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

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	)	
	)	

PETITION FOR RECONSIDERATION OF DIRECTV, INC.

Pursuant to Section 1.429 of the Commission's Rules, DIRECTV, Inc. ("DIRECTV")[1] hereby requests reconsideration of the Commission's *Second Report & Order* in the above-captioned proceeding.[2] Specifically, there is one issue on which the Commission acted in this proceeding without explaining the basis for its decision or addressing in any way the comments raised by DIRECTV and others, and another in which the Commission may have overlooked the thrust of DIRECTV's position. DIRECTV believes that, had it given full consideration to the merits on these two issues, the Commission would not have acted as it did. In addition, in view of its decision to extend its plug-and-play rules to non-cable multichannel video programming distributors ("MVPDs"), DIRECTV requests that the Commission reconsider the role that it has accorded CableLabs in administering certain aspects of its plug-and-play regime, and state

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[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, *Second Report and Order*, CS Docket No. 97-80, PP Docket No. 00-67 (rel. Oct. 9, 2003) ("Second Report and Order").

explicitly that it will not accept any future proposed regulations for bi-directional receiver specifications and related issues that have been developed without the participation of direct broadcast satellite ("DBS") service operators.

I. INTRODUCTION

DIRECTV is the United States' largest provider of DBS service, with more than 12 million subscribers nationwide, and a leading provider of digital subscription television programming. In this proceeding, the Commission has adopted rules ostensibly focused upon the development of a so-called "plug and play" standard for digital cable television. The rules are based upon a Memorandum of Understanding ("MOU") reached by representatives of the cable television and consumer electronics industries that was submitted to the Commission for consideration, and that purported to detail a "comprehensive agreement on a cable compatibility standard for integrated, unidirectional digital cable television receivers, as well as other unidirectional digital cable products."[3]

The record in this proceeding contains strong objections by DBS operators to several aspects of the MOU.[4] These substantive objections are grounded in the facts that the MOU did not reflect the input of certain key MVPD constituencies, such as DBS operators or content providers, in either its negotiation or its drafting, but the Commission nonetheless extended certain of its essential terms to *all* MVPDs.[5] For example, the *Second Report and Order* notes

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[3] *Id.* at ¶ 2.

[4] *See* Comments of DIRECTV, Inc. (Mar. 28, 2003); *see also* Letter from Eddy W. Hartenstein, Chairman and CEO, DIRECTV, Inc., and Charles W. Ergen, Chairman and CEO, EchoStar Communications Corp. to the Hon. Michael K. Powell, Chairman, FCC (Sept. 3, 2003) ("Powell Letter").

[5] Although the Commission cites Section 629 of the Communications Act, 47 C.F.R. § 549, as well as its general ancillary jurisdiction as the bases for the adoption of its proposed encoding rules, *Second Report and Order* at ¶¶ 45-57, DIRECTV finds each of these grounds questionable. Section 629 (b) expressly prohibits the Commission from prescribing

that "a key component of the MOU . . . is a set of encoding rules that would set caps on the levels of copy protection applicable to content distributed by MVPDs," as well as a "ban on the use of selectable output control technology and the down-resolution of unencrypted broadcast television by MVPDs."[6] The Commission thus imposed new content protection regulations – crafted, certified and enforced by the cable industry – on DBS operators and other non-cable MVPDs while ignoring their unique interests, business needs or technical concerns.

On a going forward basis, DIRECTV urges the Commission to facilitate a more inclusive process. The Commission should not ignore the interests of more than 21 million DBS subscribers and the countless additional cable and other MVPD subscribers who benefit from the competition that DBS operators provide. For purposes of this Petition for Reconsideration, DIRECTV requests that the Commission revisit four substantive aspects of the rules it has adopted in this proceeding – without explaining its rationale for doing so -- and refrain explicitly from further regulation in this area until the participation of DBS operators and other interested MVPD constituencies is assured.

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regulations under that Section that jeopardize the security of MVPD programming and other services offered over MVPD systems or that impeded the legal rights of a provider of such services to prevent theft of service. Regulations that hamper an MVPD's ability to provide secure content protection could reasonably be read to be plainly encompassed by the text of this provision as prohibited. Furthermore, even if the provision is read as being directed merely at signal security, *see id*. at ¶ 52, the Commission concedes that DBS provider system security is uniquely "threatened by the proposed rules." *Id*. at ¶ 53. If the regulations are indeed prohibited by Section 629(b), they are not saved by a logically circular application of the Commission's ancillary jurisdiction, or the policy underpinnings of Section 624A cited in the *Second Report and Order*, *see* 47 C.F.R. § 544A , which the Commission concedes is not by its terms applicable to MVPDs other than cable operators. *Second Report and Order* at ¶ 57. DIRECTV therefore asks the Commission to reconsider its jurisdiction and underlying authority to adopt encoding rules in this proceeding.

[6] *Second Report and Order* at ¶ 11.

