

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Cablevision Systems Corporation's)	MB Docket No. 09-168
Request for Waiver of Section 76.630(a))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 2010

Released: January 8, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. Cablevision Systems Corporation (“Cablevision”) has filed the above-captioned request for waiver (the “Waiver Request”) of the prohibition on encryption of the basic service tier set forth in Section 76.630(a) of the Commission’s rules¹ in conjunction with Cablevision’s transition to all-digital cable service in its New York City franchise areas, which cover the Bronx and about two-thirds of Brooklyn. For the reasons stated below, we grant the Waiver Request subject to the conditions described herein.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress recognized that compatibility problems between cable service and consumer electronics equipment were limiting and/or precluding the operation of premium features of consumer equipment and were affecting the ability of consumer equipment to receive cable programming. Section 624A of the Communications Act of 1934, as amended (“the Act”),² was added by Section 17 of the 1992 Cable Act. Section 624A required the Commission to issue regulations to assure compatibility between consumer electronics equipment and cable systems. In 1994, the Commission implemented the requirements of Section 624A.³ The Commission added Section 76.630(a) to its rules, prohibiting cable operators from scrambling signals carried on the basic tier of service. The Commission determined that this rule would significantly advance compatibility by ensuring that all subscribers would be able to receive basic tier

¹ 47 C.F.R. § 76.630(a). The Media Bureau placed the Waiver Request on Public Notice for comment on September 23, 2009. *Media Bureau Seeks Comment on Cablevision’s Request for Waiver of the Prohibition on Encryption of the Basic Service Tier*, 24 FCC Rcd 12017 (2009). Comments were due on October 22, 2009. Reply Comments were due on November 16, 2009. *Cablevision Systems Corporation Request for Waiver of Section 76.630(a) of the Commission’s Rules*, Memorandum Opinion and Order, DA 09-2386 (rel. Nov. 5, 2009). In addition, as required by our rules, Cablevision notified all affected subscribers of its pending waiver request and informed them how to file comments with Cablevision as well as with the Commission. See Letter from Howard Symons, Counsel, Cablevision, to Marlene H. Dortch, Secretary, FCC at Attachment (Aug. 25, 2009); 47 C.F.R. § 76.630(a).

² 47 U.S.C. § 544a.

³ See *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd 1981, 1990-92, ¶¶ 49-59 (1994).

signals “in the clear” and that basic-only subscribers with cable-ready televisions would not need set-top devices.

3. At the time the Commission adopted the rule, Cablevision argued that in certain situations, the rule prohibiting scrambling of the basic service tier could be inefficient.⁴ The Commission stated that “there are instances where cable operators may need to scramble signals to prevent theft of service or address other operating problems.”⁵ Therefore, the Commission indicated that cable operators could seek waivers of the scrambling prohibition upon a showing of “either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons.”⁶

4. The Cable Services and Media Bureaus have granted waivers of Section 76.630 on three separate occasions. Two of those cases involved operators in Puerto Rico that faced theft problems.⁷ The theft that the Puerto Rico operators faced was extraordinary – in each of those cases theft was rampant and over 15 percent of homes passed were connected illegally. While the Puerto Rico operators “aggressively pursued several means to combat cable theft aimed at both educating and penalizing offenders,” scrambling of the basic service tier presented the most reasonable way to prevent theft of service.⁸ The third case involved a cable operator that designed its cable system to allow for remote connection and disconnection of its service to a resort area. The resort area had a large percentage of transient subscribers and the operator argued that scrambling of the basic service tier would save subscribers money and be more convenient because the large number of connections and disconnections could be performed remotely without the need for a truck roll. The Bureau found that waiver was warranted based on the frequent connections and disconnections that the operator faced: “The large percentage of seasonal rental properties in the area, which may be occupied for as little as one night, require the operator to have the flexibility to connect and reconnect subscribers without costly and potentially inconvenient truck rolls.”⁹

A. The Waiver Request

5. Cablevision seeks waiver of Section 76.630 in its New York City franchise areas in conjunction with its transition to all-digital cable service in those areas.¹⁰ If Cablevision were allowed to encrypt all of its service, Cablevision could leave its system “hot,” meaning that Cablevision would send its fully encrypted signal to every home in the franchise area.¹¹ This would allow Cablevision to connect or disconnect service remotely without the need for a service call, but would require subscribers to have a set-top box or CableCARD for every set to perform the decryption necessary to receive cable service.¹²

⁴ *Id.* at 1991, ¶ 52.

