

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Volatile organic compounds.

Dated: October 18, 2011.

Susan Hedman,

Regional Administrator, Region 5.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 11-169; PP Docket No. 00-67; FCC 11-153]

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

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we propose a new rule 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: Submit comments on or before November 28, 2011. Submit reply comments on or before December 12, 2011.

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 *Notice of Proposed Rulemaking*, FCC 11-153, adopted on October 13, 2011 and released on October 14, 2011. 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 Notice of Proposed Rulemaking

1. With this Notice of Proposed Rulemaking (NPRM), we seek comment on whether to retain the basic service tier encryption prohibition for all-digital cable systems. As discussed below, we tentatively conclude that allowing cable operators to encrypt the basic service tier in all-digital systems will not substantially affect compatibility between cable service and consumer electronics equipment for most subscribers. At the same time, however, 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 relatively small, these consumers may be affected by lifting the encryption prohibition for all-digital cable systems. Accordingly, we tentatively conclude that, any 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.

2. In the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Congress recognized that compatibility problems between cable service and consumer electronics equipment were limiting and/or precluding the operation of premium features of consumer equipment and were affecting the ability of consumer equipment to receive cable programming. Section 624A of the Act was added by Section 17 of the 1992 Cable Act to address this issue. Specifically, 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. As part of that implementation, the Commission added § 76.630(a) to its rules. Section 76.630(a) of the Commission's rules prohibits cable operators from scrambling or encrypting signals carried on the basic tier of service. The Commission determined that this rule would significantly advance compatibility by ensuring that all subscribers would be able to receive basic tier 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. Subsequent to the Commission's adoption of the encryption ban, cable operators began to upgrade their systems to offer digital cable service. More recently, cable operators' transition to more efficient all-digital systems has freed up spectrum to offer new or improved products and services like higher-speed Internet access and high definition programming. As a result of this digital transition, most cable subscribers now have at least one cable set-top box or CableCARD device in their homes. 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. Encryption refers

to the method that cable operators use to make sure that cable service is available only to subscribers who have paid for service. Because encryption serves such an important purpose, encryption of digital cable service has become more sophisticated than analog scrambling techniques. Encryption methods did not used to be standard across all cable systems, however. In 2003, therefore, 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 that the cable operator encrypts. At present, approximately 77 percent of cable subscribers have at least one digital cable set-top box or retail CableCARD device in their home.

4. The fact that most subscribers have a cable set-top box or retail CableCARD device limits the impact of encryption of the basic service tier in all-digital systems on cable subscribers. Most television sets, consumer electronics devices, and leased set-top boxes have included QAM tuners since at least 2007, meaning that those devices are capable of tuning unencrypted digital cable service. As stated above, however, most cable operators who have transitioned to all-digital service encrypt the entire *CPST*. Therefore, many cable subscribers currently use CableCARDS (either in a retail device or leased set-top box) to decrypt their cable service. The remainder of digital cable subscribers use either (i) leased set-top boxes with integrated security (offered under waivers of the separated security requirement or originally deployed before the requirement became effective) to decrypt cable service, or (ii) television sets or devices with QAM tuners, but without CableCARDS, to receive any remaining unencrypted cable signals (typically limited to the basic service tier). Encryption of the basic service tier in all-digital systems would affect this second group, i.e., the digital cable subscribers who use television sets or devices with QAM tuners, but without CableCARDS. We do not know how many subscribers fall into this group, but based on the Cablevision Report discussed below, we expect it to be small.

