WHITE PAPER

DIGITAL TELEVISION TUNER REQUIREMENT

CONSUMER ELECTRONICS ASSOCIATION

Michael Petricone, Esq.
Vice President, Technology Policy
2500 Wilson Boulevard
Arlington, VA 22201
(703) 907-7500

July 23, 2002

DIGITAL TELEVISION TUNER REQUIREMENT

The Consumer Electronics Association ("CEA") is the principal trade association representing the consumer technology industries. CEA members design, manufacture, distribute and sell a wide variety of consumer electronics and information technology equipment. Our members have made very substantial investments in developing, designing, building, and marketing digital high definition displays, fully integrated receivers, set-top boxes, and other associated digital reception and display equipment.

CEA and its members strongly support the transition to digital television ("DTV") and the significant strides the Commission has made toward implementing that transition. Since 1998 CEA members have been manufacturing and aggressively marketing digital tuners, both integrated into television sets and as part of digital set-top boxes.

However, CEA opposes adoption by the Federal Communications Commission (FCC) of a requirement that all television receivers be capable of receiving and decoding DTV programming. Such a requirement contravenes the law, thwarts the successful transition to DTV, and is contrary to the public interest. The record clearly demonstrates that imposition of a digital tuner requirement would impose substantial costs upon consumers without providing any countervailing public benefit.

The FCC Lacks Statutory Authority to Require that Television Sets Contain Digital Tuners

In the context of its rule making proceeding on the transition to DTV, in 2001 the FCC concluded that the All Channel Receiver Act ("ACRA")[1] provides the FCC with authority to impose a requirement that all television sets be manufactured with tuners that would enable them to receive and decode digital programming transmitted by broadcasters. Specifically, the Commission stated that "Section 303(s) provides the Commission with authority to require that television receivers be capable of adequately receiving [DTV] channels."[2] The FCC's conclusion contravenes the law and should be rejected.[3]

---

1 47 U.S.C. § 303(s).

2 *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 00-39, 16 FCC Rcd. 5946 (2001), para. 110 ("*Report and Order and FNPRM*").

3 The Commission's decision on this point, in MM Docket 00-39, is subject to petitions for Reconsideration filed by CEA and Thomson Multimedia on March 15, 2001.

The Plain Language of ACRA Does Not Apply to DTV

The Supreme Court, in its seminal case *Chevron v. Natural Resources Defense*, stated that when a court reviews an agency's construction of the statute it administers – which is the case here – it must first ask "whether Congress has directly spoken to the precise question at issue."[4] The only time Congress addressed mandatory digital tuners, in 1997, the provision was defeated in Committee (discussed *infra*, p. 8). On the other hand, an examination of ACRA's legislative history reveals that Congress intended the provision to be very narrow, and to apply only to adding UHF reception capabilities to all television sets. Digital or other new technologies were not encompassed within its terms.

Further, as recently as January 19, 2001, FCC Chairman Kennard assumed the lack of such authority. After this proceeding was in progress and the First Report and Order adopted, the FCC Chairman sent letters to the Chairmen of the House and Senate Commerce Committees recommending that Congress amend the ACRA to require that television receivers greater than a certain screen size include DTV reception capability within a phased-in period. The premise of the letter was that the Commission lacked such authority. Nowhere does the Chairman assert that the purpose of his request was to clarify or to confirm existing FCC authority. On the contrary, his proposal is presented as an amendment to ACRA.

The plain language of ACRA and related provisions of the Communications Act make it clear that ACRA does not apply to DTV transmissions. Section 303(s) requires that all television receivers be capable of receiving "all frequencies." The Supreme Court has stated: "words, unless otherwise defined, will be interpreted as taking their ordinary, *contemporary*, common meaning."[5] The term "all frequencies" must be given the meaning it held at the time of Congress' enactment.[6] In 1962, the words "all frequencies" encompassed VHF and UHF analog television signals. Digital technology was "mere science fiction"[7] and could not have been encompassed by the term "all frequencies."

