

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

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	)	
	)	
	)	
	)	

**REPLY COMMENTS OF THE MOTION PICTURE  
ASSOCIATION OF AMERICA**

The Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member studios,<sup>1</sup> submits these reply comments in response to TiVo’s petition<sup>2</sup> asking the Federal Communications Commission to, among other things, reinstate its encoding rules on cable operators.<sup>3</sup> As demonstrated by the Program Network Interests, Verizon, and NCTA, the Commission should reject TiVo’s petition, particularly with respect to the encoding rules. The current dynamic marketplace for video delivery demonstrates MPAA’s long-standing contention that encoding rules are not necessary to fulfill the FCC’s statutory obligations or to promote the public interest. Further, the record demonstrates that the FCC lacks jurisdiction to re-impose encoding rules.

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<sup>1</sup> Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

<sup>2</sup> TiVo Inc., Petition for Rulemaking, CS Docket No. 97-80; PP Docket No. 00-67 (July 16, 2013) (“Petition”).

<sup>3</sup> These rules were recently vacated by the Court of Appeals for the D.C. Circuit in *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (“*EchoStar*”).

***Encoding Rules Are Not Necessary.*** Neither TiVo nor other proponents of re-imposing encoding rules identify a single existing consumer harm that readopting the encoding rules would address. The Commission need not—and should not—act on speculative harm alone. Indeed, readopting the encoding rules is simply not necessary to achieve the Commission’s statutory goal, under Section 629 of the Communications Act, of “assur[ing] the commercial availability” of retail set-top boxes.<sup>4</sup> As the D.C. Circuit determined in its *EchoStar* decision, the Commission itself has not “adhere[d] to the view that rigid imposition of the encoding rules is essential to making navigation devices commercially available.”<sup>5</sup> Further, since the *EchoStar* decision vacated the Commission’s rules, new retail CableCARD products have been announced.<sup>6</sup> The launch of such devices in the absence of formal encoding rules conclusively demonstrates the lack of any causal relationship between such rules and Section 629’s stated goals.

The Program Network Interests correctly explained that not only were the now-vacated encoding rules unnecessary, they actually harmed consumers by imposing an overly rigid system of copy protection limits that interfered with the market’s ability to find innovative solutions to complex technical problems.<sup>7</sup> Congress recognized nearly twenty years ago that the marketplace

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<sup>4</sup> 47 U.S.C. § 549(a).

<sup>5</sup> *EchoStar*, 704 F.3d at 998.

<sup>6</sup> See Jeff Baumgartner, *Samsung’s CableCARD Retail Box Nears Launch*, MultiChannelNews (Sept. 26, 2013), <http://www.multichannel.com/technology/samsung%E2%80%99s-cablecard-retail-box-nears-launch/145717>.

<sup>7</sup> Comments of Program Network Interests, CS Docket No. 97-80, at 2 (filed September 16, 2013) (“Program Network Interests Comments”) (“[T]he encoding rules either outright prohibited certain functionalities or established detailed procedures for classifying the encoding of new services or business models, both of which limited the ability of MVPDs and programmers to develop compelling new services for consumers within the multichannel video ecosystem.”).

and cross-industry organizations can better establish and maintain protections for content than can a governmental agency.<sup>8</sup>

The Program Network Interests further detail that the flexibility associated with nontraditional services has helped contribute to the recent explosion in ways consumers can access video content.<sup>9</sup> These commercial relationships allow new business models to emerge far more rapidly than with traditionally regulated multichannel video services, thus vitiating TiVo's suggested linkage between the encoding rules and innovation.

Accordingly, despite TiVo's unsubstantiated assertions to the contrary,<sup>10</sup> there is no evidence that consumers are harmed today by the lack of encoding rules. Programmers, service providers and consumer electronics companies have every incentive to meet their consumers' expectations and are continually working to do so.<sup>11</sup> Therefore, as NCTA argues, there is no evidence that consumers are being harmed, or will be harmed, in the absence of mandatory encoding rules.<sup>12</sup>

***The FCC Lacks Jurisdiction to Adopt Encoding Rules.*** MPAA has long expressed concerns about the Commission's authority to adopt encoding rules.<sup>13</sup> Ultimately, the D.C.

