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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	
Competition in the Market for the Delivery	)	MB Docket No. 14-16
of Video Programming	)	

REPLY COMMENTS OF TIVO INC.

TiVo Inc. ("TiVo") hereby files these reply comments in the above-captioned proceeding,[1] focusing on comments that addressed the state of competition in the market for retail set-top boxes. In its initial comments, TiVo discussed how the market for retail set-top boxes has been undermined by inconsistent enforcement of CableCARD and other rules intended to implement the pro-consumer policy of Section 629. TiVo stressed that such rules remain necessary in today's video marketplace.[2] TiVo also described[3] how operator support for the CableCARD and associated rules has gotten worse since the D.C. Circuit's decision in *EchoStar Satellite L.L.C. v. FCC*.[4] Finally, TiVo discussed the need for a successor solution to CableCARD more in tune with today's IP video marketplace, but stressed the need for the Commission to reinstate the CableCARD standard until such a successor solution is in place.[5] The Consumer Electronics Association and the AllVid Tech Company Alliance, CCIA, Consumer Action, National Consumers League, and

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[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Notice of Inquiry, FCC 14-8, at 21-22, Section IV.B (rel. Jan. 31, 2014).
[2] Comments of TiVo Inc., MB Docket No. 14-16, at 2-14 (filed Mar. 21, 2014) ("TiVo Comments").
[3] *Id.* at 15-17.
[4] 704 F.3d 992 (D.C. Cir. 2013).
[5] TiVo Comments at 17-19.

Public Knowledge filed comments supporting this view of the market for retail devices.[6]

NCTA, Verizon, and the Free State Foundation ("FSF") generally disagree, arguing that the video marketplace is providing consumers with numerous choices and that Commission action implementing Section 629 is not necessary.[7] These arguments are not new and have been made in the past.[8] TiVo's Comments in this proceeding addressed these arguments in some detail, and are referred to below in responding to the arguments made by NCTA, Verizon, and FSF.

I. CHANGES IN HOW SOME CONSUMERS ARE ABLE TO VIEW SOME VIDEO CONTENT DO NOT OBVIATE THE NEED FOR A SOLUTION FOR RETAIL DEVICES CONSISTENT WITH SECTION 629

NCTA and Verizon argue that the video marketplace is changing, and that consumers today can view video programming from multiple sources, including a growing number of OVDs, and on a variety of devices such as tablets, smartphones, game consoles, etc.[9] As TiVo has discussed previously, while these developments are no doubt welcome to consumers, they do not measure up to the type of retail

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[6] Comments of the Consumer Electronics Association, MB Docket No. 14-16, at 14 (filed Mar. 21, 2013); Comments of the AllVid Tech Company Alliance et al., MB Docket No. 14-16 (filed Mar. 21, 2013) ("AllVid Alliance Comments").

[7] Comments of the National Cable & Telecommunications Association, MB Docket No. 14-16 (filed Mar. 21, 2013) ("NCTA Comments"); Comments of Verizon, MB Docket No. 14-16 (filed Mar. 21, 2013) ("Verizon Comments"); Comments of the Free State Foundation, MB Docket No. 14-16 (filed Mar. 21, 2013) ("FSF Comments").

[8] *See, e.g.*, 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 1-4; Comments of the National Cable & Telecommunications Assoc., CS Docket No. 97-80, PP Docket No. 00-67, at 5-9 (Sep. 16, 2013).

[9] NCTA Comments at 15-19; Verizon Comments at 13-15.

competition mandated by Section 629.[10] First, though some operators and cable networks make some content available to subscribers in some areas, these developments are not the sort of retail competition required by Section 629. Cable commenters cannot point to a single retail device that is guaranteed to receive the full programming lineup for multiple operators nationwide such that it can be truthfully marketed and used as a replacement for a cable-supplied set-top box. True retail competition requires consumers to buy a retail device knowing that they would be able to access all content to which they have subscribed, and that they would continue to be able to do so if they moved to a different part of the country.[11]

Second, viewing content using tablets, smartphones, gaming consoles, etc. requires the use of cable "apps" that do not give the consumer options for viewing video content using more innovative and user-friendly ways. Retail competition involves more than simply viewing video programming on different screens; it involves innovative user interfaces, search functions, and so on that give consumers greater choice and an enhanced user experience — a true alternative to what is provided by the

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[10] TiVo Comments at 10-14; Reply Comments of TiVo Inc., CS Docket No. 97-80, PP Docket No. 00-67, at 7-10 (Oct. 25, 2013).

