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July 22, 2009

ELECTRONIC FILING

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

Re: *Ex Parte*, CS Docket No. 97-80, CSR-8152-Z

Dear Ms. Dortch:

This is to inform you that on July 21, 2009, Matthew Zinn, Senior Vice President, General Counsel, Secretary & Chief Privacy Officer, TiVo Inc. ("TiVo") and the undersigned spoke by telephone with Rick Chessen, senior legal advisor to Commissioner Michael J. Copps. We discussed issues relating to Section 629 of the Communications Act, including the movement of channels from one-way to two-way technologies such as switched digital video.

We also discussed the requested waiver of Section 76.1204(a) of the Commission's rules by Lafayette Utilities System for an IPTV tier and the broader implications for the retail market for navigation devices that were explained in greater detail in the attached *ex parte* filed by TiVo on June 26, 2009, in the above-captioned dockets.

Please direct any questions regarding this matter to the undersigned.

Respectfully,

Henry Goldberg
Attorney for TiVo Inc.

cc: Rick Chessen

June 26, 2009

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

Re: *In the Matter of Petition of Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System, for Waiver of Section 76.1204(a) of the Commission's Rules*, CSR-8152-Z; CS Docket No. 97-80

Dear Ms. Dortch,

TiVo Inc. ("TiVo") respectfully submits these ex parte comments on Lafayette Utilities System's ("LUS") petition for waiver of Section 76.1204(a) of the Commission's rules (the "common reliance rule"), and on the Commission's ongoing process of creating competition in video navigation devices.[1] LUS bases its petition on the Media Bureau's June 29, 2007 and March 19, 2008 Orders that granted waivers to certain MVPDs using IPTV systems.[2] If granted, LUS's waiver petition will further hamper the development of a competitive market for navigation devices, which Congress sought to assure in its passage of

[1] *In the Matter of Petition of Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System, for Waiver of Section 76.1204(a) of the Commission's Rules*, CSR-8152-Z (March 27, 2009) ("Petition"); *see also* MB Docket 97-80.

[2] *In the Matter of National Cable and Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CS 97-80, Memorandum Opinion and Order, 22 FCC Rcd 11780 (rel. June 29, 2007) ("All-Digital Waiver Order"); *In the Matter of Consolidated Requests for Waiver of Section 76.1204(A)(I) of the Commission's Rules*, Memorandum Opinion and Order, 23 FCC Rcd 4465 (rel. March 19, 2008).

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Section 629 of the Telecommunications Act of 1996.[3] Tellingly, LUS makes no effort to address the waiver's impact on the development of a commercial market for navigation devices because it can offer no valid justification. TiVo opposes LUS's petition for the following reasons: (1) CableCARD-reliant devices will be denied access to the digital channels on the IPTV service; (2) granting LUS's petition would be inconsistent with previous waivers; (3) LUS does not seek a waiver of Section 76.640(b); and (4) granting LUS's petition would provide a clear signal to other MVPDs that the deployment of an IPTV system is a green light to avoid the common reliance rule entirely.

If the Commission grants LUS's waiver, it will risk choking off all competition in navigation devices as to all the digital service offerings of LUS and other IPTV operators by excluding TiVo and other suppliers of CableCARD-reliant devices (both one-way and two-way). In its Petition, LUS states that its digital service tier will be based on an IPTV system and that subscribers to its digital service "must have an IPTV set-top box that handles both security and navigation functions."[4] In other words, a subscriber to LUS's digital service will not be able to use a TiVo device or other CableCARD-reliant device because they are not compatible with LUS's digital service. That subscriber will have no choice but to rent a set-top box from LUS. Moreover, LUS makes no attempt to distinguish low-cost, limited-capability set-top boxes from advanced set-top boxes offering high-definition television, two-

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[3] 47 U.S.C. § 549(c).

[4] Petition at 3-4.

way functionality, and digital video recorders.[5] In fact, LUS does not identify any specific set-top boxes at all.

This is the very situation that the Commission hoped to avoid when it stated, in 2005, that "at the heart of a robust retail market for navigation devices is the reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices."[6] If LUS's petition succeeds, it will circumvent the requirements of Section 629 to foster a competitive market for navigation devices by denying competitive devices *already on the market* access to digital channels on IPTV services. This would undermine consumer confidence because a consumer would have no assurance that the retail navigation device he or she buys today will continue to receive the same level of programming tomorrow. Accordingly, the Commission should deny LUS's Petition to preserve the competition that currently exists in the retail market for navigation devices.

