

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

In the Matter of	)	
	)	
Verizon Petition for Waiver of the	)	CS Docket No. 97-80
Set-Top Box Integration Ban,	)	CSR-7042-Z
47 C.F.R. § 76.1204(a)(1)	)	
	)	

**OPPOSITION OF TIVO INC.**

TiVo Inc. (“TiVo”) opposes Verizon’s above-captioned waiver request. Granting Verizon’s request would amount to an indefinite exemption from the integration ban, rather than a limited waiver, and would reward a well-funded multichannel video programming distributor (“MVPD”) for taking the risk of not complying with the Commission rules. Such a result would harm consumers by subverting the purpose and policy behind the Commission’s integration ban.

The waiver sought by Verizon is not necessary for the introduction of new video services and does not fall under the limited circumstances under which the Commission has contemplated granting waivers of Section 76.1204(a)(1). Moreover, Verizon’s own request demonstrates that an effective and acceptable downloadable conditional access system (“DCAS”) will not be available for the foreseeable future. Therefore, petitioner’s waiver request is not for a “limited time,” as required by the rules, but rather is for an extended, if not indefinite, period.

Finally, should the Commission decide to grant Verizon a waiver, that waiver should be limited to new entrants such as Verizon and should not apply to all multi-

service operators (“MSOs”). Verizon agrees.<sup>1</sup> Applying to all MSOs a waiver granted to Verizon would make the integration ban a dead letter.

TiVo offers a personalized television service that allows viewers to take advantage of the incredible convenience of digital technology to customize their viewing experience using advanced searching and storing mechanisms and consumer-friendly user interface. TiVo recently announced the launch of its TiVo Series3 HD DVR, the world’s first THX®-certified digital video recorder. The TiVo Series3 HD DVR supports up to two CableCARD decoders. The product acts as two independent single stream Unidirectional Digital Cable Products (“UDCP”) CableCARD hosts within one set top box, enabling dual-tuner functionality. It can also be configured to operate as a single CableCARD device.<sup>2</sup>

**I. VERIZON’S REQUESTED WAIVER IS NOT NECESSARY TO ASSIST IN THE INTRODUCTION OF NEW AND IMPROVED MULTICHANNEL VIDEO PROGRAMMING SERVICES**

Verizon attempts to justify its request by claiming that a waiver is “necessary to facilitate the rapid deployment of innovative service offerings that will provide important new competition in the video market.”<sup>3</sup> While TiVo supports Verizon’s efforts to bring additional competition to the video market, those efforts are unrelated to Verizon’s waiver request and will proceed with or without the waiver.<sup>4</sup> Grant of the waiver request simply would save Verizon some money, but at the cost of subverting the important

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<sup>1</sup> Verizon’s Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, CSR-7042-Z, at 10 n.12 (Filed July 10, 2006) (“Verizon Petition”).

<sup>2</sup> For more information on TiVo, please visit [www.tivo.com](http://www.tivo.com).

<sup>3</sup> Verizon Petition at 2.

<sup>4</sup> See Dionne Searcey & Robert A. Guth, *Verizon Reworks Microsoft Code For Its TV Boxes*, Wall St. J., Sep. 14, 2006, at B1 (describing Verizon’s plans to compete with cable operators in providing an “all-in-one” package of TV, phone, and broadband).

policy behind the Commission's rule, which is to ensure the commercial availability of navigation devices and promote competition in the market for such devices, as required by Section 629 of the Communications Act.

