**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In re<br><br>Digital Broadcast Content Protection | MB Docket No. 02-230 |

**THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION'S REPLY TO OPPOSITIONS TO NCTA PETITION FOR RECONSIDERATION**

The National Cable & Telecommunications Association ("NCTA"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby replies to the oppositions of EchoStar Satellite, LLC ("EchoStar"), the Consumer Electronics Industry ("CEA/CERC"), and the Motion Picture Association of America, Inc. to NCTA's Petition for Reconsideration or Clarification of the *Report and Order* issued in this proceeding.[1]

## I. THE RULES FOR COVERED DEMODULATOR PRODUCTS SHOULD APPLY TO DBS QPSK DEMODULATORS AS THEY DO TO CABLE SET-TOP BOXES

EchoStar's opposition to NCTA's petition is based on an apparent misunderstanding of the change that NCTA requested in the definition of "Demodulator" in "Covered Demodulator Products" that are subject to the Compliance and Robustness rules. First, EchoStar argues that because its conditional access system can convey the intent of the flag to its set-top boxes, it should not be required to carry the rc_descriptor to those same boxes.[2] We understand and agree that a conditional access system can relay the intent of the flag, and we have not objected to that solution nor sought reconsideration on that point. In fact, NCTA has supported the same option

[1] *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-273, 18 FCC Rcd 23550 (2003) ("*Report & Order*")

[2] EchoStar Opposition at 3.

for cable operators. Under Rule 76.1909(b)(2), which NCTA did not seek to change, neither DBS nor cable would have to transport the rc_descriptor in the EIT or PMT if the conditional access system conveys the intent of the flag.[3]

NCTA's petition sought reconsideration of Section 76.9000(g) of the Rules. That rule defines QAM Demodulators (which are used by cable operators) as subject to the Compliance and Robustness rules applicable to the broadcast flag, but exempts QPSK and 8-PSK Demodulators (which are used by DBS providers). We merely asked that the set-top boxes used by both the cable and DBS industries be subject to the same requirements. EchoStar's argument is that because it encrypts, as a provider it has a direct obligation under Rule 76.1090(b)(2) to require DBS boxes to behave "as if" they were subject to the rules. But cable operators have the same obligation under 73.9002(b), whether they encrypt or not.[4]

Under the current rule, a cable device is subject to output, recording, robustness and similar requirements, while a DBS device is not. Under the current rule, the manufacturers and retailers of those cable devices are subject to specific obligations from which the manufacturers and retailers of DBS boxes are exempt. EchoStar's opposition does not provide any significant reason why DBS boxes and DBS manufacturers and retailers should be treated differently. Indeed, if, as EchoStar says, its units will include 8-VSB tuners,[5] this is all the more reason to apply the same rule to satellite providers' boxes as to cable operators' boxes.

MPAA's objection to equivalent treatment of satellite boxes offers no real reason for opposition, except to induce cable to encrypt all basic tiers. MPAA claims (at 2) that if cable

[3] Echostar also confuses the application of the rule to unencrypted broadcast signals with encryption by an MVPD, but this point is somewhat tangential to its argument. EchoStar Opposition at 3-4.

[4] EchoStar also argues that NCTA's requested rule change could suddenly subject DOCSIS modems to broadcast flag requirements. But Rule 76.1909 already requires that if a cable operator delivers broadcast programming (with the rc_descriptor) over a DOCSIS channel, then those devices would be covered under the rules.

[5] EchoStar Opposition at 2, 4-5.

encrypts broadcast signals as DBS does, the difference in the rules will "evaporate." But even if the rules were clarified to permit cable operators to encrypt broadcast signals, the concern expressed in the NCTA petition will remain, because QAM demodulators are subject to a set of requirements that are not applied to QPSK and 8-PSK demodulators. The rules should be changed accordingly.

We explained in our petition that the enforcement mechanisms for broadcast flag rules are likely to be the same for cable set-top boxes and DBS boxes—testing each industry's set-top boxes to assure that the network and the boxes are working together to protect the flag. MPAA does not dispute that. MPAA contends that each industry needs to respect the flag, one by regulation, and one by private license agreement, and asserts that "[i]t is arguable which type of retransmitter bears a greater burden under the regulation."[6] The Commission can moot the argument by adopting the proposed rule change, putting devices used by cable and DBS customers on an equal footing with respect to implementing the broadcast flag.

