

**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
REPLY COMMENTS IN SUPPORT OF TIVO
PETITION FOR RULEMAKING**

October 25, 2013

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In its comments in support of TiVo’s Petition,¹ CEA recounted how the CableCARD Support Rules² and the Encoding Rules³ filled substantive needs that became apparent to industry and to the Commission as the FCC attempted to implement Section 629 of the Communications Act.⁴ CEA demonstrated that nothing in the D.C. Circuit’s *EchoStar* opinion⁵ addresses the merits of these rules or impairs the authority of the Commission to reinstate them as they apply to cable operators. These observations are supported by the comments of Public Knowledge⁶ and the AllVid Tech Company Alliance.⁷ The comments in opposition to the Petition do nothing to disturb the fact that these rules have been essentially noncontroversial on their merits, have been vital to the

¹ *Petition for Rulemaking*, CS Dkt. No. 97-80, PP Dkt. No. 00-67 (filed July 16, 2013) (“Petition”); Comments of the Consumer Electronics Association (Sept. 16, 2013).

² 47 C.F.R. §§ 76.640, 15.123 (“Support Rules”).

³ 47 C.F.R. §§ 76.1901 – 1908 (“Encoding Rules”).

⁴ Communications Act, Section 629, 47 U.S.C. § 549(a) (“Section 629”).

⁵ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013, “*EchoStar*”).

⁶ Comments of Public Knowledge at 1 (“PK comments”).

⁷ Comments of AllVid Tech Company Alliance at 1 – 2 (“Alliance comments”).

Commission's mandate under Section 629, and can and should be reinstated by the Commission. CEA agrees with PK⁸ and the Alliance⁹ that if the Commission in its rulemaking addresses more than the relief sought by TiVo it should propose regulations supporting a successor interface based on common industry standards, as outlined in prior filings by the Alliance.¹⁰

I. COMMENTS BY NCTA, VERIZON, AND PROGRAM NETWORK INTERESTS CITE NO SUBSTANTIVE REASON WHY THE SUPPORT AND ENCODING RULES SHOULD NOT BE REINSTATED AS PETITIONED FOR BY TIVO.

Nothing in the comments opposing TiVo's Petition addresses the specific merits of the CableCARD Support Rules or the Encoding Rules. The comments of Verizon, NCTA, ACA, and the Program Network Interests simply take this opportunity to pursue related agendas.

A. No Comment Provides Any Substantial Reason Not To Reinstate The CableCARD Support Rules.

About the Support Rules, which NCTA jointly proposed with CEA in 2002,¹¹

⁸ PK comments at 3.

⁹ Alliance comments at 2.

¹⁰ See Letter from Robert S. Schwartz, Counsel, AllVid Tech Company Alliance to Marlene H. Dortch, Sec. FCC Re: Video Device Competition, MB Dkt. No. 10-91; Commercial Availability of Navigation Devices, CS Dkt. No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Dkt. No. 00-67 (Sept. 20, 2011), and attachments ("Alliance Framework").

¹¹ 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").

NCTA says only that *any* “cable only” rules are “anachronistic.”¹² NCTA’s only support for this assertion is the reference to various “apps” that make some MVPD content available some of the time, to some subscribers.¹³ Yet the Commission has never found that such a variegated, hit-or-miss “app” approach serves as a substitute for a nationally standard, common interface to assure the commercial availability of competitive devices. By failing to pursue an NPRM as requested by TiVo, the Commission would tacitly be making such a finding, in the absence of any public notice or comment.

Verizon, ACA, and the Program Network Interests have even less to say about the Support Rules, *per se*. Rather than address the need for the Rules, Verizon ups the ante by disclaiming the need to supply CableCARDs at all. Verizon quotes the Commission’s Fourth NPRM implementing Section 629, characterizing CableCARDs as “an aging technology.”¹⁴ But the Fourth NPRM resulted in the Third R&O, which was directed at *enhancing* industry and Commission support for CableCARDs as an interim solution, until a successor could be identified.¹⁵ No such interim solution has yet been identified by the Commission. Verizon supplies no reason why the Commission should without public notice or comment reverse its policy and abandon all support for CableCARDs, when the most recent measure taken by the Commission was to strengthen such support.

