

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

In the Matter of)	
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	PP Docket No. 00-67
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
ON TIVO, INC.'S PETITION FOR RULEMAKING**

September 16, 2013

Rick Chessen
Neal M. Goldberg
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, DC 20001-1431
(202) 222-2445

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits these comments in response to the Petition for Rulemaking filed by TiVo, Inc. (“TiVo”).² The TiVo Petition requests that the Commission commence a rulemaking to impose new rules on cable operators that are based on regulations adopted in the Commission’s *2003 Plug-and-Play Order*³ and vacated earlier this year by the U.S. Court of Appeals for the D.C. Circuit in *EchoStar Satellite L.L.C. v. FCC*.⁴ As discussed below, such regulations are outdated and unnecessary in

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$200 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² Petition for Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 16, 2013) (“TiVo Petition” or “Petition”); *Media Bureau Seeks Comment on TiVo Petition for Rulemaking To Reinstate the Commission’s Second Report and Order Implementing Section 629 of the Act and Associated Rules*, Public Notice, CS Docket No. 97-80, PP Docket No. 00-67, DA 13-1626 (rel. July 24, 2013).

³ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20885 (2003) (“*2003 Plug-and-Play Order*” or “*2003 Order*”).

⁴ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013) (“*EchoStar*”).

today's competitive marketplace and potentially harmful to the marketplace if applied only to one set of competitors. Therefore, the Commission should reject the Petition and decline to open a rulemaking proceeding to reinstate those regulations. If the Commission nonetheless elects to initiate a rulemaking in this area, any plug-and-play rules adopted should be subject to a sunset date.

INTRODUCTION AND SUMMARY

As the *EchoStar* court recognized, the video industry is one “marked by constant innovation and year-to-year change.”⁵ Today, consumers are able to access video content from a wide variety of service providers, such as traditional cable operators, direct broadcast satellite (“DBS”) providers, and newer multichannel video programming distributors (“MVPDs”), such as telephone MVPDs, as well as online video distributors (“OVDs”), using a myriad of retail devices and platforms. In such a dynamic and vibrant marketplace, there is no place for decade-old plug-and-play regulations premised on an entirely different competitive landscape.

The Petition asks that the Commission conduct a rulemaking to impose regulations on cable operators that are modeled on rules originally adopted in the Commission's *2003 Plug-and-Play Order* and recently vacated by the D.C. Circuit.⁶ The vacated rules included: (1) technical plug-and-play requirements imposed on manufacturers of unidirectional digital cable-ready products (“UDCPs”) and cable operators, and (2) encoding rules applicable to *all* MVPDs that set limits on the levels of copy protection for MVPD-distributed content and also restricted the use of certain device output controls.⁷ Although TiVo claims that it merely seeks

⁵ *Id.* at 994.

⁶ *See id.* at 1,000.

⁷ *See 2003 Plug-and-Play Order; see also* 47 C.F.R. § 15.123 (vacated rules for digital cable ready products); *id.* § 76.640 (vacated plug-and-play rules for digital cable systems); *id.* § 79.901 *et seq.* (vacated encoding rules).

to “reinstate” these vacated regulations, the Petition in fact requests something very different from the recently-vacated regulations: that the Commission impose the encoding rules *just on cable operators*, but not their MVPD competitors. In addition, TiVo asks the Commission to “clarify” that related CableCARD rules adopted in the Commission’s *2010 CableCARD Order* remain effective.⁸ The Petition does not request any Commission action on navigation device rules imposing the separate security requirement and the integration ban (and the exemption to the ban for unidirectional navigation devices),⁹ nor does it seek any Commission action on any issue or proposal outside the scope of the Commission’s previously approved rules.

TiVo’s proposed regulations are unnecessary in today’s marketplace and the Commission should deny the Petition. Consumers today have a wide and growing array of options for accessing video from MVPD and non-MVPD sources. These include retail CableCARD devices, as well as a host of innovative device options, including tablets, smartphones, smart TVs, game consoles, and other IP-enabled devices. Moreover, cable operators are continuing to support CableCARDs notwithstanding the *EchoStar* decision, which is unsurprising since operators have a strong incentive to ensure that their customers who use CableCARDs in retail

⁸ See TiVo Petition at 14. The *EchoStar* decision had the effect of vacating rules adopted in the *2003 Plug-and-Play Order* and, arguably, related rules adopted in the Commission’s *2010 CableCARD Order*. See *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd. 14657 (2010) (“*2010 CableCARD Order*”). The CableCARD rules adopted in the *2010 CableCARD Order* – including, among other things, rules relating to CableCARD self-installations, multi-stream CableCARDs, switched digital video solutions for UDCPs, CableCARD pricing, and bring-your-own box credits for UDCP customers – were predicated on the rules vacated by the D.C. Circuit. In particular, those 2010 rules were codified in Section 76.1205, see *2010 CableCARD Order*, App. B, and the Commission clarified in a 2011 reconsideration order that those rules apply only to MVPDs “subject to the requirements of Section 76.640,” see *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Order on Reconsideration, 26 FCC Rcd. 791 ¶ 3 & App. (2011). Consequently, when the D.C. Circuit vacated in their entirety the plug-and-play rules codified in Section 76.640, that arguably had the effect of also vacating the rules in Section 76.1205 even though the latter rules were not directly addressed by the court. For similar reasons, the *EchoStar* decision also arguably had the effect of vacating rules imposing certain interface requirements on cable operator-supplied, two-way HD set-top boxes. See 47 C.F.R. § 76.640(b)(4).

⁹ See 47 C.F.R. § 76.1200 *et seq.*

devices have a positive experience or risk losing them to competitors.¹⁰ In fact, TiVo can point to no evidence that these CableCARD customers are being harmed as a result of *EchoStar*. Furthermore, regulations that impose inflexible technical specifications like the plug-and-play rules cannot adjust promptly to changes in the market and technology and inherently lack the agility called for by innovative markets such as the video service and video device markets that exist today.

