

**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 OR CLARIFICATION OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. § 1.429, hereby petitions for reconsideration or clarification of the Commission’s *sua sponte* Order on Reconsideration adopted December 19, 2003 in this proceeding.¹

Shortly after the release of the *Second Report and Order and Second Further Notice of Proposed Rulemaking* (“*Second R&O*”)², the Commission, *sua sponte*, reconsidered and revised the definition of “Unencrypted Broadcast Television” in Section 76.1902(s) of its recently-adopted encoding rules. The original rules prohibited Multichannel Video Programmers (“MVPDs”) from imposing copy controls on “Unencrypted Broadcast Television” signals, which as then defined included retransmissions that were “substantially simultaneous[.]” with the

¹ *Order on Reconsideration* (“*Recon Order*”), FCC 03-329 (rel. Dec. 23, 2003), 69 Fed. Reg. 4081 (Jan. 28, 2004).

² FCC 03-225, 2003 WL 22309173 (Oct. 9, 2003), 68 Fed. Reg. 66728 (Nov. 28, 2003).

original broadcast.³ However, because DBS providers encrypt their broadcast signals, while cable operators typically do not, the Commission revised the definition because of concern that it “could inadvertently be interpreted to create a competitive disparity” among those MVPDs.⁴ As we explain below, the original definition caused no disparity, but the revised definition will cause a substantive change that frustrates the intended application of the encoding rules.

As originally drafted, there was no disparity among MVPDs, whether or not they encrypted the retransmissions of broadcast signals. The definition of “Unencrypted Broadcast Television” referred to the retransmission of broadcast signals that were broadcast without being subject to a commercially-adopted access control method. Had the definition stopped there, there may have been room for the misinterpretation that the Commission sought to preclude. But the original definition went on to make clear that programming that begins as unencrypted over-the-air terrestrial broadcast programming does not stop being “Unencrypted Broadcast Television” “regardless of whether” an MVPD that is “substantially simultaneously” retransmitting the programming “subjects such further transmission to an access control method,” that is, scrambles it. Thus, under the encoding rules and the original definitions, cable and DBS were in the same position with respect to retransmission of “Unencrypted Broadcast Television.”

³ The key definition provided: “Unencrypted Broadcast Television means any service, Program, or schedule or group of Programs, that is a further transmission of a broadcast transmission (i.e., an over-the-air transmission for reception by the general public using radio frequencies allocated for that purpose) that substantially simultaneously is made by a terrestrial television broadcast station located within the country or territory in which the entity further transmitting such broadcast transmission also is located, where such broadcast transmission is not subject to a Commercially- Adopted Access Control Method (e.g., is broadcast in the clear to members of the public receiving such broadcasts), regardless of whether such entity [e.g., an MVPD] subjects such further transmission to an access control method.” Simultaneous retransmission is the same concept governing the compulsory copyright license under which broadcast signals are usually carried on cable systems. 17 U.S.C. §111(f).

⁴ *Recon Order*, ¶ 2.

The revision to the definition adopted by the Commission on reconsideration sought to make the same point that encrypted or unencrypted retransmission made no difference in the status of programming that was also available off air in the clear.⁵ However, the revision omitted the concept that the programming must be retransmitted “substantially simultaneously” in order to remain within the definition of “Unencrypted Broadcast Television” that could not be subject to copy controls.

The omission in the revised definition of the phrase “substantially simultaneously” substantively changes the rules in a manner which may frustrate its intended operation because certain transactions will now be constrained. Suppose a cable operator reached a retransmission agreement with a network to repurpose the network evening news on a cablecast, copy-protected basis, for the 24 hours following each evening’s live newscast. The original definition would have permitted these subsequent cablecasts to be copy protected, but the revised definition would not. Other definitions in the encoding rules were written to anticipate and resolve the status of dual use content,⁶ but the definition of other business models that might apply to non-simultaneous repurposed broadcast programming were not—because Unencrypted Broadcast Television was limited to simultaneous retransmissions. If the rule change remains in effect, revisions will need to be carefully woven into the remainder of the encoding rules to preserve the original intent of the rules with respect to “non-substantially simultaneous” retransmissions.⁷

⁵ “Unencrypted broadcast television means the retransmission by a covered entity of any service, program, or schedule or group of programs originally broadcast in the clear without use of a commercially-adopted access control method by a terrestrial television broadcast station regardless of whether such covered entity employs an access control method as a part of its retransmission.”

⁶ *E.g.*, “In the event a delivery qualifies as both Video-on-Demand and a Pay Television Transmission, then for purposes of this Rule, such delivery shall be deemed Video-on-Demand.” 47 C.F.R. § 1902(t).

⁷ The rule change also substituted the undefined, lower-case “program” for the defined, upper case “Program.”

Because the rule change was unnecessary to effectuate the intent expressed, we urge the Commission to restore the language in the original definition of "Unencrypted Broadcast Television."

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to reconsider the *Recon Order* and reinstate the definition of "Unencrypted Broadcast Television" in Section 76.1902(s) of the Rules as originally adopted in the *Second R&O*.

Respectfully submitted,

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