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<sup>8</sup> See H.R. Rep. 103-560, at 91 (1994) ("The Committee does not believe that a Commission standard-setting process is necessary to achieve these goals. The Committee believes standards are, in most cases, best set by the marketplace or by industry standard-setting organizations, particularly in dynamic and growing industries."). See also Comments of the Motion Picture Association of America, Inc., MB Docket No. 10-91, at 4 (filed July 13, 2010)(citing *id.*).

<sup>9</sup> Program Network Interests Comments at 1.

<sup>10</sup> TiVo Petition at 10-14.

<sup>11</sup> Program Network Interests Comments at 2.

<sup>12</sup> Comments of NCTA, CS Docket No. 97-80, at 15-17 (filed September 16, 2013) ("NCTA Comments")

<sup>13</sup> Reply Comments of MPAA, CS Docket No. 97-80, at 8-10 (filed April 28, 2003).

Circuit in *EchoStar* found that the Commission had neither direct nor ancillary authority under Section 629, nor ancillary authority under Section 624A, to adopt encoding rules.<sup>14</sup>

The Program Network Interests note that the court in *EchoStar* clearly rejects FCC authority to impose encoding rules on DBS providers and at the very least raises serious questions about FCC authority to impose the rules on cable operators.<sup>15</sup> Verizon stresses that the court concluded that “[i]n the end, we are left with two provisions, neither of which authorizes the encoding rules at issue.”<sup>16</sup> Specifically, the court found that the Section 629 directive to “assure the commercial availability of navigation devices” does not authorize the encoding rules where “the encoding rules are not necessary to sustain a commercial market.”<sup>17</sup> As noted above, there is no evidence on the record that encoding rules have any demonstrable effect on the commercial market for navigation devices or are necessary to sustain a commercial market for such devices.<sup>18</sup> Commenters further highlight the policy and legal infirmities of imposing

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<sup>14</sup> *EchoStar*, 704 F.3d at 996-1000.

<sup>15</sup> See, e.g., Program Network Interests Comments at 3 (“[T]he D.C. Circuit’s decision leaves significant doubt about whether the encoding rules could be reinstated in a cable-specific manner” because the court found that Section 629 provides no direct or ancillary authority, and the court questioned whether the Section 624A compatibility mandate with VCRs would extend to modern technologies); Comments of Verizon, CS Docket No. 97-80, at 6 (filed September 16, 2013) (“Verizon Comments”) (“[T]he Commission cannot simply ‘reinstat[e]’ the Second Report and Order applying the encoding rules to cable companies only because the Court invalidated all legal bases for the encoding rules as applied to all MVPDs”).

<sup>16</sup> Verizon Comments at 7 (quoting *EchoStar*, 704 F.3d at 1000).

<sup>17</sup> *EchoStar*, 704 F.3d at 997. The court further concluded that the encoding rules were not reasonably ancillary to the FCC’s Section 629 objective of assuring the commercial availability of navigation devices. Specifically, the court “refuse[d] to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC’s creativity in linking its regulatory actions to the goal of commercial availability of navigation devices.” *Id.* at 999. Verizon concluded that nothing in the court’s reasoning limited this finding to DBS encoding rules only. Verizon Comments at 6. Similarly, Verizon explained that the court raised significant concerns with ancillary authority claims under Section 624A. Verizon Comments at 7.

<sup>18</sup> Program Network Interests Comments at 1-2.

encoding rules on only a subset of MVPDs.<sup>19</sup> In response, commenters in favor of re-imposing encoding rules provide no detailed legal justification or analysis to support TiVo's Petition.<sup>20</sup>

**Conclusion.** The FCC should reject TiVo's petition to reinstate the encoding rules struck down by the D.C. Circuit with respect to cable operators. Such rules are unnecessary and overly restrictive in today's dynamic video delivery marketplace, and are beyond the FCC's authority to adopt in any case.

Respectfully submitted,

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October 18, 2013

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<sup>19</sup> NCTA Comments at 17-22.

<sup>20</sup> Comments of Consumer Electronics Association, CS Docket No. 97-80, at 1-3, 9-10 (filed September 16, 2013) (asserting without analysis that "the cable-related Encoding Rules ... were not vacated on account of anything pertaining either to their substance or to the Commission's authority or procedure in adopting them"). *See generally*, Comments of Public Knowledge, CS Docket No. 97-80 (filed September 16, 2013); Comments of AllVid Tech Company Alliance, CS Docket No. 97-80 (filed September 16, 2013).