To the extent that TiVo is concerned about the need for enforceable rules in this area, a regulatory backstop already exists. Cable operators already have a duty under the navigation device rules to support separate security for retail devices.¹¹ Nothing about the *EchoStar* decision changes anything about the cable industry's obligations in this regard. If the Commission nonetheless decides to proceed with a rulemaking in the wake of the *EchoStar* decision, it should adopt a sunset of any rules it imposes.

The Commission should not adopt encoding rules that apply solely to cable operators. Contrary to TiVo's suggestion, adopting cable-only encoding rules would not be a reinstatement of the *status quo ante*, nor is there any evidence that programmers or cable operators are targeting CableCARD devices for adverse treatment post-*EchoStar*. The Commission can, of course, monitor the marketplace, and if concerns on these issues arise, it can consider at that time what actions, if any, it can take. Furthermore, imposing cable-only rules would – as the Commission recognized in its *2003 Plug-and-Play Order* – cause significant competitive harm to cable operators. These concerns are greatly magnified in today's video marketplace, where DBS

¹⁰ And, of course, operators have an equally strong incentive to support CableCARDs in the 42 million operator-supplied set-top boxes that include CableCARDs in them.

¹¹ See 47 C.F.R. § 76.1204(a)(1) (“A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices.”).

and telephone MVPDs are among the largest MVPDs and where consumers have innumerable choices for accessing video from online sources like Netflix and Amazon. Applying encoding rules to only cable operators would not protect consumers. Instead, the rules would steer protected programming (such as early-release theatrical content) to non-cable operators, and away from the very cable customers that TiVo seeks to serve. Competition, innovation, and investment throughout the MVPD marketplace would suffer, resulting in harms to all participants in the video ecosystem, including distributors, programmers, equipment manufacturers, and, most importantly, consumers. The Commission should not consider adopting encoding rules given current marketplace conditions, but if it decides to revisit the issue, it must do so on an MVPD-wide, not cable-only, basis.

I. IN LIGHT OF MARKETPLACE DEVELOPMENTS, THE COMMISSION SHOULD NOT REINSTATE THE VACATED PLUG-AND-PLAY RULES.

TiVo asserts that the Commission should reinstate the vacated rules to protect the marketplace for retail navigation devices. However, changes in the video distribution and device marketplaces and cable operators' continued support of CableCARD devices notwithstanding the *EchoStar* decision undermine this claim and demonstrate that reinstatement of the vacated rules is unnecessary and unwise.

A. The Vacated Rules Are Unwarranted in Today's Competitive Marketplace.

Marketplace developments in the last decade make reinstatement of cable-only rules anachronistic. At the time the original plug-and-play rules were adopted in 2003, cable was the dominant video provider and DBS served only 20% of the MVPD marketplace.¹² Telephone MVPDs did not exist and television-quality Internet video was virtually non-existent given the

¹² See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901 ¶¶ 4-7 (2002) ("*Ninth Video Competition Report*").

widespread reliance on dial-up Internet connections.¹³ The Commission’s rulemaking activities at the time reflected these marketplace conditions. Traditional cable operators were perceived as largely defining the marketplace for MVPD services and the Commission’s equipment-related proceedings focused on enabling retail device options for accessing those operators’ cable services.¹⁴ In contrast, the Commission generally gave DBS a pass on equipment issues given its still nascent role in the MVPD marketplace and its use of retail channels (rather than a lease model) for providing equipment to customers.¹⁵

The video and device marketplaces are fundamentally different today. Competition in these marketplaces is fierce and content is accessible across multiple platforms and devices. Traditional cable operators now have less than a 60% share of MVPD subscribers, with DBS and telephone MVPDs having established themselves as key competitors.¹⁶ While traditional cable operators’ overall market share has declined since 2003,¹⁷ DIRECTV and DISH are now the second and third largest MVPDs in the country, with over 34 million subscribers combined at the

¹³ See *id.* ¶ 44.

¹⁴ See *id.* ¶ 4 (“[C]able television is still the dominant technology for delivery of video programming to consumers in the MVPD marketplace.”). The Commission’s navigation device rulemakings in the late 1990s were aimed at facilitating a retail marketplace for cable equipment even though the navigation device statute, Section 629, applied to all MVPDs. See, e.g., *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd. 14775 (1998) (“*Navigation Device Order*”). Likewise, the plug-and-play proceeding focused on ensuring the interoperability of retail CableCARD devices on digital cable systems. See *2003 Plug-and-Play Order*; see also *2010 CableCARD Order*.

¹⁵ See *Navigation Device Order* ¶¶ 63-66 (declining to extend the separate security requirement to DBS providers in 1998 because, at that time, DBS equipment was available at retail and portable nationwide).

¹⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd. 10,496 ¶ 3 (2013) (“*Fifteenth Video Competition Report*”).

¹⁷ Traditional cable operators’ market share of subscribers has fallen from 59.3% at the end of 2010 to 55.3% at the end of June 2013. *Id.*; see also Ian Olgeirson, *Service Providers Struggle to Escape Subscriber Doldrums*, SNL Kagan (Aug. 16, 2013). In contrast, at the time the *2003 Plug-and-Play Order* was adopted, 76.5% of MVPD subscribers received their programming from a traditional cable operator (and telcos generally were not offering cable services at that time). *Ninth Video Competition Report* ¶ 4.

end of June 2013.¹⁸ Likewise, Verizon and AT&T – companies that were not even providing MVPD services in 2003 – are the fifth and seventh largest MVPDs,¹⁹ serving over 10 million subscribers combined at the end of the second quarter of 2013.²⁰ Over 98% of consumers can choose from three or more MVPDs and many have access to four or more.²¹ Moreover, consumers no longer rely exclusively on MVPD service to access video content as evidenced by the growing popularity and number of OVDs.²² In June 2013 alone, over 183 million consumers watched online video content for an average of over 21 hours per viewer.²³

With respect to devices, competition and innovation have produced a dramatic transformation over the last decade. In 2003, cable operators delivered most of their channel lineup in analog and cable customers generally relied on operator-supplied set-top boxes and/or their analog televisions to access their cable services. In the following year, 2004, cable operators began delivering linear channels to retail CableCARD devices. Today, cable operators deliver most or all of their services in digital, including dozens of HD channels, hundreds of

¹⁸ *Fifteenth Video Competition Report* ¶ 27; see also NCTA, *Top 25 Multichannel Video Service Customers (2012)*, <http://www.ncta.com/industry-data/item/217> (last visited Sept. 11, 2013) (“*NCTA Top 25 MVPDs*”); Olgeirson, *supra* note 17.

