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Before the Senate Subcommittee on Communications, Technology, and the Internet

Hearing On: "Reauthorization of the Satellite Television Extension and Localism Act"

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Good afternoon, Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. My name is Tom Rogers and I am the President and Chief Executive Officer for TiVo Inc. TiVo developed the first commercially available DVR and is the leading provider of competitive retail Set-Top Boxes with over 4 million subscribers worldwide, including approximately 1 million US retail subscribers.

I appreciate the invitation to testify before you today to discuss whether the current law appropriately protects and promotes a video market that is responsive to consumer demands and expectations. Fundamentally, the Satellite Television Extension and Localism Act and the predecessor legislation, are about competition. The Act has given consumers choice in how they access multichannel programming. Competition and consumer choice should be the hallmark of any satellite reauthorization.

Extraneous provisions that actually undermine consumer choice and competition have no place in STELA reauthorization legislation. For this reason, TiVo opposes the legislation recently reported out of the House Communications and Technology Subcommittee which includes language that would undermine consumers' ability to purchase their own Set-Top Box to watch their cable channels. We urge this Committee to reject this anti-consumer provision.

There is a long established policy of allowing consumers to bring their own device that defines the features and experience they want to use with their network. History has shown time and again that when devices are untethered from the network and consumers have choice, innovation is unleashed. We need no better examples of this than the smart phone, the tablet, and the laptop. Consumers have device choice in most of the industries that meet their communications needs.

The one glaring exception is in the multichannel video sector. Ninety-nine percent of multichannel video provider customers use operator-supplied Set-Top Box equipment. While the cost of consumer electronics are consistently decreasing, the price charged to consumers to lease Set-Top Box equipment is consistently increasing. These are not the hallmarks of a competitive marketplace. More choice is needed and with more choice comes innovation and lower prices. A retail market allows for such choice, innovation, and ultimately lower pricing. TiVo has used the access to cable signals afforded by CableCARD to provide consumers with the option to purchase a product with features and functionality not provided by their cable operator. TiVo's latest Set-Top Box, called Roamio, is the only way for consumers to get their broadcast, cable, video-on-demand, and Internet-delivered content (such as Netflix, Amazon, Hulu Plus, YouTube) together in one user interface that enables the consumer to search across all of content offered through each of these services. TiVo's Roamio product has been heralded in the press as "the Holy Grail of Set-Top Boxes" (Wall Street Journal), "a big step up for cable TV subscribers" (TechHive), "the ultimate cable box,"[1] and "the best TV viewing experience that money can buy."[2]

TiVo stands for innovation. We are the innovators in multichannel video. TiVo not only was the first company to introduce the Digital Video Recorder, it was the first to make services like Amazon video rentals available on the television. TiVo also pioneered the ability to transfer cable television shows from a DVR to computers and mobile devices, and the integration of traditional television and over-the-top content into a seamless integrated user interface. No Set-Top Box (other than TiVo) is listed in CNET's top 20 most innovative consumer electronic products of the decade.[3] Nobody proclaims their love of a cable box. But they often do for TiVo.

Our retail products have pushed multichannel operators to improve their products and we continue to offer consumers features available only on our devices. I am not here to criticize cable, quite the contrary. TiVo is working with cable operators to offer their customers the best television experience possible. Many cable operators have told us how our retail business has hugely benefitted them because TiVo's retail devices have features and functionality that consumers want to pay for. TiVo's ability to provide choice and innovation to both retail consumers and operators depends on having access to the cable signals. Without access to the same channels as an operator-supplied box, a retail box cannot provide a real alternative to a consumer.

The provision slipped into STELA in the House bill would repeal the pro-competitive requirement that operators use the same security standard in their boxes as they make available for retail and jeopardize the ability of retail devices to access all cable programming channels. Common reliance on the same security standard is a principle that the Federal Communications Commission ("FCC") has repeatedly found is a necessary component for a

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[1] http://www.theverge.com/2013/8/20/4638390/tivo-roamio-pro-review

[2] http://venturebeat.com/2013/08/20/three-thumbs-up-for-the-new-tivo-roamio-dvrs/

[3] http://reviews.cnet.com/8301-18438_7-10413195-82.html

retail market for Set-Top Boxes to emerge. Seeking its repeal is at odds with cable's generally pro-competitive policy approach. Cable originally provided competition to broadcast networks, then to data and telephone networks, and did not oppose the original STELA legislation that enabled satellite competition to cable.

In 1996 Congress, led by former Representative – now Senator – Markey had the wisdom to include in the landmark Telecommunications Act a provision to unlock the devices through which cable subscribers get their channels. The concept was simple - consumers should have the ability to purchase a navigation device or Set-Top Box at retail and not have to rely on renting a box from their cable provider. This provision was intended to do for the multichannel video device market what the Carterfone decision 45 years ago did for the telephone industry and what the Congress is currently doing for consumers with wireless devices. When consumers have choice, innovation flourishes because manufacturers have to compete on features and functionality to entice consumers to choose its products.

