

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Buckeye Cablevision, Inc.	)	
Request for Waiver of Section 76.1204(a)(1)	)	CSR-8876-Z
Of the Commission's Rules	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of	)	
Navigation Devices	)	

**COMMENTS OF TIVO INC.**

Matthew P. Zinn  
*Senior Vice President, General  
Counsel,  
Secretary & Chief Privacy Officer*  
TIVO INC.  
2160 Gold Street  
Alviso, CA 95002  
(408) 519-9311 - Telephone

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## SUMMARY

There is no policy or factual context for action on this petition unless and until the Commission acts on its pending applications and petitions with respect to the Charter waiver and the status of its Second Report & Order regarding CableCARD support. Any relief granted to Buckeye will be relied upon by other operators, just as Buckeye relies on a Charter waiver that is the subject of a pending petition for reconsideration by the Media Bureau and an application for review by the Commission. It is imperative that this Commission address its obligations under Section 629 on the basis of policy determined at a Commission level, and on demonstrated fact rather than vague aspiration.

Buckeye's core legal and factual arguments rest directly on the Media Bureau's grant of a waiver to Charter. TiVo's Petition for Reconsideration and CEA's Application for Review, however, expose key Charter / Buckeye assertions as groundless. The Commission has *not* unconditionally determined that any conditional access system that is deemed "downloadable" constitutes "separable security" under Section 76.1204(a), so is a valid alternative or successor to the national CableCARD interface. The Commission's 2007 postponement of the "integration ban" implementation was conditioned explicitly on a 2005 NCTA promise that its "DCAS" downloadable alternative would, like CableCARDs, be interoperable on a *nationwide* basis. But Cablelabs, despite massive investment, never completed "DCAS" and the industry abandoned the project in 2009 - a Time Warner Cable executive commented

that declining costs had made the CableCARD solution less expensive. If a nationally interoperable “downloadable” system was too expensive for Cablelabs and the second largest cable operator, it is obviously beyond Buckeye’s ability. The FCC should not embrace without proof the fiction that Buckeye’s “downloadable” system would promise national interoperability comparable to CableCARD’s.

The pending Petition for Reconsideration and Application for Review were filed on May 20, 2013 – almost a year ago. It is past time for this Commission to act in a considered fashion based on public notice and comment, rather than through negotiated and sporadic relief, without public comment on final outcomes. Buckeye, like Charter and Cablevision (whose waiver is also subject to a pending Application for Review) before it, effectively seek relief not only from the “integration ban,” but also from Section 76.1204(a)’s core obligation to provide separable security at all. Like Charter, Buckeye does not promise to provide CableCARDS to subscribers who don’t presently own CableCARD-reliant products. Like Charter, Buckeye claims without specifics or demonstration that because it’s system is “downloadable” and will have an “IP” element Buckeye has no obligation to make the system *actually* interoperable with other systems or with retail products. The Commission should rule on this assertion before the Bureau acts on more waiver applications.

In addition to a factual vacuum, Buckeye’s waiver lands in an uncertain legal environment. The Commission’s 47 CFR Section 76.640 CableCARD technical support rules stand vacated by the Court of Appeals. The Commission has pending a TiVo petition that would reinstate these substantively noncontroversial rules. The

Commission should clarify its CableCARD expectations, by acting on TiVo's petition, before it considers waiving them.

If the Bureau does ultimately act favorably on this petition it should require an adequate record in which any commitments by the proponent are (a) specific and unambiguous, and (2) clearly related to a Commission determination of what is lawful. Buckeye should be required to submit for public notice and comment a specific demonstration of why and how its system will support interoperability with other systems, and how it would support IP-based retail products on a national basis comparable to the national scope of CableCARD support. Buckeye also relies on a prior blanket waiver for DTAs. To stay within the scope of that waiver, Buckeye should be required to state categorically that its product would lack *any* storage capacity (including cloud storage), *any* connection to a device other than a display, and *any* other advanced functionality. Buckeye should also be required to phase out reliance on "switched digital" techniques and ensure that retail devices can access all channels without operator-supplied equipment. Grant of a waiver would save Buckeye sufficient bandwidth as to make such techniques, which substantially disable retail competition, unnecessary.

