

**Before the
Federal Communications Commission
Washington DC, 20554**

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

COMMENTS OF PUBLIC KNOWLEDGE AND MEDIA ACCESS PROJECT

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Table of Contents

INTRODUCTION AND SUMMARY	1
DISCUSSION	4
I. The Rules Should Be Changed to Allow the Encryption of the Basic Tier on Digital Systems, Provided that Low-Income Customers and Legacy Equipment Investments Are Protected.....	4
A. The Commission Should Clarify Certain Aspects of the Proposed Rule To Protect Consumers From Equipment Incompatibility.	6
B. The Commission Should Adopt the Lifeline/Linkup Criteria For Eligibility.	6
C. The Commission Should Clarify the Rule To Prevent “Bill Shock” At the End of the Five Year Transition Period.	8
1. The Commission Should Clarify That “Free” Means “Free” Without Hidden Charges or Onerous Conditions.....	9
2. The Rule Should Require Adequate Notice Before The End of the Transition Period to Avoid Bill Shock.	10
II. The Commission Can Better Assure the Compatibility of Consumer Electronics and MVPDs By Moving Forward With AllVid	11
III. Hybrid services may be considered “all digital” in limited circumstances.....	13
CONCLUSION.....	14

Public Knowledge and Media Access Project (Commenters), file these comments in support of the proposed rules. Commenters applaud the Commission for acting via a rulemaking rather than proceeding by waiver. Indeed, this proceeding provides an important opportunity for the Commission to demonstrate that its rulemaking processes can respond to changes in technology in an expeditious manner that both promotes deployment of new services *and* protects the public interest. For this reason, Commenters urge the Commission to conclude this proceeding as expeditiously as possible. With only two minor clarifications, the proposed rule will simultaneously bring the benefits of all-digital systems to millions of cable subscribers while keeping whole those subscribers, particularly low-income subscribers, dependent on the basic tier.

INTRODUCTION AND SUMMARY

Commenters agree with the Commission that its rules should be amended to allow for the encryption of the basic service tier of all-digital cable systems.¹ Commenters' position on the issue of the encryption of the basic tier has not changed since 2009, when Commenters offered qualified support for Cablevision's petition for waiver of the encryption rules.² At that time, while satisfied that Cablevision had made its case for a waiver (provided certain steps were taken to

¹ Basic Service Tier Encryption, MB Docket No. 11-169, *Notice of Proposed Rulemaking*, FCC 11-153 (rel. Oct. 14, 2011) ("NPRM").

² Comments of Public Knowledge & Media Access Project, MB Docket No. 09-168, file Oct. 10, 2009, *available at* <http://www.publicknowledge.org/pdf/pk-cablevision-comments-20091022.pdf>.

mitigate consumer impact), Commenters urged that the Commission move to amend its rules, rather than waiving them piecemeal.

Accordingly, Commenters commend the Commission for seeking to amend its rules. While the basic service tier encryption rules did some good in carrying out Section 624A of the 1992 Cable Act (directing the Commission to assure compatibility between consumer electronics and cable systems), the technology has changed and the rule no longer serves its purpose. The Commission should move as swiftly as possible to bring its rules into alignment with the developments in digital technology.

At the same time, the Commission must make sure that the transition does not unfairly burden consumers, and that the purposes of Section 624A, and of its supplement from the 1996 Act, Section 629, are advanced. With regard to the later, the Commission should move with similar speed to adopt a Notice of Proposed Rulemaking in the pending AllVid proceeding so that consumers can have access to competing devices and services in the manner Congress intended.

The Commission's lack of action in AllVid, however, should not delay the deployment of all digital systems. Accordingly, the Commission should focus in this proceeding on ensuring that consumers remain whole. The proposed rule as a whole does a good job of balancing the legitimate expectations of consumers and the needs of cable operators to when deploying new systems. Commenters therefore generally support the proposed rules with two requested modifications. First, rather than relying solely on Medicaid standards to determine eligibility, which can vary from state to state, the Commission should adopt the approach currently employed

by the Lifeline/Linkup Program. Under the Lifeline/Linkup rules, participation in any of a list of several federal subsidy programs, including Medicaid, is considered adequate proof of need.

Second, while Commenters agree with the proposal to provide qualifying consumers with free set-top boxes for 5 years, the Commission should take precautions to avoid “bill shock” at the end of the transition period. The Commission should clarify that at the end of the transition period, basic tier subscribers will be charged the lowest rental fee for a set-top box. Cable operators cannot be allowed to provide consumers with a more expensive box, then begin charging a higher equipment fee (or use the opportunity to “up sell” consumers) after the transition period. In addition, cable operators should be required to provide consumers with three months notice when the transition period will end, advise them of any additional new charges that will accrue, and offer consumers the option of renting the lowest-cost set-top box compatible with the basic tier, in addition to any other options offered.

