

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
TiVo Inc.)	
Petition for Clarification or Waiver)	MB Docket No. 12-230
of 47 C.F.R. § 76.640(b)(4))	CS Docket No. 97-80
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996;)	
Commercial Availability of Navigation)	
Devices)	

**COMMENTS OF
MEDIACOM COMMUNICATIONS CORPORATION**

Mediacom Communications Corporation (“Mediacom”) hereby submits the following response to the Commission’s August 16, 2012 Public Notice (DA-12-1347) inviting public comment on the request of TiVo, Inc. for clarification or waiver of Section 76.640(b)(4)(iii) of the Commission’s rules. Section 76.640(b)(4)(iii) sets a deadline for cable operators to “ensure that cable-operator-provided high definition set-top boxes...shall comply with an open industry standard that provides for audiovisual communications including service discovery, video transport, and remote control pass-through standards for home networking.”

Mediacom strongly supports the public interest objectives, including the promotion of innovation, competition, and consumer choice, underlying Section 76.640(b)(4)(iii) and has no objection to the grant of TiVo’s waiver request. Moreover, Mediacom submits that the Commission can and should use the opportunity presented by TiVo’s petition to clarify that efforts by programmers to contractually constrain the ability of cable subscribers to obtain or use certain lawful devices or applications in connection with their MVPD service, including equipment or applications used by subscribers for personal recording and home networking, are

contrary to the public interest and inconsistent with the goals of the Communications Act and the Commission's rules.

DISCUSSION

The principle that it is in the public interest for consumers to have the ability to connect lawful equipment of their choice to a telecommunications network so long as doing so does not adversely impact the network dates back over forty years to the *Carterfone* decision.¹ While *Carterfone* arose in the context of attachments to a telephone company network, both Congress and the Commission have recognized the applicability of the governing principle in that case to other networks, including the facilities of multichannel video programming service providers and Internet service providers.

For instance, the Commission pointed to the *Carterfone* “right to attach principle” when it adopted Section 76.1201 of its rules (which recognizes the right of MVPD subscribers to connect or use navigation devices to or with a multichannel video programming system except in circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or the devices are used to assist in the unauthorized reception of service).² The Commission also cited *Carterfone* in the Open Internet proceeding, where it declared that “[t]he Commission has long protected end users’ rights to attach lawful devices that do not harm communications networks.”³

¹ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 423 (1968) (invalidating a tariff that prevented use of interconnecting devices that did not adversely affect the telephone system).

² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775 (1998).

³ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17942 at note 196 (2010) (discussing adoption of rule prohibiting fixed broadband Internet service providers from blocking lawful content, applications, services, or non-harmful devices). *See also Service Rules*

Indeed, although the Commission's order adopting Section 76.640(b)(4)(iii) did not specifically refer to *Carterfone*, the spirit of that requirement clearly is present in the substance of the open standards requirement and the Commission's promotion of home networking by consumers. It also is present in the Commission's acknowledgement that Congress, in enacting Section 629 of the Communications Act, "pointed to the vigorous retail market for customer premises equipment used with the public switched-telephone network and sought to create a similarly vigorous market for devices used with MVPD services."⁴

Yet, the pro-consumer, pro-competition, and pro-innovation goals that have guided Commission policy for four decades increasingly are being threatened by the efforts of programmers to contractually limit consumers' ability to lawfully "time-shift" and "space-shift" programming and to view programming on lawful devices of their own choosing (such as smart phones and devices). Those goals similarly are threatened by the programmers' efforts to limit the ability of distributors to lawfully deploy new devices and services that offer such functionality (including advanced DVR services, integrated television and Web browser devices, and other applications that utilize substantially non-infringing consumer electronics equipment).

