

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

In the Matter of)	
)	
Basic Service Tier Encryption)	MB Docket No. 11-169
)	
Compatibility Between Cable Systems and Consumer Electronics equipment)	PP Docket No. 00-67
)	
)	

**INITIAL COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers submits that if the Federal Communications Commission (“FCC”) lifts the prohibition on encryption of the basic service tier, the FCC should require operators of all-digital systems who elect to encrypt the basic service tier to provide at no cost the equipment necessary to view the basic service tier on all television sets in a household. The proposed conditions set forth in Section 76.630(a)(1)(ii), (iii), and (iv) are inadequate to afford consumer protection to the public. All-digital systems provide substantial benefits to operators including freeing up spectrum to offer new or improved products and services such as high-speed Internet access and high definition programming. As a result, Rate Counsel submits that the time limitations contained in the proposed rules are contrary to the public interest. In all-digital systems, operators should be required to provide the equipment necessary to view the basic service tier for all television sets at no cost as long as consumers have television sets that require equipment to view the encrypted basic service tier. In addition, the FCC should not limit the free equipment only to existing customer but it should be provided to all customers which would include new customers. If the FCC does permit operators to charge consumers such charges should be subject to review in the Form 1205 process under Section 623(b)(3)(A)¹. In addition, for those systems where the Local Franchise Authority no longer has authority to review rates,

¹ / 47 U.S.C. § 543(b)(3)(A).

the FCC should review any proposed charge for compliance with the FCC's rules governing installation and equipment costs.

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**INITIAL COMMENTS OF
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I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers submits Initial Comments based on its review of the Notice of Proposed Rulemaking (“Notice”) issued by the Federal Communications Commission’s (“FCC” or “Commission”) on October 14, 2011.² The Notice proposed rules to require operators of all-digital cable systems that elect to encrypt the basic service tier to comply with certain consumer

² / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A.* §§ 52:27EE-46 *et seq.*

protection measures for a limited period of time in order to minimize potential subscriber disruption.³

The FCC proposes to permit encryption in all-digital systems in four situations:

- (i) no television signals are provided using the NTSC system;
- (ii) the cable operator offers to its existing basic service tier subscribers (who do not use a set-top box or CableCard at the time of encryption) the equipment necessary to descramble or decrypt the basic service tier signals (the subscriber's choice of a set-top box or CableCard) on up to two separate television sets without charge for two years from the date of encryption;
- (iii) the cable operator offers to its existing basic-only subscribers who have an additional television set currently receiving basic-only service without a set-top box, the equipment necessary to descramble or decrypt the basic service tier signals on one television set without charge for one year from the date of encryption; and
- (iv) the cable operator offers to all existing basic-only subscribers who receive Medicaid the equipment necessary to descramble or decrypt the basic service tier signals on up to two separate televisions sets without charge for five years from the date of encryption.⁴

³ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 ("NPRM") at ¶ 1.

⁴ / *Id.* at ¶¶ 11-13 and Appendix A.

II. ISSUES FOR COMMENT

A. Reasons for Permitting Encryption

The FCC submits that the current marketplace and regulatory developments provide the basis for the proposed rule to permit basic service tier encryption for all-digital cable systems, subject to imposition of the conditions proposed in the amendments to Section 76.630(a) (1) of Commission's Rules.⁵ Those conditions require that either free set-top boxes or CableCards be provided to existing customers for a limited period of time, 1 or 2 years; and for an extended period, 5 years, for cable customers who are receiving Medicaid.⁶ The FCC indicates that this proposed rule is informed by the information gathered from Cablevision's first year of implementation of the waiver to the FCC granted to Cablevision. The FCC posits that it does not know how many subscribers would be affected by encryption but it believes it would be small based upon the reports furnished by Cablevision. Specifically, Cablevision reported that the waiver led to a reduction of 2,763 truck rolls, that the waiver would eventually permit 70% of all deactivations be performed remotely, and that in response to the conditions imposed, no consumer complaints regarding encryption of the basic service tier were received. As a result the FCC concluded:

. . . that the evidence shows that, where cable operators undertake appropriate consumer protection measures, the cost of retaining this rule (*e.g.* the need to schedule service appointments whenever a consumer subscribes to or cancels cable service as well as the expense and effect of cable operators' trucks on traffic and the environment)

⁵ / *Id.* at ¶ 8.

⁶ / *Id.* at ¶ 8 and Appendix A.

outweigh the benefits of retaining it (*e.g.* ensuring the continued utility of devices with clear-QAM tuners).⁷

B. Specific Requests for Comment by the FCC

The FCC seeks comment on the costs and benefits to subscribers and cable operators associated with basic service tier encryption for all digital systems.⁸ In addition, the FCC asks that commenters quantify in dollars the costs and benefits of allowing basic service tier encryption.

In order to fully respond to these requests, Rate Counsel submits that cable operators must identify the number of subscribers that would be affected. Although the FCC posits that they believe the number of subscribers is small based upon data provided by Cablevision,⁹ Cablevision may not be representative other cable operators. Rate Counsel notes that the Commission in the *DTV Viewability Order* required that broadcast signals must be viewable on all television receivers of a subscriber who subscribes to cable service.¹⁰ In the *DTV Viewability Order*, the FCC quantified the impact on consumers. The FCC found that there are over 40 million homes with 120 million analog cable television sets. Thus, in the absence of action, some broadcast stations would become unwatchable on these 120 million television sets. And, millions of consumers will be disenfranchised.¹¹

⁷ / *Id.* at ¶ 8.