¹² NCTA comments at 5.

¹³ NCTA comments at 8. NCTA also points to non-MVPD services as competition, and asserts that its members will continue to supply CableCARDs. This assertion is undercut, however, by NCTA joining member Charter in casting doubt on whether, without the Support Rules, cable operators are still required to do so. *See* NCTA comments at 3 & n.8; *In the Matter of Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-8740-Z, MB Dkt. No. 12-238, Opposition of Charter Communications, Inc. to Application for Review at 12 – 13 (June 3, 2013).

¹⁴ Verizon comments at 3 & n.9.

¹⁵ *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 (Oct. 14, 2010) (“Third R&O”).

ACA's CableCARD agenda is more limited – ACA seeks a common reliance waiver for “small” cable operators. Whether or not this is a worthy objective (CEA generally has opposed such waivers) would be determined, in the event an appropriate petition were to be filed, through public notice and comment. Even if granted, such a petition would provide no reason to refrain from reinstating the CableCARD Support Rules. Thus ACA's comments are orthogonal to TiVo's petition. The comments of the Program Network Interests are even less materially related to CableCARD support or the Support Rules. They address the Encoding Rules.

B. No Comment Criticizes The Encoding Rule Outcomes.

Commenters' criticisms of the Encoding Rules are also largely substance-free. NCTA does not appear to have concerns about their outcomes in practice, but asserts that the rules are no longer necessary to achieve these outcomes¹⁶ (a position belied by the Program Network Interests filing, as discussed below). NCTA also complains that the Rules' application only to cable operators would harm competition with other services.¹⁷ (This concern seems unfounded if NCTA is correct in its assertion that due to market forces the rules are unnecessary.) NCTA's actual grievance, however, lies with the 1998 First Report & Order's grant of forbearance DBS operators.¹⁸ As in the case of ACA's desire for a blanket common reliance waiver, this is a separate issue and prayer for relief that would more appropriately be the subject of a separate petition. In any event, TiVo

¹⁶ NCTA comments at 15 – 16. Indeed NCTA seems open to reinstatement if the rules would apply to other services as well. *Id.* at 19 – 21.

¹⁷ *Id.* at 19 – 21.

¹⁸ See *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Report and Order at ¶ 66 (rel. June 24, 1998, “First R&O”).

demonstrates in its Petition that cable operators would not be put at a competitive disadvantage by the reinstatement of the rules for cable.¹⁹

The comments of the Program Network Interests do indicate a desire to be free of Encoding Rule outcomes. These comments do not criticize any of the outcomes under the Rules. Rather, they complain about procedure – that it took the Motion Picture Association (MPAA) too long to obtain a waiver for specific new services.²⁰ CEA, having been a party to the proceedings referred to, finds this criticism unjustified. The initial waiver sought by the MPAA, though nominally aimed at specific new services, was written so broadly that it would have allowed any content provider or distributor to shut off any device for any reason.²¹ The Media Bureau denied MPAA’s petition but granted a narrower waiver based on the record developed through public comment, rather than the “open-ended” relief as drafted by the MPAA.²² The waiver process worked as designed,²³ benefited from public comment, and clearly would have functioned more expeditiously had the MPAA drafted its waiver request to address only the relief it actually sought.

¹⁹ Petition at 18 – 19.

²⁰ Program Network Interests comments at 2.

²¹ Both those opposed to the waiver and several entities in favor of it objected or observed that the terms of relief, as drafted by MPAA, were far broader than MPAA’s stated objectives. The Media Bureau agreed. *In the Matter of 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*, MB Docket No. 08-82, Memorandum Opinion and Order at ¶ 12 & n.42 (May 7, 2010). Any review of the Docket reveals that much time was spent on parsing and discussing the over-breadth of MPAA’s original request.

²² *Id.* at ¶ 13.

²³ “When the Commission adopted the prohibition on SOC, it specifically contemplated waivers for high value content to facilitate new business models.” *Id.* at 19. CEA opposed the more focused waiver formulation that was ultimately granted, but had ample opportunity to comment on its terms.

