

**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	)	PP Docket No. 00-67
Consumer Electronics Equipment	)	

**COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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**TABLE OF CONTENTS**

**INTRODUCTION AND SUMMARY.....1**

**I. THE BASIC TIER ENCRYPTION RULE SHOULD BE AMENDED IN LIGHT OF MARKETPLACE AND TECHNOLOGICAL DEVELOPMENTS .....2**

**II. AMENDING THE ENCRYPTION RULE WOULD HAVE SUBSTANTIAL CONSUMER AND OTHER PUBLIC INTEREST BENEFITS .....5**

**III. ENCRYPTION WOULD LARGELY ELIMINATE THEFT OF SERVICE .....7**

**IV. REVISING THE ENCRYPTION RULE WOULD HELP PROMOTE CONTINUED INNOVATION AND INVESTMENT IN CABLE NETWORKS .....8**

**V. AMENDING THE ENCRYPTION RULE AS PROPOSED WOULD NOT RESULT IN ANY CONSUMER HARMS .....8**

**VI. THERE ARE NO STATUTORY OR CONSTITUTIONAL IMPEDIMENTS TO ADOPTION OF RULES PROPOSED BY THE COMMISSION .....12**

**CONCLUSION .....14**

**APPENDIX**

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The National Cable & Telecommunications Association (NCTA)<sup>1</sup> hereby submits its comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-referenced proceeding.<sup>2</sup>

**INTRODUCTION AND SUMMARY**

The Commission has issued an *NPRM* that would amend the basic tier encryption rule to permit encryption in cable systems that have gone all-digital (*i.e.*, eliminated analog service). The Commission has tentatively concluded that to so amend its rules “will not substantially affect compatibility between cable service and consumer electronics equipment for most subscribers” and that operators who take advantage of the change in the rules “must comply with certain consumer protection measures for a limited period of time in order to minimize any potential subscriber disruption.”<sup>3</sup>

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<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

<sup>2</sup> See *In re Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, MB Docket No. 11-169, PP Docket No. 00-67, FCC No. 11-153 (rel. Oct. 14, 2011) (“*NPRM*”).

<sup>3</sup> *Id.* ¶ 1.

Earlier this month, the Commission released its “Preliminary Plan for Retrospective Analysis of Existing Rules” which, among other things, said that in identifying rules for retrospective analysis, the Commission “considers whether a regulation: (1) has been affected by changes in technology or new scientific research or changes in market structure; (2) has a disproportionate or undue burden on particular entities, has caused unintended negative effects, or could result in greater net benefits to the public if modified; and (3) has been subject to frequent requests for waivers by affected stakeholders or been identified by the public as needing revision.”<sup>4</sup> Elimination of the basic tier encryption prohibition satisfies each of these criteria.

Given the substantial public interest benefits and the lack of harms associated with encryption, NCTA endorses the Commission’s tentative conclusions and urges it to act expeditiously in amending its rules.

## **I. THE BASIC TIER ENCRYPTION RULE SHOULD BE AMENDED IN LIGHT OF MARKETPLACE AND TECHNOLOGICAL DEVELOPMENTS**

The Commission adopted the basic tier encryption rule in 1994 as part of its implementation of the 1992 Cable Act. Specifically, the 1992 Act added Section 624A to the Communications Act of 1934 requiring the Commission to issue regulations to ensure compatibility between consumer electronics equipment and cable systems.<sup>5</sup> At the time, two decades ago, cable systems transmitted their programming content almost exclusively in unencrypted analog format, which meant that customers generally could connect their cable wire directly to their “cable ready” television sets and watch the full range of programming to which they subscribed without a set-top box. The Commission noted at the time that “[t]his rule also

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<sup>4</sup> FCC, *Preliminary Plan for Retrospective Analysis of Existing Rules*, at 7 (Nov. 7, 2011) (“FCC Plan”), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-310874A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310874A1.pdf).

