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James N. Moskowitz
Admitted in the District of Columbia

January 31, 2012

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Communications; In the Matter of the Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment, MB Doc. No 11-169, PP Doc. No. 00-67

Dear Ms. Dortch:

On January 27, 2012, Ross Lieberman, Vice President of Government Affairs, American Cable Association (“ACA”), Barbara Esbin and the undersigned, counsel to ACA, participated in a meeting with Michelle Carey, Deputy Chief, Media Bureau, Steven Broeckert, Mary Beth Murphy, Alison Neplokh, and Brendan Murray, Media Bureau, to discuss the pending Notice of Proposed Rulemaking (“NPRM”) in the above referenced docket.¹

During the meeting, ACA reiterated the positions reflected in its comments and reply comments supporting the Commission’s proposal to permit, but not require, cable operators to encrypt their basic tier services on all-digital systems.² Meeting participants discussed the consumer protection measures that the Commission proposed applying to all cable operators, regardless of size, who seek to encrypt their basic service tier. ACA again urged the Commission not to adopt a “one-size-fits-all” approach to conditions, but instead to adopt ACA’s proposed alternative measures for smaller operators to ensure that the relative burden imposed on smaller providers are no greater than that imposed on larger ones. By taking this approach, the Commission will provide smaller and larger providers with an equal incentive to take advantage of the benefits of basic tier encryption. This would allow customers of cable

¹ *In the Matter of the Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Doc. No 11-169, PP Doc. No. 00-67; Notice of Proposed Rulemaking, FCC 11-153 (rel. Oct. 14, 2011) (“NPRM”).

² *See In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, Comments of the American Cable Association, at 1 (filed Nov. 28, 2011) (“ACA Comments”); *see also In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, Reply Comments of the American Cable Association, PS Docket MB Docket No. 11-169, at 1-2 (filed December 12, 2012) (“ACA Reply Comments”).

operators, regardless of size, to benefit from these proposed rule changes. ACA also encouraged the Commission to complete the rulemaking in a timely manner.³

Meeting participants discussed ACA's claim that the consumer protection measures proposed in the NPRM would disproportionately burden small operators. ACA noted as a factual matter that smaller operators are charged higher prices per set-top box than larger ones because smaller providers do not purchase these devices in the same volumes. As an example, ACA noted that Comcast, which serves more than 23 million subscribers, pays far lower prices per set-top box than ACA's 720 members who serve fewer than 5,000 subscribers. Even ACA's largest members, who serve only a few hundred thousand customers at most, pay significantly more than Comcast and other larger operators. ACA asserted, consistent with its comments and reply comments, that smaller operators generally pay at least 20% more (and often significantly more depending on the relative size differential between the largest operators and the smallest ones) to purchase set-top boxes.⁴

Participants also discussed the recurring costs ACA has found smaller operators incur when additional set-top boxes are deployed and utilized by their customers, which larger operators do not pay. ACA explained that digital cable systems require special equipment that controls conditional access for each digital set-top box used on the system. ACA stated that smaller operators cannot afford to purchase and install this digital control equipment, such as Motorola's Digital Addressable Control ("DAC"), which starts at about \$250,000. Instead, smaller operators must contract with third-party providers for remote DAC services. Companies that offer remote DAC services charge cable operators as much as \$.40, per set-top box, in recurring monthly fees for each set-top box used by its customers. Over a period of years these fees can eclipse the cost of a low-cost set-top box. In contrast, larger operators that own their own digital control equipment and spread the investment over far more subscribers do not incur these recurring costs when they deploy additional devices.

Further, participants discussed ACA's position that the cost to install set-top boxes is frequently more expensive for smaller operators than larger ones. ACA explained that its members who have migrated channels from analog to digital, report that many customers demand that operators send out an employee to install set-top boxes in their homes. ACA then noted that smaller operators often serve more rural areas than larger operators and the distance between its service center and its customers, and between customers, is greater. These factors lead to a significantly disproportionate cost impact on small operators relative to larger ones with regard to installing set-top boxes in customers' homes.