II. THE CABLECARD SUPPORT RULES AND THE CABLE ENCODING RULES REMAIN VITAL TO IMPLEMENTING THE COMMISSION'S MANDATE UNDER SECTION 629 OF THE COMMUNICATIONS ACT.

CEA's comments support TiVo's recounting of how and why the Support Rules and the Encoding Rules became and remain necessary.²⁴ Prior to the Support Rules entrants lacked a clear and stable roadmap for building products that, through common reliance, would be assured of working on any cable system.²⁵ Prior to the Encoding Rules, CE and cable parties could not agree whether a license imposing copy protection restrictions on entrant devices would be consistent with Sections 76.1201, 1203 and 1205 of Commission rules. These obstacles will re-emerge as conundrums for the Commission if both sets of rules are not reinstated as they apply to cable services.

Already, the record reflects these uncertainties. NCTA cites the Media Bureau's own uncertainty, in acting on member Charter's waiver petition, whether in the absence of Support Rules CableCARDs remain a reliable format, and suggests that CableCARD support is now voluntary rather than mandatory.²⁶ To the extent cable operators may believe that CableCARD requirements are less than certain, they must also believe that they are free to depart from the technical requirements for supporting CableCARDs. A return to non-standard support would chill prospects for additional commercial entry, just

²⁴ See CEA comments at 2, 4 – 8.

²⁵ As has often been recounted, even after adoption of the Rules and commercial entry, cable industry support was so insufficient as to derail most of the entrant products. See discussion in Third R&O at ¶ 5.

²⁶ NCTA comments at 3 & n.8, 11 – 13; *In the Matter of Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-8740-Z, MB Dkt. No. 12-238, Opposition of Charter Communications, Inc. to Application for Review at 12 – 13 (June 3, 2013). CEA disagrees with this view, but any belief by cable operators that they are free to abandon CableCARD support will imperil the viability of products that rely on CableCARDs, and is likely to chill the prospect for new product entry.

as such entry has renewed.²⁷ The Commission has a present and pressing need to reinstate the Support Rules.

The Encoding Rules replaced a petition procedure in which the Commission evinced so little confidence that in the same Order²⁸ that announced the petition process the Commission required the CE and cable parties to submit an “agreed” standard license.²⁹ Commission rules were necessary to implement any such license because it is beyond the legal power of CableLabs and its licensees, in any license provision, to prevent content owners or distributors from activating anti-copy and interface shut-off triggers. Nor can the licensees authoritatively determine whether the insertion of such triggers would comply with Sections 76.1201, 1203, and 1205 of the Commission’s rules. The Encoding Rule solution addresses a CE- cable impasse under Commission rules. The *EchoStar* case disturbs neither the necessity nor the rationale for these rules.

III. THE COMMISSION HAS THE AUTHORITY TO REINSTATE THE SUPPORT AND ENCODING RULES AND SHOULD DO SO EXPEDITIOUSLY.

No comment questions the FCC’s authority to have enacted, and to reinstate, the Support Rules. Commenters do question the Commission’s authority to reinstate the Encoding Rules, but find little support in what the *EchoStar* case actually says. The

²⁷ Samsung’s new CableCARD-reliant product, noted in the CEA comments, has been introduced. See, e.g., http://www.amazon.com/Samsung-GX-SM530CF-Smart-Cable-Built-/dp/B00EYO241Q/ref=sr_1_1?s=electronics&ie=UTF8&qid=1380228223&sr=1-1&keywords=GX-SM530CF+Smart+Cable.

²⁸ *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”).

²⁹ As recounted in the Petition at 8 – 9 and in CEA’s comments at 4 – 6, the Commission’s Sept. 18, 2000 Further Notice and Declaratory Ruling declared a right to petition for Commission review of any license imposing copy protection constraints, but in the same Order required the CE and cable interests to submit an “agreed” version of the DFAST license.

court's opinion discusses the bases cited by the FCC for applying Encoding Rules to DBS operators, and finds these bases insufficient *with respect to DBS operators*. The court's discussion raises no such issue with respect to the FCC's authority to adopt the Rules as they apply to cable. If anything, the discussion confirms this authority.