Section 76.1204(a)(1) of the Commission's rules, which requires MVPDs to cease integrating security and non-security functions into a single device by July 1, 2007, serves the Congressional intent of promoting competition in the marketplace for navigation devices. As the Commission noted when it adopted the rule, such an integration ban would further the goal of Section 629 of the Communications Act by "facilitat[ing] the development and commercial availability of navigation devices by permitting a larger measure of portability among them, increasing the market base and facilitating volume production and hence lower costs."<sup>5</sup> The Commission noted that integration of security and non-security functions "is an obstacle to the functioning of a fully competitive market for navigation devices by impeding consumers from switching to devices that become available through retail outlets"<sup>6</sup> and that requiring the separation of security would "allow[] manufacturers to provide a diverse array of equipment."<sup>7</sup> In later deciding to maintain the integration ban, the Commission noted that the ban would "help ensure that as the navigation devices market continues to mature, consumers will be able to experience the benefits of choice in the navigation devices market."<sup>8</sup>

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<sup>5</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, CS Docket No. 97-80, FCC 98-116, para. 49 (rel. June 24, 1998) ("*First Report and Order*").

<sup>6</sup> *First Report and Order*, para. 69.

<sup>7</sup> *First Report and Order*, para. 61.

<sup>8</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Second Report and Order, CS Docket No. 97-80, FCC 05-76, para. 30 (rel. Mar. 17, 2005) ("*Second Report and Order*").

While compliance with FCC rules entails cost, that usually is not a reason to waive such rules. In enacting the integration ban, the Commission correctly decided that the benefits from increased competition in the market for navigation devices outweighed whatever compliance costs that MVPDs would incur. In the *Second Report and Order*, the Commission noted that even though it expected that consumers would face “additional costs in the short term as a result of the prohibition on integrated navigation devices,” these costs “should be counterbalanced . . . by the benefits likely to flow from a more competitive and open supply market.”<sup>9</sup>

Yet Verizon justifies its waiver request principally on its desire to avoid the cost of complying with the Commission’s rules.<sup>10</sup> The implementation date for the integration ban has already been extended by two-and-a-half years and Verizon has had years to factor compliance costs into its plan to roll out video services. A company with Verizon’s financial and technical resources – one that also is working with experienced equipment vendors – should have planned to comply with a requirement for which it has had years to prepare. Verizon has presented no justification for its requested waiver that did not exist when it first planned to enter the MVPD market. Rather, Verizon simply chose to ignore the integration ban requirement and is now requesting a waiver of the rule fewer than twelve months before it is required to comply.

Verizon should not be rewarded for its conscious decision to ignore the integration ban. By granting a waiver to Verizon simply because the company is

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<sup>9</sup> *Second Report and Order*, para. 29. See also *Charter Communications, Inc. v. FCC*, No. 05-1237, slip op. at 16-18 (D.C. Cir. Aug. 18, 2006) (discussing the Commission’s weighing of compliance costs of the integration ban with the benefits to competition).

<sup>10</sup> It should be noted that Verizon’s Petition fails to provide sufficient detail regarding its expected compliance costs and why such costs might be considered particularly burdensome. Instead, it merely cites to somewhat conclusory and unsupported statements regarding CableCARD cost figures that, among other things, do not appear to fully account for scale economies.

unwilling to pay the costs of compliance, the Commission would be turning its back on the critical policy goal of promoting competition in the market for and ensuring the commercial availability of navigation devices. What Verizon describes as “needless costs” are in fact the cost of complying with the Commission’s rules, and a waiver to excuse these costs is not “*necessary* to assist the development or introduction of a new or improved” video service.<sup>11</sup> There can be no question that Verizon is going to introduce its video service regardless of the integration ban because, as the Wall Street Journal recently noted, “[m]oving quickly on TV service is crucial to Verizon because it’s in a race with cable operators to provide an all-in-one package of phone, TV and high-speed Internet access.”<sup>12</sup>

The Commission has noted that “the mere fact that consumers will bear some of the costs resulting from the imposition of the integration ban is not a sufficient justification to eliminate the ban,”<sup>13</sup> and the same logic indicates that it would not be a sufficient justification for a waiver for all set-top boxes distributed by Verizon.<sup>14</sup> As discussed above, the Commission has decided that the benefits from competition from

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<sup>11</sup> 47 U.S.C. § 549(c) (emphasis added).