## II. THE COMMISSION SHOULD REMOVE THE RULES' INADVERTENT FREEZE ON NETWORK INNOVATION

NCTA requested that references within Sections 76.1909(c)(2) and 73.9000(g) of the rules include successors to 64 and 256-QAM. Without such references, a rule change or waiver would be needed whenever a cable operator deployed modulation schemes not specifically referenced in the rule. MPAA's opposition argues that the broadcast flag rule is intended to grandfather only the particular forms of modulation that cable operators now use, and that all subsequent forms of modulation must be encrypted. But, of course, the current rules prohibit

[6] MPAA Opposition at 5.

cable's encryption of the broadcast signals so the MPAA opposition, premised as it is on a hypothetical rule change, must be rejected.

MPAA's primary justification for insisting on encryption for any successor modulation scheme is that unencrypted source broadcasting cannot continue to be retransmitted unencrypted beyond current "legacy" systems. But the broadcast flag has been advertised as creating a "speed bump" against Internet retransmission, not as creating a broad constraint on innovation as acceptance of the MPAA argument would do. So long as the protected content is unencrypted at the source, the broadcast flag cannot legitimately be turned into a means for dictating the transport technology for all distributors, or it will become only an excuse for technology mandates and constraints on innovation that are unjustified by its announced purpose.[7] As we have demonstrated elsewhere in this docket,[8] encryption of the basic tier should be an option, but not a requirement for cable operators. Because MPAA's opposition to NCTA's proposed rule change is premised on an insistence that basic service always be encrypted, MPAA's opposition should be rejected.

## III. THE COMMISSION SHOULD CLARIFY THAT CABLE OPERATORS MAY DISTRIBUTE PROGRAMMING OVER ROBUST HOME NETWORKS

CEA/CERC opposes NCTA's request for clarification that the rules permit both Marked Content and Unscreened Content to be transported around home networks using Robust Methods, so long as the content is under the "sole control" of a Covered Demodulator Product. CEA/CERC does not address the language or purpose of the rule and clarification. Instead, it reiterates a mistaken attack that it has raised in other pleadings in this docket within the past

[7] MPAA also contends that NCTA's request would create enforcement burdens because cable might adopt a new modulation scheme *after* someone builds a modulator. But neither this example, nor its other parade of horribles (at p. 5) —AM/FM radio demodulators, modems, faxes, cell phones, and other products—would even be "Demodulators," unless they are "for the purpose of digital television reception." §76.9000(g).

[8] See Comments of NCTA, February 13, 2004, at 4-6; Reply Comments of NCTA, March 15, 2004, at 1-5.

month.[9] It claims, erroneously, that NCTA's proposal would lock up a network in conditional access.[10]

The concerns expressed by CEA/CERC are misplaced. If a cable operator were to use a Robust Method for in-home distribution of Marked Content and Unscreened Content, it would be only one of many options for use in home networking. We anticipate that there will be multiple, competing home networks using wired and wireless connections and a variety of content protection techniques (or in this case, flag preservation techniques). *See* Exhibit A, attached hereto, for a schematic showing how readily competing home networks may be deployed. Any customer could choose a networking device provided by a cable operator or any competitive supplier. Each provider must use a Robust Method with some form of content protection technology for sharing the content downstream. There is no requirement that devices inside the home use DigiCipher, PowerKey, NDS, or any other content protection tool used on a cable operator's outside plant, in order to qualify as a Robust Method. The concerns of CEA/CERC that home networking would be somehow limited are without substance.

CEA/CERC also conspicuously omits any discussion of the practical issues raised by NCTA: that MPAA's approach – allowing only Unscreened Content to be distributed using a Robust Method – is infeasible in home networks where broadcast signals are carried.[11] Instead, CEA's opposition is focused on one point: it does not want any a multi-room DVR operated by a cable system to control and send the display to another room via Robust Methods. There can be significant consumer benefits to allowing a cable operator supplied multi-room DVR to share

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[9] CEA/CERC Opposition at 4; CEA Comments, February 13, 2004, at 2-3; CERC Comments, February 13, 2004, at 1-3.

[10] CEA/CERC Opposition at 4.