<sup>5</sup> See 47 U.S.C. § 544a.

will have minimal impact on the cable industry in view of the fact that most cable systems now generally do not scramble basic tier signals.”<sup>6</sup>

The underlying facts are vastly different in today’s digital world. Cable operators have digitized most of their linear channels, and now offer two-way services such as video-on-demand (“VOD”) and interactive program guides. Some cable systems – such as Cablevision’s system in New York City; Comcast’s system in Augusta, Georgia; and Bend Broadband’s system in Bend, Oregon – have completely transitioned to digital (*i.e.*, the systems no longer transmit analog channels). In this digital world, most cable customers have set-top boxes or retail devices to access cable services, and almost all channels are delivered with encryption. Over 77% of cable customers subscribe to digital service, and that percentage is significantly higher for the largest operators – for example, approximately 90% for Comcast, 74 % for Time Warner Cable, and 95% for Cablevision.<sup>7</sup> As the Commission observed in the *NPRM*, “[t]he fact that most subscribers have a cable set-top box or retail CableCARD device limits the impact of encryption of the basic service tier in all-digital systems on cable subscribers.”<sup>8</sup>

In recent years the Commission has received numerous requests from cable operators to waive the basic tier encryption rule.<sup>9</sup> In orders granting those waivers, the Media Bureau has

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<sup>6</sup> *In re Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment*, First Report & Order, 9 FCC Rcd 1981 ¶ 55 (1994) (“*Compatibility Report and Order*”).

<sup>7</sup> SNL Kagan, *Broadband Technology*, Aug. 22, 2011 at 2-3 (reporting June 2011 estimated figures for industry digital penetration, estimated Time Warner Cable digital penetration, and estimated Cablevision digital penetration); 3Q 2011 Comcast Trending Schedule at 4 (reporting Comcast digital penetration as of September 2011), available at <http://files.shareholder.com/downloads/CMCSA/1214346732x0x514123/80dd657c-ce17-4c7a-ad46-809e18b7a651/3Q11%20Trending%20Schedule.pdf>.

<sup>8</sup> *NPRM* ¶ 4.

<sup>9</sup> See, e.g., *In re Cablevision Systems Corporation’s Request for Waiver of Section 76.630(a) of the Commission’s Rules*, Memorandum Opinion & Order, 25 FCC Rcd 134 ¶ 12 (M.B. 2010) (“*Cablevision Waiver Order*”); *In re San Juan Cable LLC d/b/a OneLink Communications Petition for Waiver of Section 76.630(a) Basic Tier Scrambling*, Memorandum Opinion & Order, 26 FCC Rcd. 321 ¶ 9 (M.B. 2011) (“*OneLink Order*”). Waiver requests are also pending for Inter Mountain Cable, RCN, Coaxial Cable TV, and Mikrotec CATV.

stated that high digital penetration levels among cable customers address the compatibility concerns underlying the encryption ban. For example, in the *Cablevision Waiver Order*, the Bureau explained: “[W]ith such a high percentage of subscribers already using set-top boxes, problems due to incompatibility between cable service and consumer electronics equipment will not be widespread once basic tier scrambling is commenced.”<sup>10</sup>

Furthermore, when the encryption rule was adopted in 1994, cable was the dominant MVPD, and there were few competitors. The situation is dramatically different today. DBS and telco IPTV providers -- each requiring set-top boxes for each of their subscribers -- serve approximately 40% of the marketplace with all-digital service on a fully encrypted basis.<sup>11</sup> Likewise, online video distributors deliver video to customers on an encrypted basis. Netflix alone has 23.8 million subscribers, more than any MVPD.<sup>12</sup>

None of these video providers is barred from encrypting or otherwise protecting the content they provide to their customers. There is no persuasive justification for continued disparate regulatory treatment in this area based on delivery technology. A level playing field for all-digital MVPD systems and other video providers is particularly warranted where, as here, the marketplace is robustly competitive and video services are being delivered over a range of

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<sup>10</sup> *Cablevision Waiver Order* ¶ 15.

