

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**CONSUMER ELECTRONICS ASSOCIATION  
COMMENTS IN SUPPORT OF TIVO  
PETITION FOR RULEMAKING**

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CEA supports TiVo Inc.’s (“TiVo”) petition<sup>1</sup> for the Commission to conduct a rulemaking to substantially reinstate its Second Report & Order (“Second R&O”)<sup>2</sup> and related regulations pertaining to Section 629 of the Communications Act.<sup>3</sup> The decision and order of the D.C. Circuit that vacated these provisions<sup>4</sup> did not question the Commission’s authority to enact them. Nor did it address, criticize, or undermine either

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<sup>1</sup> *Petition for Rulemaking*, CS Dkt. No. 97-80, PP Dkt. No. 00-67 (filed July 16, 2013) (“Petition”).

<sup>2</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (rel. Oct. 9, 2003) (“Second R&O”).

<sup>3</sup> Communications Act, Section 629, 47 U.S.C. § 549(a) (“Section 629”).

<sup>4</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013, “*EchoStar*”).

the technical CableCARD Support Rules<sup>5</sup> or the cable-related “Encoding Rules.”<sup>6</sup> As TiVo’s Petition recounts,<sup>7</sup> and as reviewed by the court in *EchoStar*,<sup>8</sup> CEA played a central role in bringing to the FCC, in response to specific requests of congressional leaders and of the Commission, a CE-Cable “plug & play” Memorandum of Understanding (“MOU”) to lend impetus and stability to the Commission’s implementation of Section 629.<sup>9</sup> CEA affirms TiVo’s recitation of the history leading to that agreement and these rules, and agrees that it is essential and ought to be noncontroversial that these rules be reinstated expeditiously.

The CableCARD Support Rules and the cable-related Encoding Rules of the Second R&O were not vacated on account of anything pertaining either to their substance or to the Commission’s authority or procedure in adopting them. They were vacated only because the Encoding Rules were also applied to DBS services in circumstances where

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<sup>5</sup> Second R&O, App. B, at 42-50, 47 C.F.R. §§ 76.640, 15.123 (“Support Rules”).

<sup>6</sup> *Id.*, App. B, at 50-59, Subpart W- Encoding Rules, 47 C.F.R. §§ 76.1901-1908 (“Encoding Rules”).

<sup>7</sup> TiVo Petition at 6 - 7.

<sup>8</sup> *EchoStar* at 995; *see also EchoStar* at 1002 (Judge Edwards, concurring).

<sup>9</sup> Letter from Carl E. Vogel, President and CEO, Charter Communications, et al , to Michael K. Powell, Chairman, FCC (Dec. 19,2002) (“Cable/CE Letter”), *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* (signed by Charter Communications, Inc., Comcast Cable Communications, Inc , Cox Communications, Inc., Time Warner Cable, CSC Holdings, Inc., Insight Communications Company, L.P., Cable One, Inc., Advance/Newhouse Communications, Hitachi America, Ltd., JVC Americas Corp , Mitsubishi Digital Electronics America, Inc , Matsushita Electric Corp. of America (Panasonic), Philips Consumer Electronics North America, Pioneer North America, Inc., Runco International, Inc , Samsung Electronics Corporation, Sharp Electronics Corporation, Sony Electronics, Inc , Thomson, Toshiba America Consumer Electronics, Inc., Yamaha Electronics Corporation, USA, and Zenith Electronics Corporation) (“MOU”).

DBS parties were not included in the CE-cable negotiations or in the MOU that was forwarded to the Commission. The court declined to limit its order to the DBS coverage only because FCC counsel had advised the court that the inclusion of DBS services in the Encoding Rules was considered, in the 2002 – 2003 timeframe, to be “integral” to the CE and cable parties’ willingness to sign a related private license agreement.<sup>10</sup> Nobody has suggested, however, that this license agreement would now, a decade later, be abandoned. An indeed it remains in force. Through 2007, TV manufacturers built more than 10.1 million<sup>11</sup> CableCARD-reliant DTV receivers, indicating that most TV manufacturers had signed the DFAST license and passed a CableLabs certification wave based on DFAST and the technology referenced in the Support Rules. This month, the Media Bureau granted an analog tuner waiver to Samsung pursuant to Samsung’s announced plans to introduce a new “Smart Player” product that relies on CableCARDs.<sup>12</sup>

