

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAR 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
Commercial Availability of Navigation Devices)	PP Docket No. 00-67
Compatibility Between Cable Systems and Consumer Electronics Equipment)	

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV")' hereby submits the following comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.'

DIRECTV is the United States' largest provider of direct broadcast satellite ("DBS) service, with more than 11 million subscribers nationwide, and a leading provider of digital subscription television programming. The *Further Notice*, and the Memorandum of Understanding ("MOU") and supporting materials attached as Appendix B thereto, are nominally devoted to the need for the cable television and consumer electronics industries "to establish a so-called 'cable plug and play' standard."³ Nonetheless, it is plain that the MOU and technical proposals raised in the *Further Notice* apply more broadly than to these two constituencies, and have serious consequences for other multichannel video programming distributor ("MVPD)

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, a licensee in the DBS service and wholly-owned subsidiary of Hughes Electronics Corporation.

² See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, *Further Notice & Proposed Rulemaking*, CS Docket No. 97-80 and PP Docket No. 00-67 (released January 10, 2003) ("Further Notice").

³ *Further Notice* at ¶ 1.

No of Copies rec'd 014
List ABCDE

participants such as DBS operators and content providers, who were not invited to participate in the MOU negotiation process, and whose views and technological concerns were not taken into account. In these Comments, DIRECTV strongly urges the Commission to reject any attempt by the signatories to the MOU to use the Commission's regulatory processes to impose business models, copyright protection rules and other technical standards on all MVPDs that are unrelated to the asserted goal of establishing a standard for cable-ready digital televisions.

I. DIRECTV SUPPORTS EFFORTS TO ADVANCE THE DIGITAL TELEVISION TRANSITION THROUGH VOLUNTARY NEGOTIATIONS WHICH, UNLIKE THE MOU, TAKE INTO ACCOUNT ALL AFFECTED MVPD INDUSTRY SECTORS

DIRECTV has been pioneering innovation in digital television since the inception of its DBS service. In 1994, DIRECTV was introduced to the public as the first MVPD to retransmit television programming in an all-digital format. Since that time, DIRECTV has continued to lead the MVPD industry in distributing digital and high-definition ("HD") television content and offering advanced and interactive television services to its subscribers. For example, in 1998, DIRECTV led the MVPD industry in offering the first nationally-distributed HD programming channels.⁴ DIRECTV worked with several consumer electronics manufacturers to become the first MVPD to offer HD settop boxes with integrated ATSC tuners for the reception of digital terrestrial broadcasts, and DIRECTV was also the first MVPD to implement a Digital Visual Interface ("DVI").

DIRECTV supports the important goal of expediting the successful deployment of advanced digital and HD television in the United States to benefit all consumers. DIRECTV's commitment to advanced digital television is evidenced by the fact that *all* of DIRECTV's

⁴ DIRECTV currently offers HBO HD, HD Net, Showtime HD and a 24 Hour HD PPV Movie Channel on a regular basis and offers ad hoc HD content such as NCAA basketball games in the 2003 March Madness NCAA College Basketball Tournament.

services (both standard and high definition) are delivered digitally. DIRECTV is committed to offering consumers the highest quality service and programming available, and believes that any appropriate government regulations must respect the rights of consumers, and must be tailored to permit healthy free-market competition in the MVPD industry as a whole.

Given the diversity of industry interests and perspectives, and the sheer number of parties involved in the digital television transition, it is plain that collective action will be necessary to continue its momentum. All parties – consumer electronics manufacturers, broadcasters, MVPDs, and content providers – must cooperate if there is to be an effective advancement of digital television.

In this case, however, the MOU did not and does not reflect the input of certain key MVPD constituencies, such as DBS operators or content providers, in either its negotiation or its drafting. Although the MOU is presented as a consensus of the cable industry and the consumer electronics manufacturers relating to cable compatibility, the MOU in part recommends new regulations that would impose new content protection regulations – crafted, certified and enforced by the cable industry – on *all MVPDs*, including non-cable MVPDs such as DBS operators, without taking into account their unique interests, business or technical concerns.

