

**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)	

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

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The National Cable & Telecommunications Association (NCTA)¹ hereby submits its reply comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.²

INTRODUCTION AND SUMMARY

The record in this docket demonstrates strong and deep support for the Commission’s proposal to eliminate the basic service tier encryption ban for all-digital cable systems. The Commission should act quickly to make this rule change, consistent with Chairman Genachowski’s and the Obama Administration’s initiatives to revise or repeal outmoded regulations. As Public Knowledge and Media Access Project (“PK/MAP”) state in their joint comments, “technology has changed and the rule no longer serves its purpose” and the

¹ 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.

² See *In re Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking, 26 FCC Rcd. 14870 (2011) (“NPRM”).

Commission “should move as swiftly as possible to bring its rules into alignment with the developments in digital technology.”³

NCTA underscored in our initial comments the substantial consumer and other public interest benefits that would result from the rule change. The overwhelming majority of commenters agree. For example, the Minority Media and Telecommunications Council (“MMTC”) and the Hispanic Technology & Telecommunications Partnership (“HTTP”) explain that encryption will enable operators to activate and deactivate service remotely, thereby eliminating the need for technician visits, which can be an inconvenience to customers, and reducing truck rolls and traffic congestion. Cablevision reports that its experience in New York City provides concrete evidence of these consumer benefits. In addition, numerous cable commenters note that encryption would help reduce signal theft and energy consumption, improve service reliability, and provide strong incentives for operators to undertake the rapid digitization of cable systems.

There also is strong support in the record for adopting the Commission’s proposed transitional consumer protection measures with slight modifications to make them consistent with the Commission’s intent. NCTA proposed that the draft rules be revised to: (1) accommodate the use of analog barker and informational channels that may be used in all-digital systems; (2) establish a 60-day window during which eligible customers could request free set-top boxes or CableCARDS (consistent with the approach that Cablevision followed in New York City); and (3) include conforming edits so that the conditions use the same language as much as possible. Other commenters support these modest changes, and NCTA urges the Commission to adopt them in its final rules. With respect to the proposals made by PK/MAP, if the Commission

³ PK/MAP Comments at 2.

is inclined to consider expanding the eligibility criteria for the low-income equipment condition, it must ensure that any additional criteria are based on participation in another federal program that can be verified readily, similar to how Medicaid can be verified with a Medicaid card. Claims by a handful of commenters that the rule change will result in consumer harms are unfounded. For example, comments filed by Montgomery County and a few other LFAs suggest that encryption will affect a large number of customers. In fact, the impact of encryption will be negligible as nearly all customers in all-digital systems will already have equipment at the time of encryption, a fact demonstrated by Cablevision's experience in New York City. Likewise, the expansive equipment conditions proposed by these commenters are unjustified. These proposals, such as making the conditions permanent, go well beyond the *transitional* measures included in the *NPRM*, would raise constitutional and statutory concerns, and would, in any event, create disincentives to operators' encrypting the basic service tier and thereby limit the public interest benefits of the rule change. The Consumer Electronics Association has no substantive objections to the rule change, but rather uses its comments to press its agenda on completely unrelated issues.

Finally, eliminating the encryption rule for all-digital systems is fully consistent with Section 624A of the Communications Act. Section 624A does not require the Commission to have an encryption rule and, where rules are adopted, directs the Commission to use a cost-benefit analysis when assessing the need for, and scope of, any encryption rules and to periodically update those rules based on changing technologies. Clearly, as several commenters point out, when the required cost-benefit analysis is considered, the statute permits, if not mandates, changes to the existing encryption rule. Claims by Montgomery County that the rule change would harm the marketplace for third-party equipment are without merit. The

Commission has specifically proposed that customers can request CableCARDS, rather than set-top boxes, and encryption will have no impact on the ability of basic tier customers to continue using their QAM TVs. Those customers would just need to use their TVs in tandem with equipment to decrypt video, which is exactly how the overwhelming majority of cable customers and *all* DBS and IPTV customers receive service today.