<sup>11</sup> See NCTA Comments, MB Dkt. No. 07-269, at 8 (June 8, 2011) (noting that cable’s MVPD market share has dropped under 60%). AT&T has explained that the programming delivered on its U-verse service is fully encrypted. See Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, FCC, CS Dkt. No. 97-80, PP Dkt. No. 00-67, at 3-4 (Nov. 16, 2007) (“AT&T Letter”).

<sup>12</sup> See Letter from Reed Hastings, CEO, Netflix, to Shareholders (Oct. 24, 2011) (detailing Third Quarter 2011 earnings), available at <http://ir.netflix.com/common/download/download.cfm?companyid=NFLX&fileid=511277&filekey=85b155bc-69e8-4cb8-a2a3-22465e076d77&filename=Investor%20Letter%20Q3%202011.pdf>.

different platforms to a wide array of different devices (*e.g.*, TVs, computers, iPads, game consoles, Blu-ray players, smartphones, and so forth).<sup>13</sup>

Finally, the President’s Executive Orders on regulatory reform, which Chairman Genachowski has endorsed, directed federal agencies to review and repeal rules that “may be outmoded, ineffective, . . . or excessively burdensome[.]”<sup>14</sup> The Commission’s “Preliminary Plan for Retrospective Analysis of Existing Rules” carries forward that mission. The encryption prohibition rule is a perfect candidate for revision since, at a minimum, it (1) “has been affected by changes in technology . . . [and] changes in market structure; (2) has a disproportionate or undue burden on particular entities . . . [and] could result in greater net benefits to the public if modified; and (3) has been subject to frequent requests for waivers by affected stakeholders . . . .”<sup>15</sup>

## **II. AMENDING THE ENCRYPTION RULE WOULD HAVE SUBSTANTIAL CONSUMER AND OTHER PUBLIC INTEREST BENEFITS**

Without an encrypted system, service connections and disconnections must be handled manually, with service technicians connecting and disconnecting service taps at the pole or in the MDU lockbox. Customers who wish to add or disconnect service must make arrangements for these service calls. This means delay and inconvenience for the consumer, cost for the operator, and one or more truck rolls for each new install or disconnect.

Encryption of the basic tier would allow cable operators to activate and deactivate service remotely without the need for a service call. Under this model, the operator would keep the

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<sup>13</sup> See, *e.g.*, Letter from Michael K. Powell, President & CEO, NCTA, to Julius Genachowski, Chairman, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80 (July 7, 2011); Letter from Hank Hultquist, Vice President for Federal Regulatory Affairs, AT&T, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80 (Oct. 17, 2011).

<sup>14</sup> See Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13579, 76 Fed. Reg. 41,587 (July 14, 2011).

<sup>15</sup> FCC Plan at 7.

connection to the home on at all times. The operator could ship equipment to these customers or arrange for new customers to pick up set-top boxes, digital transport adapters (“DTAs”), or CableCARDS at a customer service center. The customer would then hook up the equipment and start receiving service. These options are of considerable benefit to consumers who would prefer not to wait at home for installation. Traditional service appointments would, of course, still be available for those customers who prefer them.

Cablevision’s experience in New York City shows that encryption of the basic tier results in dramatic reductions in truck rolls. Cablevision found that in a pilot area “truckless disconnects” comprised approximately 80% or more of all disconnects between October 2010 and August 11, 2011.<sup>16</sup> Cablevision also reported that a substantial number of customers have chosen to have a truckless service reconnection,<sup>17</sup> and the number of households eligible for remote reconnections rose to 64.2% by July 2011.<sup>18</sup>

Reduced truck rolls would also provide environmental benefits by curbing fuel consumption and CO<sub>2</sub> emissions. These benefits would occur in urban cable systems, where there is heavy traffic congestion, and in rural systems, where service calls can entail long drive times. The Media Bureau noted these environmental benefits in granting Cablevision’s waiver request.<sup>19</sup>