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**COMMENTS OF TIVO INC.**

TiVo Inc. ("TiVo"), as a smaller supplier to cable operators and a competitive entrant in the retail market, is sympathetic to smaller operators such as Buckeye Cablevision ("Buckeye") who wish to modernize their systems yet (like TiVo) are not large enough to exert any control over industry standardization or technical or purchasing trends. In TiVo's view, ambitious smaller operators such as Buckeye would be best served by the Commission taking action – as it has recognized it must<sup>1</sup> – to address the consequences, for its implementation of Section 629 of the Communications Act,<sup>2</sup> of the transition to Internet Protocol ("IP") techniques. This can only be done in

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<sup>1</sup> *In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Report and Order, at 26 n.162 (Oct. 12, 2012).

<sup>2</sup> 47 USC § 549.

the context of rulemaking rather than by a series of waivers that undermines the current common reliance on the CableCARD standard without putting in place a successor interface upon which retail devices can rely. Therefore while TiVo wishes to be supportive of small operators such as Buckeye, this waiver application rests atop a shaky foundation of past Commission and Bureau waiver-grants and non-dispositive public statements, all now pointed to as precedent as if they were a considered and uniform public policy upon which public comment had been sought and received, and had been duly enacted in regulation. Whether or not this Buckeye waiver proceeding can be cabined against such sprawl, it is more than time for this Commission to replace temporization with policy.

The proceedings, assumptions, and statements on which Buckeye must rely include:

- Commission deferral<sup>3</sup> and Bureau suggestions, pronouncements, and waiver grants pertaining to “downloadable security” that culminated in the waiver granted to Charter,<sup>4</sup> from which TiVo has petitioned for reconsideration<sup>5</sup> and the Consumer Electronics Association (“CEA”) has applied for review.<sup>6</sup> These waivers and purported exemptions are from the entire “separable security” obligation of Section 76.1204, not just the so-called “integration ban.”

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<sup>3</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Second Report and Order ¶¶ 3-4 (rel. Mar. 17, 2005) (“Deferral Order”).

<sup>4</sup> *In the Matter of Charter Communications, Inc.’s Request for Waiver of 47 C.F.R. § 1204(a)(1) of the Commission’s Rules*, MB Dkt. No. 12-238, CSR-8740-Z, CS Dkt. No. 97-80, (“Charter Waiver”), Memorandum Opinion & Order (rel. Apr. 18, 2013).

<sup>5</sup> Charter Waiver, Petition for Reconsideration of TiVo Inc. (May 20, 2013) (“Reconsideration Petition”).

<sup>6</sup> Charter Waiver, Application for Review (May 20, 2013) (“Application for Review, Charter”).

- The Commission’s inaction to date on TiVo’s Petition for Rulemaking<sup>7</sup> to reinstate the rules adopted with the Second Report & Order,<sup>8</sup> which include the utterly and entirely noncontroversial Section 76.640, which sets the consensus technical parameters for CableCARD support.
- The Bureau’s grant of a series of now-expired separable security waivers<sup>9</sup> to small “IPTV” systems in the hope and expectation of some technical standard that would support competitive device entry, and the expiration of those waivers with neither any standard nor any rulemaking having been forthcoming.

To fulfill its mandate under Section 629 to assure a market for retail navigation devices, TiVo respectfully submits that the Commission must act on these long-pending petitions and address the shortcomings of prior actions and inaction prior to considering any further waiver of the separable security requirement or of the “integration ban” alone. It is in this context that TiVo labors to provide a constructive response to Buckeye’s waiver request.

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<sup>7</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, TiVo Inc. Petition for Rulemaking, (filed July 16, 2013).

<sup>8</sup> *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (rel. Oct. 9, 2003) (“Second Report and Order”).

<sup>9</sup> *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Dkt. No. 97-80, Comments of the CEA on Six Requests for Waiver of 47 C.F.R. § 76.1204(a)(1) (July 5, 2007) (“CEA Comments on Six Requests for Waiver”); *cf. In the Matter of Basic Service Tier Encryption*, MB Dkt. No. 11-169, PP Dkt. No. 00-67, Comments of the Consumer Electronics Association at 5-7 (Nov. 28, 2011).

