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March 27, 2014

**ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Ex Parte*, CS Docket No. 97-80, PP Docket No. 00-67, MB Docket Nos. 12-328, 14-16, & 14-42, CSR-8740-Z, CSR-8876-Z**

Dear Ms. Dortch:

This is to inform you that on March 25, 2014, Matthew Zinn, Senior Vice President, General Counsel, Secretary & Chief Privacy Officer, TiVo Inc. ("TiVo") and the undersigned met with the Commission staff listed in the attachment. The purpose of these meetings was to discuss the state of competition in the market for retail set-top boxes, and the need to establish a clear standard in accordance with Section 629, as discussed in detail in TiVo's comments filed on March 21 in the Video Programming Competition Annual Report proceeding, MB Docket No. 14-16.

Mr. Zinn explained that, with 99 percent of cable subscribers leasing their set-top boxes from their cable operators and with cable operators charging consumers an estimated \$7 billion per year revenue stream from set-top box leasing, cable operators have little economic incentive to accommodate retail devices and the Commission needs to do more to assure the competitive availability of retail navigation devices as required by Section 629 of the Communications Act.

Mr. Zinn also explained that time is of the essence for the Commission to work with the industry on a successor CableCARD interface, since the video market is at a critical juncture with video about to undergo an IP transition. If the Commission fails to seize the opportunity and act now, operators will implement their own different IP solutions and the ability to implement a successor standard to CableCARD that supports a retail market (as required by Section 629) will be lost.

Ensuring that consumers have retail choices from unaffiliated set-top box manufacturers, and that such retail devices are interoperable on networks nationwide, remains an essential, pro-consumer policy today. Indeed, the principle of requiring standards to enable competition in the market for communications equipment — leading in turn to consumer benefits in the form of greater innovation, lower prices, and higher quality — is one of the most settled and successful principles in telecommunications policy, and has been extremely successful in the wireline and wireless broadband markets. It is no surprise that one of Chairman Wheeler’s first actions upon starting his tenure at the Commission was to promote consumer choice in the wireless handset market.<sup>1</sup>

Yet, almost two decades after adoption, the mandate of Section 629 remains unfulfilled. As noted above, 99 percent of cable subscribers lease their set-top box from the operator — but not because they like them.<sup>2</sup> Though the CableCARD rules were enacted in 1998, cable operators did not provide even passable support to retail CableCARD products until after the common reliance rule was put in place in 2007 and the Commission strengthened the CableCARD rules in 2010 by preventing discrimination in pricing, strengthening support, and ensuring retail device access to cable-provided signals. However, barriers to retail competition remained, ranging from continued poor CableCARD support to the lack of access to two-way cable signals. And less than two years after the 2010 rules went into effect, the situation worsened when the CableCARD technical standard was inadvertently vacated by the D.C. Circuit in *EchoStar Satellite L.L.C. v. FCC*<sup>3</sup> following a challenge to the Commission’s encoding rules as applied to DBS providers.

In July 2013, TiVo petitioned for the reinstatement of the CableCARD rules vacated by *EchoStar* as applied to cable operators.<sup>4</sup> In response, NCTA has argued that

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<sup>1</sup> See Letter from Tom Wheeler, Chairman, FCC, to Steve Largent, President and CEO, CTIA — The Wireless Association, Nov. 14, 2013.

<sup>2</sup> See, e.g., John Patrick Pullen, *America’s Most Hated Device: The Cable Box*, Aug. 27, 2013, at <http://tech.fortune.cnn.com/2013/08/27/americas-most-hated-device-cable-box/>.

<sup>3</sup> 704 F.3d 992 (D.C. Cir. 2013).

<sup>4</sup> TiVo Inc. Petition for Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 16, 2013); *Media Bureau Seeks Comment on TiVo Petition for Rulemaking To Reinstate*

the CableCARD rules are no longer needed, in part because cable operators continue to support CableCARD for retail devices.<sup>5</sup> However, TiVo's surveys of MVPD compliance with CableCARD support requirements show that compliance is down in the year-plus following *EchoStar* and is getting worse over time.<sup>6</sup>

The surveys show a drop in support from February 2013 — soon after *EchoStar* was decided — to December 2013, when the most recent survey was conducted:

- 11 percent of operators offered discounts off their bundled prices for customer-owned DVRs in Dec. 2013, down from over 25 percent in Feb. 2013. (Note that such discounts are required by 47 C.F.R. § 76.1205(b)(5)(ii)(B)(2).)
- 36 percent of MSO agents surveyed in Dec. 2013 said that self-installation of CableCARDS was not allowed, up from 25 percent in Feb. 2013. (Note that self-installation of CableCARDS is required by 47 C.F.R. § 76.1205(b)(1).)
- For those retail customers that self-install their CableCARDS, 24 percent would be charged a fee for self-installation, with fees increasing since *EchoStar*, including a fee as high as \$39.95 imposed by two operators.