II. DISCUSSION

A. The Commission Must Close The Broadband Loophole In The Encoding Rules, Which Has A Discriminatory Effect On DBS Operators And Other MVPDs That Do Not Offer Cable Modem Or Similar Broadband Services

This proceeding was nominally aimed at developing a plug and play standard for digital cable television. However, the *Second Report and Order* states that the Commission applied the proposed encoding restrictions contained in the MOU to non-cable MVPD services because the Commission believed it necessary "to draw a baseline providing MVPDs with the same floor from which to bargain with content providers." The Commission feared that the "[a]pplication of the encoding rules to the cable industry alone would create a permanent competitive imbalance in the MVPD programming market that could negatively impact consumers."[7]

Unfortunately, far from creating a competitive "baseline," at least one of the rules that the Commission has adopted has skewed the playing field even more in favor of the large cable MSOs.[8] Section 76.1901 exempts from the Commission's encoding rules content delivered over the Internet or to an MVPD's operations via cable modem or DSL.[9] Such an exemption makes little policy sense as it sets up an obvious loophole for cable operators to circumvent the

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[7] *Id.* at ¶ 71.

[8] As a threshold matter, the Commission's imposition of additional regulation on non-cable MVPDs to satisfy some notion of competitive parity with dominant cable MSOs seems radically misplaced. As of June 2002, the Commission concluded that 76.5 percent of MVPD subscribers received their programming from a franchised cable operator, and that although competitive alternatives such as DBS continue to develop, "cable television is still the dominant technology for the delivery of video programming to consumers in the MVPD marketplace." Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145 (rel. Dec. 31, 2002), at ¶ 4. Thus, the "baseline" with which the Commission is concerned is already tilted heavily in favor of dominant cable MSOs.

[9] *See* new Section 76.1901(b) and (c). This exemption is also included in a parenthetical within the definition of "Covered Product" set forth in new Section 76.1902(g).

encoding rules. As DIRECTV has pointed out to the Commission previously,[10] this exemption has the ironic effect of excusing all of the MSO signatories to the MOU from compliance with their own encoding rules to the extent they deliver video to consumers via cable modems, while non-signatories, such as the DBS operators, will be subject to the rules.

It is hard to imagine how such an exemption could be justified. Because the Commission simply adopted the rule as proposed in the MOU without discussing its rationale for doing so and without acknowledging the objections raised by DIRECTV and others, a reader is left to wonder whether the Commission actually found the exemption justifiable on some ground or overlooked the issue entirely. It is axiomatic that an administrative agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[11] The Commission has failed to observe this basic requirement of administrative law in exempting broadband connections from its encoding rules.

On reconsideration, the Commission should eliminate Subsections 76.1901(b) and (c) from its Rules, and remove the related parenthetical from Subsection 76.1902(g). If the Commission's encoding rules and output control regulations are to apply to all MVPDs, then all digital content distribution methods, including the Internet (whether via cable modem, DSL or another mechanism) and digital recorded media such as DVDs, should also be required to comply. Otherwise, the MVPD industry segments most affected by the proposed encoding rules will be DBS providers and other MVPDs that do not offer cable modem or DSL services -- a perverse and discriminatory result. DIRECTV is confident that, once the Commission addresses this issue on the merits, it will reach the same conclusion.

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[10] *See* Comments of DIRECTV, Inc. (Mar. 28, 2003); *see also* Powell Letter.

[11] *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

B. The Commission Should Require Certain Minimum Standards For Televisions Carrying An IEEE 1394 Interface

As the *Second Report and Order* notes, the proposed technical rules accompanying the MOU called for the inclusion of a DVI or HDMI interface in digital cable-ready televisions by specific rollout dates, but required IEEE 1394 interfaces only on cable operator-supplied high definition set top boxes.[12] The Commission accepted these rules, and generally "declined to mandate a 1394 or other connector interface," anticipating that "the marketplace will determine which additional connectors are best for use with digital cable ready televisions and associated products."[13]

DIRECTV supports the Commission's decision to refrain from requiring television manufacturers to implement IEEE 1394 connectors. DIRECTV has argued, however, that the Commission's rules should provide certain minimum standards for televisions that *do* include such an interface, in order to improve compatibility with satellite television.[14] Specifically, the Commission should mandate that televisions that include the IEEE 1394 interface must support the full capabilities of CEA-775A, CEA-849A and CEA-861 or successor standards. Such a measure – which the Commission does not appear to have considered in the *Second Report and Order* -- will ensure that the Commission does not by omission promote inadvertently the cable-only version of the IEEE 1394 interface. In order to further its stated goal of avoiding a "competitive imbalance in the MVPD programming market,"[15] the Commission should promote the compatibility of interfaces that support both the DBS and cable sectors of the MVPD marketplace.

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[12] *Second Report and Order* at ¶ 36 & n. 94.

[13] *Id*. at ¶ 37.

[14] Powell Letter at 2.

