

VERNER · LIPFERT
BERNHARD · McPHERSON ^{BY} HAND
CHARTERED

RECEIVED

APR 23 2001

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL
(202) 371-6206

April 23, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: MM Docket No. 00-39
Thomson Multimedia, Inc.'s Reply to Opposition**

Dear Ms. Salas:

Enclosed for filing please find the original and eleven (11) copies of the Reply to Opposition of Thomson Multimedia, Inc. in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosure

No. of Copies rec'd 11
List A B C D E

RECEIVED

APR 23 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

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

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 00-39
Rules and Policies)	
Affecting the Conversion)	
To Digital Television)	
)	

REPLY TO OPPOSITION

Thomson Multimedia, Inc. ("Thomson"), by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, 47 C.F.R. § 1.429(g), hereby files this Reply to Opposition to Petitions for Reconsideration of the Commission's *Report and Order* in the above-captioned proceeding.¹

Thomson agrees with the Association for Maximum Service Television, Inc. ("MSTV"), the National Association of Broadcasters ("NAB"), and the Association of Local Television Stations, Inc. ("ALTV")² (collectively the "Joint Broadcasters") that the Program and System Information Protocol ("PSIP") standard should be adopted. Thomson urges the Commission to do so by adopting ATSC Doc. A/65A (dated March 29, 2000) or, at a minimum, requiring that all PSIP tables necessary for communicating program selection information are transmitted.

The Joint Broadcasters, however, fall far short of persuasively arguing that the All-Channel Receiver Act ("ACRA")³ authorizes the Commission to require that television receivers be capable of receiving digital television ("DTV") broadcast signals. Indeed, the Joint Broadcasters' analysis

¹ *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 00-39, FCC 01-24 (rel. Jan. 19, 2001) (hereinafter "*Report and Order*" or "*FNPRM*" respectively).

² See MSTV/NAB/ALTV Opposition to Petitions for Reconsideration in MM Docket 00-39 (filed April 12, 2001) (hereinafter "Joint Broadcasters' Opposition").

³ All-Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. §303(s)).

requires the Commission to suspend knowledge of the fundamental reality that ACRA was a specific legislative response to one concrete technical problem of the early 1960s – the inability of TV sets to receive UHF signals – and had nothing to do with the ability to receive digital transmissions not even dreamed of in 1962. It is difficult to imagine any reviewing court accepting a legal construction of ACRA which ignores the only intent Congress had when it enacted the legislation. Accordingly, Thomson reiterates its request that the Commission reconsider its determination in the *Report and Order* that it has the legal authority to impose a DTV tuner requirement, or “forced integration.”

I. THE COMMISSION HAS TRANSCENDED THE OUTERMOST LIMITS OF ITS AUTHORITY IN DETERMINING THAT ACRA EMPOWERS IT TO REQUIRE FORCED INTEGRATION OF DIGITAL RECEPTION CAPABILITY INTO TV SETS.

The Commission is always properly concerned that its actions fall within its statutory authority. That concern should be heightened by a spate of recent court decisions overturning Commission regulations because they exceeded the agency’s statutory authority.⁴ Against that backdrop, it is most surprising that the Commission would seize upon the language of a forty-year-old statute, a statute with a distinct and clear purpose, and conclude that the statute applies to a technology that was, at best, mere science fiction at the time of enactment.

The Joint Broadcasters, who now so eagerly defend the Commission’s overreach, clearly lack confidence in the Commission’s conclusion. On March 1, 2001, broadcasters testifying before the Senate Commerce, Science and Transportation Committee, called for a “digital All Channel Receiver Act.”⁵ These proponents of forced integration obviously were not betting that the Commission’s interpretation of ACRA to encompass digital technology would withstand reconsideration, or, if

⁴ See, e.g., *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (reversing and remanding horizontal and vertical cable ownership limits); *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (vacating and remanding portions of the FCC’s collocation order).