I. COMMENTERS STRONGLY SUPPORT THE COMMISSION’S PROPOSAL TO AMEND THE ENCRYPTION BAN

NCTA explained in our initial comments that the Commission’s proposal to amend the encryption ban would result in substantial public interest benefits and should be approved promptly.⁴ The overwhelming majority of comments agree. PK/MAP supports the rule change, noting that “conversion of cable systems to digital and elimination of the prohibition on encryption of the basic tier offers significant public benefits” and adding that they “wholeheartedly and enthusiastically support these goals” and “urge the Commission to move swiftly to adopt a final rule.”⁵

Likewise, the Minority Media and Telecommunications Council (“MMTC”) and the Hispanic Technology & Telecommunications Partnership (“HTTP”) both underscore the substantial consumer benefits that will flow from eliminating the encryption ban for all-digital cable systems. According to MMTC, “if cable operators have the ability to encrypt the digital basic service tier, consumers will be able to start getting service through remote activation of digital service, thereby eliminating the need for a service call.”⁶ HTTP notes that “[m]ore convenient activation and deactivation will make it easier for consumers to order or cancel their service,” adding that “fewer required home visits by cable technicians also mean less traffic and

⁴ See NCTA Comments at 5-12.

⁵ PK/MAP Comments at 14.

⁶ MMTC Comments at 3.

less pollution on our already-crowded streets.”⁷ The Cities of Miami, Hialeah, York, and Lancaster also emphasize the pro-consumer benefits of encryption.⁸

In fact, Cablevision’s experience in New York City bears out these public interest benefits. Cablevision reports that, as of the end of October 2011, Cablevision was performing remotely *99.5 percent of all disconnects* in a 401,000 household area.⁹ Cablevision also reports that encryption is facilitating truckless service connections and reconnections. In particular, “[a]s of the end of October 2011, Cablevision left active approximately 39.5 percent of the cable taps in the 401,000 household area” in its New York City service area, and “the number of cable taps left ‘hot’ will continue to grow as Cablevision continues these efforts”¹⁰

NCTA explained in our initial comments how allowing encryption of the basic tier also would reduce signal theft and energy consumption, improve service reliability, and provide strong incentives to the rapid digitization of cable networks.¹¹ Other commenters echo these benefits. For example:

- BendBroadband details the extensive costs and technical limitations associated with trapping technology, and emphasized that such costs and limitations “could be avoided if BendBroadband were permitted to encrypt all of its programming.”¹²

⁷ HTTP Comments at 1; *see also* PK/MAP at 4-5 (“[C]able operators have made a good case that the rules impose a burden on them that could raise costs for consumers – particularly, since there is no need to actually terminate a cable signal (but only to activate or deactivate a particular decryption device), an all-encrypted lineup allows for cable systems to initiate and terminate service to a consumer’s home without a service visit.”). Various cable commenters also detail these consumer benefits to consumers as well as the operational efficiencies that will accrue to operators from reduced truck rolls. *See, e.g.*, Time Warner Cable (“TWC”) Comments at 3-6; Comcast Comments at 4-8 (same); BendBroadband Comments at 1-3 (same); ACA Comments at 2-5.

⁸ *See* City of Miami Comments at 1; City of Hialeah Comments at 1; City of York Comments at 1; City of Lancaster Comments at 1.

⁹ Cablevision Comments at 12.

¹⁰ *Id.* at 12.

¹¹ *See* NCTA Comments at 7-8.

¹² BendBroadband Comments at 2-3.

- Comcast states its expectation that, if it could encrypt the basic tier, “the unauthorized service rate would likely drop into the very low single digits,” and further explains that encryption would improve service reliability as “there would be less incentive for individuals to manipulate equipment to obtain unauthorized access to service.”¹³
- RCN underscores the importance of encryption to reducing service theft, particularly among customers who take Internet service and use QAM TVs to access cable service on an unauthorized basis.¹⁴
- PK/MAP notes that eliminating the encryption ban for all-digital systems would “provide operators with an incentive to upgrade to all-digital technology, which allows them to offer more channels to consumers over the same bandwidth.”¹⁵
- Time Warner Cable (“TWC”) states that the efficiencies and other benefits associated with encryption “will facilitate a quicker, smoother transition to all-digital cable service, which as the Commission has recognized, is itself in the public interest as all-digital service is a ‘more effective use of system capacity.’”¹⁶

Beyond these consumer and other public interest benefits, commenters also emphasize that the encryption prohibition will advance the Commission’s and the Obama Administration’s goal of revising or eliminating outdated rules. PK/MAP explains that the prohibition may have made sense when it was originally adopted in the 1990s, but “technology has changed and the rule no longer serves its purpose” and add that the Commission “should move as swiftly as possible to bring its rules into alignment with the developments in digital technology.”¹⁷ The simple fact is that, as Cablevision and other commenters point out, the vast majority of cable

¹³ Comcast Comments at 11.