⁸ / *Id.*

⁹ / *Id.* at ¶ 8.

¹⁰ / See *In the Matter of Carriage of Digital Television Broadcast Signals, Amendment to Part 76 of the Commission Rules, Third Report and Third Further Notice of Proposed Rule Making*, CS Dkt. 98-120, 22 FCC Rcd. 21064 (rel. Nov. 30, 2007) (*DTV Viewability Order*)

¹¹ / See Statement of Chairman Kevin J. Martin, in the *Viewability Order*.

If the FCC permits encryption of the basic service tier, Rate Counsel submits that the FCC should require that a consumer should be able to view the encrypted service on all television sets in each household at no additional cost, and that consumers should be provided at no charge the equipment necessary to view encrypted service on all television sets in the household for as long as the basic service tier is encrypted. Therefore, the FCC must require that cable operators report on the number of subscribers who have multiple televisions and how many of those households would be affected if the limited proposed consumer protections were adopted. Consumers should not lose the ability to view the encrypted basic service tier service on any television set that they may have, nor should the free equipment offer should not be limited in time.

As the FCC noted, there are substantial benefits to cable operators for offering new services related to the additional bandwidth available after an operator goes all-digital. Similarly, Rate Counsel submits that the proposed rule should not be limited to existing customers but should be expanded to include new customers who purchase cable service after the basic service tier is encrypted. By limiting the consumer protections to existing customers, new customers would have to purchase equipment to view encrypted service or possibly pay higher rates for the same level of service. This is fundamentally unfair and discriminatory.

Rate Counsel's concerns regarding additional television set are supported in part by a recent Rate Order issued by the New Jersey Board of Public Utilities involving a nationwide

Form 1205 rate filing by Comcast.¹² Comcast required customers in all-digital systems to purchase Digital Transport Adaptors (“DTAs”) on each television in order to continue to view all channels both on the basic and cable program service tiers. Comcast offered three free DTAs to customers and imposed a charge for more than three DTAs.

Comcast imposed the following charges; for basic service tier customers, the charge is \$0.50 and for cable program service tier customer the charge is \$1.99. Comcast’s data showed that a substantial number of consumers had more than three television sets which required them to pay for DTAs if they wanted to view all channels on all television sets. In systems that are not all-digital, Comcast required customers on the cable program service tier to have DTAs on each television set to continue to view all channels on each television set. Comcast offered three free DTAs to cable program service tier customers with a \$1.99 charge for each additional DTA. Comcast’s data showed that substantial number of consumer had more than three television sets which required them to pay for DTAs. Comcast’s initiated the charges in 2009.

Based upon the number of homes with more than three television sets, Rate Counsel submits that the public interest requires firm data on the number of customers that will be affected and an expansion of the consumer protection as outlined above.

The FCC asks for comment on the specific criteria that should be used to determine what constitutes an all-digital cable system. Rate Counsel submits that the FCC should follow the policy it adopted in the *DTA Viewability Order* that all channels must be viewable without

¹² / See New Jersey Division of Rate Counsel v. State of New Jersey Board of Public Utilities, Appeal of Local Rate Oder, CSB-A-0748, dated March 10, 2011.

additional cost to customers.¹³ The FCC asks for comments on whether this proposal would satisfy the Commission's obligations under Section 624A of the Communications Act.¹⁴ Rate Counsel concurs that the Commission has broad authority to address and regulate encryption technology as envisioned by Congress. As discussed above, Rate Counsel submits that the limited consumer protections proposed are not adequate to protect consumers in all areas of the country.¹⁵ Rate Counsel submits that the FCC should not limit the time period for which free equipment is provided. In addition, the free equipment should not be limited to the units proposed. Free equipment should be provided so that encrypted basic service tier channels are viewable on all television sets in the household. In addition the consumer protections should be offered to new customers as well for the reasons discussed above.

Rate Counsel asks the FCC to clarify that if the free equipment is limited in time and charges are subsequently imposed upon customers, those charges are subject to review and approval under Section 623(b)(3)(A) of the Communications Act and the implementing regulations of the Commission as part of the Form 1205 filing. Rate Counsel also asks that the FCC clarify that the costs for such equipment should not be borne solely by video customers but should be shared with and by Internet and telephone customers because digitalization offers opportunities for expansion of Internet and telephone services.. The FCC should require that Section 924(j) of the Commission Rules be followed as the equipment is a common cost that must be allocated among the benefited services offered by the cable operator.

¹³ / Notice at ¶ 9.

¹⁴ / *Id.* at ¶ 10.

¹⁵ / *Id.* at ¶¶ 12-13.

III. CONCLUSION

For the reasons set forth above, Rate Counsel submits that prohibition on encryption of the basic service tier can be waived for all-digital systems, but only if cable operators are required to provide equipment at no cost to customers so that the basic service tier can be viewed on all television sets in a household for as long as the basic service tier is encrypted.

Very truly yours,

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