Second, if the Commission grants LUS's Petition, it will establish a new and dangerous precedent in that, for the first time, an MVPD will be permitted to operate a tier of service completely inaccessible to retail CableCARD devices. The Commission has never allowed this. For example, in the All-Digital Waiver Order on which LUS claims to rely, none of the MVPDs granted waivers sought permission to operate an all-digital tier in

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[5] *See, e.g., Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 209, 214-215, ¶¶ 16-20 (2007).

[6] *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6807 ¶ 27 (2005), *pet. for review denied*.

conjunction with an analog tier.[7] In that Order, the Media Bureau actually required those MVPDs who had not yet converted to all-digital networks to swear that they would convert to an all-digital network.[8] Here, LUS makes no such affirmations in its Petition and apparently foresees maintaining both analog and digital systems indefinitely.[9] Remarkably, LUS admits that it views its analog tier, which offers 87 channels compared to 300 digital channels, as fulfilling its obligations under Section 76.1204 and 76.640.[10]

If the Commission grants its Petition, LUS – and undoubtedly other MVPDs – will be emboldened to create a system in which subscribers who seek to use a competitive navigation device will receive reduced service while subscribers who rent set-top boxes from the MVPD will received enhanced services. Accordingly, TiVo urges the Commission to deny LUS's Petition.

Third, the Commission should deny LUS's Petition because it does not seek waiver of Section 76.640(b) for its digital service, which requires MVPDs to implement "Point of Deployment modules," i.e., CableCARDs, to allow viewing of its *digital* channels.[11] LUS does not even address the existence or applicability of 76.640(b) other than to note that its

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[7] *See generally* All-Digital Waiver Order.

[8] All-Digital Waiver Order, ¶ 62.

[9] *See, e.g.,* Petition at 3, 6 ("[LUS] also offers its subscribers the choice of receiving less expensive basic and expanded basic programming in analog form.").

[10] Petition at 3 ("LUS believes that its analog service is fully compliant with CableCARD specifications and other obligations of Section 1204.").

[11] 47 C.F.R. § 76.640.

system does not use QAM.[12] The Commission has made clear that MVPDs "ultimately are responsible for compliance with our rules (e.g., making available and supporting CableCARDs; using CableCARDs in all devices [. . .]; complying with 76.640 of the Commission's rules; etc.)."[13] If the Commission decides that Section 76.640(b) does not apply to IPTV systems, it would create a giant loophole for MVPDs to circumvent the common reliance rule, a loophole on which LUS apparently relies. Therefore, TiVo requests that the Commission reinforce the integrity of the common reliance rule by denying LUS's Petition. TiVo also requests that the Commission initiate a new rulemaking in Docket 97-80 to clarify the applicability of Section 629 to IPTV systems and to create a standard, nationwide conditional access protocol that can be used by all manufacturers and with all MVPDs.

Finally, if the Commission grants LUS's waiver, it will not just be making a narrow decision for a relatively small MVPD. As this proceeding illustrates, every waiver request builds upon previous requests, and future petitioners will ask for the same or even broader waivers. Other MVPDs will view yet another grant of waiver as a clear indication that they need only create an IPTV tier and claim that no technology solution exists to be excused from compliance with Section 76.1204. If the Commission continues to grant waivers based on this theory, it will become a self-fulfilling prophesy: there will never be compliant equipment made if MVPDs are not required to comply with common reliance rule. Moreover, if the

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[12] Petition at 3.

[13] *In the Matter of Evolution Broadband, LLC'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-7902-Z, CS Docket No. 97-80, Memorandum Opinion and Order (rel. June 1, 2009).

Commission continues to grant waivers for systems that use proprietary technologies, competitive devices will work with fewer and fewer MVPD systems, resulting in a complete balkanization of the MVPD navigation device marketplace. This result will frustrate one of the basic goals that Section 629 was designed to achieve: national portability of navigation devices.

For all of the foregoing reasons, TiVo respectfully urges the Commission to deny the LUS waiver petition and to make it clear to all MVPDs that compliance with Section 76.1204 and 76.640 must be part of a MVPDs technology deployment plans.

Respectfully submitted,

TiVo Inc.

/s/ Matthew Zinn_____

Matthew Zinn
Senior Vice President and General Counsel