¹⁴ RCN Comments at 3-5; *see also* BendBroadband Comments at 2.

¹⁵ PK/MAP Comments at 5; *see also* Comcast Comments at 12-13 (noting that the proposed rules would promote continued innovation and investment in cable networks).

¹⁶ TWC Comments at 5. The City of Boston acknowledges that “[c]able operators would see real benefits” from the rule change in terms of fewer service appointments and enhanced system security, but, with respect to cable customers, focuses exclusively on alleged harms. City of Boston Comments at 2. As detailed *infra* Section III, those claims of harm are without merit. Moreover, City of Boston’s implicit suggestion that the benefits of encryption will flow only to operators, but not customers, is not sustainable. As noted by the Commission and numerous other commenters, reduced truck rolls and enhanced system security redound to the benefit of operators and customers alike.

¹⁷ PK/MAP Comments at 2.

customers today use a set-top box or CableCARD-enabled retail device to access cable service, and almost all customers in an all-digital cable system will have equipment.¹⁸ Consequently, the compatibility issues underlying the encryption prohibition are simply not present in all-digital systems.¹⁹

II. THE RECORD DEMONSTRATES BROAD SUPPORT FOR TRANSITIONAL CONSUMER PROTECTION MEASURES

For the subset of customers in all-digital systems who receive digital basic service without a digital set-top box, digital transport adapter (“DTA”), or CableCARD-enabled retail device, the Commission proposed in the *NPRM* certain transitional measures to ensure that such customers have access to the encrypted basic tier.²⁰ As the Commission observed in the *NPRM*, and as several comments reiterate, the number of customers who will require equipment at the time an operator encrypts the basic tier is likely to be quite small. PK/MAP notes that, “[w]hile some customers do take advantage of unencrypted digital basic tiers [using a QAM TV] from those providers that offer them, the record suggests that they are few when compared to the number of people who took advantage of unencrypted analog basic tiers in years past.”²¹ In Cablevision’s experience in New York City, “less than 0.1 percent of subscribers requested the free set-top box or CableCARD to decode the newly encrypted signal, because the overwhelming majority of subscribers already had such devices in their homes.”²² Likewise, Comcast notes

¹⁸ See Cablevision Comments at 4-6; *see also* Comcast Comments at 14.

¹⁹ See NCTA Comments at 3-4; Comcast Comments at 14.

²⁰ See *NPRM* ¶ 12.

²¹ PK/MAP Comments at 4. As discussed *infra* Section III, claims by Montgomery County, City of Boston, and New Jersey Rate Counsel that the number of affected subscribers will be much higher are based on faulty analysis and are without merit.

²² Cablevision Comments at 13-14.

that in cable systems where it has completed the transition to all-digital, almost every customer will have set-top boxes, DTAs, and/or CableCARD devices to access cable service.²³

NCTA and several other commenters agreed with the thrust of the Commission's proposal to impose equipment-related conditions on a cable operator's ability to encrypt the basic tier, but also suggested slight modifications to the Commission's proposed rules to make them consistent with the Commission's intent.²⁴ In particular, NCTA proposed that the draft rules be revised to: (1) accommodate the use of analog barker and informational channels that may be used in all-digital systems; (2) establish a 60-day window during which eligible customers could request free set-top boxes or CableCARDS (consistent with the approach that Cablevision followed in New York City); and (3) include conforming edits so that the conditions use the same language as much as possible. NCTA urges the Commission to adopt these limited changes, and notes that other operators have proposed similar revisions to the draft rules.²⁵

PK/MAP generally supports the Commission's proposed rules and agree that the use of analog barker/informational channels should be permissible under the rule change.²⁶ PK/MAP also suggests certain modifications to the condition for low-income customers. In particular, while they agree with the five-year transition period for this condition, they also propose that the Commission (1) "broaden the [eligibility] criteria to include the programs acceptable for

²³ See Comcast Comments at 14.

