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March 1, 2012

***Via Electronic Filing***

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Basic Service Tier Encryption; Compatibility Between Cable  
Systems and Consumer Electronics Equipment,  
MB Dkt. No. 11-169, PP Dkt. No. 00-67*

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Dear Ms. Dortch:

Boxee, Inc. (“Boxee”) writes in response to letters filed in this docket by the CEOs of 14 cable companies on March 1, 2011,<sup>1</sup> Bend Cable Communications, LLC on February 22, 2012,<sup>2</sup> and NCTA on February 28, 2012<sup>3</sup> and February 21, 2012<sup>4</sup> (collectively referred to herein as the “Cable Letters”). Though purporting to show that basic tier encryption will provide numerous consumer benefits at low consumer cost, the Cable Letters instead demonstrate quite different points: first, that encryption offers many benefits to cable operators, not consumers, and second, that cable operators only want those benefits if they are paid for by consumers, not the operators themselves. The Commission should reject the Cable Letters’ requests to value cable companies’ interests above consumers’.

As Boxee has previously explained, there is no evidence that encryption would have a net positive environmental impact,<sup>5</sup> and reducing the need for customers to wait for a cable technician or the ability of broadband-only subscribers to receive the unencrypted

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<sup>1</sup> Letter from Amy Tykeson, BendBroadband, Steve Miron, Bright House Networks, et al. to Hon. Julius Genachowski, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Mar. 1, 2012) (the “CEO Letter”).

<sup>2</sup> Letter from Amy C. Tykeson, Bend Cable Communications, LLC, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 22, 2012) (the “BendBroadband Letter”).

<sup>3</sup> See Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 28, 2012).

<sup>4</sup> See Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 21, 2012) (the “NCTA Letter”).

<sup>5</sup> See, e.g., Letter from Ken Plotkin, CEO, Hauppauge Computer Works, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 14, 2012) (the “Hauppauge Letter”) at 2-3 (“Environmentally this is at best a wash.”); Avner Ronen, “Cable Companies Want Government to Help Them Increase Your Bill and Limit Competition,” available at <http://blog.boxee.tv/2012/02/08/cable-companies-want-government-to-help-them-increase-your-bill-limit-competition/#.T0v5mXJSTvM> (discussing STB energy consumption).

basic tier are both things that cable operators could achieve irrespective of encryption.<sup>6</sup> Similarly, the benefits of digital service can be realized today, alongside ClearQAM (indeed, under the proposed rule, all-digital service must precede encryption). The CEO Letter's argument that encryption is needed to drive the digital transition is not only false, but reveals cable operators' anti-consumer position – why aren't they incentivized to deliver superior digital services to consumers even in the absence of an encryption “payoff”?<sup>7</sup>

Despite the above evidence to the contrary, the Cable Letters continue to insist that these are the “substantial consumer and other public interest benefits” that will result from encryption.<sup>8</sup> If these are truly benefits to consumers, then why have so many consumers urged the Commission not to proceed with the proposed rulemaking? Among the nearly seven hundred requests from consumers to spare them these “benefits” are the following:

“The mere discussion of this as an idea is purely anti-consumer and only for the benefit of the cable companies. . . . At present time, I can receive Clear QAM stations, primarily the local channels, on all my televisions. For most, this is all I need. I can also, legally, record television onto my computer using a tuner device. With this new ruling, I would be required to pay extra each month for every television set even if all I want is local channels. Given that I am too far to receive them over the air, this is additive cost for NO BENEFIT other than for the cable company's coffers. As for recording television for later viewing, I would lose this ability entirely and, again, be forced to pay the cable company extra for the use of their DVR service. Not only would this be expensive, it completely lacks the critical features that my family enjoys.”<sup>9</sup>

“Encrypting all cable content is a trick by the cable companies to tie you to their products, and force you to pay extra to rent a box that makes using your TV a miserable experience.”<sup>10</sup>

“As a basic cable subscriber, the encryption of basic tier programming would adversely affect me. I have four digital television sets in my home along with a clear QAM network tuner device. None of these devices use any form of set top box (STB) to receive programming. None of my digital television sets have the ability to accept a CableCARD. If the basic tier were encrypted, I would need a STB for each television and the network tuner would become useless. I do have the option of purchasing a different model network tuner device with the ability to use a CableCARD but this is at a significant cost to me. Assuming that the rental costs associated with the required STB would be \$5 per month per television and an additional \$5 per month for the CableCARD for my network tuner I would incur approximately \$25 per month of rental fees on my monthly cable television bill. It is important to note here that as of my 12/07/11 cable bill, my total cost for basic programming, not including any fees, is \$19.20. As you can see, my rental fees associated with encrypting basic tier programming potentially exceeds the cost of basic tier service itself. I see no way that encryption

