January 18, 2005

***VIA ECFS***

Mr. Jonathan Cody
Legal Advisor, Office of Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Communications in CS Docket 97-80

Dear Mr. Cody:

This letter is in response to the January 11, 2005 *ex parte* filling of the National Cable and Telecommunications Association (NCTA). While the CEA may well respond to NCTA's latest arguments, the NCTA, again, distorts TiVo's position on the CableCARD requirement, which warrants TiVo response on a few key points.

First, we fundamentally disagree with the NCTA's assertion that CableCARD is a priority for the cable industry. The mere fact that there is a Commission rule that requires deployment and support for CableCARDs does not make it a priority for cable. Rather, cable's priority – measured by its level of effort – is the elimination of the integration ban and complete control of navigation devices.

It is abundantly clear that cable's "support" of CableCARD fundamentally conflicts with cable's own market imperatives. Cable simply has no economic incentive to enable consumer electronics companies to provide consumers with CableCARD boxes *that are in any way competitive* with operator-supplied integrated set-top boxes.

A CableCARD box that is *competitive* with an operator-supplied integrated set-top box is the distinction that the NCTA overlooks. There is little doubt that cable would support two-way CableCARD products from manufacturers such as Samsung and LG Electronics as long as those products run OCAP and look, feel, operate and are controlled by cable operators in every way. Such products, however, do not provide consumers with a *competitive* alternative to operator-supplied integrated set-top boxes. They don't offer consumers additional innovative services and features. All they do is provide consumers with a choice between leasing a box from cable or buying essentially the very same box from Samsung or LG Electronics (plus leasing a CableCARD). In other words, you can lease a Honda Accord from your cable operator or you can buy a Honda Accord.

Cable's objective of controlling the look, feel, and operation of all set-top boxes, whether leased or purchased, was clearly articulated last week at the Smith Barney Citigroup Global Entertainment, Media & Telecommunications conference in Arizona. According to news reports, Comcast's CEO is quoted as saying: "As we move more and more into an Internet-type feeling on your television in a digital world …we know that the navigation system is critical. And whether it's video navigation with lots of screens and multiple choices ... or whether it's someday voice navigation, we want to be in control of the consumer's experience, not be using a third party."[1]

It is plain to see that this desire to monopolize the set-top rather than any concern about cost to the cable subscriber is what has precipitated the onslaught of cable lobbying on the integration ban.

We believe that Congress intended, and the integration ban is designed, to enable consumers to have a real choice of competing navigational devices. TiVo and other technology companies want to offer consumers the ability to purchase Mercedes, Fords, and Toyotas – set-top boxes that provide consumers with all of the cable operator's video programming services to which they subscribe, but have a different user interface (i.e., look and feel) and additional features, functionality and services. Specifically, we want to offer consumers the option of purchasing a competitive box that works like today's TiVo DVRs.

Further, we firmly believe that innovation and consumer choice are at stake in this proceeding. TiVo has consistently stated that it intends to create a unidirectional, Cable-Ready, high-definition DVR with CableCARD. TiVo has also consistently stated that such a product needs to have dual-tuner capability to be competitive.[2]

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[1] George Mannes "Comcast Shows Microsoft Some Muscle," January 12, 2005, http://www.thestreet.com/tech/georgemannes/10203012.html attached hereto as Exhibit A.

[2] Although TiVo was not involved in the negotiation of the Plug and Play Agreement, TiVo asked for a dual-tuner POD in the FCC rulemaking concerning that Agreement. TiVo stated that CE Manufacturers should be able to deploy devices with dual tuner functionality and stated that: "TiVo would like the Commission to require that, when a definition for a dual tuner POD is available, the MOU would permit its use by CE Manufacturers. *See* Comments of TiVo Inc., CS Docket No. 97-80; PP Docket NO. 00-67, filed March 20, 2003, at 13.

While a multistream CableCARD (i.e. dual-tuner POD) specification was developed in September 2003, no multistream CableCARDs have been produced or are scheduled to be produced until mid-2006; ironically, the very same time frame in which cable operators are required to use CableCARDs themselves. Moreover, because unidirectional products are not in cable's business interests, neither cable nor CableLabs has any intention of creating a multistream CableCARD for unidirectional products.[3]

Without a multistream CableCARD, the best companies like TiVo can do to bring a competitive offering to consumers is to try to create a device with two single-stream CableCARDs. In a good faith show of support for CableCARD, at last week's Consumer Electronics Show, TiVo announced its intention to build such a device, but TiVo has little confidence that such a product would be supported adequately by cable operators or find acceptance among cable subscribers. It would be an expensive and unwieldy device with increased hardware costs, increased customer costs resulting from the need to lease two CableCARDs, and a host of complexities resulting from the fact that dual tuner functionality was not designed to be provided by two CableCARDs.

If it was not apparent before cable's onslaught of lobbying to eliminate the integration ban, it should be plain now that requiring cable operators to use the same CableCARD security system as CE manufacturers use is the only way to give cable operators the incentive to embrace CableCARDs and ultimately enable CE manufacturers to provide consumers with competitive cable set-top boxes. TiVo urges the Commission not to make any change to the July 1, 2006 integration ban.

This letter it being provided to your office in accordance with Section 1.1206 of the Federal Communication Commission's rules.

