

affected by a disaster to designate those areas where the debris is so widespread that removal of the debris from private property is in the "public interest" pursuant to 44 CFR 206.224, and thus is eligible for FEMA Public Assistance reimbursement on a case-by-case basis. This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

*K. Congressional Review of Agency Rulemaking*

FEMA is sending the rule to Congress and to the Government Accountability Office pursuant to the Congressional Review of Agency Rulemaking Act (Congressional Review Act)(CRA), Public Law 104-121, 110 Stat. 873 (March 29, 1996) (5 U.S.C. 801 et seq). This rule is not a "major rule" within the meaning of the CRA. Furthermore, Section 808 of the CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. As stated previously, FEMA has made such a good cause finding, including the reasons therefore.

**List of Subjects in 44 CFR Part 206**

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs-housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs-housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Federal Emergency Management Agency amends 44 CFR part 206 as follows:

**PART 206—FEDERAL DISASTER ASSISTANCE**

- 1. The authority citation for part 206 is revised to read as follows:

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101 et seq.; Department of Homeland Security Delegation 9001.1.

- 2. Revise § 206.228, paragraph (a)(2) to read as follows:

**§ 206.228 Allowable costs.**

\* \* \* \* \*

(a) \* \* \*

(2) *Force Account Labor Costs.* The straight- or regular-time salaries and

benefits of a grantee's or subgrantee's permanently employed personnel are:

(i) Eligible in calculating the cost of eligible permanent repair, restoration, and replacement of facilities under section 406 of the Stafford Act;

(ii) Eligible, at the Administrator's discretion, in calculating the cost of eligible debris removal work under sections 403(a)(3)(A), 502(a)(5), and 407 of the Stafford Act for a period not to exceed 30 consecutive calendar days, provided the grantee's or subgrantee's permanently employed personnel are dedicated solely to eligible debris removal work for any major disaster or emergency declared by the President on or after October 27, 2012, in response to Hurricane Sandy; and

(iii) Not eligible in calculating the cost of other eligible emergency protective measures under sections 403 and 502 of the Stafford Act, except for those costs associated with host state evacuation and sheltering, as established in § 206.202.

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**Janet Napolitano,**

*Secretary.*

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

[MB Docket No. 11-69; PP Docket No. 00-67; FCC 12-126]

**Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission adopts new rules to allow cable operators to encrypt the basic service tier in all-digital systems, provided that those cable operators undertake certain consumer protection measures for a limited period of time in order to minimize any potential subscriber disruption.

**DATES:** Effective December 10, 2012.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact Brendan Murray, *Brendan.Murray@fcc.gov*, of the Media Bureau, Policy Division, (202) 418-2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order*, FCC 12-126, adopted on

October 10, 2012 and released on October 12, 2012. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY-B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

**Summary of the Report and Order**

1. With this Report and Order (*Order*), we amend our rules to allow cable operators to encrypt the basic service tier in all-digital cable systems if they comply with certain consumer-protection measures. As discussed below, this rule change will benefit consumers who can have their cable service activated and deactivated from a remote location. By allowing remote activation and deactivation, we expect our amended rules will result in benefits to both cable operators and consumers by significantly reducing the number of truck rolls associated with provisioning service and significantly reducing the need for subscribers to wait for service calls to activate or deactivate cable service. At the same time, we recognize that this rule change will adversely affect a small number of cable subscribers who currently view the digital basic service tier without using a set-top box or other equipment. If a cable operator decides to encrypt the digital basic tier, then these subscribers will need equipment to continue viewing the channels on this tier. To give those consumers time to resolve the incompatibility between consumer electronics equipment (such as digital television sets) and newly encrypted cable service, we require operators of cable systems that choose to encrypt the basic service tier to comply with certain consumer protection measures for a period of time. In addition, we note that this rule change may impact the ability of a small number of subscribers that use certain third-party equipment that is not CableCARD compatible to access channels on the basic service tier. To address this issue, we require the six

largest incumbent cable operators to comply with additional requirements that are intended to ensure compatibility with certain third-party-provided equipment used to access the basic tier.

2. *Background.* In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress sought to make sure that consumer electronics equipment could receive cable programming and that compatibility issues did not limit the premium features of that equipment. Section 17 of that law added section 624A to the Communications Act of 1934, as amended. Section 624A requires 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 in part by adding § 76.630(a) to its rules. Section 76.630(a) prohibits cable operators from scrambling or encrypting signals carried on the basic tier of service. Encryption is an essential component of a conditional access system, which cable operators use to ensure that subscribers receive only the services that they are authorized to receive. Nevertheless, the Commission determined that this rule would significantly advance compatibility by ensuring that all subscribers would be able to receive basic tier signals “in the clear” and that basic-only subscribers with cable-ready televisions would not need set-top boxes. The Commission concluded that “[t]his rule also will have minimal impact on the cable industry in view of the fact that most cable systems now generally do not scramble basic tier signals.”

3. In the mid-1990’s, cable operators began to upgrade their systems to offer digital cable service in addition to analog cable service (hybrid service). More recently, many cable operators have transitioned to more efficient all-digital service, freeing up spectrum to offer new or improved products and services like higher-speed Internet access and high definition programming. After a cable operator transitions to an all-digital system, most of its subscribers have at least one cable set-top box or retail CableCARD device in their homes. We expect that the percentage of homes with set-top boxes or retail CableCARD devices will continue to increase as more cable operators eliminate analog service from their systems in favor of more efficient digital service.

4. The percentage of homes with set-top boxes or CableCARD devices is high because most cable systems now

scramble most of their signals. As cable operators began to transition programming on their cable programming service tier (“CPST”) to digital, many program carriage agreements required cable operators to encrypt that programming as a condition of carriage. In addition, cable operators use encryption as part of their conditional access system to ensure that cable service is available only to those who have paid for it. Particular methods of encryption, however, vary across cable systems, which could lead to incompatibility between consumer devices and cable service. In 2003, the Commission adopted the CableCARD standard to address this incompatibility problem. The CableCARD, which subscribers must lease from their cable provider either as a part of a leased set-top box or separately for use in a compatible retail television or set-top box, decrypts the cable services. At present, over 78 percent of all cable subscribers have at least one leased set-top box or retail CableCARD device in their home. Cable operators who offer only digital service indicate that all of their subscribers have at least one leased set-top box or retail CableCARD device. Some cable subscribers rely on QAM tuners in television sets and consumer electronics devices that allow access to unencrypted digital cable service without additional equipment, but, based on the record before us, we believe that few consumers rely on them for primary access to cable service. The fact that most cable subscribers already have a cable set-top box or retail CableCARD device significantly reduces the number of subscribers who benefit from the prohibition on encryption of the basic service tier in all-digital systems in contrast to systems that carry analog service.

5. Our rules state that requests for waiver of the 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.” Prior to 2010, the Commission had waived the rule based only on theft of service. Recently, the Commission has received several requests for waiver of the rule prohibiting encryption of the basic service tier based on the argument that the rule imposes more burdens than benefits as cable operators transition to all-digital systems. The petitioners argue that there are very few people who subscribe only to the basic service tier in all-digital systems, and that access to the basic tier would therefore be unaffected by encryption for the overwhelming majority of subscribers to

such systems because they already have a set-top box or CableCARD-equipped retail device. Furthermore, they contend, encrypting the basic service tier in an all-digital system would eliminate the need for many service calls because it would allow cable operators to enable and disable cable service remotely, activating and deactivating the encryption capability of set-top boxes and CableCARDS from the headend rather than visiting subscribers’ homes. Today, cable operators typically must manually connect and disconnect the cable that runs to a home to activate or deactivate service and use traps to block access to particular channels. If the cable operator were allowed to encrypt every signal, the operator could keep every home connected to the cable plant regardless of whether the home subscribes to cable service. In addition, the operator could ensure that only paid subscribers are able to access the service by authorizing and deauthorizing CableCARDS, or other legitimate devices, as people subscribe to or cancel cable service.