⁵ *Id.* at 1991, ¶ 57. As an example of “other operating problems,” the Commission referred to Cablevision’s argument “that where recurrent non-payment situations are common, scrambling also reduces costs by allowing the cable operator to manage service without a truck-roll to disconnect and reconnect service.” *Id.* at 1991, ¶¶ 52, 57.

⁶ *Id.* at 1991, ¶ 57; 47 C.F.R. § 76.630(a).

⁷ *Liberty Cablevision of Puerto Rico, Inc. Petition for Waiver of Section 76.630(a) Basic Tier Scrambling*, 15 FCC Rcd 15064 (CSB 2000); *Centennial Puerto Rico Cable TV Corp. Petition for Waiver of Section 76.630(a) Basic Tier Scrambling*, 18 FCC Rcd 7736 (MB 2003).

⁸ *Liberty Cablevision of Puerto Rico, Inc.*, 15 FCC Rcd at 15065, ¶ 5 (CSB 2000); *Centennial Puerto Rico Cable TV Corp.*, 18 FCC Rcd at 7737, ¶ 5 (MB 2003).

⁹ *Waitsfield Cable Company Petition for Waiver of Section 76.630(a) Basic Tier Scrambling*, 16 FCC Rcd 18859, 18860, ¶ 5 (2001).

¹⁰ Cablevision’s systems serve two of New York City’s five boroughs, Brooklyn and the Bronx.

¹¹ Waiver Request at 4.

¹² *Id.* at 4-5.

As of November 16, 2009, however, more than 99 percent of Cablevision's customers in New York City already have either a set-top box or a CableCARD.¹³ In conjunction with Cablevision's transition to all-digital, Cablevision is voluntarily offering (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.¹⁴ In an effort to mitigate any harm to consumers that might result from encryption of the basic service tier, Cablevision has committed in addition to provide to its current basic-only subscribers with clear-QAM devices¹⁵ up to two set-top boxes or CableCARDS without charge for up to ten years. Cablevision has further agreed at the time of encryption not to charge connection fees for professional installation of those devices for basic-only subscribers. These offers are limited to current subscribers, upon request, and only so long as the customer remains at the current address and maintains his or her current level of service.

6. Cablevision argues that waiving the encryption prohibition will reduce costs, improve customer service, reduce fuel consumption and CO₂ emissions, alleviate traffic, and have virtually no negative impact on customers.¹⁶ Cablevision also claims that remote activation and deactivation will save its subscribers the aggravation and cost associated with setting up appointments, missing work, and waiting at home to receive service calls. Furthermore, Cablevision asserts that waiver will not frustrate the purpose of the rule prohibiting encryption of the basic service tier because nearly all of Cablevision's subscribers in its New York City franchise areas already have either a digital set-top box or CableCARD-equipped device to view digital programming; thus there would be little or no added cost and inconvenience.¹⁷ Finally, as noted, in an effort to alleviate compatibility issues for consumers who rely on clear-QAM tuners, and to limit the costs for other subscribers who receive basic-only service, Cablevision has committed to offer its basic-only subscribers set-top boxes (including high definition boxes) or CableCARDS without charge for significant periods of time.¹⁸ Therefore, Cablevision asserts, the benefits that will result from the encryption will strongly outweigh any burdens on subscribers.