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<sup>16</sup> Letter from Michael E. Olsen, Senior Vice President, Legal Regulatory and Legislative Affairs, Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-168, at 2 (Aug. 11, 2011) (“*Cablevision August Report*”); *see also* Letter from Michael E. Olsen, Senior Vice President, Legal Regulatory and Legislative Affairs, Cablevision, to William T. Lake, Chief, Media Bureau, FCC, MB Dkt. No. 09-168, at 2 (Feb. 4, 2011) (“*Cablevision February Report*”) (“Truckless disconnects comprised 89.2%, 93.8%, and 95.7% of all disconnections in the months of November, December, and January, respectively.”).

<sup>17</sup> *Cablevision February Report* at 2-3.

<sup>18</sup> *Cablevision August Report* at 2.

<sup>19</sup> *Cablevision Waiver Order* ¶ 12.

The *NPRM* also asks if these environmental gains would outweigh the impact of additional set-top boxes in customers' homes to access all-digital service.<sup>20</sup> As the Commission has noted, the number of consumers who might require additional equipment has proven to be quite modest. In addition, the kind of transitional equipment that would be provided – such as boxes with all-digital tuners (and no analog tuners) and DTAs which utilize less than four watts of power – will have negligible impact on home energy use. The environmental benefits of truckless installs and disconnects outweigh the use of transitional equipment in the relatively few homes affected.

### **III. ENCRYPTION WOULD LARGELY ELIMINATE THEFT OF SERVICE**

When cable services are delivered “in-the-clear,” they are vulnerable to theft. NCTA previously estimated that approximately 5% of cable-homes-passed access cable services on an unauthorized basis, resulting in nearly \$5 billion in unrealized revenue. That vast sum represented more than 8% of gross industry revenues that year.<sup>21</sup>

Encryption is widely recognized in the MVPD industry as the most proven way to protect programming content from piracy – as noted, DBS and IPTV providers encrypt *all* of their video services – and is of course utilized by cable operators to secure the distribution of all non-basic digital services. Encryption would enable operators to secure their services equally, and strengthen programmers' efforts to secure high-value digital content from piracy and unauthorized Internet redistribution.<sup>22</sup>

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<sup>20</sup> See *NPRM* ¶ 8.

<sup>21</sup> National Cable & Telecommunications Association, *2004 Survey of Cable Theft* (Jan. 2005), available at [http://i.ncta.com/ncta\\_com/PDFs/NCTA-2004-Signal-Theft-Survey-Results.ppt](http://i.ncta.com/ncta_com/PDFs/NCTA-2004-Signal-Theft-Survey-Results.ppt).

<sup>22</sup> See Joint Reply Comments of Program Networks (CBS Corporation; Discovery Communications, LLC; NBC Universal, Inc.; News Corporation; Time Warner, Inc.; Viacom, Inc.; and The Walt Disney Company, Inc.), CS Docket No. 97-80, at 5-6 (Aug. 12, 2010).

#### **IV. REVISING THE ENCRYPTION RULE WOULD HELP PROMOTE CONTINUED INNOVATION AND INVESTMENT IN CABLE NETWORKS**

Encryption would help facilitate the cable industry’s migration to all-digital and, eventually, to Internet Protocol-delivered services. As noted, certain cable operators have started the process of going all-digital in their cable systems, with the goal of accelerating those digitization efforts across their footprints in coming years. The benefits associated with encrypting the basic tier – fewer costly truck rolls, reduced signal theft, improving the customer experience by reducing the need for installation appointments – can provide greater incentives for operators to complete these transitions as quickly as possible.

Accelerating analog channel reclamation efforts will have important benefits for consumers. Bandwidth that was previously dedicated to analog channels can then be used for more high-definition programming, faster Internet, and new IP-based cable services, among other things. The Commission has previously underscored the importance of removing regulatory impediments to these digitization efforts,<sup>23</sup> and revising the encryption ban will advance that goal as well.

