

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 07-269
Competition in the Market for the)
Delivery of Video Programming)

**FURTHER REPLY COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby replies to the comments on the Supplemental Notice of Inquiry in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

As NCTA pointed out in its initial comments in the opening round of this proceeding,

The explosive growth of competition among MVPDs, the virtual disappearance of vertical integration between cable operators and cable program networks, and the emergence of the Internet as a viable and ubiquitous source of video programming would have been beyond Congress’s wildest dreams when it mandated rate regulation, program access, program carriage, leased access, PEG access, cable ownership restrictions and other provisions to prevent anticompetitive abuse by what it viewed as the sole significant outlet for multichannel video programming.¹

Today, the United States Court of Appeals for the District of Columbia Circuit, in vacating the Commission’s cap on ownership of cable systems, agreed that this is precisely the case. The Court found that

the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992.²

¹ NCTA Comments at 5.

² *Comcast Corp. v. FCC*, No. 08-1114, slip op. at 14 (D.C. Cir. Aug. 28, 2009).

Despite this obvious change in the marketplace, as we have pointed out, “parties seeking to gain a regulatory boost from the stale perception that competition was lacking in the video marketplace”³ continued during the last several years to focus the Commission’s attention on the regulatory concerns of the 1992 Act. And, on cue, commenting parties have reprised the same old refrains throughout this proceeding. As if nothing had changed, broadcasters clamor for more expansive must carry rights along with retransmission consent; DBS and telephone competitors ask for broader program access rights; independent program producers demand program carriage rights; consumer groups urge regulation of cable’s pricing and packaging; and TiVo seeks regulatory protection against evolving technology.

It is as if the trends recognized by the D.C. Circuit and soundly documented in at least the last three video competition reports had never occurred. None of these regulatory steps are remotely necessary to promote competition, choice and diversity in the vigorously competitive and remarkably innovative marketplace that now exists. Each of them would only frustrate the ability of that marketplace to evolve in a manner that best meets the needs and demands of consumers.

In particular, as cable’s competitors continue to seek further regulatory advantages, TiVo continues to call into question the cable industry’s willingness to embrace innovation and competitive retail devices.⁴ TiVo makes a host of unfounded claims: that the cable industry is closed to consumer electronics (“CE”) innovation and is not supporting CableCARDS; that innovations in IP, switched digital, and downloadable security, and the waivers and orders that

³ NCTA Comments at 5.

⁴ Comments of TiVo, MB Docket No. 07-269 (filed July 29, 2009) (“TiVo Comments”). Similar comments are contained in TiVo’s Petition for Reconsideration or Clarification of *Oceanic Time Warner Cable Order*. See TiVo Petition for Reconsideration or Clarification, File Nos. EB-07-SE-351, EB-07-SE-352 (filed July 27, 2009) (“TiVo Petition for Reconsideration”).

allow them, are threatening “common reliance”; that network innovations must be subject to an “administrative process” in advance of the deployment of new technologies; and that “common reliance” means all MVPDs and all retail set-top box manufacturers must adopt the same conditional access security technology. TiVo’s broad critiques are inaccurate; they are also yesterday’s arguments that were addressed when, among other things, the CE, IT, and cable communities worked together to craft the tru2way Memorandum of Understanding (“MOU”) and when the cable industry helped TiVo update the DVRs that TiVo built as “one-way” devices.

TiVo’s radical vision of “common reliance,” in which all advances in cable system technology and security must be backward-compatible to TiVo’s installed base of devices, is contrary to the Commission’s policy of promoting network and device innovation, a policy that has spurred investment and competition in networks and services, and delivered continuous innovation to consumers. The openness of the cable industry to retail innovation, and its cooperation with CE today, stands in stark contrast to the actions of all other MVPDs. TiVo is right that in today’s market, a consumer with a “plug and play” retail DTV can receive cable services via CableCARD, but needs set-top boxes to receive premium services from Verizon or any services from DirecTV, DISH, or AT&T’s U-Verse.

As discussed below, NCTA has previously proposed an “all-MVPD” solution that allows diverse video networks to serve a variety of retail devices without freezing network technologies, and we remain willing to work on such an approach. But the time for saddling cable, and cable alone, with unique set-top box-related limitations is long over, particularly since cable does more than its satellite and telco competitors to promote CE competition.

I. CABLE’S COMPETITORS PREDICTABLY RAISE ISSUES THAT HAVE BEEN EXHAUSTIVELY ADDRESSED IN OTHER PROCEEDINGS OR ARE PURELY SPECULATIVE

A. Must Carry/Retransmission Consent

In 1992, Congress provided broadcasters with a dual benefit that gives them unique status in the programming marketplace. Specifically, it guaranteed them the right to carriage of their “primary video” signal on local cable systems. *And* for those stations that elect not to be carried under the must carry regime, it gave them the right to demand compensation in return for *consenting* to cable carriage.

Broadcast stations and cable systems each benefit, to varying degrees, from cable carriage. Such carriage gives broadcast stations (which provide their signal over the air at no charge throughout their communities) much greater viewership potential, which they use to drive advertising revenues. And, to the extent that such stations are attractive to viewers, their carriage, which makes viewing over-the-air channels more easily available and provides better quality signals, enhances the value of cable service to customers.

The extent to which the value of carriage to broadcasters exceeds or is exceeded by the value to cable operators varies from station to station. What this means is that in a freely operating marketplace, sometimes stations would pay to be carried, sometimes cable operators would pay for the right to carry stations, sometimes there would be no payment in either direction, and sometimes a station would not be carried at all. But Congress created a *one-sided* mechanism. Broadcast stations that would be required to pay or would not be carried at all get carried without paying anything, while those that have the leverage to negotiate for compensation may do so.

