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

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| In the Matter of | ) | |
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| Applications of | ) | MB Docket No. 14-90 |
| | ) | |
| AT&T, Inc. and | ) | |
| DIRECTV | ) | |
| | ) | |
| For Consent To Assign or Transfer Control of | ) | |
| Licenses and Authorizations | ) | |

**COMMENTS OF TIVO INC.**

TiVo Inc. ("TiVo") files these comments in response to the above-captioned merger application to address the issue of competition from retail navigation devices as envisioned by Section 629 of the Communications Act.[1] TiVo does not take a position on whether the merger should be approved, but urges that any affirmative action taken on the application for these two multichannel video programming distributors ("MVPDs") to merge into a very large, bi-modal programming distributor must include measures to require the merged company to comply effectively with Section 629.

DBS provider DIRECTV in 1998[2] was granted forbearance from complying with its obligation to support competitive devices based principally on its marketplace support of retail

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[1] 47 U.S.C. § 549.

[2] *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Report and Order, ¶¶ 22, 64–66, 13 FCC Rcd 14775,14783 & 4800–02 (rel. June 24, 1998) ("First R&O"); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices,* CS Docket No. 97-80, Order on Reconsideration, ¶¶ 36-37, 14 FCC Rcd 7596, 7613–14 (rel. May 14, 1999) ("*Reconsideration Order*").

products, which it has since withdrawn.[3] AT&T has also not been required to meet is Section 629 obligations as an MVPD. The IPTV industry, despite industry promises and Commission-imposed deadlines, has not come forward with a technical solution for supporting products that are not operator-supplied.[4] Any FCC action approving the merger of the leading DBS MVPD and the leading IPTV MVPD must require that the merged company comply meaningfully and effectively with existing law, including Section 629's obligation to support commercial competitive devices.

## I. THE MERGED COMPANY WILL BE A MAJOR MVPD THAT MUST BE REQUIRED TO COMPLY WITH THE OBJECTIVES OF SECTION 629 OF THE COMMUNICATIONS ACT AND WITH THE COMMISSION'S EXISTING REGULATIONS.

Section 629 of the Communications Act requires the Commission to

> [A]dopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of … equipment used by consumers to access multichannel video programming and other services

[3] As was noted in the first R&O and the Reconsideration Order, as a competitive entrant DIRECTV licensed independent manufacturers and encouraged sales of competitively sourced products at retail. Upon becoming established as the second-largest MVPD, however, DIRECTV ended its support for competitive products at retail. Pursuant to a private agreement, DIRECTV does acquire and sell one TiVo model, not available independently at retail, which must be built to a DIRECTV specification that is severely limited in comparison to TiVo's other products and that, as DIRECTV tells its subscribers, is limited compared DIRECTV's current products. *See, e.g.*, https://www.tivo.com/shop/roamio; http://www.directv.com/technology/tivo_receiver; https://support.directv.com/app/answers/detail/a_id/853/related/1.

[4] *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CS Dkt. No. 97-80, Memorandum Opinion and Order, DA 07-2921 (rel. June 29, 2007) ("Consolidated Waiver Order"); *In the Matter of Massillon Cable TV, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7229-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order, DA 07-2919 (rel. June 29, 2007); *In the Matter of ComSouth Telesys, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, CSR-7223-Z, CS Dkt. No. 97-80, Memorandum Opinion and Order, DA 07-3318 (rel. July 23, 2007).

> offered over multichannel video programming systems, *from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor*.[5]

The Commission has implemented Section 629 by requiring MVPDs to provide separable security that allows subscribers to use unaffiliated retail devices while still protecting against signal theft. For more than a decade, cable system MVPDs have been subject to these requirements and have supplied CableCARDs to their subscribers who choose to use retail devices, while also using the same separable security solution in their own operator-supplied devices. However, at present, neither AT&T nor DIRECTV support the use of retail devices on their networks, contrary to Section 629 — thereby denying their subscribers the benefits of device competition and choice.

If the merger is allowed, the merged company, in addition to being the largest MVPD,[6] will be the only MVPD to supply programming and services via both direct satellite and wired transmissions. With its national scope, the new AT&T will in certain respects resemble the original AT&T system — a system that was required to open its network to device competition under the Commission's *Carterfone* policies and Part 68 rules.[7] Section 629 and the Commission's regulations designed to allow competition from retail set-top boxes were modeled

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[5] 47 U.S.C. § 549(a) (emphasis supplied).

[6] Based on the figures from June 2012 taken from the most recent Annual Video Programming Market Competition Report, the merged company would have 24 million subscribers, which would rank it ahead of the largest MVPD, Comcast, by almost 2 million subscribers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, FCC 13-99, at 61-62, Table 7 (rel. July 22, 2013). Of course, should the pending merger of Comcast and Time Warner Cable be approved, the merged AT&T-DIRECTV would be the second largest MVPD behind the merged Comcast-Time Warner Cable. Nevertheless, the arguments herein regarding the size and national scope of the combined AT&T-DIRECTV hold true irrespective of whether the merged company is the largest or second-largest MVPD.

