digital basic tier. Many of the observations raised by commenters in those dockets remain relevant here today. The Commission did not decide this question in 2003. But, as Public Knowledge and MAP observe, if the Commission thinks it is now time to do so, this waiver request is not the proper vehicle; Cablevision has made little assertion that its situation is somehow distinct from that of other cable MVPDs.

Cablevision's main argument now is that encrypting the basic tier will provide cost savings and reduce the incidence of unauthorized access to basic tier programming by nonsubscribers, because nonsubscribers can be more cheaply and reliably excluded from access to encrypted cable service than from unencrypted service. As Cablevision notes, the Commission has previously granted waivers on similar grounds to cable operators seeking to scramble their analog basic tier programming. But those operators appear to have made a more particularized argument that the lack of scrambling was an unusually serious burden for them. Compare Opposition of CEA at 3-4 (describing more particularized claims of previous waiver applicants). Cablevision does not make this assertion in this case. Accordingly, as Public Knowledge and MAP predict, if the Commission grants this waiver, other MSOs will likely follow up with their own identical requests – what these commenters called “Cablevision waivers”. Indeed, RCN has already filed comments in this docket urging the Commission to grant it and other MSOs a waiver on the same basis. See Comments of RCN Telecom Services, Inc., at 6 (requesting “similar waivers for other operators”).

Cable subscribers rely on clear QAM

Cablevision minimizes the extent to which subscribers would be affected by the proposed waiver.

It states that, when its cable system is all-digital, “by definition - all or nearly all of the customers already will have digital set-top boxes or CableCards” and hence “any negative impacts of encryption on subscribers will be negligible and would not implicate the concerns underlying the existing rule”. Petition for Waiver at 2. It also states that “[t]oday's cable subscribers typically do not have an expectation - or the capability - of receiving digital cable services without a set-top box.” *Id.* at 7. Several commenters have made clear that these assumptions are illogical. Although it requires some relevant apparatus, receiving digital cable need not require a set-top box any more than receiving analog cable does. Individual commenters in this docket – whether Cablevision customers or subscribers to other services who may fear a future waiver – have described how they currently receive digital cable service without set-top boxes. Hence, contrary to Cablevision's assertion, the policy in § 76.630(a) of the Commission's rules can plausibly apply to ensuring that digital cable subscribers do not need a set-top box to enjoy the programming they pay for. MSTV, noting that many digital television sets already include a QAM tuner, avers that “[t]here is no reason to doubt the continued importance of Section 76.630(a) to subscribers” who want the benefit of this tuner without a set-top box. Opposition of MSTV at 3.

Relying on clear QAM and preferring not to have a set-top box is not a particularly bizarre choice. The Commission and others have gone to considerable length to ensure that many devices, especially digital televisions, contain QAM tuners. Compare Opposition of CEA at 2 (describing prevalence of QAM tuners in the marketplace). Hence these tuners are actually widespread in the market and the docket includes several personal accounts of satisfied individual end-users of this equipment.

Clear QAM is particularly necessary for subscribers who want to access cable television with a personal computer. Some of them have already bought adapter products such as El Gato's. Most of these products, particularly if not bundled with a PC, do not support CableCARD and are thus compatible only with clear QAM. Several individual commenters in this docket describe having purchased clear QAM receiving equipment and using it with existing digital cable services; granting the waiver would destroy the value of these subscribers' hardware investment. Commenter El Gato explained the effect of the waiver on its customers; as CEA notes, several other firms also make clear QAM-only receiving hardware. Presumably, the effects on their customers would be similar.

As we have previously noted, television viewers who have a personal computer and no digital television may find that buying a television adapter for their computers is a cheaper means of getting access to digital television service than buying a digital TV. Quite apart from the question of their potential cost to subscribers, set-top boxes that Cablevision intends to provide will probably not work with PCs, so they are not a particularly useful alternative for subscribers who use PCs with their cable subscriptions. We consider this problem in our discussion below of MSTV's proposal.

This waiver will not determine whether particular programming is available on basic cable

Cablevision argues that, if the waiver is not granted, some copyright holders may withhold programming from basic tier cable. As El Gato notes, Cablevision does not provide a specific example of a copyright holder who would do so or explain the basis for this concern; it conveys hypothetical threats on behalf of absent and unnamed parties. As a general matter, such threats even by major copyright holders are frequently idle. See Comments of Viacom, MB Docket No. 02-230, December 6, 2002, at 1, 12:

Viacom's comments [...] address[] [...] the withholding of digital programming in the absence of a broadcast flag regime and the impact such a reduction in high quality programming would have on the DTV transition and on the broadcast industry. For the reasons discussed below, if a broadcast flag is not implemented and enforced by Summer 2003, Viacom's CBS Television Network will not provide *any* programming in high definition for the 2003-2004 television season. [...]

Accordingly, Viacom wishes to make clear for the record in this proceeding that the absence of a broadcast flag regime in the near future will have a materially adverse effect on the levels of digital broadcast television programming it makes available. Specifically, if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season. And, without the security afforded by a broadcast flag, Paramount will have less incentive and enthusiasm to make digital content available and will factor that into its decision-making at the time.

These threats – the clearest of several issued in 2002 along the lines hypothesized here by Cablevision – were mere empty bluster. Viacom never made good on any of them.