Commenters stress that it fully expects that all cable operators transitioning their systems will act in good faith. Experience shows, however, that it best serves consumer and cable operators both for the Commission to set clear rules for consumer protection from the beginning. Accordingly, the Commission should adopt now, at the beginning of the cable digital transition, rules that will prevent possible bill shock in the future.

DISCUSSION

I. The Rules Should Be Changed to Allow the Encryption of the Basic Tier on Digital Systems, Provided that Low-Income Customers and Legacy Equipment Investments Are Protected

The encryption rules were justified when adopted: they ensured that basic-tier customers did not need to use a set-top box to access their programming, and allowed for broader compatibility with the consumer electronics of the time. Even customers who subscribed to encrypted tiers could access the basic tier on second or third televisions without converter equipment, and off-the-shelf devices (such as VCRs) could be used to tune into the entire basic tier for older, non-Cable-ready televisions.

But their time has passed. As the Commission notes, the transition to digital cable systems has changed the calculus of burdens to benefits. As a factual matter, relatively few customers, especially customers of all-digital systems, access programming without a converter device of any kind. By Commission waiver, most all-digital cable systems already encrypt their basic tiers, meaning that for customers of those systems, a TV's digital QAM tuner cannot be used to access the basic service tier in any event. While some customers do take advantage of unencrypted digital basic tiers 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. Thus, the benefit of the rules is reduced. At the same time, cable 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. As the Commission notes, this is true only of digital systems, which justifies changing the rules only as to them. Additionally, a benefit of limiting the waiver to all-digital systems is to provide operators with an incentive to upgrade to all-digital technology, which allows them to offer more channels to consumers over the same bandwidth.

While perhaps few in number, the viewers who make use of unencrypted basic tiers are not unimportant. They may be low-income viewers who only subscribe to the basic tier, have not upgraded their home electronics in some time, and who can ill afford a new, unexpected expense. Or they may be AV enthusiasts with a significant investment in video recorders, PC tuner cards, and other equipment that makes use of unencrypted signals. And average families might access unencrypted basic tiers on secondary or tertiary television sets. Given the cost savings that cable systems report they will enjoy as a result of this rule change, and the low number of affected subscribers they report will be affected, it is not unreasonable for the Commission to require that cable systems that wish to encrypt their digital basic tiers undertake a few measures designed to minimize the impact of this transition yet further. To that end, Commenters support the FCC's proposal to impose conditions on cable systems that avail themselves of the ability to encrypt their digital basic tiers—requiring them to offer “(a) current basic-only subscribers up to two set-top boxes or CableCARDS without charge for up to two years, (b) digital

subscribers who have an additional television set currently receiving basic-only service one set-top box or CableCARD without charge for one year, and (c) current qualified low-income basic-only subscribers up to two set-top boxes or CableCARDS without charge for five years.”³

A. The Commission Should Clarify Certain Aspects of the Proposed Rule To Protect Consumers From Equipment Incompatibility.

The Commission should additionally specify that these converter devices should output signals in the format, and with the connections, that a subscriber requires in order to achieve the purposes of the rule—analog or digital, for instance, or component, coaxial, or HDMI. Additionally, any cable system that provides CableCARDS should also provide tuning adapters, free of charge, to allow CableCARD users to access switched digital channels. These clarifications will ensure that encryption does not interfere with the purpose of the statute that “cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders.”⁴

B. The Commission Should Adopt the Lifeline/Linkup Criteria For Eligibility.

In the Cablevision Waiver, the Commission used eligibility for Medicaid as an indicator of qualification for subsidy as a low-income subscriber, and solicits comment as to whether that criteria is sufficient for a general rule.⁵ Commenters respectfully suggest that the Commission should broaden the criteria to include the programs acceptable for eligibility for Lifeline/Linkup. Lifeline/Linkup requires

³ NPRM § 12.

⁴ 47 U.S.C. §544a(b)(1).

⁵ NPRM at ¶13.

proof of income at or below 135% above the federal poverty guidelines or participation in one of the following federal assistance programs: Medicaid, Food Stamps, Supplemental Security Income, Federal Public Housing Assistance, Low-Income Home energy Assistance Program, Temporary Assistance to Needy Families, or the National School Lunch Program's Free Lunch Program.⁶

The criteria adopted in the Cablevision were appropriate for that waiver because the waiver encompassed a limited, well-defined footprint. For a national rule, however, the variability of Medicaid qualification criteria by state could result in one subscriber to a cable operator being eligible while a subscriber to the same cable operator in another state might be ineligible. Furthermore, the Supreme Court has recently granted certiorari over the modifications to the Medicaid program as part of its review of the Patient Protection and Affordable Care Act,⁷ creating further uncertainty around the scope of Medicaid coverage.

