

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

In the Matter of)
)
Applications of) MB Docket No. 14-90
)
AT&T, Inc. and)
DIRECTV)
)
For Consent To Assign or Transfer Control of)
Licenses and Authorizations)

REPLY COMMENTS OF TIVO INC.

TiVo Inc. (“TiVo”) files these reply comments in the above-captioned AT&T and DIRECTV merger proceeding, focusing on the failure of the merging parties to support retail competition in the market for navigation devices as envisioned by Section 629 of the Communications Act.¹ As explained below, neither company, and certainly no other party, has offered any relevant justification for the merging companies’ failure to comply with Section 629 or any explanation why the merging parties should not be required to support retail devices in the limited, non-industry wide manner suggested by TiVo in its earlier-filed comments.

As TiVo explained in its comments, DIRECTV and AT&T are among the largest MVPDs and would be the largest MVPD if the merger is approved, but at present these providers deny their subscribers the benefits of the device competition and choice envisioned by Section 629.² TiVo also explained that the original rationales for excluding DBS and IPTV providers

¹ 47 U.S.C. § 549.

² Comments of TiVo Inc., MB Docket No. 14-90, at 2-4 (filed Sep. 16, 2014) (“TiVo Comments”).

from the device competition rules implementing Section 629 are no longer applicable.³

Accordingly, TiVo urged the Commission to adopt as part of any merger approval a requirement that the merged entity comply effectively with the requirements of Section 629 by affording equal device access to its MVPD programming and channel lineups. TiVo urged the Commission to accomplish this by requiring the merged company to make its conditional access solution available to retail manufacturers to design and produce competitive navigation devices.⁴

AT&T and DIRECTV's Joint Opposition is largely non-responsive and seems to ignore what TiVo actually said in its comments.⁵ First, the Joint Opposition argues — apparently responding to Public Knowledge's Petition to Deny — against the imposition of an industry standard and says that such issues of “general applicability” should be addressed in the “AllVid” proceeding.⁶ However, the Joint Opposition fails to address or otherwise respond to TiVo's request that the Commission condition the merger by requiring the merged company simply to make available to retail manufacturers the same conditional access solution it uses in its systems — not an “industry standard.” While TiVo certainly supports industry standards that would work across multiple MVPDs, it has requested a far more limited condition appropriate to this merger proceeding.

³ *Id.* at 5-7.

⁴ *Id.* at 8. TiVo noted that for as long as the merged company uses different security solutions for its DBS and IPTV systems, it should be required to make those two solutions available to manufacturers, and if and when it begins using a single solution across its network that solution should be made available. *Id.* In addition to making its security solutions available to retail device makers, any MVPD operated by AT&T/DirecTV should be subject to the same requirements contained in 47 CFR 76.1200 *et seq.*, including the right to attach and no restrictions on unaffiliated third party devices beyond protecting against theft of service and harm to the network.

⁵ Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, MB Docket No. 14-90, at 62-65 (“Joint Opposition”).

⁶ *Id.* at 62.

Next, the Joint Opposition argues that “competition in the video device and set-top box market is more vibrant than it has ever been” and that “[c]onsumers can receive video content on their televisions through a wide and growing variety of additional devices”⁷ However, the examples cited by AT&T and DIRECTV either involve devices used to view OTT content or “TV Everywhere” applications from U-verse and DIRECTV that simply allow MVPD programming to be viewed on different screens. Neither of these examples speaks to the type of competition in navigation devices envisioned by Section 629, which was designed to provide consumers with retail choice that facilitates innovative ways to *navigate* -- view, search for, and discover -- MVPD programming, not simply choice among different screens on which to view the same programming presented the same way.⁸

AT&T and DIRECTV also cite DIRECTV’s TiVo HD DVR as an example of “set-top boxes developed in partnership with other innovators.”⁹ However, as TiVo has explained,¹⁰ DIRECTV required that the TiVo HD DVR built for its network be designed to a DIRECTV specification that is severely and needlessly limited in comparison both to DIRECTV’s own leased products and to TiVo’s other products, and that in effect permits almost none of the advantages that customers of TiVo’s industry-leading retail devices enjoy. TiVo’s experience has been that DIRECTV “partnered with other innovators” by limiting their ability to innovate.

