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Before the Committee on Energy and Commerce Subcommittee on Communications and Technology

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

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Good morning Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. My name is Matthew Zinn and I am the Senior Vice President, General Counsel, Secretary, and Chief Privacy Officer for TiVo Inc. TiVo developed the first commercially available DVR and is the leading provider of competitive retail STBs with over 4 million subscribers worldwide, including approximately 1 million US retail subscribers.

I appreciate the invitation to testify before you today. Ordinarily TiVo would not be giving its opinion on legislation to authorize the regulatory structure and compulsory licenses governing the satellite industry. Our business has little to do with STELA. I am part of this panel only because of a completely unrelated provision that was slipped in to the STELA reauthorization legislation pushed by a cable lobbying group to eliminate choice in how consumers watch cable programming.

I am not here to criticize cable but certain interests within the cable industry are trying to undermine competition and choice. The provision slipped into STELA would repeal the pro-competitive requirement that operators use the same security standard in their boxes as they make available for retail. Common reliance on the same security standard is a principle that the Federal Communications Commission has repeatedly found is a necessary component for a 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, cable then provided competition to data and telephone networks, and cable did not oppose the original STELA legislation that enabled satellite competition to cable.

This provision is also an aberration in terms of how all comparable industries are treated. Consumers should be able to use whatever device they choose to access video programming just like they can use whatever computer, telephone or cell phone they want to utilize the Internet or wireless networks.

In 1996 this Committee 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. Consumers should be able to use whatever device they choose to access multichannel video programming just like they can use whatever computer, telephone or cell phone they want to utilize the Internet or wireless networks.

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.[1] 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,[2] the FCC in 2010 adopted rules to strengthen its CableCARD regulations to deal directly with 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.[3] While CableCARD success has been hobbled

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[1] *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)

[2] *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.")

[3] *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) .

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.

Just as consumers are finally enjoying TiVo Roamio, a competitive retail product that critics are calling "the best TV viewing experience that money can buy,"[4] the National Cable & Telecommunications Association is seeking to freeze out retail competition. The provision inserted into STELA would repeal the requirement that cable operators use the same security standard in their boxes as they make available for retail boxes and allow operators to lock out competitive devices, by – as they did before the "integration ban" became effective – offering superior access to programming and functions to their own devices, and inferior and faulty access to competitive devices. This can include not only renewed discrimination against existing CableCARD-reliant devices, but also unequal implementation of new, IP-based technologies.

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.[5] The reality is much different. **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.)[6]

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

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

[5] 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.")

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

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 spend $200, $400, or $600 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?

Until common reliance became the rule and cable operators began relying on CableCARDs themselves, the technology defied Moore's Law – it remained needlessly expensive, while similar technologies became cheaper, faster, and more reliable. Only common reliance has brought the cost down and brought a moderate level of support for retail devices. An end to common reliance would freeze this progress on CableCARDs, allow cable operators to exclude CableCARDs from future product plans, increase costs for consumers using retail devices, and eliminate any incentive for the industry to help develop a successor solution for retail devices.[7]

History has shown time and again that when devices are untethered from the network, innovation is unleashed. We need no better examples of this than the smart phone, the tablet, the laptop, and smart televisions, to name just a few of today's innovations. The one place where innovation has been painfully slow is in the multichannel video sector. Ninety-nine percent of multichannel video provider customers use operator-supplied STB equipment. The Committee should be focused on increasing competition and choice for consumers in this market, not undermining the limited choice they have today.

I am not here to defend the status quo. Far from it. The legislation that Congress enacted in 1996 has not achieved the results Congress intended. But poor implementation and enforcement at the FCC and lack of cooperation from certain cable operators are the culprits. That is old news. We need to look forward and figure out the best way to implement Congress' great idea today. Removing cable operators' incentive to support retail boxes through common reliance on the same security standard without putting a replacement solution in place for retail devices is not the answer and would deprive consumers of the limited choice they have today.

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

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[7] Indeed, operator-vendors may cease making new CableCARDs altogether since operators would no longer need to purchase them for their own products. Putting retail boxes at a cost and technology disadvantage certainly will not fulfill the goal of Section 629 of assuring a retail market.

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.[8] 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.[9] Then it abruptly announced that it would terminate support for its app on the Xbox 360 service.[10] 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 <u>guaranteed</u> access to all of their cable programming.

Successor technologies that can enable retail choice are available. Congress does not need to legislate. In fact, if the provision repealing the integration ban passes it will actually undermine the choice and innovation that exists today and lock consumers into accessing their cable content <u>only</u> from a box or app supplied by their multichannel video provider. This would be a step backwards for consumer choice in the multichannel video sector.

As a company whose business depends on providing consumers with superior technology, TiVo has been a leader in innovation in video devices. 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. TiVo's latest set-top box, called Roamio, 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), and "the ultimate cable box."[11] No STB (other than TiVo) is listed in CNET's top 20 most innovative

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[8] 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.

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

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

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

consumer electronic products of the decade.[12] Nobody proclaims their love of their cable box. But they often do for TiVo.

TiVo is in no position to advise the Committee on whether the Satellite compulsory license should be 5 years or permanent or whether retransmission consent provisions should be modified. Rather, I am here today to say that a provision that will undermine the retail market for set top boxes and deprive consumers of choice has no place in a STELA reauthorization bill.

This Committee has always stood for competition and choice, and for fostering free market solutions where those can suffice. 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. There are already companies who have indicated they have a desire to work with us to do just that. The amendment to Section 629 in the STELA reauthorization bill will undermine that process by taking away the incentive for the industry to work out that next generation solution. Such an amendment stands the very heritage of this Committee on its head because of the lobbying efforts of a contingent of the cable industry - an industry that has also traditionally stood for competition and consumer choice, and an industry that TiVo is helping lead the way to the next generation of television.

I respectfully urge you to support innovation and consumer choice and remove the amendment to Section 629 from the STELA reauthorization bill.

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