6. In January 2010, the Media Bureau granted a conditional waiver of the rule that prohibits encryption of the basic service tier to Cablevision with respect to Cablevision’s New York City systems, which are all-digital. The Bureau based its decision on the fact that encryption of the basic service tier on Cablevision’s all-digital systems would allow Cablevision to enable and disable cable service remotely. The Bureau also found that remote activation and deactivation of cable service would “reduce[ ] costs for Cablevision, improve[ ] customer service, and reduce[ ] fuel consumption and CO2 emissions.” Remote activation and deactivation, the Bureau concluded, would reduce installation costs for Cablevision’s subscribers and also benefit these subscribers by reducing the number of occasions when they must wait at home for a service call, as compared to unencrypted cable systems. The Bureau reasoned that Cablevision would sufficiently address the problem of incompatibility with consumer electronics “by providing basic-only subscribers with set-top boxes or CableCARDS without charge for significant periods of time.” Finally, the Bureau also concluded that the waiver would “provide an experimental benefit that could be valuable in the Commission’s further assessment of the utility of the encryption rule,” and therefore required Cablevision to file three reports detailing the effect of encryption on subscribers. Four cable operators have filed similar petitions for waiver with the Commission’s Media

Bureau since the release of the Cablevision Waiver.

7. In the wake of these petitions as well as requests from Public Knowledge and Media Access Project for the Commission to deal with the basic service tier encryption issue by launching a rulemaking proceeding, the Commission issued a Notice of Proposed Rulemaking in October 2011. The Commission proposed to allow cable operators to encrypt the basic service tier in all-digital systems, subject to conditions that would minimize disruption for affected subscribers by providing a transition period in which to make informed choices about purchasing or leasing new equipment to continue accessing service. Based on the reports that Cablevision submitted as a condition of its waiver, the Commission in the Encryption NPRM predicted that the rule change would reduce truck rolls and service calls with modest adverse effects on few subscribers. We received comments or reply comments on the Encryption NPRM from 34 parties, and a number of subsequent ex parte filings. The parties' positions are described in the ensuing Discussion.

8. *Discussion.* Because of the public benefits associated with allowing all-digital cable operators to encrypt the basic service tier, we amend our rule to permit this practice as long as the cable operator complies with certain consumer protection measures. Encryption of all-digital cable service will allow cable operators to activate and deactivate cable service remotely, thus relieving many consumers of the need to schedule appointments when they sign up for or cancel cable service. In addition, encryption will reduce the number of truck rolls necessary for manual installations and disconnections, reduce service theft, and establish regulatory parity between cable operators and their satellite competitors, who are not subject to the encryption rule. We find these benefits offset the increased burdens that may result from encryption of the basic service tier. Recognizing, as noted above, that some consumers rely on unencrypted basic tier service, we adopt narrowly tailored consumer protection measures to help ease the transition to encrypted service for those consumers. In the sections below, we first discuss which systems will be allowed to encrypt the basic service tier. Then we discuss the benefits associated with permitting all-digital cable operators to encrypt the basic service tier, as well as the burdens associated with our rule change and consumer protection measures we adopt to mitigate those

burdens. Finally, we discuss the legal basis for the rule changes.

9. *Systems Eligible to Encrypt.* In the Encryption NPRM, the Commission proposed to allow encryption of the basic service tier only with respect to all-digital systems "because remote activation and deactivation of cable service, and its attendant benefits, are only feasible in all-digital systems." For this reason, we limit encryption eligibility of the basic tier to all-digital systems. The Commission proposed to define an "all-digital" system as one in which "no television signals are provided using the NTSC system." As explained below, we adopt our proposed definition, finding that it will best achieve our goal of facilitating remote activation and deactivation of cable service "while minimizing interference with the special functions of subscribers' television sets."

10. Commenters suggested several substantive changes to our proposed rule. Several commenters suggested that we extend encryption eligibility to cable operators that offer unencrypted analog "barker channels." Mikrotec and Inter Mountain Cable suggested that operators should be allowed to encrypt the basic service tier as long as all "programming" on the basic tier is transmitted digitally and "if that condition is met, then there should be no concern that the system otherwise uses analog modulation." They also suggest that eligibility to encrypt should be determined subscriber-by-subscriber, not on a system-by-system basis, because cable operators may elect to transition portions of systems to all-digital piecemeal, and the rule should not discourage that practice.

11. We believe the best criterion for eligibility to encrypt the basic service tier is that the system carries only digital signals aside from unencrypted analog barker channels. Encryption on hybrid systems (that is, systems that transmit signals in analog and digital) would not generate the benefits associated with encryption on all-digital systems because the analog portion of the system will still require truck rolls to activate and deactivate service and the Commission does not have a separated security solution like CableCARD to ensure that retail devices can access scrambled analog cable programming. Therefore, permitting hybrid systems to encrypt would not result in the type of benefits that justify easing the encryption requirement for all-digital systems. We do not believe that it is practical to adopt Mikrotec and Inter Mountain Cable's proposal to determine eligibility for encryption on a consumer-by-consumer basis, because

encryption disparity on a consumer-by-consumer basis could lead to consumer confusion: Under this proposal, one subscriber could be subject to encryption (and the commensurate consumer-protection measures described below), while his neighbor could face no encryption and be able to access channels on the basic service tier. The administrative burdens of determining the applicability of the rule would also make such a proposal unreasonable. Therefore, we believe that our rule, which determines eligibility for encryption on a system-wide basis, is more reasonable and will better serve the public interest.

12. *Benefits of Permitting Basic Service Tier Encryption.* Remote Activation and Deactivation. Based on examination of the record, we are persuaded that allowing encryption of the basic service tier on all-digital systems will reduce the need for many consumers to schedule a service call and wait for the cable technician to arrive before initiating or terminating their cable service. ACA states in its comments that physical connection and disconnection of cable service in all-digital systems is "unnecessary but for the existence of the basic service tier encryption prohibition." Comcast predicts that encrypting the basic service tier will allow the company to perform nearly half of its activations and 90 percent of its deactivations remotely. Cablevision reports that, since it received waiver of the encryption prohibition, 99.5 percent of its deactivations were performed remotely and a growing number of its new customers are eligible for remote activation. The result for consumers is that in many cases they will no longer need to rearrange their schedules to wait for cable technicians to arrive at their homes in order to activate and deactivate their cable service, making activation and deactivation of service much more convenient.

13. In addition to the projected time savings for subscribers because of remote activation and deactivation, the record is replete with secondary benefits that cable operators and their customers will realize as a result of remote service change. These include savings for cable operators because of a reduction in the need to dispatch service technicians to customers' homes. For example, commenters assert that reduced costs due to truck rolls and system maintenance will save cable operators money that they can use to "invest in innovative new products that customers demand and highly value." In addition, Comcast states that, with remote activation and deactivation,

“technicians would need to access drop lines less frequently, thereby reducing ‘wear-and-tear’ on the lines and the need for maintenance.” Many commenters also highlight the benefits remote activation and deactivation will have on vehicle traffic and the environment. Microtek and Inter Mountain Cable even suggest that these increased efficiencies could lead to lower rates for subscribers.