The first basis cited by the FCC is the Commission's obligation to assure commercial availability of navigation devices. Reviewing FCC arguments about the Encoding Rules' necessity, in order for devices to meet "consumers' expectations that their digital televisions and other equipment will work to their full capabilities,"³⁰ the court concludes:

"Consumer satisfaction enhances consumer demand, ensuring a viable commercial market. *However, as the FCC acknowledges, the encoding rules are not necessary to sustain a commercial market for direct broadcast satellite devices. ... Applying the encoding rules to cable providers may meet consumer expectation with respect to the market for cable devices, but that is no reason to impose these rules on all MVPDs.*"³¹

The court goes on to review the alternative grounds offered by the FCC, of ancillary jurisdiction. It observes: "Neither side disputes that the encoding rules, through their application to cable and satellite broadcasts, qualify as regulations of 'radio and wire communication service' under Title I. At issue instead is whether the encoding rules were reasonably ancillary to the FCC's effective execution of its duties under either § 629 or § 624A." Again, the court reaches its conclusion re satellite by

³⁰ *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 at ¶ 60 (rel. Oct. 9, 2003) ("Second R&O").

³¹ *EchoStar* at 997 (emphasis supplied).

emphasizing the *difference* between the basis for applying the Encoding Rules to cable and for applying them to satellite:

“The FCC is not authorized under § 629 to take any action that lessens the competitive pressures *posed by satellite providers* in order to induce cable operators to ratify an MOU the agency favors.”³²

“[T]here is every reason to believe § 624A was directed at cable systems alone.”³³

In his concurring opinion Judge Edwards emphasizes that the court is not even saying that the FCC, today, lacks authority to subject DBS operators to these Encoding Rules. Judge Edwards observes:

Congress obviously afforded the FCC considerable discretion in directing the agency to promulgate standards “to assure the commercial availability ... of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.” 47 U.S.C. § 549(a). The statute does not by its terms prohibit the requirement of encoding rules. Rather, any challenge to the agency's exercise of its discretion under Section 629 must take into account the circumstances presented and the Commission's explanation for the action in question.³⁴

Noting that Petitioner had *conceded* the Commission's ability to adopt the cable “plug and play standards,”³⁵ Judge Edwards concludes, “I agree that, *in this case*, the FCC has failed to show the necessary link between the imposition of encoding rules on satellite carriers and the mandate of Section 629.”³⁶ He observes that the FCC had then

³² *Id.* at 998 – 999 (emphasis supplied).

³³ *Id.* at 999.

³⁴ *Id.* at 1001.

³⁵ *Id.*

³⁶ *Id.*, emphasis supplied.

and has now an ability to promulgate a set of rules “that considers the positions of all MVPD providers.”³⁷

As in the case of the Support Rules, the commenters may have grievances pertaining to Section 629 that are orthogonal to or related to CableCARD. NCTA and other commenters remain free to petition the Commission for relief based on changed DBS circumstances since the development of the record on which *EchoStar* was decided.³⁸ That such future petitions might be lodged with the FCC does not change the fact that nothing in the *EchoStar* case questions or undermines the Commission’s authority to apply Encoding Rules to cable services.

IV. IF THE COMMISSION INCLUDES ANY OTHER PROPOSALS IN A RULEMAKING IT SHOULD PROPOSE A SUCCESSOR INTERFACE TO IMPLEMENT SECTION 629.

Perhaps because this is a proceeding about whether to *launch* an NPRM, other commenters have taken this comment round as an opportunity to propose that the Commission pursue additional matters arising under Section 629. If the Commission chooses to do so in this NPRM, it should include the most pressing such matter – the need to identify and support in its regulations a successor common interface to CableCARD. The Commission in its Basic Tier Order agreed with CEA on the need for such an interface.³⁹ If the Commission does include additional matters, CEA supports the addition to Commission regulations of provisions that would support a successor

³⁷ *Id.*

³⁸ DBS operators continue to benefit from forbearance so have not been subject to the Commission’s implementation rules. *See* First R&O at ¶¶ 64 – 66.

³⁹ *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Report and Order at ¶ 35 n.162 (rel. Oct. 12, 2012).

interface through reference to common industry standards, as proposed in September, 2011 by the AllVid Tech Company Alliance.⁴⁰

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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⁴⁰ See Alliance Framework.