⁷ *Id.* at 63.

⁸ TiVo has addressed in the past the ways in which simply enabling programming to be viewed on different devices/screens differs from the type of competition envisioned by Section 629. *See, e.g.*, Reply Comments of TiVo Inc., MB Docket No. 14-146, CS Docket No. 97-80, at 4 (filed Oct. 20, 2014); Comments of TiVo Inc., MB Docket No. 14-16, at 10-14 (filed Mar. 21, 2014); Reply Comments of TiVo Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 7-10 (Oct. 25, 2013).

⁹ Joint Opposition at 63.

¹⁰ TiVo Comments at 2 n.3.

Finally, AT&T and DIRECTV argue that “the transaction will improve AT&T’s and DIRECTV’s set-top box offerings” thanks to the stronger economies of scale enjoyed by the merged company.¹¹ This supposed benefit is to the *operators’ own* set-top box offerings — it is simply non-responsive to say that set-top box competition is not needed because the operators’ own offerings will be improved. Congress and the Commission have rightly favored policies that promote competition as the means for providing consumers with innovation and improved choice.

One of the major stated justifications for this merger is to improve AT&T and DIRECTV’s economies of scale so the combined entity can achieve more favorable programming pricing.¹² In fact, the scale of the combined entity will give it a pricing advantage over almost all of its competitors. The merger will also *reduce* the number of competitive MVPDs in any market in which AT&T provides U-Verse service. In a market with greater consolidation of sources for linear video programming, ensuring retail device competition at least gives consumers choice with respect to how they access, view, and search for video content. Retail device competition would also serve as a competitive check on the ability of the merging parties to leverage their increased size and the reduction in MVPD competition in order to charge higher set-top box leasing and installation fees.¹³ A further advantage of retail device

¹¹ Joint Opposition at 64 and n.233.

¹² AT&T and DIRECTV Merger Application, Form 312, Exhibit A, Description of Transaction, Public Interest Showing, and Related Demonstrations, MB Docket No. 14-90, at 34-37 (filed June 11, 2014).

¹³ DIRECTV has announced plans to increase its programming prices on February 5, 2015. See Phillip Swann, *DIRECTV to Raise Prices in February*, Dec. 29, 2014, at <http://tvpredictions.com/directv122914.htm>. It can be anticipated that DIRECTV will subsequently also increase its equipment prices, as it has in the past. See, e.g., Todd Spangler, *DIRECTV to Hike Rates 4.5% in 2013*, Dec. 27, 2012, at <http://www.multichannel.com/news/video/directv-hike-rates-45-2013/306455>; Laura Northrop, *How Phantom Fees Finally Drove Me Away From DIRECTV*, Feb. 11, 2013, at <http://consumerist.com/2013/02/11/how-phantom-fees-finally-drove-me-away-from-directv/>.

competition is that manufacturers of retail devices have no incentive to favor programming from a particular source. As a result, TiVo has been a pioneer in integrating over-the-top video content from sources such as Netflix, Amazon, YouTube, etc. with MVPD-provided linear programming, allowing consumers to search for video programming across multiple sources. Thus, retail device competition enhances competition in program content.

Accordingly, TiVo urges the Commission to condition any merger approval on a requirement that the merged company provide: (1) consumers with a right to attach unaffiliated retail devices to its MVPD network(s), and (2) competitive manufacturers with fully-featured access to the conditional access solution(s) used in order to enable manufacturers to provide consumers with the benefits of retail device competition with no restrictions on unaffiliated third party devices beyond protecting against theft of service or harm to the network.

Conclusion

For the reasons discussed herein, TiVo urges the Commission, if it decides to approve the merger of the leading DBS MVPD and the leading IPTV MVPD, to require that the merged company comply meaningfully and effectively with existing law, including Section 629's obligation to support commercial competitive devices, as discussed above.

Respectfully submitted,

/s/

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