**I. NO ACTION SHOULD BE TAKEN IN RELIANCE ON THE FACTUALLY AND LEGALLY FLAWED WAIVER GRANTED TO CHARTER.**

On May 20, 2013 – almost one year ago – TiVo petitioned for reconsideration and CEA applied for review of the waiver granted to Charter Communications. Both CEA and TiVo regarded this waiver grant as extraordinary, in granting relief, not petitioned for, from the core separable security obligation based on admittedly incomplete information and incorrect and inadequate findings of fact. TiVo’s Petition and CEA’s Application were duly published for comment, but to date no action has been taken on either. The concerns expressed in these filings were comprehensive, serious, and well-documented. The Bureau should take no action on Buckeye’s petition until action has been taken on the TiVo petition and / or the CEA application. At the very least, no action should be taken *in reliance on* the Charter waiver without addressing the issues, arguments, and facts marshaled by TiVo and CEA with respect to areas where Buckeye would rely on Charter.

**A. The Charter Waiver’s, Hence Buckeye’s, Precedential Assumptions About “Downloadable Security” Were Demonstrably Incorrect.**

CEA’s Application for Review addressed and exposed as groundless Charter’s, hence Buckeye’s, assertion that the Commission had authoritatively determined that any conditional access system deemed as “downloadable” must be considered an acceptable “separable security” alternative to providing a CableCARD interface. This is a critical issue because to the extent the Bureau issues a waiver from the obligation to *supply* CableCARDS, as it has done for Charter and for various “IPTV” and

“downloadable” systems discussed further below, or that it approves or requires future conduct without determining whether such conduct is compliant with Section 76.1204, the Bureau is issuing a waiver not only of the “integration ban,” but *also* of Section 76.1204’s core obligation to supply separable security.

CEA’s Application for Review examined the history of purported determinations by the Commission that any nominally “downloadable” technology complies with Section 76.1204’s separable security obligation and found no basis for any such assertion:<sup>10</sup>

In freeing Charter from complying with Commission regulations enacted to assure commercial availability of retail navigation devices, the Order cites<sup>11</sup> Bureau level *dicta* from 2007 – footnotes in the context of *denying* waiver applications. In neither case did the denied waiver application pertain to the obligation to supply CableCARDs, and in neither case had relief been sought generally from Section 76.1204(a)(1). (The waiver petitions and denials could not have discussed relief from Section 76.1205(b)(1), which was adopted by the Commission three years later after full notice and public comment.)

These June 2007 Bureau statements, like its January, 2007 press release,<sup>12</sup> occurred more than two years before the cable industry *gave up* on achieving a common interface comparable to CableCARD’s, and have never been reviewed or adopted by the Commission.<sup>13</sup> In any event, the

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<sup>10</sup> Application for Review, Charter, at 19 – 21 (emphasis and fns. 10 - 13 in original).

<sup>11</sup> Order at 10 n.81.

<sup>12</sup> Public Notice, *Media Bureau Acts on Requests for Waiver of Rules on Integrated Set-Top Boxes and Clarifies Compliance of Downloadable Conditional Access Security Solution* (rel. Jan. 10, 2007). As cited in the Bureau’s waiver denial footnotes, the Bureau previously had made forward looking statements that technology such as BBT’s *could* offer common reliance, but included no rulings or factual or legal findings with respect to going-forward compliance with Section 76.1204(a)(1).

<sup>13</sup> CEA timely filed an Application for Review of the Bureau’s 2009 Cablevision waiver in which CEA specifically asserted that a Commission finding of legality would have been necessary to implement downloadable security, and that the Bureau’s action was defective because the Bureau made no such finding. *See Cablevision Systems*

Court of Appeals has made plain, in the most recent cable industry appeal of the Commission's navigation device rules, that Bureau level orders are precedent only as to the parties involved and cannot bind the Commission. A Bureau action "simply means that those rulings are binding on the parties to the proceeding. ... [U]nchallenged staff decisions are not Commission precedent."<sup>14</sup>

As CEA notes and TiVo discusses further below the Commission-level action in postponing the implementation of the integration ban was based on an explicit NCTA promise, with a 2008 deadline, of future *nationwide* interoperability. This deadline was not met, the project was abandoned a year later, and the integration ban *did* go into effect in 2007. Accordingly, the best that can be said about the "precedent" relied upon by Charter then and Buckeye now is that the burden is on the applicant to claim and to specifically demonstrate national interoperability before a technology can be assumed to be compliant as "separable security." Moreover, having been disappointed by the NCTA's failure to deliver on its claims of national interoperability as made under NDA, the evidence in support of any such claim should be presented on the record and subject to public comment. Unsupported statements are no substitute for actual evidence of national interoperability.