In the years since Congress created this “heads-I-win, tails-you-lose” structure for the broadcasters in 1992, the bargaining power of broadcasters seeking compensation has dramatically increased. In 1992, broadcasters with attractive programming and local cable operators had a more balanced and symbiotic relationship. Broadcasters had exclusive local rights to distribute popular network and syndicated programming; if cable operators wanted to carry such programming, they could only get it from the local broadcaster. But at the same time, if local broadcasters wanted to maximize their viewership by facilitating reception by MVPD customers, they usually could only reach such viewers by making their signals available to the local cable operator, since DBS then significantly lagged cable in the number of customers, and, in most communities, the cable operator was the only wireline MVPD.

Today, of course, as the Commission’s annual reports have made clear, the retail MVPD marketplace has become vibrantly competitive. Most households have at least three MVPD alternatives to choose from – the cable operator and the two national DBS services. And in an already large and quickly growing number of communities, large telephone companies and other wireline “overbuilders” provide additional fully competitive alternatives. As a result, while broadcasters continue to be the exclusive providers of popular first-run network programming, they can more fully exploit this exclusivity against a multiplicity of competitive MVPDs.

In these changed circumstances, it is hardly surprising that the National Association of Broadcasters (“NAB”) maintains that retransmission consent is “working well” and that the Commission should “resist the calls of MVPDs who seek government intervention to tilt the free-market retransmission consent regime in their favor.”⁵ But the structure for the retransmission of broadcast signals is not a “free market” regime and has always been tilted in

⁵ NAB Comments at 14.

favor of the broadcasters as the result of the must-carry/ retransmission consent option. And it has been tilted further by the maintenance of local exclusivity for network programming on the broadcaster side while competition has taken hold and flourished on the MVPD side. The result is to increase dramatically the ability of broadcasters to insist that cable operators (and their customers) pay to receive signals that they are licensed and required to provide over-the-air free of charge to their entire community.

But the broadcasters think they deserve even more. While insisting on the right to continue charging for carriage of broadcast stations that cable operators want to carry, and on free mandatory carriage of stations that cable operators may not want to carry, they continue to push for carriage of each must-carry station's additional multicast streams of programming.⁶ Cable operators are required, for the next three years, to carry must-carry broadcasters' primary digital signal on valuable 6 MHz analog channels. And when those broadcasters provide their primary signal in HD, operators are required to carry an HD digital version *in addition to* the analog version. Cable operators also often carry the multicast and HD streams of retransmission consent stations in addition to analog versions of the primary signal where the station provides programming that is attractive to customers – or where the station insists on such additional carriage in return for retransmission consent.

NAB is all for the “marketplace” when the retransmission consent requirement enables broadcasters with exclusive rights to popular programming to charge cable operators whatever the competitive MVPD market will bear. But it has no use for any such marketplace when broadcasters provide programming that cable operators have no desire to carry and their customers have little interest in watching. In those cases, according to NAB, cable operators

⁶ *Id.* at 16.

should be compelled to carry not only analog and HD versions of the primary video signal but also any additional multicast signals transmitted by the broadcaster – all at no charge to the broadcaster.

The Commission has repeatedly rejected the notion that it should – or that it has the authority to – require carriage of a must-carry broadcaster’s multicast signals.⁷ The one-sided must carry/retransmission consent marketplace imposed by Congress on cable operators already pushed the limits of the First Amendment when applied only to carriage of the primary video signal⁸ and when cable was, rightly or wrongly, perceived by a narrow Supreme Court majority well over a decade ago as having bottleneck control over access to MVPD customers in local communities.⁹ In today’s competitive MVPD marketplace, the continuing constitutional vitality of that determination has been significantly eroded. The broadcasters’ arguments that must carry rights can and should be *expanded* to encompass multicast signals – at the same time as MVPD competition enlarges the bargaining power of retransmission consent stations – should finally be retired.

B. Program Access

Once again, telephone company competitors argue that the Commission’s “program access” rules should be expanded to preclude cable operators, in any circumstances, from refusing to make any “regional sports networks” that they own available to any MVPD

⁷ See, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order, 20 FCC Rcd at 4516, 4532 (2005); *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2620-21 (2001).

⁸ See *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997).

⁹ See *Turner Broadcasting System v. FCC*, 512 U.S. 612, 656 (1994).

competitors. They contend that such programming is, in all instances, “must have programming,” without which a competing MVPD cannot effectively compete for viewers.

NCTA has addressed these arguments in its reply comments in the initial round of this proceeding, as well as in the pending rulemaking proceeding that is specifically considering the program access rules.¹⁰ As we noted, expanding the rules in this manner would be at odds with both the language and clear intention of Section 628 of the Communications Act. But jurisdictional issues aside, there is scant reason to believe that the continued vigorous and intense competition among incumbent cable operators, DBS companies and telephone companies can now be reversed or diminished by exclusive contracts between MVPDs and *any* program networks, whether satellite-delivered, terrestrially delivered, vertically integrated, or non-vertically-integrated. Continuing to give competitors a regulatory guarantee to programming is neither necessary nor warranted in today’s fully competitive marketplace.

On a related matter, the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) raises a number of issues regarding the terms and conditions on which program networks offer their services to cable operators and other MVPDs. For example, OPASTCO raises concerns regarding allegedly mandatory tying of “must have” programming to other less desirable programming. OPASTCO contends that this is at odds with the Commission’s “good faith” negotiating requirement, under which “take it or leave it” negotiating tactics are a *per se* violation.¹¹ While the Commission has already sought and received comments on such alleged practices, it is necessary to point out here that the (statutory) “good faith” negotiating requirement cited by OPASTCO applies to *retransmission consent*

¹⁰ See NCTA Reply Comments at 5-12. See also NCTA Comments, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, January 4, 2008.