²⁴ See NCTA Comments at 8-12; *see also* Comcast Comments at 16; Cablevision Comments at 15-16.

²⁵ See Inter Mountain Cable/Mikrotec Comments at 5-6 & Att. (suggesting various modifications to the draft rules); BendBroadband Comments at 7 (proposing that the set-top box offers "be required to be available only for the period thirty days before and after the date of encryption" and that the offers "only apply if the customer had the additional television as of the date of encryption"); ACA Comments at 5-6 (urging that set-top box offers "should be available for the period thirty days before and thirty days after the date of basic tier encryption").

²⁶ See PK/MAP Comments at 13 ("Secondary analog components of a primarily digital service – such as an analog channel that only provides information on how to subscribe to a service, or an analog channel that provides emergency information – should not prevent a system from being considered, for regulatory purposes, all-digital.").

Lifeline/Linkup,”²⁷ and (2) require cable operators to provide participating low-income customers with notice as to when the equipment promotion will end (notice would be provided monthly starting three months prior to the end of the promotion) and what the charge will be for the equipment.²⁸

As to the first proposal, Medicaid provides a reasonable eligibility criterion for low-income customers. It is relatively easy to administer – i.e., a customer simply provides documentation that he or she is receiving Medicaid without the need for any further vetting by the operator. In addition, because Medicaid is a national program, operators can train their customer service representatives to implement the low-income condition on a uniform basis across their service areas. Moreover, this Medicaid-based approach has been implemented successfully in Cablevision’s New York City system. Nonetheless, if the Commission is inclined to consider expanding the eligibility criteria for the low-income equipment condition, it must ensure that any additional criteria are based on participation in another federal program that can be verified readily, similar to how Medicaid can be verified with a Medicaid card. NCTA would *not* support adding any eligibility criteria that would place cable operators in a role of making income determinations for individual customers. For example, NCTA would oppose any requirement that cable operators assess whether the consumer or his or her family has income at or below 135% of the federal poverty level, which is another method for qualifying for

²⁷ *See id.* at 7 (noting that the Lifeline/Linkup programs include: Medicaid, Food Stamps, Supplemental Security Income, Federal Public Housing Assistance, Low-Income Home Energy Assistance Program, Temporary Assistance to Needy Families, and the National School Lunch Program’s Free Lunch Program).

²⁸ *See id.* at 8-11. PK/MAP also proposes that any cable system that provides CableCARDS to eligible customers should also provide tuning adapters to access switched digital video (“SDV”) channels. *See id.* at 6. The Commission already requires cable operators to enable SDV support for retail CableCARD devices via a tuning adapter or some other method. *See* 47 C.F.R. § 76.1205(b)(4). The Commission also should refrain from imposing requirements relating to set-top box outputs. *See* PK/MAP Comments at 6. Operators are fully committed to providing customers with equipment that will make basic tier channels accessible on their TV sets, and mandating the use of particular outputs would unnecessarily complicate implementation of the equipment conditions and potentially delay encryption of the basic tier.

Lifeline/Linkup.²⁹ This would require cable operators to analyze tax returns or pay stubs, thereby creating significant administrative burdens and raising potential privacy concerns.

As to the second proposal, operators will, as PK/MAP says, “act in good faith” in administering the condition for low-income customers. Operators have every incentive to ensure that the transition for these customers goes smoothly. This means informing customers about the length of the equipment promotion and taking other measures to keep them satisfied.³⁰

Consistent with these incentives, Cablevision reports that it has administered the equipment conditions in New York City without customer complaint,³¹ and the City of New York confirms that “based on the information available to the City, it appears that the Cablevision transition to encryption of the basic tier led to minimal consumer disruption.”³² NCTA and our members share PK/MAP’s interest in informing low-income customers of the duration, expiration and other terms of their equipment promotion. NCTA believes, as does PK/MAP, that operators will act in “good faith” to provide appropriate notice to their low-income customers making unnecessary any rule changes addressing that issue.³³

²⁹ See 47 C.F.R. § 54.409(c).

³⁰ Operators would have no incentive to engage in the types of “unscrupulous” conduct referenced in the PK/MAP comments. See PK/MAP Comments at 9. Doing so would obviously upset customers and risk possible enforcement action.