¹⁹ See *NCTA Top 25 MVPDs*, *supra* note 18.

²⁰ Robin Flynn, *Telco TV Video Subs Breach the 10 Million Mark*, SNL Kagan (July 26, 2013).

²¹ *Fifteenth Video Competition Report* ¶ 36, Tbl. 2 (finding that almost 47 million U.S. homes (over 35%) have access to at least four MVPDs).

²² For example, Netflix, the largest OVD, has 29.81 million U.S. subscribers – more than any cable operator – gaining over 6 million subscribers in the last year alone. George Winslow, *Netflix Hits 29.8 Million U.S. Subs, Beats Earnings Estimate*, *Broadcasting & Cable* (July 22, 2013), http://www.broadcastingcable.com/article/494615-Netflix_Hits_29_8_Million_U_S_Subs_Beats_Earnings_Estimates.php. Other OVDs are also experiencing strong growth. Hulu Plus subscribers doubled from 2 million to 4 million in the last year. Brian Stelter, *Hulu Says Number of Paid Subscribers Has Doubled*, *N.Y. Times*, Apr. 30, 2013, available at http://www.nytimes.com/2013/05/01/business/media/hulu-says-it-has-4-million-paid-subscribers-double-last-years-total.html?_r=0.

²³ Press Release, comScore, Inc., *comScore Releases June 2013 U.S. Online Video Rankings* (July 17, 2013), available at http://www.comscore.com/Insights/Press_Releases/2013/7/comScore_Releases_June_2013_U.S._Online_Video_Rankings.

other digital channels, and thousands of video-on-demand programs, and have started the next stage of their evolution to IP-based platforms.

These changes continue to greatly expand retail device options for cable customers. Customers can still opt for a leased set-top box or a retail CableCARD device, but the marketplace is migrating rapidly toward a model where cable services are delivered as an application on a wide and growing array of third-party, IP-enabled devices, including tablets, smartphones, game consoles, smart TVs, and PCs.²⁴ And, of course, these very same IP-enabled devices can be used to access content from all manner of MVPDs as well as OVDs and other online sources.²⁵

Marketplace studies demonstrate that these trends are likely to accelerate. For example, a 2012 Viacom study highlighted that, out of the total time spent watching full TV episodes, 15% of all viewing occurs on tablets²⁶ and industry forecasts predict that by 2017, 65% of households

²⁴ See, e.g., Jeff Baumgartner, *Arris Braces for Cable's Set-Top Transition*, Multichannel News (Aug. 8, 2013), <http://www.multichannel.com/distribution/arris-braces-cable%E2%80%99s-set-top-transition/144865> (noting decline in shipments of legacy set-top boxes, and quoting Arris executive Larry Robinson as saying: "With MSOs moving to IP to support second screen experiences, the industry is undergoing a significant inflection point"); Michael Wolf, *Here's Why the TV Apps Economy Will Be a \$14 Billion Business*, Forbes (June 20, 2013), available at <http://www.forbes.com/sites/michaelwolf/2013/06/20/heres-why-the-tv-apps-economy-will-be-a-14-billion-business/> (reporting that the latest research forecasts that the TV apps economy will reach \$14 billion by 2017 as cable companies begin to offer their services to smart TVs, Internet set-top boxes, and game consoles); SNL Kagan, U.S. Multichannel Service Provider Video App Highlights (May 2013) (detailing the various apps provided by several cable operators, as well as other MVPDs, that allow subscribers to access live linear channels and on-demand video content on a variety of retail devices); *Fifteenth Video Competition Report* ¶ 368 (noting that the proliferation of portable IP devices has opened up new distribution opportunities for MVPDs and that MVPDs have begun making their video content accessible over a variety of portable devices). Even TiVo recognizes this shift in the marketplace and has added new features to its latest DVR that allow users to stream live TV and recordings to mobile devices, such as iPhones and iPads, in order to meet consumer demand for second screens. See Todd Spangler, *TiVo Punches Live Cable TV, DVR Content Outside the Home With "Roamio"*, Variety, Aug. 20, 2013, available at <http://variety.com/2013/digital/news/tivo-punches-live-cable-tv-dvr-content-outside-the-home-with-roamio-1200582143/>.

²⁵ See *Fifteenth Video Competition Report* ¶¶ 4, 102, 366-367. Consumer use of TV Everywhere services continues to increase at a fast pace. *Id.* ¶ 4; Tony Lenoir, *TV Everywhere Viewership Jumps 24% Since January*, SNL Kagan (June 26, 2013) (reporting that the unique viewers for seven MVPDs increased 24% between January and May 2013).

²⁶ Anser Haider, *M&C Edition, Meteoric Rise Forecast for Mobile Media Revenues*, SNL Kagan (Apr. 23, 2012). Tablet and mobile video views increased 19% in the first quarter of 2013, with these devices accounting for more (footnote continued...)

will own tablets and 58 billion hours of TV and video will be watched on tablets.²⁷ These projections also underscore that the device marketplace is operating most creatively and effectively in the areas where it is *not* constrained by CableCARD rules.²⁸ Consumers want the ability to access MVPD and other video on their tablets and other IP devices and MVPDs and other video providers are responding to that demand. TiVo itself has directed its innovation towards streaming, networking, and cloud-based approaches.²⁹

In describing these dramatic changes, the Commission recently observed that “[the device] marketplace is more dynamic than it has ever been, offering consumers an unprecedented and growing list of choices to access video content.”³⁰ These developments in the video distribution and device marketplaces also confirm the *EchoStar* court’s statement that the video industry is “marked by constant innovation and year-to-year change,”³¹ and underscore the D.C.