#### **V. AMENDING THE ENCRYPTION RULE AS PROPOSED WOULD NOT RESULT IN ANY CONSUMER HARMS**

As noted, the encryption rule was adopted in 1994 to promote compatibility between cable service and consumer electronics equipment. The situation is very different in today’s digital environment, where most cable customers already have set-top boxes, DTAs, or CableCARD-compatible devices to access cable services. As a result, exempting cable operators with all-digital systems from the encryption prohibition would not lead to any widespread

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<sup>23</sup> See *In Re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Third Report & Order and Order on Reconsideration, 25 FCC Rcd. 14657 ¶ 45 (2010) (“Transitioning to an all-digital cable system allows operators to make more efficient use of spectrum capacity, allowing the operators to dedicate more of their spectrum to broadband and other services.”).

compatibility problems. In all-digital cable systems, almost all customers will already have a set-top box or CableCARD to access digital services. And to accommodate the relatively rare cases where customers receive digital basic channels without a set-top box or CableCARD-compatible device, reasonable conditions can protect against consumer disruption.

In that regard, we agree with the thrust of the Commission's proposal to impose conditions on a cable operator's ability to encrypt the basic tier, although the language of the proposed rules needs to be modified slightly to make them consistent with the Commission's intent. The conditions the Commission proposes would require operators to provide equipment at no charge during a transitional period to certain existing customers who use existing devices at the time of encryption to receive digital basic tier channels in the clear.<sup>24</sup> Specifically, in the words of the proposed rules appended to the *NPRM*, the basic tier encryption prohibition would not apply in systems in which:

- (i) no television signals are provided using the NTSC system; and
- (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; and
- (iii) the cable operator offers to its existing digital 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 television sets without charge for five years from the date of encryption.

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<sup>24</sup> See *NPRM* ¶ 12.

These rules provide a reasonable and workable framework. However, below we suggest a few slight modifications to the proposed rules to track the Commission’s intent and address questions raised in the *NPRM*. The revised rules with our suggested modifications are provided in Appendix A to these Comments.

*First*, the Commission has proposed that a cable operator may encrypt the digital tier only if, among other conditions, “no television signals are provided using the NTSC system.”<sup>25</sup> But in the *NPRM* itself, the Commission poses questions on how to treat systems that may not yet have sunset every single analog transmission, such as systems with a single analog barker channel left live after digitization.

The benefits that can accrue from encrypting the digital basic tier – such as remote install and reduction in carbon footprint – accrue regardless of whether barker or informational channels are left on in analog to provide information to consumers. Systems may well provide connected households with analog barker channels explaining how to subscribe or promoting digital services, and may even combine locally-inserted informational channels.<sup>26</sup> If a system is willing to leave one or more analog channels on live to provide potential customers with information about subscribing to service, while still enabling digital connects and disconnects of the encrypted digital basic tier, then the proposed relief should extend to those systems as well. Therefore, we recommend that the rule be revised to permit the encryption of the basic tier, even if a barker channel is delivered in analog on an unencrypted basis, as long as all other channels are delivered in digital. The revised rule (with changes indicated below) would read:

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<sup>25</sup> *NPRM* at Appendix A.

<sup>26</sup> As part of a contract with a residential community, for example, cable systems may help to combine locally-inserted analog signals from lobby cameras, pool cameras, condo message boards, and other video sources with the cable feed. Such informational channels are not comparable to programming provided by a television broadcast station. The rule should make clear that carriage of such informational channels in analog would not disqualify an otherwise all-digital system from encrypting its basic service.