The Commission has many years of experience administering the Lifeline/Linkup program. The Lifeline/Linkup criteria have proven eminently manageable for a national rule involving numerous potential providers, similar to the circumstances here. It is reasonable to adopt standard criteria across Commission programs designed to provide assistance to low-income consumers. Such an approach will enhance consistency, ease of administration, and will prevent

⁶ The qualification criteria are taken from the Commission's Lifeline/Linkup website, <http://www.fcc.gov/guides/lifeline-and-link-affordable-telephone-service-income-eligible-consumers>

⁷ *Dep't of Health and Human Services v. Florida*, Case No. 11-398 (cert. granted Nov. 14, 2011), available at: <http://www.supremecourt.gov/qp/11-00398qp.pdf>

low-income consumers in need of assistance from being denied eligibility due to the vagaries and inconsistencies around the state-by-state administration of Medicaid.

By contrast, the use of the Lifeline/Linkup criteria creates little, if any, risk of overinclusiveness. The use of the 135% of the poverty guideline to limit eligibility will prevent significant over-inclusiveness. Finally, as the Commission recognizes in the NPRM, only a small fraction of providers even subscribe to basic tier service. Even if one assumed that the Lifeline/Linkup criteria are slightly overinclusive here, which Commenters do not believe to be the case, cable operators are unlikely to incur significant additional cost as a result.

Given the balance of competing interests, protecting low-income consumers from incurring undeserved additional cost from under-inclusion as against accidental over-inclusion of some limited number of borderline cases, the Commission should err on the side of protecting low-income consumers. Commenters therefore request the Commission modify the proposed rule to include the other Lifeline/Linkup criteria in addition to Medicaid eligibility.

C. The Commission Should Clarify the Rule To Prevent “Bill Shock” At the End of the Five Year Transition Period.

The rule proposed by the Commission should provide adequate protection for low-income consumers and provide a reasonable period of transition for those dependent on old equipment and access to an unencrypted basic tier. It is possible, however, that individual cable operators may seek to dissuade or charge eligible low-income consumers through hidden fees or onerous practices. In addition, it is possible that some cable operators may seek to use the end of the transition to “up sell” eligible low-income consumers to higher-cost boxes. While Commenters expect

that the vast majority of cable operators have no such intent, two relatively simple clarifications will prevent even accidental “bill shock” for consumers unaware that the five year program is intended as a transition program, not a permanent free set-top box.

1. The Commission Should Clarify That “Free” Means “Free” Without Hidden Charges or Onerous Conditions.

The proposed rules requires that:

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.

Commenters seek clarification that “without charge” remains genuinely without charge, and that the rules prohibit any sort of hidden fee or rate increase. For example, unscrupulous cable operators might provide high-functionality boxes for a fee as the default, and require consumers to “opt out” to free low-functionality boxes. Or cable operators might require consumers to replace their box or reapply for a free box every year unless they agree to lease a box. Alternatively, cable operators might provide a high-cost box for the transition period, then charge consumers an equipment or service fee after the fact.

Commenters stress that they anticipate that the majority of cable operators have no such intention and that they intend to act in good faith. Commenters also note that there have been no complaints about Cablevision with regard to its program. Experience indicates, however, that it is best to avoid confusion from the beginning. Even where an operator behaves in good faith, there can be legitimate disagreement between customers and cable operators over their rights, as well as confusion on

the part of customers. Indeed, because the transition period for the Cablevision waiver has not yet expired, the Commission does not yet have any experience by which to judge whether basic tier subscribers will experience confusion and “bill shock” when the transition ends.

For this very reason, Commenters do not suggest any modification of the rule. All Commenters request is that the Commission state clearly in the final order that the box provided by the cable operator must be genuinely free for the transition period, and that if eligible consumers believe that a cable operator is attempting to charge them through some hidden fee or imposing onerous conditions to discourage their receiving assistance, the Commission will take appropriate action.

2. The Rule Should Require Adequate Notice Before The End of the Transition Period to Avoid Bill Shock.

Eligible consumers receiving a five year subsidized set-top box may not realize when the transition ends that cable operators may now lawfully impose rental fees. In addition, individual cable operators may seek to use the transition as an opportunity to induce low-income subscribers to purchase or lease more expensive services or equipment than necessary to maintain basic service. The Commission should therefore adopt a relatively modest set of obligations to ensure that the national transition to digital cable goes smoothly from beginning to end.