CEA agrees with TiVo that the Commission can and should remove the uncertainty that threatens the video programming industry by reinstating the Second R&O as it pertains to cable operators. Reinstating the Second R&O as requested by TiVo will not harm any party and will simply reinstate rules that without controversy have been

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<sup>10</sup> As noted in the MOU, a draft copy of the DFAST License Agreement was provided to the FCC for informational purposes rather than for approval. The parties cautioned that if the FCC did not substantially adopt the parties’ recommendations in regulation, the DFAST License offer might be withdrawn, or prospective licensees could decline to sign it. This was the only sense in which the DBS coverage of the Encoding Rule draft regulations could be said to be “integral” to the MOU or to any other regulations.

<sup>11</sup> HD Guru, “How the cable industry plans to cheat 10 million HDTV owners,” <http://hdguru.com/how-the-cable-industry-plans-to-cheat-10-million-hdtv-owners/>, Apr. 15, 2008.

<sup>12</sup> *In the Matter of Samsung Electronics America, Inc. Petition for Waiver of Section 15.118(b) of the Commission’s Rules*, MB Dkt. No. 13-165, Memorandum Opinion and Order (rel. Sept. 6, 2013). Re the product introduction *see* n. 18, *infra*.

in place for a decade and relied upon by cable operators, content providers, device manufacturers, and consumers. CEA believes the existing record, and any comments on TiVo's petition, should support the prompt reinstatement of these rules. If the Commission feels obliged to issue a formal Notice of Proposed Rulemaking, it should do so expeditiously so as to avoid any further uncertainty.

**I. THE CABLECARD SUPPORT RULES ARE ENTIRELY UNRELATED TO *ECHOSTAR*, HAVE BEEN NONCONTROVERSIAL IN PRACTICE, AND SHOULD BE REINSTATED FORTHWITH.**

There is no valid reason for the Commission to hesitate in reinstating Sections 76.640 and 15.123 of its rules. These rules are entirely unrelated to any controversy that was before the court in *EchoStar*, have been necessary, beneficial, and noncontroversial since their adoption, and are in no sense "integral" to DBS or to the Encoding Rules.

As TiVo recounts in its Background and Introduction,<sup>13</sup> the Commission, upon the adoption of its initial rules implementing Section 629, expected competitive device entry to occur by July 1, 2000, the date on which major cable operators were required to have CableCARDS available.<sup>14</sup> When entry failed to occur, Members of Congress, and the Commission and its Media Bureau, convened meetings to interrogate members of the cable, consumer electronics, and retail industries.<sup>15</sup> The CE manufacturing and retail industry and the cable industry each pointed to purported failings and omissions of the

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<sup>13</sup> Petition at 3 – 9.

<sup>14</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Report and Order (rel. June 24, 1998) ("First R&O"); and Order on Reconsideration, CS Dkt. No. 97-80, statement of Commissioner Ness (rel. May 14, 1999).

<sup>15</sup> See Petition at 5 – 6 and notes 21 and 22.

other.<sup>16</sup> In response to these assertions, which included complaints about the terms on which licenses to build CableCARD-reliant products were offered,<sup>17</sup> CEA and the NCTA organized, convened, and led meetings between delegations of industry executives and engineers throughout most of 2002. Working with CableLabs engineers, they agreed on a draft DFAST license and a set of supporting technical references to be recommended to the FCC. The license draft was filed with the FCC for purposes of public information. The technical references, recommended for citation in FCC rules, were adopted after public notice and comment and codified at 47 C.F.R. Sections 76.640 (operator support obligations) and 15.123 (device labeling requirements). As a result of the clarity and confidence provided by Section 76.640 and the DFAST license, competitive entry followed.<sup>18</sup>

While there have been subsequent controversies about common reliance and the adequacy of field and “back end” support given to retail CableCARD-reliant products,<sup>19</sup> no controversy has arisen from or been linked to Section 76.640. Indeed, upon the

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<sup>16</sup> *Id.* notes 19 and 20.

<sup>17</sup> Petition at 4 – 6 and n. 19.