- (i) no television signals (**except barker or informational channels**) are provided using the NTSC system; and

*Second*, we suggest some minor editorial changes to the proposed rule sections “(ii)”, “(iii)”, and “(iv)” to track the Commission’s intent and to conform each proposed condition with the others, using the same language as much as possible. The changes we suggest make no substantive changes in the rules as proposed in the *NPRM* and are indicated below as follows:

- (ii) the cable **system** operator offers to its existing **subscribers who subscribe only to the basic service tier without use of 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; and
- (iii) the cable **system** operator offers to its existing digital subscribers who have an additional television set ~~currently~~ receiving **only the basic service tier without use of a set-top box at the time of encryption** ~~basic only service without a set-top box~~, the equipment necessary to descramble or decrypt the basic service tier signals (**the subscriber’s choice of a set-top box or CableCARD**) on one television set without charge for one year from the date of encryption; and
- (iv) the cable **system** operator offers to **its existing subscribers who receive Medicaid and also subscribe only to the basic service tier without use of a set-top box or CableCARD at the time of encryption**, ~~all existing basic only subscribers who receive Medicaid~~ 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 five years from the date of encryption<sup>27</sup>; **and**

*Third*, as part of commitments Cablevision made to the Commission when seeking its basic tier encryption waiver, it promised to offer free set-top boxes to certain customers for 30

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<sup>27</sup> As in the case of Cablevision, cable operators should have discretion to determine the means for verifying whether a requesting customer has a QAM TV. See Letter from Howard Symons, Counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 09-168 (Jan. 7, 2010).

days prior to and 30 days following encryption.<sup>28</sup> Consistent with the Commission’s intent to provide transitional measures for existing customers at the time of encryption, we propose adding such a requirement as a new subsection “(v).” The new language would read as follows:

**(v) the cable system operator notifies its existing subscribers of the availability of the offers described in subsections (ii) through (iv) at least thirty days prior to the date of encryption and makes the offers available for at least thirty days prior to and thirty days after the date of encryption.**<sup>29</sup>

## **VI. THERE ARE NO STATUTORY OR CONSTITUTIONAL IMPEDIMENTS TO ADOPTION OF RULES PROPOSED BY THE COMMISSION**

The Commission raises questions about whether conditioning the rule as it proposes would raise statutory and constitutional questions. Such questions may in fact arise in other instances if certain conditions are placed on exercising regulatory choices. In particular, constitutional or statutory objections plainly could be raised if regulators, for example, attempted to require regulatees to provide free equipment to a large number of customers. Such requirements could become tantamount to prohibited rate regulation or confiscation if those

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<sup>28</sup> See *Cablevision ex parte*, MB Docket No. 09-168 (Jan. 7, 2010); *Cablevision August Report* at 2.

<sup>29</sup> The Commission asked for comment about how to handle digital cable services that are not QAM-based, particularly signals delivered in Internet Protocol (“IP”). See *NPRM* ¶ 9. Like cable services transmitted in QAM format, IP cable services are “all digital” and should be treated as outside of the rule against basic service encryption. As the Commission has noted, Section 624A arose in an analog world with standard analog channelization across cable systems and standard analog channelization in television receivers. See *Compatibility Report and Order* ¶ 49 (rule would significantly advance compatibility by ensuring that all subscribers are able to receive basic tier signals “in the clear” and that basic-only subscribers with cable-ready televisions will not need set-top devices); see also *In re Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, 15 FCC Rcd. 8776 ¶ 17 (2000) (indicating that the intent of Section 76.630(a) in 1994 was to “prohibit analog basic service tier scrambling”). Standard analog and QAM tuner TVs are not designed to access IP channels, so encryption to protect those channels has no impact on the functionality of those TVs. Section 624A directs that “the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers’ television receivers or video cassette recorders.” 47 U.S.C. § 544a(b)(2) (emphasis added). If the Commission believes clarification is needed on this issue, the Commission can state in its implementing order that it does not construe the encryption rule as applying to the delivery of signals in Internet Protocol.

requirements, for example, were unbounded in time or cost.<sup>30</sup> However, the proposals in the *NPRM* as modified by our suggestions above would minimize such concerns.

