



September 3, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Ex Parte Submission in CS Docket No. 97-80 and
PP Docket No. 00-67**

Dear Ms. Dortch:

On September 3, 2003, David Donovan of MSTV and Jack Goodman of NAB met with Anthony Dale of Commissioner Kevin Martin's Office to discuss issues in the above referenced proceeding. MSTV and NAB urged the Commission to include a specification requiring the inclusion of an over-the-air DTV tuner in any television set classified as a "unidirectional cable ready television set." Specifically, we discussed NAB and MSTV's Comments and Reply Comments. We also discussed issues pertaining to the FCC's jurisdiction and notice issues under the Administrative Procedure Act. Our position on these issues is discussed below.

MSTV and NAB have urged the Commission, as part of its adoption of cable compatibility standards in the pending "plug and play" proceeding,¹ to require that digital televisions include an over-the-air DTV tuner in order to qualify for "cable ready" or equivalent labeling.² Including this industry standard in the "cable ready" voluntary labeling regime would ensure that consumer expectations that "cable ready" sets are capable of receiving over-the-air

¹ *In re* 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 of Proposed Rulemaking*, 18 FCC Rcd 518 (2003) ("Plug and Play FNPRM").

² See Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in CS Docket No. 97-80 and PP Docket No. 00-67, at 2-3 (Mar. 28, 2003).

digital signals are met, as well as the expectations of the DTV technical community that “cable ready” televisions build on the foundation of the digital broadcast standard.³ It is important to bear in mind throughout this analysis that the labeling requirement set forth in the MOU is not a mandate and does not require manufacturers to build digital sets to particular specifications. It is voluntary, and if the over-the-air DTV tuner requirement were adopted as part of that labeling regime, it, too, would be voluntary. The sole consequence of a manufacturer’s failure to include an over-the-air DTV tuner in a set would be its inability to use a “cable compatible” or other designated label.⁴ Including an over-the-air tuner requirement as part of such a labeling scheme would also fall squarely within the Commission’s jurisdiction, advancing the statutory goals of adopting cable compatibility requirements and advancing the digital transition.⁵

In January 2003, the Commission adopted a *Further Notice of Proposed Rulemaking* relating to a Memorandum of Understanding (“MOU”) and proposed rules filed at the FCC by the Consumer Electronics Association and the National Cable and Telecommunications Association setting forth an agreement on a cable compatibility standard for an integrated, unidirectional digital cable television receiver, as well as other unidirectional digital cable products.⁶ Specifically, the *Plug and Play FNPRM* sought comment on: (i) the MOU and the proposed rules included therein; (ii) the potential impact of the MOU and the proposed rules on consumers, content providers, small cable operators and non-cable MVPDs; (iii) the jurisdictional basis for Commission action in this area, including the creation of encoding rules for audiovisual content provided by MVPDs; (iv) whether Commission action is

³ *See id.* at 3.

⁴ The Commission has endorsed labeling regimes in other contexts. In its pending *Notice of Inquiry* on DTV receiver performance standards, the Commission has suggested that digital receivers meeting certain specifications could be marked with a label identifying compliance with industry standards. *See In re Interference Immunity Performance Specifications for Radio Receivers; Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, Notice of Inquiry*, 18 FCC Rcd 6039, ¶ 36 (2003). And Sections 68.354 and 68.612 of the Commission’s rules require that terminal equipment subject to a Supplier’s Declaration of Conformity or that is certified by a Telecommunications Certification Body be labeled in accordance with Administrative Counsel for Terminal Attachments requirements. 47 C.F.R. §§ 68.354 & 68.612. Such labeling must also meet FCC requirements for enforcement purposes. 47 C.F.R. § 68.612.

⁵ It is worth noting that no one commenting on the *Plug and Play FNPRM* has disputed the Commission’s authority to act in this regard. In fact, the response of the cable and consumer electronics manufacturing industries to the NAB/MSTV proposal has been that such a requirement is unnecessary because manufacturers already plan to include over-the-air DTV tuners in televisions. If that is the case, then they should not object to adoption of the NAB/MSTV proposal as part of a voluntary labeling regime, as it would lend certainty to the market without imposing additional obligations on manufacturers.