First, the Commission should require cable operators to give sufficient notice in advance so that consumers will have adequate time to consider alternatives if they cannot afford the additional rental fees. Commenters recommend that the Commission require cable operators to begin notifying low-income subscribers with free set-top boxes on each monthly bill for the 3 months preceding the end of the

transition. The notice should clearly state the amount of the new charge and when the new charge will begin. This will prevent consumers who may have forgotten that the subsidy is intended as a transition from incurring unwanted charges.

Second, the Commission should require that the monthly charge for any equipment provided to eligible low-income consumers under the transition program should be the lowest rental fee the cable operator generally charges for its lowest-functionality set-top box. Cable operators should not be permitted to establish a high-price default, and require eligible consumers to replace their boxes or require them to affirmatively request the lowest cost box. Any subscriber taking part in the program is a low-income subscriber, and the cable operator (and the Commission) should assume that the default for such subscribers is the least expensive option available.

This proposed change is not meant to limit either the legitimate marketing activities of cable operators or the ability of basic tier subscribers to purchase or lease more sophisticated equipment and services. This should not prevent cable operators from offering better equipment for a fee, either during the transition or as part of the end of the transition. Its sole purpose is to protect low-income basic tier subscribers from accidentally receiving equipment or services they do not want and cannot easily afford.

II. The Commission Can Better Assure the Compatibility of Consumer Electronics and MVPDs By Moving Forward With AllVid

The best way to implement Section 624A of the 1992 Cable Act is not through rules like the basic service tier encryption rule, which limits the design flexibility of cable networks and does not account for the technological diversity of MVPDs, but

through AllVid, a technological and policy solution that is expressly designed to avoid those shortcomings.

AllVid will be more effective than the basic tier encryption rules, doing more to “assure[] compatibility between [video devices] and cable systems.”⁸ Unlike the basic tier encryption rules, AllVid will provide for compatibility between all of a provider’s services, including premium channels, and third-party devices, and will (pursuant to Section 629 of the Communications Act) work across all MVPDs, not just cable systems. Once widely adopted, AllVid-compatible television sets will be able to access a subscriber’s complete programming lineup without external converter devices. AllVid will make it possible for users to watch their MVPD programming on computers, tablets and smartphones within the home, without having to depend on customized and proprietary “apps” with limited content availability. At the same time, AllVid will provide value to viewers who subscribe to only lower programming tiers and watch video on only one television, making their home entertainment configurations simpler and cheaper, while providing them the option to switch between cable, satellite, and telco IPTV providers without costly and confusing device upgrades. Finally, AllVid will promote the adoption of broadband by making Internet-delivered video more accessible to less technical users—which will provide further competitive pressure on MVPDs.

One further benefit of AllVid is directly relevant to this proceeding is that, if it implements AllVid, the Commission will no longer have to consider the policy implications of the technological design of MVPD systems, as it is doing here. AllVid

⁸ 47 U.S.C. § 544a(b)(1).

is designed to provide a common in-home interface and set of standards that all MVPDs would support—the same way that, for instance, in-home WiFi works the same way regardless of whether Internet connectivity is provided through cable, DSL, fiber, or satellite. AllVid does not encourage or discourage any particular back-end technology. Digital cable, IPTV, and satellite are all the same under AllVid. MVPDs are free to use whatever technologies they find most appropriate to ensure signal security and use bandwidth efficiently. Under AllVid, no cable system will need to petition the FCC for a waiver or a rule change when it needs to upgrade its system. This not only benefits MVPDs and consumers, but allows the Commission to direct its resources to more pressing matters.

III. Hybrid services may be considered “all digital” in limited circumstances

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. However, if an operator provides any of its programming channels in analog form, its hybrid system should be considered all-digital for regulatory purposes only if and only if (1) It does not encrypt any channels it provides via analog transmission, and (2), consistent with one of the primary factual justifications for this rule change, it uses remote activation and does not require a service visit to begin service.⁹

⁹ The Commission’s conclusion that remote activation is not “feasible” for hybrid systems is incomplete. NPRM § 9. While site visits are required to prevent theft of service with unencrypted and analog service (either to physically connect a home or to remove video traps), theft of service is likely to be a *de minimus* issue if a hybrid system’s most valuable programming is offered digitally and encrypted. In any event,

CONCLUSION

As the Commission found in the NPRM, conversion of cable systems to digital and elimination of the prohibition on encryption of the basic tier offers significant public interest benefits. Commenters wholeheartedly and enthusiastically support these goals. The modifications and clarifications suggested above are minor in scope and impose little burden on cable operators. At the same time, adoption of the modifications proposed above will contribute significantly to the public interest benefits of the proposed rule change by providing greater clarity and protection for vulnerable, low-income subscribers. Commenters urge the Commission to move swiftly to adopt a final rule.

Respectfully submitted,

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any hybrid provider can transition to all-digital if this would provide it better system security.