5. In the past, the Commission has waived the basic service tier encryption prohibition on a demonstration of extraordinary theft of service. Theft of service occurs when unauthorized users physically connect their outlets to the cable plant; in other words, people would climb poles and connect the

cable operator's coaxial cable to homes that do not subscribe to cable 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 therefore the overwhelming majority of subscribers to all-digital systems already have a set-top box or CableCARD-equipped retail device and therefore would be unaffected by encryption of the basic service tier. Furthermore, they contend, encrypting the basic service tier in an all-digital system will eliminate the need for many service appointments because it will allow cable operators to enable and disable cable service remotely by activating and deactivating the encryption capability of set-top boxes and CableCARDS from the headend. In order to remotely activate and deactivate service, cable operators must leave every home connected to the cable plant rather than manually disconnect the cable that runs to a home, which is how many cable operators disconnect service today. If the cable operator is allowed to encrypt every signal, the operator can keep every home connected to the cable plant regardless of whether the home subscribes to cable service. The operator can ensure that only paid subscribers are able to access the service by authorizing and deauthorizing CableCARDS as people subscribe or cancel cable service.

6. In waiver proceedings, certain commenters have asserted that while encryption of all service tiers has its benefits, it also imposes some burdens on consumers and device manufacturers. For example, some commenters explained that they own or manufacture devices like personal computer cable tuner cards that cable subscribers use to view or record unencrypted programming with their computers. These commenters expressed concern that those devices do not have the ability to decrypt cable signals and therefore could not display encrypted cable programming. These commenters asserted that they purchased or manufactured these devices based on the expectation that unencrypted basic service tier QAM signals would be available from cable operators, and that encryption of the basic service tier would make the devices useless. In addition, some commenters objected to the impact that

encryption of the basic service tier would have on televisions with clear-QAM tuners that currently are attached to the cable network directly without a set-top box. Encryption of the basic service tier would require those subscribers to lease a set-top box to access basic service tier channels on those television sets.

7. 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 necessary service calls, as compared to unencrypted cable systems. The Bureau reasoned that Cablevision sufficiently addressed 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, and we understand that additional cable operators plan to file in the absence of this proceeding.

8. We initiate this proceeding to determine whether the Commission's basic service tier encryption prohibition, which was adopted over 15 years ago, remains necessary to promote compatibility between digital cable service and consumer electronics equipment in all circumstances. In this regard, we note, as described above, that the video marketplace has changed significantly over this period. Specifically, most cable operators have updated their systems to provide bidirectional, digital signals in addition to analog service, and some cable operators, like RCN and BendBroadband, transmit only digital

signals and have eliminated analog service in all of their systems. Other operators, like Cablevision and Comcast, have eliminated analog service on certain systems and plan to eliminate analog service in all systems over the coming years. As discussed above, data from SNL Kagan indicates that over three-quarters of cable subscribers have at least one device in their home that can both demodulate and decrypt digital cable services. Furthermore, because the Commission incorporated the CableCARD standard into our rules in 2003, consumer electronics manufacturers can build digital cable ready devices that can access encrypted cable service without the need for a converter box. Given these marketplace and regulatory developments, we tentatively conclude that it is appropriate to allow basic service tier encryption for all-digital cable systems, subject to certain measures intended to ameliorate any potential harm to consumers in the short run. Our proposal is informed by the information garnered from Cablevision's first year of implementation under the Bureau's waiver conditions. Specifically, in its recently filed final report, Cablevision stated that basic service tier encryption led to a reduction of 2,763 truck rolls, and predicted that it eventually will perform over 70 percent of all deactivations remotely. In its waiver petition, Cablevision asserted that by reducing service calls it could reduce the environmental harms associated with use of gas-consuming, traffic-causing trucks. Furthermore, Cablevision reports that no subscribers filed complaints regarding encryption of the basic service tier, which suggests that with the appropriate consumer protection measures, encryption of the basic service tier in all-digital systems does not affect subscribers adversely. We believe that this evidence shows that, where cable operators undertake appropriate consumer protection measures, the costs of retaining this rule (e.g., the need to schedule service appointments whenever a consumer subscribes to or cancels cable service as well as the expense and effect of cable operators' trucks on traffic and the environment) outweigh the benefits of retaining it (e.g., ensuring the continued utility of devices with clear-QAM tuners). We seek comment on this tentative conclusion. Specifically, we seek comment on the costs and benefits to subscribers and cable operators associated with the basic service tier encryption rule as it applies to all-digital cable systems. We also invite comment on any environmental costs

and benefits associated with the rule. Would elimination of the encryption ban benefit the environment through reduction in the gas consumption and traffic associated with truck rolls, and would those benefits outweigh any countervailing environmental effects, such as energy consumption from additional set-top boxes? To the extent feasible, commenters should quantify in dollars any asserted costs or benefits of the basic service tier encryption prohibition.