¹¹ OPASTCO Comments at 11.

negotiations between MVPDs and *broadcasters*.¹² There is no such rule generally requiring non-broadcast program networks and MVPDs to negotiate or deal with each other in good faith – or to deal with each other at all.

OPASTCO also raises issues regarding arrangements for Internet availability of video content. These types of arrangements are in a very early and rapidly evolving stage, and, wholly apart from jurisdictional and constitutional questions, it would be premature and counterproductive for the Commission to seek to address purely speculative problems regarding these innovative initiatives.¹³

C. Program Carriage

Another issue that has been exhaustively discussed during the last few years – and is predictably raised once again by Consumers Union in this proceeding – is the supposed need to strengthen the Commission’s rules on program carriage. Specifically, Consumers Union maintains that “[p]rogrammers that are not affiliated with an MVPD or a broadcaster are generally unable to reach an agreement for program carriage,” and that “if the Commission has any intention of creating a national programming marketplace in which independent programmers have a chance to reach willing viewers, it must modify its carriage complaint process.”¹⁴

¹² See 47 U.S.C. § 325(b)(3)(C).

¹³ In this regard, for example, OPASTCO notes approvingly that the nascent “TV Everywhere” initiative, which is designed to make television programming available online to video subscribers, will be “open and non-exclusive,” *id.* at 7, which is, in fact, the case. Speculation that this might someday change is nothing more than unfounded conjecture.

¹⁴ Consumers Union Comments at 5.

NCTA and others have addressed these specious contentions in recent rulemaking proceedings. First, the premise that unaffiliated programmers cannot reach agreements for program carriage is hard to take seriously when, in fact, almost all the channels on every cable system are filled with programming that is in no way affiliated with the cable operator. Today, cable systems typically provide more than two hundred channels of diverse – and diversely owned – programming on their systems. Only a small fraction of these channels are owned by any cable operator, and in no case are more than a tiny fraction carried on any particular system owned by the operator of that system.

While broadcaster-owned program networks occupy a portion of the channels on cable systems, that portion is still a minority of all channels. And the ownership is scattered among a number of broadcast entities and is hardly concentrated. In any event, those broadcaster-owned networks are also unaffiliated with any cable operator.

For any *new* network, gaining carriage along with hundreds of existing (mostly cable-unaffiliated) networks and services is an uphill struggle with small odds. But this is hardly because it is unaffiliated with the cable operator. Given the small number of available channels, the risks inherent in committing significant resources to a new service, and the need to develop a product of sufficient quality to attract cable viewers, it would not be surprising if existing providers of multiple programming networks had the expertise and economies of scope and scale to be more prevalent than other providers in securing carriage.

In any event, the point of the program carriage provisions of the 1992 Act was never to provide a preference, much less a guarantee of carriage, to unaffiliated program networks in the absence of any evidence that a network was being denied carriage *because* it was unaffiliated

with the cable operator.¹⁵ As NCTA pointed out in the rulemaking proceeding considering program carriage complaint procedures,

[t]he Commission made clear in implementing Section 616 that it should not “unduly interfer[e] with legitimate negotiating practices between multichannel video programming distributors and programming vendors.” And Congress also instructed the Commission to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability” of diverse programming sources. Commenters point to nothing that suggests that Congress intended to provide the Commission authority to force cable operators to carry any particular non-affiliated program service. And, as Time Warner’s comments show, any such requirement would raise serious constitutional concerns.¹⁶

Therefore, the mere fact that some unaffiliated networks may have difficulty negotiating access to a cable system is hardly evidence that the complaint process needs to be repaired. Consumers Union seems to think that the rules need to be tinkered with and liberalized until more unaffiliated program networks can readily get access (on their proposed terms) to cable systems – just as it has argued that the Commission’s leased access procedures and maximum permissible rates must be amended until leased access becomes economically viable for any programmer who wants such access.

But this has it backwards. Neither the program carriage nor the leased access provisions of the Act are meant to subsidize access to a cable system where such access is not economically viable on competitive marketplace terms. Absent evidence of anticompetitive, discriminatory denials of access based on affiliation, there is no reason to believe that the rules and the marketplace are not working exactly as Congress hoped and intended.

¹⁵ Carriage by cable operators of networks affiliated with *broadcasters* in lieu of independently-owned networks would in no circumstances constitute the sort of discrimination based on affiliation proscribed by the program carriage provisions of the Act.

¹⁶ NCTA Reply Comments in MB Docket 07-42 (Oct. 12, 2007), *quoting Second Report and Order*, 9 FCC Rcd 2642, 2643 (1993) *and* 1992 Cable Act, Section 2(b)(2), *and citing* Time Warner Cable Comments in MB Docket 07-42 at 12 (“Rules that force an MVPD to carry services that it would not otherwise have carried, or to carry them on different terms than it chooses, require a constitutionally sufficient justification. Whether or not such a justification may have existed at one time, it clearly does not exist any longer.”).

II. TIVO'S COMPLAINTS ABOUT THE CABLE INDUSTRY DO NOT COMPORT WITH THE FACTS

A. Contrary to TiVo's Claims, Cable Has Opened Paths For Innovation For Retail Navigation Devices.

1. Cable operators are working cooperatively with TiVo and other CE manufacturers on retail solutions.

TiVo makes a number of unfounded and erroneous claims about the cable industry's support for retail navigation devices. As an initial matter, TiVo is wrong in suggesting that there has been little progress on retail issues over the last decade.¹⁷ The simple fact is that cooperation and collaboration between cable operators and CE manufacturers have never been stronger. Operators and manufacturers coordinate network support with product launches, hold regular "summits" to brief each other on the progress of tru2way and other deployments, stay abreast of new developments, and coordinate solutions to bugs that inevitably develop in the implementation of innovative technology rollouts.