(...footnote continued

than 10% of all online viewing. Seth Shafer, *Broadcast Online Video Views Impacted by Mobile in Q2*, SNL Kagan (July 24, 2013).

²⁷ Jim Barthold, *NPD and TDG Reports Look at Now and Future of Video Consumption*, FierceOnlineVideo (Feb. 1, 2013), <http://www.fierceonlinevideo.com/story/reports-look-now-and-future-video-consumption/2013-02-01>.

²⁸ For example, Apple TV is the best selling set-top connected device in the U.S. market, see *Fifteenth Video Competition Report* ¶ 234, and accounts for 56% of all streaming devices worldwide, with a total of 13 million Apple TVs sold (half of which sold in 2012 alone), Janko Roettgers, *More Than Half of All Streaming Boxes Sold Are Apple TVs*, GigaOM (July 16, 2013), <http://gigaom.com/2013/07/16/apple-tv-roku-sales-stats/>; Richard Lawler, *Tim Cook: 13 Million Apple TVs Sold, Half in the Last Year; ‘Grand Vision’ for TV*, engadget (May 28, 2013), <http://www.engadget.com/2013/05/28/13-million-apple-tv-d11/>. Similarly, Roku recently announced that it had sold 5 million Roku players in the U.S. since launching in May 2008. Anthony Wood, *Celebrating 5 Million Roku Players*, Roku Blog (Apr. 10, 2013), <http://blog.roku.com/blog/2013/04/10/celebrating-5-million-roku-players/>.

²⁹ See Spangler, *supra* note 24.

³⁰ *Fifteenth Video Competition Report* ¶ 354. According to SNL Kagan estimates, the number of connected devices in the marketplace capable of accessing video content, including game consoles, OTT set-top boxes like Roku or Apple TV, tablets, desktops and laptops, will be 384 million by the end of 2013 and 538 million by the end of 2016. Deana Myers & Ian Olgeirson, *Service Providers Lessen OTT Substitution, But Challenges Persist*, SNL Kagan (Sept. 11, 2012).

³¹ *EchoStar*, 704 F.3d at 994.

Circuit’s repeated statements in recent years about the dynamic nature of the video marketplace.³²

In such a dynamic marketplace, FCC technical rules, no matter how well-intentioned, end up serving as a barrier to innovation. TiVo itself has had to seek repeated waivers of the plug-and-play rules to move from the hybrid analog-digital world encapsulated in those rules to an all-digital world with new interface technologies.³³ The Commission has had to struggle to adapt the rules to a changing market and changing technology. It took two years to grant a waiver for early-release theatrical content;³⁴ four years to change the rules to reflect the introduction of M-Cards;³⁵ almost seven years to reflect that broadcast content had become available on cable on-demand menus;³⁶ and nearly a decade to close out all the reconsideration petitions and move the rules to judicial review – where they failed.³⁷ Regulations that impose inflexible technical

³² See *Comcast Cable Commc’ns, Inc. v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“[T]he video programming distribution market has changed dramatically, especially with the rapid growth of satellite and Internet providers.”); see also *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 711 (D.C. Cir. 2011) (stating that “[t]he video programming industry does indeed look very different today than it did when Congress passed the Cable Act in 1992” and noting the decreased national market share of cable operators in light of increased competition from DBS and telephone MVPD providers); *Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (noting “the overwhelming evidence concerning the dynamic nature of the communications marketplace,” particularly increased competition from DBS providers).

³³ *TiVo, Inc.; Petition for Waiver of Sections 15.117(b), 15.118(b), 15.123(c), and 15.123(d) of the Commission’s Rules*, Memorandum Opinion and Order, DA 13-1740 (rel. Aug. 9, 2013) (waiving plug-and-play analog tuner requirement); *TiVo, Inc.; Request for Waiver of Section 15.118(b), 15.123(b)(1), and 15.123(c) of the Commission’s Rules*, Memorandum Opinion and Order, 26 FCC Rcd. 12743 (2011) (same); *Intel Corporation, Motorola, Inc, TiVo, Inc.; Requests for Waiver of Section 76.640(b)(4)(ii) of the Commission’s Rules*, Memorandum Opinion and Order, 25 FCC Rcd. 7539 (2010) (waiving plug-and-play 1394 output requirement).

³⁴ *Motion Picture Association of America; Petition for Expedited Special Relief; Petition for Waiver of the Commission’s Prohibition on the Use of Selectable Output Control (47 C.F.R. § 76.1903)*, Memorandum Opinion and Order, 25 FCC Rcd. 4799 (2010) (“MPAA Waiver Order”) (granting the waiver for selectable output control requested May 9, 2008).

³⁵ *2010 CableCARD Order* ¶¶ 32-33 (incorporating M-Cards into the rules after Nov. 13, 2006 Letter from CableLabs, TiVo, Motorola, Solekai, Digeo, Digital Keystone, ViXs including suggested rule updates).

³⁶ *Id.* ¶ 57 (amending definition of “Unencrypted Broadcast Television” in 2010 in response to 2004 NCTA reconsideration petition).

³⁷ *Id.* ¶¶ 53-69.

specifications like the plug-and-play rules cannot adjust promptly to changes in the market and technology, and inherently lack the agility called for by innovative markets.

In light of these marketplace facts, the *EchoStar* decision should be viewed as a useful corrective in an area that is still encumbered by outdated regulations – not as an invitation to regulate one sector of a competitive marketplace.