Furthermore, there is little receptivity shown to taking those views into account now. To the contrary, the MOU by its terms is presented by the cable and consumer electronics industries as a “comprehensive package” that is not subject to revision or modification. It contemplates that its signatories will withdraw if any changes are made: thus effectively excluding comments from the Commission, other key participants in the MVPD and content industries, and consumers.

⁵ See MOU, *Executive Summary* §§ 1.2 and 1.3.

DIRECTV sees no need for the MOU to be implemented via regulation, and would prefer that it stay a voluntary paradigm that applies only to the parties who crafted it – cable operators and consumer electronics manufacturers. However, if the Commission does decide to promulgate regulations based on the MOU, it is critical that such regulations stay narrowly tailored to the subject at hand – namely, adopting a technical standards specification for cable-ready digital televisions. As discussed below, the Commission should not adopt encoding rules and other technical standards that purport to apply to all MVPDs, and should not get into the business of reviewing and ruling upon new business models proposed by non-cable MVPD industry participants. Such a regime not only reaches well beyond the development of a cable “plug-and-play” standard, but would be affirmatively detrimental to MVPD marketplace competition, innovation and consumer choice.

II. THE MOU REACHES WELL BEYOND THE CREATION OF A “CABLE PLUG & PLAY” STANDARD AND INAPPROPRIATELY SEEKS TO IMPOSE CONTENT PROTECTION REGULATIONS ON ALL MVPD TECHNOLOGIES

The nominal purpose of the MOU – and this proceeding – is to facilitate the development of “cable-ready” digital televisions. Yet, the cable and consumer electronics industries have expanded that charter to include the presentation of a “joint regulatory recommendation related to copy protection issues, including ‘encoding rules.’”⁶ This recommendation would (i) apply these new encoding rules to “content delivered by all” MVPDs, (ii) ban the use of “selectable output control” technology by all MVPDs, and (iii) impose a business model review process on all MVPD competitors.⁷

As set forth below, all of these proposals would be detrimental to DBS operators specifically and to MVPD competition and innovation generally. DIRECTV strongly urges the

⁶ MOU Cover Letter at 3.

⁷ *Id.*

Commission to separate and de-couple the content protection and consumer recording rights implications of the MOU from issues surrounding the compatibility of unidirectional cable systems and digital televisions. Content protection and recording rights should not be addressed in this proceeding, and the MOU's recommendation on these points should be rejected to the extent that it is proffered as a basis for imposing regulations on all MVPDs.

Encoding Rules. The encoding rules proposed by the parties to the MOU are problematic on a number of levels and should not be adopted in this proceeding.

First, it is quite clear that the encoding rules as proposed are riddled with loopholes and greatly skewed towards favoring the incumbent cable operators who helped to draft them. The signatories to the MOU serve up their proposed encoding rules to the Commission with the opening statement that "each multichannel video programming distributor shall comply with" the encoding rules; however, in the very next provision, the parties state that these rules "shall not apply to distribution of any content over the Internet, nor to a multichannel video programming distributor's operations via cable modem or DSL."⁸ Additionally, the encoding rules proposed by the MOU do not apply to DVDs, personal computers and other consumer electronics devices that are able to deliver and transmit digital content.

As a result, in the final analysis, the MVPD industry segments most affected by the proposed encoding rules are DBS providers and those cable companies that do not operate cable modem services. Ironically, all of the MSO signatories of the MOU would be **excused** from compliance with their very own encoding rules simply because their content is being distributed via a cable modem. This type of discriminatory treatment of MVPDs is untenable and cannot be sustained as a legal or policy matter.

⁸ See Draft Encoding Rules Section 76.1901(b) and (c).

More fundamentally, encoding rules are unrelated and irrelevant to the goal of producing “cable-ready” digital televisions. Put simply, encoding rules are designed to address copy protection and copyright issues. To the extent that such issues are appropriate for the Commission to address, they should not be framed by the exclusive needs of the cable and consumer electronics industries. For example, the encoding rules proposed do not address or take into account either the rights of content owners or the “fair use” rights of consumers. **As** such, they are untenable, and certainly should not be implemented in the guise of advancing the development of digital television.