TiVo also mischaracterizes cable industry support for CableCARD-enabled retail devices.¹⁸ Operators continue to dedicate substantial resources to train their technicians on deploying CableCARDS and to troubleshoot any technical issues with particular retail device models.¹⁹ And, contrary to TiVo's claims, the data from NCTA's CableCARD reports demonstrate that the overwhelming majority of CableCARD installations require a single truck

¹⁷ TiVo Comments at 2.

¹⁸ *See id.* at 5-6 (stating that "CableCARD installation for competitive navigation devices is a struggle for the consumer").

¹⁹ Many of the technical issues with CableCARD installations have long since been resolved. The cable industry provides detailed reports every 90 days of CableCARD installations in CS Docket 97-80. Those reports chronicle how early bugs were worked out.

roll.²⁰ Greg Gudorf, CEO of DVR manufacturer (and TiVo competitor) Digeo, recently commented that CE manufacturers “now have much better support for CableCARD devices.”²¹

Cable’s collaboration with the CE industry is also illustrated in how it works with TiVo. TiVo’s most recent (Series 3) DVR is designed around CableCARDs, offers its own user interface, and combines cable linear programming with content from the Internet, Netflix, Amazon, and other content sources. The cable industry even helped TiVo overcome the device’s one-way limitation. TiVo, like other “unidirectional” devices, was designed as a “one-way” receiver without the technical capacity to operate as a “two-way” cable device.²² In voluntary collaboration with TiVo, Motorola, Scientific-Atlanta, BigBand Networks, and C-COR, the cable industry developed and deployed a USB-connected “Tuning Adapter” which handles the “two-way” tuning of switched digital video (“SDV”) signals for a “one-way” TiVo device. TiVo agreed with this approach and endorsed the solution to the Commission.²³

Today, many cable operators provide Tuning Adaptors to TiVo customers without additional charge. However, TiVo is incorrect in asserting that there was an agreement between TiVo and NCTA to provide these without charge forever.²⁴ In fact, there have been *no* agreements between TiVo and NCTA regarding the pricing of Tuning Adaptors or the duration

²⁰ TiVo notes that the average number of truck rolls for most major cable operators is about 1.1 – which means that 9 out of 10 installations are completed successfully with a single truck roll. TiVo is therefore mischaracterizing the data when it says that the “average” consumer needs “multiple” visits. TiVo Comments at 5.

²¹ Comm. Daily at 4 (July 24, 2009).

²² TiVo suggests that it has the “core technical capability” to operate as a two-way device, but what it means is that some of its devices have an Internet connection. TiVo Comments at n.30; TiVo Petition for Reconsideration at 6, 12. Every major cable network, as well as FiOS and U-verse, provide two-way communication and authentication of entitlements that are quite different from Internet connections and downloads.

²³ See *Ex parte* letter of CableLabs, TiVo, Motorola, Solekai, Digeo, Digital Keystone, ViXs, to Marlene H. Dortch, FCC, CS Docket 97-80 (filed Nov. 13, 2007); *Ex parte* Letter of Henry Goldberg, Counsel to TiVo, to Marlene H. Dortch, FCC, CS Docket 97-80 (filed Nov. 27, 2007).

²⁴ TiVo Petition for Reconsideration at 17-18 (“... TiVo reached an agreement with NCTA under which cable operators deploying switched digital video would provide TiVo subscribers with Tuning Adaptors at no additional cost ...”).

of any discounted offerings, and TiVo's prior explanations to the Commission regarding Tuning Adapters make no such claims either.²⁵

TiVo downplays the point, but the cable industry's support of retail manufacturers stands in clear contrast to its competitors. Even though the navigation device statute applies equally to all MVPDs,²⁶ the Commission has never required DBS providers (which now serve over 31 million subscribers) to comply with the separate security mandates.²⁷ The Commission has maintained this differential treatment of the DBS industry even though DBS companies are now the second and third largest MVPDs and even though the DBS industry has largely abandoned its prior retail model and now relies primarily on proprietary, leased devices.²⁸ Verizon and AT&T also rely on proprietary, non-interoperable set-top boxes that are specialized for their respective networks and technologies. You cannot buy an AT&T U-verse box or lease one with separable security. Verizon offers a CableCARD, but the CableCARD is limited to supporting one-way services.²⁹

²⁵ TiVo Comments at 10 n. 22; *see also* <http://www.ncta.com/ReleaseType/MediaRelease/4439.aspx?hiddenavlink=true&type=relyp1>; *Ex Parte* Letter of CableLabs, TiVo, Motorola, Solekai, Digeo, Digital Keystone, ViXs, to Marlene H. Dortch, CS Docket 97-80 (Nov. 13, 2007); *Ex Parte* Letters of Henry Goldberg, counsel to TiVo, to Marlene H. Dortch, CS Docket 97-80 (Nov. 27, 2007).

²⁶ *See* 47 U.S.C. § 549.

²⁷ *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, Report and Order*, 13 FCC Rcd 14775, ¶ 66 (1998) ("1998 Order"); 47 C.F.R. § 76.1204(a)(2).

²⁸ *See* DIRECTV Group Inc., Form 10-K, at 2, 29 (Mar. 10, 2006) (noting launch of lease program for new and existing subscribers on March 1, 2006); DISH DBS Corp., Form 10-K, at F-14 (Mar. 16, 2009) ("DISH Network subscribers have the choice of leasing or purchasing the satellite receiver and other equipment necessary to receive our programming. Most of our new subscribers choose to lease equipment and thus we retain title to such equipment.").

²⁹ The IP card to which TiVo refers but says it knows little about, *see* TiVo Comments at 12-13, is actually a standard released for trial use beginning July 28, 2009 and running until January 28, 2011. *See* APOD Trial-Use Standard ATIS-0800033.

