

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

_____)	
In the Matter of)	
)	
Petition For Rulemaking And Request For)	
Declaratory Ruling Filed By The Coalition)	MB Docket No. 09-23
United To Terminate Financial Abuses Of)	
The Television Transition, LLC)	
_____)	

**REPLY COMMENTS OF FUNAI ELECTRIC CO., LTD.
AND FUNAI CORPORATION, INC.**

Funai Electric Co., Ltd. and Funai Corporation, Inc. (collectively, “Funai”),¹ by their counsel, reply to the comments filed with the Commission regarding the above-captioned petition (“Petition”) of the Coalition United To Terminate Financial Abuses of the Television Transition LLC (the “Coalition”).² The record in this proceeding supports the Commission’s firm rejection of the Coalition’s proposals to broadly regulate the rates, terms, and conditions of patent licenses involving digital television (“DTV”).

¹ Funai filed initial comments in this proceeding on April 27, 2009. Funai has served U.S. consumers for many years by providing high-quality, low-cost DTVs, digital converter boxes, CRT TVs (including both analog and digital), and other consumer electronics in the United States. Funai licenses its DTV technology to other suppliers. Funai established its U.S. presence in 1991. Funai’s U.S. headquarters are in Rutherford, New Jersey, with an office in Torrance, California.

² See *Reasonable and Nondiscriminatory Licensing of Patents Essential to Implementation of Mandatory Digital Television Standards*, Petition for Rulemaking and Request for Declaratory Ruling (filed Jan. 2, 2009); *Petition for Rulemaking and Request for Declaratory Ruling Filed by the Coalition United to Terminate Financial Abuses of the Television Transition, LLC*, Public Notice, 24 FCC Rcd 2407 (MB 2009).

I. MOST COMMENTERS, INCLUDING NEUTRAL PARTIES, OPPOSE THE PETITION.

A strong majority of the initial comments oppose the Petition based on its fundamental legal and policy infirmities.³ Most notably, two neutral third parties, the Advanced Television Systems Committee, Inc. (“ATSC”) and the American Bar Association Section of Science and Technology Law (“ABA Science and Tech Law Section”), filed initial comments that voice substantial concerns about the Petition’s unsupportable proposals. Another neutral third party, the American National Standards Institute (“ANSI”), filed reply comments on May 26, 2009, also expressing concern about specific aspects of the Petition.⁴

ATSC is an international non-profit organization that coordinates the “development, implementation and promotion of voluntary technical standards for advanced television systems.”⁵ ATSC’s members include broadcasters and programmers as well as equipment manufacturers.⁶ Neither the Coalition’s two members -- VIZIO, Inc. (“VIZIO”) and Westinghouse Digital Electronics, Inc. (“WDE”) -- nor Funai is a member. ATSC emphatically opposes the Petition because of its likely harm to television product innovation, the standards process and, ultimately, consumers:

³ ATSC, ABA Science and Tech Law Section, Koninklijke Philips Electronics, N.V.2 and Qualcomm Inc. (“Koninklijke Philips/Qualcomm”), Mitsubishi Electric Corporation, MPEG LA, LLC, Philips Electronics North America Corporation and LG Electronics USA, Inc. (“Philips/LG”), Thomson Licensing LLC and Thomson S.A. (“Thomson”), Valley View Corporation, and Zenith Electronics LLC, all filed either oppositions to, or comments criticizing, the Coalition Petition on April 27, 2009.

⁴ ANSI is the “coordinator of the [United States’] private sector-led and public-sector supported standardization system.” ANSI “oversees the creation, promulgation, and use of thousands of norms, guidelines, and conformance activities that directly impact businesses in nearly every industry.” ANSI Reply Comments at 1.

⁵ ATSC Comments at 3.

⁶ See ATSC Members, <http://www.atsc.org/members/>.

The ATSC is gravely concerned that a proposal to regulate licensing terms under the ATSC DTV Standard, if adopted by the Commission in response to the Petition, would stifle innovation and discourage members of the advanced television systems industry from participating in the creation of new technology standards. Today's market-driven licensing model -- where license terms are determined by parties in the context of negotiated business arrangements -- provides an economic incentive for industry members to invest in research and development and to create new inventions. These innovations serve as catalysts for industry members to participate in technology standards development activities and to update existing standards or create new standards. The ATSC strongly believes that encouraging the continual evolution of standards is essential for the advancement of DTV [t]echnology that will benefit industry members and consumers alike.⁷

ATSC has established a Patent Policy that governs the use of essential patent claims for technologies in its standards, including the ATSC DTV Standard.⁸ Under the ATSC Patent Policy, participants in ATSC standards development that have essential patent claims to technologies used in ATSC standards must make those technologies available under reasonable and nondiscriminatory ("RAND") terms and conditions. ATSC notes that the ATSC Patent Policy applies to all participants involved in development of the ATSC DTV Standard.⁹ This policy has succeeded because, as Funai explained in its initial comments, holders of DTV patents, including Funai, "have licensed their technology widely, on reasonable terms and conditions."¹⁰

The ABA Science and Tech Law Section, an infrequent commenter before the Commission, specifically opposes the Petition's proposal to establish regulatory "benchmarks" for assessing the reasonableness of RAND licensing based on "international comparable" royalty

⁷ ATSC Comments at 6. Although commenter Rob Glidden proposes a royalty-free standards process, *see* Glidden Comments at 1, such a process would seriously hamper incentives for innovation.

