

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	MB Docket No. 02-230
Digital Broadcast Content Protection)	
)	
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)	

REPLY COMMENTS

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Summary

To date, the Commission has used two very different processes to approve new DTV technologies. In the Plug & Play proceeding, the Commission adopted interim procedures that leave the DTV technology approval process largely in the hands of CableLabs, an interested third party under the control of industry sectors. By contrast, in the Broadcast Flag proceeding, the Commission adopted interim procedures that require public notice and disclosure of technology licensing terms and fees, as well as evidence demonstrating that new technologies will be licensed on reasonable and non-discriminatory terms. Because the interim procedures adopted in the Broadcast Flag proceeding are open, fair, and based on objective criteria, they should be used as a blueprint for technology approval decisions going forward.

There is widespread opposition to designating CableLabs as the sole, or even the initial, arbiter of new DTV technologies. Indeed, there is opposition to virtually any proposal that would give an *interested party* authority to make determinations as to which new DTV technologies will be chosen as a Commission standard. Rather, the comments make clear that either the Commission or an independent entity should make such determinations using an open and transparent approval process with public oversight.

While there is a difference of opinion concerning the specific criteria to be used in approving new DTV technologies, there is broad support for adoption of objective criteria that will serve as a guide for deliberation and as a benchmark in making final judgments. As to *who* should develop the criteria, Genesis believes that such an important task should be handled by the Commission itself or by an independent, open-standards-setting organization or federal advisory committee.

There is significant support for implementing a *unified* DTV technology approval process. In the words of the American Antitrust Institute: “In the absence of a unified regime, the Commission risks the incongruous result that device compatibility and interoperability will depend on the mode of program delivery.” To avoid such a result, the Commission should make every effort to assure that content or recording technologies are suitable for both Broadcast Flag and Plug & Play purposes.

Finally, and perhaps most importantly, many commenters in both the Broadcast Flag and Plug & Play proceeding emphasized, as has Genesis, the need for a reasonable and non-discriminatory patent licensing process. It is essential that the Commission take *affirmative* steps to ensure that license terms are disclosed and that licensees are made aware of which patents must be licensed for the use of any new DTV technology. The Commission can no longer simply announce that “all must be fair,” and then take no steps to insure fairness.

The Commission should heed the concerns expressed in the comments, and act decisively to insure that the processes used to approve new DTV technologies are open, fair, objective, and unified. By doing so, the Commission will foster a vibrant and competitive DTV marketplace.

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REPLY COMMENTS

Genesis Microchip, Inc. (“Genesis”), by its counsel, and pursuant to Section 1.415 of the Commission’s rules, hereby submits these reply comments in the above-captioned Further Notices of Proposed Rulemaking.¹ Due to the similarity of issues raised in these proceedings, Genesis is filing identical reply comments in both proceedings.

I. Background

There is widespread agreement that the issues being addressed in the Broadcast Flag and Plug & Play proceedings are closely intertwined.² At issue in both proceedings is the

¹ *In the Matter of Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 03-273 (rel. November 4, 2003) 30 Communications Reg. (P&F) 1189 (2003) (the “Broadcast Flag” proceeding); and *In the Matter of 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 and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80 and PP Docket No. 00-67, FCC 03-225 (released October 9, 2003) 30 Communications Reg. (P&F) 834 (2003) (the “Plug & Play” proceeding).

² See e.g., Comments of Philips Electronics North America Corp. (“Philips”) in Plug & Play proceeding at 4-5 (“there will be enormous overlap because consumer electronics manufacturers will be making equipment that in the overwhelming majority, if not almost all instances, will be affording appropriate levels of protection to both digital broadcast and cable programming content.”); Comments of The

process for approving new digital television (“DTV”) technologies. In the case of the Plug & Play proceeding, the focus is on “outputs and associated content protection technologies to be used in unidirectional digital cable products.”³ In the case of the Broadcast Flag proceeding, the focus is on “new content protection and recording technologies to be used with device outputs on Demodulator Products.”⁴ Fundamentally, both proceedings deal with questions of due process in the adoption of new DTV technologies.