[11] NCTA Petition for Reconsideration or Clarification at 7.

programming with a legacy set-top box (or any other device) in another room. CEA's members also offer various forms of home networking, many of them proprietary.[12] Nothing in the proposal to allow Robust Methods for transporting Marked Content and Unscreened Content prevents anyone from offering such products. The CEA/CERC position would preclude cable operators from offering competing home networking methods, thereby retaining that market entirely for the CE industry, and denying consumers a choice. That is not a principled basis for denying the clarification requested by NCTA.[13]

MPAA also omits any discussion of these practical issues, but opposes this requested clarification.[14] Its Opposition is explicitly based on broadcast flag rules MPAA had proposed be adopted, not the rules the FCC actually adopted. MPAA contends that there is a difference of opinion about what was intended by the participants in the BPDG as to the intent of the proposed rules on networking. But the FCC rules did not adopt the language proposed by MPAA. The rules do not say that a second device under "sole control" of another device may have no display. Rather, they say that both Marked Content and Unscreened Content may be transported around home networks using Robust Methods, so long as the content is under the "sole control" of a Covered Demodulator Product. This is the point NCTA seeks to make absolutely clear so that there will not be the kind of dispute that MPAA raises. Indeed, by proffering a late request for a new rule definition, MPAA has tacitly admitted that the rules do not say what it wishes they said.

MPAA also argues that NCTA's request would nullify Table A. To the contrary: Table A will continue to define permitted technologies as devices pass flagged content over to the

[12] For example, the new "Super G" wireless home networking gear relies on proprietary technology. http://compnetworking.about.com/b/a/059026.htm. Other major manufacturers are developing proprietary home networking solutions.

[13] *See* Reply Comments of NCTA, March 15, 2004, pp. 2-4.

[14] ATI Technologies, Inc also filed a perfunctory opposition raising the same point about multi-room DVRs, the substance of which is addressed in this response to MPAA.

independent control of another device. NCTA's petition addressed the connection of one device to another, where the first device remains in "sole control" of any display by the second. There is no risk imposed on flagged content.

MPAA's Opposition actually offers good reasons to adopt NCTA's proposal. We offered as examples of a robust connection the use of encryption and conditional access to control the disposition of the flagged content in a device under the sole control of another. As MPAA explained in its Opposition: "The Broadcast Flag regulation ensures compliance by regulation where necessary, but allows private solutions where they would be effective."[15] Those MPAA-endorsed "private solutions" that include encryption allow the encryptor to "include in their decryption licenses a condition that the decrypting device must adhere to the Flag regulation's compliance and robustness rules. …To meet its obligations under the regulation, the retransmitter must require the receiving device manufacturer to sign a decryption license obligating the receiving device to protect Marked Content upon decryption, similar to a license for a Table A technology that manufacturers of non-demodulating sink devices must sign."[16] NCTA's proposed solution can meet all of those requirements, "just as if the content were moving within the Covered Demodulator Product only," as proposed by MPAA,[17] and precisely as stated by the text of the rules as adopted.

[15] MPAA Opposition at 3.
[16] Id. at 3-4.
[17] Id. at 7.

## CONCLUSION

For the reasons stated above, NCTA requests that the Commission make the changes and clarifications requested in its Petition for Reconsideration or Clarification.

Respectfully submitted,

**/s/ Daniel L. Brenner**


Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk

National Cable & Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903
202-775-3664

William A. Check, Ph.D.,
Vice President, Science & Technology

Andy Scott, Senior Director, Engineering

Paul Glist
Cole, Raywid, & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
202-828-9820
pglist@crblaw.com