B. Comments

7. The Commission received comments, replies, and ex parte letters from 36 parties in response to the Waiver Request. Ten commenters supported the Waiver Request, three commenters neither supported nor opposed the Waiver Request, and 23 commenters opposed the Waiver Request.

¹³ Cablevision Reply at 1-2.

¹⁴ Cablevision Reply at 1-2; Letter from Howard Symons, Counsel, Cablevision, to Marlene H. Dortch, Secretary, FCC at Attachment (Dec. 17, 2009).

¹⁵ Quadrature Amplitude Modulation ("QAM") is the method that the cable industry uses to deliver digital cable service. Clear-QAM refers to unencrypted QAM service. Granting Cablevision's request will allow Cablevision to encrypt the basic service tier, and therefore televisions that could otherwise tune unencrypted QAM channels will not be able to access the basic service tier without additional equipment.

¹⁶ Waiver Request at 3-5. Cablevision asserts that customer service would be improved by eliminating the need to stay home to wait for installation. Cablevision explains that the box can be picked up by the customer or sent to the customer's home and notes that this would reduce installation costs. *Id.*

¹⁷ Waiver Request at 4-5. We note that Cablevision's waiver request is specifically limited to its New York City systems for these reasons. Our consideration of their request is similarly limited to these specific circumstances.

¹⁸ Cablevision Reply at 2 ("Cablevision will accommodate the remaining analog customers – now numbering less than 6,000 of more than 700,000 customers – by offering them two boxes or CableCARDS free for two years. Digital subscribers who have an additional television set currently receiving only analog basic will also be able to receive a set-top box or CableCARD free for one year. Qualified low-income broadcast basic customers will get two CableCARDS or set-top boxes free for five years."); Letter from Howard J. Symons, Counsel, Cablevision, to William T. Lake, Chief, Media Bureau, FCC (Dec. 31, 2009).

Commenters who endorse Cablevision's request do so based on general public interest concerns and not as Cablevision subscribers. These commenters, including three members of Congress, a New York City councilperson, the A. Philip Randolph Institute ("APRI") et al, two property managers, two cable operators, and the New York League of Conservation Voters, support Cablevision's waiver for largely the same reasons Cablevision provides in its Waiver Request. These commenters agree that grant of the waiver will reduce costs, improve customer service, reduce fuel consumption and CO₂ emissions, alleviate traffic, and have virtually no negative impact on customers.¹⁹ They also maintain that the benefits that will result from the encryption, including offering subscribers an easier and more efficient way to activate and terminate service without appointments and enhancing security of the cable network, strongly outweigh any burden on subscribers.²⁰

8. Public Knowledge and Media Access Project ("PK and MAP"), the City of New York, and Prof. Timothy Collins take no position on Cablevision's request, but they do highlight potential burdens that may have been underestimated in Cablevision's request. PK and MAP express concern that grant of Cablevision's request could lead to many more similar encryption waiver requests, and that the Commission would then face a "policy by waiver" situation, which they argue would be an unacceptable way for the Commission to set policy. Therefore, they suggest that the Commission immediately conduct a rulemaking on the topic of basic service tier encryption.²¹ PK and MAP also assert that the negative effect of encryption on consumers' equipment with clear-QAM tuners could be greater than Cablevision asserts. Therefore, PK and MAP suggest that the Commission require Cablevision to offer boxes without charge to their basic tier subscribers for a reasonable transition period, and to ensure that legacy devices will continue to function after the transition.²² The City of New York suggests that the Commission test Cablevision's factual assumption that consumers do not expect compatibility between their consumer electronics equipment and digital cable systems. Therefore, the City of New York proposes that the Commission limit the waiver to a period of three years, at which time the Commission could reevaluate whether basic service tier encryption negatively affects Cablevision's subscribers.²³ Finally, due to a concern that granting Cablevision's request could have an effect on V-Chip compatibility, Prof. Collins encourages the Commission to condition a grant of Cablevision's request with a commitment that Cablevision subscribers will be able to use PSIP data for V-Chip parental control purposes.²⁴