⁵ *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science and Transportation*, 107th Cong. (2001) (written testimony of Jeff Sagansky, President and CEO, Paxson Communications Corporation); see also, *id.* (written testimony of Ben Tucker, Executive Vice President for Broadcast Operations, Fisher Broadcasting).

necessary, judicial review. These broadcasters even declined to seek clarification of ACRA from Congress. Instead, they recognized that a new law was necessary to address a new technology. And they were not alone. Six weeks earlier, former Chairman Kennard wrote to the Congress seeking an amendment to the Communications Act to enable the Commission to impose a DTV tuner requirement.⁶

The Joint Broadcasters conclude that ACRA, because it includes the language “all frequencies,” grants the Commission the authority to force integration of digital reception capability into TV sets. To reach this conclusion, the Joint Broadcasters combine a contrived plain language reading of the statute with willful denial of persuasive legislative history. The Joint Broadcasters’ interpretation must be rejected for multiple reasons.

A. A Plain Language Reading of ACRA Precludes its Application to Digital Technology.

The Joint Broadcasters deem dispositive the fact that ACRA does not speak of “UHF frequencies,” but of “all frequencies,” and proclaim that if the plain language of a statute covers a situation, the statute is applicable.⁷ This, according to the Joint Broadcasters, is true whether or not Congress specifically contemplated the situation in passing the statute. The Joint Broadcasters’ contention not only fails to heed a fundamental canon of statutory construction, but assigns a contrived meaning to the term “all frequencies.”

First, the Supreme Court has stated: “words, unless otherwise defined, will be interpreted as taking their ordinary, contemporary, common meaning.”⁸ The term “all frequencies” must be given

⁶ Letter from William E. Kennard, Chairman, FCC, to The Honorable Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science and Transportation, at 3 (dated Jan. 19, 2001). The Joint Broadcasters’ argument that calls for a new law merely represent an attempt to expeditiously achieve forced integration strains credulity. Presumably, this “expeditious” approach would involve traversing the legislative process and agency rulemaking alike – hardly a swift or easy process. Moreover, if proponents believed that ACRA already provided the requisite authority, that surely would have appeared in their testimony.

⁷ Joint Broadcasters’ Opposition at 3.

⁸ See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (viewing the term “bribery” as used in the Travel Act of 1961).

the meaning it held at the time of Congress' enactment.⁹ In 1962, the words "all frequencies" encompassed VHF and UHF technology – digital technology was "mere science fiction."¹⁰ Thus, it is pure fantasy to argue that digital technology is encompassed by the term "all frequencies."

More importantly, all television receivers Thomson manufactures and markets today comply fully with the outermost boundaries of the plain language of the analog-based ACRA. That is, Thomson's products are capable of receiving all analog television broadcast signals transmitted on all frequencies. In order to receive these signals, receivers respond, at a minimum, to broadcasts transmitted in both the VHF and UHF frequency bands. Forced integration of digital reception capability does not only require TV sets to receive all television broadcast frequencies, but rather "all technologies." But ACRA speaks only to frequencies, not technologies. Accordingly, a plain language reading of ACRA does not cover digital technology and fails to provide a legal basis for the Commission's imposition of a forced integration requirement on manufacturers.

B. Even If the Joint Broadcasters' Plain Language Reading of ACRA Is Accepted, the Express Intent of Congress Makes Clear That ACRA Does Not Encompass Digital Technology.

The Joint Broadcasters cling to their plain language reading at all costs in order to avoid confronting the clearly expressed intent of Congress. This willful ignorance is justified, according the Joint Broadcasters, based on *Chevron U.S.A. v. Natural Resources Defense Council*¹¹ and its progeny.¹² Contrary to the Joint Broadcasters' contention, however, *Chevron* does not require an agency always to give effect to the facial language of a statute. In fact, "the language of a statute may

⁹ *Id* at 42 ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute.").

¹⁰ *See Report and Order* at p. 59 (Separate Statement of Commissioner Furchtgott-Roth).