2. Tru2way is a platform for innovation for retail devices.

TiVo is also incorrect in asserting that tru2way is not a viable alternative for retail manufacturers.³⁰ The tru2way technology agreed to in the Memorandum of Understanding (“MOU”) among leading cable, CE, and IT companies is a giant step beyond one-way devices and Tuning Adapters.³¹ Under the MOU, CE manufacturers may build retail “two-way” digital TVs, DVRs, and other devices and receive all of cable’s one-way and interactive services by using a CableCARD instead of a set-top box. Such DTVs made by Panasonic are already in homes in Chicago, Denver, and Atlanta.

Furthermore, CE manufacturers are not limited to presenting cable services in their tru2way devices. The MOU explicitly states that “[i]nnovation in cable networks, cable services, and devices that access cable services is desirable” and further provides that the MOU shall not “be a basis for limiting or freezing the cable network, cable services, Adopters’ IDCs [i.e., consumer products] or Founder navigation devices, or for imposing additional investment requirements on the cable network.”³² Consistent with these pro-innovation goals, CE manufacturers may bring Internet content and cable content together in the same device, have

³⁰ TiVo Comments at 11. The technical concerns that TiVo raises about the tru2way platform, *see id.* at 11-12, were fully answered by NCTA and others in the Commission’s 2007 rulemaking on two-way plug-and-play issues. *See, e.g.,* Comments of the National Cable & Telecommunications Association in CS Docket 97-80 (filed Aug. 24, 2007); Reply Comments of the National Cable & Telecommunications Association in CS Docket 97-80 at 14 (filed Sept. 10, 2007).

³¹ The agreement was signed by cable operators serving more than 82% of all U.S. cable subscribers and passing over 105 million homes. The MOU signatories include major CE and IT companies— Sony, Samsung, Panasonic, LG Electronics, Funai (known in the US under the brand names Philips, Magnavox, Sylvania, and Emerson), Digeo, ADB, and chip maker Intel – and the nation’s top six cable providers – Comcast, Time Warner Cable, Cox, Cablevision, Charter and Bright House Networks. *See Ex Parte* Letter of Kathryn Zachem to Monica Desai, CS Docket 97-80 (filed May 28, 2008) (summary of MOU); *Ex Parte* Letter of Kathryn Zachem to Monica Desai, CS Docket 97-80 (filed June 10, 2008) (text of MOU); Joint Status Report of the National Cable & Telecommunications Association and the Consumer Electronics Association, CS Docket No. 97-80, (filed July 29, 2008)((providing information about additional signatories to MOU): *Ex Parte* Letter of Neal Goldberg, NCTA, to Marlene Dortch, CS Docket No. 97-80; PP Docket No. 00-67(filed July 31, 2008)(providing information about additional signatories to MOU).

³² Memorandum of Understanding among Cable Operators and Consumer Electronics Adopters Regarding Interactive Digital Cable Ready Products, April 25, 2008, § 9.

their own menus and user interfaces, include cable channels in their own guides, create and manage their own home networks, and add gaming, widgets, or other features and functions. Significantly, cable operators also agreed to help populate a competing CE guide with guide data, so that consumers may have a choice of user interfaces within the same device.³³ Moreover, as cable operators add new interactive services to the tru2way platform, retail tru2way devices will be able to receive the new services.³⁴

The MOU also resolved the wide array of business and technology issues that had previously kept the industries apart. The MOU affords CE companies a meaningful voice in CableLabs' specification change processes. The tru2way license terms clearly invite, encourage, and allow the innovations noted above for both networks and devices. The certification process provides for short-form certification and a path to self-certification. With the tru2way middleware platform, content providers such as the motion picture studios and linear programmers are provided a consistent platform upon which to develop new content offerings.

The MOU has produced a certainty in rules, specifications, agreements, and certification processes that has allowed for major investment. Cable operators have already deployed over 2.5 million tru2way set-top boxes for lease to their customers and are upgrading their cable headends to support tru2way.³⁵ As noted, tru2way devices are now available at retail in three major markets, and manufacturers of tru2way equipment and developers of tru2way applications

³³ The guide data is delivered via the digital CBS channel for use by CE manufacturers who have license rights to use such guide data from the owner of the guide data.

³⁴ The tru2way technology is part of the same Java-based solution used in video systems in Europe and Japan, Blu-Ray Disc, and many cell phones and other devices throughout the world. Deploying a national Java-based platform allows developers to create "write once, run anywhere" cable applications, opening up cable to still more innovation.

³⁵ Although only large MSOs are MOU signatories, they serve 82% of cable customers. As equipment manufacturers ramp up, tru2way is likely to become standard equipment, as happened with the deployment of DOCSIS-based cable modems.

now hold successful “interops” to test new applications and devices on the tru2way platform.³⁶

This is remarkable success in such a challenging economic environment and has been achieved in the absence of any government regulation of two-way networks and services.

B. TiVo’s Proposals Are Inconsistent with the Pro-Innovation Policies of Congress and the Commission.

TiVo suggests that “common reliance” be redefined radically to impose an “administrative process” in advance of the deployment of new technologies; that any CableCARD replacement technology must be, among other things, “open, non-proprietary, nationally portable, available for use by unidirectional as well as bidirectional plug and play devices, and relied upon by multichannel video programming providers and retail set-top box makers alike;” and that such requirements are “mandated by the Commission and the Congress.”³⁷ At bottom, TiVo’s demand is for nothing less than that every advance in cable network technology and security be backward-compatible with TiVo’s installed base of devices. In fact, neither Section 629 nor the Commission’s rules and implementing orders compel such an outcome. To the contrary, Congress specifically directed the Commission to “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”³⁸

Furthermore, in adopting its separable security regulations, the Commission took care not to lock out innovation in networks or services.³⁹ It re-crafted the rules to focus energies on

³⁶ See, e.g., Record Number of Vendors Participate in Recent CableLabs® Tru2way™ Interop, May 20, 2009, http://www.cablelabs.com/news/pr/2009/09_pr_tru2way_interop_05209.html. The most recent tru2way Developers Conference was held August 10-11, 2009.