⁶ *Plug and Play FNPRM* ¶ 2.

needed and authorized in areas not addressed by the MOU, such as the down-resolution of programming; and (v) any other issues germane to the Commission's consideration of the MOU and proposed rules.⁷ Adoption of such a requirement in this proceeding is appropriate both because the *Plug and Play FNPRM* asks for comment on issues not raised in the MOU and on any other issues germane to FCC's consideration of proposed rules, both of which would include an over-the-air DTV tuner requirement, and because NAB and MSTV raised the over-the-air tuner issue in their comments and the cable and consumer electronics industries responded in their replies, so concerned entities had notice and sufficient opportunity to comment on it. Moreover, as noted in MSTV and NAB's Reply Comments, in earlier phases of this proceeding, the inclusion of an over-the-air tuner was recognized as an expected component of a "cable-ready" receiver.

Moreover, the Commission has ample statutory authority to require inclusion of an over-the-air DTV tuner in televisions before they may be labeled as "cable ready." Section 624A(c)(2)(A) of the Communications Act directs the Commission, at such time as it adopts regulations to ensure consumer electronics equipment compatibility, "to specify the technical requirements with which a television receiver or video cassette recorder must comply in order to be sold as 'cable compatible' or 'cable ready.'"⁸ A requirement that manufacturers include an over-the-air DTV tuner in their sets in order to be able to use a particular label is consistent with this statutory mandate, as it is a technical requirement with which a receiver must comply to be sold as "cable ready."⁹ This provision was added to the Act by the 1992 Cable Act, and the Conference Report explained that its purpose was "to make clear what standards need to be met, consistent with and in conformity to the compatibility regulations issued pursuant to [this section], in order for televisions or VCRs to be sold as cable ready or cable compatible."¹⁰ In mandating that the Commission establish these specifications, Congress vested in the FCC the authority to discern consumer expectations with respect to "cable ready" or "cable compatible" televisions and to ensure that those expectations are met through manufacturer compliance with a labeling regime. In the analog context, consumers know and expect that a set labeled as "cable ready" will not only plug directly into a cable outlet, but also will be capable of tuning analog

⁷ See *id.* ¶¶ 3-4.

⁸ 47 U.S.C. § 544A(c)(2)(A).

⁹ Section 624A(c)(2)(D) states that the Commission should "ensure that any standards or regulations developed under the authority of this section to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options other than those specified in paragraph (1)(B), including telecommunications interface equipment, home automation communications, and computer network services." 47 U.S.C. § 544A(c)(2)(D). This section does not limit the Commission's ability to include an over-the-air DTV tuner requirement as part of a voluntary labeling regime, as including such a tuner would not adversely affect other features, functions, and protocols of televisions.

¹⁰ H. Conf. Rep. No. 102-862, at 89 (1992).

signals over the air, a point recognized by the consumer electronics manufacturing industry.¹¹ If digital sets labeled as “cable ready” or “cable compatible” are not similarly equipped, well-established consumer expectations will be upset, and the Commission will have failed to live up to the legislative mandate in Section 624A.

Section 624A(d) bolsters the Commission’s authority to adopt an over-the-air tuner requirement as part of a digital television labeling scheme. Section 624A(d) directs the FCC to “periodically review and, if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.”¹² In this section, Congress thus anticipated that advances in television receiver or cable system technology might warrant appropriate changes and adaptations to the Commission’s rules. To the extent that digital technology has led to improvements and changes in and to cable systems and television receivers, Section 624A gives the FCC the authority to amend its rules relating to “cable ready” labeling to take account of those changes. And taking account of those changes in a way that assures that consumer expectations regarding analog television sets continue to be met with respect to digital is consistent with the legislative mandate embodied in Section 624A(d).

Even if requiring inclusion of an over-the-air tuner as a condition of a digital television’s being sold as “cable compatible” or “cable ready” were determined to be beyond the Commission’s explicit statutory mandate under Section 624A, the Commission could implement such a rule by exercising its ancillary jurisdiction to carry out the statutory purpose of advancing the digital transition. Courts have long recognized the Commission’s authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.¹³ For example, Section 1 of the Communications Act gives the FCC authority to regulate “interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”¹⁴ Section 2 gives the Commission authority over “all persons engaged within the United States in providing such

¹¹ See Consumer Electronics Industry Reply Comments in CS Docket No. 97-80 and PP Docket No. 00-67, at 4-5 (“Public statements by many consumer electronics representatives, before and after both the DTV Tuner Mandate and the December 19th filing, have stressed the efficiency and economic benefits of integrating cable and DTV tuning capacities in television receivers.”).

¹² 47 U.S.C. § 544A(d).

¹³ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (explaining that the Commission’s authority is not limited “to those activities and forms of communication that are specifically described by the Act’s other provisions”).