¹¹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹² Joint Broadcasters' Opposition at 3.

not support an agency's interpretation where the statutory context or legislative history indicates that Congress intended a different result."¹³

The *Chevron* Court did state that if the intent of Congress is clear, an agency "must give effect to the unambiguously expressed intent of Congress."¹⁴ *Chevron* makes clear that Congressional intent is determined by "employing traditional tools of statutory construction."¹⁵ Quite recently, when reversing and remanding the Commission's cable ownership rules, the U.S. Court of Appeals for the D.C. Circuit stated:

We analyze the agency action under the familiar framework of [*Chevron*]. If we find (using traditional tools of statutory interpretation) that Congress has resolved the question, that is the end of the matter. We must place the statutory language in context and "interpret the statute 'as a symmetrical and coherent regulatory scheme.'"¹⁶

The Joint Broadcasters, like the Commission before it,¹⁷ fail to employ the traditional tools of statutory construction and fail to place the statutory language in context. Therefore the Joint Broadcasters' reliance on the plain meaning of such language must fail.

The unambiguously expressed intent of Congress with respect to ACRA was to address a specific problem. To this end, the Senate Report states: "because of the nonavailability of television receivers which are capable of picking up UHF signals as well as VHF signals, the bulk of the UHF band is unused today . . . this legislation is designed to remedy this situation."¹⁸ The Senate Report identifies the heart of the UHF-VHF dilemma as "the relative scarcity of television receivers in the

¹³ See *Specialty Equip. Market Ass'n v. Ruckelshaus*, 720 F.2d 124 (D.C. Cir. 1983) (emphasis added).

¹⁴ *Chevron*, 467 U.S. at 842-43; see also *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998).

¹⁵ *Chevron*, 467 U.S. at 843 n. 9. The *Regions Hospital* Court makes it clear that *Chevron* focuses on intent: ("If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hospital*, 522 U.S. at 457 (citing *Chevron*, 467 U.S. 837, 842 & 843 n. 9) (emphasis added).

¹⁶ *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (citations omitted) (emphasis added).

¹⁷ See *FNPRM* at ¶ 111.

United States which are capable of receiving the signals of UHF stations.”¹⁹ ACRA indeed solved the UHF/VHF reception problem. It was certainly never intended, and cannot be used, to solve the digital technology reception problem which first arose nearly forty years later. Under the intent of Congress test announced by *Chevron*, the Joint Broadcasters’ argument must fail.

II. THE CLAIM THAT THE “CIRCUMSTANCES AND FACTORS” THAT DROVE ADOPTION OF ACRA MERIT ITS APPLICATION TO DIGITAL TECHNOLOGY IS UNAVAILING.

Bereft of persuasive legislative history, the Joint Broadcasters and the Commission are becoming increasingly comfortable with the idea that ACRA’s legislative history supports forced integration simply because the “circumstances and factors” that led Congress to enact ACRA resemble those that exist today.²⁰ The Joint Broadcasters’ Opposition cites the *FNPRM* as support for its “circumstances and factors” argument.²¹ The *FNPRM* in turn cites the comments of NAB and NABA.²²

Unfortunately, for the Joint Broadcasters, the “circumstances and factors” argument has been created out of whole cloth, and is neither a legally-recognized tool of construction, nor a precedent the Commission should set. Armed with the Commission’s endorsement in the *FNPRM*, the Joint Broadcasters take the not-unexpected tactic of trying to further turn and twist a factual argument – “the circumstances and factors” argument – into a rationale for contending that Congress intended ACRA to apply to more than what was known or knowable at the time of its enactment. Such a tactic not only strains belief, but in fact is based on an incomplete set of facts.

¹⁸ See S. REP. NO. 87-1526, 2d Sess. (1962), *reprinted in* 1962 U.S.C.A.A.N. Vol. 1, 1873, 1874 (“Senate Report”).

¹⁹ *Id.* at 1875.

²⁰ Joint Broadcasters’ Opposition at 4.

²¹ *Id.*

²² *FNPRM* at ¶ 105.