To implement this section, Section 629 of the 1996 Act, the FCC urged cable operators to reach agreement with the consumer electronics industry. Cable operators came forward with a standard CableCARD interface for national access by competitive entrant devices but did not promise to rely on this technology in their own devices. The FCC accepted this offer *provided* that cable operators (1) make CableCARDs available by July 1, 2000, and (2) rely on the CableCARD interface in their own newly fielded devices by January 1, 2005. The FCC determined that only by requiring "common reliance" by retail devices and operator-leased devices on the same security technology would retail devices receive the support necessary to attain the goals of Section 629.

The first CableCARD-reliant products – televisions with CableCARD slots – came to market in 2003 – 2004 but in the absence of common reliance received poor or nonexistent support from cable operators as documented in FCC and court decisions.[4] That lack of support finally led the FCC to implement common reliance on the same security technology (also known as the "integration ban") as of July 1, 2007. By this time, CableCARD televisions were disappearing from the market due to lack of cable operator support. But, the emergence of High Definition Television and the impending digital transition encouraged TiVo and others to begin selling HD CableCARD DVRs.

Because retail CableCARD devices were still being disadvantaged by cable operators,[5] the FCC in 2010 adopted rules to strengthen its CableCARD regulations to deal directly with

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[4] *See, e.g., Charter Communications v. FCC,* 440 F.3d 31, 40-44 & n.10 (D.C. Cir. 2006); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report and Order ¶ 39 & n.162 (Mar. 17, 2005)

[5] *See, e.g.,* Federal Communications Commission, Connecting America: The National Broadband Plan ("National Broadband Plan") § 4.2 at 52 ("[C]onsumers who buy retail set-top boxes can encounter more installation and support costs and hassles than those who lease set-top boxes from their cable operators.")

certain cable operators' evasion of CableCARD requirements, by providing for consumer self-installation of CableCARDs, access to switched digital programming, and ending economic discrimination against competitive products.[6] While CableCARD success has been hobbled by a lack of support from certain cable providers and a refusal to allow retail devices to have access to two-way services like Video On Demand, CableCARD is a fully realized solution that provides consumers today with a choice of using a better alternative to an operator-supplied box.

The history of implementation of Section 629 shows that if Congress wants to promote choice and innovation, retail devices must have the same access to signals as operator-supplied devices. Allowing cable operators to treat the boxes they lease to subscribers differently than retail devices undermines retail choice and competition.

Even with CableCARD, certain cable operators have treated their own leased boxes differently and implemented switched digital video ("SDV") technology that denied retail devices direct access to numerous cable channels. SDV uses the two-way cable infrastructure for upstream signaling to request a channel be sent to the set-top box similar to video-on-demand. However, retail boxes have been prohibited from using the upstream capability of the cable network and are thus unable to receive SDV signals directly. Users of retail devices in SDV signals have thus been forced to use operator-provided equipment (so-called "tuning adapters") to enable their retail box to receive SDV signals, an approach antithetical to the goal of providing consumers with the choice to not use operator-provided equipment and still receive their cable channels.

That CableCARD is a flawed solution for retail is not new news. I am not here to defend the status quo. The issue confronting the Committee is how to ***improve*** the national standard that has allowed for retail competition, not how to repeal it.

There is an existing policy objective of ensuring that retail devices have access to cable signals so that competitive retail products can be created with innovative features and functionality. Without a uniform standard for accessing signals, a retail market cannot exist. TiVo would be happy to move to a new standard by which it can access cable signals. Legislation is not necessary to do that. All that is required is for a handful of companies to work cooperatively on a next generation standard under the supervision of the FCC that is non-burdensome and works for operators and retail devices. Repealing the existing uniform standard policy without putting a new standard in place will undermine competition, increase costs for consumers using retail devices, and eliminate any incentive for the industry to help develop a successor solution for retail devices.[7]

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[6] *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Report and Order and Order on Reconsideration*, 25 FCC Rcd 14657 ¶ 5, 27 (2010) .

[7] The NCTA claims that CableCARD increases the cost of a set-top box by $56 citing an "estimate cited by the FCC" but this figure is based on data from 2008 or earlier – before common reliance and mass production lowered CableCARD costs. *See In the Matter of James Cable, LLC, RCN Corporation, WideOpenWest Finance, LLC Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* CSR-7216-Z, CSR-7113-Z, CSR-

Congress needs to solve for the policy objective rather than undermining the existing policy in the name of lifting an industry burden that applies equally to retail devices and from which TiVo also wants to move on to a successor standard. The multichannel video industry is confronting its own IP transition. Now is the time to unleash innovation and give consumers the benefits of choice and competition in video devices like they have Internet, telephone and wireless devices.