³⁷ TiVo Comments at 13-15; see also TiVo Petition for Reconsideration at 6, 12.

³⁸ H.R. Rep. No. 104-458, at 181 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 124, 194 (“*Conference Report*”).

³⁹ 1998 Order ¶¶ 15-16 (“this is both a particularly opportune and a particularly perilous time for the adoption of regulations. ... It is perilous because regulations have the potential to stifle growth, innovation, and technical developments at a time when consumer demands, business plans, and technologies remain unknown, unformed

emerging digital technologies, rather than legacy devices.⁴⁰ It adopted the “one-way” plug-and-play rules knowing that technology would evolve, and that one-way devices would not be able to receive new and interactive services.⁴¹ It has since issued orders and waivers to permit networks to convert analog to digital spectrum and repurpose spectrum for more HD and more broadband;⁴² to clear the path for SDV digital technology to reclaim even more spectrum;⁴³ to

or incomplete. Our objective thus is to ensure that the goals of Section 629 are met without fixing into law the current state of technology.”).

⁴⁰ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd. 7596 (1999).

⁴¹ 47 C.F.R. § 15.123(a) (“Unidirectional digital cable products do not include interactive two-way digital television products.”); *In the Matter of Oceanic Time Warner Cable*, Order on Review, FCC 09-52, at ¶11 (rel. June 26, 2009) (“*Oceanic Time Warner Cable Order*”) (“Our UDCP rules were not intended to provide access to bi-directional services or to freeze all one-way cable programming services in perpetuity.”). When adopting the plug-and-play rules, the Commission explained that set-top boxes would be required for UDCPs to receive interactive services, and adopted labeling requirements so that consumers would know about the “need for set-top boxes in order to receive interactive services” on unidirectional devices. *Commercial Availability of Navigation Devices*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶¶ 7, 41 (2003). In 2005, the Commission disclaimed any need for cable networks to constrain the pace of their innovation – even if CE products did not keep up: “It is not our intent to force cable operators to develop and deploy new products and services in tandem with consumer electronics manufacturers. Cable operators are free to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services.” *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report & Order, 20 FCC Rcd at 6809, ¶ 30 (2005) (“*2005 Order*”). TiVo has ignored this history.

⁴² *See In the Matter of Evolution Broadband, L.L.C.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, FCC 09-46 (rel. June 1, 2009); *In the Matter of Cable One, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, FCC 09-45 (rel. May 28, 2009). TiVo recently filed an *ex parte* letter clarifying that it does not oppose waivers of the integration ban for one-way, standard-definition set-top boxes. *See* Letter from Henry Goldberg, Counsel for TiVo, to Marlene Dortch, FCC, CS Dkt. No. 97-80 (filed Aug. 12, 2009).

⁴³ In the *Oceanic Time Warner Cable Order*, the Commission highlighted the consumer benefits associated with reclamation of cable bandwidth through SDV technology, noting that such reclamation would enable “the launch of new HD channels and the introduction of diverse and niche programming options, including foreign-language content and other diverse programming” and “facilitate the deployment of advanced broadband technologies such as DOCSIS 3.0, as well as expand broadband capabilities.” *Oceanic Time Warner Cable Order* ¶ 13. It is unfortunate that TiVo ignores those findings and even suggests that the use of SDV should be discouraged in cable. TiVo Comments at 9 n.20. TiVo has also made a number of legal and technical claims in its Petition for Reconsideration of the *Oceanic Time Warner Cable Order*; those claims are without merit and have been fully answered by parties in that proceeding. *See e.g.*, Opposition of Time Warner Cable, File Nos. EB-07-SE-351, EB-07-SE-352 (filed Aug. 11, 2009).

use new forms of IP distribution;⁴⁴ and to develop downloadable security.⁴⁵ This is not an “endless string” of waivers, accidental “dictum,” or an incentive-destroying erosion of Commission policy or rule, as TiVo portrays it:⁴⁶ it reflects a flexible regulatory approach that promotes innovation in networks, services, and devices to the benefit of consumers.⁴⁷ TiVo’s proposal would impede these developments, to the detriment of consumers and competition.

TiVo errs in suggesting that *Carterfone* and the Commission’s Part 68 rules provide a basis for reversing these pro-innovation, pro-consumer policies.⁴⁸ First, the Commission has rejected the telephone analogy as inapt for cable.⁴⁹ The telephone network was originally built to a common standard nationwide by a single homogenous entity, AT&T. The Part 68 rules

⁴⁴ *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 11780 (MB 2007).

⁴⁵ *Cablevision Systems Corporation*, 24 FCC Rcd. 393 (2009). Contrary to TiVo’s claims, see TiVo Comments at 8 & 13 n.31, Cablevision and NDS described the open-standard and non-proprietary key ladder technology in that docket, including its reliance on code that is already available in commodity chips from multiple manufacturers. See Cablevision’s Request for Extension of Waiver at 3 (Nov. 26, 2008); Cablevision’s Reply to Opposition of the Consumer Electronics Association to Request for Extension of Waiver at 1-3 & Att. (Dec. 23, 2008). TiVo itself uses one of those chips in its DVRs, and so should be familiar with them. Cf. TiVo Comments at 7-8, n. 31. TiVo’s insistence on backward-compatibility and prior regulatory approval of new technologies would needlessly and unlawfully hobble efforts to deploy downloadable security, contrary to the Commission’s long-standing endorsement of this approach as the preferred path of complying with the Commission’s separable security rules. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794 (2005).