By its terms, ACRA addresses only the reception of "all frequencies," and television receivers comply with this requirement. They respond and decode broadcasts transmitted in both the VHF and UHF frequency bands. ACRA does not, however,

---

4 467 U.S. 837, 842-43 (1984)

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

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

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

require that television receivers receive all broadcasts on all frequencies offered by "*all technologies*." A plain language reading of ACRA simply does not include digital technology and fails to provide a legal basis for the Commission's imposition of a requirement on manufacturers. Receivers are not subject to the broad plenary jurisdiction of the Commission in the same way of transmitters and licensees.

Section 330 of the Communications Act addresses the three specific statutory requirements applicable to television sets set forth in Section 303 of the Act – all channel reception, closed captioning, and the V-chip. That ACRA does not include digital technology is underscored by the terms of Section 330 (which pertains to the shipment of television receivers in compliance with Section 303). With respect to compliance with ACRA (Section 303(s)), Section 330 does not extend the FCC's authority to newly developed technologies.[8] In stark contrast, with respect to compliance with both the Television Decoder Circuitry Act of 1990 (Section 303(u)) (closed captioning), and the "v-chip" provisions of the Telecommunications Act of 1996 (Section 303(x)), respectively, Section 330 *provides explicitly* that the FCC shall have jurisdiction to adopt regulations under those provisions when *new video technologies* are developed. Specifically, Section 330(b) provides as follows:

> As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that closed-captioning service continues to be available to consumers.[9]

And, Section 330(c) provides:

> As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers.[10]

It is well-settled that, where Congress explicitly confers power in one portion of a statute, and does not convey it in another portion of the statute, a conclusion may be drawn from Congress' silence. *U.S. v. Juvenile No. 1*, 118 F.3d 298 (5th Cir. 1997), *cert. denied*, 522 U.S. 976 (1997) and *cert denied*, 522 U.S. 988 (1997) (where Congress includes particular language in one section of a statute, but omits it in another section of the same statute, it is generally presumed that Congress acts intentionally and purposely). If Congress did intend for the FCC's authority under ACRA to extend to newly developed technologies, it has had multiple opportunities to so amend Section 330(a) of

---

8 47 U.S.C. § 330(a).

9 47 U.S.C. § 330(b).

10 47 U.S.C. § 330(c)(4).

the Communications Act. That it declined to do so, even at the time it added Sections 330(b) and (c) to the Communications Act, and again when it considered an amendment introduced by Rep. Markey in 1997, discussed *infra* at p. 8, affirms that Congress did not intend ACRA to apply to new technologies such as DTV.

Finally, the Commission itself has recognized the limited scope of ACRA. In addition to the Chairman's letter sent to Congress in January of 2001 requesting that it enact a DTV tuner requirement, discussed *supra* at p. 2, in *Sanyo Manufacturing Corporation*[11] the Commission stated that the signal sources used by the TV set there at issue, which received only certain channels, were products of *technologies that did not exist at the time that the statute was enacted.* Accordingly, the set was not subject to the requirements of ACRA.

Legislative History Demonstrates that the Statute Does Not Apply to DTV

Congress enacted the ACRA in 1962.[12] It was intended to confer only that authority necessary to achieve a specific purpose: to serve and promote UHF broadcasting. Specifically, ACRA sought to remedy the lack of UHF receiving equipment by requiring that all television receivers include the capability to receive all VHF and UHF channels.[13] Its legislative history makes clear that ACRA was not intended to confer upon the FCC broad authority over television receivers. In crafting the provisions of ACRA, Congress explicitly considered, but rejected, broader language that would have more broadly extended the Commission's authority over television receivers. Consequently, arguments that ACRA authorizes the Commission to require digital tuners in all analog sets, and *vice versa*, are misplaced.