[7] 47 C.F.R. § 68.110(b).

on the *Carterfone* policies and regulations to achieve the same end of giving consumers the advantages of retail competition in the equipment they attach to the network.[8] As a matter of competition policy to protect the public interest, the Commission should be guided by congressional intent and its own policies and regulations in insisting that if this merger is to proceed, the merged company should achieve effective compliance with Section 629 and the existing Commission regulations implementing Section 629.

While there are technical differences with respect to DBS systems vis-à-vis wired cable systems, TiVo's experience with DIRECTV has shown that technical access to programming has not been a stumbling block to the use of retail devices. Device competition has been constrained, instead, by DIRECTV's business objective of controlling the relevant device market, in a manner contrary to the intent of Section 629 and Commission regulations. A merger condition in favor of ***competitive*** entry thus is required.[9]

Meanwhile, the IPTV device market has been fractured and has lacked a technical solution. AT&T, in acquiring DIRECTV, would become a major national actor and the largest MVPD. The FCC, in reviewing this merger and protecting the public interest, should not allow this merger to occur without making some provision for retail device competition in this national market of close to 25 million subscribers.[10]

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[8] *See*, 141 Cong. Rec. E635-01 (daily ed. Mar. 21, 1999, 1995 WL 118602 (statement of Rep. Bliley).

[9] Competitive entry requires that unaffiliated retail products not only have access to all MVPD programming but also are not restricted in providing differentiated features and functionality, including a different look and feel to the product.

[10] TiVo has favored and continues to favor a rulemaking to achieve a national competitive benchmark standard for device access to all IPTV providers. TiVo recognizes that merger conditions cannot accomplish this on an industry-wide basis. It is entirely reasonable and in furtherance of the public interest, however, to expect the merged company to comply with the intent and objectives of Section 629 and existing Commission regulations and to bring to its

Accordingly, if this merger is approved, there should be an obligation of the merged company to give equal support to retail devices as it does to products that it provides to its subscribers, and thus to avoid any constraints in licensing or certification that would make such support unequal.

## II. THE RATIONALES FOR NOT REQUIRING DIRECTV OR AT&T TO COMPLY WITH THE COMPETITIVE OBLIGATIONS OF SECTION 629 ARE NO LONGER APPLICABLE.

None of the reasons previously cited by the Commission for delaying the enforcement of Sections 76.1201–1205 with respect to these DBS and IPTV MVPDs will apply to the merged company. Moreover, as discussed above, the merged company would be the largest MVPD in the market rather than a niche player. Hence an explicit path to compliance should be a condition of the merger if it is to be approved.

### A. The Enforcement Forbearance For DIRECTV Was Based On Its Former Status As A Competitive Entrant And On Its Now-Ended Support For Retail Devices.

The Commission's 1998 forbearance in applying Sections 76.1201–1205 to DIRECTV was based on three factors, taken together: (1) DIRECTV's status as a fledgling competitive entrant, (2) DIRECTV's practice of licensing competitive products and supporting retail devices, and (3) the national footprint of DBS operators.[11] DIRECTV is now the second- largest MVPD and no longer supports any retail devices. The national DBS footprint means that DIRECTV can more easily support retail products than if it were a combination of different regional legacy

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large subscriber base the benefits of device competition. Whether other IPTV providers can or should follow this example can be an issue for future consideration. An obligation now for the merged company to provide meaningful support to competitive devices will itself create the opportunity for a viable and substantial retail market, and will also provide a potentially beneficial example and path for other providers.

[11] *Supra*, n. 2.

networks. Hence all three factors evaluated in 1998 and 1999 by the Commission now weigh in favor of, rather than against, requiring effective compliance with Section 629 and explicit compliance with Sections 76.1200–1205 of the Commission's regulations.

Because DIRECTV operates nationally and has previously provided its security technology specifications to independent manufacturers, it was not necessary for the Commission to require an industry-wide conditional access solution as the Commission did for cable operators with the CableCARD. With its national footprint, DIRECTV does not need to solve regional variation problems in order to maintain secure device access. It merely needs to provide competitive manufacturers with an appropriate, single set of device specifications, with equal access to network features, functions, and services — just as DIRECTV has done previously.

### B. The Commission Has Conditioned IPTV Industry Forbearance On Now-Ignored Promises To Support Competitive Devices By Standard Means. A Merged Company Should Be Required Provide A Solution For Its Own Programming And Services.

The Commission has made clear that IPTV video programming providers are MVPDs and are subject to Sections 76.1201–1205.[12] In addressing waiver requests from smaller IPTV providers, the FCC has relied upon the expressed intention of these providers, through an industry standards organization, to provide a technical solution that would allow competitive retail products to be equally supported on these systems. These IPTV providers, in seeking waivers, promised to achieve a standard means of device access, and cited an industry-wide project of the ATIS IPTV Interoperability Forum as potentially providing a solution.[13] Based on

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[12] *See, e.g.*, Consolidated Waiver Order at ¶¶ 55–62 (granting limited waivers but denying waivers based on the use of IP technology in delivering multichannel video programming).