9. We propose to allow encryption of the basic service tier only with respect to all-digital systems, as remote activation and deactivation of cable service, and its attendant benefits, are only feasible in all-digital systems. We seek comment on the specific criteria that the Commission should use to determine what constitutes an all-digital cable system. For example, what if a system transmits nearly all of its channels solely in digital, but maintains a single, unencrypted analog channel to inform potential subscribers about how to subscribe to service? We seek comment also about digital cable services that are not QAM-based. Is it appropriate to include IP and other non-QAM digital cable services in the definition of an all-digital cable system for the purposes of the proposed rule revision? We also seek comment on whether the Commission should revise the encryption rule with respect to any hybrid (analog/digital) systems where basic service tier programming is provided digitally but the cable operator also continues to provide some analog service to its subscribers (which is the case in many cable systems today). Would revision of the encryption rule with respect to those systems have any attendant benefits given that remote activation and deactivation of cable service is not feasible in hybrid systems?

10. We further seek comment on whether our proposed rule would satisfy our regulatory obligations under section 624A of the Communications Act. Section 624A directs the Commission to issue regulations as necessary to assure compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders. Essentially, with section 624A, Congress sought to develop a "plug and play" compatibility regime. We note that while Congress specifically cited scrambling and encryption as an

impediment to compatibility, it nonetheless directed 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 further prohibits the Commission from limiting the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders. Based on section 624A, we believe the Commission has broad authority to address and regulate encryption technology within the parameters established by Congress.

11. We recognize that some subscribers of only the basic service tier currently access digital cable service without a CableCARD or converter box. We tentatively conclude that if the Commission allows cable operators to encrypt the basic service tier in all-digital systems, we should, at the same time, minimize any instances of incompatibility due to encryption of the basic service tier by implementing transitional measures for the limited universe of subscribers who currently access the unencrypted digital basic service tier without a set-top box. That is, we recognize that there are some consumers who currently are able to access the basic service tier without using a set-top box because of the current encryption prohibition. Accordingly, to mitigate any potential harm experienced by these consumers, we believe our rules should implement transitional measures to prevent consumers from having to purchase or lease new equipment immediately in order to continue accessing the basic service tier if their cable operators choose to encrypt this tier.

12. When the Media Bureau granted the waiver authorizing Cablevision to encrypt the basic service tier, it conditioned that waiver to limit the immediate costs that basic service tier subscribers would face on account of the need for additional equipment like set-top boxes to provide digital televisions equipped with clear QAM tuners access to basic service tier channels. Those conditions require Cablevision to offer "(a) current basic-only subscribers up to two set-top boxes or CableCARDS without charge for up to two years, (b) digital subscribers who have an additional television set currently receiving basic-only service one set-top box or CableCARD without charge for one year, and (c) current qualified low-income basic-only subscribers up to two set-top boxes or

CableCARDs without charge for five years.” We believe that similar measures are appropriate and necessary for purposes of relaxing the encryption ban because of the potential harm to basic-only subscribers who have come to rely on access to unencrypted basic-only service. A transition period will provide affected subscribers time to make informed choices about equipment and/or other alternatives available in their service area. We therefore propose that cable operators that choose to encrypt the basic service tier in their service area provide to subscribers, without charge for a limited time, devices that can decrypt the basic service tier as described above. We seek comment on this proposal.

