Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
The Status of Competition in the Market	)	MB Docket No. 16-247
For the Delivery of Video Programming	)	

REPLY COMMENTS OF VERIZON

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TABLE OF CONTENTS

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	)	
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I. INTRODUCTION AND SUMMARY.

Consumers continue to enjoy the benefits of increased competition among broadcasters, Multichannel Video Programming Distributors (MVPDs), and online video services. These competing video services offer consumers more content, more sources of content, and more platforms for viewing video programming. But these competitive successes could be undermined by the rapidly rising cost of must-have video programming. Popular content is often owned by large programmers or other MVPDs who use their bargaining power to collect ever increasing sums for carriage. Competitive MVPDs, particularly those who do not own content, are forced to raise their prices, harming consumers and reducing competition. Verizon and others have frequently pointed to the principal sources of increased content costs: the broken retransmission consent regime and unreasonable programmer practices such as forced bundling of desired with undesired content.

MVPDs lack the leverage to keep in check retransmission rates for broadcast programming due to Commission rules that favor broadcasters over MVPDs in retransmission consent negotiations. Similarly, competitive MVPDs lack the bargaining power to reject

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

demands from large content owners and vertically-integrated MVPDs to carry packages of programming, leading to bloated bundles that consumers may pay for but do not want.

The Commission can preserve competitive gains that benefit consumers by pursuing policies that promote competition among video providers and increase consumer choice.[2] It should reform the current retransmission consent regime to put an end to actions that harm consumers, including ballooning rates for carriage of broadcast TV signals and multiple blackouts of broadcast programming. The Commission compiled a strong record supporting reform but declined to strengthen the existing rules. The Commission can still address abuses by examining closely the impact on competition and consumers of recent broadcaster tactics to ensure MVPDs and broadcasters conduct negotiations in good faith.

The Commission should also ensure that its program access rules remain available and useful as competitive providers offer additional choices for consumers, and it should consider expanding the rights of MVPDs to access must-have programming. Competitive video providers need reasonable access to must-have programming to field meaningful alternatives for consumers. The program access rules are instrumental in enabling existing and emerging competitive providers to obtain reasonable access to programming under the control of incumbent cable operators.

II. VIDEO PROVIDERS ARE OFFERING INNOVATIVE SERVICES THAT BENEFIT CONSUMERS.

Consumers saw increased competition in 2015 among video distributors who continued to roll out new content, create new distribution sources, and offer new options for when and on

[2] *See* Public Notice, "Media Bureau Seeks Comment on the Status of Competition in the Market for Delivery of Video Programming," 31 FCC Rcd 8796, ¶¶ 19-21 (MB 2016) (seeking information on market conditions and regulations affecting competition in the video marketplace).

what devices consumers can access video services.[3] For example, since its initial deployment in 2005, Verizon has invested billions of dollars to expand the availability of its all-fiber, Fios broadband network and to offer consumers the triple play of video, broadband, and telephone services. At the end of 2015, subscribership to Verizon's Fios video service increased to 5.8 million, a year-over-year increase of 3.2 percent.[4] Verizon ended 2015 with over 7.0 million Fios broadband customers. At the end of the third quarter of 2016, Fios video subscribers numbered 4.7 million, and broadband subscribers 5.6 million.[5]

Consumers of MVPD services can now access hundreds of linear video channels and tens of thousands of movie and TV titles on demand. Fios subscribers can choose from English-language and Spanish-language programming in traditional cable packages. Consumers who desire more control over their programming can select Verizon's innovative and consumer-friendly "Custom TV" service.[6] A Custom TV package includes a base set of national network and local broadcast station channels. Customers then select from either Custom TV/Essentials or Custom TV/Sports & More. Custom TV allows consumers to pay for those sets of channels that most interest them and avoid paying for those they do not want. Since its introduction in 2015, Custom TV has proven popular with subscribers, with more than a third of new Fios subscribers signing up for Custom TV packages.

