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	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, EchoStar Satellite, L.L.C.[1] ("EchoStar") hereby submits its comments in response to the Second Further Notice of Proposed Rulemaking ("Second Further Notice") in the above-captioned proceeding.[2] As the Commission is well aware, EchoStar, as well as other members of the DBS industry strenuously objected to being made subject to the draft encoding rules that were agreed to by the cable and consumer electronics industries. The DBS industry did not participate in these negotiations and they do not adequately address its interests. In spite of these complaints, the Commission chose to apply these draft encoding rules to all Multichannel Video Programming Distributors ("MVPDs"), including DBS providers, in order to promote a so-called

[1] EchoStar Satellite L.L.C. was formerly known as EchoStar Satellite Corporation.

[2] *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumers Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 30 Comm. Reg. (P&F) 834 (2003) ("Second Further Notice").

"need for competitive parity among MVPDs."[3] EchoStar provides its views in these comments on the following two issues now being considered by the Commission: (1) whether the Commission should prohibit activation by MVPDs of down-resolution for non-broadcast MVPD programming content; and (2) whether Cable Television Laboratories, Inc. ("CableLabs") is the appropriate entity to make initial approval determinations regarding outputs and associated content protection technologies to be used in unidirectional digital cable products.

EchoStar believes that MVPDs should have multiple content protection mechanisms available, including the ability to activate down-resolution for non-broadcast MVPD programming content, in order to best address its needs and those of content providers and consumers alike. In this way, the Commission will provide for more flexibility during the negotiations between MVPDs and content providers, and thereby allow the marketplace to develop and mature, while at the same time providing alternative arrangements should any one protection mechanism become compromised by a security breach. It will also allow consumers to receive programming of better than standard-definition quality where the alternative would be to settle for standard definition. With regard to the second issue, EchoStar is of the view that CableLabs must <u>not</u> be chosen as the sole initial arbiter for determining the outputs and associated content protection technologies to be used in unidirectional digital cable products, especially those chosen by and for the DBS industry. As the self-described "consortium that is dedicated to helping its cable operator members integrate new cable telecommunications

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[3] *Id.* EchoStar maintains that the Commission lacked the requisite authority to apply these rules to DBS providers, that there was insufficient notice that such rules would apply generally to the DBS industry, and that the adoption of these rules is arbitrary and capricious decision-making. The filing of these comments to the specific issues raised in the Second Further Notice is without prejudice to the filing by EchoStar of a petition for review of these decisions in the Court of Appeals.

technologies into their business objectives,"[4] CableLabs will obviously be biased in favor of the cable industry. EchoStar would prefer that a more independent body make such initial determinations, or instead rely upon the Commission to decide upon these issues.

I. THE COMMISSION SHOULD NOT PROHIBIT MVPDs FROM ACTIVATING DOWN-RESOLUTION FOR NON-BROADCAST PROGRAMMING CONTENT

In its Second Further Notice, the Commission requests additional comment on the permissibility of down-resolution of non-broadcast programming, recognizing that while a ban on the down-resolution of broadcast programming was agreed to by the consumer electronics and cable industries, no such recommendation was made on how other MVPD programming should be treated.[5] EchoStar urges the Commission not to prohibit the down-resolution of non-broadcast programming. In this regard, EchoStar also suggests that the Commission prescribe a minimum standard for an acceptable quality DTV signal – on the order of a maximum 50 percent reduction in both vertical and horizontal resolution. This minimum standard would apply both to the 1080i and 720p DTV modes.

An absolute ban on down-resolution for non-broadcast programming would unnecessarily restrict EchoStar's ability to provide greater access to programming that may otherwise not be available to its subscribers absent such a content protection mechanism. In EchoStar's experience, an MVPD's willingness to provide such a protection mechanism to content providers may enable it to offer programming with better than standard definition that would not otherwise have been available to consumers at all. As noted earlier in this proceeding by the National Cable & Telecommunications Association ("NCTA"), down-resolution is one of many possible solutions to the analog reconversion problem, and the best solution has yet to be

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[4] *See http://www.cablelabs.com/about/overview* (last visited Jan. 14, 2004).