ACA reiterated the point discussed in its reply comments that the Commission in the prior waiver cases varied the conditions that it imposed based on the size of the operator.⁵ For

³ In the course of the discussion, ACA noted, consistent with its Comments in this proceeding, that RCN submitted its Petition for Waiver of the Basic Service Tier Encryption rules prior to the Commission issuing its NPRM, and that the Commission should consider approving the RCN's waiver petition independently, if it could not complete its rulemaking promptly. See, ACA Comments at 4 (*citing In the Matter of RCN Telecom Services, Inc.'s Petition for Waiver of Section 76.630(a) of the Commission's Rules*, File No. CSR-8525-Z (filed Aug. 12, 2011)).

⁴ See ACA Reply Comments at 5-6.

⁵ *Id.* at 4.

example, in the Cablevision waiver petition (involving 3.2 million subscribers), the Commission adopted the conditions that it now proposes to apply to the entire industry in the NPRM.⁶ In contrast, in the Liberty Cablevision Waiver Petition proceeding, involving 108,600 subscribers, the Commission only required that the operator forgo any set-top-box *installation* charges necessitated by basic tier encryption. ACA argued that the Commission should, consistent with these precedents, impose reduced consumer protection burdens on small operators as a condition of waiver of the basic tier encryption rule.

Participants discussed ways the Commission could revise its proposed rules so that any consumer protection measures adopted impose the same proportional burden on larger and smaller operators, with small operators defined as those with 400,000 or fewer subscribers.⁷ Specifically, participants discussed ACA's proposal that small cable operators be permitted to fulfill the requirement to provide free set-top boxes by using the least expensive equipment available for purchase in the market, including refurbished devices that have integrated conditional access security. Since the Commission banned the sale and deployment of set-top boxes with integrated security in 2007,⁸ many larger cable operators have accumulated a large inventory of these devices as they replaced older, yet still functioning devices with newer, more advanced boxes. As a result of this increased supply with no demand, ACA members estimate that they could purchase a refurbished set-top box with integrated security, such as the Motorola DCT-2224 or 2244, from a larger domestic cable operator or third-party vendor, for as little as \$25 per box. This is less expensive than the lowest priced digital television adapter ("DTA") available to small cable operators through their buying cooperative, the National Cable Television Cooperative ("NCTC"). Presumably, this is also close to the price that the largest cable operators pay to purchase DTAs.

ACA encouraged adoption of its proposal to permit smaller operators to purchase refurbished set-top boxes with integrated security as a means of lessening the burden the NPRM's proposed consumer protection measures would otherwise impose on smaller operators. ACA suggested that the impact of its proposal on the development of a marketplace for a retail set-top boxes would be *de minimis*,⁹ particularly if the Commission permits the deployment of integrated set-top boxes solely for the purpose of satisfying the conditions contained in proposed Section 76.630(a)(1). To further ensure a limited impact on the marketplace for retail set-top boxes, ACA suggests that small cable operators be permitted to obtain and deploy only set-top boxes that have previously been deployed in the market, rather than new devices. Moreover, ACA suggests that small cable operators who qualify for the right to offer set-top boxes with integrated conditional access remain obligated to offer CableCARDS upon request by customers.

Finally, in addition to allowing smaller cable operators to deploy refurbished set-top boxes with integrated security, ACA suggested reducing the time frames that free set-top boxes

⁶ See *id.*

⁷ *Id.* at 7.

⁸ 47 C.F.R. § 76.1204(a)(1) (providing that "no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.").

⁹ See ACA Reply Comments at 9.

would need to be made available to subscribers under certain circumstances and consistent with its reply comments in this proceeding.¹⁰

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely



James N. Moskowitz

cc (via email): Michelle Carey
Steven Broeckaert
Mary Beth Murphy
Alison Neplokh
Brendan Murray

¹⁰ See *id.* at 7.