

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

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In the Matter of:)	
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation)	
Devices)	
)	
Compatibility Between Cable Systems and)	PP Docket No. 00-67
Consumer Electronics Equipment)	
_____)	

CONSOLIDATED REPLY OF DIRECTV, INC.

DIRECTV, Inc. (“DIRECTV”) submits these reply comments to address three issues raised in response to DIRECTV’s Petition for Reconsideration of the Commission’s *Plug and Play Order* – (1) the continued status of CableLabs as a *de facto* gatekeeper for the approval of new plug-and-play technologies, (2) the so-called “broadband loophole” in the encoding rules, and (3) minimum standards for televisions carrying an IEEE 1394 interface.¹ Some parties in this proceeding would have the Commission believe that the concerns raised by DIRECTV are speculative (or worse), or that DIRECTV’s proposed solutions are overreaching. Yet DIRECTV’s concerns are

¹ Petition for Reconsideration of DIRECTV, Inc. (filed Dec. 29, 2003) (“DIRECTV Petition”); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885 (2003) (“*Plug and Play Order*”). DIRECTV’s response to the Home Recording Rights Coalition’s discussion of downresolution, *see* Home Recording Rights Coalition Opposition to Petitions for Reconsideration at 12 (filed Mar. 10, 2004) (“HRRC Opposition”), is fully set forth in its Further Reply Comments filed in response to the *Plug and Play Order*. *See* Further Reply Comments of DIRECTV (filed Mar. 15, 2004) (“DIRECTV Further Reply Comments”).

real and immediate. And DIRECTV's proposed solutions are actually quite simple. The Commission should therefore grant DIRECTV's Petition.

I. CABLELABS SHOULD NOT BE PLACED IN A POSITION TO EXERCISE *DE FACTO* CONTROL OVER THE DEVELOPMENT OF NEW OUTPUTS AND ASSOCIATED CONTENT PROTECTION TECHNOLOGIES.

DIRECTV has argued repeatedly that CableLabs should not be “the sole initial arbiter of outputs and associated content protection technologies to be used in unidirectional digital cable products.”² NCTA now responds that this position “appears to be premised on a misunderstanding” – namely that “DIRECTV appears to believe that CableLabs’ approval is required for new interfaces on *DirecTV’s* set-top boxes.”³ NCTA argues that, as the DFAST license by its terms empowers CableLabs only to make determinations relevant to UDCP devices that use the POD-Host interface, it “has no bearing” on the technology available for use in set-top boxes deployed by any other MVPD.⁴

But the DFAST license very much has a bearing on non-cable MVPDs. As DIRECTV explained in its Further Reply Comments, cable’s competitors may well seek to deploy POD devices of their own, particularly if – given cable operators’ continued domination of the MVPD market⁵ – the POD-Host arrangement becomes a market standard.⁶ In such case, non-cable MVPDs would certainly want at least the option of using the DFAST license process – without placing their fates in the hands of their chief competitors.

² *Plug and Play Order*, 18 FCC Rcd. at 20119; DIRECTV Petition at 7, Further Comments of DIRECTV, Inc. at 10-12 (filed Feb. 13, 2004) (“DIRECTV Further Comments”); Further Reply Comments of DIRECTV, Inc. at 6 (filed Mar. 15, 2004) (“DIRECTV Further Reply Comments”).

³ The National Cable & Telecommunications Association’s Opposition to Petitions for Reconsideration and Notice of Joint Proposal for Improved Testing Rules at 3 (filed Mar. 10, 2004) (“NCTA Opposition”) (emphasis in original).

⁴ *Id.* at 3.

⁵ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1609 (2004) (finding that cable holds a 75% share of the MVPD market).

⁶ DIRECTV Further Reply Comments at 6.

DIRECTV and many others have already elaborated at length on CableLabs' manifest lack of qualification for the role proposed for it under the Plug and Play Order.⁷ There is no need to belabor the point here.

II. THE COMMISSION SHOULD CLOSE THE BROADBAND LOOPHOLE

In its petition, DIRECTV argued that the Commission should close the “broadband loophole” placed – without a word of discussion or justification – in the new encoding rules. This provision exempts from those rules (1) content delivered over the Internet, and (2) an MVPD's operations via cable modem or DSL.⁸ DIRECTV argued that this exemption could lead to an entirely perverse result by exempting the cable operators that initiated the plug-and-play process while binding the DBS operators that were excluded from the process.

In opposing DIRECTV's request, some parties argue that the broadband loophole does not (yet) merit the Commission's attention, either because both cable and DBS alike are “exposed to unregulated competition from the Internet and other technologies,”⁹ or because the cable and consumer electronics industries have promised to seek legislation closing the loophole,¹⁰ or because the issue is otherwise unripe for consideration,¹¹ or because DIRECTV has not put sufficient “objective evidence” in the record to establish that there is a problem in the first place.¹²

⁷ See, e.g., DIRECTV Petition at 7-8; DIRECTV Further Comments at 10-11; DIRECTV Further Reply Comments at 6-10; see also, e.g., Opposition to the Petitions for Reconsideration [and] Reply Comments of the Consumer Federation of America at 13 (filed Mar. 15, 2004); Reply Comments of EchoStar Satellite L.L.C. at 3 (filed Mar. 15, 2004); Reply Comments of Verizon in Response to Second Further Notice of Proposed Rulemaking at 3-6 (filed Mar. 15, 2004).