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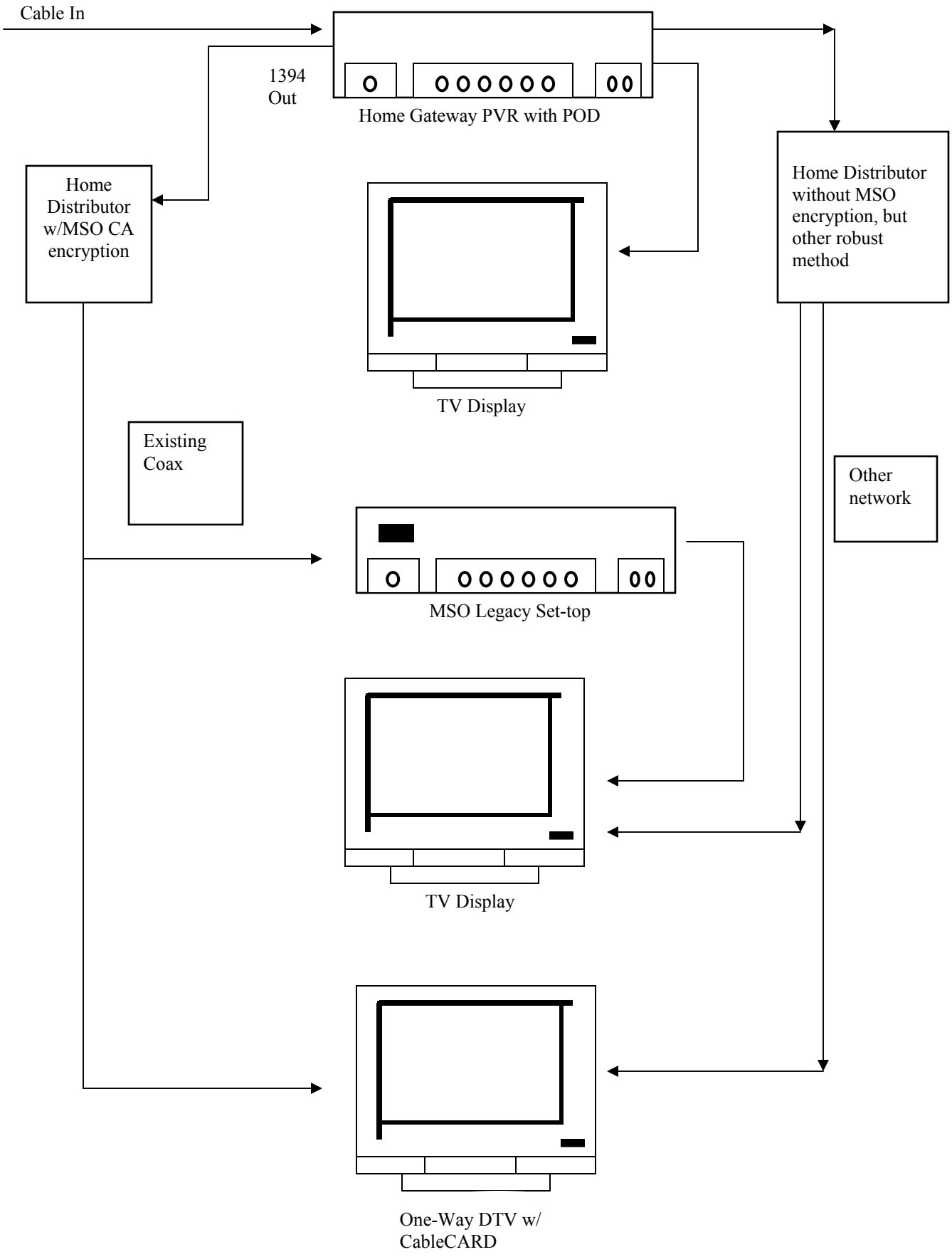
**Exhibit A**


Cable In
1394
Out
Home Gateway PVR with POD
Home Distributor w/MSO CA encryption
Home Distributor without MSO encryption, but other robust method
TV Display
Existing Coax
Other network
MSO Legacy Set-top
TV Display
One-Way DTV w/ CableCARD

## CERTIFICATE OF SERVICE

I, Julie P. Gordy, do hereby certify that a copy of the foregoing "National Cable & Telecommunications Association's Reply to Oppositions and Comments to NCTA's Petition for Reconsideration" was served by United States First Class Mail, postage prepaid, this 24th day of March, 2004 on the following:

Pantelis Michalopoulos
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, D.C. 20036

Karen E. Watson
Lori Kalani
EchoStar Satellite LLC
1233 20th Street, NW
Washington, D.C. 20036

Michael D. Petricone
Vice President, Technology Policy
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201

Marc A. Pearl
Executive Director
Consumer Electronics Retailers Coalition
1341 G Street, N.W. – Suite 1100
Washington, D.C. 20005

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005

Jon A. Baumgarten
Bruce E. Boyden
Proskauer Rose LLP
1233 Twentieth Street NW, Suite 800
Washington, DC 20036

Geoff Phillips
ATI Technologies, Inc.
33 Commerce Valley Drive East
Thornhill, Ontario L3T 7NG
Canada

_/s/_ Julie P. Gordy____