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<sup>6</sup> See Letter from Melissa Marks, General Counsel, Boxee, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 13, 2012) (the “Boxee Letter”) at 2 (noting that self-installation and remote activation exist currently alongside Clear QAM and filters, to the extent used, are typically installed outside the home); Hauppauge Letter at 3.

<sup>7</sup> See CEO Letter at 2. See also Boxee Letter at 3 (“To delay the move to digital systems unless given permission to encrypt Clear QAM, thereby forcing additional hardware rental costs on millions of consumers and hindering device compatibility, in no way benefits consumers.”)

<sup>8</sup> See NCTA Letter at 1; CEO Letter at 1.

<sup>9</sup> Comments of Tom Scales (Dec. 28, 2011).

<sup>10</sup> Letter from Michael Alderete to Chairman Julius Genachowski, attached to Letter from Peter Brody, Public Knowledge, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 14, 2012) at 350 (the “489 Consumer Attachment”).

benefits the consumer, even with a promotional period of free STB equipment. Eventually, I will have to pay for this, so called, improvement.”<sup>11</sup>

“Providers that have a legal stranglehold on physical access should be required to compete with startups and other innovative companies and not rest on their laurels.”<sup>12</sup>

“I understand requiring a set top box to view premium level channels, but the basic tier shouldn’t require me to pay my provider even more in monthly fees. I have several TVs in my home, but I don’t need the premium access on all of them, and in some cases new innovative devices like Boxee and HD-Homerun are much more powerful to use than what my cable provider will ever offer me.”<sup>13</sup>

“This is just another attempt for cable companies to squeeze more money out of its customers that just want to watch some channels that they already pay for. . . . If the cable companies don’t want to lose money than they just need to innovate and sell a better product.”<sup>14</sup>

“It seems clear to me that the cable companies’ current effort to further restrict consumer options is an attempt to stem the tide that has already turned against them, not by providing more competitive service offerings, but by limiting consumer choice, and stifling innovation.”<sup>15</sup>

As these consumers, and others, recognize, the only real benefits of encryption will be realized by cable operators, who will profit from the deployment of additional, low-quality set-top boxes at consumers’ expense, as well as from the increased cost and reduced functionality of what would otherwise be very competitive non-cable devices.

Though operators insist upon the importance of preventing unauthorized access to the unencrypted basic tier, the Cable Letters make clear that they are only willing to address that issue at consumers’ and competitors’ expense. The BendBroadband Letter, for example, states that without encryption, BendBroadband will have to place traps at the homes of its 4,400 broadband-only customers.<sup>16</sup> But BendBroadband completed its all-digital conversion over three years ago<sup>17</sup> – if access to ClearQAM by broadband customers is of such high concern, why has BendBroadband not taken steps to address it in the past three years? The Cable Letters argue that RF traps are too expensive and difficult to use in light of the way in which cable operators have elected to utilize their digital spectrum. But the choice not to use the digital spectrum in a way conducive to traps, like the choice not to spend money on traps, was made by the cable operators. Now they wish for the Commission to permit encryption in order to “save” them money that they haven’t been spending in the first place, all to prevent a harm that they themselves have chosen not to

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<sup>11</sup> Comments of Shawn Foy (Dec. 27, 2011).

<sup>12</sup> Letter from Andrew Enamorato to Chairman Julius Genachowski, FCC, attached to Letter from Peter Brody, Public Knowledge, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 23, 2012) at 24 (the “183 Consumer Attachment”).

<sup>13</sup> Letter from Matthew Letnaunchyn to Chairman Julius Genachowski, FCC, 489 Consumer Attachment at 63.

<sup>14</sup> Letter from Rene Cruz to Chairman Julius Genachowski, 489 Consumer Attachment at 34.

<sup>15</sup> Letter from Mike O’Rourke to Chairman Julius Genachowski, 489 Consumer Attachment at 48.

<sup>16</sup> BendBroadband Letter at 1.