⁸ See 47 C.F.R. § 76.1901(b)-(c).

⁹ NCTA Opposition at 3.

¹⁰ NCTA Opposition at 2.

¹¹ Comments and Opposition of BellSouth Entertainment, LLC at 4 (filed Feb. 25, 2004) (“BellSouth Opposition”).

¹² *Id.*

To read these arguments, one might think that DIRECTV is concerned about a mere hypothetical – one in which some unknown Internet provider may at some unknown future date offer some unknown variety of video service without following the encoding rules. This is not the case. Cable operators are working on this technology *right now*. Last year, CableLabs issued a series of multimedia specifications that, taken together, “foresee[] a wide variety of graphically-rich services such as interactive games and *streaming media* delivered via cable’s IP-based network.”¹³ As one equipment provider describes it, use of these specifications are but one manifestation of how “[t]he architecture of the backbone network in cable systems is evolving.”¹⁴

[The next generation of cable networks will start] with new backbone architectures that integrate with the existing hybrid fiber/coax (HFC) access network, thereby using the embedded HFC and [set-top box] infrastructure that cable operators have deployed over the past several years. Upgrades to the HFC network will follow the backbone network as native MPEG-2 video services evolve to IP-based services and home networks are introduced to interconnect a variety of IP-enabled communication, information, and entertainment devices in the home.¹⁵

¹³ “CableLabs® Issues PacketCable™ Multimedia Specification,” Press Release, June 27, 2003 (emphasis added), *available at* http://www.cablelabs.com/news/pr/2003/03_pr_pc_multi_spec_062703.html. CableLabs elaborates: “[T]he PacketCable Multimedia architecture offers a general-purpose platform for cable operators to deliver a variety of IP-based multimedia services that require QoS treatment.” “PacketCable™ Multimedia Architecture Framework Technical Report,” (June 27, 2003), *available at* <http://www.packetcable.com/downloads/specs/PKT-TR-MM-ARCH-V01-030627.pdf>. *See also* “CableHome™ Overview,” Slide Presentation, Sept. 2003 at 3, 5, *available at* <http://www.cablelabs.com/projects/cablehome/downloads/slideshow.ppt> (mapping out an architecture in which IP and MPEG services alike are delivered over DOCSIS modems to cable customers, and where the residential Internet gateway is described as the “[f]oundation for future home services”).

¹⁴ “Delivering MPEG-2 Video Services over a Multiservice IP Network,” Cisco White Paper at 8 (2002), *available at* http://www.cisco.com/application/pdf/en/us/guest/netso/ns0/c654/ccmigration_09186a008009d4d1.pdf.

¹⁵ *Id.* at 1. According to Cisco, use of a receiving interworking unit as a gateway between the backbone network and the HFC access network “provides a migration path as traditional digital video services based on MPEG-2 transport evolve to IP-based streaming media services delivered over DOCSIS channels.” *Id.* at 8.

When this technology is deployed, cable operators will be able to deliver their current video offerings over cable modems. And, as things currently stand, this will allow the cable industry to ignore the very encoding rules it negotiated, and which it fought so hard to apply to DBS in the name of “parity.”¹⁶ In other words, rules that should not apply to DBS in the first place will, effectively, apply *only* to DBS.¹⁷ This is DIRECTV’s core concern. It is by no means “unripe” or “irrelevant” to this proceeding – especially given the Commission’s failure to acknowledge DIRECTV’s arguments in any way when it created the broadband loophole.

Other commenters are concerned about DIRECTV’s proposed remedy. They argue that, even if the broadband loophole is a problem, DIRECTV’s request to close it raises jurisdictional concerns,¹⁸ goes beyond the limited scope of this proceeding,¹⁹ will “driv[e] high-quality content to foreign Internet distributors,”²⁰ or will stifle the development of new business models.²¹

It may well be that applying the encoding rules to “*all* digital content distribution methods” would raise jurisdictional issues (although the Commission has already

¹⁶ See *Plug & Play Order*, 18 FCC Rcd. at 20910 (seeking to avoid “creating a regulatory and marketplace imbalance” between cable and DBS).

¹⁷ As to MPAA’s claim that the real problem is not that entities can circumvent the encoding rules, but instead that DIRECTV is subject to the rules in the first place, DIRECTV agrees, and continues to believe that the best outcome would be for the Commission to reconsider its jurisdiction and authority to extend the new encoding rules beyond the cable operators who helped negotiate them. See DIRECTV Petition at 3 n.5. To the extent such rules apply to *anybody*, however, they should apply to cable operators – the very entities for whom Congress crafted this legislation in the first place. See, e.g., Joint Comments of DIRECTV, Inc. and Hughes Network Systems, CS Docket No. 97-80 at 5-6 (filed May 16, 1997) (citing legislative history suggesting that Congress meant section 629 to apply only to cable operators); Opposition of DIRECTV to Petitions for Reconsideration, CS Docket No. 97-80 at 5 (filed Sept. 23, 1998) (same).