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*Corporation's Request for Waiver of Section 76.1204(a)(I) of the Commission's Rules*, CSR-7078-Z, CS Dkt. No. 97-80, Application for Review, at 8-11 (Feb. 17, 2009) ("Application for Review, Cablevision"). This Application, except for the subsequent telephone conference revoking enforcement as described in CEA's *ex parte* letter of March 15, note 4, has never been acted upon by the Commission so presumably remains pending.

<sup>14</sup> *Comcast*, 526 F.3d at 770.

**B. The Charter Waiver's, Hence Buckeye's, Factual Assumptions About "Downloadable Security" Were Demonstrably Incorrect.**

Buckeye provides scant factual information on which any assertion about interoperability might rest – only a link to its supplier's web page. Nothing on this page, or on the exhibits to the Buckeye petition, provides a basis for any claim of interoperability with existing or future systems of any other operator. Indeed, Buckeye asserts only that "[t]his is the *same type* of separate, downloadable security ...."<sup>15</sup> Yet CEA's Application for Review demonstrated in detail that the Charter system as described to and relied upon by the Bureau is "no more likely than fully integrated security to support operation of a device on more than one MSO system."<sup>16</sup> Buckeye has not even attempted to supply the level of information that has been demonstrated by CEA to have been insufficient in Charter's case to indicate any potential for future interoperability.

**C. The Charter Waiver's Assumptions About the Potential Interoperability of Systems Were Incorrect and an Insufficient Basis To Assume Future Support For Retail Devices.**

Given the scant evidence presented by Charter, CEA explained in its Application for Review that there is no reason to expect that such a system can or will support a retailable product:

[So] long as the interface between systems and devices is at the level of conditional access, the different CPUs, operating systems, and features necessitate that a "downloadable" approach can support more than a

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<sup>15</sup> *In the Matter of Buckeye Cablevision, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-8876-Z, CS Dkt. No. 97-80, Request for Waiver, at 5 (Mar. 3, 2014) ("Petition")* (emphasis supplied, fn. omitted).

<sup>16</sup> Application for Review, Charter, at 13 – 16.

single system only if there are a limited number of *documented product architectures* in the market. Otherwise, though nominally “downloadable,” the CA system is no superior to “integrated security” and in fact *is* integrated security. Charter has not claimed that it can standardize or even limit the number of system architectures that U.S. operators will employ and the Order is silent on the subject. So in fact there is *no* evidence of record to support the Bureau’s *hope* that some unspecified degree of *potential* architecture commonality between Charter and Cablevision can move the market any “closer” to having a device designed for one system work on another – any more than using the same motor in a car model and a boat model will turn all cars into boats.<sup>17</sup>

CEA went on to explain that in promising the FCC a true DCAS system, as the basis for the integration ban postponement it received in 2005, NCTA recognized and promised to address this limitation. Thus the entire industry focused its efforts, at CableLabs, on producing a truly interoperable DCAS system – but ultimately abandoned this effort, in 2009, as “too expensive”:<sup>18</sup>

It was to overcome precisely this (and other) obstacles that CableLabs invested in its “DCAS” system that would provide a single, standard, chip, platform, and interface between chip and CPU. It was on the basis of CableLabs’ promise to field a *standard interface* downloadable system by 2008 that the FCC issued its March 17, 2005 Deferral Order, delaying the “integration ban” until June 1, 2007. *But* in mid-2009 CableLabs *broke* its promise to the FCC and decided to abandon the DCAS project on grounds that achieving an interface comparable to CableCARD’s is “too expensive”:

“TWC EVP of technology policy and product management Kevin Leddy lamented during a panel on the topic of [tru2way](#) at the Consumer Electronics Show that the ‘economics of downloadable security are challenging’ while CableCARD costs continue to slide downward.”<sup>19</sup>

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<sup>17</sup> *Id.* at 17 (emphasis in original).

<sup>18</sup> *Id.* (note omitted, emphasis and fn.19 in original).

<sup>19</sup> Jeff Baumgartner, *MSOs Closing PolyCipher Headquarters*, Light Reading Cable, (June 5, 2009), [http://www.lightreading.com/document.asp?doc\\_id=177662&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=177662&site=lr_cable).

If the entire industry and its second-largest operator in 2009 found *interoperable* downloadable security to be more expensive than CableCARDs, and Charter could present no evidence of interoperability in 2013, there is no basis to expect that a small operator such as Buckeye will have overcome this obstacle now. Buckeye, in pointing only to “precedent,” makes no such claim.