<sup>12</sup> Dionne Searcey & Robert A. Guth, *Verizon Reworks Microsoft Code For Its TV Boxes*, Wall St. J., Sep. 14, 2006, at B1. It should also be noted that while Verizon’s most recent Form 10-K discusses the importance of its rollout of video services in the company’s overall strategic plans and the significance of local franchising requirements to Verizon’s introduction of such services, it makes no mention of any contingencies related to complying with the integration ban. See Form 10-K for Verizon Communications Inc. for FY 2005, available at [http://investor.verizon.com/sec/sec\\_frame.aspx?FilingID=4275196](http://investor.verizon.com/sec/sec_frame.aspx?FilingID=4275196).

<sup>13</sup> *Second Report and Order*, para. 27.

<sup>14</sup> While it is encouraging to note that Verizon would use the money it saved from not complying with the set-top integration ban to invest in “continued expansion of its broadband network,” Verizon Petition at 25, this fact should not excuse Verizon’s failure to comply with the Commission’s rules. As discussed herein, the integration ban serves the important policy goal of promoting competition in the navigation devices market, and this goal should not be sacrificed to meet other policy goals. Moreover, this logic would apply equally to cable MVPDs, who could also invest in broadband deployment – indeed, this logic would apply equally to any company seeking a waiver from Commission requirements that pledged to spend the money saved for some worthwhile cause.

independent manufacturers in the navigation devices market outweigh any compliance costs initially incurred by consumers because of the integration ban. At present, of course, TiVo and all other CableCARD device makers have no choice but to bear the “necessary costs” of CableCARD to provide consumers with any sort of choice in navigation equipment.

Finally, while additional competition in the market for the delivery of video services would no doubt help consumers, Verizon overstates the similarity between itself and the DBS providers that were new entrants when they were exempted from the Commission’s integration ban requirement. While the Commission discussed DBS providers’ status as new entrants in the MVPD marketplace in making its decision to exempt them from the requirement to separate security functions, it did so only after noting that the market for DBS equipment was competitive and far different from the market for equipment for other MVPD services. The Commission noted that DBS equipment is “available at retail and offer[s] consumers a choice,”<sup>15</sup> which is not true of equipment used in conjunction with Verizon’s FIOS network.

The Commission also based its decision to exempt DBS providers on the fact that DBS equipment was geographically portable and could be used by customers throughout the continental United States, which is again not true of equipment used in conjunction with Verizon’s FIOS network.<sup>16</sup> Thus, Verizon’s claims that it would have the same incentives as did DBS providers to compete with incumbent MVPD providers ignores the importance of promoting competition in *both* the service and equipment markets and the

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<sup>15</sup> *First Report and Order*, para. 64.

<sup>16</sup> *See Charter Communications, Inc. v. FCC*, No. 05-1237, slip op. at 19 (D.C. Cir. Aug. 18, 2006) (noting the importance of geographic portability in the Commission’s decision to exempt DBS providers, but not other MVPDs, from the integration ban).

fact that the market for DBS equipment was competitive at the time DBS providers were exempt from the integration ban.

**II. DCAS IS NOWHERE NEAR BEING READY TO BE WIDELY DEPLOYED OR AVAILABLE TO COMPETITIVE DEVICES, MAKING VERIZON'S WAIVER REQUEST AN OPEN-ENDED EXEMPTION RATHER THAN A WAIVER FOR A "LIMITED TIME"**

TiVo agrees wholeheartedly with Verizon that DCAS should be open and nonproprietary, divorced from the OpenCable Application Platform ("OCAP"), and not designed to benefit or be controlled by individual competitors or a particular class of competitors in the marketplace. DCAS should also be made available for use by UDCP devices. An open DCAS would facilitate true interoperability and would promote competition in both the service and equipment markets as consumers would be able to choose from a wide array of services and devices without having their choices locked in by service providers.<sup>17</sup>