However, even assuming that major television programming licensors have the concerns Cablevision attributes to them and are genuinely prepared to act on them, Cablevision and initial commentors have not offered any reason to think that the disposition of *this waiver* will influence their decisions. These copyright holders primarily license their programming to terrestrial television broadcasters. These broadcasters' signals, retransmitted by cable MSOs, make up the bulk of the cable basic tier. As El Gato observes, even if the Commission granted the proposed waiver, exactly the same channels would be available in unencrypted form. In particular, they would be available both (1) on digital terrestrial stations that originally broadcast the programming which Cablevision is retransmitting, and (2) on the clear QAM signals of *other* cable MSOs' digital basic tiers. Granting the proposed waiver would significantly affect Cablevision customers, but not significantly diminish the overall availability of clear digital terrestrial broadcasts and other firms' clear QAM retransmissions of particular programming on Cablevision's digital basic tier. Even if copyright holder threats about clear QAM had been expressed and even if the Commission considered them credible, *granting this waiver would not be a useful way of addressing those threats.*

If Cablevision's waiver is granted, the programming on digital terrestrial channels in its service area will remain available in the clear to millions of viewers nearby – both over the air and, once other cable operators in the New York metropolitan area fully convert their basic-tier service to QAM, on those operators' digital basic tiers. Unsurprisingly, cable MSOs in the New York metropolitan area retransmit a similar assortment of terrestrial signals, including a nearly identical selection of major network affiliate stations¹. Operators outside of Cablevision's New York service area, *including Cablevision itself*, would continue to retransmit their own service areas' local network affiliate stations in clear QAM.

A time-limited waiver would still cause harm

The City of New York proposes that the Commission grant the requested waiver with a sunset period so that the harm it causes can be assessed and the necessity for the waiver revisited. The City believes that adoption of devices with clear QAM tuners might be small now but may increase in the future:

It is thus likely that over a relatively short span of time a significant number of basic tier customers (and others) will be able to obtain new television sets with QAM tuners, or similar digital-signal-compatible technology, as a standard or requested feature. If this happens, the bottleneck burden of acquiring a set top box or similar operator-provided technology to access basic tier-only may affect a greater number of subscribers, warranting a future review of the issue Cablevision now raises.

Comments of the City of New York at 3. However, we fear precisely the reverse outcome: small firms like El Gato that make innovative and inexpensive clear QAM products may exit this market entirely if the Commission grants a series of waivers on the pattern of Cablevision's request. Then existing purchasers of these products will be stranded, while prospective purchasers are denied the benefit of relatively affordable ways of getting access to basic cable service and, potentially, “lock[ed] into the feature sets offered by leased set top boxes” (Opposition of CEA at 3).

Preserving subscribers' existing access means fully decrypting programming

MSTV, on the other hand, opposes the waiver in the form requested by Cablevision but proposes an alternative:

In the event that the Commission were to grant a waiver, however, and consistent with statutory provisions establishing the importance of providing viewable local broadcast

1 Compare <http://www.optimum.com/package_list.jsp?regionId=8&pkgType=0> (a representative Cablevision basic-tier line-up) with <[http://www.timewarnercable.com/MediaLibrary/4/50/Content %20Management/Documents/Learn/CLUs_1009_Manhattan.pdf](http://www.timewarnercable.com/MediaLibrary/4/50/Content%20Management/Documents/Learn/CLUs_1009_Manhattan.pdf)> (a representative Time Warner Cable basic-tier line-up). Line-ups are also similar in New Jersey; see <[http://www.comcast.com/Customers/Clu/ChannelLineup.ashx? print=1&CGID=2416](http://www.comcast.com/Customers/Clu/ChannelLineup.ashx?print=1&CGID=2416)> (a Comcast line-up across the Hudson River in Jersey City). Although these operators are retransmitting terrestrial stations mainly in analog form, we presume they will continue to retransmit substantially the same signals as they switch to all-digital transmissions.

signals to all subscribers, the Commission should require Cablevision to provide equipment necessary to decrypt the basic-tier signals to basic-only subscribers, with no charge for equipment rental or purchase, shipment, or installation/service.

Opposition of MSTV at 6. However, MSTV's description of "equipment necessary to decrypt the basic-tier signals" particularly emphasizes technical issues regarding the integrity of electronic program guide (EPG) systems. We believe it is worth emphasizing that such equipment should fully decrypt the programming (after verifying that a subscriber has paid and is entitled to receive it), to avoid imposing new technical restrictions on the use of basic tier programming or creating compatibility problems. Providing a set-top box which applies new restrictions to basic tier cable programming represents a reduction in the quality of Cablevision's service and is sure to reduce the set of devices and home theater configurations compatible with it. Thus, if the Commission grants the waiver on the terms suggested by MSTV, Cablevision should issue subscribers STBs which provide them with access to the entire digital basic tier over an open standard unencrypted digital output (or a clear QAM or clear VSB-modulated RF output) and which can be controlled by an open standard interface.

Conclusion

Commenters have explained that Cablevision has not explained what distinguishes it from other cable MSOs; hence the logic of this waiver request could apply to other providers as well, as Public Knowledge and MAP warn and RCN expressly urges. Such waivers would harm technology firms like El Gato as well as their customers – individual subscribers like the individual commenters here. Protecting these individuals is a clear and proper goal of § 76.630(a) and, as briefing in this and other DTV dockets has indicated, the digital TV transition provides no reason to abandon this policy. Speculation about the influence of this waiver on copyright holders' licensing practices is premature and implausible.

Accordingly, we request that the Commission deny the proposed waiver or, in the alternative, grant the waiver subject to the condition that Cablevision issue STBs providing its subscribers with a level of access to basic tier television programming substantially equivalent to their current level of access.

Respectfully submitted,

/s/

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Certificate of Service

I, Seth Schoen, declare that on November 6, 2009, I caused these Reply Comments to be served upon Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., counsel for petitioner Cablevision Systems Corporation, by First-Class Mail.

_____/s/_____

Seth Schoen