As originally proposed, ACRA would have authorized the Commission to set "minimum performance standards" for all television receivers.[14] In the course of Congressional consideration of the bill, however, this provision was criticized for providing the Commission with too great a role in receiver design. It was argued that granting such broad authority would allow the FCC to adopt standards requiring that all television receivers be color, for example.[15] Testifying before the Senate Commerce Committee, Congressman Kenneth Roberts (D-AL) stated:

---

[11] 58 RR 2d (P & F) 719 (1985) at para. 7.

[12] *Report and Order and FNPRM* at p. 59 (Statement of Commissioner Harold W. Furchtgott-Roth concurring in Part and Dissenting in Part).

[13] 47 U.S.C. § 303(s); *See* Senate Report No. 87-1526, 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. Vol. 1, 1880 ("Senate Report").

[14] Senate Report No. 87-1526, 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. Vol. 1, 1880 ("Senate Report"), at 1879.

[15] *Id.*

> The FCC should not have the power to require that all sets be color sets, or have a certain size of picture tube or be made with a certain size speaker and so forth.[16]

Similarly, during hearings on the bill before the House Committee on Interstate and Foreign Commerce, industry officials criticized the proposed language because it "provides too broad an authority to prescribe 'minimum performance capabilities.'"[17] The House Committee thereafter dropped the language authorizing the Commission to set "minimum performance standards," and amended the bill that became ACRA for the specific purpose of ensuring that it was limited to ensuring reception of the UHF channels.[18]

During consideration of the bill in the Senate after referral of the more limited House bill, the Chairman of the Communications Subcommittee obtained specific representations from FCC Chairman Newton Minnow which were relied upon and prominently quoted and referred to in ACRA's legislative history. In a letter to Senator Pastore (D-RI), Chairman of the Subcommittee on Communications, FCC Chairman Minnow expressed concern that the House version of the bill was inadequate to ensure compliance by receiver manufacturers and requested a broader grant of authority. He pledged, however, that the Commission would implement the legislation by issuing reasonable regulations. Chairman Minnow assured Congress that:

> [The Commission] would avoid extreme or unreasonable performance specifications, but rather, would select standards, which are in the realm of the average characteristics of UHF receivers available on the open market today.[19]

---

16 See *Electronic Indus. Assoc. Consumer Elec. Group v. FCC*, 636 F.2d 689, 694 (citing *All-Channel Television Receivers: Hearing on S.2109 before the Subcomm. on Communications of the Senate Comm. On Commerce*, 87th Cong., 2d Sess. 59 (1962)).

17 *See Electronic Indus. Assoc.* at 694 (citing *All Channel Television Receivers and Deintermixture: Hearings on H.R. 8031 Before the House Comm. On Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 274 (1962) (testimony of W. Walter Watts, RCA Corp.)).

18 *See* H.R. REP. NO. 87-1559, at 1 (1962) ("House Report").

19 Letter from FCC Chairman Newton Minnow to Senator John Pastore (May 11, 1962) *reprinted in* Senate Report, App. C 1890, 1892.

Indeed, the Chairman sought only the most limited authority needed to accomplish the statutory goal of promoting the viability of UHF broadcasting.[20]

To assuage fears of Senators opposed to the original broad grant of power to the Commission, the Senate Commerce Committee in its Report on the bill emphasized the Commission's promises that receiver design regulations would be limited to ensuring the addition of UHF channels:

> The FCC has assured us that the practical need for procuring authority which would permit effective enforcement of this legislation would not involve the Commission broadly in the dealing of television set manufacturers. *On the contrary, the Commission's authority, restrictive as it would be of section 303(s), would be most limited and narrow.* On the basis of these representations, your committee agrees that the authority given to the Commission to require that all channel receivers "be capable of adequately receiving" UHF channels is narrow in scope and in the main consistent with what the House did in reporting its legislation.[21]