B. Cable Operators Continue To Support CableCARDs Notwithstanding the *EchoStar* Decision.

TiVo asserts that *EchoStar* has created uncertainty about continued cable industry support for retail CableCARD devices and that rules are needed to re-establish stability in this area and to avoid the risk of future harm to CableCARD customers.³⁸ These claims are unfounded. There is no evidence that operators are pulling back on their support for CableCARD. Quite the opposite – even in the absence of the plug-and-play rules, cable operators’ support for CableCARD has continued since the *EchoStar* decision was issued in January. As of NCTA’s most recent quarterly CableCARD report, the nine largest incumbent cable operators have deployed over 603,000 CableCARDs for use in retail devices, as well as over 42 million operator-supplied CableCARD-reliant set-top boxes.³⁹ Cable industry support for CableCARDs is unsurprising given the substantial investment that operators have made in CableCARDs over the last decade⁴⁰ and given operators’ incentives to ensure that customers with retail CableCARD devices have a positive experience or risk losing them to competitors.⁴¹

³⁸ TiVo Petition at 2-3, 21-23.

³⁹ Letter from Neal M. Goldberg, NCTA, to Marlene Dortch, FCC, CS Docket No. 97-80, at 1 (July 31, 2013).

⁴⁰ Among other things, cable operators have had to incur costs to supply CableCARDs to UDCP customers, to design and deploy CableCARD-equipped set-top boxes, to provide bring-your-own-box credits to customers who use a UDCP in lieu of equipment included in cable packages, and to provide customer care and technical support for UDCP customers. These are costs that no other MVPD or non-MVPD video provider has had to bear.

⁴¹ As noted above, *see* discussion *supra* at 7, over 98% of consumers can choose from over three MVPDs.

TiVo's claim that *EchoStar* has created "uncertainty" around CableCARD is further undercut by TiVo's own statements in the Petition and by other marketplace developments both pre-*EchoStar* and post-*EchoStar*. According to TiVo, "retail CableCARD devices grew by 8 percent in 2012, and CableCARD-equipped set-top boxes grew by 22 percent."⁴² TiVo goes on to note that "consumers are seeing greater choice from new CableCARD devices from Samsung and Ceton Corp"⁴³ – even after *EchoStar*. In addition, the fact that some cable operators are deploying TiVos as their leased DVRs further validates these marketplace trends.⁴⁴ TiVo provides no evidence that the *EchoStar* decision will reverse these developments.

To the extent TiVo is concerned about the need for enforceable rules in this area,⁴⁵ a regulatory backstop already exists. As TiVo has previously noted,⁴⁶ irrespective of the vacated rules, cable operators have an independent duty under the Commission's navigation device rules

⁴² TiVo Petition at 22 & n.52.

⁴³ *Id.* at 22 & n.53.

⁴⁴ TiVo's claim regarding the availability of navigation devices for small and mid-size cable operators makes no sense. *See id.* at 22-23 (alleging that CableCARD rules are necessary to ensure that small and mid-size cable operators have access to low-cost set-top boxes from a variety of manufacturers). Since *EchoStar*, TiVo has reported a surge in business as a wholesale OEM provider, which its CEO expects to continue. TiVo Reports Results for the Second Quarter Ended July 31, 2013, <http://investor.tivo.com/phoenix.zhtml?c=106292&p=irol-newsArticle&ID=1850119&highlight=> (noting that TiVo subscriptions have increased 33% in the past year as cable operator deployments continue to drive growth, with TiVo CEO Tom Rogers stating that "We've added almost one million new TiVo subscriptions from our operators relationships during the last year, and we expect to continue our strong subscription growth as Atlantic Broadband, Cable One, Com Hem, GCI, Midcontinent, and Mediacom have all recently gone live or are close to launching a TiVo solution. . . . [W]e are finding that the more embedded we are with operators, the more products and functionality they want from TiVo."); *see also* TiVo Reports Results for the First Quarter Ended April 30, 2013, <http://investor.tivo.com/phoenix.zhtml?c=106292&p=irol-newsArticle&id=1822298> (reporting largest quarterly cable operator subscription increase in over seven years, and quoting TiVo CEO Tom Rogers as saying that "We saw one of the best quarters ever in terms of subscription growth, driven by a number of our existing operator deals in the U.S. and abroad that are fully up and running. As a result, we delivered solid MSO revenue growth, which we expect will only continue as we roll out additional deployments."). TiVo points to no evidence to suggest that device manufacturers will stop deploying CableCARD devices to the small and mid-size cable operators it is serving as an OEM supplier. Furthermore, these operators will continue to provide CableCARDS for TiVo, just as other operators provide CableCARDS for other suppliers.

⁴⁵ *See* TiVo Petition at 21-22.

⁴⁶ *See* TiVo Reply to Opposition, MB Docket No. 12-328, CS Docket No. 97-80, CSR-8740-Z, at 3 (June 10, 2013).

to make “separate security” available to customers with retail equipment.⁴⁷ The separate security requirement was unaffected by the *EchoStar* decision. In fact, the Commission has recognized that “CableCARD is the *de facto* standard that cable operators use” to comply with that requirement and expects “that most will continue to rely on CableCARDS despite the D.C. Circuit’s ruling” in *EchoStar*.⁴⁸ Thus, while NCTA continues to question the need for any rules in this area given current marketplace conditions,⁴⁹ the separate security requirement remains in force today and provides the Commission with a regulatory basis for overseeing CableCARD support in the industry.⁵⁰

In the event the Commission nonetheless decides to proceed with a rulemaking, the Commission should consider sunseting any rules it imposes after a limited period of time, e.g., three to five years, unless it affirmatively acts to extend them beyond that time period. Sunseting the rules after a limited period of time would accommodate clear marketplace trends towards IP-based solutions and avoid a situation where cable operators are locked into supporting CableCARD technology indefinitely.⁵¹

⁴⁷ See 47 C.F.R. § 76.1204(a)(1).