¹⁴ 47 U.S.C. § 151.

service” and over “all interstate and foreign communication by wire or radio,” which “include[s] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”¹⁵ Section 4(i) grants the Commission authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions,”¹⁶ and Section 303(r) of the Communications Act directs the Commission to: “Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.”¹⁷ The Commission’s ancillary jurisdiction to act pursuant to these provisions is well-established and has been interpreted broadly.

Application of the Commission’s ancillary jurisdiction is particularly appropriate in the face of changes in technology that could not necessarily have been foreseen by Congress. In *United States v. Southwestern Cable Co.*, for example, the Supreme Court upheld the Commission’s exercise of its ancillary authority to regulate newly emerging cable television systems, despite the fact that Congress’s attempts to pass legislation explicitly authorizing legislation were unsuccessful.¹⁸ Ultimately, the Court concluded that the Commission’s obligation to provide “‘a widely dispersed radio and television service’ with a ‘fair, efficient, and equitable distribution’ of service among the ‘several States and communities,’” gives it broad discretion to adopt regulations relating to broadcasting.¹⁹ When the Commission finds that achievement of its goals is jeopardized absent regulation, it has the authority to step in to fill the void.²⁰ Therefore, it is well within the Commission’s ancillary authority to determine that consumers expect that sets labeled as “cable ready” or “cable compatible” will be able to tune over-the-air channels and that therefore new digital sets must include an over-the-air DTV tuner before they can be marketed as “cable ready.”

When it exercises its ancillary authority, the Commission looks to legislative goals and objectives embodied in other provisions of the Communications Act. In the case of requiring digital televisions to include an over-the-air DTV tuner to qualify for a “cable ready” label, the legislative purpose behind Section 624A of the Act, as well as provisions relating to the sunset of the DTV transition and the reallocation of broadcast spectrum, constitute existing Commission statutory authority sufficient to support the exercise of ancillary jurisdiction. The statutory purpose of Section 624A is to set marketplace expectations by establishing standards

¹⁵ 47 U.S.C. § 152(a).

¹⁶ 47 U.S.C. § 154(i).

¹⁷ 47 U.S.C. § 303(r).

¹⁸ *See Southwestern Cable*, 392 U.S. at 169-70.

¹⁹ *Id.* at 173-74 (quoting S. Rep. No. 86-923, at 7 (1959) and 47 U.S.C. § 307(b)) (footnote omitted).

²⁰ *See id.* at 175.

for televisions that are labeled and sold as “cable ready” or “cable compatible.” As discussed above, these expectations are well-established in the analog world— analog “cable ready” sets are capable of tuning channels delivered either by cable or over the air. Mandating that digital sets include an over-the-air tuner in order to be so labeled satisfies the statutory purpose behind Section 624A by ensuring that well-established consumer expectations with respect to analog television sets, namely that analog “cable ready” sets are also capable of receiving over-the-air analog signals, are carried forward into the digital era.

Section 309(j)(14)(C) of the Act provides for the Commission to recapture and auction analog broadcast spectrum as the digital transition progresses and stations relinquish their analog channels.²¹ It expresses the legislative objective of making valuable broadcast spectrum available for other new uses, as well as raising money for the U.S. Treasury. Section 309(j)(14)(B) sets forth the circumstances under which the digital transition may be extended on a market-by-market basis, including if at least 15 percent of households in the market cannot receive the digital signals of each local station, and its purpose is that no viewers be left behind while the transition is underway.²² Encouraging manufacturers to include over-the-air tuners in digital sets by making their incorporation part of a voluntary labeling regime advances the congressional goals embodied in these two sections by ensuring that households have available to them receivers capable of receiving the digital signals of all local stations (some of which may not be carried by cable), allowing the transition to end and analog broadcast spectrum to be reallocated for other purposes. It also, as discussed above, satisfies consumer expectations that digital sets labeled “cable ready” or “cable compatible” can receive over-the-air digital signals.

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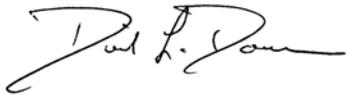
²¹ See 47 U.S.C. § 309(j)(14)(C).

²² See 47 U.S.C. § 309(j)(14)(B).

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Because requiring that digital televisions include an over-the-air DTV tuner to qualify for a “cable ready” label satisfies consumer and industry expectations and is within the scope of the *Plug and Play FNPRM*, as well as within the Commission’s direct and ancillary jurisdiction, the Commission should include such a requirement in the “cable ready” labeling regime.

Respectfully submitted,



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cc: Anthony Dale