The NCTA has been characterizing the repeal of the integration ban as a minor change and claiming that they still have to support retail CableCARD products.[8] Again, allowing operator-supplied boxes to use a different security standard than retail boxes results in a tilted playing field that undermines retail choice and competition. Moreover, the NCTA and some of its members are simultaneously taking the position at the FCC that there are no rules requiring them to provide or support CableCARDs to retail devices (and the FCC should not reinstate any rules unintentionally vacated by the DC Circuit Court of Appeals in a decision, *EchoStar v. FCC,* that did not even address the CableCARD rules.)[9]

7139-Z, Memorandum Opinion and Order, 23 FCC Rcd. 10592 (2008) at **3, n.30. In the intervening 6 years, we believe that the unit cost of a CableCARD, when ordered in volume, has likely come down to about $10. The additional cost of the CableCARD interface for the set-top box, including additional software, has likely come down to about $2. The NCTA similarly estimates that the costs attributable to the integration ban exceed $1 billion without providing any support for this estimate. Whatever the cost of CableCARD, however, they pale in comparison to the over $7 billion per year that consumers pay to lease equipment from cable operators. This translates to approximately $50 billion in equipment lease revenue during the period of time that the NCTA claims to have incurred $1 billion in CableCARD costs. Whatever the cost, however, there is no justification for imposing the cost on retail devices but not on operator-supplied devices. These costs will surely rise again if operator-supplied devices are not using CableCARDs as there would no longer be mass production. Putting retail boxes at a cost and technology disadvantage certainly will not fulfill the goal of Section 629 of assuring a retail market.

[8] See Letter to The Honorable Greg Walden, Chairman, and The Honorable Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology from James Assey, Executive Vice President, National Cable & Telecommunications Association dated September 18, 2013 at 2 ("repealing the integration ban will not affect the separate requirement for cable operators to make CableCARDs available to cable customers who buy a retail set top box from TiVo or others.")

[9] Opposition of Charter Communications, Inc. To Petition For Reconsideration, CSR-8740-Z, MB Docket No. 12-328 (June 3, 2013) at 3 n.6 ("*EchoStar* does not address downloadable security; what it changes is that CableCARD support is no longer required, and thus cable operators are free to rely solely on other compliant technologies…"); Comments of the National Cable & Telecommunications Association on TiVo Inc.'s Petition for Clarification or Waiver, CS Docket No. 97-80 (February 14, 2014); Comments of the National Cable & Telecommunications Association on TiVo Inc.'s

This means that if the integration ban is eliminated, and if the FCC agrees with NCTA's position, there will be **no requirement** for cable operators use CableCARDs themselves and **no requirement** to supply CableCARDs to new retail devices. Indeed, **no requirement** for cable operators to even support existing retail CableCARD devices. Cable operators would be free to use new security technology but leave retail devices using legacy technology that they will have little incentive to support, keep current with new technology developments, or control costs. Would anyone reasonably expect any consumer to purchase a retail set top box for the express purpose of replacing their cable-supplied Set-Top Box if there was no assurance that their cable operator would actually support that retail box? Retail devices have to be treated the same, in terms of access to programming and support, as operator-supplied devices for consumers to have a real choice and for the effects of competition to take hold.

In support of its position that no current rules and no next generation standard are needed to guarantee that retail devices have access to cable signals, the NCTA has tried to portray cable apps on Xbox or Roku as evidence of the emergence of a retail set top box market. While there has been some experimentation with apps on third party devices in the last couple of years, these experiments only serve to confirm that a successor security standard is essential. None of these apps <u>guarantee</u> that a consumer can purchase a retail device to (a) receive <u>all</u> 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 lowest-common denominator approach supplied by their cable provider; and (e) work with more than one provider.[10] CableCARD does this for scheduled programming but it is clear that core MVPD services are moving on to IP technologies instead. Real device competition requires a successor solution in which consumers can have confidence that any retail devices they purchase for the purpose of receiving the cable programming to which they subscribe will be supported and will deliver their cable programming channels.

The removal of the AT&T U-Verse app on X-Box last December confirms that apps provide no such assurance to consumers. AT&T U-verse had advertised its app on X-Box as an inducement for customers to sign-up for its service.[11] Then it abruptly

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Petition for Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (September 16, 2013).

[10] Imagine buying an iPhone and then learning if you move to another community it no longer works because your local service provider won't support it. It’s the same with these app experiments. They don’t work across operators. Why would someone buy a Samsung TV that works today with Charter in Los Angeles knowing that if they move to Atlanta Cox won’t support it? Retail choice requires national portability. CableCARD does this today and any successor standard must likewise be nationally portable.

[11] http://www.prnewswire.com/news-releases/att-extends-tv-watching-to-more-devices-with-launch-of-u-verse-tv-on-xbox-360-104699739.html

announced that it would terminate support for its app on the Xbox 360 service.[12] The point is, these apps and other solutions come and go, and are not a reliable alternative to what is available on a competitive Set-Top Box where consumers are guaranteed access to all of their cable programming.

The video market is at a critical juncture with video about to undergo an IP transition. Now is the time to seize the opportunity to foster a next generation standard for accessing television signals. 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.

This Committee can play a strong role on this important pro-competition and consumer choice issue by supporting a process that puts in place a more efficient market solution worked out between the industries. I respectfully urge you to support innovation and consumer choice and resist including any provisions in the STELA reauthorization bill that would undermine video device competition.

[12] http://www.multichannel.com/distribution/att-u-verse-tv-drop-support-xbox-360-december-31/146904