¹⁸ NCTA Opposition at 2; Opposition of the Motion Picture Association of America, Inc. to the Petition for Reconsideration Filed by DIRECTV, Inc. at 4 (filed Mar. 10, 2004) (“MPAA Opposition”); Comments on Petitions for Reconsideration of Microsoft, *et al.* at 8 (filed Mar. 10, 2004) (“IT Comments”); Consumer Electronics Industry Opposition to Petitions for Reconsideration at 15 (filed Mar. 10, 2004) (“CEA Opposition”).

¹⁹ IT Comments at 8; CEA Comments at 15.

²⁰ MPAA Opposition at 4.

²¹ IT Comments at 9.

interpreted its jurisdiction in this proceeding quite broadly). And, perhaps, such a solution would indeed drive content to foreign distributors or stifle innovative business models (although the descriptions of how this might happen strike DIRECTV as implausible). But surely one can address these kinds of concerns without creating such a large loophole for cable operators. After all, if cable operators are jurisdictionally subject to the encoding rules because they are “multichannel video programming systems” providing “multichannel video programming” under section 629 of the Act, there is no obvious reason why they should escape such jurisdiction when they offer the very same programming over a DOCSIS platform.²²

This is why DIRECTV has sought to eliminate from the new rules the loophole created by sections 76.1901(b) and (c), *but not* the scope of the rules implemented by section 76.1901(a).²³ This change would prevent cable operators from evading the rules by shifting their operations to a DOCSIS platform.²⁴ Yet it would keep the provision limiting the encoding rules’ reach to multichannel video programming systems. Assuming that the Commission continues to apply the encoding rules beyond cable operators in the first place, the “MVPD-only” provision should be more than sufficient to address any legitimate concerns about jurisdiction and Internet policy.

²² 47 U.S.C. § 549(a).

²³ See DIRECTV Petition at 5 (stating that, “[o]n reconsideration, the Commission should eliminate Subsections 76.1901(b) and (c) from its Rules, and remove the related parenthetical from Subsection 76.1902(g)”).

²⁴ The cable industry has already shown some proclivity for altering its operations in order to evade its regulatory responsibilities. Satellite carriers have long believed, for example, that cable operators have moved programming from satellite to terrestrial delivery in order to evade the program access requirements of section 548(c) of the Communications Act. See, e.g., *EchoStar Comm’s Corp. v. FCC*, 292 F.3d 749, 752 (D.C. Cir. 2002) (affirming Commission decision declining to find such evasion in the case of Comcast SportsNet).

III. THE COMMISSION SHOULD REQUIRE MINIMUM STANDARDS FOR TELEVISIONS CARRYING AN IEEE 1394 INTERFACE

DIRECTV warned in its Petition against the possibility of “promot[ing] inadvertently [a] cable-only version of the IEEE 1394 interface.”²⁵ DIRECTV asked the Commission to specify that televisions with such an interface must support a variety of 1394 standards.²⁶ BellSouth supports this request.²⁷

CEA, however, states that this request “seems unnecessary” because “consumer electronics manufacturers and retailers . . . have every incentive to specify interfaces that mate with DBS, as well as with cable, products.”²⁸ DIRECTV hopes CEA is right. If so, of course, DIRECTV’s proposal would create certainty while imposing minimal (if any) burden on consumer electronics manufacturers. If, though, CEA turns out to be wrong, DIRECTV’s proposal would prevent competitive distortion in the MVPD market. Requiring satellite operators to conform to a cable-only version of the 1394 interface would increase the cost and complexity of DBS set top boxes. And regardless of whether *most* CE manufacturers would deploy 1394 interfaces that mate with DBS boxes, the presence of even a small minority of cable-only devices would, as a practical matter, force DBS operators to deploy the more expensive set-top boxes to *everybody*. CEA has nowhere stated how such an outcome would serve the public interest.

As for NCTA’s observation that satellite operators should “conform their own set-top box connectors to whatever CE builds,”²⁹ DIRECTV understands why the dominant incumbent that can dictate standards would favor such a system, but wonders why any policy-maker would want to place the incumbent’s competitors needlessly at risk. Certainly, NCTA provides no good reason.

²⁵ DIRECTV Petition at 6.

²⁶ *Id.* As CEA notes, DIRECTV mistakenly included the CEA -861 specification in this list. CEA Opposition at 16. That specification of course relates to DVI, not 1394.

²⁷ BellSouth Comments at 3.

²⁸ CEA Opposition at 16.

²⁹ NCTA Opposition at 4.

CONCLUSION

For the foregoing reasons, the Commission should grant DIRECTV's Petition for Reconsideration.

Respectfully submitted,

Susan Eid
Vice President, Government Affairs
Robert H. Plummer
Senior Director, Advanced Technology
DIRECTV, INC.
2230 East Imperial Highway
El Segundo, CA 90245
(310) 535-5400

/s/

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth St, NW
Washington, DC 20036
(202) 730-1350

Counsel for DIRECTV, Inc.

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