⁴⁶ Comments of TiVo at 6, 9; TiVo Petition for Reconsideration at i, 2. The navigation device statute and rules and Commission precedent make clear that set-top box waivers may be granted to MVPDs *or* equipment suppliers. See 47 U.S.C. § 549(c) (“The Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, *or* an equipment provider...” (emphasis added)); 47 C.F.R. § 76.1207 (same); see also *In the Matter of Pace Micro Technology PLC: Petition for Special Relief*, 19 FCC Rcd. 1945 ¶ 8 (2004) (granting waiver of Part 76 equipment rule to set-top box manufacturer).

⁴⁷ The fact that consumer electronics devices eventually are outpaced by changes in technology and in network services is well accepted by the consumer electronics industry. As CEA President Gary Shapiro put it in a recent interview, “I mean, think about it: you buy a television 15 years ago. Why do you have the constitutional right that it’ll last forever? Any other product you use you know that it’s likely to break down, service will be stopped. That’s just the risk you take. Hell, I signed up for ClearPass to get through airports three months ago and a month after I signed up it went out of business. I wasn’t thrilled, but that’s the risk you take.” Erica Ogg, *Reflecting on the DTV transition*, Aug. 4, 2009, http://news.cnet.com/8301-1001_3-10303225-92.html.

⁴⁸ See TiVo Petition for Reconsideration at 4, 7.

⁴⁹ The Commission recognized in 1998 that “the telephone networks do not provide a proper analogy to the issues in this proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks.” *1998 Order* ¶ 39.

applied to devices connected to a highly stable interface: a telephone loop with electrical characteristics that had remained essentially uniform and unchanged for a century, and used only for a well-defined “plain old telephone service” that needed no content protection. By contrast, cable technology, facilities, and services are widely varied and evolving rapidly, delivering multiple new broadband, two-way, digital services.⁵⁰ Second, the Part 68 rules never imposed government constraints on the design of telephone networks and services, as TiVo suggests should apply to cable. It merely required disclosure of the interface characteristics established unilaterally by the Bell System. Cable has *already* provided a consensus-driven tru2way interface for retail navigation devices.

Likewise, TiVo is wrong in suggesting that the Commission’s “common reliance” goal provides a basis for constraining innovation in providing separable security.⁵¹ The integration ban was imposed to provide “insurance” that cable operators would support CableCARDs in retail devices. If, as the Media Bureau has suggested, a CableCARD adds about \$56 in cost to a set-top box,⁵² then the cable industry has incurred approximately \$784 million to date to comply with the integration ban (i.e. \$56 x 14 million = \$784 million). In light of the 437,800 CableCARDs deployed in retail CableCARD-enabled devices, the 14 million CableCARDs installed in leased set-tops constitute a \$30 “common reliance” insurance premium for every \$1 of retail device “coverage.” Common reliance should not compel such lopsided and expensive results. Even the parties to the tru2way MOU agree that common reliance does not mean that

⁵⁰ The cable business is also quite different from the telephone business in the pre-*Carterfone* days. The Bell System sought to prevent competition from Carterfone to its wholly-owned Western Electric equipment division. By contrast, cable does not own any of its set-top box vendors. Cable operators buy set-tops from Pace, Panasonic, Samsung, Cisco, Motorola, and others, to rent to consumers at regulated rates that essentially allow only the recovery of costs.

⁵¹ See TiVo Comments at 9-10.

⁵² See *In the Matter of James Cable, LLC et al., Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 23 FCC Rcd. 10592, ¶ 9 n.30 (MB 2008).

100% of cable devices must operate exactly as retail devices do to ensure cable operator support for retail devices, illustrating that “common reliance” can be tailored to avoid waste and invite innovation.⁵³

Commission rules should continue to enable cable to invent new offerings without first passing through a long political, regulatory, or standards process. This is how cable brought digital cable, high-speed Internet, video-on-demand (“VOD”), and other innovative services to consumers. Preserving an environment for such continuous innovation provides certainty, invites investment, and benefits consumers.

C. The Commission Should Eliminate The Differential Treatment Of Cable Operators Under The Navigation Device Rules And Promote Market-Driven Solutions.

TiVo complains that tru2way has not been adopted by satellite or telephone, and that “common reliance means that *all* MVPDs and *all* retail set-top box manufacturers rely on the *same* conditional access security system.”⁵⁴ We agree that each MVPD should be held to separable security mandates if cable is. But the cable industry does not seek to impose *cable* technology on other platforms. Integral to a robust competitive market is the ability of each MVPD platform to design, deploy, and utilize network and premises technologies that present competitive choices to consumers. This in turn spurs competitive response by others in the market. Satellite uses QPSK; cable responds with QAM, DOCSIS 3.0, and tru2way; Verizon offers IP; and AT&T switches all channels to maximize its bandwidth. Each MVPD seeks to augment its own technology to compete with the best features of the others, and the consumer reaps the benefits.

⁵³ Under the MOU, the cable industry committed to include tru2way in 20% of the set-tops it buys after July 1, 2009, up to a ceiling of 10 million. Memorandum of Understanding among Cable Operators and Consumer Electronics Adopters Regarding Interactive Digital Cable Ready Products, April 25, 2008, § 4.

⁵⁴ TiVo Comments at 13.