⁴⁸ See *Fifteenth Video Competition Report* ¶ 361.

⁴⁹ See discussion *supra* Section I.A.

⁵⁰ The Commission has information to perform such a monitoring function. In its *Second Report and Order* in CS Docket No. 97-80, the Commission directed certain cable operators to file periodically with the Commission “reports detailing CableCARD deployment and support.” *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 ¶ 41 (2005). NCTA compiles these reports from the five largest incumbent cable operators and submits them to the Commission every 90 days.

⁵¹ Such a sunset is not unprecedented. In the *Basic Tier Encryption Order*, for example, the Commission found it appropriate to automatically sunset after three years the requirement that the six largest incumbent cable operators provide basic service tier access to third-party-provided IP-enabled clear QAM devices before permitting encryption of the basic service tier, absent action from the Media Bureau extending the requirement. See *Basic Tier Encryption*, Report and Order, 27 FCC Rcd. 12786 ¶¶ 21-23 (2012) (“*Basic Tier Encryption Order*”).

II. THE COMMISSION SHOULD REFRAIN FROM ADOPTING CABLE-ONLY ENCODING RULES.

TiVo urges the Commission to impose new encoding rules on cable operators, but not their MVPD competitors. TiVo claims that the absence of rules now creates a risk that programmers and distributors may adopt copy and output controls that harm CableCARD customers and further asserts that cable-only rules would have no adverse impacts on cable operators or their customers. Those claims are without merit.

TiVo points to no marketplace evidence that programmers or distributors are imposing stricter copy or output controls on UDCPs or other devices since the *EchoStar* decision was issued, so there is no basis for its assertion that current marketplace conditions warrant new rules. Furthermore, adopting cable-only rules as TiVo proposes would create further disparities in the marketplace that leave cable operators at a competitive disadvantage compared to their MVPD counterparts. If the Commission nonetheless decides to consider new encoding rules, it should only proceed if it believes the rules can be imposed on *all* MVPDs.⁵²

⁵² TiVo is correct in noting that the D.C. Circuit did not address whether the Commission had the authority to adopt cable-only encoding rules. *See* TiVo Petition at 15. However, that does not mean that the Commission now has carte blanche to impose such rules. Neither Section 629 nor Section 624A requires the Commission to reinstate cable-only encoding rules. Moreover, the D.C. Circuit has placed clear constraints on the exercise of the Commission's Section 629 authority. The *EchoStar* decision rejected the Commission's request for wide-ranging direct and ancillary authority under Section 629, a request it characterized throughout the majority opinion as "capacious," "unbridled," "omnibus," and "effectively plenary." It specifically noted the limiting language in Section 629(f) that "Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996." The court wrote: "*we refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices.*" *See EchoStar*, 704 F.3d at 999 (emphasis added). It also raised questions about the Commission's reliance on an analog-era statute, Section 624A, as a jurisdictional basis for rulemaking in this area. *See id.* at 999 n.4 ("We set aside for now whether § 624A's reference to 'video cassette recorders,' now a largely antiquated technology, is adequate to sustain the FCC's purported interest in the ability of consumers to retain 'the full benefits of . . . the functionality' of their recording devices.") (citations omitted). In a key decision adopted after the 2003 plug-and-play rules, the D.C. Circuit had likewise rejected the Commission's claim of authority to adopt broadcast flag rules. The court chided the Commission for an overbroad claim of ancillary authority, finding no specific statutory provision giving the Commission authority to regulate consumers' use of television receiver apparatus after the completion of a broadcast transmission. *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). In any event, even putting these jurisdictional questions aside, the Commission would still have to justify any new rules in a

(footnote continued...)

A. Even in the Absence of the Encoding Rules, Consumers Continue To Access and Record Video Programming on Their Retail CableCARD Devices.

TiVo's claim that CableCARD customers will be harmed absent the encoding rules is purely speculative. TiVo points to no evidence that programmers or distributors have acted post-*EchoStar* in ways that disadvantage CableCARD devices. Rather, consumers continue to enjoy the ability to access and record video programming on their CableCARD devices. This suggests that current marketplace dynamics make adoption of encoding rules unnecessary.

As TiVo acknowledges, encoding limits have become "customary practice" in the marketplace over the last decade.⁵³ There are now well-defined expectations among programmers, distributors, and consumers regarding copy and output controls for existing business models. For example, VOD programming is generally subject to more restrictive copy controls than linear channels, and broadcast channels are provided on a "copy freely" basis. Moreover, at the time when the restrictions on output controls were adopted in the *2003 Plug-and-Play Order*, the Commission was concerned about the impact of selectable output controls and down-resolutions on legacy devices with unprotected component analog outputs.⁵⁴ These concerns have since abated with the widespread adoption of copy-protected digital outputs, such as HDMI, on set-top boxes and other TV-connected devices. There are far fewer devices in the marketplace that rely on unprotected analog outputs than was the case a decade ago.

TiVo implies that programmers might take a more aggressive posture on copy and output controls going-forward. Notwithstanding these purely speculative claims, programmers, cable

(...footnote continued

marketplace that is fundamentally different than the marketplace the Commission confronted over a decade ago. See discussion *infra* Section II.C.

⁵³ See TiVo Petition at 18.

⁵⁴ See *2003 Plug-and-Play Order* ¶¶ 58-64.

operators, and other MVPDs are focused on delivering their services to a broad and growing range of devices and on giving customers the flexibility to view programming at their convenience, whether on a live, on-demand, or recorded basis. As such, it is in the collective interests of programmers, cable operators, and other MVPDs to both meet consumer expectations and promote innovative services that are enabled by new technologies. Thus, these marketplace forces and consumer demand will inform and balance any encoding decisions going forward.⁵⁵ The Commission can, of course, monitor the marketplace, and if concerns on these issues arise, it can consider at that time what actions, if any, it can take.