9. The Consumer Electronics Association ("CEA"), Elgato Systems, seventeen consumers all of whom reside outside of Cablevision's New York franchise areas, two local governments (one of which is outside of Cablevision's New York franchise areas and the other is from another state), the Electronic Frontier Foundation ("EFF"), and the Association for Maximum Service Television, Inc. ("MSTV") oppose Cablevision's request.²⁵ CEA, EFF, Elgato, and seventeen consumers argue that consumers who purchased consumer electronics or Elgato software products bought those products with the expectation that they would be able to access unencrypted QAM signals on the basic service tier, and

¹⁹ See, e.g., Letter from Rep. Edolphus Towns, Member of Congress, 10th District, New York, to Julius Genachowski, Chairman, FCC (Nov. 18, 2009); Letter from Anthony Harmon, President, APRI, New York Chapter, et al to Julius Genachowski, Chairman, FCC (Oct. 22, 2009); Letter from Robert Raphael, Gilman Management Corporation, to Marlene H. Dortch, Secretary, FCC (Oct. 30, 2009); Letter from Marcia Bystryn, President, New York League of Conservation Voters, to Julius Genachowski, Chairman, FCC (Nov. 24, 2009).

²⁰ See, e.g., RCN Comments at 3-6, BendBroadband Comments at 2-5.

²¹ PK & MAP Comments at 2-3; PK & MAP Reply at 2-4.

²² PK & MAP Comments at 3-7; PK & MAP Reply at 4-5.

²³ City of New York Comments at 2-4.

²⁴ Prof. Collins Comments at 2.

²⁵ Although some of the 17 consumers were Cablevision subscribers, none of them were subscribers to Cablevision's New York City systems that are the subject of their waiver request.

that granting Cablevision's request would disenfranchise those consumers.²⁶ EFF explains that even a time-limited waiver will cause harm because it could put companies whose devices and software rely on clear-QAM signals (like Elgato Systems) out of business.²⁷ EFF dismisses Cablevision's argument that encryption of basic service tier programming will afford greater protection of programming carried on the basic service tier, explaining that the bulk of basic service tier programming is available unencrypted over-the-air.²⁸

10. MSTV and EFF argue that granting this request could affect thousands of basic service tier subscribers that rely on their current clear-QAM devices to receive their broadcast channels from Cablevision. Therefore, MSTV and EFF suggest that if the Commission does choose to grant Cablevision's request, the Commission "should require Cablevision to provide equipment necessary to decrypt the basic-tier signals on a free-of-charge basis to basic-only subscribers, and should ensure that broadcasters' audio/visual quality, program-related material, and channel branding are preserved."²⁹ In a similar vein, the City of Yonkers and a cable advisory council from Connecticut assert that granting Cablevision's request would degrade basic service and PEG programming because consumers will be loath to accept additional equipment, particularly if that equipment comes at an additional cost.³⁰

11. Cablevision responds to its critics by explaining that it will take steps to mitigate any harm to its subscribers, and that the benefits of basic service tier encryption will outweigh any harm. Cablevision highlights the fact that none of the consumers who commented live in the affected service area, and that Cablevision does not seek waiver in Yonkers or Connecticut. In conjunction with its transition to all-digital cable service, Cablevision will offer its current subscribers up to two CableCARDS or set-top boxes (including high-definition boxes) without charge for up to two years, and at the time of encryption will not charge connection fees to install those devices for basic-only subscribers.³¹ In order to maintain compatibility between clear-QAM devices and Cablevision's encrypted service, Cablevision will also offer its basic-only subscribers who have clear-QAM devices up to two set-top boxes or CableCARDS for those devices for up to ten years without charge.³² Furthermore, Cablevision claims, remote activation and deactivation will save all subscribers the aggravation associated with setting appointments, missing work, and sitting at home to receive service calls. Finally, Cablevision asserts that grant of the Waiver Request would have no impact on subscribers' ability to use V-chip technology or the ratings system on Cablevision's cable systems serving New York City.³³ Therefore, Cablevision asserts that the public interest favors granting its waiver request.