TiVo suggests that its business requires more cable regulation and a guarantee that Tuning Adapters must be free forever.⁵⁵ But that is not what will decide whether TiVo will succeed or fail. It is consumer choice and TiVo's own creativity in this competitive market that will determine whether it succeeds in the marketplace. TiVo's retail equipment sales took off when TiVo cut several hundred dollars off its \$800 equipment price.⁵⁶ After it lost an agreement with DirecTV, it signed many more with Amazon (to download high definition movies and television shows); Best Buy (to produce a special Best Buy DVR and embed its DVR platform in a few HDTVs); Sea Change and RCN (to integrate VOD with TiVo devices); Comcast (to embed the TiVo guide in Comcast leased set-tops); Cox (to trial the same); and Evolution Broadband (to develop a broadband-enabled DVR). It announced on its earnings call on May 27, 2009 that it is "develop[ing] a TiVo application that is truly compatible with the tru2way stack" and that Comcast will be presenting the TiVo HD retail box as an alternative to a digital adapter.⁵⁷ TiVo's success is in its own hands, not in the hands of regulators.⁵⁸

⁵⁵ *Id.* at 10 n.23; *see also* TiVo Petition for Reconsideration at 18.

⁵⁶ HD TiVo price drop coming this year, TG Daily, March 12, 2007, <http://www.tgdaily.com/content/view/31208/97/>. ("The Series 3 recorder has seen disappointing sales, mainly because of the prohibitive price of \$800. Most owners of HD DVRs lease a unit from their cable or satellite provider for around \$10 a month."). TiVo states that the DVR "has not flourished in the way Videocassette Recorders (VCRs) did in the analog era." TiVo Petition for Reconsideration at 4. The reality is that unlike the VCR, TiVo service carries a substantial monthly subscription fee, plus early termination fees. TiVo Service Monthly and Prepaid Pricing Plans, <https://www3.tivo.com/store/plans.do>.

⁵⁷ On the earnings call, TiVo quantified the results: "with our existing relationships with DIRECTV, Comcast and Cox, we are already covering roughly 35%, 40% of the paid television universe in the United States." Transcript of TiVo Earnings call for 2010 1Q, May 27, 2009 <http://seekingalpha.com/article/139973-tivo-inc-q1-2010-earnings-call-transcript>. Todd Spangler, *Comcast To Make TiVo 'Primary DVR Choice' In One Tru2way Market*, Multichannel News, May 27, 2009 <http://www.multichannel.com/article/277143-Comcast-To-Make-TiVo-Primary-DVR-Choice-In-One-Tru2way-Market.php>.

⁵⁸ As CEA's Gary Shapiro put it recently, allowing technologies to emerge and to fail is part of an economic process that gives consumers better, faster and less expensive technology choices, that forces market players to adapt to the changing demands, and that creates new jobs. Gary Shapiro: Washington's Fear of Failure Threatens To Foster Bad Economic Policy, <http://www.cbsnews.com/stories/2009/07/22/opinion/main5180932.shtml> (July 23, 2009) ("In the technology industry, failure has been a powerful force for advancement. Technologies are displaced as newer, better ones emerge to meet the changing needs of consumers and our society. The VCR gave way to DVD players, which in turn have been challenged by Blu-ray devices and Internet streaming. The beneficiaries of these failures are

TiVo is right, though, that in today's market, a consumer with a "plug-and-play" retail navigation device can receive cable services via CableCARD, but needs set-top boxes to receive two-way services from Verizon or any services from DirecTV, DISH, or AT&T's U-Verse. NCTA has previously raised the possibility of an "all-MVPD" plug-and-play solution – that is, a solution that uses a standard network interface that is platform agnostic, allowing diverse MVPD networks to serve a variety of retail devices. In the summer of 2007, the cable industry asked the Commission to encourage an all-provider solution, and actively sought support for the concept from AT&T, Verizon, and satellite providers during the summer and fall of 2007, including numerous high-level contacts among the parties. Unfortunately, AT&T, Verizon, and satellite providers all declined cable's invitation, and cable proceeded with its plan to negotiate and conclude the tru2way MOU with major CE and IT companies. When NCTA announced the MOU in June 2008, we specifically renewed the cable industry's invitation to collaborate on a voluntary all-MVPD solution.⁵⁹ TiVo has now added its voice to suggesting an all-MVPD solution.

It may still be possible to select an interface through which consumer devices can work on all MVPD systems, yet still allow MVPD networks to select their own technology, differentiate themselves, and use *different* network-specific devices to connect to digital televisions and make their services available through that common interface. This approach

consumers and by extension, the economy itself.... For the technology industry, creative destruction forces even the most established players to adapt to the changing demands of the market or risk fading away. The American economy and consumers have historically benefited from this perennial cycle of improvement. Innovations get better, faster and less expensive for consumers. Meanwhile, more jobs are created to make room for new opportunities and evolving consumer demand.”) As Mr. Shapiro added in a more recent interview “we have a position that we believe in the free market and we don't think we should be asking government for special favors for our industry.” Erica Ogg, Reflecting on the DTV transition, August 4, 2009, http://news.cnet.com/8301-1001_3-10303225-92.html.

⁵⁹ Remarks by Kyle McSlarrow, National Press Club, Washington, D.C. June 9, 2008, at 4, available at <http://www.ncta.com/ReleaseType/MediaRelease/McSlarrow-Remarks-at-National-Press-Club.aspx>.

would preserve the benefits of rapid innovation in video services but not undermine the certainty on which current investment and innovation are proceeding. The cable industry remains willing to work with the Commission, our MVPD competitors, and other interested parties to develop such a solution.

But the cable industry cannot support, and the Commission should not endorse, TiVo's calls for still more cable-specific burdens. Applying additional rules to only one competitor would give an unfair competitive advantage to others in the vibrantly competitive video marketplace. Moreover, because such rules can never keep up with rapidly evolving technologies, they would only impede innovation and the availability to consumers of beneficial technological advances.

Respectfully submitted,

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