



1001 K STREET, 2<sup>ND</sup> FLOOR  
SACRAMENTO, CA 95814

916/446-7732  
FAX 916/446-1605

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California Energy Commission  
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Sacramento, CA 95814-5512

<b>DOCKET</b>	
<b>11-AAER-1</b>	
DATE	AUG 30 2011
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**RE: DOCKET NO. 11-AAER-1  
2009 RULEMAKING PROCEEDING ON APPLIANCE EFFICIENCY  
REGULATIONS - PHASE II**

Dear Commissioners:

The California Cable & Telecommunications Association (CCTA) files these Comments in the above-captioned proceeding pursuant to the Notice of Scoping Workshop on the Energy Commission's consideration of adopting new appliance efficiency standards related to set top boxes.

Initially, CCTA notes that the Energy Commission first considered the adoption of appliance efficiency standards for set top boxes in 2004, Docket 03-AAER-1. In September, 2004, the Energy Commission recognized that the State of California was federally preempted from adopting state specific standards for set top boxes and excluded these appliances, as well as certain televisions with set top functions, from consideration. As discussed below, federal law continues to preempt the State of California from adopting state standards related to set top boxes. In addition, adoption of State energy efficiency standards for set top boxes will likely prevent set top boxes from delivering Internet access programming and broadband "on demand" services, and therefore significantly restrict California residents access to and use of broadband. As a result, adoption of energy efficiency standards relating to set top boxes is not only preempted, it is counter to the State's interest in promoting broadband adoption by California citizens.

I. Adoption of State-Specific Technical Standards for Set Top Boxes Inconsistent With Federal Standards Is Expressly Preempted Under Title VI of the Communications Act.

In the Communications Act of 1934 ("Act"), Congress recognized the need for regulation at the federal, state and local levels.<sup>1</sup> Congress thus included express preemption provisions in the Communications Act, but preserved some degree of state and local regulation over specific areas. The Act provides that any *inconsistent* state or local law shall be preempted and superseded.<sup>2</sup> Thus, if an express provision of the Act prohibits the type of regulation proposed by a State, or if enforcement would frustrate the effectiveness of the Act, the State regulation would be preempted and superseded.<sup>3</sup>

<sup>1</sup> 47 U.S.C. Section 521(3); H.R. Rep. No. 98-934, 98<sup>th</sup> Cong., 2d Sess.3, reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4656.

<sup>2</sup> 47 U.S.C Section 556(c ).

<sup>3</sup> *Houstonian Cable Vision Co v. Dep't of Public Utility Control*, 622 F. Supp 798 (D.Conn (1985), 622 F. Supp at 806 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Perez v. Campbell*, 402 U.S. 637 (1971)).

Section 624 (e) of the Act, as amended,<sup>4</sup> provides:

**Technical Standards:** Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. *No state or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or any transmission technology.*

The Supreme Court has succinctly explained why the FCC must have the authority to preempt state and local technical standards for cable systems. In *City of New York v. FCC*, 486 U.S. 57 (1988), the Court quoted with approval FCC findings that:

- *"a multiplicity of mandatory and nonuniform technical requirements undermined 'the ultimate workability of the over-all system,' and could 'seriously imped[e]' the 'development and marketing of signal source, transmission, and terminal equipment.'"*
- *"Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes."*

The Federal Communications Commission ("Commission") has made it abundantly clear that while local enforcement of the Commission's technical standards is permissible, Section 624 (e) precludes local franchising authorities and states from regulating in the areas of technical standards, customer equipment and transmission technologies.<sup>5</sup>

All television set top boxes currently manufactured are in compliance with the Commission's technical standards, as set forth in Part 76, subpart K of the Commission's Rules. These standards deal generally with transmission and signal parameters and signal quality. These standards do not prescribe any power consumption levels for set top boxes either in the active or the stand-by/low power modes. Thus, the Commission has not adopted in any manner the Energy Star set top box specification promoted by the U.S. Department of Energy and the U.S. Environmental Protection Agency, or any similar standard. Thus any mandatory restriction on energy consumption adopted by a state would be an impermissible "restriction" on a cable operator's use of set top boxes.

The Legislative history leaves no doubt about the extent of the prohibition in Section 624 (e). In the 1996 amendments to the Communications Act, Congress eliminated two sentences in Section 624 (e) previously authorizing local franchising authorities to establish and enforce technical standards. In lieu of those two sentences, Congress added the following sentence:

No state or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or nay transmission technology.

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<sup>4</sup> 42 U.S.C. Section 544 (e)

<sup>5</sup> *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 F.C.C. Rcd. 5296, at paras 131-132 ("*Cable Act Reform Order*").

This amendment was intended to prohibit states and local franchising authorities from enacting and enforcing technical standards that differ from those established by the Commission.<sup>6</sup> Congress was particularly concerned that inconsistent and excessive local regulation would impede technological development:

The Committee intends by this subsection to avoid the affects of disjointed local regulation [t]he patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.<sup>7</sup>

The legislative history echoes the Commission's concerns about local regulation of technical standards, customer equipment and transmission technologies. In the Cable Act Reform Order, the Commission stated, "uniformity of technical standards...is essential to prevent the inefficiency and confusion that threatened the cable industry during the period when local authorities...could set stricter standards than those promulgated by the Commission."<sup>8</sup> Any proposal to apply California specific technical standards on cable set-top boxes would create precisely the inefficiency and confusion Congress sought to avoid, and would undermine the national equipment market that it sought to promote for cable television equipment.

Moreover, while the Energy Commission has not yet provided clear guidelines on its intent to limit energy consumption for set top boxes, the limitation of energy consumption could well affect broadband services provided to consumers, digital downloading, Internet capability and emergency warning services provided over cable systems connected to set top boxes by making it impossible for cable to maintain "always on" broadband connection feature that is necessary for advanced digital features.

For these reasons, the Cable Act expressly preempts all inconsistent state and local laws. It explicitly prohibits states and localities from restricting a cable system's use of any type of subscriber equipment, and the Energy Commission's attempt to regulate technical standards governing set top boxes is wholly preempted by federal law.

Sincerely,

/s/

Lesla Lehtonen  
Senior Vice President, General Counsel  
[lesla@calcable.org](mailto:lesla@calcable.org)

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<sup>6</sup> H.R. Re. No. 204, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. Pt. 1, at 110(1995).

<sup>7</sup> *Id.*

<sup>8</sup> 14 F.C.C. Rcd. 5296 at para 127 (citing *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report*, 5 F.C.C. Rcd 4962, 5056 (1990)).