<sup>17</sup> *Id.*

prevent,<sup>18</sup> and conveniently, in a way that would result in them receiving additional hardware rental fees and having fewer device competitors.<sup>19</sup>

Finally, the Cable Letters argue that, unlike the large amounts we are meant to believe they would suddenly start investing were the basic tier to continue to be unencrypted, the consumer costs of encryption would be minimal. The record contains a great deal of evidence suggesting this is not the case, since operators don't have knowledge of how many subscribers use ClearQAM on additional TVs,<sup>20</sup> the proposed transitional relief is too narrowly drawn to make ClearQAM users sufficiently whole,<sup>21</sup> the Cablevision data is likely under-representative,<sup>22</sup> and CableCARD is not a comparable alternative to ClearQAM.<sup>23</sup> But beyond the question of the harms' scope is that of why they should be inflicted at all. Increasing consumers' hardware costs and decreasing the availability of reasonably priced competitive devices, all in order to solve issues of incumbents' own creation that they have elected not to invest in addressing, cannot be called a balancing of interests – especially when done under a rule enacted to foster device compatibility and competition.<sup>24</sup>

Far from suggesting that the Commission “hobble cable operators” with a “primitive” technology,<sup>25</sup> Boxee continues to request that the Commission take a forward-looking approach to the question of encryption. As the Cable Letters have pointed out, the transition to all-digital systems paves the way for new methods of delivering services, such as via IP.<sup>26</sup> IP delivery has the potential to provide compatibility among devices and services offered by cable operators, other MVPDs, and non-MVPD companies, to spur innovation across the home-entertainment sector, and to achieve all the goals cable operators seek from encryption – in other words, to achieve a true balance of interests.

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<sup>18</sup> See BendBroadband Letter at 1 (“[W]e believe it is necessary to encrypt our basic tier because doing so would save approximately \$700,000 in avoided cost of traps. . .”). See also RCN Comments (Nov. 28, 2011) at 3-4 (explaining that RCN does not use RF traps).

<sup>19</sup> See Letter from Melissa Marks, General Counsel, Boxee, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 2, 2012) and attachment thereto (the “Boxee Presentation”) at slide 17.

<sup>20</sup> See, e.g., RCN Comments at 5-6 (“The number of such customers [using unencrypted QAM] is difficult to quantify. . .”). See also Hauppauge Letter at 1 (“[A]ccording to NCTA’s metric, a customer is not relying on clear QAM if she is renting a set-top box. This is fallacious.”); Boxee Presentation at slide 16; Boxee Letter at 3.

<sup>21</sup> See, e.g., Comments of Public Knowledge and Media Access Project (Nov. 28, 2011); Reply Comments of Public Knowledge and Media Access Project (Dec. 12, 2011); Boxee Presentation at slides 10-11, 20.

<sup>22</sup> See Boxee Letter at 4.

<sup>23</sup> See Boxee Presentation at slides 14-15; Letter from Melissa Marks, General Counsel, Boxee, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 16, 2012) notes 11-12 and at 3. See also Comments of Glenn Connery (Feb. 17, 2012) at 2 (“I recently had a Cable Card install with Comcast for a new TiVo Elite and lost at LEAST two days of work to get it installed successfully—multiple attempts at self-install, hours on the phone and on chat with Comcast with many well-meaning but completely ignorant of Cable Card support personnel, two truck rolls etc just to get one Cable Card installed and working. Until they can do better than that this request [to encrypt the basic tier] should be DENIED.”).

<sup>24</sup> See 47 U.S.C. § 544a.

<sup>25</sup> See BendBroadband Letter at 4.

<sup>26</sup> See NCTA Letter at 6; Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 7, 2012) at 4; CEO Letter at 2.

The Commission should act based on the best interests of consumers – not based on what cable companies would have the Commission believe are consumers’ best interests – and accordingly, should not permit a cable operator to encrypt the basic tier until it offers a comparable forward-looking alternative, such as delivering a standard encrypted IP feed of broadcast channels in a way that does not require additional hardware, rental fees or cable operator consent.

Pursuant to the Commission’s rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully Submitted,

/s/ Melissa Marks

Melissa Marks  
General Counsel

cc: Hon. Julius Genachowski  
Commissioner Robert McDowell  
Commissioner Mignon Clyburn  
Sherrese Smith  
William Lake  
Jessica Almond  
Alison Neplokh  
Michelle Carey  
Mary Beth Murphy  
Steve Broeckaert  
Brendan Murray