However, Verizon's own conclusion about the state of DCAS development and deployment shows that DCAS will not even be close to being ready by the July 1, 2007 implementation date of the integration ban. Despite being given almost seven years to implement the integration ban, the cable industry sought and was granted extensions amounting to an additional two-and-a-half years. Having promised DCAS as a solution to the requirements of Section 76.1204(a)(1), the cable industry has shown no signs of developing and deploying DCAS by the July 1, 2007, integration ban implementation date. While NCTA claims that a DCAS solution can be deployed by mid-2008, DCAS is

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<sup>17</sup> See generally Comments of Hewlett-Packard Co. et al. in Response to Verizon Petition, CS Docket No. 97-80, CSR-7042-Z (filed Sep. 18, 2006).

at best a will-of-the-wisp and at worst a mechanism for perpetuating cable's dominance in the MVPD marketplace.

Verizon has made clear, and TiVo agrees, that the cable industry's DCAS proposal unacceptable. Thus, it is highly likely that either DCAS deployment will be further delayed as Verizon and others object to the cable industry's DCAS proposal, or Verizon will continue to petition for waivers from implementing DCAS, or both.

In the face of such uncertainty, Verizon's request for a waiver "until an open DCAS system can be implemented"<sup>18</sup> is not for a "limited time" as required by the rules.<sup>19</sup> The Commission cannot grant a waiver of its rules for such an indeterminate period of time. TiVo, others in the consumer electronics industry, potential new entrants, and, most importantly, the public cannot wait indefinitely for the considerable benefits that will result from a leveling of the playing field in the market for commercial navigation devices. Instead, the Commission should put an end to the delays and the uncertainty surrounding the future of CableCARDs and require MVPDs to adhere to the July 1, 2007 integration ban implementation date, a move which promises finally to fulfill the statutory goal of promoting competition in the market for and ensuring the commercial availability of navigation devices.

### **III. SHOULD THE COMMISSION DECIDE TO GRANT VERIZON A TEMPORARY WAIVER, SUCH A WAIVER SHOULD BE LIMITED TO NEW ENTRANTS AND SHOULD *NOT* BE AVAILABLE TO ALL MSOS**

As explained above, grant of Verizon's waiver request is not necessary to assist in the introduction of new and improved MVPD services and is contrary to the purpose of the integration ban specified in Section 76.1204(a)(1) of the Commission's rules. If the

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<sup>18</sup> Verizon Petition at 5.

<sup>19</sup> 47 C.F.R. § 76.1207.

Commission nevertheless decides to grant Verizon its requested relief, it should make it clear that such relief is being granted to Verizon in its capacity as a new entrant and that such waiver is not available to all MSOs.<sup>20</sup> Given that Verizon has not provided any information regarding the specific devices for which a waiver is sought,<sup>21</sup> the Commission has no basis on which to extend any waiver granted to Verizon to other MSOs on a service provider-wide basis.

Extending the relief granted to Verizon to all MSOs would effectively render the integration ban a dead letter. Having failed to overturn the integration ban in court, the MSOs are attempting to reduce its effect by filing a series of waiver requests seeking to exempt a significant number of devices from the Commission's requirements, thereby undermining the critical policy goal of ensuring the competitive and commercial availability of navigation devices pursuant to Section 629 of the Communications Act. Applying a Verizon "waiver" to all MSOs would be the final blow to the integration ban.

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Accordingly, for the foregoing reasons, the Commission should deny Verizon's petition or, at minimum, make it clear that any relief granted to Verizon does not apply to all MSOs on a service provider-wide basis.

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<sup>20</sup> Cf. Verizon Petition at 10 n.12 ("To the extent the Commission wishes to grant Verizon's waiver on a service provider-wide basis, Verizon submits that the waiver should apply to those service providers who, like Verizon, are providing service using a hybrid QAM/IP system over FTTP architecture.").

<sup>21</sup> See *Second Report and Order*, para. 37 (noting that waiver requests under Section 76.1204(a)(1) should "include the full specifications for any device(s) for which the waiver is sought").

Respectfully submitted,

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Dated: September 18, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Opposition to Verizon Waiver was sent by mail, this 18<sup>th</sup> day of September, 2006, to each of the following:

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