III. DISCUSSION

12. Cablevision has provided cogent reasons for and concrete benefits attributable to its request to encrypt the basic service tier for its systems in New York City. If Cablevision encrypts the basic service tier, it will realize the benefits that result from remote connection and disconnection:

²⁶ See, e.g., CEA Comments at 1-3; EFF Reply at 2; Elgato Comments at 2; Vincent E. Fasano Comments; Michael Mahan Comments.

²⁷ EFF Reply at 4.

²⁸ *Id.* at 3.

²⁹ MSTV Comments at 1.

³⁰ City of Yonkers Comments at 4-7; Area Nine Cable Council Comments.

³¹ Letter from Howard Symons, Counsel, Cablevision, to Marlene H. Dortch, Secretary, FCC at Attachment (Dec. 17, 2009).

³² Letter from Howard J. Symons, Counsel, Cablevision, to William T. Lake, Chief, Media Bureau, FCC (Dec. 31, 2009).

³³ Cablevision Reply at 11, n.30.

reduced costs for Cablevision, improved customer service, and reduced fuel consumption and CO₂ emissions.³⁴ Cablevision's subscribers will also benefit from reduced installation charges and avoid the inconvenience of waiting for service calls. Furthermore, by providing basic-only subscribers with set-top boxes or CableCARDS without charge for significant periods of time, Cablevision will substantially limit burdens associated with basic tier encryption. We find it significant that the City of New York, which is the franchising authority charged with regulatory oversight of local cable service, does not oppose Cablevision's request. We believe that the set-top box and CableCARD offers detailed above will address the City of New York's concerns regarding device compatibility, and therefore we decline to limit grant of this waiver to three years. We believe that Cablevision has taken appropriate steps to mitigate any burden to its customers that may arise as a result of the waiver and has further demonstrated that a waiver is justified in this specific set of circumstances.³⁵

13. Section 76.630(a) of the Commission's rules provides that requests for waiver of the basic service tier encryption prohibition "must demonstrate either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons."³⁶ In addition, the Commission's rules allow it to waive its regulations for good cause shown subject to the provisions of the APA and the Commission's rules.³⁷ In general, waivers must articulate an "appropriate general standard," show special circumstances warranting a deviation from the general rule, and show that such a deviation will serve the public interest.³⁸ As set forth in detail below, we believe that Cablevision has demonstrated a strong need to scramble basic signals due to the unique set of circumstances in its New York City franchise areas, thus warranting waiver of the general rule prohibiting encryption of the basic service tier. Furthermore, we believe that deviation from this general rule will serve the public interest.

14. In the Waiver Request, Cablevision states that it performed over 1 million service calls company-wide last year.³⁹ Furthermore, Cablevision explains that the New York City area is unique due to the large number of apartment and co-op buildings which require Cablevision to coordinate service calls both with subscribers and building superintendents. This added complexity leads to a high incidence of missed or postponed service calls, which frustrates and adds cost to all parties involved. In addition to loss of time for consumers and Cablevision alike, these repeated visits contribute to traffic congestion and vehicular pollution. Waiver of the basic service tier encryption prohibition will allow Cablevision to eliminate many installation calls, to the benefit of subscribers, property managers, Cablevision employees, and others in New York City. Given the unusually high cost of installation calls in the New York City market, we are convinced that grant of the Waiver Request will serve the public interest.

15. We also find it compelling that more than 99 percent of Cablevision's subscribers in the New York City franchise area already have digital set-top boxes or CableCARDS. As the Bureau explained in the cases dealing with basic service tier encryption in Puerto Rico, "with such a high percentage of subscribers already using set-top boxes, problems due to incompatibility between cable

³⁴ Cablevision also notes that waiver will enable it to compete more equitably with other services that are already all-digital and for which service may be initiated remotely.

