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

In the Matter of	)	
	)	
Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)))	MB Docket No. 14-261

COMMENTS OF TIVO INC.

TiVo Inc. ("TiVo") welcomes the Commission's examination of its rules and its proposal for its rules to apply generally on a technology-neutral basis in light of the fact that video services are being provided increasingly over the Internet.[1] TiVo's comments below focus on the market for competitive devices used to view video programming, and highlight the need to ensure that such a market remains viable — and indeed thrives — as the market for the delivery of video programming continues to evolve.

The Commission rightly emphasizes that operators that "merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator."[2] Thus, the procompetitive policies of Section 629 that enable innovation and consumer choice in navigation devices continue to apply during the MVPD marketplace's "IP transition." Moreover, as discussed below, ensuring the commercial availability of navigation devices is even more important in a world in

[1] *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, FCC 14-210, at 2, ¶ 1 (rel. Dec. 19, 2014) ("*NPRM*").

[2] *NPRM* at 32, ¶ 71.

which consumers increasingly subscribe to both traditional MVPD services and over-the-top ("OTT") video services, because only providers of retail devices have the incentives to ensure that consumers can navigate among the myriad of available video programming choices.

I. AS VIDEO PROGRAMMING DISTRIBUTION MAKES ITS "IP TRANSITION", THE COMMISSION SHOULD ENSURE THAT CONSUMERS BENEFIT FROM SECTION 629'S GOAL OF DEVICE COMPETITION AND CONSUMER CHOICE

A. Retail Device Competition Remains Vital as Video Programming Services and Technologies Evolve

TiVo has on numerous occasions discussed the benefits of Congress's goal of ensuring the competitive availability of set-top boxes and other devices used to access multichannel video programming.[3] A competitive retail market ensures that consumers benefit from the full range of innovation and choice in how they access and view the programming they have paid for. A competitive market also has the potential to result in consumer savings by avoiding the significant, recurring set-top box leasing fees charged by operators.[4] TiVo's experience as a retail set-top box and user interface provider underscores these benefits, as it has for over a decade been an industry leader in retail device design and functionality. TiVo introduced many popular features that

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[3] *See, e.g.*, Comments of TiVo Inc., MB Docket No. 14-16, at 8-14 (filed Mar. 21, 2014) ("TiVo Video Competition Report Comments"); Petition for Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67, at 21-23 (filed July 16, 2013); Reply Comments of TiVo Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 5-14 (Oct. 25, 2013.

[4] On the whole, the cable industry makes an estimated $7 billion annually from set-top box leasing fees. *See* TiVo Video Competition Report Comments at 10 n.20.

were later adopted by some cable operators for the boxes and user interfaces they supply — features ranging from basic DVR functionality, which is ubiquitous today, to the ability to stream and side-load linear video programming to consumer electronics devices such as tablets and smartphones.

In addition to the benefits of promoting innovation and lowering costs for consumers, retail device competition also has the benefit of lowering switching costs as consumers navigate among various MVPD choices — a benefit that applies in greater force in a market with growing numbers of new OTT providers of video programming. This is because retail device manufacturers have no incentive to favor programming from one MVPD or other video programming source over another.

TiVo's example is illustrative. TiVo's award-winning products were the first to give consumers the ability to view both MVPD-provided and online video distributor ("OVD") content by making it easy for users to switch between MVPD-provided subscription video content and OTT content from Netflix, Amazon Prime, Hulu Plus, VUDU, YouTube, etc. TiVo has also been a leader is allowing users to search for content across both MVPD and OVD sources, a feature that has been enhanced in TiVo's recently-deployed OnePass™ technology that brings together a user's subscription TV and streaming options for easy viewing. The OnePass™ feature adapts to the way consumers view video programming content today, recognizing that consumers typically look for particular shows, not particular sources of programming. And as a manufacturer of retail devices who is not affiliated with any MVPD or producer of program content, TiVo does not — and has no incentive to — favor content from one source over another.

Operators who lease set-top boxes, on the other hand, have an economic incentive to favor their own content. Few if any operator-supplied set-top boxes allow users to view OVD or other unaffiliated OTT content, and operator control over set-top boxes leads to control over what consumers watch. These concerns are heightened in an era of increased industry consolidation and efforts to control the available user interface and user experience.[5]

Thus, retail device competition will not only spur innovation and consumer choice, it will also help enable competition in the delivery of new video programming services. Unfortunately, retail device competition to date has been hampered by inconsistent operator support for the one-way CableCARD standard that does not reflect today's IP world. TiVo has long advocated for a successor standard that reflects changes in technology since the unidirectional CableCARD standard was adopted — changes including the evolution to IP delivery — and looks forward to working with the wide array of industry representatives that are part of the Downloadable Security Technology Advisory Committee to produce an outcome that enables retail device

[5] *See* Susan Crawford, *The Big Lock-In*, Feb. 16, 2015, *at* https://medium.com/backchannel/the-clock-is-ticking-on-comcasts-plan-to-take-over-internet-tv-460295f8d33a; Petition to Deny of Netflix, Inc., MB Docket No. 14-57, at 73-75, 88-89 (Aug. 27, 2014) (discussing Comcast's ability and incentive to discriminate against OVDs based on its control of consumer set-top boxes and the worsening of this harm that will result from the proposed Comcast-Time Warner Cable merger); Petition to Deny of COMPTEL, MB Docket No. 14-57, at 22-27 (Aug. 25, 2014) (same); Petition to Deny of Public Knowledge and Open Technology Institute, MB Docket No. 14-57, at 36-40 (Aug. 25, 2014) (same).

competition regardless of the video distribution technology or platform used.