³¹ See Cablevision Comments at 2.

³² City of New York Comments at 4.

³³ The City of New York suggests that, when the promotional period ends, the equipment will be subject to rate regulation under Section 623(7)(A) regardless of whether a particular cable system is subject to effective competition. See City of New York Comments at 4 n.7; see also New Jersey Rate Counsel Comments at 7 (asking the Commission to clarify that equipment charges imposed at the end of the promotional period “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”). The City is incorrect. Basic equipment is subject to rate regulation only in regulated cable systems. Neither the Commission nor LFAs have authority to regulate equipment in non-regulated systems. See 47 U.S.C. § 543(a)(2); *Time Warner Entertainment Co., LLP v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995) (explaining that § 543(a)(2) “prohibits the Commission and franchising authorities from utilizing their rate regulation authority under the 1992 Cable Act to regulate the rates charged by cable systems facing ‘effective competition’”). New Jersey Rate Counsel also suggests that costs for equipment for basic customers should be shared with Internet and telephone customers. See New Jersey Rate Counsel Comments at 7. The Commission’s cost allocation rules do not mandate such an approach,

III. CONTRARY TO THE CLAIMS OF CERTAIN COMMENTERS, ENCRYPTION WILL NOT RESULT IN CONSUMER HARMS

Montgomery County, Maryland and other LFA commenters raise concerns about alleged consumer harms from the rule change.³⁴ These commenters assert that encryption will affect a large number of cable customers. For example, Montgomery County observes that 77% of cable customers today take digital service and implies that the remaining 23% of cable customers will be adversely impacted by the rule change.³⁵ That claim is simply incorrect and mixes apples and oranges. The Commission is proposing that encryption be permitted only in cable systems *that will have already gone “all-digital.”* As noted above, in such systems, nearly all customers, including basic tier customers, will *already* have equipment and will not be impacted by the encryption of the basic tier.³⁶ The simple fact is that encryption will have a negligible impact on cable customers in systems that are already all-digital, and those customers who are impacted will be eligible for equipment under the conditions.³⁷

and sharing costs in this way would be contrary to the rate principles underlying Form 1205 as the equipment that operators would be providing to basic tier customers would be used exclusively to access cable services.

³⁴ See Montgomery County Comments at 2-4; City of Boston Comments at 2-3; New Jersey Rate Counsel Comments at 4. Montgomery County opposes the rule change, while City of Boston, New Jersey Rate Counsel, and City of New York urge the Commission to impose more onerous conditions on operators.

³⁵ See Montgomery County Comments at 2-3.

³⁶ BendBroadband notes that “every single one of [its] 35,000 customers has at least one set-top box and there are over 2.7 set-top boxes on average per household in the system.” BendBroadband Comments at 4.

³⁷ The Commissions should reject proposals by Montgomery County, New Jersey Rate Counsel, and City of New York to require cable operators to submit data about such customers. See Montgomery County Comments at 3; New Jersey Rate Counsel Comments 4; City of New York Comments at 6. Such reporting would be unnecessary, particularly in light of the very small number of customers who will be affected by encryption, and would also be contrary to the Commission’s ongoing efforts to *reduce*, not expand, reporting obligations for cable operators and other service providers. See, e.g., FCC, *Preliminary Plan for Retrospective Analysis of Existing Rules*, at 7 (Nov. 7, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310874A1.pdf (noting that the Commission has launched the Data Innovation Initiative to modernize and streamline how it collects, uses, and disseminates data and that, as part of the Initiative, the Commission has identified 25 data collections that may be eliminated); *In re Standardized and Enhanced Requirements for Television Broadcast Licensee Public Interest Obligations*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 00-168, FCC 11-162, App. C ¶ 10 (rel. Oct. 27, 2011) (noting that the FNPRM “seeks to minimize reporting requirements” and ease “administrative burdens”). Such data reporting requirements would also trigger Paperwork Reduction Act review, which would unnecessarily delay implementation of the rule change and the associated pro-consumer benefits.