To date, the Commission has treated the technology approval processes very differently for each proceeding. In the Plug & Play proceeding, the Commission is proposing to permit CableLabs to be the initial arbiter of new technologies pursuant to objective standards developed by CableLabs. Only in the case of a dispute will the Commission review a CableLabs’ decision on the objective criteria chosen and the application of such criteria to a proposed technology.⁵

By contrast, in the Broadcast Flag proceeding, the Commission developed its own objective criteria and detailed interim approval procedures. Specifically, Section 73.9008 requires all new technologies to be approved by the Commission – rather than an interested third party. Among other things, Section 73.9008 requires public notice of an application and provides a means by which objections may be filed. If a proposed technology is to be offered publicly, the proponent must provide the Commission with a

American Antitrust Institute (“AAI”) in Plug & Play proceeding at 3 (“the AAI supports consolidation of the [Plug & Play] proceeding with the *Broadcast Flag* proceeding for the purpose of the establishment of guidelines, procedures, and regulations applicable to all digital content protection technologies.”); and Comments of the Motion Picture Association of America, Inc. (“MPAA”), et al., in Broadcast Flag proceeding at 2 (“The same substantive considerations for ensuring the security and timeliness of new authorized outputs for Broadcast Flag-compliant devices apply in the Plug & Play context as well.”).

³ Plug & Play Second Further Notice of Proposed Rulemaking at ¶ 78.

⁴ Broadcast Flag Further Notice of Proposed Rulemaking at ¶ 61.

⁵ See Plug & Play Second Report and Order at ¶ 79.

copy of its licensing terms and fees, as well as evidence demonstrating that the technology will be licensed on a reasonable, non-discriminatory basis.⁶

The significant differences in these two approaches to technology adoption can be traced to the origins of each proceeding. In the Plug & Play proceeding, the Commission elected to blindly accept an inflexible proposal that was put together by a private industry coalition. Approval of new technology by CableLabs was a key feature of the proposal. By adopting interim procedures that leave the approval process largely in the hands of CableLabs, the Commission took the path of least resistance. Conversely, in the Broadcast Flag proceeding, the Commission followed the more traditional approach for approving new technologies by spelling out the procedures and safeguards in its rules to ensure due process. As a result, the public is left with two very different approval processes designed to achieve the same goal – FCC adoption or endorsement of new DTV technologies.

In both proceedings, the Commission requested comment on several important issues concerning due process in the adoption of new DTV technologies. The Commission asked: (1) whether objective criteria should be used to evaluate the new technology and, if so, what specific criteria should be used; (2) whether CableLabs, in the case of Plug & Play, or content owners, in the case of Broadcast Flag, are the appropriate entities to make initial technology approval determinations; and (3) whether another entity should have decision making authority, including the Commission, a qualified third party, or an independent entity representing various industry and consumer interests.

Genesis and others raised additional issues that go to the heart of any process for approving new technologies – scrutiny of patents, the requirement for reasonable and nondiscriminatory licensing, and public disclosure of licensing terms. In this regard, Genesis acknowledged that providers and distributors of digital programming are entitled to protect their content. However, Genesis pointed out that certain standards adopted by

⁶ See Broadcast Flag Report and Order at ¶¶ 52-54.

the Commission to achieve these goals are, in fact, proprietary technologies that are being licensed in an anti-competitive manner. As a solution, Genesis proposed that the following steps be taken to stem anti-competitive practices:

Open Standards-Setting. Require that all new DTV technologies be approved by an ANSI-accredited standards-setting organization or an open standards-setting group with ANSI-equivalent policies.

Full Public Disclosure. Require that when new DTV technologies are offered publicly, there be full public disclosure of all patents and pending patent applications, all necessary patent claims, and all licensing terms and conditions associated with the new DTV technologies.