Examples of the types of restrictions that programmers have been seeking (drawn from Mediacom's own experience as well as from published reports) include the following:

- provisions limiting the wireless delivery of programming within a subscriber's premises of signals delivered by wireline technology;
- provisions limiting the use of other space-shifting technology (*e.g.*, "Slingbox").

for the 698-746, 747-762, and 777-792 MHz Bands, Second Report and Order, 22 FCC Rcd 15289, ¶ 206 (2007) ("*C Block Order*") (requiring "C Block" spectrum licensees to allow consumers to freely use devices and applications of their choosing).

⁴ *Implementation of Section 304 of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657 (2010) at ¶ 2, *citing* H.R. Rep. No. 104-204, at 112-13 (1995).

- provisions that would allow cable operators to deploy in-home DVRs, but not remote storage or “cloud” DVR services or DVRs with ad-skipping functionality; and
- provisions barring a cable operator from deploying advanced set-top boxes capable of a variety of lawful functionalities including (but not limited to) a Blu-ray player, game console, or “Internet television.”

None of the technologies that the programmers are trying to constrain operators from deploying (and consumers from using) are unlawful. Efforts to block the provision of remote-storage DVR service have failed in court.⁵ Dish Network’s ad-skipping functionality, while currently the subject of litigation, has not been enjoined and other techniques for facilitating ad-skipping during playback have been and are being deployed without challenge. Moreover, because home networking applications are designed to facilitate “private performances” of programming, they are presumptively lawful.⁶

Practices that “imped[e] the development and deployment of devices and applications that consumers want to use” are contrary to the public interest.⁷ That principle clearly encompasses programmers’ attempts to limit the deployment of services and applications that are widely available from third-party retailers, such as “Internet-connected devices,” Blu-ray players, Internet televisions, etc. Indeed, certain TiVo devices available at retail offer over-the-top content reception functionality; yet, in negotiating for program carriage rights, Mediacom has faced demands that it disable or otherwise not include such functionality in the DVRs that it

⁵ See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir 2008), *cert. denied*, 129 S. Ct. 2890 (2007).

⁶ See, e.g., *id.*; *American Broadcasting Cos. et al. v. Aereo, Inc.*, No. 1:12-cv-01540 (SDNY, July 11, 2012).

⁷ *C Block Order*, *supra*, at ¶ 207. Just recently, the Commission demonstrated its commitment to promoting consumer choice and innovation by entering into \$1.25 million consent decree with Verizon Wireless arising out of that company’s practice of blocking the use “tethering” applications with its wireless network. *Cellco Partnership d/b/a Verizon Wireless*, Order, DA 12-1228 (Enf. Bur., rel. July 31, 2012).

leases consumers. Such demands limit consumer choice, lessen competition and reduce competition. They also produce opportunities for programmers not only to discriminate among equipment manufacturers, but also to discriminate among MVPDs by allowing “favored” distributors to deploy lawful services and technologies, while denying similar rights to other MVPDs.

Ultimately, the technology restrictions that programmers are demanding threaten the Commission’s longstanding goal, mandated by statute, of establishing a retail market for consumer premises equipment and ensuring that consumers can take advantage of the full functionality of the devices available to them. Under the circumstances, therefore, it is perfectly appropriate for the Commission to take such actions as are necessary to ensure that programmers cannot prevent or limit consumers from watching the programming they lawfully purchase when, where, and how they want. Mediacom urges the Commission to clarify that programmers may not demand and cable operators may not enter into contractual arrangements the effect of which are to restrict consumers’ access to and/or or use of substantially non-infringing devices that do not harm the network.⁸

CONCLUSION

For the reasons stated above, the Commission should clarify that the imposition by programmers of restrictions on the deployment to or use by consumers of lawful devices or applications in connection with their MVPD service, including equipment or applications used by subscribers for personal recording and home networking, are contrary to the public interest and inconsistent with the goals of the Communications Act and the Commission’s rules.

⁸ Mediacom previously proposed that the Commission adopt such a rule in the pending program access reform rulemaking proceeding. *See* Reply Comments of Mediacom Communications Corporation, MB Docket 12-68, et al. (filed July 23, 2012). The instant waiver proceeding provides an alternative vehicle for obtaining the same result.

Respectfully submitted,

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