## **II. THE COMMISSION NEEDS TO ACT ON TIVO’S PETITION FOR RULEMAKING.**

Buckeye’s assurances with respect to support of CableCARD-reliant products would be welcome if sufficiently comprehensive.<sup>20</sup> They are made, however, in a needlessly uncertain context, because the Commission’s 47 CFR Section 76.640 CableCARD support rules stand vacated by the Court of Appeals.<sup>21</sup> On July 16 of last year, TiVo petitioned for the reinstatement of these rules. After the Commission published TiVo’s petition for public comment, CEA accurately observed in its Reply Comments that “[n]othing in the comments opposing TiVo’s Petition addresses the specific merits of the CableCARD Support Rules.”<sup>22</sup> TiVo in its own Reply Comments asked, “one has to wonder why NCTA is opposed to the reinstatement of the CableCARD standard if cable operators [nevertheless] plan to comply with the rule by

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<sup>20</sup> See discussion below, part IV.A.

<sup>21</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

<sup>22</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Consumer Electronics Association Reply Comments in Support of TiVo Petition for Rulemaking, at 2 (Oct. 25, 2013).

continuing to provide CableCARDS.”<sup>23</sup> This Commission should avoid piling waiver upon waiver toward uncertain ends when action on a fully submitted and substantively noncontroversial petition would eliminate doubt in multiple respects.<sup>24</sup>

### **III. THE COMMISSION NEEDS TO ADDRESS THE STATUS OF IPTV CABLE SYSTEMS UNDER SECTION 629.**

In addition to relying on purported Commission precedent re any technology deemed “downloadable,” the Buckeye petition bases expectations of future interoperability on plans to implement Internet Protocol (“IP”) streaming. Yet all the FCC record shows on this subject is a spate of small operator petitions that, as in the case of NCTA’s DCAS, received favorable action based on expectations that were never

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<sup>23</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No. 00-67, Reply Comments of TiVo Inc. at 11 (Oct. 25, 2013).

<sup>24</sup> The consequences of the FCC not yet acting on TiVo’s petition add to confusion at best and are potentially far-reaching at worst. NCTA now argues, based on the vacatur of the 2003 Second Report & Order, that even the 2010 *Third Report & Order* is a nullity because it points, for convenience, to Section 76.640 to define “Cable Operator.” *In the Matter of TiVo Inc. Petition for Clarification or Waiver of 47 C.F.R. § 76.640(b)(4)*, CS Dkt. No. 97-80, Comments of NCTA, at 4-5 (Feb. 14, 2014). While TiVo and others disagree and regard this argument as absurd opportunism, it further clouds the conditional access and overall Section 629 regulatory environment until the FCC takes some action to resolve pending issues re the status and meaning of its rules. *See In the Matter of TiVo Inc. Petition for Clarification or Waiver of 47 C.F.R. § 76.640(b)(4)*, CS Dkt. No. 97-80, CEA Reply Comments in Support of TiVo Petition for Clarification or Waiver of 47 C.F.R. § 6.640(b)(4)(iii), at 2 (Feb. 28, 2014); Reply Comments of the AllVid Tech Company Alliance at 2 n.5 (Feb. 28, 2014); Reply Comments of TiVo Inc., at 2.

fulfilled, leaving systems in regulatory limbo.<sup>25</sup> TiVo<sup>26</sup> and others<sup>27</sup> have urged the Commission to follow through on its “AllVid” Notice of Inquiry<sup>28</sup> in order to update its rules to provide for a nationally interoperable IP successor to CableCARD. Until the Commission does so, no matter how the Bureau disposes of this petition Buckeye will join many other small operators in legal limbo.