[11] *See EchoStar*, 704 F.3d at 995 (noting that fulfilling the purpose of Section 629 of assuring the competitive availability of navigation devices from independent manufacturers, retailers, and other vendors "demands technical standardization among MVPDs so that navigation devices can be marketed nationally …."); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, FCC 98-116, ¶ 70 (rel. June 24, 1998) ("What is important is for the [POD] supplied by the service provider to be designed to connect to and function with other navigation devices through the use of a *commonly* used interface or through an interface that conforms to appropriate technical standards promulgated by a *national* standards organization.") (emphasis added); *id*. ¶49 (discussing the importance of a conditional access security solution that permits portability of equipment).

operator. Indeed, Section 629 uses the term *navigation* device — and not viewing device — for a reason. Section 629 also seeks to assure the availability of retail navigation devices that can be used with MVPD services. As TiVo noted in its Comments, none of the cable apps and other options discussed by NCTA and Verizon guarantee that consumers can purchase a retail device to (a) receive all of the cable programming they are paying for; (b) record that programming for later viewing; (c) incorporate Internet-delivered content; (d) frame the experience in a user interface better and more innovative than the basic approach supplied by their cable provider; and (e) work with more than one provider.[12]

In summary, though the growing options for viewing video content cited by NCTA and Verizon are no doubt welcome, they are not substitutes for true retail competition as mandated by Section 629.

II. SUPPORT FOR CABLECARD AND OTHER FCC RULES INTENDED TO ASSURE THE COMPETITIVE AVAILABILITY OF SET-TOP BOXES HAS GOTTEN WORSE

While Verizon argues that CableCARD rules are simply not required and should be abandoned, NCTA takes a slightly different approach and argues that there is no need to reinstate the CableCARD technical standard because cable operators continue to support CableCARD.[13] However, as TiVo has explained, its surveys of operator compliance with CableCARD support show the opposite — that CableCARD support has dropped in the year-plus since *EchoStar* was decided and is getting worse over

[12] TiVo Comments at 12-13; AllVid Alliance Comments at 6-8.
[13] NCTA Comments at 21-22.

time.[14] TiVo's internal surveys of CableCARD support by operators show a drop in support from February 2013 — soon after *EchoStar* was decided — to December 2013, when the most recent survey was conducted:

- Only 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. (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. (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.

- 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.

The fact that CableCARD support is getting worse is not surprising considering the fact that 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.[15]

Regardless of this trend of declining CableCARD support, mere statements from NCTA that cable operators will continue to provide and support CableCARDs are not

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[14] TiVo Comments at 15-17; *Ex Parte* Letter filed by TiVo Inc., CS Docket No. 97-80 et al., at 2-4 (Mar. 27, 2014). As another recent example of lack of CableCARD support, TV Producer Tim Gibbons was unable to watch his desired program this past weekend, and was apparently told by Time Warner Cable customer support that CableCARD-enabled devices do not always receive all programming that the subscriber has paid for. *See* Dave Zatz, *How Bad is CableCARD Support?*, April 21, 2014, *at* http://www.zatznotfunny.com/2014-04/bad-cablecard-support/.

[15] *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).

enough and do not provide the level of certainty required for a retail market to exist. To begin with, statements by the NCTA are not binding on its members, and NCTA's members have made no binding representations or promises to provide and support CableCARDs (much less make a successor solution available). CableCARD support (or lack of support) occurs at the local level with customer service personnel and technicians who provide cable services to consumers. Without rules in place, consumers have nothing to point to when they are told that an operator does not support CableCARDs, does not support self-installation, does not provide a triple play discount to users of retail CableCARD boxes, and so on. NCTA and Verizon can allege that these compliance issues don't happen, but the unfortunate reality is that they do — more often than any of us would like. Moreover, manufacturers need to know that the standard they are using will be supported before they will invest the resources to develop and build innovative new products, and consumers need to know that the products they buy will work with any operator in any part of the country. Self-serving, non-binding statements are not enough.

TiVo urges the Commission to act on its pending Petition for Rulemaking and reinstate the CableCARD technical rules vacated by *EchoStar*. Failing to do so will harm manufacturers of retail devices just as consumers are beginning to see more choice in the market from manufacturers in addition to TiVo such as Samsung and Ceton. Indeed, even as it argues that cable operators will continue to support CableCARD, NCTA acknowledges that some operators will end up supporting "other separable security approaches."[16] This is precisely the sort of outcome that cannot support a retail market; a fragmented market in which different operators use different security solutions directly undercuts a retail market. Manufacturers of retail devices cannot market and sell different devices in each operator territory, and of course consumers will not buy a retail device if they know it will only work with a particular operator. To forestall such industry fragmentation, and as discussed more fully below, the Commission should reinstate the CableCARD technical standard and work with industry to enable it to develop a successor standard to CableCARD.