Reasonable and Non-Discriminatory Licensing Terms. Require that all new DTV technology licenses be evaluated to ensure that they are being offered on reasonable and non-discriminatory terms.

Federal Advisory Committee. Establish a standing federal advisory committee to evaluate and recommend to the Commission new DTV technologies that have been approved by either an ANSI-accredited standards-setting organization or an open standards-setting group with ANSI-equivalent policies.

Uniform Standards. Instruct the newly established federal advisory committee to recommend standards that are compatible with the content protection standards of both the Plug & Play and Broadcast Flag proceedings in order to avoid inconsistent, redundant or conflicting standards.

II. There is Widespread Agreement that Interested Parties Should not be the Arbiter of New Technologies.

In the proposals made by the cable and consumer electronics industries in the Plug & Play proceeding, CableLabs was designated as the initial arbiter of new DTV technologies. The Commission wisely has questioned whether this is an appropriate role for CableLabs.⁷ Similarly, in the Broadcast Flag proceeding, the Commission has questioned whether content owners are the appropriate entities to make initial approval

⁷ Plug & Play Second Further Notice of Proposed Rulemaking at ¶ 85.

determinations of new content protection and recording technologies.⁸ In essence, the Commission has asked: Is it appropriate for any *interested party* to have authority to make determinations as to which new DTV technologies will be chosen as a Commission standard? The answer is a resounding “no”.

With the exception of the members of the Plug & Play coalition and, oddly, the MPAA, no party commenting in the Plug & Play proceeding deemed it wise to permit CableLabs to be the arbiter of new technology. For example, AAI cited the “need for the Commission or an independent entity to make the initial determination of the approval of new content protection or recording technologies,” and emphasized that CableLabs “is not such an independent entity.”⁹ Other groups such as Public Knowledge and the Consumers Union (“the Consumer Groups”) agreed, noting that “CableLabs...is a private research entity and not an open standards body.”¹⁰ Similarly, EchoStar Satellite L.L.C. (“EchoStar”) explained that, CableLabs “is a partisan organization that cannot reasonably be viewed as an impartial arbiter on any dispute involving non-cable MVPDs.”¹¹

EchoStar warns:

If it were tasked by the 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 no-cable MVPDs more than the cable industry.¹²

In addition, the Home Recording Rights Coalition (“HRRC”) opposes designating CableLabs as the sole arbiter of DTV technologies or interfaces, and is clearly uncomfortable with allowing CableLabs even to act as the initial arbiter. HRRC explains:

⁸ Broadcast Flag Further Notice of Proposed Rulemaking at ¶ 64.

⁹ Comments of AAI in Plug & Play proceeding at 4.

¹⁰ Comments of Consumer Groups in Plug & Play proceeding at 8-9.

¹¹ Comments of EchoStar in Plug & Play Proceeding at 4.

¹² *Id.* at 5.

CableLabs, at present, stands in a unique position as a private laboratory, owned by the only incumbent providers of navigation devices, exercising power over potential entrants as the *only* licensor and (for now) the *only* test facility. HRRC trusts that competition in the testing world will improve, but for the foreseeable future CableLabs will remain the licensor of its owners' competitors. As such, its use and abuse of discretion needs to be strictly scrutinized by the Commission.¹³

Microsoft, Hewlett-Packard, Dell and Apple (the "IT Industry Commenters") also argue forcefully against designating CableLabs as the initial arbiter of DTV technologies:

[G]ranting this right of first decision to a representative of just one of the affected industries (i.e., CableLabs) – which can certainly be expected to put its founders' interests first – ultimately could stifle technological innovation and put at risk the open and flexible architecture of the PC and similar devices.¹⁴