Congress thus affirmatively and knowingly rejected language that would have authorized the Commission to set "minimum performance standards" and otherwise be broadly involved in the regulation of receiver design. Rather, Congress enacted legislation authorizing the Commission to "require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies." As stated in the Senate Report accompanying the final bill, the legislation gave the FCC "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.*"[22]

This legislative history expresses Congress's focused and unambiguous intent as to ACRA's sole purpose – a purpose that excludes all but UHF reception capability. The Supreme Court long has adhered to the principle that guidance on the meaning of a statute is provided by the Congressional purpose in enacting it; and that to determine Congressional intent courts properly consider contemporaneous events, the situation as it existed, and as it was addressed by Congress.[23]

---

20 *Id.* at 1891.

21 Senate Report at 1880 (emphasis added).

22 Senate Report at 1873 (emphasis added).

23 *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892) (citing *United States v. Union Pacific Railroad*, 91 U.S. 72, 79).

Furthermore, it is long-settled that deletion of a provision from a bill "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[24] Correct interpretation of a statute includes the traditional tools of statutory construction, including an examination of the statute's legislative history and purpose.[25] When implementing the Satellite Home Viewer Improvement Act of 1999, the Commission recognized this very principle, that a statute cannot be interpreted to require an approach that Congress rejected.[26] The same must be held in this instance. The legislative history of ACRA is clear: the statute had a narrow purpose, and therefore cannot be stretched to apply to DTV tuners.

Congress, the Courts and the FCC Have Interpreted ACRA as Having a Narrow Purpose

Congress, the courts, and the FCC have remained true to the legislative history and purpose of ACRA and recognized its narrow application. In several instances Congress has provided the Commission with authority to regulate television receivers in specific contexts. Each time it has passed a specific statute precisely because the Commission lacks general authority over the non-radiating aspects of TV receiver design and manufacture.[27] However, such authority always has been narrow and limited to very specific receiver issues. For example, in the Television Decoder Circuitry Act of 1990 Congress required manufacturers to produce television sets with special decoder chips that enable display of close-captioned television transmissions for the hearing impaired.[28] Similarly, in the Telecommunications Act of 1996, Congress required use of "v-chip" technology in all receivers over a certain size to help facilitate parental control over the viewing of television broadcasts.[29]

---

24 *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

25 *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-43 (1984); *Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

26 *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* First Report and Order, FCC 00-99 (released March 16, 2000) (citing *INS v. Cardozo-Fonseca,* 480 U.S. 442-43 (1987).

27 *See, e.g., Radio Frequency Interference: Hearing on S. 864 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation,* 95th Cong. 117 (1978) at 15 (FCC Commissioner Ferris, speaking to Chairman Goldwater, states that the Commission lacks authority, absent an Act of Congress, to adopt mandatory standards for television receivers).

28 47 U.S.C. § 303(u).

29 47 U.S.C. § 303(x).

Measures such as these are clear evidence that Congress consistently has viewed ACRA as limited to all channel capability and that it must specifically authorize the Commission to act when it intends for the Commission to impose any other type of regulation on television receivers. In recognition of this, Representative Edward Markey, the ranking Member of the House Telecommunications and Internet Subcommittee, proposed an amendment to the Communications Act requiring that receivers have the capability to receive digital television signals.[30] The proposed amendment was rejected on a 31-11 roll call vote.[31] Without statutory authority, the Commission lacks authority to impose receiver requirements in the DTV context or otherwise.

The same interpretation of the scope of authority conveyed by the ACRA was the basis of a judicial opinion. 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.[32] Relying extensively on ACRA's legislative history, which the court described as "clearer than most," it concluded "Congress did not . . . give the Commission unbridled authority to reach its goal of [UHF/VHF] comparability. Congress specifically rejected a broad grant of power when it deleted the provision allowing the Commission to set 'minimum performance standards.'"[33] The court also noted that Congress adopted the statutory language only 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."[34]

The D.C. Court of Appeals' interpretation of ACRA unambiguously viewed the Commission's authority to be limited to a specific problem in a specific context. As acknowledged by the Court, Congress' intent in enacting ACRA was limited to addressing UHF reception capabilities. Accordingly, reliance on ACRA as authorizing the Commission to require that receivers have both NTSC and DTV reception capability, or any other DTV performance standard, is without merit.