⁸ *See* ATSC Comments at 2 and Exhibit A.

⁹ *See id.* at 2, 3-4.

¹⁰ *See* Funai Comments at 9.

rates, and ANSI agrees in its reply comments.¹¹ The expertise of the ABA Science and Tech Law Section regarding patent licensing issues is reflected in the ABA's *Standards Development Patent Policy Manual*, published in 2007 (the "ABA Manual").¹² The ABA Science and Tech Law Section cautions that:

[I]t is difficult to make generalizations about RAND royalty rates without taking into account the many other material terms and conditions that are included in patent licenses, many of which differ from licensee to licensee. Due to these distinctions among individual licenses no single data point including an 'international comparable' should serve as a benchmark for each proffered license. Consequently, we urge the Commission to consider this broader range of factors and the complexity that would be involved in considering the appropriateness of CUT FATT's specific request¹³

The ABA Science and Tech Law Section rightly questions the Petition's proposal to have patent holders bear the burden of proving that fees higher than "international comparables" are reasonable and nondiscriminatory, requesting that the Commission "recognize fully the complexities of the issue raised by the Petition."¹⁴ The ABA Science and Tech Law Section details the complexities of RAND licensing, which previously have been addressed in the ABA Manual, demonstrating that numerous factors not even mentioned in the Petition inform this specialized field.¹⁵

ANSI argues that the Petition's proposal to form a patent pool raises antitrust and competition law issues, and agrees with commenter MPEG LA, LLC that "the patent pool proposal may have unintended consequences that will be known only in hindsight."¹⁶ ANSI

¹¹ See ABA Science and Tech Law Section Comments at 3, 4 and n.8; ANSI Reply Comments at 5.

¹² See ABA Science and Tech Law Section Comments at 2.

¹³ *Id.* at 3-4. See also ANSI Reply Comments at 5.

¹⁴ See ABA Science and Tech Law Section Comments at 6-7.

¹⁵ See *id.* at 5-6.

¹⁶ See ANSI Reply Comments at 5, 6.

notes that several parties filing initial comments also “seem to share ANSI’s antitrust concerns” regarding the Petition’s proposal for mandatory patent pools.¹⁷ Considered together, the arguments advanced by several neutral, third-party experts – ATSC, the ABA Science and Tech Law Section, and ANSI – strongly support rejection of the Petition.

Numerous other commenters point out the infirmities of the Petition. Several parties question the Commission’s jurisdiction in this area, citing the D.C. Circuit’s decision in *American Library Association v. FCC*.¹⁸

Multiple parties agree that the current system of enforcing patent-holders’ rights is working effectively to promote DTV innovation and availability to consumers.¹⁹ Zenith, Thomson, Koninklijke Philips/Qualcomm and others demonstrate that U.S. consumers already are benefiting from a U.S. market for DTVs that is both competitive and innovative, with multiple suppliers offering a wide variety of DTVs at prices that have decreased dramatically over the years.²⁰ As a result, the Coalition’s scheme is irrelevant to the ongoing success of the DTV transition, and could even harm the U.S. market for products that incorporate DTV technology.²¹ For example, MPEG LA, states that the Coalition’s proposals would discourage

¹⁷ See *id.* at 6 n. 10 (citing MPEG LA Comments at 7, Mitsubishi Comments at 7, and Koninklijke Philips/Qualcomm Comments at 17).

¹⁸ See Koninklijke Philips/Qualcomm Comments at 7, Thomson Comments at 2, and Zenith Comments at 2, *citing American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

¹⁹ See ATSC Comments at 6; Koninklijke Philips/Qualcomm Comments at 4; LG/Philips Comments at 2; Thomson Comments at 2-3; Zenith Comments at 12-13.

²⁰ See Koninklijke Philips/Qualcomm Comments at 14-15; Thomson Comments at 3; Zenith Comments at 12.

²¹ See, e.g., Koninklijke Philips/Qualcomm at 15-16. As Zenith and Thomson explain, the Petition is based on a mischaracterization of general Commission statements from early DTV orders and notices about RAND patent licensing as enforceable regulatory requirements. Because no such requirements exist, they cannot be the subject a request for declaratory ruling, which seeks to establish “forfeiture principles” for these alleged requirements. See Zenith Comments at 19-20 and Thomson Comments at 4. Valley View states that it is not aware that

innovation because inventors will be subject to a “planned” marketplace if their inventions are successful.²² Further, as Mitsubishi explains, the relief sought by the Coalition would force patent holders to form a mandatory licensing pool defined by government-set royalties, an outcome never contemplated by Congress or any U.S. agency.²³