#### **IV. BUCKEYE’S SYSTEM AND COMMITMENTS NEED TO BE CLARIFIED FOR THE RECORD BEFORE ACTION IS TAKEN.**

In TiVo’s view, one failing of the Charter waiver, as well as of the waiver for Cablevision that was relied on as precedent, is that the factual expectations of the Bureau were not adequately specific, nor were the commitments required of the

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<sup>25</sup> See, e.g., *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Dkt. No. 97-80, *Bernard Telephone Company Inc.*, CSR-7886-Z, *Colo Telephone Company*, CSR-7887-Z, *Coon Creek Telephone Company and Coon Creek Telecommunications Corp.*, CSR-7888-Z, *F & B Communications, Inc.*, CSR-7889-Z, *Farmers Cooperative Telephone Company*, CSR- 7890-Z, *Heart of Iowa Communications Cooperative*, CSR-7891-Z, *Kalona Cooperative Telephone Company*, CSR-7892-Z, *LaMotte Telephone Company*, CSR-7893-Z, *Local Internet Service Company*, CSR-7903-Z, *Mahaska Communication Group, LLC*, CSR-7894-Z, *Radcliffe Telephone Company, Inc.*, CSR-7895-Z, *South Slope Cooperative Telephone Company*, CSR-7896-Z, *Wellman Cooperative Telephone Association*, CSR-7897-Z, *West Liberty Telephone Company*, CSR-7898-Z, *Winnebago Cooperative Telecom Association*, CSR-7899-Z, *Comments of CEA* (June 4, 2008); *CEA Comments on Six Requests for Waiver*.

<sup>26</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, FCC 14-8, *Notice of Inquiry (“NOI”)*, *Comments of TiVo Inc.* at 17 - 19 (Mar. 21, 2014).

<sup>27</sup> See, e.g., *NOI, Comments of the Consumer Electronics Association* at 14-15; *Comments of the AllVid Tech Company Alliance, CCIA, Consumer Action, National Consumers League and Public Knowledge* at 4-6 (Mar. 21, 2014).

<sup>28</sup> *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, MB Dkt. No. 10-91, CS Dkt. No. 97-80, PP Dkt. No. 00-67, *Notice of Inquiry* (rel. Apr. 21, 2010).

proponent before any waiver was granted. If the Bureau does act favorably on this petition (after addressing TiVo's pending petitions), it should require an adequate record in which any commitments by the proponent are (a) specific and unambiguous, and (2) clearly related to a Commission determination of what is lawful.<sup>29</sup>

**A. Support for CableCARD-reliant Devices Must Be Clarified.**

A major element of TiVo's pending Petition for Reconsideration of the Charter waiver pertains to Charter, post-*EchoStar*, having reinterpreted its commitment to supply CableCARDS to apply only to existing owners of CableCARD-reliant products, not to future owners.<sup>30</sup> As in other respects, Buckeye's petition is modeled on Charter's, so stops short of making any explicit commitment to supply CableCARDS to subscribers not currently owning CableCARD-reliant products.<sup>31</sup> Before acting on any waiver petition pertaining to CableCARDS, either the Commission should clarify the CableCARD support requirement in the context of one of the pending matters discussed above in Part I, or at the very least the Bureau should require the petitioner to state with clarity and precision on the record whether future customers' CableCARD-reliant products will be supported. It should not grant any petition unless an

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<sup>29</sup> In both the Cablevision and the Charter waivers the Bureau imposed forward-looking *post-waiver* requirements on the proponents while explicitly declining to state whether, if fulfilled, these obligations would constitute *compliance* with applicable FCC regulations once the temporary waiver has expired. Thus the Bureau, in the case of downloadable security, not only *tolerated* the sort of limbo in which IPTV operators exist, but *created* a further limbo. See Application for Review, Cablevision; Application For Review, Charter.

<sup>30</sup> TiVo Petition for Reconsideration at 1-4, 8-9, 14-16.

<sup>31</sup> Petition at 12.

unequivocal commitment (subject to future regulatory action by the Commission<sup>32</sup>) is made.

**B. What Constitutes a “DTA” That Is Exempt From Section 76.1204(a)(1) Must Be Clarified.**

In recounting the coverage of the DTA element of its planned device under the blanket waivers that pertain to DTAs, Buckeye stresses that these devices will not have “internal” storage capacity. The petition is silent, however, on whether such devices may have “external” capacity, either through “cloud” storage or support of external video storage devices which would make them “advanced functionality” devices rather than DTAs. Other operators now offer “cloud DVR” storage,<sup>33</sup> and external storage products are readily available to consumers.<sup>34</sup> Again, lest a once-granted waiver be stretched through imprecision, a petitioner seeking coverage under a blanket waiver that limits functions such as storage and two-way operation should be required to state categorically whether *any* storage capacity, *any* connection to a device other than a display, and *any* other advanced functionality will be supported. If the answer is affirmative the product should not be considered eligible under the prior blanket

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<sup>32</sup> In the event that the Commission has referenced in its regulations a nationally interoperable and commercially viable successor interface, it may be appropriate in the future for the Commission, in its regulations, to sunset the CableCARD support requirements.

