

September 16, 2013

VIA ELECTRONIC FILING

The Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*; Petition for Rulemaking; CS Docket No. 97-80 and PP Docket 00-67

Dear Madam Secretary:

The undersigned program network interests (collectively, the "Program Network Interests") hereby jointly respond to the petition for rulemaking filed by TiVo Inc. ("TiVo") in the above-referenced proceedings. The Program Network Interests largely did not participate in the original rulemaking proceeding which established the Commission's unidirectional cable plug-and-play ("UDCP") rules,<sup>1</sup> including accompanying encoding rules.<sup>2</sup> In light of the rapidly evolving video distribution marketplace, and the decision earlier this year by the D.C. Circuit Court of Appeals vacating the UDCP and encoding rules,<sup>3</sup> we feel it is important to articulate our specific interests as program networks in response to TiVo's petition for rulemaking to reinstate the UDCP and encoding rules with respect to the cable industry.<sup>4</sup>

TiVo suggests that the explosion of new ways in which consumers can access video content is attributable to the existence of the encoding rules for the past ten years.<sup>5</sup> In fact, this unprecedented wave of innovation is the direct product of investment and groundbreaking technological advances in largely *nontraditional* services embraced by content creators, program networks, and service providers in private collaboration with device manufacturers. Our common goal is to enable creative ways for consumers to access video that also promote the sustained creation of high quality content. Where there is more latitude to explore these opportunities unfettered by legacy regulations, as has been the case with most of these new services and applications, consumers directly benefit from rapid advancements.

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<sup>1</sup> See 47 C.F.R §§ 15.123, 76.640.

<sup>2</sup> *Id.* at §§76.1901-1909.

<sup>3</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir 2013) ("*EchoStar*").

<sup>4</sup> TiVo Inc., Petition for Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment*; PP Docket No. 00-67 (filed July 17, 2013) ("*TiVo Petition*").

<sup>5</sup> *Id.* at 18.

In contrast, the encoding rules either outright prohibited certain functionalities or established detailed procedures for classifying the encoding of new services or business models, both of which limited the ability of MVPDs and programmers to develop compelling new services for consumers within the multichannel video ecosystem. When the rules were adopted, the Commission found that the record did not demonstrate any harm to innovation or limits on flexibility for new technologies and business models.<sup>6</sup> In practice, however, the burdens associated with seeking relief from the rules have served to either entirely forestall new MVPD services, or substantially delayed their introduction, thereby limiting the innovations available to U.S. consumers on these platforms. TiVo also suggests that consumers' expectations will be frustrated in the absence of government-mandated encoding rules, but there is simply no evidence that this has occurred since the D.C. Circuit decision was issued. Indeed, programmers and service providers have every incentive to avoid such an outcome, given the potential for consumer backlash. As such, TiVo's concerns are merely speculative and no further FCC action is warranted.

The Program Network Interests agree with the National Cable & Telecommunications Association ("NCTA") that today's robust, evolving, and competitive video marketplace is fundamentally different from that a decade ago when the UDCP and encoding rules were adopted. Consumers today can access video content in myriad ways, utilizing a wide range of devices both within and outside the home.<sup>7</sup> While the universe of UDCP devices has remained small since 2003, continued cable operator support for already-deployed devices, in addition to a new product announcement by Samsung,<sup>8</sup> since the D.C. Circuit decision underscore that the UDCP regime has continued to function well in the absence of formal FCC rules. As such, we do not believe that the reinstatement of the UDCP rules, both in terms of cable operator support and device labeling, are necessary.

The Program Network Interests likewise do not agree with TiVo's proposal to reinstate the encoding rules solely with respect to cable operators. As the Commission recognized at the time it adopted the rules, "[a]pplication of the encoding rules to the cable industry alone would create a permanent competitive imbalance in the MVPD programming market that could negatively impact consumers."<sup>9</sup> Further, given that more than 40% of the current MVPD market<sup>10</sup> would not be covered by cable-specific rules, TiVo's assertion that "consistency in

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<sup>6</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Second Report and Order*, 18 FCC Rcd 20885, ¶ 70 (2003) ("UDCP Order").

<sup>7</sup> See Comments of Time Warner Inc., *Video Device Competition Implementation of Section 304 of Telecommunications Act of 1996, et al.*, MB Docket No. 10-91, at 2-6 (submitted July 13, 2010).

<sup>8</sup> Samsung Electronics America Inc., Petition for Waiver of Section 15.118(b) of the Commission's Rules (filed May 21, 2013).

<sup>9</sup> *UDCP Order* at ¶ 71.

<sup>10</sup> According to the FCC's most recent Video Competition Report, DBS and telco providers together represented an approximate 42% of the nationwide MVPD households in 2012. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report*, FCC 13-99 at ¶ 3 (rel. July 22, 2013).

practice” across the industry is essential to the viability of consumer products appears misplaced.<sup>11</sup> In fact, TiVo’s proposal would have the effect of creating greater inconsistency.

Finally, we note that the D.C. Circuit’s decision leaves significant doubt about whether the encoding rules could be reinstated in a cable-specific manner. In addition to finding no direct authority under Section 629 of the Communications Act,<sup>12</sup> which “provides no explicit textual basis for the encoding rules,” the decision also determined that such rules were not ancillary to Sections 629’s stated purpose of promoting the commercial availability of navigation devices.<sup>13</sup> And while Section 624A<sup>14</sup> does not support ancillary authority for encoding rules applicable to all MVPDs, the D.C. Circuit specifically set aside the question of whether the provision’s explicit compatibility mandate “between cable systems on the one hand and televisions and video cassette recorders on the other” would extend to modern technologies.<sup>15</sup>

For these and other reasons, the Program Network Interests jointly urge the Commission that no further action is needed with respect to its former UDCP and encoding rules.

Respectfully submitted,

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<sup>11</sup> TiVo Petition at 18.

<sup>12</sup> 47 U.S.C. §549.

<sup>13</sup> *EchoStar* at 7-10.

<sup>14</sup> 47 U.S.C. §544a.

<sup>15</sup> *EchoStar* at 11-12, n.4.

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