[5] *See* Second Further Notice at ¶¶ 64, 82.

determined.[6] MVPDs should have the flexibility to offer multiple content protection mechanisms, including a constraint of content resolution, to content providers in order to best reconcile their demands with consumer preferences. In this regard, the Commission correctly recognizes that even with the use of down-resolution, consumers with analog outputs would still be able to receive a viewable picture, rather than a blank screen as would be the case with the use of selectable output control.[7] In order to address any concerns as to consumer expectations regarding picture quality, EchoStar suggests that the Commission mandate at least a minimum level of DTV resolution – on the order of at least one-half the resolution in both the horizontal and vertical planes. This picture quality would still be better than a standard definition program.

II. CABLELABS SHOULD NOT BE MADE THE INITIAL ARBITER OF OUTPUTS AND ASSOCIATED CONTENT PROTECTION TECHNOLOGIES

CableLabs describes itself as "a nonprofit research and development consortium that is dedicated to pursuing new cable telecommunications technologies and to helping its cable operator members integrate those technical advancements into their business objectives."[8] As the Commission is also aware, CableLabs is funded exclusively by the cable industry to serve the needs of the cable industry. Clearly, it is a partisan organization that cannot reasonably be viewed as an impartial arbiter on any dispute involving non-cable MVPDs. Indeed, the Commission has acknowledged that CableLabs' gatekeeping function could pose a severe threat to innovation and interoperability in the MVPD marketplace.[9] If it were tasked by the

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[6] *See* Comments of the NTCA, CS Docket No. 97-80, PP Docket No. 00-67 (Mar. 28, 2003), at 26-27.

[7] *See* Second Further Notice at ¶ 64.

[8] *See http://www.cablelabs.com/about/overview* (last visited Jan. 14, 2004).

[9] *See* Second Further Notice at ¶¶ 78, 83.

Commission with the role of initial arbiter of all outputs and associated content protection technologies, CableLabs would have both the incentive and the ability to hinder or prevent the use of certain outputs and technologies that could benefit non-cable MVPDs more than the cable industry. For example, the DBS industry may be able to negotiate with content providers for the distribution of programming using content protection technologies that the cable industry is unwilling or unable to offer. As the initial arbiter of the use of such technologies, CableLabs would have every incentive to delay and ultimately reject the use of these content protection technologies. Even if an initial determination were overturned by the Commission, the inherent delays and uncertainties associated with the process would have a significant impact on the DBS industry's ability to compete with cable MVPDs.

EchoStar strongly urges the Commission to select a more independent body for this role. Absent the identification of a qualified and acceptable third party or a truly independent organization, EchoStar suggests that the Commission make such determinations in the first and last instance. EchoStar further urges the Commission to establish procedures to expedite the process of making decisions on outputs and associated content protection technologies.

Irrespective of which entity is chosen as the initial arbiter of outputs and content protection technologies, strict confidentiality must be afforded to all proprietary information submitted during the selection process. Such information should be considered "trade secrets" and, pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), not made routinely available for public inspection. In fact, this information should be afforded the same heightened degree of confidentiality as certain applications for equipment certification, which

have significant competitive implications and security concerns.[10] Such heightened confidential treatment will assist in preventing sensitive business information and trade secrets regarding the design and use of new outputs and associated content protection technologies from being acquired by competitors or other individuals with harmful intentions.

III. CONCLUSION

For the foregoing reasons, EchoStar urges that the Commission provide MVPDs, particularly DBS providers, with the flexibility they need to protect the content of non-broadcast programming, including the activation of down-resolution for non-broadcast MVPD programming. In order to preserve consumer expectations as to picture quality, the Commission should also consider establishing a minimum threshold for degrading DTV resolution – on the order of 50 percent in both the horizontal and vertical planes -- for both 720p and 1080i DTV picture modes. Moreover, the Commission must not designate CableLabs as the initial arbiter of outputs and associated content protection technologies used in unidirectional digital cable products. The Commission should afford the highest level of confidentiality to materials submitted in such matters and, at the same time, make the process as expeditious as possible for those entities involved.

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[10] *See* 47 C.F.R. § 0.457(d)(1)(ii); *see also, e.g. Amendment of Parts 2 and 15 of the Commission's Rules to Further Ensure that Scanning Receivers Do Not Receive Cellular Radio Signals*, Report and Order, 14 FCC Rcd. 5390, 5401-02, ¶ 33 (1999) (heightened confidentiality is afforded to portions of applications for equipment certification of scanning receivers that contain proprietary commercial information, including schematic diagrams, technical narratives describing equipment operation, and design details).

Respectfully submitted,

/s/

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