14. *Reduction of Theft and Piracy.* Another benefit of basic tier encryption is the likely reduction in theft of cable service. In 2004, NCTA estimated that five percent of homes passed receive unauthorized cable service, which equates to five billion dollars in unrealized revenue that cable operators could dedicate to offering improved services. The resulting reduction in cable operator revenues may increase the rates operators charge their subscribers. In addition, Comcast explains that theft of service reduces the quality of cable service because thieves sometimes access the cable system by splitting cables and adding unauthorized taps, which degrade connections and can lead to signal leakage and lower broadband speeds. This unauthorized splicing also can add to wear-and-tear on the cable system and increase the need for maintenance. Encryption of the basic service tier will discourage thieves from splicing cable lines as it will not enable viewing of the signals without leasing an authorized set-top box or CableCARD from the operator. Encryption of the basic service tier could also benefit channels that are carried on the basic service tier, as developers of high-value content may be more willing to make the content available to basic service tier channels if they are encrypted and less susceptible to piracy.

15. *Regulatory Parity.* Several commenters emphasized that the proposed rule change will increase regulatory parity between cable operators and satellite providers, which are not subject to the encryption rule. Commenters explain that the technology and market landscapes were quite different when the rule was adopted, when consumers had a reasonable expectation that they would be able to connect their televisions directly to a coaxial cable without the need for a set-top box. In the years since enactment of the 1992 Cable Act, consumer expectations have changed substantially. First, cable operators have introduced new and innovative services, such as video on demand and pay-per-view services, that cannot be accessed by digital subscribers without an authorized set-top box or, in some

instances, a CableCARD. As a result, almost all digital subscribers already use set-top boxes or CableCARDS to access cable service. Second, since the 1992 Cable Act, satellite television operators have begun to offer video programming services to tens of millions of subscribers, who access these services through the use of one or more converter boxes. Our rules do not prohibit satellite operators from encrypting their services, and therefore they are able to make service changes remotely and in real time. Cable operators argue that this puts them at a regulatory disadvantage vis-à-vis their competitors that are not constrained by the requirements of § 76.630(a). We believe that by amending our encryption rule we will reduce this regulatory disparity and enable all-digital cable operators to provide a similar level of customer service as their MVPD competitors.

16. *Consumer Protection Measures to Reduce Burdens on Subscribers.* Although we expect our rule change will affect relatively few subscribers, we nonetheless adopt consumer protection measures to mitigate any resulting harm to subscribers who are impacted by encryption of the digital basic tier. This rule change will impact the few digital cable subscribers who access the basic service tier without a set-top box or CableCARD: They will need to obtain a set-top box or CableCARD from their cable operator once the operator encrypts the basic service tier. To give these consumers time to assess their options to access encrypted cable service, we will require cable operators that choose to encrypt to offer affected subscribers equipment necessary to receive the encrypted programming without charge for a limited time, and to notify their subscribers about encryption and the equipment offers. In addition, we require the six largest incumbent cable operators to offer equipment that is compatible with IP-enabled clear-QAM devices provided by third parties. We intend that this requirement will provide an opportunity for affected consumers to make informed choices about whether to purchase a CableCARD-compatible device, lease a set-top box from their cable operator, or use another method to access the broadcast and other channels carried on the basic service tier (for example, by accessing the signals over-the-air or via another MVPD). As we explained in the Encryption NPRM, such an opportunity will minimize the impact of encryption on clear-QAM users by offering a transition period during which they can continue to

access the basic tier without an additional equipment charge while they consider their options for device compatibility. In this section, we identify the small class of subscribers that encryption may affect and adopt two categories of measures to protect those subscribers: Transitional equipment requirements and notice requirements.

17. *Subscribers That May Be Affected by Encryption of the BST.* The Commission concluded in 1994 that adopting the basic service tier encryption prohibition “will have minimal impact on the cable industry in view of the fact that most cable systems now generally do not scramble basic tier signals.” Today our examination of the record reflects that relaxing the encryption prohibition for all-digital systems will have minimal impact on consumers because most subscribers do not rely on the clear-QAM tuners in their devices to access basic tier signals. Nevertheless, we recognize that lifting the encryption prohibition may impact some cable subscribers who use clear-QAM devices to access the basic tier, such as subscribers who use second or third television sets to access unencrypted digital basic service tier service without set-top boxes or CableCARDS and subscribers that use third-party provided IP-enabled devices that have clear-QAM tuners. Several cable subscribers and equipment manufacturers filed comments claiming that our rule change would have a negative impact on them. These subscribers explain that they rely on clear-QAM tuners in their electronic devices (such as computers and television sets) to access basic tier programming, and that because they have more than two devices on which to view BST programming (e.g., they have multiple televisions in their home), their monthly bills will increase because they will need a greater number of converter boxes than afforded under the free box conditions that the Commission proposed in the Encryption NPRM. We are concerned about the effect of this rule change on the small group of subscribers who access unencrypted basic service tier programming through clear-QAM receivers, but, at the same time, recognize that no consumer protection measure could fully satisfy every affected subscriber. Nonetheless, we believe that the consumer-protection measures outlined below are appropriate and necessary to minimize disruption to affected subscribers by providing a reasonable transition period

to make informed choices about the options available to access the basic tier.

18. *Transitional Equipment Requirements Applicable to All Cable Operators.* To limit the costs that affected consumers may face due to encryption, we adopt our proposed consumer-protection measures that require a cable operator that chooses to encrypt the basic service tier to: (i) Offer to existing subscribers who subscribe only to the basic service tier and do not use a set-top box or CableCARD, the subscriber's choice of a set-top box or CableCARD on up to two television sets without charge for two years from the date of encryption; (ii) offer existing subscribers who subscribe to a level of service above "basic only" but use an additional television set to access only the basic service tier without the use of a set-top box or CableCARD at the time of encryption, the subscriber's choice of a set-top box or CableCARD on one television set without charge for one year from the date of encryption; and (iii) offer existing subscribers who receive Medicaid, subscribe only to the basic service tier, and do not use a set-top box or CableCARD, the subscriber's choice of a set-top box or CableCARD on up to two television sets without charge for five years from the date of encryption. These consumer protections apply to televisions and devices connected to the cable system at the time of encryption. To ensure that any subscriber likely to be affected by encryption has adequate time to consider these offers, we will require cable operators to keep the offer open to subscribers for at least 30 days before the date the operator begins encrypting the first basic tier channel on the channel lineup and for at least 120 days after that date. NCTA suggested that the offer extend for only 30 days after the date that encryption begins. We believe that 30 days after the date of encryption would not afford affected consumers sufficient time to learn about the effect of encryption and the consumer-protection measures available to them and act on the information. Furthermore, because encryption will affect only a very small number of subscribers, the consumer protection measures we adopt will not be unduly onerous on cable operators. We expect these transitional protections will substantially mitigate the costs to affected subscribers while they consider alternative means for accessing the basic service tier.

19. *Equipment Requirements Applicable to Top Six Incumbent Cable Operators.* A few commenters assert that the free equipment conditions described above do not mitigate any disruption

because some consumers may own third-party provided IP-enabled devices that do not have the ability to decrypt cable signals. Therefore, these commenters call for the Commission to reject the proposed rule, or adopt special measures to mitigate disruption to consumers that use those third-party devices. Specifically, these parties complain that existing cable set-top boxes and DTAs are not compatible with IP-enabled devices because they do not output signals in a manner that third-party-provided IP-enabled devices can access. Accordingly, such devices would not be compatible with the operator's free equipment offering—i.e., there would be no connection by which such devices could access the basic tier channels—thus rendering such devices useless if a cable operator chooses to encrypt the basic tier. Commenters assert that such devices were purchased or manufactured on the expectation that unencrypted basic service tier QAM signals would continue to be available from cable operators. The record indicates that at least four companies have developed products that rely on customers' ability to access clear-QAM signals, and that a relatively small number of consumers have purchased these devices for this capability. As explained above, however, we anticipate the impact of encryption of the basic tier on the public at large will be minimal because the record indicates that only a small number of consumers rely on clear-QAM devices to access the basic tier. And the record further indicates that subscribers who use IP-enabled clear-QAM devices that would be incompatible with the free equipment offerings by cable operators represent an even smaller subset of clear-QAM users.