Sincerely,

/s/ Matthew P. Zinn

Matthew P. Zinn
Vice President, General Counsel & Chief Privacy Officer

cc: Chairman Michael K. Powell
Commissioner Kathleen Abernathy
Commissioner Kevin Martin
Commissioner Michael Copps

3 NCTA's argument in its December 20, 2004 ex parte, that its delay in developing a multistream CableCARD should be discounted because the Commission did not require cable to develop a multistream CableCARD in the Plug and Play Agreement clearly demonstrates what happens when cable's market incentives are not aligned with those of CE Manufacturers. Retail availability of competitive navigation devices will never exist if all cable will do is what the FCC directs them to do. This is precisely why the Commission put the common reliance rule in place in the first place.

Commissioner Jonathan Adelstein
Jordan Goldstein
Stacy Robinson Fuller
Johanna Mikes Shelton
Daniel Gonzalez
Monica Desai
Kenneth Ferree
Deborah Klein
Rick Chessen
William Johnson
Steve Broeckaert
Mary Beth Murphy
Natalie Roisman
Alison Greenwald
John Wong
Thomas Horan

# Exhibit A

George Mannes

## Comcast Shows Microsoft Some Muscle

**By George Mannes**
**Senior Writer**
1/12/2005 9:37 AM EST
URL: http://www.thestreet.com/tech/georgemannes/10203012.html

Brian Roberts made it clear again this week: When it comes to competing with **Microsoft** (MSFT:Nasdaq) , **Comcast** (CMCSA:Nasdaq) is no **IBM** (IBM:NYSE) .

In contrast to IBM's legendary strategic misstep of ceding the onscreen personal computer experience to Microsoft, Comcast CEO Roberts reiterated Monday -- in both word and deed -- that the cable operator will jealously guard and guide the onscreen gateway to the world of advanced television and other services.

While Microsoft is a supplier of set top-box software to Comcast, Roberts' comments served to demonstrate that in the world of TV, Microsoft is just another supplicant pleading for the attention of the nation's largest operator of cable TV systems. More evidence came in the form of a newly announced transaction with the ailing TV software supplier **Liberate Technologies** (LBRT:OTC BB) .

Though a Microsoft executive doesn't see any particular danger to Microsoft from Liberate, one analyst does. "Liberate had basically fallen off the face of the earth as a competitive threat," says Josh Bernoff, principal analyst at Forrester Research. But on Monday, says Bernoff, "it suddenly became a whole lot more important."

At issue is the software enabling customers of Comcast and other cable operators to receive, and to navigate through, various advanced services.

Speaking at the Smith Barney Citigroup Global Entertainment, Media & Telecommunications conference in Arizona Monday, Roberts emphasized the importance of a navigation system -- and Comcast's efforts to keep it under its firm control.

Roberts talked about Comcast's desire to differentiate itself through its technology. He noted Comcast's partnership with Microsoft -- which resulted in the deployment of Microsoft's Foundation Edition set-top software in certain advanced cable boxes used by Comcast customers in the state of Washington -- as well as Comcast's control of a joint venture with **Gemstar-TV Guide International** (GMST:Nasdaq) to develop an interactive onscreen programming guide.

"As we move more and more into an Internet-type feeling on your television in a digital world," said Roberts, "we know that the navigation system is critical. And whether it's video navigation with lots of screens and multiple choices ... or whether it's someday voice navigation, we want to be in control of the consumer's experience, not be using a third party."

Comcast got a little more of that control Monday with the announcement that, with the newly private cable operator **Cox Communications**, it was buying the North American assets of Liberate for $82 million.

Liberate "is developing a software platform which is intended to provide cable operators with a flexible platform to add new digital cable products and applications," the companies explained Monday. "This platform will become increasingly important as digital cable products continue to evolve and interactive features become more widespread."

"Comcast is leading the way in developing and deploying new cable entertainment and communications products, and purchasing Liberate's North American assets will give us greater control over the software platform that will help drive new features that distinguish us from other providers," Comcast Executive Vice President Steve Silva said in a statement. "Liberate's technology will help us better integrate existing features -- including video on demand, digital video recorders and high-definition television -- on consumers' set-top boxes."

Ed Graczyk, director of marketing for Microsoft TV, says he believes that the Liberate deal enables Comcast to integrate Liberate's software, called middleware, with Microsoft's Foundation Edition software. Foundation Edition, says Graczyk, was designed as a core "building block" software, and gaining Liberate's assets, he says, gives Comcast an in-house development team to build on top of Foundation Edition.

"Two to three years ago, we definitely competed with Liberate," says Graczyk. "Then they imploded."

But Bernoff views the situation differently. "It's a serious threat to Microsoft, because now you have a development shop that's completely under control of Comcast," he says. "The combination of that plus Gemstar/TV Guide's program guide looks like a pretty good answer for the question of 'Where is Comcast going?'"

As for the question of where Comcast is going -- a company spokesman declined to comment for this story -- it's obvious that the company's ambitions lie far beyond the set-top box. Roberts said as much Monday in his description of what Comcast engineers were working on in the lab: "OK, what company can take this crazy world of technological innovation and change gadgets all the time, and bring entertainment and communication ... choice and control, and bring it all together for you in a seamless easy-to-use way?"

The idea was to "make the home experience one company you can call," he said. "They have all the products; they're on the cutting edge."

While Roberts never got around to naming the company, one assumes it's headquartered in Philadelphia, not Redmond.