Montgomery County also asserts that encryption will result in *increased* truck rolls needed for initial equipment installation and to address customer problems with self-installs.³⁸ That has not been the experience of cable customers and operators in similar circumstances. Cablevision is providing truckless service connections and disconnections in New York City. Comcast reports that over 80% of customers have chosen to self-install their DTAs – without any significant volume of complaints or problems – and customers strongly prefer a self-install option for these devices.³⁹ Of course, customers would still have the option of having a service technician visit their homes for professional installation and/or disconnection if they prefer, but encryption clearly provides the opportunity to facilitate truckless self-installations at the customer’s convenience. And it is worth emphasizing that, once the basic tier is encrypted, the opportunity for truckless installation and/or disconnection becomes available to *all* customers, not just basic tier customers.⁴⁰ There also is no merit to the County’s claims that encryption will result in substantial energy-related equipment costs for customers. As we noted in our initial comments, few customers will require new equipment due to encryption, and the equipment that

³⁸ See Montgomery County Comments at 5.

³⁹ See Comcast Comments at 5.

⁴⁰ As noted in the *NPRM*, customer service can be improved by eliminating the need to stay home to wait for installation. Set-top boxes can be picked up by the customer at the customer’s convenience or sent to the customer’s home. See *NPRM* ¶ 5 n.26; see also *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 ¶ 6 n.16 (2010) (“*Cablevision Waiver Order*”).

is typically provided, such as DTAs, use very little power.⁴¹ On the other hand, reduced truck rolls will result in substantial reductions in fuel consumption.⁴²

Based on their faulty claims of consumer harm, Montgomery County and other LFAs recommend that the rule change be accompanied by far more expansive equipment conditions. For example, Montgomery County, New Jersey Rate Counsel, and City of Boston urge that the conditions not be time limited.⁴³ These proposals should be rejected. As the Commission noted in the *NPRM*, the equipment conditions are *transitional measures* for customers who may be using QAM TVs to watch unencrypted digital basic service at the time of encryption.⁴⁴ Likewise, the Commission should reject proposals by the City of New York that the Commission adopt equipment conditions for basic-only customers with analog TVs in addition to basic-only customers with QAM TVs.⁴⁵ The City is mistakenly conflating two separate and distinct transitions: the transition to all-digital and the transition to basic tier encryption. The *NPRM* deals with the second transition, not the first transition, as the rule change only applies to cable

⁴¹ See NCTA Comments at 7; *see also* Comcast Comments at 7 (noting that DTAs consume between three and four watts of power); TWC Comments at 6 n.15 (same). The County disregards the environmental benefits associated with encryption. The greater Washington, DC area, which includes Montgomery County, has the worst traffic congestion in the nation, *see* Ashley Halsey III, *D.C. Area is No. 1 Nationwide in Traffic Congestion, Study Says*, Wash. Post, Sept. 27, 2011, so the prospect of reduced truck rolls would plainly benefit Montgomery County residents.

⁴² See Comcast Comments at 7; Cablevision Comments at 7. The City of Boston also raises concerns that Cablevision-like equipment conditions might conflict with the Senior Discount plan that the City has negotiated with its franchised cable operators. See City of Boston Comments at 4. That would not be the case. The conditions will have *no* effect on obligations under existing franchise arrangements.

⁴³ See Montgomery County Comments at 1; City of Boston Comments at 1; New Jersey Rate Counsel Comments at ii. New Jersey Rate Counsel incorrectly states that mandating the equipment be provided at no charge forever would be consistent with the policy adopted in the *Viewability Order* that “all channels must be viewable without additional cost to customers.” New Jersey Rate Counsel Comments at 6-7. The *Viewability Order* does not limit an operator’s ability to charge for equipment. In fact, in its discussion regarding operators that elect to go all-digital, the Commission specifically considered the set-top box costs associated with going all-digital, and stated that “nothing in this order precludes [cable operators] from recovering the costs of those boxes from subscribers” *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, Third Report and Third Further Notice of Proposed Rulemaking*, Third Report & Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 ¶ 42 (2007) (“*Viewability Order*”).

⁴⁴ See *NPRM* ¶¶ 11-12.