TiVo's further concerns that retail CableCARD devices would be uniquely targeted for more restrictive controls are baseless.⁵⁶ TiVo presents no evidence that any cable operator or programmer has singled out TiVo devices or other UDCPs for new output or copy controls, nor does it provide any reasonable explanation as to why any cable operator or programmer would act in such a manner. As noted, cable operators have strong incentives to ensure that their UDCP customers have a positive experience or risk losing them to competitors. And, with respect to programmers, it seems highly doubtful that they would target UDCPs for discriminatory treatment given that retail CableCARD devices are a small fraction of the device marketplace.⁵⁷

⁵⁵ The Commission noted when initially enacting the encoding rules that it sought to “strike[] a measured balance between the desire of content providers and MVPDs . . . and the preservation of consumer expectations regarding the time shifting of programming for home viewing and other permitted uses of such material.” *2003 Plug-and-Play Order* ¶ 11. The marketplace, however, has struck and maintained that balance, obviating any continued need for the rules.

⁵⁶ See TiVo Petition at 10-11, 13.

⁵⁷ Only about 1% of cable customers use retail CableCARD devices. See *2010 CableCARD Order* ¶ 4; see also *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, 25 FCC Rcd. 4275 ¶ 10 (2010) (noting the small number of retail CableCARD devices compared to the number of operator-supplied CableCARD-reliant set-top boxes deployed).

Thus, there is no real UDCP-specific “harm” that would justify adoption of any cable-only encoding rules.

B. Cable-Only Encoding Rules Would Harm Competition and Innovation.

TiVo misleadingly states that cable-only encoding rules would “simply reinstate rules that have been in place for a decade”⁵⁸ and goes on to suggest that such rules would result in no marketplace or consumer harms.⁵⁹ However, imposing encoding rules on cable operators, but on no other MVPDs, would *not* restore the rules to the *status quo ante*. Rather, such cable-only rules would result in the very marketplace-distorting harms that the cable and consumer electronics industries and the Commission all sought to avoid in adopting MVPD-wide encoding rules in the *2003 Order*. TiVo utterly fails to address this fundamental parity concern.

The Commission explained in the *2003 Order* that cable-only encoding rules would leave cable operators at a “significant competitive disadvantage in obtaining access to content” and that such rules would lead to a “regulatory and marketplace imbalance between cable and DBS.”⁶⁰ Those concerns have only intensified in the intervening decade. Cable operators today face stiff competition from other MVPDs. OVDs and other online sources for video have become a significant part of today’s competitive landscape. Furthermore, the rapid pace of technological change in this dynamic marketplace makes it exceedingly difficult to predict how business models will evolve in the next few years, let alone the next decade.⁶¹

Cable-only encoding rules would hamstring cable operators as they try to adapt and compete in this environment. For example, if the vacated encoding rules were now imposed

⁵⁸ TiVo Petition at i.

⁵⁹ *Id.* at 17-19.

⁶⁰ *2003 Plug-and-Play Order* ¶ 57.

⁶¹ See discussion *supra* Section I.A.

only on cable operators, the rules would require operators to seek a waiver or other Commission approval for any new business models that conflicted with or were not expressly authorized by the rules.⁶² Conditioning a cable operator's ability to innovate on first obtaining Commission approval, when competitors face no similar obligation, is untenable. As noted above, it took the Commission two years to process the MPAA petition seeking a waiver of the selectable output control rules for early-release movies.⁶³ If a cable operator were forced to go through a similar approval process for each and every future business model, while its MVPD competitors did not, it would risk losing any first-mover advantage and perhaps even the entire business opportunity. Competitors would face no similar obstacles to the deployment of innovative services. Applying such rules to only cable operators would not protect consumers. Instead, the rules would steer protected programming (such as early-release theatrical content) to non-cable MVPDs and away from the very cable customers that TiVo seeks to serve. Competition, innovation, and investment throughout the MVPD marketplace would suffer, resulting in harms to all participants in the video ecosystem, including distributors, programmers, equipment manufacturers, and, most importantly, consumers.⁶⁴

The cable industry already faces significant regulatory disparities relative to its MVPD competitors, such as the requirement to comply with the integration ban and other navigation device-related rules that, while written to apply broadly to all MVPDs, have largely been enforced only against cable operators. The Commission should view the *EchoStar* decision as a

⁶² The operator would have to seek a waiver of the reinstated rules or petition for Commission approval of new business models. See 47 C.F.R. § 76.1906.

⁶³ See *MPAA Waiver Order*.

⁶⁴ TiVo appears to argue that inclusion of DBS in the encoding rules was essential to adoption of the overall plug-and-play package and to manufacturers' decisions to sign the DFAST license, but those considerations "are now so attenuated that they should not bar the Encoding Rules from reinstatement." TiVo Petition at 16. In fact, as noted, the encoding rules were imposed on all MVPDs to avoid regulatory and marketplace imbalances. *2003 Plug-and-Play Order* ¶ 57.

helpful step forward in removing some regulatory imbalances, rather than as an invitation to step backwards and reimpose disparate legacy rules. Such a forward-looking approach would be consistent with the Obama Administration's directive to eliminate outdated regulations⁶⁵ and consistent with the Commission's frequent statements about the importance of regulatory parity and competitive neutrality.⁶⁶

C. The Commission Should Only Consider Adopting Encoding Rules if They Can Be Imposed on All MVPDs.

As discussed above, encoding rules are neither necessary nor justified in light of current marketplace conditions. If, however, the Commission decides to adopt new encoding rules, it should only consider doing so if it believes that the rules can be applied broadly to all MVPDs. Otherwise, the Commission should refrain from imposing the rules on any MVPD.