The Joint Broadcasters submit that the following three characteristics that exist today mirror the “circumstances and factors that let [sic] Congress to enact ACRA:”

- this is a unique transition of the entire television system;
- while prices for receivers may initially be higher, they will fall as production increases, and the requirement would protect longer-term consumer interests; and
- any initial increase in receiver costs will be more than counterbalanced by benefits to consumers, including the ability to more quickly reclaim and reallocate analog spectrum.²³

It mocks logic to believe that these very circumstances and factors drove Congress, in 1962, to enact ACRA. The legislative history is replete with Congress’s statements regarding the true circumstances and factors driving enactment of ACRA, for example:

- the nonavailability of television receivers which are capable of picking up UHF signals as well as VHF signals, [resulting in] the bulk of the UHF band [being] unused today.²⁴
- the relative scarcity of television receivers in the United States which are capable of receiving the signals of UHF stations;²⁵ and
- [the need for] certain regulatory authority to require that all television receivers . . . be equipped at the time of manufacture to receive all television channels. That is, the 70 UHF and 12 VHF channels.”²⁶

This was not, as Joint Broadcasters claim, the same “unique transition of the entire television system” we are attempting today. For one thing, it in no way affected VHF broadcasters, with the exception of having to compete with a growing number of UHF broadcasters. Second, the technology required to include UHF capability in all receivers was relatively simple, by no means as complex and

²³ Joint Broadcasters’ Opposition at 4.

²⁴ Senate Report at 1874.

²⁵ *Id.* at 1875.

²⁶ *Id.* at 1873. Congress’s specific qualification, as discussed in the Senate Report, that, by passing the ACRA, television receivers would be required to receive 70 UHF and 12 VHF frequencies, clearly reveals Congress’s intent that the effect of the legislation be limited to the finite number of then-allocated VHF and UHF channels.

expensive as including digital reception capability with its requisite, costly digital tuning, decoding and computer memory requirements.

Additionally, while lawmakers may have been willing to accept and justify slightly higher consumer prices for television receivers to implement the larger public policy goal of bolstering use of the UHF band and the viability of UHF broadcasters vis-à-vis their VHF competitors, there is no evidence Congress would have passed the ACRA had it meant doubling or tripling consumer prices for the most popular sizes of television receivers.²⁷

Finally, to say that spectrum reclamation, as Joint Broadcasters claim, drove Congress, in 1962, to enact ACRA, is simply wrong.

III. NEITHER THE COMMISSION, NOR THE COURTS PREVIOUSLY INTERPRETED ACRA IN THE MANNER NOW ARGUED BY THE JOINT BROADCASTERS.

Like the Commission in the *Report and Order*, the Joint Broadcasters fail to present any precedent supporting the Commission's determination that ACRA provides it with the authority to impose forced integration of DTV reception capability on DTV manufacturers.²⁸ Instead, the Joint Broadcasters attempt to paint as "inapposite" the Commission's decision in *Sanyo*,²⁹ and the United States Court of Appeals for the District of Columbia Circuit's decision in *Electronic Industries Association Consumer Electronic Group v. FCC*,³⁰ ("EIA/CEG") which both give credence to the argument that ACRA should be narrowly construed.³¹ Such a claim can only be explained either as an

²⁷ See Comments of Thomson in MM Docket 00-39 (filed April 6, 2001). It is certainly not the role of an agency to impose such sharply increased costs on the public.

²⁸ The Joint Broadcasters claim the Commission has long recognized that ACRA provides authority to require both digital and analog reception in television sets. (citing *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order, Third Report and Order, Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6924 (1992)). The precise nature or source of that authority, however, is not discussed or revealed by the Commission in the *Third Report and Order*.

²⁹ *Sanyo Manufacturing Corp.*, 58 Rad. Reg. 2d (P&F) 719 (1985) (decision on reconsideration of *Sanyo Manufacturing Corp.*, 56 Rad. Reg. 2d (P&F) 681 (1984)).