In the specific context of DTV, the Commission itself noted that it traditionally has "not regulated broadcast receivers except insofar as they incidentally radiate

---

30 House Comm. on Commerce, 105th Cong. Amendment to the Comm. Print of June 10, 1997 (offered by Rep. Markey).

31 *Id.*

32 636 F.2d 689 (1980).

33 *Id.* at 696.

34 *Id.*

energy."[35] Furthermore, throughout the digital television proceedings, the FCC declined to mandate the manufacture of dual mode receivers capable of receiving and decoding both NTSC and ATSC signals. Specifically, in its *Fifth Report & Order*, the Commission noted that it has "previously determined in this proceeding that the All Channel Receiver Act does not mandate the manufacture of dual-mode (DTV and NTSC) receivers."[36]

This position in the digital television proceeding is consistent with the Commission's earlier interpretation of ACRA when it acknowledged in *Sanyo* that the concern of Congress in enacting ACRA was to "remedy a situation where the UHF television allocations were progressively being rendered less useful because fewer and fewer television sets could receive anything but the VHF channels" and that the signal sources used by the TV set there at issue, which received only certain channels, were products of *technologies that did not exist at the time that the statute was enacted.* [37] Accordingly, the television set in *Sanyo* was not subjected to the requirements of ACRA.

There is No Justification to Apply ACRA to DTV

Finally, the "circumstances and factors" underlying the adoption of ACRA to protect and preserve UHF broadcasting are not present in the context of DTV transmissions. It has been argued by the Joint Broadcasters[38] that the following three characteristics that exist today mirror the "circumstances and factors" that lead 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

---

35 *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Fifth Report and Order, 12 FCC Rcd at 12853 (1997) (citing 47 C.F.R. §§ 15.101 *et seq.*).

36 *Id.* at 2855-6 (citing Third Report and Order, Third Further Notice of Proposed Rule Making, 7 FCC Rcd 6924, 6984 (1992)).

37 *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)).

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

- 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.[39]

This argument is incorrect. The legislative history is replete with Congress' 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.[40]

- the relative scarcity of television receivers in the United States which are capable of receiving the signals of UHF stations,[41] 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."[42]

The facts and circumstances underlying ACRA were not 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 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

---

39 *Id.* at 4.

40 Senate Report at 1874.

41 *Id.* at 1875.

42 *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.

had it meant double or tripling consumer prices for the most popular sizes of television receivers.[43]

Finally, spectrum reclamation certainly did not drive Congress, in 1962, to enact ACRA.

Adoption of a Digital Tuner Requirement Would Be Arbitrary and Capricious

Even if the FCC has the statutory authority to impose a digital tuner requirement, the record before the Commission compels the conclusion that it would be arbitrary and capricious to do so. There is ample evidence in the Commission's DTV transition proceeding regarding the substantial increased costs a digital tuner requirement would impose upon consumers and the resultant adverse impact such cost increases would have both on the public and on the effective transition to digital television.

Based in large part on facts already submitted in the FCC record in the ongoing DTV rule making proceeding, CEA analyzed the economic impact of such a requirement and is providing that analysis to the FCC for inclusion in the record. While CEA will not restate here all of the findings contained in that analysis, the record amply reflects that the imposition of a digital tuner requirement today would increase manufacturers'costs by more than $200 per television receiver. More than half of all television receiver sales are sets 25 inches or less with an average price of $175.