[15] *Second Report and Order* at ¶ 71.

C. If The Plug-And-Play Regime Remains Extended To All MVPDs, CableLabs Should Not Be The Administrator of the DFAST License

DIRECTV also asks the Commission to refrain from assigning CableLabs, a wholly-owned affiliate of the cable industry, the institutionally difficult responsibility for making objective decisions that serve the interests of *all* MVPDs, both cable and non-cable alike.

The Second Report and Order identifies several potential roles for CableLabs in its new plug-and play regulatory regime. Among these are managing changes of the Dynamic Feedback Arrangement Scrambling Technique ("DFAST") license,[16] and acting as the sole initial arbiter of outputs and associated content protection technologies to be used in unidirectional digital cable products.[17] On this latter issue, the Commission has acknowledged the concern that CableLabs' "gatekeeping" function could pose a severe threat to innovation and interoperability in the MVPD marketplace,[18] and therefore has solicited further comment.[19] However, a similar issue arises with CableLabs' administration of the DFAST license.

The DFAST license specifies how to license necessary security technology that moves bits across the pins of the CableCard to the host device and also defines requirements for the host device. Although the *Second Report and Order* is silent on the topic, it may be possible for non-cable MVPDs to utilize and enhance the specifications of one-way plug-and-play devices to allow host devices to receive their services, as well. As a creature of the cable industry,[20] however, CableLabs will have both the incentive and the ability to hinder or prevent entirely the

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[16] *Id*. at ¶ 76.

[17] *Id*. at ¶ 83.

[18] *Id*. at ¶ 78.

[19] *Id*. at ¶ 83.

[20] CableLabs defines itself as "a nonprofit research and development consortium that is *dedicated to helping its cable operator members* integrate new cable telecommunications technologies into their business objectives." www.cablelabs.com (emphasis supplied).

use of DFAST technology by non-cable MVPDs by discounting or ignoring altogether DFAST license requests by non-cable MVPDs and their manufacturers. In analogous contexts, such as program access, the Commission has been extremely wary of the harm to non-cable MVPDs specifically and MVPD competition generally that can flow from setting up a cable-affiliated gatekeeper to an important input.[21] The Commission has done just that by designating CableLabs as the sole administrator of changes to the DFAST license.

Against DIRECTV's initial recommendation, the Commission did not restrict the plug-and-play rules to the cable and consumer electronics industries and instead extended the regime to non-cable MVPDs in the interests of promoting a principle of "competitive parity."[22] It obviously does not serve this policy goal to allow a wholly-owned representative of the cable industry apply the DFAST license in a discriminatory fashion for cable-only use, particularly when cable operators continue to be the dominant distributors of multichannel video programming and exercise market power. DIRECTV therefore asks the Commission to reconsider the appointment of CableLabs to this role, and apply a neutral administrator that is institutionally capable of objective decisionmaking regarding changes to the DFAST license and related determinations.

D. Future Industry Negotiations On Bi-directional Receiver Specifications And Related Issues Should Include DBS Operator Representatives

The exclusion of DBS operators from the initial plug and play negotiation process was wrong. It is very clear that the Commission has adopted rules flowing from that inter-industry

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[21] *See, e.g., In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Competition Act of 1992,* Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105, 3123 (1994), ¶ 35 (citations omitted) ("The legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated program suppliers that would deny programming to non-cable technologies.").

process that directly affect DBS operators and their subscribers. And notwithstanding the fact that the Commission subsequently chose to put the fully negotiated package out for public notice and comment,[23] the practical reality is that the process to date, combined with the "take it or leave it" triggers built by the cable and consumer electronics industries into the substance of the MOU itself,[24] largely has precluded DBS operators from offering meaningful input into this proceeding.

As a new round of cross-industry discussions begins on bi-directional receiver specifications, the Commission has explicitly encouraged the cable and consumer electronics industries "to consult with interested parties and affected industries."[25] In the future, the Commission should not accept any proposed regulations related to bi-directional receiver specifications and related issues unless the voluntary inter-industry process includes DBS operators. DIRECTV requests that the Commission make this point clearly on reconsideration.

III. CONCLUSION

For the foregoing reasons, DIRECTV respectfully requests reconsideration of the *Second Report and Order*.

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22 *Second Report and Order* at ¶ 43.

23 *See id.*

24 The MOU by its terms was presented by the cable and consumer electronics industries as a "comprehensive package" that was not subject to revision or modification, and contemplated that its signatories would withdraw if any changes were made by the Commission. *See* MOU*, Executive Summary* §§ 1.2 and 1.3.

25 *Second Report and Order* at ¶ 8, n. 22. *See also Statement of Commissioner Kevin J. Martin* (noting concerns of interested parties that were excluded from the initial MOU process, and strongly encouraging that "*all* interested parties be allowed to participate in setting the groundwork for any necessary rules") (emphasis in original).

Respectfully submitted,

DIRECTV, Inc.

By: /s/

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

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