13. Are the consumer protection measures we propose to adopt adequate to protect all subscribers of digital cable systems in all areas of the country? We seek comment on the number of subscribers that this rule change will affect. We also seek comment on an appropriate time frame for requiring cable operators to provide set-top boxes at no cost to current subscribers, and particularly with regard to low-income subscribers. Are the time frames established in the Cablevision proceeding appropriate to serve the goal of minimizing the immediate costs that basic subscribers and subscribers with additional sets receiving basic-only service face through this modification of the rules? In the context of the Cablevision waiver, the Media Bureau used receipt of Medicaid as an indicator of a current qualified low income basic-only subscriber. Does it make sense to do so in the context of this NPRM? We invite commenters to suggest other indicators to delineate what constitutes a current qualified low income basic-only subscriber. Are additional safeguards necessary and appropriate, and, if so, what are these safeguards? Would an interim 7-year time period or longer be more consistent with ensuring there is not an economic hardship on low-income subscribers who prior to the potential relaxing of the encryption ban would not have needed additional equipment? We seek comment on any other measures the Commission should take to protect subscribers if we decide to relax the prohibition on encryption of the basic service tier for all-digital cable systems.

14. Although we propose to relax the encryption ban for all-digital systems, our proposal does not require cable operators operating those systems to encrypt the basic service tier. Rather, our proposed rule permits cable operators to encrypt this tier provided that they offer free set-top boxes to

basic-only subscribers for a limited period of time. Because cable operators may decide whether they wish to encrypt under the requisite regulatory conditions (i.e., provide set-top boxes at no cost to affected subscribers for a limited period), we see no statutory or constitutional constraints to imposing such a requirement. In that regard, we note that the proposed regulatory conditions would be implemented pursuant to our authority under sections 624A, not as a rate regulation prescribed under section 623(b) of the Act. Accordingly, we do not believe section 623(b)(3)(A)'s requirement to base on actual cost any price or rate standards for equipment installation and leasing would bar the Commission from imposing the set-top box condition for relaxing the encryption prohibition. We seek comment on this analysis.

15. *Ex Parte Presentations.* The proceeding this NPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with § 1.1206(b) of the Commission’s rules. In proceedings governed by § 1.49(f) of the Commission’s rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the

electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules.

16. *Initial Regulatory Flexibility Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 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).

17. With respect to this NPRM, an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act is contained below. Written public comments are requested in the IRFA, and must be filed in accordance with the same filing deadlines as comments on the NPRM, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this NPRM, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this NPRM and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**.

18. *Initial Paperwork Reduction Act of 1995 Analysis Paperwork Reduction Act Analysis.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed 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).

19. *Comment Filing Procedures.* Pursuant to §§ 1.415 and 1.419 of the Commission’s rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s

Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

20. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

21. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW-A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC, 20554.

22. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

23. Additional Information: For additional information on this proceeding, please contact Brendan Murray of the Media Bureau, Policy Division, Brendan.Murray@fcc.gov, (202) 418-1573.

24. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303(r), 403, and 624A of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), 303(r), 403, and 544a, this Notice of Proposed Rulemaking is *adopted*.

25. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this

NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

26. *Need for, and Objectives of the Proposed Rules.* With this NPRM, the Commission seeks comment on elimination of the basic service tier encryption prohibition for all-digital cable systems. 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 certain technical rules related to cable service do not translate well. Therefore, the Commission proposes to allow all-digital cable operators to encrypt the basic service tier.

27. *Legal Basis.* The authority for the action proposed in this rulemaking is contained in sections 1, 4(i) and (j), 303, 403, 601, 624, and 624A of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (j), 303, 403, 521, 544, and 544a.

28. *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").

29. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (NAICS) defines "Wired Telecommunications Carriers" 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. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year. Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

30. *Wired Telecommunications Carriers—Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite (DBS) services, home satellite dish (HSD) services, satellite master antenna television (SMATV) systems, and open video systems (OVS). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable

and Other Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households. Among BSPs, however, those operating under the OVS framework are in the minority. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

31. *Cable System Operators (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 2006, 7,916 cable operators 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. Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

32. *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 65.3 million cable subscribers in the United States today. Accordingly, an operator serving fewer than 654,000 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 654,000 subscribers or less totals approximately 7,916. 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.