Other parties also point out that Commission regulation of patent licenses would intrude on court decisions and International Trade Commission (“ITC”) determinations that already protect the rights of DTV patent holders.²⁴ Parties warn against creating a broad regulatory scheme that would effectively install the Commission as another forum for resolving patent disputes currently handled by the courts and the ITC. In fact, in December 2008, during an ITC investigation in which the ITC determined that Coalition member VIZIO infringed on a DTV patent owned by Funai, VIZIO represented that the U.S. district courts are the proper place to decide RAND issues involving DTV patents. According to VIZIO:

The proper forum to determine what is ‘reasonable and nondiscriminatory’ is a district court, not the ITC. Indeed, Funai has already filed district court actions against Respondents seeking a reasonable royalty, so dismissing the Complaint in [the ITC] would allow those district court actions to proceed to determine a ‘reasonable and non-discriminatory’ royalty for any infringement of the ’074 Patent.²⁵

there has been “any obstruction” to the DTV services mandated by the Commission. Valley View Comments at 8.

²² See MPEG LA Comments at 7.

²³ See Mitsubishi Comments at 3.

²⁴ See Koninklijke Philips/Qualcomm Comments at 3-4; Philips/LG Comments at 2; Thomson Comments at 3; Zenith Comments at 18.

²⁵ See *Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same*, ITC Inv. No. 337-TA-617, Respondents’ Petition for Review of Judge Charneski’s Initial Determination at 68 (Public Version Dec. 11, 2008).

Less than one month later the Coalition, representing VIZIO, petitioned the Commission, imploring it to assume jurisdiction over RAND issues. VIZIO apparently seeks any forum that will rule in its favor, regardless of jurisdictional propriety.²⁶

II. THOSE FEW COMMENTS SUPPORTING THE PETITION SHOULD BE REJECTED.

The remaining commenters do not provide convincing support for the Petition. Harris Corporation (“Harris”), which states general support for the Petition, expressly refrains from supporting the Petition’s specific proposals.²⁷ Rather, its comments focus on unrelated private patent litigation that Rembrandt Technologies, L.P. (“Rembrandt”) has brought against Harris regarding a DTV patent.²⁸ By Harris’ own admission, the Delaware state court found in that case that Rembrandt, the patent holder, is subject to a RAND commitment and that Rembrandt is contractually bound to license the disputed patent to Harris on RAND terms.²⁹ Harris appears to be concerned that the pending litigation will set an unfavorable precedent, and, like VIZO, seeks the Commission as an alternative forum by proposing its own set of “threshold requirements.” As the record demonstrates, and as addressed above, use of scarce Commission resources to create a new forum for patent disputes is unnecessary and, in fact, is against the public interest.³⁰

Although Harris purports to make a reliance-based argument by claiming that it relied on the Commission to take “action when needed” regarding RAND licensing,³¹ Harris provides no evidence of any such reliance, let alone reliance to Harris’ detriment. Harris in no way indicates

²⁶ See David S. Hancock Comments.

²⁷ See Harris Comments at 2.

²⁸ See *id.* at 3.

²⁹ See *id.* at 3-4.

³⁰ See *supra* note 20; see also Funai Comments at 2-3.

³¹ See Harris Comments at 2.

that it sought Commission action on its patent issue prior to its initial comments or, for example, ever asked a court for a primary jurisdiction referral to the Commission. Although Harris claims that Commission involvement is needed to protect the DTV transition, it fails to demonstrate how its proposals would affect the DTV transition at all.

Similarly, although RetireSafe claims that American consumers are the subjects of “price gouging” by DTV patent holders,³² the overwhelming evidence in this proceeding shows that the DTV marketplace is one of the most competitive in the United States, as demonstrated by declining DTV prices over the years and the multiple DTV suppliers and manufacturers that compete for sales.³³ The real consumer issues related to the DTV transition have involved consumer education and difficulties with the discount coupons for digital converter boxes. The availability of inexpensive DTVs to consumers has never been an issue in the DTV transition.

Finally, GTW Associates requests the Commission consider several statements in a variety of Commission documents regarding patent and royalty matters and seeks clarification of their meaning and/or interrelationship.³⁴ The Commission should not devote its scarce resources to such an inquiry, some of which appears to lie outside the scope of the Petition. As shown by the comments of the ATSC, the ABA Science and Technology Section, and multiple other parties in this proceeding, the Commission has no reason to become further embroiled in patent licensing issues that already are being addressed competently by private parties, other expert agencies, and the courts.

³² See RetireSafe Comments at 1.

³³ See Funai Comments at 8-9; Koninklijke Philips/Qualcomm Comments at 14-15; Thomson Comments at 3; Zenith Comments at 12.

³⁴ Although the GTW comments are dated April 27, 2009, a search of the Commission’s Electronic Comments Filing System webpage indicates that the Commission received them on May 5, 2009.

III. CONCLUSION.

As demonstrated by the initial comments on the Petition, the Commission should reject promptly the Coalition Petition and deny both the request for declaratory ruling and the petition for rulemaking.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May 2009, a copy of the foregoing Reply Comments of Funai Electric Co., Ltd. and Funai Corporation, Inc. has been served to the following via the indicated methods:

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