

THE COMMISSION'S CONCLUSION THAT THE ALL CHANNEL RECEIVER ACT GRANTS IT THE AUTHORITY TO IMPOSE A DTV RECEPTION REQUIREMENT IS WRONG AS A MATTER OF LAW

Congress, the Commission, and the courts have interpreted ACRA as conveying nothing more than the specific authority to promote the viability of UHF broadcasting. Moreover, even among those who would like to read ACRA broadly, there is a recognition that in the absence of a specific statutory directive addressing digital tuners, the Commission lacks authority to require that all tuners receive DTV channels. Consequently, the Commission's determination that it has the authority under ACRA to require that television receivers be capable of adequately receiving digital broadcast signals is misplaced and should be reversed on reconsideration.

Congress Adopted ACRA For the Narrow Purpose of Ensuring the Viability of UHF Television.

The tools of statutory construction – particularly legislative history and Congressional purpose – demonstrate that Congress unequivocally did not intend for ACRA to apply in the broad manner the Commission implicitly concludes it does in its DTV Biennial Review *Report and Order*. Congress enacted ACRA in 1962 (when DTV technology was mere science fiction) for the sole purpose of ensuring the viability of UHF broadcasting. The ACRA's legislative history, evidenced particularly in the Senate Report accompanying the legislation, fully supports this conclusion. It is difficult to imagine any reviewing court accepting a legal construction of ACRA which ignores the only intent Congress had – and could have had – when it enacted the legislation.

The Plain Text of ACRA Requires All Televisions to Receive All Analog Television Frequencies, Not All Technologies.

Arguments that the ACRA's reference to "all frequencies" by its definition includes DTV frequencies are unavailing. The Supreme Court has stated: "words, unless otherwise defined, will be interpreted as taking their ordinary, contemporary, common meaning." See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (viewing the term "bribery" as used in the Travel Act of 1961). The term "all frequencies" must be given the meaning it held at the time of Congress' enactment. *Id.* at 42 ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute."). In 1962, the words "all frequencies" encompassed VHF and UHF technology – digital technology was mere science fiction. Thus, it is pure fantasy to argue that digital technology is encompassed by the term "all frequencies." In fact, all television receivers manufactured and marketed by Thomson today comply fully with the outermost boundaries of the plain language of the analog-based ACRA – they are capable of receiving all analog television broadcast signals transmitted on all frequencies. 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.

The Commission Itself Has Previously Recognized Its Narrow Authority Under ACRA With Regard to New Technologies.

The Commission's decision in *Sanyo Manufacturing Corporation* demonstrates the Commission's own view that devices designed to receive *new technologies* fall outside the scope of ACRA. In that case, the Commission noted that the signal sources used by the video display device at issue were products of *technologies that did not exist at the time that the statute was enacted* and, accordingly, concluded the device...involved fell outside the scope of ACRA. *Sanyo Manufacturing Corp.*, 58 RR 2d (P & F) 719 (1985) at 7 (decision on reconsideration of *Sanyo Manufacturing Corp.*, 56 RR 2d (P & F) 681 (1984)).

Congress's Unambiguously Expressed Intent in Enacting ACRA, As Evidenced in Its Legislative History and Congressional Purpose, Dictates Its Application *Only* to Analog Technology.

Pursuant to the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*, if the intent of Congress is clear, an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Significantly, intent is not dependent on the plain language of a statute, but by "employing traditional tools of statutory construction," a precedent strictly adhered to by the U.S. Court of Appeals for the D.C. Circuit. *Id.* at 843 Note 9. The Commission, in asserting its authority under ACRA to force integration of DTV reception in all televisions, appears to focus exclusively on the text of ACRA. However, an examination applying ACRA's legislative history, structure and purpose reveals indisputably that that Congress did not intend for ACRA to apply in the broad manner the Commission claims. To the contrary, utilizing accepted tools of statutory construction, there is no question that Congress intended to solve one narrow problem that existed 40 years ago: receipt of analog UHF channels. That problem, and Congress' narrowly targeted solution, ACRA, had nothing to do with digital television. Accordingly, under *Chevron*, there is no room for interpretive latitude for the FCC to apply ACRA to a technology – DTV – that did not exist when it was enacted. Entreaties by the Commission and virtually all proponents of forced integration of DTV that Congressional action is needed, at a minimum, to clarify the Commission's authority under ACRA, greatly undermine any claim of existing authority.

The "Circumstances and Factors" That Led to ACRA's Enactment Were Distinctly Different From Those Affecting the DTV Transition.

Broadcasters and the Commission have suggested that ACRA's legislative history supports forced integration simply because the "circumstances and factors" that led Congress to enact ACRA purportedly resemble those that exist today. In fact, the "circumstances and factors" argument is neither a legally-recognized tool of construction, nor a precedent the Commission should set. However, even assuming, *arguendo*, that the "circumstances and factors" argument as posed by broadcasters had weight, it would fail on the facts. Unlike the

DTV transition, the government-directed resuscitation of UHF television in 1962 was not a “unique transition of the entire television system” (most obviously it in no way affected VHF broadcasters, aside perhaps from a competitive standpoint). Moreover, the cost involved in adding UHF capability to all receivers was minimal due to the fact that UHF reception did not require the introduction of a new *technology* but rather simply an extension of the product’s tuning range. DTV reception is a far more complex and expensive endeavor. 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, there is no evidence Congress would ever have countenanced doubling or tripling consumer prices for the most popular sizes of television receivers, as would be the case with forced integration of DTV reception. Finally, to suggest – as broadcasters do – that analog spectrum reclamation drove Congress in 1962 to enact ACRA, is simply wrong.

The Courts Have Recognized the Limitations of the Commission’s Authority Under ACRA.

In *Electronic Industries Association Consumer Electronic Group v. FCC*, the United States Court of Appeals for the District of Columbia considered the Commission’s scope of authority under ACRA. 636 F.2d 689 (1980). Relying extensively on the Act’s legislative history, which it described as “clearer than most,” the court concluded that Congress left to the Commission the task of achieving a single goal: improving “UHF Service to make that band competitive with VHF.” *Id.* at 695. In addition, the court also noted that the statute was only adopted after the Commission explicitly committed that it would “avoid extreme or unreasonable performance specifications,” and “select standards which are in the realm of the average characteristics of UHF receivers available on the open market today.” *Id.* at 696. The court’s interpretation of ACRA is consistent with Thomson’s argument that ACRA confines the Commission’s authority to a specific problem, a specific context and a specific time. A contrary construction by the Commission today could not withstand judicial review.