20. To mitigate any harm to the small group of consumers that may use such devices, NCTA's six largest incumbent cable members—serving 86 percent of all cable subscribers—have committed to adopt, prior to encrypting, a solution that would provide basic service tier access to third-party provided IP-enabled clear QAM devices. Pursuant to this commitment, these six cable operators will make basic service tier channels available either via connection from operator-supplied equipment or by providing access to the operator's security technology. Specifically, these cable operators have proposed to either (i) provide a converter box with "standard home networking capability" that can provide IP-enabled clear QAM devices access to basic service tier channels on the same terms proposed in the Encryption NPRM ("Option 1"), or

(ii) enable IP-enabled clear QAM devices to access basic service tier channels without any additional hardware through the use of commercially available software upgrades ("Option 2"). NCTA proposed to sunset these commitments three years after we adopt this Order unless the Commission extends them. Boxee and CEA argue that these commitments do not sufficiently support the operation of IP-enabled clear QAM devices. Instead, they advocate that all cable operators should be required to make the basic service tier available to IP-enabled devices without additional hardware. CEA further encourages the Commission not to sunset the commitments after three years. The AllVid Alliance suggests that the Commission initiate a Notice of Proposed Rulemaking seeking comment on "a nationally-portable common IP-based interface from MVPD services to consumer devices."

21. We believe that the commitments from the six largest incumbent cable operators will be sufficient to address the compatibility issue concerning IP-enabled devices and achieve the objectives of section 624A of the Act—i.e., to ensure compatibility between cable service and consumer electronics equipment. We do not extend the additional equipment requirement to smaller cable operators because we do not believe it is necessary at this time. As noted above, based on the current record, only a small number of consumers rely on IP-enabled devices to access the basic tier and thus we expect this particular compatibility problem to be extremely limited in scope. Because the six largest incumbent cable operators subject to the rule serve 86 percent of all cable subscribers nationwide, we expect most consumers that use such devices will have ready access to the necessary equipment. Moreover, large cable operators generally dictate equipment features to manufacturers and commonly get priority in delivery of that equipment. We anticipate that the large operators' demand for this equipment eventually will lead all equipment to include this functionality in the marketplace, and thus the equipment small cable operators provide will eventually include the IP functionality as well, regardless whether they specify this particular feature. Nonetheless, we may revisit this issue if the equipment market does not develop as expected or if we find that small cable operators do not make their service compatible with these consumer devices.

22. Contrary to Boxee's argument, nothing in section 624A requires that consumer equipment compatibility be

achieved by means of a hardware-free solution. Under the equipment measure we adopt today, the vast majority of consumers will be able to access service that is encrypted using a commercially available security technology or via equipment with standard home-networking capability in much the same way they do today. In fact, if this standard home-networking capability is connected to a wireless home network, the consumer experience could improve because consumers will be able to access basic service tier channels without physically connecting a device to a coaxial plug from the wall. Thus, mandating a hardware-free solution is not necessary to protect consumers in the context of the instant proceeding.

23. We adopt these commitments as required preconditions to encrypting by the top six incumbent cable operators with slight modifications and clarifications. These conditions will automatically sunset three years from the release date of this Order unless the Media Bureau ("Bureau") determines prior to this date that the IP-enabled device protections remain necessary to protect consumers. We believe that a future review of these rules is warranted because the market for these IP-based devices is nascent and it is unclear whether consumer demand for this equipment will flourish. Accordingly, we delegate authority to the Bureau to initiate a review two years after the release of this Order to decide whether these IP-enabled device protections remain necessary to protect consumers or whether it is appropriate to sunset the IP-enabled device protections. If the Bureau does not release an order extending these protections within three years from the release date of this Order, then the consumer protection measures concerning IP-enabled devices detailed above will no longer apply to the top-six cable operators for purposes of encryption of the basic service tier. In deciding whether the sunset is appropriate, the Bureau shall consider the costs to cable operators and the benefits to consumers, whether competitive services are available, regulatory parity between cable and other MVPDs, the state of technology and the marketplace, and cable operators' efforts to meet these commitments and ensure compatibility. The Bureau shall also consider whether the IP-enabled device protections should be extended to small cable operators.

24. Second, we add some clarifying language to address Boxee and CEA's concerns that cable operators could use licenses to limit retail device manufacturers from building compatible

devices. Any license terms that cable operators require for the "standard home networking capability" used to offer access to the basic service tier in Option 1 and the "requirements necessary (including any authentication processes)" in Option 2 must be made available on a good faith basis. In adopting this "good faith" licensing requirement, we intentionally do not specify any particular technology or technology licensing model (e.g., we do not require or specify "fair, reasonable, and non-discriminatory" licensing, as that term has been interpreted in other contexts, as urged by Boxee and CEA). Third, we require the operators that choose to offer access to the basic service tier using Option 1 to "publicly disclose the DLNA profile or other protocol that is being used for the home-networking capability on such operator-supplied equipment." Such a requirement is necessary to ensure that third-party manufacturers have the information necessary to build a device that works with cable-provided equipment. We also remind cable operators that § 76.640(b)(4)(iii) of our rules, which goes into effect in December of this year, requires all high definition set-top boxes (except for one-way, non-recording set-top boxes) to include an IP-compatible output based on an open industry standard that provides for audiovisual communications including service discovery, video transport, and remote control command pass-through standards for home networking. We believe that these additional consumer protection measures will ease the transition to encrypted service for the vast majority of the small subset of customers that rely on third-party provided IP-enabled devices to access the basic service tier.

25. *Other Issues.* Public Knowledge and Media Access Project state in their comments that there have been no complaints from customers in Cablevision's encrypted systems about "hidden fees" related to the free device offers, and they anticipate that cable operators "intend to act in good faith." Out of an abundance of caution, however, they suggest we affirmatively state that cable operators may not impose service fees (such as "digital access fees" or "outlet fees") in lieu of rental fees for the free devices. Consistent with Public Knowledge and Media Access Project's suggestion, we clarify that boxes provided by cable operators that choose to encrypt the basic service tier must be provided without any additional service charges related to the equipment.

26. Public Knowledge and Media Access Project also suggest that we tie the low-income condition to Lifeline/Linkup eligibility because Medicaid eligibility can vary from state to state. We reject that suggestion as unnecessary. As several commenters point out, Medicaid eligibility presents an easily verifiable, bright-line test, and is less likely to cause confusion among subscribers and cable customer service representatives.

27. We also reject calls from some commenters to require free equipment in perpetuity for existing subscribers, and not to limit free boxes to existing subscribers. The consumer protection measures we adopt are intended to mitigate the disruption that may be experienced by current cable subscribers. We do not agree that free equipment is necessary for new subscribers: Given the movement to digital services, many subscribers have become accustomed to leasing set-top devices, and that trend seems likely to continue. Furthermore, we agree with NCTA that unnecessarily burdensome conditions such as free devices for all new subscribers could discourage cable operators from encrypting and prevent the public from realizing the benefits that stem from cable operators' ability to remotely activate and deactivate service which benefits most subscribers. Accordingly, we do not condition this rule change on cable operators' supplying free devices in perpetuity to existing subscribers or to new subscribers.

