

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

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

VIA ELECTRONIC FILING

**REPLY COMMENTS ON CUT FATT'S PETITION FOR
RULEMAKING AND REQUEST FOR DECLARATORY RULING**

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EXECUTIVE SUMMARY

The Petition for Rulemaking and Request for Declaratory Ruling submitted January 2, 2009 by the Coalition United to Terminate Financial Abuses of the Television Transition LLC ("CUT FATT"), cites widespread and continuing overcharging and overreaching in US digital television ("DTV") patent licensing and proposes a set of remedial and corrective measures.

The Commission's request for comments has brought mostly highly critical opposing comments from patent holders, and mostly mild or ambivalent comments from standards groups and other interested parties. Only one commenter, Harris Corporation, themselves an acknowledged recipient of the sort of licensing practices for which the CUT FATT petition seeks redress, takes a direct stance in favor of the spirit of the petition. Perhaps more comments will surface.

There is more to this topic, however, and a different perspective ought to be aired and considered. Public standards require public accountability. America pays more for less in DTV standards. Current DTV licensing practices are not working. The FCC should engage more, not less, in standards.

These reply comments, generally supportive of the CUT FATT petition but in some ways encouraging of an even broader consideration, endeavor to provide information and reasoning that highlight concerns raised by the CUT FATT petition and request that the Commission look more, and more deeply, into these matters. Perhaps one beneficial outcome of the CUT FATT petition, beyond worthy immediate redress, might be to reawaken competitive juices and inspire a needed serious look to the future of digital TV and broadband in the network age.

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I, Rob Glidden, hereby respond to the Commission's request for reply comments on the above-referenced Petition for Rulemaking and Request for Declaratory Ruling (the "Petition")¹, and respectfully request that the Commission consider taking further action on matters raised in the Petition.

BACKGROUND

Twenty two years ago, in 1987, American broadcasters petitioned the FCC to catch up with Japan's head start in high-definition TV, sounding an alarm that:

"NHK's system has been under development for 15 years at the cost of hundreds of millions of dollars."²

¹ See FCC Public Notice, *Media Bureau Action, Petition for Rulemaking and Request for Declaratory Ruling Filed By The Coalition United to Terminate Financial Abuses of the Television Transition, LLC*, MB Docket No. 09-23, DA 09-439 (Feb. 25, 2009). Comments responding to the Public Notice include filings by the American Bar Association Section of Science & Technology Law ("ABA"), Advanced Television Systems Committee, Inc. ("ATSC"), Funai Electric Co., Ltd. and Funai Corporation, Inc. ("Funai"), GTW Associates ("GTW"), Harris Corporation ("Harris"), Mitsubishi Electric Corporation ("Mitsubishi"), MPEG LA, LLC ("MPEG LA"), Philips Electronics North America Corporation and LG Electronics USA, Inc. ("Philips/LG"), Koninklijke Philips Electronics, N.V. And Qualcomm Inc. ("Philips/Qualcomm"), Retiresafe, Thomson Licensing LLC and Thomson S.A. ("Thomson"), Valley View Corporation ("Valley View"), and Zenith Electronics LLC ("Zenith").

² 1987 petition launching FCC docket 87-268 (emphasis added)

Today, arguably *thirty seven years* after the beginning in earnest of the commercial development of DTV systems, patent holders, in strikingly mirroring language to twenty two years ago, claim that they still have not been adequately compensated under a patent system that protects inventions for only twenty years:

"patent royalties properly due to dozens of DTV technology innovators who spent **many years and hundreds of millions of dollars developing the technology**"³

And there appears to be no end in sight. Unidentified yet still needed “innovation” is claimed as the justification for a system of perpetual catch-up and the continuation of a largely unmonitored and confidential pricing system that is little more than an illusion of public list prices masking a constructed complex of cross-licensing, discounting, and conveniently-timed announcements of incomplete patent pools, often many years, and even over a decade, after the completion of standards. And despite the self-congratulatory appeals to American pride and success lacing many comments, the fact is that the American US DTV system has largely slipped from the world stage, giving way to the perception, whether reality or not, of less expensive and more fully-featured DTV systems, and now offers little more than a cautionary tale to a now-needed American Broadband Plan.

This could not have been the DTV system that America anticipated 22 years ago. How did we get so far off track, and what is the way back to competitiveness, sustainable innovation, and a more sound network policy for our networked and broadband age?

Constructive steps and thinking can be found in a Petition for Rulemaking and Request for Declaratory Ruling submitted January 2, 2009 by the Coalition United to Terminate Financial Abuses of the Television Transition LLC (“CUT FATT”), which cites widespread and continuing overcharging and overreaching in US digital television (“DTV”) patent licensing.

³ Zenith at i (emphasis added).

The CUT FATT petition proposes two basic approaches to address overreaching and improve licensing practices:

- A presumption of reasonableness based on “international comparables”⁴
- Encouragement of patent pool formation and review of terms.⁵

The Petition has drawn strongly-worded opposition comments from US DTV patent holders, including several ATSC patent pool and Grand Alliance members, and MPEG-2 patent holders,⁶ or their successors. Comments deny any problem at all;⁷ claim the proposals are unprecedented and contrary to the American free market system;⁸ assert the remedies extend unlawfully beyond the Commission's authority;⁹ raise the specter of undermining of the U.S. patent system as a whole;¹⁰ argue that proposals are intrusive,¹¹ extreme,¹² arbitrary,¹³ and/or

⁴ “First, the FCC should declare that DTV royalty demands for claimed "essential" patents that exceed international comparables are presumed to violate the FCC's RAND requirements. Patent holders that demand fees higher than international comparables should have the burden of proving that those fees are reasonable and nondiscriminatory, and the FCC should state its intention to impose forfeitures on parties that cannot do so.” CUT FATT Petition at 3.

⁵ “[T]he FCC should require "essential" patent holders - parties claiming to hold patents that are needed to implement FCC-mandated standards - to declare their patents and make best efforts to form a license pool. The FCC should review the terms offered by any such pool for compliance with the FCC's existing RAND standard.” CUT FATT Petition at 3

⁶ “The MPEG-2 portfolio license includes essential patents owned by Alcatel Lucent; British Telecommunications plc; CIF Licensing, LLC; Columbia University; Fujitsu; GE Technology Development, Inc.; Hitachi, Ltd.; KDDI Corporation; LG Electronics; Mitsubishi; Nippon Telegraph and Telephone Corporation (NTT); Panasonic Corporation; Philips; Samsung Electronics Co., Ltd.; SANYO Electric Co., Ltd.; Scientific-Atlanta, LLC; Sony; Thomson Licensing; Toshiba Corporation; and Victor Company of Japan, Ltd. (JVC). See <http://www.mpegla.com/m2/index.cfm>.” Zenith at n.24

⁷ “In short, the Petition’s proposals for DTV patent licensing regulation by the Commission are, at most, a questionable solution in search of a public policy problem – and the problem does not exist.” Thomson at 5.

⁸ “CUT FATT is asking the FCC to do something which is unprecedented. Neither Congress nor a U.S. government agency has ever compelled patent holders to form a licensing pool defined by government-mandated royalties. In essence, this would be a grant of a compulsory license for what the licensee wants to pay. Such *ex post* regulation of prices runs contrary to the patent system's goal of encouraging innovation and, quite frankly, to the American free market system.” Mitsubishi at 3.

⁹ “[a]ny attempt by the FCC to regulate the royalties of MPEG LA, or any patent relating to DTV decoders, would unlawfully exceed the FCC's authority” Mitsubishi at 4.

¹⁰ “[T]he *ex post* regulation of patent royalties undermines the intent of the patent system, and basically amounts to a governmental taking of patent rights” Mitsubishi at 10.

¹¹ “intrusive regulation” (Philips/LG at 1); “elaborate regulatory framework” (Thomson at 2); “unprecedented action” (Zenith at 3).

¹² “CUT FATT is asking the Commission to take an extreme, unprecedented, and unauthorized regulatory action,” Mitsubishi at 6.

¹³ “Petitioner proposes to rewrite countless existing private license agreements and void existing patent pool agreements covering hundreds of essential DTV patents by requiring patent holders to make the patents available either for free or on terms which the Petitioner arbitrarily and unilaterally deems reasonable and nondiscriminatory.”

dangerous and retarding of innovation¹⁴; and assert the premises are founded on non-existent requirements of reasonableness¹⁵. Some comments simply express competitively visceral concerns.¹⁶

A. DTV Licensing Practices Have Undermined American Competitiveness

It is noteworthy to consider the defense that commenters *do not* mount in their defense of the status quo. Apart from general claims that the market for US digital *televisions* is competitive (a fact no doubt attributable to a host of global and domestic factors in the decades-long transition to digital technologies in general), there is little to no specific defense of the US DTV system of standards and specifications as being particularly world-class, world's-best, pride-of-the-world, or any such claims of particular impressiveness. Tellingly, there are tepid allusions to factors such as "unique interference issues not present in other parts of the world",¹⁷ dismissing comparisons to the rest of the world as "specious"¹⁸. No doubt advocates of particular standards can step up to make compelling cases, and healthy global competition is no doubt a good thing.

But such faint praise and defensive claims of uniqueness are telling, and reflect the situation that the US DTV system has lost ground on the global stage in recent years, and has lost competitive positioning in a broader competition for global influence. As described below, DTV

Zenith at 3.

¹⁴ "Government intervention is both unwarranted and would set dangerous precedents that likely would retard innovation" MPEG LA at 4.

¹⁵ "The entire rationale for the Petition is based on a mischaracterization of general Commission statements from early DTV orders and notices about reasonable and nondiscriminatory ("RAND") patent licensing as enforceable regulatory requirements. Of course, no such requirements exist, and therefore cannot be the focus of a request for declaratory ruling, which seeks to establish "forfeiture principles" for these non-existent requirements." Funai at 3.

¹⁶ "Vizio and WDE are not looking out for consumers. Instead, they are looking to further pad their own bottom lines." Zenith at ii. "Petitioner Is A Coalition Of Two "Patent-Poor" DTV Set Makers." Zenith at 5. "Indeed, rather than risking investment in the creation of new technology, Vizio and WDE have chosen to ride on the successful R&D efforts of the DTV technology pioneers." Zenith at 12

¹⁷ Zenith at 15.

¹⁸ [T]he robust and feature-rich ATSC DTV Standard developed in the United States is very different from the overseas television technologies of DVB-T in Europe and ISDB in Japan, making specious the comparison on which Petitioner attempts to rely. Zenith at 15.

licensing practices are hardly incidental to this situation, they are a central and contributing factor.

B. Petition Proposals are Modest; Commission Should Consider Doing More

What the strongly-worded opposing comments cited above *are not saying* is that over the years other processes and techniques have have been developed and implemented around the world to address patent licensing concerns, including facilitation, arbitration, ex ante RAND, and royalty free processes, each of which has claim to at least some extent addressing concerns raised by the CUT FATT petition. The CUT FATT petition, in this context, is a modest and remedial effort to simply address the most egregious of patent overcharging, once the problem has gotten so out of hand. Indeed, an ounce of prevention is worth a pound of cure, but here there is much shouting about even considering either prevention or cure.

C. Commission Should Become More, Not Less, Engaged in Standards

Finally, and perhaps in some way most important, the gist of opposing comments if taken at their spirit risks leading the Commission away from, not toward, the kinds of competencies, capabilities, and approaches it needs to develop in our networked, broadband age. Some are even calling for the Commission to begin thinking of itself as much as a standards organization or facilitator as a regulatory body, given the growing and critical role of standards as a policy tool for building and protecting open networks. The hands-off attitudes expressed or implied in many of the comments are seem thus misplaced and overblown.

DISCUSSION

I. PUBLIC STANDARDS REQUIRE PUBLIC ACCOUNTABILITY

A. Guidelines and Antitrust Waivers Developed for Private, Voluntary Activities Are Not Sufficient to Protect Public Standards

A fundamental and significant oversight and misfocus of numerous comments taken as a whole is that they operate from a philosophical framework that it is wholly adequate, almost without any consideration, to apply rules and guidelines for private, voluntary standards activities to the context of publicly mandated and/or publicly facilitated and encouraged standards. Thus, they tend to see patent licensing in DTV primarily through the lens of private business transactions, constrained only by contract-like obligations to particular standards organizations to disclose potentially essential patents, to behave in broadly-defined commercially reasonable and nondiscriminatory ways, and to avoid running afoul of occasional antitrust constraints.

The ABA acknowledges that its own patent licensing guidelines, the *ABA's Standards Development Patent Policy Manual* (the "ABA Manual"), developed by the Technical Standardization Committee and published in August 2007, do not directly address the case of publicly mandated and/or publicly facilitated and encouraged standards¹⁹ and notes that this has been in general an under-studied topic²⁰. Still, the ABA comments intimate at a fear that consideration of the public context of standards might somehow inappropriately spill over into more permissive practices in the context of purely private standards.²¹ Neither the ABA nor any other commenter explains why it would be appropriate to apply private practices to a public context almost without thinking, yet an imagined potential collateral impact of public accountability on an argued private context of voluntary standards would be cause for specific and heightened concern and clearly stated limited applicability.

¹⁹ "While the ABA Manual "is not directed to standards whose policies are prescribed by governments ...the information may be useful in assessing the terms associated with such activities." ABA at 3.

²⁰ "One of the issues before the Commission - RAND royalties in the context of a standard mandated by a regulatory authority -- has not been widely discussed or analyzed in the literature, which has traditionally focused the RAND analysis on voluntary standards." ABA at 3.

²¹ "Should the Commission grant CUT FATT's requests to any extent, the Section urges the Commission to at least limit its decision to the ATSC DTV standard which the Commission has mandated and clearly state that its decision should not be broadly applied to other standards, and in particular, voluntary standards." ABA at n.5.

B. Petition Proposals are Modest Compared to Global Best Practices

ATSC patent procedures are particularly lax, even providing a mechanism to standardize technology that is not provided on reasonable and nondiscriminatory terms²². The ATSC organization abdicates any oversight or facilitating role²³, even though its closest peer organization, the DVB in Europe, has long taken a proactive, multi-faceted role in patent pool facilitation activities,²⁴ and in part at the encouragement of the European Commission recently looked to tighten and reinforce these activities. Still, ATSC takes a categorical position favoring

²² The ATSC procedure to exempt for reasonable and nondiscriminatory requirements is described in the ATSC Patent Policy dated December 1, 1986:

“1. Prior to a vote on a Specification Document subject to a disclosed Essential Claim and no later than the time frames specified in Section 5, the ATSC shall receive from the person or entity that holds the Essential Claim written confirmation (using the attached form) that: ...

c. A license to the Essential Claim will not be provided under reasonable and nondiscriminatory terms and conditions to applicants for the purpose of implementing the Specification Document.

If a Participant submits a statement under Section 1(c), the technology group considering the Specification Document to which such Essential Claim pertains shall consider whether alternatives to including such Essential Claim are feasible. If there are no feasible alternatives, and the technology group considers that a Specification Document incorporating an Essential Claim identified by a statement under Section 1(c) is in the interests of the Membership, application shall be made to the ATSC Board of Directors for an exception to this policy. The application shall include all information supplied by the Participant, and reasons that an exception should be made. If the Board approves, work on the Specification Document may continue, but when the Specification Document is balloted to the ATSC Membership for approval, the ballot shall include information on the policy exception and the reasons for approval.”

ATSC at 8-9, and available at http://www.atsc.org/policy_documents/ (last visited May 26,2009)

²³ “The ATSC does not monitor or control any actions taken by parties in the commercialization of technologies relevant to the ATSC DTV Standard, nor does the ATSC participate in the licensing of such technologies.” ATSC at 2.

²⁴ “The DVB fosters by applying a number of tools to encourage patent holders to form patent pools promptly after standardisation. These tools include:

- a mechanism for early confirmation by a technology contributor of its willingness to participate in a pooling effort;
 - information meetings of patent holders and other interested parties while the specification is under development;
 - a process for a “light-touch” essentiality review to determine eligibility for participation in initial meetings of a pooling effort;
 - provision of DVB technical expertise in helping to define the scope of a pooling effort and in “peer review”;
 - monitoring of the facilitation of the formation of a programme; and
 - a forum for exchange of views among DVB member on the terms offered by a licensing programme.”
- http://www.dvb.org/membership/ipr_policy/ (last visited May 26, 2009)

“business arrangements privately negotiated by parties on a case-by-case basis”²⁵, citing in part the need to incentivize participation its own ongoing activities²⁶.

C. It is Unreasonable and Potentially Discriminatory to Shield DTV Licensing Terms Behind Claims of Private Business Confidentiality

There is a particular strain of have-it-both-ways advocacy concerning the claimed need for confidentiality in DTV licensing practices as stated in the comments²⁷. In the midst of claims that imply, without directly saying, that there is significant consistency in patent pool pricing²⁸ (assumedly therefore reasonableness and non-discrimination), there are at the same time claims that patent licensing practices are complex cross-licensing²⁹ affairs and any effort to make the terms more publicly visible merit a strong suspicion that they are simply a gambit to inappropriately find out about competitively sensitive data³⁰.

So which is it? Consistent or complex? Non-discriminatory or situational? As described below, there are reasons to believe more of the latter than the former in each case.

II. AMERICA PAYS MORE FOR LESS IN DTV STANDARDS

A. Patent Overcharging Has Made US DTV Globally Uncompetitive

Claims in the CUT FATT petition that patent licensing practices for the US DTV system have produced significantly higher costs in the US over global comparables has brought multiple

²⁵ “The ATSC believes that commercialization of patented technologies relating to the ATSC DTV Standard should continue to be the subject of business arrangements privately negotiated by parties on a case-by-case basis.” ATSC at 2-3.

²⁶ “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.” ATSC at 6.

²⁷ “The FCC also cannot order the public disclosure of confidential commercial business agreements, as the Petition requests....Private licensing agreements, especially the financial terms of such agreements, are confidential and proprietary information.” Zenith at 19

²⁸ “The MPEG LA patent portfolio licenses offer the same terms and conditions to all licensees.” Zenith at 10

²⁹ “Private licensing agreements, especially the financial terms of such agreements, are confidential and proprietary information. Many of these agreements reflect complex financial arrangements involving IP cross licensing valuations and a myriad of unrelated confidential business issues.” Zenith at 19.

³⁰ “The Petitioner also advocates that the FCC rule that any confidentiality requirement in an essential DTV patent license agreement is a per se violation of the RAND requirements. In this way, the Petitioner would have the FCC invalidate scores of private licensing agreements with no offsetting benefit.” Zenith at 5

protests in the comments. Some comments question scope;³¹ some claim the difference is exaggerated³² or flatly deny a difference³³; some cite unique American needs.³⁴ But the comments provide almost no specific information.³⁵

In truth, price matters very much in DTV system consideration and adoption, and all the more so in these challenging economic times. And with numerous developing countries in the early phases of DTV deployment, they have as a whole been much less willing to accept open-the-checkbook, set-the-price-later attitudes that may have characterized earlier adoptions, and this has contributed to a changing global DTV landscape.

So actually, the differences in DTV licensing pricing is even more pronounced than may be apparent from simply examining given royalty prices at patent pool Web sites. Discounting beyond list appears to exist, and appears to be spreading³⁶. Discounting has been acknowledged in official Japanese government materials³⁷, and in government-to-government MOUs.

³¹ “Thomson suspects that it [the \$23 figure] encompasses more than just ATSC-essential patent licenses and a much broader range of patent owners and technologies than the “corresponding” \$1 figure referenced in the Petition.” Thomson at 4.

³² “Moreover, contrary to the Petitioner’s unsupported claims, the total cost of royalties for essential DTV patents in Europe and Japan is much more than \$1 per DTV receiver and the royalties for essential U.S. DTV patents is much less than \$30 per set.” Zenith at 2.

³³ “Patent royalties for the essential ATSC DTV patents cost much less than the Petitioner claims.” Zenith at 15

³⁴ “[T]he fact that the ATSC standard is different from those used for DTV elsewhere in the world. The ATSC standard was designed for the unique requirements of U.S. broadcasting, where numerous DTV licensees operate in relatively limited spectrum bands, which poses difficult interference issues.” Thomson at 4.

³⁵ One commenter, Mitsubishi Electric, a shareholder in ULDAGE license administrator (*see* <http://www.uldage.com/en/company/company01.html>) provides a correction, but otherwise accepts *arguendo* the royalty rates are accurate, but considers the matter beyond scope for other reasons. “For purposes of these Comments, it can be assumed that the royalty rates alleged in the petition are accurate. However, it is noted that the petition errantly describes the royalty for ISDB as 100 yen per unit, even though the actual royalty for ISDB is 200 yen per unit.” Mitsubishi Electric at n.14

³⁶ “In order to reach an agreement, Japan offered Brazil exemption from some of the royalty payments due for the application of its technology as well as the possibility of building a new semiconductor factory. In addition the transition from the existing TV standard PAL-M to SBTD-T will be financed by the Japanese JBIC and the Brazilian development bank BNDES.” *Brazil decides on a Digital Terrestrial TV system*, Item added: 2nd July 2006, http://www.dvb.org/about_dvb/dvb_worldwide/brazil/ retrieved 05/21/09

³⁷ “Stakeholders in the Japanese private sector have expressed their intentions to support the introduction of digital TV systems by providing technical information, offering exemption from payment of royalties, etc.” Biweekly Newsletter of the Ministry of Internal Affairs and Communications (MIC), Japan Vol, 17, No. 9, August, 2006 http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Releases/NewsLetter/Vol17/Vol17_09/Vol17_9.html (last visited May 26,2009)

Discounting offers continue, and expressly acknowledge that lower DTV royalties lead to lower consumer prices³⁸, and are sometimes expressed by government officials themselves³⁹

So there are alternative, and more colorable, explanations for why US DTV royalties are so high. For example, it could be speculated that the Japanese DTV system moved in recent years towards becoming more aggressive through price cutting and trade deals. Countries considering ATSC began to have second thoughts, and in some cases like Argentina (originally mentioned in the 2004 ATSC patent pool plan as already having adopted ATSC⁴⁰) started to back away by 2005⁴¹. With the prospect of few, if any, further national adoptions on the horizon other

³⁸ See, for example the statement: "We hereby reinforce our commitment to exempt payments for industrial property rights regarding the patents of ISDB-T transmission technology for production of TV receivers in Chile. We believe this option to be the most effective contribution because it allows direct transfer of the benefit to a lower consumer price, a key requirement of the Chilean Government." Letter from Yasuo Takahashi, Chairperson, DiBEG – Digital Broadcasting Experts Group & ARIB – Association of Radio Industries and Businesses to Mr. René Cortázar, Ministro de Transporte y Telecomunicaciones República de Chile, April, 20th, 2007 http://www.subtel.cl/prontus_tvd/site/artic/20070315/asocfile/20070315175818/comments_chelean_govenment_diberg_ver4_200407.pdf (last visited May 26, 2009)

"The Digital Broadcasting Experts Group (DiBEG) was founded in ARIB (ASSOCIATION OF RADIO INDUSTRIES AND BUSINESSES) to promote ISDB-T, the Japanese Digital Terrestrial Broadcasting System, in the world. ARIB is a legal entity of Japan established under the authority of the Ministry of Internal Affairs and Communications, to define, refine and maintain technical standards related to radio technologies based on the consensus among all concerned in government, academics, broadcast and telecommunication companies and manufacturers."

³⁹ "We could provide financial or technical support. We've done this in Brazil," Fuseda said." Darwin G. Amojelar, Japan offers aid for shift to digital TV, Manila Times, March 20, 2009 (quoting Hideo Fuseda, Japan's Ministry of Internal Affairs and Communications director for digital broadcasting technology) <http://www.manilatimes.net/national/2009/march/20/yehey/business/20090320bus4.html> (last visited May 26, 2009)

See also "Supply of low-or super-low-interest funds by the Development Bank of Japan Support by the "Extraordinary Law for Measures to Promote the Construction of Advanced TV Broadcasting Facilities" etc....Financial support for the implementation of broadcasting stations in disadvantaged areas" Digital TV Broadcasting in Japan, Presentation by Akira OKUBO, Ministry of Internal Affairs and Communications Japan, 13th June –14th June, 2007, Bangkok, Thailand.

http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/presentation/pdf/070613_1.pdf

⁴⁰ http://www.mpegla.com/news/n_04-12-22_atsc.pdf ("the ATSC digital television standard, which has been adopted thus far in the U.S., Canada, South Korea, Argentina and Mexico"). Mention of Argentina was dropped from subsequent mentions of the ATSC patent holders meetings at when the patent license was announced ("the Advanced Television Systems Committee (ATSC) and used in digital televisions sold in the United States, South Korea, Mexico, Canada and other countries") http://www.mpegla.com/news/n_07-09-20_atsc.pdf

⁴¹ According to published news reports, in September 2005 "Argentina decided to reverse its decision to adopt ATSC as the country's terrestrial DTV standard and consider other options" Doug Lung, *Argentina Favoring Brazilian Version of ISDB-T for Terrestrial DTV*, September 12, 2008 <http://www.tvtechnology.com/article/66586>

Recent news reports indicate Argentina now appears close to adopting ISDB. "[L]ast week, the Argentine President, Cristina Fernández de Kirchner, confirmed that the country is about to follow Brazil with ISDB. "We are working to

than those countries already very closely in a U.S. orbit, and the prospect of upcoming subsidization of set tops in the U.S. during the transition, it perhaps simply made more financial sense to “price high” and capture maximum revenues from those deployments that were already locked in to the ATSC standard, writing off the potential of further national adoptions around the world to other standards.

This active involvement by the Japanese government, or any other government for that matter, should not in itself be considered scandalous or untoward – on the contrary, one could see such activities as highly constructive, enlightened and helpful to the developing world, or just good, healthy competition. The U.S. Government also funds promotional activities abroad for ATSC, as recently as last fall⁴². Competitive factors could inspire all sorts of competitive conjecture such as above, no one can predict the future of any particular country, but the point is that these factors are relevant in considering claims as to actual price paid for royalty licenses.

complement and agree on a common digital TV system so that part of the TV sets' production elements can be produced in Argentina", she announced." *Confirmed: Argentina is close to ISDB*, TV TELCO Latam, April 27, 2009, <http://www.tvtelco.com/nota.aspx?idcontenido=846&ididioma=2>

Peru Has recently chosen ISDB. See *Peru chooses Japanese-Brazilian standard for digital television system*, April 23, 2009, <http://www.andina.com.pe/Ingles/Noticia.aspx?id=h0quUr98/uM=>

Peru chose ISDB in part because of cost. "Jorge Cuba, the vice minister of communications explained that the Japanese-Brazilian standard had been chosen, among other reasons, for its low cost." Israel Ruiz, *Digital TV decoders to be sold in Peru for \$28 in six months*, Living in Peru 24 April, 2009, <http://www.livinginperu.com/news/8880>

⁴² See for example, USTDA promotional support of ATSC to Peru in September 2008:

"Peru Digital Television Standards – In 2008, USTDA funded an orientation visit to support the Government of Peru's efforts to update the country's telecommunication regulatory framework, including the adoption of a national digital satellite television (DTV) standard. The visit was designed to provide the Peruvian delegates with an opportunity to learn about the U.S. approach to telecom regulatory issues such as long distance licensing, broadband networks, Voice-over-Internet-Protocol (VoIP), digital television, convergence, spectrum, allocation, and local loop unbundling." <http://www.ustda.gov/program/sectors/standardsdevelopment.asp> (last visited May 26, 2009).

"The purpose of this Orientation Visit is to educate and promote the ATSC Standard, which is the standard developed and used by the U.S. for digital television and to encourage the Peru policy makers to choose this standard when Peru makes the transition from digital to analog." TRI manages and provides technical, logistical, and communications support to the U.S. Trade Development Agency (USTDA) Orientation Visit on Digital Television Standards, http://www.tech-res.com/tri/news/tri_pr_Event_USTDA_OV_Peru_021809.pdf (last visited May 26, 2009)

B. DTV Licensing Practices Have Put America in “Perpetual Catch-up”

The net effect of all of this is that the US DTV system appears to be caught in continuing cycle of catch-up, justifying compromise on process, reassuring appeals to uniqueness and special needs, declarations of victory, and generally cutting corners. The US DTV system isn't doing that well globally in the first place, one might feel in the air, so we'll need extra compensation to justify the R&D investment. Whatever the truth or merit of such thinking, it is interesting to consider many of the claims made in the comments in this light.

C. Commission Should Look Beyond Suspect Appeals to American Pride to a Level Global Playing Field

Commenters cite a vibrant market in the US for digital televisions⁴³ and then make a leap of logic to direct causality.⁴⁴ Televisions sell. Patent pools exist. Therefore patent pools cause televisions to sell.

In light of the above, however, might it not be better to ask a different set of questions. Why isn't America on a level global playing field? Wouldn't promoting a global playing field be more in the US and world's interest? Would we really rather substitute such globally significant innovations as the “World Wide Web” for a “US Web Built to Unique US Requirements”?

III. CURRENT DTV LICENSING PRACTICES ARE NOT WORKING

⁴³ See for example:

“the Commission’s digital television (“DTV”) regulations and policies have facilitated a vibrant DTV set market where both established and new manufacturers are competing successfully.” Zenith at 1.

“the existing market mechanisms appear to be working efficiently as the U.S. consumers have a wide variety of DTVs available to them and all indications are that they will continue to do so” Thomson at 3.

⁴⁴ “The Successful DTV Receiver Market Is Due In Large Part To The Private Patent Licensing Pools.” Zenith at 13

“In 1996, the Commission rightly decided not to regulate DTV patent licensing terms, and the market for DTVs has developed into one of the most competitive in the United States.” Thomson at 1.

“The U.S. DTV set market is robust and competitive because of the time and effort that many DTV technology pioneers, including Zenith, have invested — and are continuing to invest in the design and development of the ATSC digital broadcast technology.” Zenith at 11.

A. Eleven Years is an Unreasonable Amount of Time to Establish the ATSC Patent Pool, and the Surrounding Circumstances Raise Concern

The ATSC patent pool was not launched until 2007⁴⁵, almost eleven years after adoption of the ATSC standard by the FCC. This is such a long period of time that it appears unreasonable on its face, and is far longer than the general rule of two years expected by ATSC's peer organization, the DVB.⁴⁶ Significant outcry was met by the MHP patent pool in Europe for delays of less than eleven years.

Moreover, given the changing global landscape in DTV adoption in recent years as described above, it is not hard to see how waiting so long could have competitive consequences and motivations far beyond the sort envisioned in the original DoJ review letters of the mid 1990s.

B. DTV Licensing Practices Have Caused Policy Concern Around the World, and Governments Have Stepped In

Plainly put, several comments paint Vizio as a scofflaw⁴⁷ (though Vizio does not appear to be alone in MPEG-LA related litigation).⁴⁸

⁴⁵ See MPEG LA at 4 ("MPEG LA's ATSC Patent Portfolio License launched in 2007"). The ATSC license was announced September 20, 2007, including Zenith Electronics Corporation; Scientific-Atlanta, Inc.; Samsung Electronics Co., Ltd.; Mitsubishi Electric Corporation; Matsushita Electric Industrial Co., Ltd. (Panasonic); LG Electronics Inc.; and Koninklijke Philips Electronics N.V. (http://mpegla.com/news/n_07-09-20_atsc.pdf). A plan and call for patents was announced on December 22, 2004, referring to ATSC specifications A/53, revision C Including Amendment No. 1, A/65B (Revision B), Doc. A/69, Doc. A/74, and A/54A (http://mpegla.com/news/n_04-12-22_atsc.pdf); a first patent holder meeting was announced in July 18, 2005 (http://mpegla.com/news/n_05-07-18_ATSC.pdf); a second public meeting was announced on January 24, 2006 (http://mpegla.com/news/n_06-01-24_atsc.pdf). No additional licensors have joined the pool since 2007. See MPEG LA at 4.

⁴⁶ "[A]rticle 14.9 now sets the general rule that pools should be completed within two years from adoption of the underlying specification." Carter Eltzroth, *IPR Policy of the DVB Project: Commentary on Article 14 MoU DVB* at 18 (eltzroth draft 31/12/07), http://www.dvb.org/membership/ipr_policy/IPR_commentary0712.pdf

⁴⁷ "Vizio initially was unwilling to pay patent royalties for the MPEG-2 collection of patents, which are necessary to comply with the ATSC DTV Standard, forcing JVC, Mitsubishi, Samsung, Sony, and others to file a patent infringement lawsuit....As the current Petition and previous litigation demonstrate, Vizio and WDE have no desire to properly compensate patent holders for their inventions." Zenith at 6-8.

⁴⁸ A brief scan of press releases at the MPEG-LA website indicates mentions of litigation involving Apex Digital, Expedia Media, Lenovo, AMD, ATI, Amino, Target, Odeon, Vizio, Dicentia, Polaroid, COMAGWestinghouse, CDA Datenträger Albrechts GmbH of Germany, East European Authoring and Encoding Centre Ltd. of Bulgaria, GEMA OD S.A. of Spain, GZ Digital Media a.s. of the Czech Republic, MAF Diskettes SrL of Italy, Megaus Sp. z.o.o. of Poland, and The Video Duplicating Co. Ltd. (VDC) of the United Kingdom. Alba, Audiovox, Acatel Lucent, Opta Corporation, Mintek, Regency Media Pty Ltd., ODS, Sonopress, QOL, V.T.V. NV, and kd.

But taking a longer view, it interesting to notice that comments paint a decidedly one-sided and revisionist history of patent pools, denying in essence that U.S. government bodies have ever been seriously concerned,⁴⁹ acknowledge only in passing the Antitrust waivers that (narrowly) authorize many of the questioned practices,⁵⁰ and provide tautological declarations.⁵¹

Patent pools have long raised policy and competitive concerns⁵², and recent research shows that modern patent pools, in spite of assumptions and expectations to the contrary⁵³, have had significant difficulty getting a significant percentage of essential patents into the pool in the

<http://mpegla.com/news.cfm> (last visited May 26, 2009).

⁴⁹ “Neither Congress nor a U.S. government agency has ever compelled patent holders to form a licensing pool defined by government-mandated royalties.” (Mitsubishi Electric at 3); “Since World War I, we are unaware of any situation where the government has either regulated royalty rates or compelled pooling.” (Mitsubishi at 6).

⁵⁰ The U.S. Department of Justice has issued several business review letters concerning joint patent licensing programs for industry standards such as the MPEG-2 and DVD standards. See June 26, 1996, Letter fr. J. Klein to G. Beeney and June 10, 1999, Letter fr. J. Klein to C. Ramos (both available at <http://www.usdoj.gov/atr/public/busreview/letters.htm>)

⁵¹ “These pools provide timely and cost-effective access to scores of manufacturers that have delivered millions of affordable DTV sets to U.S. consumers. The Petition provides no real evidence to the contrary. Accordingly, the private pools and privately negotiated licensing agreements are working well.” Philips/LG at 2.

⁵² An instructive thumbnail history of antitrust policy concerning patent pools is contained in Layne-Farrar, Anne and Lerner, Josh, To Join or Not to Join: Examining Patent Pool Participation and Rent Sharing Rules at 2 (January 7, 2008). Available at SSRN: <http://ssrn.com/abstract=945189>

"After an early phase of allowing a great deal of latitude for any combination of patents, antitrust authorities began to take a far more limited view of patent pools in 1912. Throughout the 1940s more pools were disbanded than were allowed, and in the '50s all of challenged patent pools were found anticompetitive (Gilbert, 2002). As a result, firms largely stopped attempting to form patent pools for a good many years. The trend finally reversed course in 1995, when the Department of Justice and the Federal Trade Commission issued new guidelines for intellectual property that recognized the pro-competitive aspects of patent pools. Then in 1997, a group of firms belonging to the Moving Picture Expert Group (MPEG) approached the DOJ for clearance to form a patent pool based on a subset of patents within the MPEG-2 standard for digital video."

See also See Richard J. Gilbert, Antitrust for Patent Pools: A Century of Policy Evolution, 2004 STAN. TECH. L. REV. 3, http://stlr.stanford.edu/STLR/Articles/04_STLR_3

⁵³ “Much of the economic analysis of patent pools has focused on their role in competition policy. As such, the largely theoretical literature has generally overlooked the fact that joining a patent pool is voluntary, often assuming that all eligible firms will join (the one exception is Aoki and Nagaoka, 2004).” Layne-Farrar *supra* at 2.

first place.⁵⁴ Moreover, patent overcharging has been problematic for related standards in recent years, including MPEG-4⁵⁵ and MHP⁵⁶.

Patent pool regulation has also played a long history in broadcasting, even prior to the digital television era. Consider the example of RCA, originally structured in 1921 as the patent pool for radio patents. After government proceedings in 1924 (FTC and “packaged licensing”) and 1930 (Department of Justice consent decree separating RCA from its owners), RCA entered into a consent decree in 1958 concerning color TV patents (for which RCA was then the key owner), described interestingly in Time magazine⁵⁷.

⁵⁴ “[A]s many as one half to two-thirds of the eligible firms choose not to join a patent pool”. Layne-Farrar *supra* at 24.

This is far less than the critical mass the DVB has found necessary to support successful patent pool formation. “To satisfy DVB’s criteria, the pool must include “at least 70 percent of all Members or their affiliated companies holding [essential] IPRs”. This was intended to ensure that the patent pool had a “critical mass” of patents available for licensing, making the pool attractive as a “one-stop shop”” Eltzroth *supra* at 33.

In contrast, patent pools participants appear to have been effective in using patent prosecution techniques such as continuations, continuations-in-parts, and divisions: “The ratio of the patents which were obtained by using these practice amounts to 44% of the essential patents for MPEG2.” Sadao Nagaoka, Tomoyuki Shimbo & Naotoshi Tsukada, *The structure and the evolution of essential patents for standards: Lessons from three IT Standards* (Sept. 2006), <http://www.iir.hit-u.ac.jp/iir-w3/file/WP06-08nagaoka.pdf>

⁵⁵ MPEG-4 was plagued by licensing issues, leading Leonardo Chiariglione, the convenor of the MPEG committee, to state in a presentation at the MPEG 20th Year Anniversary Commemoration in Tokyo in November 2008: “the MPEG-4 Visual licensing killed half of the standard....The “use fee” licensing model facilitated the widespread use of proprietary codecs” http://www.itscj.ipsj.or.jp/forum/forum2008MPEG20/03MPEG20_Leonardo.pdf

See also Gwendolyn Mariano, MPEG-4 rival raises antitrust specter, CNET News, April 9, 2002, http://news.cnet.com/MPEG-4-rival-raises-antitrust-specter/2100-1023_3-879392.html

⁵⁶ See Junko Yoshida, Safety of patent pool imperiled: After interactive-TV spec fiasco, DVB members ponder fate of open process, EE Times, March 12, 2007:

“The patent holders got greedy to the point that they killed MHP,” said Philip Laven, technical director of the European Broadcasting Union (EBU). Many broadcasters in Europe are now saying that they will “punish” MHP patent holders by not implementing it. The exception may be Italy, where the government has mandated MHP’s use and the installed base of MHP set-tops already numbers in the millions.

<http://www.eetimes.com/showArticle.jhtml;jsessionid=Nv0VZKF0XCC1WQSNLQCKHSCJUNN2JVN?articleID=197801654>

The European Broadcasting Union withdrew its recommendation on MHP, reinstating it after the Via Licensing license administrator dropped license charges on free-to-air broadcasters. <http://tech.ebu.ch/docs/r/r106v2-08.pdf>

⁵⁷ “In a sweeping civil consent decree in one of the biggest Eisenhower Administration Sherman Act suits to date, RCA agreed to 1) put some 100 color TV patents into a royalty-free pool, 2) make available to all comers on a royalty-free basis at least 12,000 other existing radio-TV patents, 3) license all new patents during ‘the next ten years at a “reasonable” royalty rate.” *Boost for Color TV*, Time Magazine, November 10, 1958,

A sampling of recent activities around the world where governments have had active involvement standardization and patent licensing process, include China (AVS⁵⁸), the European Commission (MHP⁵⁹), and Brazil (Java DTV⁶⁰).

C. “Multi-Dipping” and Other DTV Licensing Gambits are Unreasonable and Discriminatory

Several comments create the impression that there is adequate completeness⁶¹ and consistent participation⁶² patent pools and DTV licensing practices and patent holders even check their competitive advantage at the door.⁶³ But there are obvious loopholes, gambits and reasons to question whether anyone ever would, or should, be expected to behave in such unrealistically non-self advancing ways. Consider, for example:

- participating in the one patent pool but not another
- Licensing patents to other companies

<http://www.time.com/time/magazine/article/0,9171,938051,00.html>

“The 1958 consent decree [with RCA] was part of a drive by the Justice Department’s Antitrust division to open the new electronics-based industries to competition by making the patents of IBM, AT&T, and RCA available to all... [The consent decree] made licenses available to domestic companies without charge... Foreign buyers would continue to pay full freight. ... RCA Labs, in order to maintain licensing income after the consent decree, began to concentrate on licensing to Europe’s Philips and Japan’s leading consumer electronics makers.” Alfred D. Chandler Jr., *Electronic Century: The Epic Story of the Consumer Electronics and Computer Industries* (2001)

⁵⁸ "Development of AVS was initiated by the government of the People's Republic of China. Commercial success of the AVS standard would not only reduce China's royalty/licensing payments to foreign companies, it would presumably earn China's electronics industry recognition among the more established industries of the developed world, where China is still seen as an outlet for mass production with limited indigenous design capability....According to the state-run media, a key consideration of AVS was to reduce foreign dependence on core intellectual properties used in digital media technology". http://en.wikipedia.org/wiki/Audio_Video_Standard

⁵⁹ "The review has also addressed questions directed to DVB by the European Commission on DVB’s IPR policy and the need for timely disclosure of licensing terms for essential intellectual property rights." http://www.dvb.org/news_events/news/mhp_patent_pool_expericnc/index.xml (last visited May 26, 2009). See also http://www.osmosys.tv/documents/Osmosys_Open_Letter_onMHP_Licensing.pdf

⁶⁰ See Rob Glidden, *Royalty-Free Java DTV Specification Released for Brazil and the World*, January 12, 2009, <http://www.robglidden.com/2009/01/royalty-free-java-dtv/>

⁶¹ “Notably, MPEG LA requires pool licensors to include all essential patents that issue worldwide and allows new patent licensors and essential patents to be added at no additional cost to licensees.” Zenith at 10.

⁶² “[A]ny licensor that practices the technology in question is obligated to become a licensee on the same terms and conditions (including royalty payments) as any other licensee” MPEG LA at 6

⁶³ “But these patent owners do not discuss their own competitive positions and do not disclose terms of their own licensing programs for their own individual patents that are not already in the public domain.” MPEG LA at 6

- Staking patents to other pools with even higher claims
- Participation in one pool while discounting in another
- Selling, and buying, inclusion in a standard, even under secret terms⁶⁴.

It is not a pretty picture, and no doubt given the political nature of standards one might not expect it to be. And it is essential that competition be maintained, so restriction of certain behaviors like like participating in multiple pools must be allowed. But it all should be transparent.

Incomplete participation in the ATSC pool is by now widely accepted as a given – even favorable comments only dare to describe that it includes “at least many”⁶⁵ patents.

Thomson, for example, indicates in its comments that it offers a “NAFTA Digital Television” patent license for the sale of DTVs in North America with includes, among other patents, patents it considers essential to the ATSC standard⁶⁶ but does not disclose the price⁶⁷, whether the ATSC-specific patents are available separately without tying to other patents, or an explanation of why these patents are not included in the MPEG LA patent pool.

Finally, the US DTV patent practices seem to have yet more innovation to offer – one commenter even proposes the potential of retroactive “essential yet not essential”⁶⁸ patent declarations.

⁶⁴ "Dolby's selection came after it offered another of the four voting members of the Alliance's Technical Oversight Group, Zenith Electronics Corp., a 25 percent discount on patent royalties in exchange for Zenith's vote, said Craig Todd, a senior member of Dolby's technical staff, in a deposition in the suit. Zenith subsequently changed its vote on the Oversight Group to be in favor of Dolby, but it is unclear whether Zenith accepted Dolby's offer of a royalty discount. If so, it would mean that half of the voting members, MIT and Zenith, of the Grand Alliance were receiving monetary compensation from Dolby as a partial result of their vote for Dolby." Keith J. Winstein, MIT Getting Millions For Digital TV Deal, *The Tech*, November 8, 2002, <http://tech.mit.edu/V122/N54/54hdtv.54n.html>

⁶⁵ "Mitsubishi Electric Corporation ("Mitsubishi"), and at least many of the current ATSC essential patent owners, currently license their essential ATSC patents as part of the ATSC pool administered by MPEG LA." *Mitsubishi* at 4.

⁶⁶ "This license includes, among many others, patents that are essential to practice the ATSC terrestrial broadcast standards." Thomson at 2.

⁶⁷ Thomson states only that their licensing program offers “very reasonable royalty terms” and has not been a subject of court or International Trade Commission litigation. Thomson at 2.

⁶⁸ "The proposed rules may have the reverse effect and encourage certain patent holders who voluntarily license their patents through private pools to avoid the rule by declaring that their patents are not essential to the ATSC DTV Standard but are nonetheless infringed by DTV set manufacturers." Zenith at n.8.

D. DTV Licensing Practices Have Stifled Access to Public Domain and Free Technology

One need only look to the emerging yet struggling community of open video codecs for the Web to see the collateral impact current DTV licensing practices have had. Despite repeated efforts to create royalty free codecs for the Web, and the wide availability of royalty-free technologies at the IETF and elsewhere, and the preference for royalty-free technologies by such organizations as the World Wide Web, many standards groups appear steadfastly opposed or disinterested in solving or even considering this need.

E. DTV Licensing Practices Are Unnecessarily Prolonging Pool Lifespans Through Questionable Tactics

Yet another question the Commission should rightly consider: when will these practices end? What is the end date? Given that the US DTV standard was adopted in 1996, shouldn't it now be possible to at least put an clear and definitive end date to patent licenses? If not, what are the specific actual improvements or innovations that merit continuing the patent licensing practices? What are they really worth?

IV. FCC SHOULD ENGAGE MORE, NOT LESS, IN STANDARDS

A. Commenters Propose No Specific Innovation Or Other Compelling Need To Justify Continuing Current DTV Licensing Practices

Commenters provide no justification for why there would be any reason to believe that the Commission would be less cognizant of or respectful of the positive and longstanding place of the U.S. Patent system, would take a inconsistent view of patent law⁶⁹, though they seem to

⁶⁹ “[T]he federal courts and other federal expert agencies, such as the International Trade Commission and the United States Patent and Trademark Office, understand fully the complexities of the patent laws. In order to ensure consistency in decisions involving patent law, the federal courts and these other agencies – not the FCC – should address the concerns raised by the Petitioner.” Philips/LG at 2

imply otherwise.⁷⁰ Also, though there was no doubt only the prospect, not explicit promise⁷¹, there is no explanation why royalties on standards are the only or primary motivator to investment in DTV⁷², compared to the more obvious reasons of offering better products. What innovation and what technology requires free rein for after-the-fact continuation of current practices? The Commission, and America, should know before, not after, opening the checkbook, or keeping it open indefinitely.

B. DTV Licensing Practices Threaten to Undermine Broadband Policy

Video is a critical element of broadband deployments worldwide and in the US. It is both ironic and telling that the licensing practices that have developed through the US DTV experience have done little to nothing to contribute video technologies or standards to broadband deployments, which today are essentially captured by proprietary solutions. Is this really an acceptable, necessary, or desirable outcome, or foundation for future innovation?

C. Our Network Age Needs Greater Policy Engagement in Standards

Some recent commentary urges that the Commission move beyond viewing standardization as peripheral to its core mission, and actively embrace standardization as a useful, even necessary, policy mechanism to promote its regulatory objectives⁷³ and there is a

⁷⁰ "Indeed, the FCC cannot consider the relief sought by Petitioner without also considering the important role played by the U.S. patent system in driving innovation, competition, and the U.S. Economy." Philips/Qualcomm at iii

⁷¹ "There can be no question that the promise of patent rights motivated the developers of the ATSC DTV Standard to pursue their research and development ("R&D") efforts vigorously for almost a decade and to commit hundreds of millions of dollars to the endeavor with no guaranteed return." Zenith at 8."

⁷² "Commission action to lower patent royalties associated with DTV technology would have long-term detrimental effects because it would discourage continued development of DTV technology." Thomson at 2-3

⁷³ See, for example, Werbach, Kevin D., *Higher Standards: Regulation in the Network Age* (March 29, 2009). Harvard Journal of Law and Technology, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1369962>

And at a symposium last fall on the legacy of the 1968 Carterfone decision, often invoked as the start of modern telecommunications regulation, Kevin Werbach, co-lead of the Federal Communications Commission Agency Review for the Obama-Biden Transition Project articulated the perspective that although "Carterfone established a principle of interconnection", the decision alone produced "[n]o significant or game-changing competitive entry" without subsequent implementation standards.

Werbach went on to note "[s]tandards define industry structure ... [c]rucial in network industries", and to allude to the potential of the "FCC as a catalyst for open standards" and of "Reinvigorating Standardization". See

growing philosophical and policy analysis supporting this approach in works related to networks⁷⁴, network effects⁷⁵, and platform economics.⁷⁶

D. Commission Has, and Should Improve, Standards Competency

Several commenters question the competency of the Commission to consider the patent licensing and other patent related matters⁷⁷, and cite Allnet.⁷⁸ They also question jurisdiction,⁷⁹ at least in part because regulating royalties would allegedly involve regulation of a device outside of receiving a signal⁸⁰, although there is a tinge of unwillingness to look beyond tactical litigation advantage.⁸¹

<http://law.scu.edu/hightech/carterfone-powerpoints.cfm>

⁷⁴ Mark Buchanan, *Nexus: Small Worlds and the Groundbreaking Science of Networks* (2002); Duncan J. Watts, *Six Degrees: The Science of a Connected Age* (2004)

⁷⁵ See Carl Shapiro & Hal Varian, *Information Rules* (1998)

⁷⁶ See Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J. LAW & TECH. 85 (2003).

⁷⁷ See, for example: “Thomson respectfully suggests that the Commission should rely on existing forums to resolve patent licensing issues and focus its attention on DTV issues more directly within its expertise.” Thomson at 3.