⁴⁵ See City of New York Comments at 5.

systems that have completed the transition to all-digital delivery. It also bears emphasis that the Commission has – rightly – never required that equipment be provided at no charge as part of an operator’s transition to all-digital.⁴⁶

Moreover, making the transitional measures permanent or otherwise expanding their scope, as proposed by the LFAs, would raise constitutional and statutory concerns. As we noted in our comments “[s]uch requirements could become tantamount to prohibited rate regulation or confiscation if those requirements, for example, were unbounded in time or cost.”⁴⁷ It also goes without saying that making the equipment conditions more costly and onerous would skew marketplace competition⁴⁸ and have a chilling effect on operators’ plans to go all-digital and encrypt the basic tier, thereby limiting the public interest benefits of the rule change and denying consumers the innovative services that accompany the transition to all-digital delivery.⁴⁹

⁴⁶ As noted, *supra* note 43, the *Viewability Order* specifically states that operators *can* charge for equipment associated with going all-digital. The City of New York also proposes that the rule change be time-limited so that the Commission could subsequently “evaluate the burden on basic-tier only subscribers.” City of New York Comments at 4. The Commission rejected a similar proposal from the City in the Cablevision waiver proceeding, *see Cablevision Waiver Order* ¶ 12, and should similarly conclude here that the proposed equipment conditions will address any potential compatibility concerns for the small number of customers likely to be impacted by encryption of the basic service tier.

⁴⁷ NCTA Comments at 12-13.

⁴⁸ For example, cable’s DBS competitors face no restrictions on their ability to charge their customers for equipment. *See id.* at 4-5 (also noting that Netflix and other online video distributors also fully encrypt their video services); *see also* Comcast Comments at 18 n.46; Cablevision Comments at 10-11. Consequently, burdening cable operators with open-ended equipment conditions would place operators at a competitive disadvantage in the MVPD marketplace.

⁴⁹ New Jersey Rate Counsel states that it would be “unfair and discriminatory” to exclude *new* subscribers from the equipment conditions. New Jersey Rate Counsel Comments at 5. Rate Counsel is incorrect. The purpose of the equipment conditions is to address potential harm to customers who may be accessing unencrypted digital basic channels using a QAM TV *at the time of encryption*. Once those channels are encrypted, such customers will need a set-top box or CableCARD to access those channels. Customers who subscribe to service *after* the basic tier has been encrypted are not impacted in this way. Such customers were never receiving unencrypted channels on the cable system, so giving them free equipment would be a windfall.

IV. THE COMMISSION SHOULD NOT IMPOSE EQUIPMENT CONDITIONS RELATING TO GOVERNMENT AND OTHER INSTITUTIONAL BUILDINGS

The Alliance for Community Media, the City of Boston, and Montgomery County propose that the equipment conditions be extended to government and other institutional buildings.⁵⁰ The Commission did not take this approach in the *Cablevision Waiver Order*, and should refrain from doing so here. Cable operators typically negotiate these types of equipment issues as part of their franchise agreements with local communities, and equipment-related commitments with respect to government and other institutional buildings will be tailored to the particular needs of individual communities. Imposing a “one-size-fits-all” approach would override these individually negotiated solutions and risk doing far more harm than good by constraining the flexibility to meet a particular community’s needs based on the preferences of that community. Agreements between local communities and cable operators can and do accommodate different community needs and preferences; FCC mandates would not.

V. THE RULE CHANGE IS FULLY CONSISTENT WITH SECTION 624A

As we explained in our initial comments, the Commission has authority to make the proposed rule change. Section 624A does not require the Commission to have an encryption rule and, where rules are adopted, directs the Commission to use a cost-benefit analysis when assessing the need for, and scope of, any encryption rules and to periodically update those rules based on changing technologies.⁵¹ Clearly, when the required cost-benefit analysis is

⁵⁰ See ACM Comments at 2 n.6; City of Boston Comments at 5; Montgomery County Comments at 7. ACM also urges that the Commission ensure that “PEG channel programming continues to be as accessible and functional for all viewers on a cable system after encryption as it was before” and that “PEG programming is not adversely affected by encryption.” ACM Comments at 3. It is not clear what potential harms ACM has in mind. All basic tier channels that are encrypted, including PEG and broadcast channels, will be accessible with a set-top box or CableCARD device. There will be no change in the customer experience.

⁵¹ See NCTA Comments at 13; see also BendBroadband Comments at 6; Comcast Comments at 17-19; ACA Comments at 6.

considered, the statute permits, if not mandates, changes to the existing encryption rule consistent with what the Commission has proposed.