28. Certain commenters express concern about the impact that basic service tier encryption could have on institutional subscribers and schools in particular. They suggest that the Commission extend the free-device consumer protections to institutional subscribers to prevent the rule change from placing a financial burden on them. Cable operators, however, suggest that these commenters conflate encryption with digitization, and we agree. As cable operators transition to all-digital service, these institutional subscribers will need devices to convert digital signals to analog regardless of whether the service is encrypted unless the institutional subscribers use television sets with clear-QAM tuners and only use those televisions to access the basic service tier. Furthermore, Comcast argues that cable operators establish agreements with local institutions on a case-by-case basis, and that each franchising authority negotiates consumer protection measures to meet its needs. We are persuaded that it is unnecessary to adopt consumer-protection measures

with respect to institutional subscribers, because we expect that cable operators will continue to work with local institutions—and may be required to do so by franchising authorities—to ensure that the institutions' needs will be met. We emphasize that our rules are not intended to limit or preempt existing, renegotiated, or future franchise agreements that provide institutional subscribers more equipment on different terms than our rules require for residential subscribers. We expect that cable operators will work closely with local franchising authorities and institutions to ensure that any disruption institutional subscribers experience as a result of encryption will be minimized.

29. ACA and BendBroadband express concern about the effect that the conditions will have on small cable operators. We agree with ACA and BendBroadband that in some instances the benefits of encryption may be outweighed by the burdens of administrative upgrades to account for the new billing procedures needed to offer free devices for a limited period of time. We note, however, that the decision to encrypt the basic service tier will be a voluntary decision made at the sole discretion of the cable operator under the rules we adopt here. Thus, each cable operator may use its business judgment to decide whether, and when, the benefits of encryption outweigh the costs of upgrading billing software and providing equipment to its subscribers to ease the transition to encrypted service.

30. *Notification Requirements.* Based on the record, we believe that notification requirements are also necessary to protect consumers. Therefore, we will require cable operators to notify their subscribers about the planned encryption and the device offers at least 30 days before the date encryption of the basic tier commences. We will also require cable operators to notify their subscribers at least 30 days, but no more than 60 days, before the end of the free device transitional period. These notifications are necessary to make the device-based consumer protection measures meaningful to consumers; the measures would be meaningless if affected consumers were not made aware of the offers.

31. NCTA proposed that our rules require cable operators to notify their subscribers about encryption and free device offers at least 30 days prior to the date encryption of the basic service tier commences. Several commenters supported NCTA's proposal, and we agree that it is important to identify

when cable operators must notify their subscribers about encryption. Therefore, we will require cable operators to notify their subscribers that they will encrypt at least 30 days before the date encryption of the basic service tier commences, at which time they must also include information about the transitional device requirements set forth in Section 76.630. The notice must state:

On (DATE), (NAME OF CABLE OPERATOR) will start encrypting (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on your cable system. If you have a set-top box, digital transport adapter (DTA), or a retail CableCARD device connected to each of your TVs, you will be unaffected by this change. However, if you are currently receiving (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on any TV without equipment supplied by (NAME OF CABLE OPERATOR), you will lose the ability to view any channels on that TV.

If you are affected, you should contact (NAME OF CABLE OPERATOR) to arrange for the equipment you need to continue receiving your services. In such case, you are entitled to receive equipment at no additional charge or service fee for a limited period of time. The number and type of devices you are entitled to receive and for how long will vary depending on your situation. If you are a (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) customer and receive the service on your TV without (NAME OF CABLE OPERATOR)-supplied equipment, you are entitled to up to two devices for two years (five years if you also receive Medicaid). If you subscribe to a higher level of service and receive (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on a secondary TV without (NAME OF CABLE OPERATOR)-supplied equipment, you are entitled to one device for one year.

You can learn more about this equipment offer and eligibility at (WEBPAGE ADDRESS) or by calling (PHONE NUMBER). To qualify for any equipment at no additional charge or service fee, you must request the equipment between (DATE THAT IS 30 DAYS BEFORE ENCRYPTION) and (DATE THAT IS 120 DAYS AFTER ENCRYPTION) and satisfy all other eligibility requirements.

32. We believe that 30 days' notice will provide a reasonable opportunity for affected consumers to avail themselves of free device offers in advance of basic service tier encryption without unduly burdening cable operators. In addition, at least 30 days, but no more than 60 days, before the

end of the free device transitional period, a cable operator that encrypts must notify subscribers that have taken advantage of the transitional period that the period is ending as follows:

You currently receive equipment necessary to descramble or decrypt the basic service tier signals (either a set-top box or CableCARD) free of charge. Effective with the (MONTH/YEAR) billing cycle, (NAME OF CABLE OPERATOR) will begin charging you for the equipment you received to access (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) when (NAME OF CABLE OPERATOR) started encrypting those channels on your cable system. The monthly charge for the (TYPE OF DEVICE) will be (AMOUNT OF CHARGE).

33. While our rule prescribes the language that cable operators must use to notify their subscribers about encryption and the device-based protection measures, we leave open the option for cable operators to supplement this notice as they see fit. We will not require the six largest incumbent cable operators to provide special notice to their subscribers about the availability of IP-enabled device compatibility, though they must comply with existing notice requirements. Third-party IP-enabled device manufacturers have an economic incentive to ensure their customers are aware of the functions and features of their devices, e.g., provide notice to their customers in marketing materials about the need to obtain IP-enabled equipment from their cable operator and the special equipment the six largest incumbent cable operators are required to offer their subscribers under Commission rules.

34. Public Knowledge and Media Access Project proposed that we require operators to notify subscribers when their free device period is ending on each monthly bill for the three months preceding the end of the transition period. We agree that preventing "bill shock" is important, and § 76.1603(d) of our rules requires cable operators to provide written notice of any increase in price to be charged for equipment necessary to access the basic service tier at least 30 days before the increase is effective. We do not believe that the three notices that Public Knowledge and Media Access Project propose are necessary. But we are concerned that cable operators could notify their subscribers too early in the transition period to render notification essentially meaningless. Therefore, we believe it is important to define the window for notices more precisely so that affected subscribers are notified no more than 60

days before the end of the transitional free-device period. At that time, affected subscribers can determine the course that best suits their circumstances. Some subscribers may opt to continue their current level of service and pay for the additional equipment charges. Other subscribers may choose to reduce their level of service or terminate their existing cable service and pursue a competitive alternative that better meets their service needs and budgets.

35. The New York City Department of Information Technology and Telecommunications (NYC DoITT) argues that, because Cablevision's encryption of its New York City systems is nascent, the Commission cannot be sure of the long-term effects that basic service tier encryption may have. Therefore, NYC DoITT encourages the Commission to make this rule change temporary. We agree that we cannot predict how our rule change will affect the cable industry and subscribers with absolute certainty. The information before us indicates, however, that this rule change will result in the substantial public interest benefits discussed above and that any additional burdens imposed on a limited number of subscribers will be tempered by the consumer protection measures adopted herein. The Commission will keep apprised of the consequences of the rule change and, if the situation develops differently than predicted, we can revisit the issue on our own initiative or in response to a petition for rulemaking. In the future, we may seek information from the operators that have chosen to encrypt to ensure that the expected benefits are being achieved and any burdens to consumers are being minimized. However, nothing in the record persuades us that it is necessary to build a sunset into the rule.