The subject of encoding rules can and should be addressed by truly consensual private agreements that impose technical standards that are acceptable to content providers, MVPDs and consumer electronics manufacturers – the outcome of which will be ultimately judged by the marketplace. If necessary, the Commission can facilitate such a process through the issuance of a separate *Notice of Inquiry* on the subject. But the attempt of the MOU signatories to achieve content protection regulation for all MVPDs through the “back door” here is utterly inappropriate and should be rejected.

Finally, there are a number of other specific deficiencies with respect to the proposed encoding rules, as well. For example, the MOU lacks encoding rules for HD analog formats, leaving these susceptible to unlimited copying and distribution. Furthermore, the proposed encoding rules fail to address or govern format conversion, thus ignoring completely the need for mechanisms that will pass encoding rules through every possible format conversion scenario in order to protect the rights of content owners. Until these mechanisms are understood, it is difficult to see how the encoding rules in the MOU could be deemed to be acceptable.

Selectable Output Controls. **As** another part of its regulatory recommendation on copy protection issues, the MOU calls for a ban on the use of “selectable output control” technology

by all MVPDs. However, such a restriction on output controls limits a distributor's ability to respond properly if a given technology is compromised or perceived to be insecure by the content community. This creates the untenable situation of "hack'one – hack all" if outputs can not be controlled (*i.e.*, turned on and off) by an MVPD.

There are important public interest benefits to layering multiple conditional access systems, multiple encoding rules and multiple compliance and robustness rules in the MVPD marketplace. In addition to facilitating increased consumer choice, this technological diversity allows content providers and distributors to select the "best of breed" in terms of service offerings, content protection and delivery quality, rather than sink to a lowest common denominator solution. DBS operators, for example, have set extremely high standards in the MVPD industry in terms of conditional access and content protection. Those standards should not now be forcibly diluted through regulation tailored to the needs of the cable incumbents who helped to drive the MOU process.

At a minimum, if any restriction on selectable output controls is implemented, it should not apply to outputs that are included on a particular MVPD's set-top box solely for use with recording devices (*e.g.*, USB 2.0 and 1394), as it is not appropriate for "copy never" content to be transmitted over those interfaces and the MVPD should be permitted to disable those outputs.

In addition, any selectable output control restriction must also encompass DVDs, cable modem service and other sources of digital distribution. **An** MVPD's ability to select output controls provides it with another method of securing content by turning off certain output interfaces. If DBS providers lose the ability to use selectable output controls as a copy protection mechanism, while other sources of digital content distribution, such as DVDs or cable modem service, retain it, it would give an unfair advantage to these providers. For example, if **5C** protection technology were to be compromised, content providers would likely withhold

content from distributors that could not shut down the 1394 output interface, and would instead provide such content to distributors that could control (*i.e.*, shut down) the use of 1394. As a result, if there were differing output control rules for DBS as opposed to DVD or cable modem service, the content owners would provide content to these providers and not to DIRECTV due to concerns about 1394 not being a secure output. If the MOU were implemented, DBS operators would be prohibited from shutting down such an output, thereby providing a copy protection advantage to DVD and cable modem service providers.

The selectable output control sections of the MOU, at a minimum, need clarification, or they should be excised. For example, the revocation rules in existing content protection schemes perform selectable output control by definition – however, the proposed encoding rules, as written, seem to disallow revocation of all outputs that would be necessary to disallow access to certain content. The use of the phrases “output through *any* analog or digital output,” read literally, would include disallowing content through “all” outputs, which would prohibit conditional access systems from disallowing content through every output when the receipt of such content is not authorized. This clearly cannot be the intent of the MOU, but it could be the result.

“Defined Business Model” Approach.

DIRECTV has been working with the content community to better protect valuable digital content and to invent its own methods of improved access to digital content for consumers. The imposition of encoding rules on a “per business model” basis, as proposed by the MOU signatories, stifle such efforts and constitute a tremendous impediment to innovation and the development of new service offerings in this quickly evolving marketplace.

It is unlikely that the business models can be comprehensively and universally defined such that all MVPD constituencies will agree as to which content offerings fall into which

business model. Indeed, even had DBS operators been invited to participate in the MOU process, cable and DBS have such fundamentally different business models that creating mutually acceptable definitions would be extremely problematic, even with respect to how those businesses are run today (as opposed to how these businesses will evolve in the future).