³⁵ We note that this waiver is consistent with our "viewability" requirements. See 47 C.F.R. § 76.56(d)(3). Cablevision's waiver request applies only to its all-digital systems in Brooklyn and the Bronx. Thus, these subscribers must have some type of digital device in order to subscribe to this cable service.

³⁶ 47 C.F.R. § 76.630(a).

³⁷ 47 C.F.R. §§ 1.3, 76.7. See also, e.g., *AT&T Corp. v. FCC*, 448 F.3d 426 (D.C. Cir. 2006).

³⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C.Cir.1969)); see also *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C.Cir.1970) (applicant bears heavy burden to demonstrate that his arguments for waiver are substantially different from those that have been carefully considered in rulemaking proceeding).

³⁹ Waiver Request at 3.

service and consumer electronics equipment will not be widespread once basic tier scrambling is commenced.”⁴⁰ Cablevision asserts that fewer than 1 percent of its customers would be affected by the waiver because they do not already have a set-top box or a CableCARD. Even so, we are concerned about the increased cost for those basic-only subscribers who rely on Section 76.630’s encryption prohibition to ensure compatibility with their consumer electronics equipment (i.e., digital televisions equipped with QAM tuners). Consequently, in order to mitigate the harm to this subset of customers, Cablevision has committed to offer up to two set-top boxes (including those capable of outputting a high-definition picture) or CableCARDS without charge for up to ten years to basic-only subscribers and to provide up to one set-top box for one year to those digital subscribers who have an additional television set currently receiving basic-only service. The Bureau is persuaded that this offer, as more fully described in paragraph 6 and upon which the waiver is conditioned, should substantially mitigate the costs for subscribers who are affected and thus addresses many of the concerns raised by commenters opposed to Cablevision’s request. This offer should be included in a notice by Cablevision to its subscribers.

16. Finally, we believe that this waiver will provide an experimental benefit that could be valuable in the Commission’s further assessment of the utility of the encryption rule, and in this regard, we require Cablevision, as a condition of the waiver, to provide the Commission with a 3-month, 6-month, and 12-month report describing the number of customer complaints related to this waiver, the number of set-top boxes and CableCARDS described above that were provided at no charge, the number of installations provided at no charge, the impact of the waiver on the reduction in truck rolls, and any further steps that it took in order to effectively manage the encryption process and the impact on its customers. The reports shall be filed in the docket and provided to the Bureau at the 3, 6 and 12-month intervals from the date on which Cablevision encrypts its basic signals, or if the encryption is implemented over a period of time, then from the date on which the encryption was completed, or from 30 days after the first date of encryption, whichever comes sooner. We will continue to monitor the situation in New York City and reserve the right to revoke the waiver granted herein at any time if the public interest warrants such action.⁴¹ In addition, should the Commission address the encryption rule in a rulemaking, as requested by PK and MAP, Cablevision must come into compliance with any rules subsequently adopted.

IV. CONCLUSION

17. For the reasons stated herein, we conclude that Cablevision has demonstrated a strong need to encrypt the basic service tier, has committed to take steps necessary to mitigate harm to its subscribers, and through the reporting requirement will provide valuable data to the Commission relative to the impact of this waiver in its New York City franchise areas.

⁴⁰ *Centennial Puerto Rico Cable TV Corp.*, 18 FCC Rcd at 7738, ¶ 8 (MB 2003).

⁴¹ 47 U.S.C. §§ 154(i), 544a.

V. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3, 76.7, and 76.630(a) of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, 76.630(a), the request for waiver filed by Cablevision Systems Corporation of Section 76.630(a) of the Commission's rules, 47 C.F.R. § 76.630(a), **IS GRANTED** to allow Cablevision to encrypt the basic service tier in Cablevision's New York City franchise areas pursuant to the terms and conditions discussed herein. The Bureau reserves the right to revoke the waiver granted herein at any time if the public interest warrants such action.

19. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau