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July 7, 2009

WRITTEN EX PARTE PRESENTATION – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: 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

Dear Ms. Dortch:

Funai Electric Co., Ltd. and Funai Corporation, Inc. (collectively, "Funai") responds to new issues raised in the reply comments (the "Reply") filed on May 27, 2009 in the above-captioned proceeding by the Coalition United to Terminate Financial Abuses of the Television Transition, LLC ("Petitioner")[1] and its members VIZIO, Inc. ("VIZIO") and Westinghouse Digital Electronics, Inc. ("WDE").[2]

None of the new arguments and proposals first introduced in the Reply justifies further action in this proceeding. No public policy reason supports action by the Commission, even assuming *arguendo* that it has jurisdiction to so regulate. Moreover, the Reply fails to demonstrate that such jurisdiction exists. Without that jurisdictional showing, neither the Commission nor other parties should devote additional resources to considering the Petition or the Reply.

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[1] Petitioner filed a petition for rulemaking and request for declaratory ruling (the "Petition") in this proceeding on January 2, 2009.

[2] Funai also responds briefly to the *ex parte* presentation by Mr. Rob Glidden on June 24, 2009, and his reply comments. *See* Letter from Mr. Rob Glidden to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-23 (Jun. 25, 2009) ("Glidden Letter") and attached presentation ("Att."); *see also* Glidden Reply Comments. All citations to comments and reply comments in MB Docket No. 09-23 (filed on April 27, 2009 and May 27, 2009, respectively) herein are short-cited.

Rejection of the Petition Would Advance the Public Interest. In the *ATV Fourth Order*, the Commission concluded after considering DTV patent licensing issues that "if a future problem is brought to our attention, we will consider it and take appropriate action."[3] Because the Petition and Reply do not present a "problem" for U.S. consumers on which further Commission action is needed, the "appropriate action" for the Commission to take is promptly to dismiss or deny the Petition and terminate this proceeding.

Petitioner makes the overblown claim that Commission action in this proceeding "will have a profound impact on the DTV transition"[4] and urges the Commission to keep allegedly "abusive" DTV licensing from "hindering the nation's transition to digital television."[5] Events have not borne out Petitioner's fears. The June 12, 2009, DTV transition date has passed, and as Chairman Genachowski told the Commission staff, "the June 12th switch succeeded far beyond expectations."[6] Although challenges remain for consumers and broadcasters, the availability of reasonably priced DTVs and digital converter boxes has never been an issue.[7] If anything, the vibrant market for DTVs and digital converter boxes evident throughout the DTV transition reinforces the case for terminating this proceeding.

Petitioner concedes, as it must, that the DTV market is competitive.[8] The Reply does not deny the voluminous record evidence showing the declining consumer prices for DTVs and the numerous competitors that provide DTVs in the U.S. market, admitting that "the Commission's prior efforts to drive down the cost of DTVs have borne fruit."[9] The record

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[3] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* Fourth Report and Order, 11 FCC Rcd 17771, 17794, ¶ 55 (1996) ("*ATV Fourth Order*").

[4] Reply at 15.

[5] *Id.* at 18.

[6] Hon. Julius Genachowski, Chairman, FCC, *Remarks to the Staff of the Federal Communications Commission* (Jun, 30, 2009) at 3, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf.

[7] Funai has supplied several models of the digital converter boxes that owners of analog television sets need for the DTV conversion. In contrast, VIZIO did not participate in providing digital converter boxes.

[8] *See* Reply at 3.

[9] *See id.* at 5.

also overwhelmingly contradicts commenter Rob Glidden's claims that greater Commission involvement in the standards process is warranted because "America pays more for less in DTV standards" and because current DTV licensing practices are not working.[10] An abundant supply of DTVs is available to U.S. consumers from a wide variety of DTV suppliers, at reasonable prices that have declined over time. DTVs sold in the United States are highly competitive with those sold in the rest of the world. According to the ATSC Forum:

> Prices for ATSC-compliant devices have fallen so much that HDTV sets in the U.S. cost less than comparable HDTV sets in Japan, less than standard-definition sets of the same size in Europe (which cannot even handle an HDTV signal), and even less than analog color television sets of the same size in South America or the Caribbean.[11]

In light of this success story for DTV consumers, the proposals of the Petition and the Reply are unnecessary and would impose needless burdens and costs on DTV manufacturers and ultimately on consumers. In the end, Petitioner's proposals would advance only the competitive interests of its members, VIZIO and WDE. Petitioner complains of the costs and license terms of some DTV patents, but competent and experienced forums – specifically the International Trade Commission ("ITC") and the federal courts – already exist to adjudicate those issues. VIZIO has been involved in those forums for years regarding DTV patents, but has only recently sought Commission involvement in DTV patent matters. In light of the competitive DTV market, Petitioner's allegations cannot justify further Commission action. As Sony has explained:

> Under the most generous reading of the Petition, taking every fact alleged therein as true and every claim as valid, Petitioner shows only that the licensing costs of manufacturing an ATSC-compliant device exceed the licensing costs under other standards. Petitioner does not show that these differences are unreasonable in

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[10] *See* Glidden Letter, Att. at 4, and Glidden Reply Comments at 8, 12. Although Mr. Glidden states that he is filing on his own behalf, he apparently is employed by Sun Microsystems on its Java DTV project, *see* http://www.linkedin.com/in/robglidden. The Glidden Reply Comments mention Java DTV, *see* Glidden Reply Comments at 16, but do not mention Mr. Glidden's association with that project.

[11] *See* ATSC Forum Reply Comments at 3. The ATSC Forum is a separate "sister organization" of the ATSC. *Id.* at 1. The ATSC Forum also challenges a variety of Mr. Glidden's claims on international matters, and notes in particular that the ATSC standard used in U.S. DTVs also has been adopted by Canada, Mexico, South Korea, Argentina, Honduras, and El Salvador, so that "more than 500 million people around the world have access to DTV services enabled by the ATSC Standard." *See id.* at 2, n.3.

> violation of any duty or obligation assumed by a licensor. More importantly, given the market conditions described above, Petitioner cannot demonstrate that these differences have limited competition or raised prices in the U.S. digital television market, and thereby have harmed U.S. consumers.[12]

In fact, two neutral third parties - the American National Standards Institute ("ANSI") and the ABA Science and Technology Law Section - specifically oppose the Petition's proposal to establish regulatory "benchmarks" for assessing the reasonableness of DTV licensing based on "international comparable" royalty rates because of the broad range of factors, including other individualized material terms and conditions in patent licenses, that actually inform reasonable and nondiscriminatory ("RAND") licensing.[13]

Moreover, the Reply has no answer for the likely harms to the public interest noted by the Advanced Television Systems Committee, Inc. ("ATSC"), another neutral party, if the Petition is granted. ATSC shows convincingly that regulation of licensing terms as contemplated in the Petition would stifle innovation and discourage the television industry from participating in the creation of new standards.[14] This is an especially serious concern as the United States attempts to modernize its communications infrastructure to respond to the recent economic downturn.

Despite its utter failure to provide persuasive evidence for Commission intervention, the Reply nonetheless presents the Commission with extensive proposals for comprehensive involvement in the patent process, essentially as a shadow ITC or court. The proposals include information collection, the possible use of administrative law judges, prohibitions on certain activities, patent pools, and price regulation. However, the proposed elaborate administrative machinery appears to provide nothing more than yet another forum for VIZIO

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[12] Letter from Jim Morgan, Sony Electronics, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 09-23 (June 10, 2009) ("Sony Letter") at 2.

[13] *See* ANSI Reply Comments at 5; ABA Science and Technology Law Section Comments at 3-4.

[14] *See* ATSC Comments at 6. *See also* MPEG LA Comments at 7 (arguing that "[f]uture research and development will be retarded if inventors of new technologies are subject to a risk of a 'planned' marketplace if their inventions are successful"). Similarly, the Commission should not adopt Mr. Glidden's suggestion that there should be a policy preference for royalty-free standards because such a policy preference would chill incentives for innovation. *See* Glidden Letter, Att. at 5; *see also* Glidden Reply Comments at 22-23.

and WDE to challenge the terms and conditions of some DTV patent licenses already under review in other forums.[15]

The Commission should reject Petitioner's blatant attempts to manipulate the regulatory process for competitive advantage.[16] As the record indicates, multiple forums already exist – most notably before the ITC and the federal courts – for addressing patent licensing issues. The Reply concedes that VIZIO repeatedly raised, and failed to prevail on, RAND issues before the ITC in an investigation to which Funai is a party.[17] However, the Reply attempts to cast VIZIO's lack of success with those arguments as a failure by the ITC to address them.[18] The Reply does not deny that VIZIO and WDE, acting through the Petitioner, filed the Petition seeking Commission control of patent licensing less than a month after VIZIO stated to the ITC that the U.S. district courts are the proper place to decide RAND issues involving DTV patents.[19]

Petitioner Has Not Established a Jurisdictional Basis for Its Proposals. In the Reply, Petitioner also fails to establish a jurisdictional basis for the extensive regulatory regime that it proposes. As an initial matter, Petitioner cannot demonstrate that the Commission even adopted a RAND requirement. As Funai noted in its initial comments, at most the Commission recognized RAND as a "principle" or "premise" associated with DTV patent licensing.[20] As a policy matter, the Commission's restraint in recognizing the RAND principle without adopting detailed rules or regulations was fully justified, as today's highly competitive DTV market and the ongoing successful DTV transition prove.

Petitioner's reliance on a portion of Section 336(b)(1) of the Communications Act of 1934, as amended (the "Act"), to support Commission intervention[21] is farfetched. Section

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[15] Sony convincingly questions Petitioner's arguments regarding market conditions and patent valuation as well as the need for mandated patent license disclosure. *See* Sony Letter at 1-2.

[16] Similarly, the Commission should not mandate patent license disclosure as proposed by Public Knowledge in reply comments.

[17] *See* Reply at 17.

[18] *See id*.

[19] *See* Funai Reply Comments at 6-7.

[20] *See* Funai Comments at 11.

[21] *See* Reply at 20-21.

336(b)(1) provides that, when devising the regulations for additional spectrum licenses for advanced television services (DTV), the Commission shall:

> (1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services.[22]

Section 336(b)(1)provides no independent basis for Commission jurisdiction over patent licensing. Rather, it focuses on the technology or method designated by the Commission for providing DTV. The language of Section 336(b)(1) begs the question of what "technology or method" can be designated by the Commission.

Not surprisingly, the Reply cites no precedent that relies upon Section 336(b)(1) to authorize the Commission's regulation of patent licensing for advanced television services. The Reply tacitly recognizes this weakness with the novel, unsupported argument that Section 336(b)(1) turns the Commission into a "standard-setting body" analogous to a private standard-setting organization ("SSO").[23] The Reply fails to provide any citation to any Commission or judicial precedent for this preposterous statutory interpretation. In the DTV proceeding, as in many other proceedings, the Commission necessarily distinguished its regulatory activities from the activities of private standard-setting bodies such as ATSC, ANSI, and others.[24]

The Reply also claims that jurisdiction to adopt patent licensing rules is based on a few non-DTV cases in which the Commission accepted or imposed some form of a RAND commitment.[25] Several of these cases appear to rely for authority, in turn, on a Revised

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[22] 47 U.S.C. § 336(b)(1). The Reply at n. 44 also refers to Section 303(b) of the Act without providing any authority indicating that the Commission has ever relied on this section to create regulations regarding DTV patent licensing.

[23] *See* Reply at 20-21.

[24] *See ATV Fourth Order*, 11 FCC Rcd at 17790 ¶ 42 (finding that Commission selection of the ATSC standard was the "minimum of regulation" needed for a smooth transition); *id.* ¶ 43 (noting that "the ATSC DTV standard is a 'voluntary' one, selected by private parties under the auspices of the ATSC, an American National Standards Institute ('ANSI')-accredited organization.")

[25] *See id.* at 21-23. In addition to broadcasting cases, the Reply cites the Commission's actions in 1976 regarding telephone jacks, a case distinguishable from DTV because of the Commission's authority pursuant to Title II of the Act as well as the monopoly status of AT&T at the time.

Patent Policy published in a public notice issued by the Chief Engineer of the Commission in 1961.[26] The Revised Patent Policy, a staff-issued public notice, cannot serve to impart jurisdiction to the Commission. In fact, it does not even purport to establish Commission rulemaking authority over patent matters:

> Essentially, the new procedure, which supplements existing patent procedures of long standing, provides for enlarging the staff in order that the Commission may keep currently abreast of all patents issued and technical developments in the communications field which may have an impact on technical standards approved by the Commission in the various services.[27]

The Revised Patent Policy acknowledges the Commission's extremely limited role in patent issues – a role that the Revised Patent Policy itself limits to having Commission staff "keep currently abreast" of patent issues and technological developments, not active regulation. The Commission's decision in 2007 regarding digital AM- and FM-radio technology is consistent with this approach.[28] In that case the Commission had considered the behavior of the patent holders and declined to act, stating that "we do not believe that it is appropriate at this time for us to adopt regulations governing [technology] licensing and usage fees" and promising only to take "appropriate action" in the future if conditions changed.[29] Similarly, based on the record compiled to date in this proceeding, the Commission should decline to act at this time on DTV licensing issues and dismiss or deny the Petition.

The Reply argues further that Commission jurisdiction over patent licensing can be based on its authority to enforce voluntary commitments made in Commission proceedings.[30] The Reply neglects to acknowledge, however, that in the *ATV Fourth Order*, the

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[26] *See Revised Patent Procedures of the Federal Communications Commission*, Public Notice, 1961 FCC LEXIS 54 (Dec. 1, 1961) reprinted in *Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service*, 3 FCC 2d 1, App. B (1996).

[27] *See id.*

[28] *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd 10344, 10384 ¶101 (2007).

[29] *See* Reply at 23, citing *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd 10344, 10384 ¶101 (2007).

[30] *See* Reply at 23-25.

Commission did not invoke its enforcement authority when considering patent issues. The Commission was properly more restrained, consistent with its limited jurisdiction in this area, merely stating that "if a future problem is brought to our attention, we will consider it and take appropriate action,"[31] without specifying what, if any, action would be appropriate. The Petition itself, while asking for a wide variety of Commission actions, is expressly a petition for rulemaking and declaratory ruling.[32]

The Reply also fails to establish that the Commission has ancillary jurisdiction to impose and enforce the patent licensing regulations proposed in the Petition and the Reply. The Reply does not refute the general consensus in the record that the proposed regulations do not satisfy the test for ancillary jurisdiction of *American Library Association v. FCC*.[33]

The Reply unsuccessfully attempts to distinguish its proposed regulatory framework for patent licensing from the improper broadcast-flag requirement in *American Library Association* by arguing that "ATSC patents are necessary for the transmission of the digital-television standard."[34] This claim is factually incorrect, as a DTV manufacturer could infringe on a patent while using technology that successfully receives a DTV signal.[35] Moreover, Petitioner's argument does not respond to the analysis demanded by *American Library Association*. Under even the most generous reading, Petitioner fails to explain how the detailed requirements for patent licensing proposed in the Petition and the Reply are (i) within the Commission's general jurisdictional grant and (ii) are reasonably ancillary to the

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[31] *See ATV Fourth Order* at 17794 ¶ 55.

[32] Although the Reply claims that unnamed parties have violated RAND commitments, *see* Reply at 24-25, Funai explained in its initial comments that holders of DTV patents, including Funai, "have licensed their technology widely, on reasonable terms and conditions," *see* Funai Comments at 9, and numerous other parties agree that DTVs are widely licensed on RAND terms.

[33] *See* 406 F.3d 689 (D.C. Cir. 2005) ("*American Library Association*"); *see also* Funai Comments at 6-8, Koninklijke Philips/Qualcomm Comments at 7, Thomson Comments at 2, and Zenith Comments and Opposition at 2.

[34] *See* Reply at 26-27.

[35] For example, on April 10, 2009, the ITC determined that VIZIO is infringing a Funai patent covering DTV technology. *See Certain Digital Televisions and Certain Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617, Commission Notice of Final Determination (Public Version, Apr. 10, 2009), *appeal filed and request for temporary stay granted*, *VIZIO Inc. v. Int'l Trade Commission*, No. 2009-1386 (Fed. Cir. June 10, 2009).

effective performance of the Commission's statutory duties.[36] In light of the successful DTV transition and the development of the competitive market for DTVs in the United States that have occurred without active Commission involvement in DTV patent licensing matters since 1996, Petitioner's proposals do not satisfy the *American Library Association* standard for ancillary jurisdiction.[37]

The Commission should not be swayed by the new arguments and proposals introduced by Petitioner's Reply in this proceeding. Funai requests that the Commission dismiss or deny Petitioner's proposals for rulemaking and for declaratory ruling in this matter and terminate this proceeding.

Very truly yours,

/s/ Cheryl Tritt
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[36] *See American Library Association*, 406 F.3d at 700.

[37] *See* Funai Comments at 6-8.