



November 19, 2014

ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte*, MB Docket No. 14-146, CS Docket No. 97-80

Dear Ms. Dortch:

On August 29, 2014, TiVo Inc. (“TiVo”) filed a Petition seeking waiver of or clarification regarding the requirement set forth in 47 C.F.R. § 76.640(b)(4)(iii) that TiVo products supplied wholesale to cable operators include an interactive and recordable home networking interface based on an open industry standard.¹ On October 20, 2014, TiVo filed Reply Comments noting that its request for waiver was unopposed, and addressing arguments made by Verizon, the only party that filed Comments in response to TiVo’s Petition.²

TiVo addresses herein arguments made by NCTA in its Reply Comments in the above-captioned proceeding,³ since these were in reality late-filed comments in response to TiVo’s Petition.⁴ NCTA largely repeats the arguments made by Verizon in its

¹ Petition of TiVo Inc. for Waiver or Clarification of 47 C.F.R. § 76.640(b)(4)(iii), MB Docket No. 14-146, CS Docket No. 97-80 (filed Aug. 29, 2014) (“TiVo Petition”).

² Reply Comments of TiVo Inc., MB Docket No. 14-146, CS Docket No. 97-80 (filed Oct. 20, 2014) (“TiVo Reply Comments”).

³ Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 14-146, CS Docket No. 97-80 (filed Oct. 20, 2014) (“NCTA Reply Comments”).

⁴ In addition to NCTA, the Digital Living Network Alliance (“DLNA”) also filed Reply Comments. Reply Comments of the Digital Living Network Alliance, MB Docket No. 14-146, CS Docket No. 97-80 (filed Oct. 20, 2014). DLNA characterizes TiVo’s Petition as seeking, in the alternative, “clarification from the Commission that its similar, but proprietary, solution be explicitly declared as acceptable for compliance with §76.640(b)(4)(iii).” *Id.* at 4. DLNA’s characterization of what TiVo is seeking is incorrect. While TiVo believes that its home networking solution provides users with the home networking functionality intended by Section 76.640(b)(4)(iii), it acknowledges that its proprietary solution does not meet the Commission’s definition of an “open industry standard” – hence TiVo’s Petition for Waiver. DLNA also opposes TiVo’s request for waiver (or extension of time to comply with the rule),

Comments⁵ — arguments that TiVo responded to in its Replies. Specifically, NCTA argued that the home networking interface rule had been vacated by the D.C. Circuit’s decision in *EchoStar v. FCC*,⁶ that TiVo’s waiver request demonstrates that the home networking interface rule should be eliminated, and that any waiver or extension of the compliance deadline granted to TiVo should be extended to the entire industry.

NCTA’s arguments ignore the specific facts and circumstances that underlie TiVo’s request for waiver of Section 76.640(b)(4)(iii) on behalf of its wholesale cable operator customers, including:

- TiVo’s boxes already provide a home networking solution that allows the home networking functionality envisioned by the rule;
- The high cost to TiVo given its relatively limited resources of developing an alternate solution with lesser functionality than its existing solution;
- The harm to small and mid-sized cable operators with limited economies of scale who rely on TiVo’s boxes to provide their customers with competitive products and services;
- The lack of competitive harm given TiVo’s domestic base of less than two percent of all cable subscribers; and
- The fact that the primary purpose of Section 76.640(b)(4)(iii), which is to enable cutting-edge home networking solutions “while ensuring that cable operators do not rely on proprietary specifications that reject input from interested industries,”⁷

but does so in conclusory fashion claiming that its guidelines “have been available long enough to enable implementation” without providing further details or arguments, and without addressing TiVo’s specific waiver request.

⁵ Comments of Verizon, MB Docket No. 14-146, CS Docket No. 97-80 (filed Oct. 6, 2014).

⁶ As TiVo noted in its Petition and Reply Comments, a finding that Section 76.640(b)(4)(iii) was negated as a result of the decision in *EchoStar v. FCC* would make action on this Petition unnecessary. The Commission, however, has declined to make such a finding to date and NCTA has not presented any additional arguments or facts in support of such a finding. TiVo has previously noted its disagreement with the legal conclusion that *EchoStar* in effect vacated all rules adopted in the Commission’s 2010 *Third Report and Order*. See *Charter Communications, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CSR-8740-Z, MB Docket No. 12-328, CS Docket No. 97-80, Reply Comments of TiVo, Inc. at 4-5 (Jun. 10, 2013).

⁷ *TiVo Inc.’s Request for Clarification and Waiver of the Audiovisual Output Requirement of Section 76.640(b)(4)(iii); Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 12-230, CS Docket No. 97-80, PP Docket No. 00-67, Memorandum Opinion and Order, DA 12-1910, ¶ 11 (rel. Nov. 28, 2012).

is not at risk because TiVo is using a home networking specification that was developed for the retail market and not to serve its cable operator customer's proprietary interests.

TiVo is uniquely situated in the market as a manufacturer that develops set-top boxes for the retail market and also acts as a wholesale supplier of those same set-top boxes to small and mid-size cable operators. In the absence of a competitive market for set-top boxes, TiVo is obliged to use its existing retail platform as a baseline for anticipating operator choices with respect to home networking solutions AND to develop ways to distinguish its retail offerings from set-top boxes that can be so easily leased from an operator. In doing so in this instance, TiVo invested significant time and financial resources to develop a home networking solution prior to the finalization of the industry standards-setting process. TiVo's request for waiver asks the Commission to recognize this investment toward providing consumers with the home networking functionality anticipated by Section 76.640(b)(4)(iii) and to not in effect penalize TiVo for its prior investment in furtherance of the goal of the rule.

NCTA's calls for eliminating the home networking rule are far beyond the scope of this narrow proceeding involving TiVo's waiver request, and are not supported by the record. Moreover, as TiVo noted in its Reply Comments, the unique facts presented by TiVo's request do not support an industry-wide waiver.⁸ NCTA has not demonstrated good cause or "particular facts [that] would make strict compliance inconsistent with the public interest"⁹ that would justify a broad, industry-wide waiver grant. If particular operators or manufacturers were to demonstrate that their set-top boxes provide subscribers with home networking solutions that satisfy the goal of the rule while not causing competitive concerns by using operator-backed proprietary specifications, waiver of the rule may be justified.

Accordingly, TiVo urges the Commission ignore the overly broad requests from NCTA and Verizon and to grant TiVo's Petition expeditiously. Please direct any questions regarding this matter to the undersigned.

⁸ TiVo Reply Comments at 5-6.

⁹ *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

Respectfully submitted,

TIVO INC.

_____/s/_____
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cc: William Lake
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