Those opposing CableLabs or any other interested party as the sole, or even initial, arbiter of new DTV technologies have echoed suggestions made by Genesis in its comments. The IT Industry Commenters favor of a process of self-certification (based on objective criteria), but suggest, as an alternative, a requirement that "new technologies are evaluated for compliance with the objective criteria by an independent, objective entity that employs widely publicized, transparent processes and procedures."¹⁵ Similarly, AAI believes there is a strong "need for the Commission or an independent entity to make the initial determination of the approval of new content protection or recording technologies."¹⁶ AAI states that "[a]pproval of a technology with intra-or cross-industry effects must not be delegated to a particular industry (e.g., content producers) or particular groups within one or more industries, unless such groups are legitimate standards-setting organizations."¹⁷ EchoStar expresses similar views stating that "[a]bsent the identification of a qualified and acceptable third party or a truly independent

¹³ Comments of HRRC in Plug & Play Proceeding at 10.

¹⁴ Comments of IT Industry in Plug & Play proceeding at 6.

¹⁵ *Id.* at 10.

¹⁶ Comments of American Antitrust Institute in Plug & Play proceeding at 5.

¹⁷ *Id.* at 3.

organization, EchoStar suggests that the Commission should make the determinations.”¹⁸ The Center For Democracy and Technology urges a “...flexible, open, and transparent approval process procedure with public oversight.”¹⁹ The Center suggests, as did Genesis, that, “The Commission should establish an oversight advisory board made up of individuals from broadly diverse industry and public backgrounds, including representatives of consumers and public interest groups, content producers, manufacturers, and technology companies.”²⁰ The Digital Transmission Licensing Administration, LLC maintains that any approval authority have, “...no ties to any specific party with an interest in the outcome.”²¹

The message is clear. Interested parties should not be given the power to approve new technologies. Further, if the Commission is not to assume the task itself, it must delegate the task to an independent body, possibly a standards-setting organization, or an advisory committee. This has consistently been Genesis’ position.

III. The Comments Support an Approval Process that is Governed by Application of Objective Criteria.

In both the Plug & Play and Broadcast Flag proceedings, the Commission requests comment on whether the approval of new DTV technologies should be based on a set of objective criteria.²² Although there is a difference of opinion concerning *which* objective criteria should be used, there is broad support for adoption of criteria that would not only serve as a guide for deliberation, but also as a benchmark that would enable the Commission to judge the reasonableness of any pronouncement on new technologies.²³

¹⁸ Comments of EchoStar in Plug & Play proceeding at 5.

¹⁹ Comments of the Center for Democracy and Technology in Broadcast Flag proceeding at 3.

²⁰ *Id.* at 8.

²¹ Comments of the Digital Transmission Licensing Administration, LLC in Broadcast Flag proceeding at 1.

²² Plug & Play Second Further Notice of Proposed Rulemaking at ¶ 84; Broadcast Flag Further Notice of Proposed Rulemaking at ¶ 62.

²³ *See e.g.*, Comments of Verizon Telephone Companies in Broadcast Flag proceeding at 7; Comments of Philips in Plug and Play proceeding at 12; Comments of IT Industry in Plug & Play proceeding at 7;

Even some who would leave the approval process for Plug & Play technologies in the hands of CableLabs recognize the need for a decision-making process. Clearly, that process requires objective standards in order to (1) assist a final arbiter in making judgments on the adoption of new technologies; (2) create fairness in the marketplace for the introduction of new technologies;²⁴ and (3) make it possible for manufacturers to self-certify new technologies that they have developed.²⁵

Genesis agrees that objective criteria must be established. The question is: Who is to develop the criteria? In Genesis' view, like the approval process, such an important task should be addressed either by an independent, open standards-setting organization, a federal advisory committee or the Commission, itself. Interested parties clearly have a role to play in the development of objective criteria and must participate in the process. But the process itself must be conducted by a neutral organization.

IV. Many Commenters Agree that the Commission Should Implement a Unified Approval Process.

Genesis has urged the Commission to implement a unified process for approving both Plug & Play and Broadcast Flag technologies. Many commenters agree with this suggestion.²⁶ As AAI notes: "In the absence of a unified regime, the Commission risks the incongruous result that device capability and interoperability will depend on the mode of program delivery."²⁷ AAI further explains:

Comments of Consumer Electronics Association in Plug & Play proceeding at 14-15; and Comments of the Consumer Groups in Plug & Play proceeding at 8-9.