With respect to the Commission’s authority to revise its encryption rule, Section 624A does not require that the Commission have such an encryption rule. Rather, it says that the Commission should determine “whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals[.]”<sup>31</sup> Moreover, the provision also specifically directs the Commission to “periodically review and, if necessary, modify the regulations . . . to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.”<sup>32</sup> Because the Commission is proposing to eliminate the prohibition on encryption only for cable systems which are “all-digital” and would therefore be delivering their basic tier in digital, the vast majority of that system’s customers will already have compatible equipment (and the remaining customers will be provided with such equipment for a transitional period). Therefore, the rule change would be consistent with the statute’s directive to the Commission to update its rules based on changing technologies.

Section 624A also directs the Commission to use a cost-benefit analysis when assessing the need for, and scope of, any encryption rules.<sup>33</sup> Eliminating the rule would impose little to no costs on the consumer – the vast majority will not be affected at all, and the small subset of customers requiring a new digital set-top box, DTA, or CableCARD will be provided with transitional equipment at no charge. The benefits, however, are substantial. As noted above and

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<sup>30</sup> For example, Congress provided that “A state or franchising authority may not, for instance, regulate the rates for cable services in violation of section 623 of Title VI, and attempt to justify such regulation as a ‘consumer protection’ measure.” H. R. Rep. No. 09-934, at 79 (1984). The Eshoo amendment further limits the authority of the Commission to “regulate encryption technology” (*NPRM* ¶ 10) under Section 624A, although it provides ample latitude to relax the ban on basic service encryption.

<sup>31</sup> 47 U.S.C. § 544a(b)(2).

<sup>32</sup> *Id.* § 544a(d).

<sup>33</sup> *Id.* § 544a(c)(1).

by the Commission in the *NPRM*, encryption will result in an improved customer experience by eliminating the need for truck rolls for service connection or disconnection; will provide substantial operational efficiencies for cable operators; will reduce service theft and the risk of unauthorized redistribution of content, to the benefit of operators and programmers alike; and will provide benefits to the public at large due to less traffic congestion and pollution. Clearly, when the required cost-benefit analysis is considered, the statute permits, if not mandates, changes to the existing encryption rule.

### **CONCLUSION**

The Bureau indicated in the *Cablevision Waiver Order* that the waiver “will provide an experimental benefit that could be valuable in the Commission’s further assessment of the utility of the encryption rule,” and, in this regard, required Cablevision to provide periodic reports on the customer impact of the waiver.<sup>34</sup> As Cablevision has shown in its reports, there have been no customer complaints about encryption, little customer need for additional equipment, and substantial benefits associated with reduced truck rolls. Where, as here, an existing rule has been overtaken by technology and its rationale no longer applies, the Commission should move expeditiously to amend it.

Respectfully submitted,

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<sup>34</sup> *Cablevision Waiver Order* ¶ 16.

**APPENDIX  
MODIFICATIONS TO PROPOSED RULE**

- (i) no television signals (except barker or informational channels) are provided using the NTSC system; and
- (ii) the cable system operator offers to its existing subscribers who subscribe only to the basic service tier without use of ~~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; and
- (iii) the cable system operator offers to its existing digital subscribers who have an additional television set ~~currently~~ receiving only the basic service tier without use of a set-top box at the time of encryption ~~basic only service without a set-top box,~~ the equipment necessary to descramble or decrypt the basic service tier signals (the subscriber's choice of a set-top box or CableCARD) on one television set without charge for one year from the date of encryption; ~~and-~~
- (iv) the cable system operator offers to its existing subscribers who receive Medicaid and also subscribe only to the basic service tier without use of a set-top box or CableCARD at the time of encryption, ~~all existing basic only subscribers who receive Medicaid~~ 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 five years from the date of encryption; and
- (v) the cable system operator notifies its existing subscribers of the availability of the offers described in subsections (ii) through (iv) at least thirty days prior to the date of encryption and makes the offers available for at least thirty days prior to and thirty days after the date of encryption.