³⁰ *Electronic Indus. Ass'n Consumer Elec. Group v. FCC*, 636 F.2d 689 (D.C. Cir. 1980) ("EIA/CEG").

³¹ Joint Broadcasters' Opposition at 5.

attempt to divert attention from interpretations that disserve their instant goal, or just plain missing the point. Both the FCC's *Sanyo* decisions and the *EIA/CEG* case support the position taken by Thomson here.

First, to the certain dismay of the Joint Broadcasters, nothing in the Commission's *Sanyo* decisions indicates that ACRA applies to anything other than UHF and VHF frequencies in analog technology. As the Joint Broadcasters note, Sanyo Manufacturing Corporation requested a waiver of the Commission's Rule implementing ACRA (for a video display device that responded to signals on VHF Channels 3 and 4 only). Significantly, the Commission, on its own accord, found that a waiver was not necessary because the technology involved was not only outside the scope of its rules, but outside the purview of ACRA as well.³² ACRA's purview, according to the Commission, was determined by "the ambit of Congressional concern motivating the legislation," and that concern was to "remedy a situation where UHF television allocations were progressively being rendered less useful."³³

Second, the Joint Broadcasters fail to refute the fact that the United States Court of Appeals for the District of Columbia Circuit considered the Commission's scope of authority under ACRA and concluded that Congress left to the Commission the task of achieving a single goal: improving "UHF Service to make that band competitive with VHF."³⁴

ACRA has never previously been interpreted to apply to digital technology. While the Joint Broadcasters do not desire a narrow interpretation of ACRA, Commission and judicial interpretation assigning a limited scope to ACRA is, in fact, thoroughly apposite.

³² *Sanyo Manufacturing Corp.*, 58 Rad. Reg. 2d (P & F) at ¶ 15.

³³ *Id.* at ¶ 7.

³⁴ *EIA/CEG*, 636 F.2d at 695.

III. CONCLUSION.

As shown in Thomson's Petition for Partial Reconsideration, the Commission's conclusion that ACRA grants it the authority to impose a DTV tuner requirement is wrong as a matter of law. The plain language of the statute placed in context so it accurately reflects the express intent of Congress compels the conclusion that the Commission has transcended the outermost limits of its authority. The Joint Broadcasters' Opposition fails to provide the requisite legal authority for the Commission's action. For these reasons, Thomson renews its request that the Commission reconsider its determination that ACRA grants it the authority to require that television receivers be capable of adequately receiving DTV broadcast signals.

Respectfully submitted,

THOMSON MULTIMEDIA, INC.



Lawrence R. Sidman, Esq.

Michael M. Pratt, Esq.

Sara W. Morris

VERNER, LIIPFERT, BERNHARD,

MCPHERSON & HAND, CHARTERED

901 15th Street, N.W., Suite 700

Washington, D.C. 20005

(202) 371-6206

Counsel to Thomson Multimedia, Inc.

David H. Arland
Director, Government and
Public Relations
THOMSON MULTIMEDIA, INC.
P.O. Box 1976, INH-430
Indianapolis, IN 46206-1976
(317) 587-4832

April 23, 2001

CERTIFICATE OF SERVICE

I, Stephanie Suerth, do hereby attest that on this day, April 23, 2001, I caused a copy of the foregoing Reply to Opposition to be hand delivered to the following:

Victor Tawil
Senior Vice President
Association for Maximum Service Television, Inc.
1776 Massachusetts Avenue, NW
Suite 310
Washington, DC 20036

Jonathan D. Blake
Jennifer A. Johnson
Russell D. Jessee
Covington & Burling
1201 Pennsylvania Avenue, NW
P.O. Box 7566
Washington, DC 20044

Henry L. Baumann
Jack N. Goodman
Valerie Schulte
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

David L. Donovan
Association of Local Television Stations, Inc.
Vice President Legal & Legislative Affairs
1320 19th Street, NW
Suite 300
Washington, DC 20036



A handwritten signature in black ink, appearing to read "Stephanie Suerth", is written over a horizontal line.