²⁴ Comments of Home Rights Recording Coalition in Broadcast Flag proceeding at 6; Comments of Intel in Plug & Play proceeding at 6-7.

²⁵ Comments of Center for Democracy and Technology in Broadcast Flag proceeding at 3.

²⁶ See e.g., Comments of the Motion Picture Association of American in Broadcast Flag proceeding at page 3; Comments of the Consumer Groups in Plug & Play proceeding at page 6; Comments of Matsushita Electric Corporation of America in Broadcast Flag proceeding at 2.

²⁷ Comments of AAI in Plug & Play proceeding at 3.

[Assume a]... new recording technology is approved for digital recordings under the broadcast flag regime, and is implemented in an integrated ATSC demodulator/recorder product. If the consumer wishes to make a recording of a permitted type of broadcast content, unless the recording technology is also approved under the DFAST license regime, such a recording may be made only when content is delivered over-the-air and not when delivered via an MPVD. Obviously, the manufacturer of such a product would seek approval under both regimes. But it should be unnecessary to do so, and such a duplication of effort is inefficient.²⁸

Neither Genesis nor any of the commenters contends that the same objective standards should apply to both Broadcast Flag and Plug & Play technologies. Nevertheless, the technologies, while intended for applications in different modalities, will be affected by the standards adopted in each proceeding. And there are commonalities in the technologies. Thus, the Commission should make every effort to assure that content or recording technologies are suitable for both the Broadcast Flag and Plug & Play proceedings. The best way to satisfy this goal is to create a unified approval regime.

V. Commenters Uniformly Agree that the Commission Must Adopt Regulations to Ensure Reasonable and Non-discriminatory Licensing of DTV Technology.

Many commenters in both proceedings emphasized, as has Genesis, the need for a reasonable and non-discriminatory licensing process.²⁹ Moreover, in situations where the Commission *mandates* the use of a particular technology, it has a responsibility to regulate the technology licensing process beyond the mere admonition that licensing be reasonable and non-discriminatory.³⁰ It is essential that license terms be disclosed and

²⁸ *Id.*

²⁹ Comments of Consumer Groups in CS Docket 97-80 at 9 (“we believe that approved protection technologies either should be open or should be licensable on a reasonable and nondiscriminatory basis (RAND)”); Comments of IT Industry in Plug & Play proceeding at 12 (“Licenses for approved technologies shall be made on reasonable, non-discriminatory bases pursuant to terms and conditions that are fully disclosed to potential licensees”); Comments of AAI in Broadcast Flag proceeding at 5-6 (“licensing terms should be offered on a reasonable and non-discriminatory (“RAND”) basis”).

³⁰ Comments of Philips in Broadcast Flag proceeding at 22. “...the Commission should adopt a set of specific safeguards where technologies are licensed to third parties to effectuate the general principle that licensing be on a reasonable and non-discriminatory basis.”

that licensees be made aware of which patents must be licensed for the use of any new technology.

The IT Industry Commenters urge the Commission to specify not only that licenses for approved technologies be made available on a reasonable, non-discriminatory basis, but “pursuant to terms and conditions that are fully disclosed to potential licensees.”³¹ Moreover, the IT Industry Commenters believe it necessary for the Commission to specify that licensed elements “be limited to such specifically identified patents or other proprietary rights as are ‘essential’ to implement the technology in accordance with the applicable compliance rules (and all claimed patents and pending patents shall be fully disclosed to potential licensees before the license is signed) and any patent nonassert or grantback provisions be reasonable in scope.”³² In the same vein, the MPAA states that any authorization of technology must include, “the technology’s licensing terms and conditions concerning output and recording controls, including licensing terms and conditions claimed to establish compliance with [applicable sections of the Commission’s rules]”.³³

The AAI maintains that “[g]uidelines for technology licenses should be established and licenses should be vetted by experts to ensure that license terms are not anticompetitive.”³⁴ Specifically, AAI states that “FCC guidelines should track the ‘IP Guidelines of the DOJ/FTC (*Antitrust Guidelines for the Licensing of Intellectual Property*), issued by the U.S. Department of Justice and the Federal Trade Commission.”³⁵

³¹ Comments of IT Industry in Plug & Play proceeding at 12-13.