36. *Legal Basis.* Section 624A of the Communications Act provides the Commission broad authority to make changes to our encryption rule and to impose the consumer-protection measures we adopt today. Congress's objective in enacting section 624A was to ensure compatibility between cable systems and consumer TV (receiving and recording) equipment, consistent with the need to prevent theft of cable service. Section 624A(b)(2) directs the Commission to "determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals." Section 624A(d) directs the Commission to periodically review and modify regulations adopted pursuant to section 624A "to reflect improvements and

changes in cable systems, television receivers, video cassette recorders and similar technology." The record suggests that to achieve the statutory goals of section 624A a blanket ban on encryption is no longer necessary, and that changes in cable technology justify relaxing the rule for all-digital cable systems, provided consumer protection measures are addressed. As explained above, cable technology is markedly different than it was when the Commission first adopted the encryption prohibition set forth in § 76.630. For example, the transition to all-digital systems means that encryption of the basic service tier will permit remote activation and deactivation of cable service resulting in significant savings of time and resources for both cable operators and the vast majority of cable customers. Furthermore, as discussed below, the CableCARD standard provides an avenue for consumers to purchase consumer electronics devices that are compatible with digital cable service, which achieves Congress' stated goal in section 624A.

37. Relaxing the encryption rule in this manner will not impede section 624A's goal of compatibility between consumer electronics equipment and cable systems. The Commission has adopted a standard that allows for "plug and play" compatibility between consumer electronics devices and cable systems. This standard provides a clear path for device manufacturers to follow if they wish to build devices that are compatible with digital cable systems and can access all linear digital cable services. Montgomery County, Maryland argues that the CableCARD standard is not successful, and that the Commission should endeavor to relieve compatibility problems, rather than compound them. According to Montgomery County, relaxing the encryption rule will lead to compatibility problems because consumers will no longer be able to use clear-QAM tuners on non-primary television sets. However, the Commission has already adopted a solution for compatibility between consumer electronics equipment and digital cable: The CableCARD standard is intended to allow consumers to buy compatible retail devices to access all linear digital cable services as opposed to the basic-only service that clear-QAM tuners can access without additional equipment. Indeed, the Commission's cable-ready labeling rules prohibit device manufacturers from labeling their devices as "digital cable ready" unless they comply with the CableCARD standards. Thus, under our

existing rules, manufacturers should not have indicated to consumers that devices could receive digital cable service unless those devices were, in fact, CableCARD-compatible. Therefore, we disagree with Montgomery County's characterization that encryption will lead to an abundance of compatibility problems due to the rule changes adopted herein. Section 624A(c)(1)(B) expressly directs the Commission to consider "the costs and benefits to consumers of imposing compatibility requirements on cable operators." As discussed above, the costs associated with a blanket encryption prohibition in all-digital systems greatly outweigh the anticipated benefits to consumers, particularly in light of the consumer protection measures we are also adopting. Furthermore, in 2010, the Commission adopted changes to the CableCARD rules, including streamlined device approval procedures, a self-installation option, and a prohibition on price discrimination against CableCARD devices, that should increase the retail availability and the quality of experience for CableCARD devices and further increase compatibility between consumer electronics and cable service by ensuring that retail devices can access all linear digital cable services. Given these technological and rule changes, we conclude that a complete prohibition on basic service tier encryption in all-digital systems is no longer necessary to ensure compatibility between consumer electronics devices and cable service, provided certain consumer protection measures are satisfied.

38. We also conclude that the requirement in section 623(b)(3)(A) of the Act to base any price or rate standards for equipment installation and leasing on actual cost does not bar the Commission from imposing the consumer protection measures set forth in § 76.630(a)(1)(ii)–(vi) of our new rules. The commenters who addressed our legal authority agree that the consumer protection measures—which are adopted as a transitional measure and implicate a limited number of affected customers—do not run afoul of section 623 of the Communications Act, and we did not receive any comments claiming that the consumer protection measures, as structured, would violate section 623. These measures are not being imposed as a regulation of equipment rates under section 623. Rather, the consumer protection measures are being adopted pursuant to section 624A(b)(2)'s broad grant of authority to the Commission to determine "under what circumstances



to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals.” We have determined that relaxing the encryption prohibition should be permitted for all-digital systems, provided the potential harm to affected consumers is minimized. Our new rule permits a cable operator to elect to abide by the encryption prohibition without having any obligation to offer subscribers equipment for a transitional period. It is only when a cable operator chooses to encrypt the basic service tier that it is required to comply with the requisite regulatory conditions (by providing set-top boxes at no cost to affected subscribers for a limited transitional period). Thus, this requirement is imposed as a condition of a cable operator’s voluntary election to encrypt the basic service tier, and not as a rate regulation imposed under section 623(b)(3)(A).

39. *Waiver Requests.* As mentioned above, the Commission has pending before it four petitions for waiver of the encryption ban. These petitions have been pending for more than a year. Petitioners seek immediate relief, claiming that they face extraordinary theft of service. We find good cause to grant these waiver requests effective upon release of this Order to prevent further delay. For the reasons set forth above, these waivers are conditioned upon the petitioners’ complying with the consumer protection requirements discussed in this Order.

40. *Conclusion.* We conclude that allowing cable operators to encrypt the basic service tier in all-digital systems will result in substantial, tangible benefits to both consumers and cable operators with minimal countervailing burdens on affected subscribers. We believe that the consumer-protection measures that we adopt will mitigate any burdens that encryption will have on the limited number of consumers that may be affected by the instant rule change.

41. *Paperwork Reduction Act Analysis.* The Report and Order in this document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

42. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act, the Commission has

prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this Report and Order. The FRFA is set forth below.

43. *Congressional Review Act.* The Commission will send a copy of this Third Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

44. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303(r), 601, and 624A of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 521, and 544a, this Report and Order *is adopted*.

45. *It is further ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303(r), 601, and 624A of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 521, and 544a, Part 76 of the Commission’s rules *is amended* as set forth in the rules and is effective December 10, 2012. It is our intention that all of the rule changes adopted in this order are interdependent and inseparable and that if any provision of the rules, or the application thereof to any person or circumstance, are held to be unlawful or invalid, the remaining rule changes adopted herein shall not be effective.

46. *It is further ordered* that, pursuant to § 1.3 of the Commission’s rules, 47 CFR 1.3, the requests for waiver of § 76.630(a) of the Commission’s rules, 47 CFR 76.630(a), filed by RCN Corporation, Mikrotec CATV, LLC, Inter Mountain Cable, Inc., and Coaxial Cable TV *are granted*, to the extent described herein and conditioned as set forth above.

47. *It is further ordered* that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

48. *It is further ordered* that the Commission *shall send* a copy of this Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

49. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making (NPRM). The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. No commenting parties specifically addressed the IRFA.

This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA. The Commission will send a copy of the R&O, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the R&O and FRFA (or summaries thereof) will be published in the **Federal Register**.

50. *Need for, and Objectives of the Proposed Rules.* With this Report and Order, the Commission amends its rules to allow cable operators to encrypt the basic service tier in all-digital cable systems if they comply with certain consumer-protection measures. This rule change will benefit consumers who can have their cable service activated and deactivated from a remote location. By allowing remote activation and deactivation, we expect our amended rules will result in benefits to both cable operators and consumers by significantly reducing the number of service calls associated with provisioning service and significantly reducing the need for subscribers to wait for service calls to activate or deactivate cable service. At the same time, we recognize that this rule change will adversely affect a small number of cable subscribers who currently view the digital basic service tier without using a set-top box or other equipment. If a cable operator decides to encrypt the digital basic tier, then these subscribers will need equipment to continue viewing the channels on this tier. To give those consumers time to resolve the incompatibility between consumer electronics equipment (such as digital television sets) and newly encrypted cable service, we require operators of cable systems that choose to encrypt the basic service tier to comply with certain consumer protection measures for a period of time. The Commission concludes that allowing cable operators to encrypt the basic service tier in all-digital systems will lead to benefits like decreased service calls and theft of service, with few associated burdens on consumers. Therefore the Commission believes that this rule change will reduce burdens on small entities. The Commission predicts that encryption of the basic service tier will not substantially affect compatibility between cable service and consumer electronics equipment for most subscribers because over 75 percent of subscribers already have set-top boxes to decrypt the signals. Because the rule is voluntary—a cable operator with an all-digital system may choose whether to encrypt that system—each cable operator may decide whether the benefits of encryption (which include

reduced service calls and reduced theft) outweigh the cost of providing its subscribers with the equipment they will need to continue viewing the channels on the basic service tier.