<sup>18</sup> *See, e.g.*, John P. Falcone, *Sony’s Line Show 2004*, *CNET*, [http://reviews.cnet.com/4520-8900\\_7-5123305-1.html](http://reviews.cnet.com/4520-8900_7-5123305-1.html). (“For 2004, Sony is taking its home-video offerings to the next level. All non-flat-panel HDTVs come equipped with the next-generation [HDMI interface](#) and are [CableCARD ready](#), so they can be plugged directly into compatible digital cable systems without a separate box.”) The initial generation of TV products were not supported in the marketplace for reasons unrelated to Section 76.640. However, Samsung this month is introducing a CableCARD-reliant “Smart Player.” *See* Mari Silbey, *Samsung Embraces CableCARDS*, *Light Reading*, [http://www.lightreading.com/document.asp?doc\\_id=702886](http://www.lightreading.com/document.asp?doc_id=702886), May 28, 2013.

<sup>19</sup> *See, e.g.*, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No.00-67, Third Report and Order and Order on Reconsideration ¶ 5 (Oct. 14, 2010).

petition of companies in both the CE and cable spheres, in 2010 the Commission built upon this structure by amending Section 76.640 to provide for a new, IP-based interface between operator-provided and home network devices.<sup>20</sup> In all of the public comments leading up to that action by the Commission, and in the FCC's general review and enhancement of its CableCARD-related rules in 2010, not a single complaint or other substantive request for revision was made about Section 76.640. Similarly, Section 15.123, while not as necessary for technical guidance and stability, has been uncontroversial.<sup>21</sup>

**II. THE ENCODING RULES HAVE BEEN UNCONTROVERSIAL IN THEIR OPERATION AND HAVE PROVIDED PREDICTABILITY AND RELIABILITY FOR CONSUMERS, MANUFACTURERS, AND CABLE OPERATORS.**

In the decade since the Commission's Encoding Rules were adopted, while EchoStar / DISH complained about the fact of DBS *coverage* in the Encoding Rules, there has been little complaint about their *substance*. The only controversy, with respect to "Selectable Output Control" in the context of a new business model, was resolved, as TiVo recounts and as the court noted in *EchoStar*, by Commission approval, through petition for waiver, of a limited exception for "early window" content.<sup>22</sup> There has been

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<sup>20</sup> *Id.* ¶¶ 39 – 44.

<sup>21</sup> Section 15.123 pertains to the labeling and test verification of CableCARD-reliant products. It was recommended after lengthy and detailed discussions among consumer electronics and cable engineers, and has resulted in the successful testing, verification, and self-verification of products. Like Section 76.640, it pertains strictly to CableCARDS so is irrelevant to DBS and to the *EchoStar* plaintiffs.

<sup>22</sup> *Motion Picture Association of America Petition for Expedited Special Relief; Petition for Waiver of the Commission's Prohibition on the Use of Selectable Output Control* (47 C.F. R. § 76.1903), Memorandum Opinion and Order, MB Dkt. No. 08-82, CSR-7947-Z,

no hint of concern that the Encoding Rules in any way have been detrimental to content owners, cable MSOs, or device manufacturers or other than of benefit to consumers.

The Encoding Rules, like the CableCARD Support Rules, represent a collaborative private sector solution that settled long and painful prior disputes and relieved much uncertainty. As TiVo recounts,<sup>23</sup> retailers and cable operators, in discussing licensing terms, had failed to agree on whether cable operators, in imposing “compliance” rules that would limit the capability of attached retail devices, were prohibited by the existing Section 629 rules (76 C.F.R. Sections 76.1201, 1203, and 1205) from imposing restraints addressed to copy protection, rather than addressed only to “theft of service” or “harm to the network.” This impasse, and the unfettered remote control that operators would have over how or whether retail products would function, was cited to the FCC by retailers as an obstacle to the introduction of products, because consumers could not be advised prior to purchase about what their products’ capabilities would be.<sup>24</sup> The FCC responded in a September 18, 2000 “Further Notice & Declaratory Ruling” that upon petition of any entity that had signed a license containing such restrictions the Commission would apply these rules on a case-by-case basis.<sup>25</sup> In the same document the FCC, recognizing that an agreed solution would be preferable to an

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¶¶ 12-18 (rel. May 7, 2010); *see EchoStar*, 704 F.3d at 997-998. CEA was among those vigorously opposing earlier petitions and arguments for broader exceptions.