“[T]he Commission is not equipped to define or oversee such far-reaching regulations... [T]he Commission has limited experience and expertise in the intricacies of patent law and the determination of patent royalty rates” Philips/LG at 1-2.

“The Commission has very limited experience and expertise in patent law, especially reasonable royalty determinations for hundreds of essential patents (a task the FCC has never undertaken).” Zenith at 3

⁷⁸ Allnet Communication Services, Inc., Order, 10 FCC Rcd 12125 (1995) (deferring to federal court determination on patent validity and associated licensing issues)”

⁷⁹ “As an initial matter, the Petition fails to establish the Commission’s jurisdiction over patent licensing, which appears to be extremely limited under the principles of *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). The Petition does not mention any statutory provision that expressly authorizes the Commission to regulate patent licensing, and the *American Library Association* decision indicates that the Commission does not have authority to regulate DTV receivers or “apparatus” when “those apparatus are not engaged in the process of receiving a broadcast transmission.” 406 F.3d at 691. Commission regulation of the terms and conditions under which DTV patents are licensed appears to be outside the scope of regulating the technical and engineering characteristics that determine how a DTV receiver - or “apparatus” - receives a broadcast transmission.” Thomson at 2.

⁸⁰ “[I]t is unclear why CUT FATT believes that the Commission has the authority to regulate such royalties since this would involve regulating a DTV set when it is not receiving any signal.” Mitsubishi at 4.

⁸¹ See for example “Such a rule would actually promote litigation because patent-poor companies, such as Petitioner’s members, would have little to lose by refusing to enter into a license. Without a patent holder’s right to sue for an injunction, alleged infringers would, in the worst case, be ordered to pay a reasonable royalty. In the best case, where the alleged infringers prove that the patents at issue are invalid or not infringed, royalties would be avoided altogether.” Zenith at n.9.

More generally, the claim is made that the relevant patent assessment is significantly complex⁸². This claim appears, however, to be belied by the going rate for independent patent evaluation for inclusion in patent pools, which is below \$10,000 per patent⁸³. Given there are only 45 U.S. Patents currently listed in the ATSC patent⁸⁴ pool, these numbers suggest that an entire *de novo* reevaluation of the essentiality of the entire ATSC patent portfolio might be had for less than a half million dollars – hardly a beyond-the-scope-of-competence scale compared to the multiple claims cited above of hundreds of millions of dollars of investment over decades in DTV intellectual property.

Also IEEE has made suggestions about how the FCC can improve its competencies, including reaching outside the FCC for needed competencies.⁸⁵

E. Commission Should Consider Going Beyond Petition Proposals

⁸² “[T]he complex and closely intertwined issues of patent validity, claim construction and the setting of reasonable patent royalty rates require careful deliberation for just a single patent.” Philips/LG at 2.

⁸³ For example, in 2002, MPEG LA announced the evaluation fee per patent of \$8500 for H.264 JVT/MPEG-4 AVC Patents (“to cover costs of the patent expert’s evaluation”), http://www.mpegla.com/news/n_02-09-11_jvt.html

This \$8500 fee continued in 2003. “For each patent or patent application submitted, an evaluation fee of US \$8,500.00 to cover the outside cost of the patent expert’s evaluation is paid to MPEG LA. Additional fees may be required to cover additional outside costs in the event of reevaluation by patent experts.”

http://www.mpegla.com/news/n_03-11-17_avc.html

Via Licensing, a competing patent pool administrator company owned by Dolby, charges \$8000 per patent to evaluate for essentiality for IEEE 802.16 (http://www.vialicensing.com/patent/IEEE80216_index.cfm), Digital Radio Mondiale Audio (http://www.vialicensing.com/patent/DRM_index.cfm), MPEG-4 Audio (http://www.vialicensing.com/patent/MPEG4_index.cfm), and as of 2002 charged \$6,500 per Digital Radio Mondiale Audio patent evaluation (http://www.vialicensing.com/news/details.cfm?VIANEWS_ID=316) (sites last visited May 26, 2007).

⁸⁴ <http://www.mpegla.com/atsc/atsc-att1.pdf>

⁸⁵ See Letter from Russell J. Lefevre, Ph.D. (President, IEEEUSA) to Kevin J. Martin (Chairman, FCC), June 5, 2008, at <http://www.ieeeusa.org/policy/POLICY/2008/060508.pdf>. IEEE recommendations include:

- Reinvalidate the dormant Technological Advisory Council (TAC);
- Seek advice from The National Academies on key long-term policy issues;
- Budget for and contract for supplemental support on novel technical policy issues where staff and capabilities are not available;
- Institute regular dialog with industry and academia to identify out-of-date rules.

See Gerald W. Brock, *Telecommunication Policy for the Information Age: From Monopoly to Competition* 88 (1998) (“Controversy over AT&T’s PCA [Protective Connecting Arrangement] requirement caused the FCC to initiate an inquiry into desirable methods of protecting the network and to arrange with a panel of the National Academy of Sciences to evaluate the information submitted.... The panel concluded that network protection was necessary and that protection could be adequately provided by either PCAs or a program of standards and certification of equipment”)

Many of the topics raised in this discussion point in an opposite direction from numerous comments, which in essence defend the status quo and propose that the FCC do nothing new of significance. But it is worth asking some simple questions – knowing what we know now, is this how we would have wanted our DTV system to be? Would someone today considering which DTV system to deploy want to embrace and continue the system as-is, or would experience point to new procedures and processes? Other countries are already looking at or deciding on newer generations of DTV systems, shouldn't we be doing more?

F. Commission Should Promote Transparency, A Level Global Playing Field, Open Value Chains, Ex Ante Disclosure, Proactive IP Analysis and a Preference for Royalty-Free

In light of the above discussion, it seems that there is much more involved in the policy ramifications of the US DTV experience than would be implied by merely considering continued calls for a privatized, unsupervised system of confidential business transactions that are self-policed with a vaguely defined concept of “reasonable and nondiscriminatory” requirements. The CUT FATT petition identifies specific, actionable steps that move beyond the vague and conveniently unenforceable to measurable metrics and tangible procedures. This kind of thinking is needed more than ever.

Taking a moment to step back and look at broader values and principles that are worthy of consideration in this context, I would propose the Commission consider the following principles:

- Transparency: A principle of public accountability for public standards seems a natural starting point, rather than a presumption of private gain at public expense.

- A Level Global Playing Field: In our globalized world, it is more important than ever to develop a sober, modern perspective on standardized systems for communication networks in the US.

- Open Value Chains: Networks are never about a single segment of a value chain.

- Ex Ante Disclosure: It is hard to identify how the current system would have been worse with more up-front disclosure and early action on patent pool formation and licensing review, and it is easy to imagine how it could have been better.

- Proactive IP Analysis: Building infrastructures on the uncertain sands of unknown ownership is problematic in the best of circumstances, and not necessary.

- Preference for Royalty-Free: As networks and technologies mature and evolve, it is natural, and inherent in our patent system, that useful technology move into a public domain. Rather than fight this inevitability, it should be embraced as a welcome platform for further progress and innovation.

CONCLUSION

For the reasons set forth above, I respectfully request that the Commission consider taking further action on matters raised by the Petition.

Respectfully submitted,

ROB GLIDDEN

 /s/ Rob Glidden
Rob Glidden

Service List

On the date indicated below, a copy of the foregoing Reply Comments was filed in the above-referenced docket and sent to the following individuals via the method indicated below:

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May 27, 2009