51. The need for FCC regulation in this area derives from changing technology in the cable services market. When the Commission adopted technical rules in the 1990s, digital cable service was in its infancy, and therefore the rules were adopted with analog cable service in mind. Today, digital cable service is common, and the encryption rule does not translate well in systems that offer all-digital service. Therefore, the Commission will allow all-digital cable operators to encrypt the basic service tier.

52. We recognize that some consumers subscribe only to a cable operator's digital basic service tier and currently are able to do so without using a set-top box or other equipment. Similarly, there are consumers that may have a set-top box on a primary television but access the unencrypted digital basic service tier on second or third televisions in their home without using a set-top box or other equipment. Although we expect the number of subscribers in these situations to be extremely small, these consumers may be affected by lifting the encryption prohibition for all-digital cable systems. To address this problem, we conclude that operators of all-digital cable systems that choose to encrypt the basic service tier must comply with certain consumer protection measures for a limited period of time in order to minimize any potential subscriber disruption, including a requirement that the six largest cable operators offer IP-enabled set-top boxes to subscribers as part of these protections.

53. The Commission believes that the rule will save small entities money. The consumer protection element of the rule—the requirement that cable operators offer existing basic tier customers set-top boxes without charge for certain lengths of time—does associate a cost with the rule. But the Commission believes that the financial benefit to small cable operators in reduced truck rolls and theft of services will far outweigh that cost. Furthermore, because the decision of whether to encrypt the basic tier is voluntary, small businesses will be able to make a business decision about whether to encrypt.

54. *Legal Basis.* The authority for the action proposed in this rulemaking is contained in sections 1, 4(i) and (j), 303(r), 601, and 624A of the Communications Act of 1934, as

amended, 47 U.S.C. 151, 154(i) and (j), 303(r), 521, and 544a.

55. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the Small Business Act. In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).

56. *Cable and Other Program Distribution.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.” The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year. Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more. Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the NPRM.

57. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide. As of 2008, out of 814 cable operators, all but 10 (that is, 804) qualify as small cable companies under this standard. In addition, under the Commission's rules, a “small system” is a cable system serving 15,000 or fewer subscribers.

Current Commission records show 6,000 cable systems. Of these, 726 have 20,000 subscribers or more, based on the same records. We estimate that there are 5,000 small systems based upon this standard.

58. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.” There are approximately 63.7 million cable subscribers in the United States today. Accordingly, an operator serving fewer than 637,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that the number of cable operators serving 637,000 subscribers or less is also 804. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

59. *Direct Broadcast Satellite (“DBS”) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, “Wired Telecommunications Carriers,” which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts. Currently, only two entities provide DBS service, which requires a great investment of capital for operation:

DIRECTV and EchoStar Communications Corporation (“EchoStar”) (marketed as the DISH Network). Each currently offer subscription services. DIRECTV and EchoStar each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider. We seek comments that have data on the annual revenues and number of employees of DBS service providers.

60. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,” which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts. As of June 2004, there were approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs. The IMCC indicates that, as of June 2006, PCOs serve about 1 to 2 percent of the multichannel video programming distributors (MVPD) marketplace. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, as of June 2006, PCOs serve approximately 900,000 subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated

number of units served by the largest 10 PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.

61. *Open Video Services*. The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.” The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year. Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more. Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

62. *Computer Terminal Manufacturing*. “Computer terminals are input/output devices that connect with a central computer for processing.” The SBA has developed a small business size standard for this category of manufacturing; that size standard is 1,000 or fewer employees. According to 2007 Census Bureau data, there were 42 establishments in this category that operated during 2007. Only 3 had more than 100 employees. Consequently, we estimate that all of these establishments are small entities.

63. *Other Computer Peripheral Equipment Manufacturing*. Examples of peripheral equipment in this category include keyboards, mouse devices, monitors, and scanners. The SBA has developed a small business size standard for this category of

manufacturing; that size standard is 1,000 or fewer employees. According to 2007 Census Bureau data, there were 647 establishments in this category that operated in 2007. Of these, only 62 had more than 100 employees. Consequently, we estimate that the majority of these establishments are small entities.

64. *Audio and Video Equipment Manufacturing*. The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees. Data contained in the 2007 U.S. Census indicate that 491 establishments operated in that industry for all or part of that year. In that year, 376 establishments had between 1 and 19 employees; 80 had between 20 and 99 employees; and 35 had more than 100 employees. Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

65. *Description of Reporting, Recordkeeping and Other Compliance Requirements*. The rules adopted in the Order will require cable operators to notify their subscribers about offers of free equipment associated with encryption. The rule also requires a cable operator to notify its subscribers when those subscribers are subject to charges at the end of the free equipment period.

66. *Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered*. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

67. As an alternative to the rules the Commission adopted, the Commission considered leaving the current rule in place—with the result that no cable operator would realize the benefits of encryption—or exempting small cable companies from the consumer protection rules that require encrypting cable operators to provide certain subscribers with free set-top boxes for a limited time. The Commission rejected

leaving the rule in place because that alternative would not lead to the benefits of reduced service calls and reduced cable theft. The Commission rejected exempting small cable companies from the consumer protection rules because it concluded that the protections are necessary to give affected consumers time to consider how to make consumer electronics equipment (such as digital television sets) compatible with newly encrypted cable service. For these reasons, the Commission concluded that basic service tier encryption prohibition should be relaxed. The Commission also concluded that transitional consumer protection measures are necessary to serve the limited number of consumers who currently access unencrypted cable service without the use of a set-top box.

68. *Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Proposals.* None.

#### List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

#### Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

#### PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.630 by revising paragraph (a) and revising section notes 1 and 2 and removing notes 3 and 4.

The revisions read as follows:

#### § 76.630 Compatibility with consumer electronics equipment.

(a) Cable system operators shall not scramble or otherwise encrypt signals delivered to a subscriber on the basic service tier.