B. Existing Facilities-Based MVPD Services Should Remain Subject to the Rules Implementing Section 629 Regardless of The Technology Used to Deliver Video Programming

TiVo agrees with the Commission that existing facilities-based operators should continue to be subject to Section 629's obligations regardless of whether or not they employ IP delivery of video programming.[6] The many benefits to consumers of retail device competition are independent of the technical means of delivery of video programming. Moreover, the Commission's policies in support of Section 629 should remain in place on a technology-neutral basis.[7] The Commission should not grant waivers based on claims that deploying new technology makes compliance with Section 629 difficult — MVPDs must factor compliance with existing rules into any planned technology changes. Unfortunately, the track record of many operators on this front has been poor and all too often consumers using retail set-top boxes have been denied access to programming as operators deploy new technologies for video delivery.[8]

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[6] *NPRM* at 32, ¶ 71 (noting that operators that provide video programming services using IP delivery would continue to be regulated as they have been).

[7] *Cf. NPRM* at 28 n. 173 (noting that the core requirements in Sections 76.1200–76.1210 apply to all MVPDs).

[8] For example, when cable operators deployed switched digital video ("SDV") technology, customers using retail set-top boxes were typically denied access to the full line-up of channels to which they subscribed. The Commission ultimately required cable operators to ensure that customers using retail devices would have access to channels delivered using SDV. *See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Third Report and Order and Order on Reconsideration, FCC 10-181, at 7-11, ¶¶ 9-14 (rel. Oct. 14, 2010). However, even today, customers of systems using SDV technology typically rely on the use of an additional set-top device — a tuning adapter — to access

II. OTT MVPDs SHOULD BE SUBJECT TO SECTION 629 AND RELATED RULES PROMOTING RETAIL DEVICE COMPETITION AND THE COMMISSION SHOULD CONTINUE TO MONITOR THIS EVOLVING MARKET

TiVo's experience with OVDs such as Netflix, Amazon Prime, Hulu Plus, VUDU, and YouTube suggests that OTT MVPDs generally have the incentive to be available on as many retail devices as possible. As discussed above, TiVo has for years integrated OTT content from OVDs into its DVRs to allow users to view both traditional MVPD-provided content and OTT content and has observed that OVDs such as Netflix, Amazon Prime, and others wish to be on as many devices as possible, from TiVo set-top boxes to Roku boxes, game consoles, Blu-ray players, and Smart TVs. Although these OVDs are different from the OTT linear video programming providers that the Commission has proposed to define as MVPDs, the incentives for all OTT providers that do not control the facilities over which their services are provided should be similar. Traditional MVPDs, on the other hand, have typically leveraged their control over the facilities used to provide video programming services to promote their own operator-supplied boxes that in turn favor their own content.[9]

TiVo urges the Commission to make clear that OTT MVPDs are, as MVPDs, subject to Section 629 and its applicable implementing rules. For now, given the incentives discussed above for OTT MVPDs to be available via as many devices as

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SDV channels, a cumbersome and far from optimal solution that defies the principle of Section 629 that retail devices be on par with operator-supplied devices.

[9] *See* note 5, *supra*.

possible, there is no need for the Commission to adopt new rules or take other steps to ensure that OTT MVPD services are available on retail devices. Instead, the Commission should monitor the availability of OTT MVPD services on set-top boxes, and take action if it finds that OTT MVPDs are not making their services available to competitive device users on a nondiscriminatory basis.

Continued Commission oversight and action might well be needed if the Commission decides to treat OTT services offered by existing, facilities-based MVPDs as not being subject to the same rules as traditional, managed video services offered by those same entities. If facilities-based MVPDs are able to deny retail devices their OTT-delivered content, it would cause serious harm to the retail device market and to consumer choice — especially if such MVPDs' own devices (and devices provided by other facilities-based operators) are not so constrained. Years of MVPD reluctance to support unaffiliated retail devices demonstrates that operators will use their market power and control over programming to deny unaffiliated retail devices access to programming in order to favor their own leased devices and harm retail competition. Moreover, some commentators have noted the dangers of large MVPDs offering OTT and other IP-based services outside their own service footprint, including the danger that such operators could dominate both the device and video programming markets.[10] Thus, to the extent that OTT linear video programming services are provided by existing facilities-based MVPDs, they may not have the same incentives as OVDs and

[10] Susan Crawford, *The Big Lock-In*, *supra* note 5.

unaffiliated OTT MVPDs to be on as many retail consumer devices as possible. In such cases, the Commission may have to adopt more specific, targeted requirements — or clarify existing requirements — to ensure that consumers are able to receive all available linear programming services for which they pay on the retail device of their choice.

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Respectfully submitted,

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