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[3] *See* Comments of NCTA at 7-13.
[4] *See* Verizon, "4Q 2015 Investor Quarterly," at 6 (Jan. 21, 2016), *available at* http://www.verizon.com/about/investors/quarterly-reports/4q-2015-quarter-earnings-conference-call-webcast.
[5] *See* Verizon, "2016 Investor Quarterly 3Q," at 15 (Oct. 20, 2016), *available at* http://www.verizon.com/about/investors/quarterly-reports/3q-2016-quarter-earnings-conference-call-webcast. On April 1, 2016, Verizon completed the transfer of Fios video subscribers in California, Texas, and Florida to Frontier Communications. *See* Verizon, "2016 Investor Quarterly 1Q," at 16 (Apr. 21, 2016), *available at* http://www.verizon.com/about/investors/quarterly-reports/1q-2016-quarter-earnings-conference-call-webcast.
[6] For more information about Fios Custom TV, see http://www.verizon.com/home/fiostv/.

To meet the demand for video services – via both traditional cable and over-the-top platforms – broadband providers continue to increase the speeds available to consumers. During 2015, Verizon subscribers embraced faster broadband speeds for their broadband connections through Fios Quantum, which offers download speeds ranging from 50 Mbps to 500 Mbps. By the end of 2015, nearly 75 percent of Fios broadband customers subscribed to speeds of 50 Mbps or higher. These speeds easily support consumers' increasing consumption of video services, including online platforms, over multiple devices in the home.

In addition to the options available for home viewing, Fios video subscribers can use the Fios Mobile app to watch live and on-demand programming on mobile tablets and smartphones inside and outside the home. Fios Mobile subscribers can watch over 200 channels of live TV at home, including Disney, HBO, TBS, The History Channel and The NFL Network, and access over 80,000 movie and TV titles from the Fios library – all on the mobile devices of their choice. Fios video subscribers can access over 140 channels outside the home. In 2015, Verizon added to the Fios Mobile app the capability to access in-home recorded programs for subscribers with both Fios Quantum and Internet service, giving customers even more flexibility in watching their preferred video content.[7]

Also in 2015, Verizon introduced go90, an over-the-top video service that targets mobile consumers, particularly millennials, with innovative video-viewing features such as sharing content via social media. go90 features content from HBO Now, Awesomeness TV Inc., the NFL, and Vice Media Inc., among others.

[7] *See* Verizon Media Center, "Verizon Expands Fios Mobile App to Include Remote DVR Streaming," (Dec. 14, 2015), *available at* http://www.verizon.com/about/news/verizon-expands-fios-mobile-app-include-remote-dvr-streaming.

III. LARGE BROADCAST AND CABLE PROGRAMMERS ENGAGE IN PRACTICES THAT HARM CONSUMERS AND DISCOURAGE COMPETITION.

The record reflects that acquiring video content at reasonable rates is the most significant barrier that an MVPD faces in offering a competitive video programming service to consumers.[8] Several factors contribute to the rising rates for video programming carriage, principally: (1) the "helium-infused trajectory of retransmission consent fees";[9] and (2) forced bundling, the practice of packaging must-have programming with less desired programming.[10]

For more than 20 years, MVPDs have had to pay for carriage of over-the-air broadcast programming, through compulsory copyright license fees and through payments negotiated with stations opting for the retransmission consent regime.[11] MVPDs face significant difficulties when negotiating retransmission consent agreements because of the various regulatory preferences broadcasters enjoy under the statute and the Commission's rules. Broadcasters are the sole source for much of the most desired current video programming, and the Commission has heightened their advantage at the bargaining table through regulatory preferences such as the network non-duplication and syndicated exclusivity rules.