³² *Id.* [Emphasis added].

³³ Comments of MPAA, Appendix A, Revised Proposal for Table A Criteria, in Plug & Play proceeding and Broadcast Flag proceeding.

³⁴ Comments of AAI in Broadcast Flag proceeding at 4.

³⁵ *Id.* at 4-5. It should be noted that in the recent decision by an administrative law judge (ALJ) to terminate the Federal Trade Commission’s investigation of Rambus Inc. (In the Matter of Rambus Inc., Docket No. 9302, February 23, 2004), it was made clear that the FTC is not abandoning its concern that licensing be reasonable and non-discriminatory and that, as a matter of policy, patents should be disclosed. In Rambus,

AAI's comments provide a thoughtful blueprint for Commission action and reflect concerns that Genesis has repeatedly raised with the Commission.³⁶ The Commission simply cannot mandate a technology without requiring disclosure of the patents claiming the technology and the licensing terms applicable to those who elect to adopt the technology. In this regard, AAI explains that:

Because approved technologies will inherit the force of law upon approval, the private acceptance of licensing arrangements by many, or even numerous, parties, cannot substitute for an independent evaluation of the implications of such arrangements. In this proceeding, the Commission's rulemaking is likely to apply to technical specifications and licenses which have in some cases already been broadly adopted in the marketplace. The Commission risks adopting an *ex post* governmental mandate requiring parties to accept licensing arrangements that in many respects cannot be scrutinized and in other respects cannot survive scrutiny.³⁷

The AAI goes on to explain the insidious nature of licensing agreements that impose hidden burdens:

In many cases, adopters may not even see the specification until after a license is signed and a royalty paid. Adopters called upon to agree to non-assert or grantback provisions ostensibly limited to 'necessary claims' without knowing what (or whether) any IP is being conveyed are utterly incapable of knowing what they are relinquishing, whether any IP they possess infringes the licensors' IP (if any) or whether the licensor is, in fact, infringing their IP.³⁸

the ALJ merely found that there was no requirement under JEDEC procedures to disclose patents and pending patents and therefore, in not disclosing them, Rambus was not guilty of deception. Had the ALJ found an obligation to disclose patents and pending patents, there is little doubt that the Rambus decision would have been very different. The FTC staff has recently announced that it will be appealing the ALJ's decision to the full Commission.

³⁶ See Reply Comments of Genesis in Plug & Play proceeding, filed April 28, 2003, at 4; Petition for Reconsideration of Genesis in Plug & Play proceeding, filed December 29, 2003, at 7-9; Petition for Reconsideration of Genesis in Broadcast Flag proceeding, filed January 2, 2003, at 6; and Comments of Genesis in Plug & Play proceeding and Broadcast Flag proceeding, filed February 13, 2004, at 7

³⁷ *Id.*

³⁸ *Id.*

Finally, AAI provides the Commission with the same recommendation that Genesis provided in its Reply Comments to the Commission's original Notice of Proposed Rulemaking in the Plug & Play proceeding:

[A]ll putative licensors of governmentally approved technology should, as a threshold matter, be required to identify any and all patents, copyrights, or trade secrets they deem necessary to the technology being licensed. In the absence of such disclosure, the establishment of the guidelines and procedures recommended herein would be utterly ineffectual.³⁹