<sup>33</sup> See, e.g., Jeff Baumgartner, *Cablevision's Network DVR Can Record 10 Shows at Once: Updated*, Multichannel News, July 23, 2013, <http://www.multichannel.com/distribution/cablevisions-network-dvr-can-record-10-shows-once-updated/144537>.

<sup>34</sup> See, e.g., [http://www.amazon.com/Hauppauge-1212-Definition-Personal-Recorder/dp/B0018LX0DY/ref=sr\\_1\\_4?s=electronics&ie=UTF8&qid=1395940766&sr=1-4&keywords=hauppauge+pvr+2](http://www.amazon.com/Hauppauge-1212-Definition-Personal-Recorder/dp/B0018LX0DY/ref=sr_1_4?s=electronics&ie=UTF8&qid=1395940766&sr=1-4&keywords=hauppauge+pvr+2).

waiver. The Commission needs to completely understand the features and functionalities of the product for which a waiver is sought.

**C. Any Waiver Must Be Predicated On An End To The Use of Switched Digital Techniques And The Availability Of All Streamed Content To Retail Devices.**

Buckeye's is a system that presently employs "switched digital" techniques in order save bandwidth, thus requiring that for a TiVo subscriber to receive all of the content to which she is entitled she must receive and connect an additional set-top box, requiring home visits and, in many cases, resulting in operation problems for that consumer.<sup>35</sup> The Commission justified the imposition of this burden on subscribers on the basis that it would save bandwidth for operators. The grant of a discretionary waiver for an all-digital, hybrid IP system, however, would save bandwidth for Buckeye to the extent that maintaining Switched Digital channels would be an unnecessary burden for subscribers with CableCARD-reliant products. Therefore, if relief is granted, Buckeye should be required to phase out its use of the Switched Digital technique on a system-by-system basis as it phases in these products and ensure that CableCARD-reliant products can receive all cable channels without the need for additional operator-supplied equipment.

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<sup>35</sup> See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, PP Dkt. No.00-67, Third Report and Order and Order on Reconsideration, at ¶ 12 (Oct. 14, 2010).

**D. This Petition Should Not Be Granted Until The Commission Acts On Pending Matters And Buckeye Demonstrates Specifically How Its IPTV System Would Interoperate With Retail Devices And Other Actual and Potential IPTV Systems.**

Even if the Bureau chooses to deal with this petition in the absence of a clear policy context by acting on it before CEA's and TiVo's pending application and petitions are addressed, the Commission must at the very least require Buckeye to submit, *for public notice and comment*, a specific demonstration of why and how its system will support system interoperability and IP-based retail products on a nationwide basis, as do CableCARDS. Thus far, Buckeye has presented no factual basis for concluding that the system for which a waiver of the separable security obligation of Section 76.1204(a)(1) is sought will be interoperable with any other cable system or, absent a CableCARD, with any retail device. As TiVo recounts above, waivers granted on the basis only of hope or expectation have not resulted in actual support for *any* retail products or for *any* system interoperability. In the absence of any such requirement, deadlines and expectations contained in Bureau and Commission actions have been unavailing.

**V. CONCLUSION**

While TiVo is sympathetic to smaller operators such as Buckeye that wish to modernize their systems yet are not large enough to exert any control over industry standardization or technical or purchasing trends, unfortunately, there is no policy or factual context for action on this petition unless and until the Commission acts on the pending applications and petitions with respect to the Charter waiver and the core

obligations for the support of CableCARD-reliant products. Although Buckeye is a small operator, waivers of the core Section 76.1204 obligations have had potentially major consequences. Any relief granted to Buckeye will surely be requested by other operators just as Buckeye's waiver is predicated on expanding the relief granted by previous waivers. It is imperative that this Commission address its obligations under Section 629 on the basis of policy determined at a Commission level, and on demonstrated fact rather than vague aspiration. TiVo remains interested in working with Buckeye, with other stakeholders, and with the Commission to achieve the results intended by the Congress in enacting Section 629.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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Matthew P. Zinn  
*Senior Vice President, General Counsel,  
Secretary & Chief Privacy Officer*  
TiVO INC.  
2160 Gold Street  
Alviso, CA 95002  
(408) 519-9311 - Telephone

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