Montgomery County nonetheless argues that the rule change would conflict with the purpose of Section 624A because encryption would increase consumer “dependence” on operator-supplied equipment and harm the marketplace for third-party devices.⁵² The County is incorrect. As noted, almost all customers in all-digital systems will already have equipment, so the impact on consumers would be small. With respect to the equipment marketplace, encryption will *increase*, not decrease, opportunities for third-party devices as customers eligible for the equipment conditions have the option of obtaining a CableCARD for a CableCARD-enabled retail device, rather than a set-top box. Likewise, encryption will have no impact on the ability of basic tier customers to continue using their QAM TVs; they will just need to use the TV sets in tandem with a set-top box or retail CableCARD-enabled device to view digital basic service channels. This is no different than how non-basic cable customers receive service today, or how *all* DBS and IPTV customers get their video services (which are fully encrypted and require a set-top box on every TV set).⁵³

The Consumer Electronics Association (“CEA”) appears to take the view that the Commission has authority to make the rule change and that the change proposed is not

⁵² See Montgomery County Comments at 8-9. Curiously, the County’s solution to this alleged harm would be to require cable operators to sell *operator-supplied* equipment to customers. See *id.* at 7. The Commission has declined to adopt similar proposals in the past. 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 ¶ 19 n.69 (2010).

⁵³ Montgomery County’s suggestion that encryption will somehow give cable operators “gatekeeper control” over their customers, see Montgomery County Comments at 9 n.28, completely ignores the robust and ever-increasing competition in the video marketplace today. In Montgomery County alone, customers have a choice of three cable operators – Comcast, RCN, and Verizon – as well as DirecTV and Dish Network. Moreover, customers can access video services from Netflix, Amazon, and a host of other online providers. As Comcast notes, market share for cable’s competitors has steadily grown over the years, while cable’s share has declined, “raising the question of what consumer benefits are served by the prohibition on basic tier encryption for only a segment of the marketplace.” Comcast Comments at 18 n.46; see also NCTA Comments at 4 (noting increased market share of DBS and telco providers).

objectionable, but the Commission should not make the change unless it is accompanied by a raft of new rulemakings on unrelated matters.⁵⁴ CEA proceeds to use the rest of its comments to discuss a laundry list of issues that are completely outside the scope of the *NPRM*. Along the way, CEA appears to ask the Commission to launch at least five new rulemakings and touts this broad regulatory agenda as a “true solution” to managing the marketplace transition to digital and IP.⁵⁵ CEA’s call for extensive new government regulations stands in marked contrast to the constant lament of CEA President Gary Shapiro about the harms caused by government mandates.⁵⁶ NCTA has explained in other contexts why government regulation in this dynamic marketplace would be misguided and would chill continued investment and innovation.⁵⁷ For these reasons, the Commission should disregard CEA’s comments.

⁵⁴ See CEA Comments at 1-2 (“If the [NPRM] were matched by equally proactive measures, this rule change to capture potential efficiencies, even at the cost of some inconvenience to some subscribers, would be unobjectionable.”).

⁵⁵ *Id.* at 12.

⁵⁶ See, e.g., Gary Shapiro, *Say No to Buggy-Whip Technology Mandates*, TV Technology (Nov. 16, 2010) (quoting Mr. Shapiro as saying that “the free market – not government mandates – holds the best hope for ensuring that our industries continue to innovate and thrive”), available at <http://www.tvtechnology.com/article/109248>.

⁵⁷ See, e.g., Letter from Kyle McSlarrow, President and CEO, NCTA, to Julius Genachowski, Chairman, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80 (Jan. 26, 2011); Letter from Michael K. Powell, President and CEO, NCTA, to Julius Genachowski, Chairman, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80 (July 7, 2011); Letter from Neal Goldberg, Vice President and General Counsel, NCTA, to Sherrese Smith, Senior Counsel & Legal Advisor to Chairman Genachowski, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80 (Aug. 10, 2011); see also Letter from Kathryn A. Zachem, Senior Vice President, Comcast Corporation, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67 (Oct. 17, 2011).

CONCLUSION

NCTA urges the Commission to adopt the recommendations set forth in these reply comments and NCTA's initial comments in this proceeding and respectfully requests that the Commission act without undue delay in eliminating the encryption ban for all-digital cable systems.

Respectfully submitted,

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