(1) This prohibition shall not apply in systems in which:

(i) No encrypted signals are carried using the NTSC system; and

(ii) The cable system operator offers to its existing subscribers who subscribe

only to the basic service tier without use of a set-top box or CableCARD at the time of encryption the equipment necessary to descramble or decrypt the basic service tier signals (the subscriber's choice of a set-top box or CableCARD) on up to two television sets without charge or service fee for two years from the date encryption of the basic service tier commences; and

(iii) The cable system operator offers to its existing subscribers who subscribe to a level of service above "basic only" but use a digital television or other device with a clear-QAM tuner to receive only the basic service tier without use of a set-top box or CableCARD at the time of encryption, the equipment necessary to descramble or decrypt the basic service tier signals (the subscriber's choice of a set-top box or CableCARD) on one television set without charge or service fee for one year from the date encryption of the basic service tier commences; and

(iv) The cable system operator offers to its existing subscribers who receive Medicaid and also subscribe only to the basic service tier without use of a set-top box or CableCARD at the time of encryption the equipment necessary to descramble or decrypt the basic service tier signals (the subscriber's choice of a set-top box or CableCARD) on up to two television sets without charge or service fee for five years from the date encryption of the basic service tier commences;

(v) The cable system operator notifies its existing subscribers of the availability of the offers described in paragraphs (ii) through (iv) of this section at least 30 days prior to the date encryption of the basic service tier commences and makes the offers available for at least 30 days prior to and 120 days after the date encryption of the basic service tier commences. The notification to subscribers must state:

On (DATE), (NAME OF CABLE OPERATOR) will start encrypting (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on your cable system. If you have a set-top box, digital transport adapter (DTA), or a retail CableCARD device connected to each of your TVs, you will be unaffected by this change. However, if you are currently receiving (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on any TV without equipment supplied by (NAME OF CABLE OPERATOR), you will lose the ability to view any channels on that TV.

If you are affected, you should contact (NAME OF CABLE OPERATOR) to arrange for the equipment you need to continue receiving your services. In such case, you are entitled to receive

equipment at no additional charge or service fee for a limited period of time. The number and type of devices you are entitled to receive and for how long will vary depending on your situation. If you are a (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) customer and receive the service on your TV without (NAME OF CABLE OPERATOR)-supplied equipment, you are entitled to up to two devices for two years (five years if you also receive Medicaid). If you subscribe to a higher level of service and receive (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) on a secondary TV without (NAME OF CABLE OPERATOR)-supplied equipment, you are entitled to one device for one year.

You can learn more about this equipment offer and eligibility at (WEBPAGE ADDRESS) or by calling (PHONE NUMBER). To qualify for any equipment at no additional charge or service fee, you must request the equipment between (DATE THAT IS 30 DAYS BEFORE ENCRYPTION) and (DATE THAT IS 120 DAYS AFTER ENCRYPTION) and satisfy all other eligibility requirements.

(vi) The cable system operator notifies its subscribers who have received equipment described in paragraphs (a)(1)(ii) through (iv) of this section at least 30 days, but no more than 60 days, before the end of the free device transitional period that the transitional period will end. This notification must state:

You currently receive equipment necessary to descramble or decrypt the basic service tier signals (either a set-top box or CableCARD) free of charge. Effective with the (MONTH/YEAR) billing cycle, (NAME OF CABLE OPERATOR) will begin charging you for the equipment you received to access (INSERT NAME OF CABLE BASIC SERVICE TIER OFFERING) when (NAME OF CABLE OPERATOR) started encrypting those channels on your cable system. The monthly charge for the (TYPE OF DEVICE) will be (AMOUNT OF CHARGE).

(2) Requests for waivers of this prohibition must demonstrate either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons. As part of this showing, cable operators are required to notify subscribers by mail of waiver requests. The notice to subscribers must be mailed no later than 30 calendar days from the date the request for waiver was filed with the Commission, and cable operators must inform the Commission in writing, as soon as possible, of that notification

date. The notification to subscribers must state:

On (date of waiver request was filed with the Commission), (cable operator's name) filed with the Federal Communications Commission a request for waiver of the rule prohibiting scrambling of channels on the basic tier of service. 47 CFR 76.630(a). The request for waiver states (a brief summary of the waiver request). A copy of the request for waiver shall be available for public inspection at (the address of the cable operator's local place of business).

Individuals who wish to comment on this request for waiver should mail comments to the Federal Communications Commission by no later than 30 days from (the date the notification was mailed to subscribers). Those comments should be addressed to the: Federal Communications Commission, Media Bureau, Washington, DC 20554, and should include the name of the cable operator to whom the comments are applicable. Individuals should also send a copy of their comments to (the cable operator at its local place of business).

Cable operators may file comments in reply no later than 7 days from the date subscriber comments must be filed.

\* \* \* \* \*

**Note 1 to § 76.630:** 47 CFR 76.1621 contains certain requirements pertaining to a cable operator's offer to supply subscribers with special equipment that will enable the simultaneous reception of multiple signals.

**Note 2 to § 76.630:** 47 CFR 76.1622 contains certain requirements pertaining to the provision of a consumer education program on compatibility matters to subscribers.

■ 3. Section 76.1603 is amended by revising paragraph (d) to read as follows:

**§ 76.1603 Customer service—rate and service changes.**

\* \* \* \* \*

(d) A cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. If the equipment is provided to the consumer without charge pursuant to § 76.630, the cable operator shall provide written notice to the subscriber no more than 60 days before the increase is effective. The notice should include the price to be charged, and the date that the new charge will be effective, and the name

and address of the local franchising authority.

\* \* \* \* \*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[FWS-R8-FHC-2011-0046]; [FF08E00000-FXES1113080000D2-123]

RIN 1018-AX51

**Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program; Final Supplemental Environmental Impact Statement on the Translocation of Southern Sea Otters**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final Supplemental Environmental Impact Statement on the Translocation of Southern Sea Otters (final SEIS). The final SEIS evaluates options for continuing, revising, or terminating the southern sea otter translocation program, which was initiated in 1987. The purpose of the program was to achieve a primary recovery action for the southern sea otter: to create an established population at San Nicolas Island sufficient to repopulate other areas of the range should a catastrophic event affect the mainland population. The document describes the proposed action and alternatives under consideration and discloses the direct, indirect, and cumulative environmental effects of each of the alternatives.

**DATES:** We will execute a Record of Decision no sooner than 30 days after the date the Environmental Protection Agency publishes its notice of availability of the final SEIS in the **Federal Register**.

**ADDRESSES:** The final SEIS and other documents are available in electronic format at the following places:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. In the search field, enter FWS-R8-FHC-2011-0046, which is the docket number. Then click on the Search button. On the resulting screen, you may view documents associated with the docket.

- *Agency Web site:* You can view supporting documents on our Web site at <http://www.fws.gov/ventura/>.

- *Our office:* Call 805-644-1766 to make an appointment, during normal business hours, to view the documents, comments, and materials in person at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003-7726.

Alternatively, a limited number of CD-ROMs and hard copies of the final SEIS are available from the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003-7726.

**FOR FURTHER INFORMATION CONTACT:** Lilian Carswell, at the above Ventura street address, by telephone (805-612-2793), or by electronic mail ([Lilian\\_Carswell@fws.gov](mailto:Lilian_Carswell@fws.gov)). Persons who use a telecommunications device for the deaf may call the Federal Information Relay Services at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** We announce the availability of our final Supplemental Environmental Impact Statement on the Translocation of Southern Sea Otters (final SEIS). The final SEIS evaluates options for continuing, revising, or terminating the southern sea otter translocation program (52 FR 29754, Aug. 11, 1987). The document describes the proposed action and alternatives under consideration and discloses the direct, indirect, and cumulative environmental effects of each of the alternatives.

**Background**

The final SEIS reevaluates the effects of the southern sea otter translocation plan, as described in the U.S. Fish and Wildlife Service's 1987 environmental impact statement on our program for translocation of southern sea otters (May 8, 1987, 52 FR 17486). Using information obtained over the decades since the program's implementation, we evaluate the impacts of alternatives to the current translocation program, including termination or revisions to the program. The need for action stems from our inability to meet the goals of the southern sea otter translocation program. Contrary to the primary recovery objective of the program, the translocation of sea otters to San Nicolas Island has not resulted in an established population sufficient to repopulate other areas of the range should a catastrophic event affect the mainland population. Additionally, maintenance of a management zone has proven to be more difficult than anticipated and hinders or may prevent recovery of the southern sea otter.