33. *Cable and Other Subscription Programming*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis * * *. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers." The SBA has developed a small business size standard for firms within this category, which is all firms with \$15 million or less in annual receipts. According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year. Of this total, 217 firms had annual receipts of under \$10 million and 13 firms had annual receipts of \$10 million to \$24,999,999. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

34. *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 Census Bureau data, there were 71 establishments in this category that operated with payroll during 2002, and all of the establishments had employment of under 1,000. Consequently, we estimate that all of these establishments are small entities.

35. *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 Census Bureau data, there were 860 establishments in this category that operated with payroll during 2002. Of these, 851 had employment of under 1,000, and an additional five

establishments had employment of 1,000 to 2,499. Consequently, we estimate that the majority of these establishments are small entities.

36. *Audio and Video Equipment Manufacturing*. These establishments manufacture "electronic audio and video equipment for home entertainment, motor vehicle, public address and musical instrument amplifications." The SBA has developed a small business size standard for this category of manufacturing; that size standard is 750 or fewer employees. According to Census Bureau data, there were 571 establishments in this category that operated with payroll during 2002. Of these, 560 had employment of under 500, and ten establishments had employment of 500 to 999. Consequently, we estimate that the majority of these establishments are small entities.

37. *Description of Reporting, Recordkeeping and Other Compliance Requirements*. The rules proposed in the NPRM will not impose additional reporting, recordkeeping, and compliance requirements on cable operators.

38. *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.

39. As indicated above, the NPRM seeks comment on elimination of the basic service tier encryption prohibition for all-digital cable systems. The Commission considered leaving the current rule in place. The Commission tentatively concludes, however, that an exemption of the rule for all-digital cable systems could reduce the service calls that a cable operator must perform, and therefore the Commission believes that this proposed rule change will reduce burdens on small entities.

40. We welcome comments that suggest modifications of any proposal if based on evidence of potential differential impact on smaller entities. In addition, the Regulatory Flexibility

Act requires agencies to seek comment on possible small entity-related alternatives, as noted above. We therefore seek comment on alternatives to the proposed rules that would assist small entities while ensuring improved customer support by cable operators for digital cable products purchased at retail.

41. *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 proposes to amend 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. Section 76.630 is amended by revising paragraph (a) and Note 1 and 2 to read as follows:

§ 76.630 Compatibility with consumer electronics equipment.

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

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

(i) No television signals are provided using the NTSC system; and

(ii) The cable operator offers to its existing basic service tier subscribers (who do not use 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 separate television sets without charge for two years from the date of encryption; and

(iii) The cable operator offers to its existing digital subscribers who have an additional television set currently receiving basic-only service without a set-top box, the equipment necessary to descramble or decrypt the basic service

tier signals on one television set without charge for one year from the date of encryption; and

(iv) The cable operator offers to all existing basic-only subscribers who receive Medicaid the equipment necessary to descramble or decrypt the basic service tier signals on up to two separate television sets without charge for five years from the date of encryption.

(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 thirty 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).

(3) 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.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648-AY56

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 32

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 32 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) for review, approval, and implementation by NMFS. Amendment 32 proposes to implement a 10-year rebuilding plan for gag; revise the annual catch limits (ACLs) and accountability measures (AMs) for gag, red grouper, and shallow-water grouper (SWG); revise recreational annual catch targets (ACTs) for gag and red grouper; implement a 4-month gag recreational season; adjust the commercial quota for gag and SWG for 2012 through 2015 and subsequent fishing years; adjust multi-use individual fishing quota (IFQ) shares for gag and red grouper; and implement a 22-inch (56-cm) commercial minimum size limit for gag. The intent of Amendment 32 is to end overfishing of gag, allow the gag stock to rebuild, and constrain the harvest of red grouper consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments must be received on or before December 27, 2011.

ADDRESSES: You may submit comments on the amendment identified by "NOAA-NMFS-2011-0135" by any of the following methods:

- *Electronic submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.