⁶⁵ President Obama has encouraged the Commission to eliminate unnecessary regulations, *see* Exec. Order No. 13,579, 76 Fed. Reg. 41,585, 41,587 (July 14, 2011), and has issued other Executive Orders that likewise seek to eliminate outmoded and excessively burdensome regulation, *see* Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); *see also* Exec. Order No. 13,610, 77 Fed. Reg. 28,467, 28,469 (May 14, 2012). The Commission has since adopted a Final Plan for Retrospective of Existing Rules in compliance with Executive Order 13,579. FCC, Final Plan for Retrospective Analysis of Existing Rules (May 18, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf. In addition, the Commission took an initial step to remove burdensome regulations for cable operators consistent with the President's directive. *See Basic Tier Encryption Order* ¶¶ 8, 15 (permitting cable operators to encrypt the basic service tier in all-digital systems in order to, among other things, reduce the regulatory disparity between cable operators and DBS providers who were never prohibited from encrypting their services).

⁶⁶ *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 ¶¶ 4, 45 (2005) (stating that “we should regulate like services in a similar manner” in order to encourage market-based investment decisions, rather than ones driven by regulatory disparities and emphasizing the importance of creating a “regulatory regime that is technology and competitively neutral”); *see also Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees*, Report and Order, FCC 13-110 ¶ 32 (rel. Aug. 12, 2013) (extending regulatory fee obligations to so-called “IPTV providers” such as AT&T because “assessing regulatory fees on cable television systems, but not on IPTV . . . may place cable providers at a competitive disadvantage”); *Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, Report, 26 FCC Rcd. 2909 ¶ 87 (2011) (stating that regulating cable operators and telecommunications carriers in a similar manner with respect to exclusive contracts established regulatory parity among competitors and ensured that the Commission's policies regarding competitors were competitively neutral); *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd. 5385 ¶ 5 (2008) (“In an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition.”).

TiVo does not address the possibility of reinstatement of encoding rules for all MVPDs, presumably based on the court’s clear and unequivocal rejection of the rules as adopted in the *2003 Order*. However, the court’s decision in that regard was based on a Commission record largely developed in the late 1990s. The D.C. Circuit found that the Commission could not rely on the navigation device statute, Section 629, as a basis for imposing encoding rules on DBS because the Commission had determined (in 1998) that DBS customers purchased their set-top equipment at retail, rather than leasing equipment from their providers.⁶⁷ Consequently, in the court’s view, DBS was already achieving the retail availability goals of Section 629, so further Commission action to stimulate a retail marketplace for DBS equipment was unnecessary.

If the Commission decides to wade back into this issue, it must take into account the current state of the marketplace and tailor its encoding rules accordingly.⁶⁸ As Judge Edwards recognized in his concurrence in *EchoStar*, Section 629 “does not by its terms prohibit the requirement of encoding rules [on DBS providers]. Rather, any challenge to the agency’s exercise of discretion under Section 629 must take into account the circumstances presented and the Commission’s explanation for the action in question.”⁶⁹ The “circumstances presented” today with respect to DBS equipment practices differ fundamentally from those described in the Commission’s prior record on the issue and relied upon by the *EchoStar* court. DBS providers – like their cable and telephone competitors – generally lease set-top equipment to their customers;

⁶⁷ *EchoStar*, 704 F.3d at 997. The court concluded that, because the Commission had previously acknowledged that satellite equipment was available at retail and portable nationwide, the encoding rules were not necessary to sustain a commercial market for satellite devices. *Id.*

⁶⁸ See discussion *supra* Section I.A; see also *Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (overturning the FCC’s 30% cable subscriber limit as arbitrary and capricious “[i]n view of the overwhelming evidence concerning the ‘dynamic nature of the communications marketplace,’” particularly increased competition from DBS providers) (citation omitted); *Sierra Club v. U.S. EPA*, 671 F.3d 955, 957, 968 (9th Cir. 2012) (holding that the EPA’s reliance on outdated data and failure to even consider new data when approving an implementation plan was arbitrary and capricious).

⁶⁹ *EchoStar*, 704 F.3d at 1001.

such equipment is no longer sold at retail.⁷⁰ These marketplace developments eliminate the distinction between cable operators and DBS providers in the record that was before the *EchoStar* court.

⁷⁰ DIRECTV moved to a leasing model in 2006. *DIRECTV Opts for a Leasing Model*, Multichannel News, Jan. 23, 2006; *see also* BendBroadband Request for Waiver, CS Docket No. 97-80, at 13-18 (Oct. 4, 2006) (presenting evidence that DIRECTV moved to proprietary, leased boxes beginning March 1, 2006); BendBroadband Reply Comments, CS Docket No. 97-80, at 5-7 (Dec. 15, 2006) (same). Similarly, DISH devices generally are no longer available at retail and are typically included in the base price of DISH programming packages. *See* Comments of NCTA on Fourth Further Notice of Proposed Rulemaking, CS Docket No. 97-80, at 51-52 (June 14, 2010) (explaining that DISH's retail partners like Radio Shack have generally stopped selling DISH receivers). Telephone MPVDs similarly lease equipment to their customers. *See* AT&T U-Verse Terms of Service, § 6, <http://www.att.com/u-verse/att-terms-of-service.jsp> (last visited Sept. 11, 2013) (“If you do not purchase the Equipment from AT&T, you agree to rent the Equipment as part of your purchase of the Services for the duration of your receipt of the Services.”); FiOS TV, Additional Information Regarding FiOS TV equipment, <http://www.verizon.com/support/residential/tv/fiostv/general+support/new+to+fios+tv/questionsone/84837.htm> (last visited Sept. 11, 2013) (noting that customers only have the option to rent FiOS TV set-top boxes).

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission deny TiVo's Petition and refrain from initiating a rulemaking proceeding that would impose outdated regulations and that could stifle competition and innovation. TiVo has not identified a problem that needs fixing and the fixes it proposes are a poor fit for today's dynamic marketplace. A rulemaking in this area does not serve consumers, innovation, or the Commission – which has far more pressing priorities. The Petition should be denied. If the Commission nonetheless elects to initiate a rulemaking in this area, any plug-and-play rules adopted should be subject to a sunset date.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Neal M. Goldberg
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, DC 20001-1431
(202) 222-2445

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