Other commenters are similarly concerned that an unfettered licensing process for a mandated technology would be a dangerous practice. Philips, for instance, urges the Commission to adopt a set of "specific licensing standards,"⁴⁰ and warns that, "if careful limits are not imposed, the licensing terms of approved technologies can harm or even destroy, competition in content protection technology. By granting a favored position to a small group of competitors, technology licensing terms can also harm competition among device manufacturers and restrict consumer choice and flexibility."⁴¹ In comments directed to the Broadcast Flag proceeding, but which can apply equally to the concerns that Genesis has expressed in the Plug & Play proceeding, Philips warns of these anti-competitive effects:

The regime adopted by the Commission to implement the Broadcast Flag is a unique hybrid, combining a government technology mandate, with the full force and effect of law, together with reliance on a private license agreement which has the potential to confer enormous power on the licensor relative to other manufacturer licenses. In such circumstance, the license needs to embody enforceable, pro-competitive safeguards, to avoid manipulation of government power to enforce self-serving decisions of private parties having the potential to reconfigure the competitive landscape to their own liking."⁴²

The comments in these proceedings leave little doubt regarding the importance of establishing a process to ensure that new technologies are licensed reasonably and on a non-discriminatory basis – whether the Commission chooses new DTV technologies

³⁹ *Id.*

⁴⁰ Comments of Philips in Broadcast Flag proceeding at 22.

⁴¹ *Id.* at 7.

⁴² *Id.* at 22.

itself, or relegates the task to another body. Inevitably, as the comments make clear, in order to ensure fair and reasonable licensing, the Commission must also require disclosure of applicable patents.

Unfortunately, the Commission's 1961 patent policy, which is only a statement of principle, is not up to the task. The Commission can no longer announce that all must be fair, and then take no steps to insure fairness. The Commission cannot enforce a policy that technology be licensed on reasonable and non-discriminatory terms without taking steps to examine licenses or to define what is meant by "reasonable." And, the Commission's threat of "appropriate action" if it finds that its Patent Policy has been ignored is no longer (if it ever was) a means to assure compliance. With no standards, no guidelines, no criteria, and little attention, the Patent Policy is useless and will be treated accordingly.

Genesis' own frustrating foray into the DVI licensing process, even before a government mandate that DVI be employed, should serve as ample warning of the anti-competitive actions that might be taken by patentees when a federal government agency anoints a privately-developed technology whose licensing has been neither reviewed by the government nor made available for public scrutiny. Now the Commission has before it a record showing that the only way to assure reasonable and non-discriminatory licensing is to develop criteria for reasonableness and require disclosure of licensing terms and associated patents. The Commission should heed the advice of Genesis and other commenters.

VI. Conclusion

There is widespread agreement that the process for approving new DTV technologies must be open, fair (*i.e.*, not controlled by interested third parties), and based on objective criteria. Scrutiny should be given to licensing terms, and patents and pending patents should be disclosed to the public. Essentially, this describes the "interim" process adopted by the Commission in the Broadcast Flag proceeding. This is a far cry from how the Plug & Play coalition selected technology – through a closed process, under the

control of industry sectors, based on private considerations, and with disregard for the importance of licensing terms and disclosure of patents.

It is puzzling how the same Commission that adopted the interim procedures in the Broadcast Flag proceeding, and expressed concerns over the technology approval processes going forward in both proceedings, could have rubber-stamped the self-serving proposals of the Plug & Play coalition without apparent misgivings. Nevertheless, the Commission can now rely on a record that supports an open approval process controlled by an independent entity – a process requiring disclosure of licensing terms and conditions, and patents bearing on proposed technology

Genesis respectfully requests that the Commission heed the concerns expressed in the record as now established, and act to adopt open processes described above. By doing so, the Commission will foster a vibrant, competitive marketplace for DTV.

Respectfully submitted,

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March 15, 2004

Certificate of Service

I, Tracy Haynes, hereby certify that a true and correct copy of the foregoing Reply to the Opposition to the Petition for Reconsideration of Genesis Microchip, Inc., was served by first-class mail, on March 15, 2004, to each of the following persons:

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