<sup>23</sup> Petition at 4 – 5.

<sup>24</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling, CS Dkt. No. 97-80, (rel. Sept. 18, 2000, “Further Notice & Declaratory Ruling”). *See* Commission discussions of comments, ¶¶ 14 – 24.

<sup>25</sup> *Id.* ¶ 29.

*ad-hoc* one, instructed the CE and cable sides to work out their existing disputes and to submit a “final version” of the DFAST license within 30 days.<sup>26</sup>

The Encoding Rules benefit cable operators as well as device vendors and consumers. After DVR functionality appeared in retail products such as TiVo’s, it became a feature of devices leased by MVPDs, which now promote devices with six or more tuners.<sup>27</sup> So long as the existing content licenses remain in effect, this benefits everyone. But CEA shares TiVo’s concern that in the absence of the level playing field provided by 47 C.F.R. Sections 1901 – 1908, these features on which consumers now rely will become pawns in license struggles between distributors and content owners, who can threaten to hobble leased devices. Consumers owning retail devices face a double whammy: *both* content originators *and* content distributors can arbitrarily trigger restrictions on retail products while not imposing them on leased devices.

Nothing in the *EchoStar* case or opinion provides any justification for the Commission to retreat from its Section 629 obligations by allowing this to happen. The issues about whether the cable or the CE side might withdraw from their 2002 MOU and decline to sign or implement the DFAST license (making the Encoding Rules, at that

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<sup>26</sup> *Id.* ¶ 32. The actual completion of the MOU took significantly longer.

<sup>27</sup> See Mike Snider, “*Super DVRs swoop in to save your shows,*” *USA Today*, Sept. 10, 2013, <http://www.usatoday.com/story/tech/personal/2013/09/10/directv-dish-lead-on-super-dvrs/2684649/>. “Satellite TV operators DirecTV and Dish Network led the charge with digital video recorders that let you record five or more programs at a time. These super DVRs have evolved to let you watch programs on your smartphone and tablet at home and away. Now cable companies such as Comcast, Cox and Time Warner are at work on their own.”

time, “integral” to the MOU) became moot a decade ago.<sup>28</sup> Any statement in 2002 reserving a right to withdraw was for the benefit of the public in commenting on the proposed regulations, and for the benefit of the Commission in considering them. Nothing in the present day CE-Cable context, and nothing in the *EchoStar* case, suggests that the Commission should even hesitate to reinstate its rules as they pertain to the CE and cable industries.

In the absence of Encoding Rules, Commission policy reverts to the September 18, 2000 Further Notice and Declaratory Ruling, which *still*, in enforcing Sections 76.1201, 1203, and 1205, asserts Commission authority over CE-Cable copy protection impositions. Under the Declaratory Ruling section, if any party believes it has offered or signed a license that is unfair, it can petition the FCC pursuant to paragraph 29. Under the Further Notice section, the CE and Cable industries are obliged by paragraph 32 to submit to the Commission a mutually acceptable DFAST license agreement. Reverting to such an after-the-fact procedure would again raise the need for Encoding Rules and a mutually agreed license, because such *ad-hoc* determinations are not sufficiently predictive to support investment by entrants.

The Encoding Rules have been a successful and stable solution to a real problem in the implementation of Section 629 that emerged only among the CE, cable, and

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<sup>28</sup> This option was, in any event, self-declared by the parties and never in any sense binding on the FCC. If the FCC had made major revisions to draft regulations proposed in the MOU this would have broken no promise to CE or Cable. Conversely, the CE and Cable parties to the MOU would have had the right to decline to implement the DFAST license.

content industries.<sup>29</sup> The *EchoStar* case, brought by a DBS service, provides no reason or justification for the FCC not to reinstate these rules as they pertain to cable. If the Commission should fail to do so, the underlying problems, controversies, and distractions for the FCC will re-emerge.

### CONCLUSION

Both the CableCARD Support Rules and the Encoding Rules adopted with the Second Report & Order have been successful in their objectives and uncontroversial in their implementation. In the absence of any changed circumstance or legal impediment, it would be arbitrary of the Commission to fail to reinstate them.

Respectfully submitted,

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<sup>29</sup> DBS operators continue to benefit from forbearance so have not been subject to the Commission's implementation rules. See First R&O, ¶¶ 64 – 66.