III. THE MOVEMENT OF THE VIDEO INDUSTRY TOWARD IP MAKES CLEAR THAT A SUCCESSOR SOLUTION IS NEEDED, BUT THE CABLECARD RULES MUST BE REINSTATED UNTIL SUCH A SUCCESSOR SOLUTION IS IN PLACE

NCTA, Verizon, and FSF argue that the CableCARD regime is outdated and that IP solutions are driving video innovation outside the CableCARD regime.[17] They also argue that the FCC's common reliance rule is adding avoidable costs[18] to leased,

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[16] NCTA Comments at 21 ("As we have explained in comments on TiVo's Petition to reinstate the rules vacated in *EchoStar*, even if technical rules were not reinstated, cable operators would still support CableCARDs *or other separable security approaches*." (emphasis added)).
[17] NCTA Comments at 18-19, 22-23; Verizon Comments at 13-15; FSF Comments at 12-13.
[18] It should be noted that TiVo believes that the CableCARD costs quoted by NCTA are overstated and/or high only because of a lack of competition among makers of CableCARDs. *See Reauthorization of the Satellite Television Extension and Localism Act: Hearing Before the Senate Subcomm. on Communications, Technology, and the Internet of the Senate Comm. On Commerce, Science, and Transportation*, Statement of Mr. Thomas Rogers, President and CEO, TiVo Inc. at 4-5 n.7 (April 1, 2014) (refuting NCTA's CableCARD cost estimates). In an era of falling costs of electronics equipment, there is simply no reason for the cost of CableCARD to have remained as high as NCTA claims they are today. Of course it should also not be forgotten that the CableCARD standard was developed by the cable industry — the same industry that has resisted and continues to resist the development of a successor solution to CableCARD. In effect, the cable industry is bemoaning a standard and a state of affairs that it has every

operator-supplied devices and to energy consumption costs, and conclude that the CableCARD regime is obsolete and that the focus should be on IP solutions for delivering video content.[19]

TiVo agrees — the CableCARD standard is far from an optimal solution, and the focus should be on an IP successor solution. CableCARD is as much as burden on providers of retail devices as it is on operators. As discussed in the previous section, CableCARD installation hassles are well-documented. CableCARDs used in retail devices are prohibited from using the upstream capabilities of the cable network, and thus, in most systems, do not enable retail devices to use two-way features such as VOD, a feature that operators use to advertise to potential and existing customers but deny to retail devices. (NCTA even acknowledges the disadvantages that retail devices face, arguing that one of the reasons subscribers prefer leasing set-top boxes from the operator is because operator-provided boxes "provide[] services that their existing TVs and other devices do not support."[20]) The one-way retail CableCARD standard also does not allow retail devices to access Switched Digital Video (SDV) channels without using the inelegant and inconvenient solution of a tuning adapter.

Indeed, as TiVo discussed in its Comments,[21] it is precisely because of such roadblocks that competition from retail devices has not been as robust as the Commission had hoped. Given the unsatisfactory record of CableCARD support, the

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opportunity to change for the better — for operators, for retail manufacturers, and for consumers.

[19] NCTA Comments at 19-20; Verizon Comments at 14-15; FSF Comments at 8-9.

[20] NCTA Comments at 19.

[21] TiVo Comments at 2-7; *see also* AllVid Alliance Comments at 4-6, 12-15.

current uncertainty surrounding CableCARD, and NCTA's continuing lobbying efforts to gut the regulations implementing Section 629, it is a testament to the demand for retail set-top boxes that a market for such devices exists at all. TiVo customers continue to purchase TiVo's highly-rated and critically acclaimed DVRs because of their superior quality, features, and ease of use.

Still, TiVo agrees that the existing CableCARD regime should be replaced with a successor, IP-based solution that better reflects today's marketplace and technology. TiVo has long supported a successor solution so long as it fulfills the goals of Section 629 by actually enabling retail competition and innovation. TiVo stands ready to work with all interested parties to develop a successor solution. Notwithstanding the arguments and warnings about "tech mandates,"[22] the reality is that there is no reason why a successor standard cannot be created by industry, and no reason why a successor standard cannot allow for sufficient flexibility to permit ongoing innovation by both operators and device manufacturers. The Commission's role can be limited to ensuring that the successor solution supports retail competition, and maintaining ongoing oversight to ensure that operators are treating retail devices in a nondiscriminatory fashion vis-à-vis their own leased devices. Indeed, by requiring the Commission to "consult[] with appropriate industry standard-setting organizations," Section 629 has always assumed such a division of roles: industry standard-setting bodies would establish standards, and the Commission would adopt rules — such as the common

[22] Verizon Comments at 14-15; FSF Comments at 12-14; NCTA Comments at 22-23.

reliance rule and the support and nondiscriminatory pricing rules established in the 2010 *Third Report and Order* — that assure the competitive availability of retail devices.

As TiVo has repeatedly stressed, however, it is important that the CableCARD standard be reinstated prior to the development of a successor interface. Ensuring that the existing standard is in place gives all parties the incentives needed to work toward a successor solution. Conversely, allowing each operator to develop its own proprietary solution runs the risk of creating a fractured industry that will move the industry further away from a single, national standard that is a successor to CableCARD. As the Commission noted in 2010 when it strengthened the CableCARD support rules, until a new solution that actually enables retail competition is available, the Commission should continue to ensure that the existing CableCARD standard works for consumers and retail manufacturers.[23]

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[23] *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 6, ¶ 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 ...."); *cf. 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.").

Respectfully submitted,

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