[13] *See, e.g.*, *In the Matter of IPTV operators Group, Group Petition for Waiver of 47 C.F.R. § 76.1204(b)*, CS Dkt. No. 97-80, Petition of the IPTV Operators Group for Waiver for a Limited

these representations, the Commission granted time-limited waivers from the regulations implementing Section 629 that give subscribers the benefits of retail device competition.[14]

The IPTV waiver periods granted by the Commission have expired, yet no uniform technical solution has been forthcoming. The interoperability project cited to the Commission and relied upon in the waiver grants has ended without apparent result.[15] AT&T, as a dominant company and prospectively the largest overall MVPD, can provide the necessary leadership by making its own system compliant. Accordingly, a merged AT&T should be obliged to support competitive devices on its own separate or unified DBS / IPTV system(s). The specific obtainable goals in this respect are set forth below.

## III. THE COMMISSION MUST REQUIRE THAT THE MERGED COMPANY COMPLY EFFECTIVELY WITH SECTION 629 AND COMPLY EXPLICITLY WITH SECTIONS 76.1200–1205 BY AFFORDING EQUAL DEVICE ACCESS TO ITS MVPD SIGNALS, CHANNEL LINEUPS, AND VIDEO ON DEMAND PROGRAMMING.

TiVo proposes that, if AT&T's acquisition of DIRECTV is to be approved, the merger should be conditioned on the merged company — in its DBS/IPTV provision of MVPD programming and services — providing the following support for subscribers relying on competitive devices on a basis equal to that afforded to subscribers who rely on leased devices:

- Secure device access to program streams
- Subscriber access to full channel lineups
- Subscriber access to the MVPD's Video on Demand offerings

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Time of the Open Interface Requirement, 47 C.F.R. § 76.1204(b*)* at 9 & n.23 (June 1, 2007).

[14] Consolidated Waiver Order at ¶¶ 58-62.

[15] The ATIS IPTV Interoperability Forum, touted by waiver applicants as providing a multi-provider solution, sunset in November 2013, without having provided any such solution to the FCC. *See* http://www.atis.org/iif/.

- Limitations on device certification and licensing restrictions unrelated to signal security, per requirements of Sections 76.1201, 1203 & 1205 discussed below

Such reasonable merger conditions should assure that the merged company, consistent with Section 629 and Sections 76.1201, 76.1203, and 76.1205(a), is not able to require and tout (as DIRECTV presently does[16]) that competitively-branded devices lack features and functions compared to the MVPD-branded devices solely due to limitations imposed on the competitive device by the MVPD. It is within the power of a merged AT&T – DIRECTV company to accomplish this. TiVo does not anticipate the need for the companies to develop a new conditional access solution; instead, the Commission should simply require that the merged company make its conditional access solution available to manufacturers to design and produce competitive retail navigation devices. For as long as the merged company uses different security technologies for its DBS and IPTV systems, it should be required to make these two solutions available to manufacturers; if and when it begins using a single security solution across its entire network, it should be required to make such a solution available.

## IV. AS SECTIONS 76.1203 AND 76.1205 OF COMMISSION REGULATIONS REQUIRE, COMPETITIVE PRODUCTS SHOULD NOT BE HAMSTRUNG BY CERTIFICATION OR LICENSE REQUIREMENTS NOT DIRECTED TO PROTECTING AGAINST SIGNAL SECURITY OR ELECTRONIC HARM TO THE NETWORK.

The regulations implementing Section 629 adopted by the Commission require:

- No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service. (Section 76.1201)

[16] *See* note 3, *supra*.

- A multichannel video programming distributor may restrict the attachment or use of navigation devices with its system in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices that assist or are intended or designed to assist in the unauthorized receipt of service. … *Such standards shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service.* In any situation where theft of service or harm occurs or is likely to occur, service may be discontinued. (Section 76.1203, emphasis supplied)

- Technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems shall be provided by the system operator upon request in a timely manner. (Section 76.1205(a))

Thus, the Commission's regulations require that an MVPD's obligation to provide specifications and support for competitive devices can be constrained by the MVPD only to protect against theft of service or electronic harm to the network. These regulations were modeled after the device deregulation provisions that applied to the original AT&T telephone network and are particularly appropriate as applied to an AT&T MVPD network of comparable national scope. Thus they should define the conditions that should apply to the merged company if the merger is to go forward.

Facing a new, national DBS / IPTV market controlled by a single MVPD provider, the FCC solution must be: access to the same specifications and security technology that apply to the operator's proprietary leased devices. As TiVo sets forth above, this must include secure device access to program streams, subscriber access to full channel lineups, subscriber access to the MVPD's Video on Demand offers, and a certification/licensing process that is limited to assuring compliance with security and reception requirements, consistent with Sections 76.1201, 1203 & 1205, and not impeding features and functionality that would competitively differentiate unaffiliated retail devices.

**Conclusion**

For the reasons discussed herein, TiVo urges the Commission, if it decides to approve the merger of the leading DBS MVPD and the leading IPTV MVPD, to require that the merged company comply meaningfully and effectively with existing law, including Section 629's obligation to support commercial competitive devices, as discussed above.

Respectfully submitted,

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