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*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).

<sup>5</sup> See Comments of the National Cable & Telecommunications Assoc., CS Docket No. 97-80, PP Docket No. 00-67, at 11-12 (Sep. 16, 2013) (arguing that cable operators continue to support CableCARD after *EchoStar*); Letter from Michael K. Powell, President, NCTA, to Tom Wheeler, Chairman, FCC, MB Docket Nos. 10-91 & 07-269, CS Docket No. 97-80, Feb. 5, 2014, at 6 ("Of course, cable operators continue to support third-party use of CableCARDS ....").

<sup>6</sup> TiVo conducts surveys of MVPD CableCARD support every few months, and the three surveys it has conducted since *EchoStar* was decided show a troubling trend of compliance that is getting worse on several fronts. Of course, the fact that compliance by certain operators has declined comes as no surprise given that the NCTA and certain operators have taken the position that the rules requiring support for retail devices that were adopted by the Commission in 2010 are no longer in effect. See Comments of National Cable & Telecommunications Association, CS Docket No. 97-80, at 4-5 (Feb. 14, 2014); Comments of Verizon, CS Docket No. 97-80, at 5 (Feb. 14, 2014); Opposition of Charter Communications, Inc. to Petition for Reconsideration, MB Docket No. 12-328, CSR-8470-Z, at 3 (June 3, 2013).

- 36 percent of MSO agents surveyed in Dec. 2013 offer their own operator's DVR on an unsolicited basis to customers requesting CableCARDS for retail devices, up from 26 percent in Feb. 2013.

Indeed, the very afternoon that he met with the Commission, Mr. Zinn was contacted by a TiVo board member complaining that he was flatly denied CableCARDS for his TiVo boxes by Time Warner Cable in Dallas, Texas and told he had to use a Time Warner DVR. The continuing lack of support for CableCARDS and the cable industry's incentives to favor their own devices point to the immediate need for the Commission to reinstate the CableCARD technical standard and clarify that the CableCARD support rules continue to apply. Manufacturers need to have a high level of confidence that the standard they use to invest in and manufacture their products will continue to be supported, and consumers need to know that the product they are buying will work with any cable operator.

TiVo also discussed the need for a successor solution to assure the availability of bidirectional video signals to retail devices pursuant to Section 629, but emphasized that the CableCARD solution, which is fully realized today, must remain in place until a successor standard is in place.<sup>7</sup>

Finally, TiVo discussed its Petition for Reconsideration of the waiver granted to Charter Communications, and voiced its concern that the continued grant of waivers of the common reliance rule is further eroding the common national standard that a retail set-top box market requires. TiVo further stressed the need for the Commission to clarify that simply because a conditional access solution is "downloadable" does not make it an acceptable solution for retail devices, and that different conditional access

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<sup>7</sup> See *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, Third Report and Order and Order on Reconsideration, FCC 10-181, at ¶ 8 (rel. Oct. 14, 2010) ("[W]e must keep in mind that CableCARD is a realized technology – consumer electronics manufacturers can build to and are building to the standard today. Until a successor technology is actually available, the Commission must strive to make the existing CableCARD standard work ..."); *id.*, ¶ 51 ("[O]pponents of ending the integration ban assert that it would discourage cable operators from negotiating in good faith in developing a successor technology to CableCARD, as cable operators would have no economic incentive to work to develop such a technology in a timely fashion. We agree. The integration ban continues to serve several important purposes – better support for CableCARD devices, economies of scale for CableCARDS, and economic incentives to develop better solutions. Ending the integration ban before a successor standard is developed would undermine the market for retail navigation devices.").

solutions for different operators would destroy interoperability and make it impossible for retail manufacturers to market and sell devices to consumers nationwide.

In conclusion, TiVo urges the Commission to fulfill the mandate of Section 629 by acting expeditiously to reinstate the CableCARD rules vacated by *EchoStar* as they apply to non-DBS providers, and to work with industry to develop a successor to the CableCARD interface.

Please direct any questions regarding this matter to the undersigned.

Respectfully,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive, slightly slanted style.

Henry Goldberg  
Devendra T. Kumar  
*Attorneys for TiVo Inc.*

cc: Gigi Sohn  
Maria Kirby  
Clint Odom  
William Lake  
Michelle Carey  
Alison Greenwald Neplokh  
Nancy Murphy  
Brendan Murray  
Steve Broeckaert  
Adam Copeland  
Chad Guo

## List of Commission Staff Present at Meetings

### Office of Chairman Wheeler

Gigi Sohn, Special Counsel  
Maria Kirby, Legal Advisor

### Office of Commissioner Rosenworcel

Clint Odom, Legal Advisor

### Media Bureau

William Lake, Bureau Chief  
Michelle Carey, Deputy Bureau Chief  
Alison Greenwald Neplokh  
Nancy Murphy  
Brendan Murray  
Steve Broeckaert  
Adam Copeland  
Chad Guo