For example, under the encoding rule regime proposed, certain programming services that are currently offered by DIRECTV have not been recognized in the rules' definition of "Defined Business Models." DIRECTV offerings such as NFL Sunday Ticket, one-time or weekend free-view concerts, and limited free-view windows for premium movie channels, such as HBO, Showtime and Cinemax, would not squarely fall into a specific Defined Business Model and would require DIRECTV to petition the Commission in order to provide these offerings.

Such a result is absurd and anticompetitive. The business model approval process would amount to a public hearing by the Commission every time an MVPD desired to offer a consumer a new and unique programming or service offering if that offering did not squarely fall within pre-defined criteria. Not only would this result stifle creativity and innovation, it would unfairly advantage slow-moving MVPD incumbents by allowing them to get an advanced preview through the regulatory process of what a competitor may be offering, and even an opportunity to publicly oppose such new offerings and slow their deployment, all to the detriment of the consumer. This again results in a lowest common denominator approach to service and programming offerings, which is not in the public interest.

⁹ See Draft Encoding Rules, § 76.1902.

111. AT MOST, THE COMMISSION SHOULD STRIVE FOR MINIMALLY INTRUSIVE REGULATION AND MANDATE ONLY “ACTUAL” PLUG-AND-PLAY COMPONENTS OF THE MOU THAT ARE APPLICABLE TO THE CABLE AND CONSUMER ELECTRONICS INDUSTRIES

In light of the above comments, if the Commission does attempt to impose regulations based on the MOU, those regulations should be minimally intrusive and tailored to the stated purpose of this proceeding, namely, ensuring “the compatibility of cable television systems with DTV receivers and related consumer electronics equipment.”” Such efforts should be confined to the following general areas:

Support of Unidirectional Digital Cable Products. The Commission can impose regulations in response to the MOU that merely require digital cable systems with an activated channel capacity of 750 MHz or greater to support operation of unidirectional digital cable products. The Commission can also ensure that navigation devices utilized in connection therewith have an IEEE 1394 interface and comply with those technical standards. Such efforts could facilitate the development of cable-ready digital televisions.

Establishing a Labeling Regime. The Commission could also establish a labeling regime for unidirectional digital cable television receivers and related digital cable products that meet certain technical specifications. As mentioned, the MOU’s proposal of regulating business models via encoding rules is not appropriate; however, the idea of labeling content may have merit. Customers of MVPD and CE products should not be expected to understand and adhere to the subtleties that separate the “Defined Business Models” as proposed by the MOU, and should not be expected to understand the encoding rules that would apply to each business model. However, a customer can and should be expected to understand content control, which would be analogous to the Commission’s V-Chip content ratings., Regardless of whether a

¹⁰ *Further Notice* at ¶ 1.

movie is a comedy, drama or action movie, a different rating can be attached, and the consumer can and will understand the implications of such ratings. Moreover, the ratings can be applied across a wide variety of delivery mechanisms – theatrical, DVD, television, books, magazines, even music.

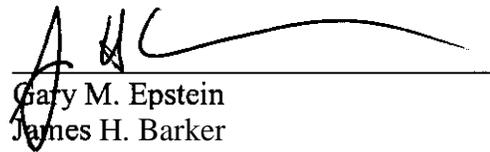
IV. CONCLUSION

There is no policy downside to the Commission taking a narrowly tailored approach in this proceeding. Cable operators and consumer electronics manufacturers have chosen to exclude DBS and other MVPDs from the MOU negotiation process. That is their right, but such negotiations cannot and should not then be used as a basis for the Commission to apply regulations to all MVPDs, or to address subjects as important and sensitive as copy protection. In keeping a narrow focus, the Commission remains unhindered from continuing to promote the advancement of HD and digital television through the development of cable-ready digital televisions. There should be no Commission mandate of encoding rules in this proceeding, which should be left to content owners, distributors and CE manufacturers to work out via private agreement. Instead, the Commission can add value to the MOU process by continuing to facilitate a cable “plug-and-play” standard and by exploring a labeling regime for unidirectional cable television receivers and related digital cable products.

Respectfully submitted,

DIRECTV, Inc.

By:



Gary M. Epstein
James H. Barker
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-2505
(202) 637-2200

March 28, 2003