Adverse implications of such price increases include the following:

- lower income customers would be unable to afford, or unwilling to purchase, these more expensive receivers, effectively eliminating them from the group of consumers who will receive the benefits of DTV;
- consumers generally would postpone their purchase of newer receivers until the price is reduced sufficiently to warrant replacement of existing equipment, thus further delaying the achievement of DTV penetration levels;
- development of alternative equipment that can receive and decode digital transmissions less expensively and without the replacement of existing customer equipment could be reduced or even cease; and
- customers would develop resentment toward DTV because the timing and method of the transition will be mandated by government regulation rather than consumer choice and marketplace competition.

Each of these consequences of a digital tuner mandate will adversely affect the potential success of the transition to DTV. If the requisite statutory penetration levels are not

[43] *See* Comments of Thomson in MM Docket 00-39 (filed April 6, 2001). It certainly is not the role of the FCC to impose sharply increased costs on the public.

reached in a particular market within an established timeframe, DTV transition time periods will be further delayed. That delay will adversely effect the amount of digital programming that is developed and transmitted, further frustrating the purposes of the statute. In sum, the substantial record reflects that the costs of implementing a digital tuner requirement far outweigh the suggested benefits (of which CEA is unable to find any). Were the Commission to adopt a digital tuner requirement in the face of this substantial record, such action would be arbitrary and capricious. *See California, et al. v. F.C.C.*, 39 F.3d 929 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) (Circuit Court vacated and remanded portion of FCC order because FCC failed to weigh certain record evidence, thus rendering FCC's cost-benefit analysis flawed, and that portion of the FCC's order arbitrary and capricious); *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

The FCC Failed to Adhere to Required Administrative Procedures in Concluding it May Adopt a Digital Tuner Requirement

The FCC Failed to Address Comments and Reply Comments in the Record

In the DTV transition proceeding, the Commission sought comment on its legal authority to impose a DTV tuner standard for television receivers. Among others, CEA set forth in detail its legal analysis leading to a clear conclusion that under existing law the Commission lacks authority to impose a digital tuner requirement. The Commission did not address this issue in its *Report and Order,* but concluded in the *FNPRM* that it has such authority. Therein the Commission unequivocally stated: "Section 303(s) provides the Commission with authority to require that television receivers be capable of receiving [DTV] channels,"[44] and made proposals based upon this conclusion.

But it failed to set forth any underlying analysis or substantive discussion of analyses in the record that reach the contrary conclusion. Having requested and received comment on this issue in response to its original *Notice,* it therefore must have decided the issue *sub silentio*. Having raised the issue and received substantial comment on it, the Commission is obligated to explain its legal reasoning.

The FCC Failed to Provide a Reasoned Analysis for its Change in Policy

In its digital television proceedings, the Commission twice declined to mandate the manufacture of "dual mode" television receivers, which are capable of receiving and

---

[44] *Report and Order and FNPRM* at para. 110.

decoding both NTSC and ATSC signals, citing the lack of a mandate under the ACRA.[45] It is well established that an administrative agency may not suddenly change prior policies without supplying " reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[46]

Nonetheless, the FCC in its *FNPRM* not only determines that it has the authority to impose such a requirement, but does so without supporting analysis. Accordingly, even if the Commission had the legal authority to impose a DTV tuner mandate, which CEA strongly believes it does not, its action in this instance was arbitrary and capricious and violated the Administrative Procedure Act.[47]

Conclusion

Only very recently has the Commission attempted to stretch this 1962 statue to cover new digital technology. In a separate paper CEA will present information on the high cost to consumers that such a mandate would impose. The FCC lacks authority to require digital tuners in all television sets for the reasons discussed above.

---

45 *See* Fifth Report and Order, 12 FCC Rcd. 12809, 12855-6 (1997) (citing Third Report and Order, Third Further Notice of Proposed Rule Making, 7 FCC Rcd. 6924, 6984 (1992)).

46 *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). The United States Court of Appeals for the District of Columbia Circuit, addressing FCC action, has held: "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored..." *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see also, American Telephone & Telegraph Company v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992) (FCC acted arbitrarily when it failed to acknowledge a change in policy).

47 *See State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).