By virtue of broadcasters' market position, normal marketplace dynamics often do not function as they would when the parties have relatively equal bargaining power. For example, an MVPD cannot pursue effective alternative arrangements to carrying the broadcast programming that is the subject of the negotiations because of the broadcast station's network non-duplication and syndicated exclusivity rights. When a local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can also block carriage of

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[8] *See* Comments of NTCA–The Rural Broadband Association, at 3; Comments of ITTA at 4.
[9] Comments of ITTA at 5.
[10] *See id.*; *see also* Comments of NTCA at 5.
[11] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 5 (2011).

out-of-market stations with the same programming. An MVPD is thus generally limited to a single input for the broadcast network or syndicated programming that consumers expect to receive.

When faced with such negotiating leverage, MVPDs essentially have two choices. They can pay the higher fees demanded, resulting in skyrocketing retransmission consent fees. The results of the Commission's most recent cable rate survey confirm this trajectory, finding that the "average annual total amount paid for retransmission consent by a cable system was nearly $7.8 million in 2013 and $12.7 million in 2014, an increase of 63.2 percent" <u>in just one year</u>.[12]

The only alternative to paying the increased rates for retransmission is for MVPDs to risk exposing their customers to a loss of desired programming through a blackout. In the case of competitive MVPDs like Verizon, the risk of program disruptions is especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers.[13]

Large media conglomerates also encumber distribution rights for specific programming with demands to carry channel bundles, increasing the rates paid for distribution rights of the desired content and resulting in carriage of programming that is often of little interest to most consumers.[14] Holding sole-source rights to must-have programming can significantly strengthen the bargaining position of programmers in negotiations with an MVPD that wants to field a competitive offering, essentially forcing an MVPD to purchase bloated bundles of programming. As Verizon and other MVPDs have experienced, some undesired programming may even

[12] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*; *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, DA 16-1166, ¶ 28 (MB rel. Oct. 12, 2016).
[13] *See* Comments of ITTA at 10.
[14] *See id.* at 6-7; *see also* Comments of NTCA at 10-11.

include channels that the programmer has not yet launched.[15] The result is that MVPDs and consumers pay for channels they do not want and do not – or cannot – watch, and MVPDs have limited ability to offer targeted programming that better addresses consumers' needs and preferences, such as Verizon's Custom TV packages.[16]

IV. THE COMMISSION SHOULD VIGOROUSLY ENFORCE GOOD FAITH NEGOTIATING PRACTICES FOR RETRANSMISSION CONSENT.

The current retransmission consent regime is broken and needs reform. Consumers continue to suffer harm through increases in pay-TV rates resulting from escalating retransmission consent fees and increasing instances of threatened and actual blackouts of broadcast programming. Congress should enact needed reforms by overhauling the statutory scheme in Section 325 of the Communications Act. But the Commission could also adopt additional protections for MVPDs and consumers as recommended by Verizon and other MVPDs.[17] With direction from Congress to reexamine its totality of the circumstances test for retransmission consent negotiations, the Commission should again consider bolstering its rules to restore some balance to broadcaster-MVPD negotiations and continuity to consumer access to broadcast station programming.[18]

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15 *See* Comments of ITTA at 5.

16 *Cf.* D. Frankel, "Verizon's McAdam: We would sell skinny bundles 'exclusively' if programming deals would allow it," Fierce Cable (Oct. 11, 2016) available at http://www.fiercecable.com/cable/verizon-s-mcadam-we-would-sell-skinny-bundles-exclusively-if-programming-deals-would-allow-it.

17 *See, e.g.*, Comments of Verizon, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-216 (Dec. 1, 2015); Comments of the American Television Alliance, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-216 (Dec. 1, 2015).

18 *See* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (directing Commission to initiate rulemaking to reexamine its totality of the circumstances test); *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 (2015).

Although it has decided not to adopt new rules for retransmission consent at this time,[19] the Commission must address the ballooning fees for, and increasing blackouts of, broadcast signals through robust enforcement of the existing rules for good faith negotiations. The Commission has broad authority to prohibit a broadcast station from "failing to negotiate in good faith."[20] The Commission should apply its existing rules to ensure broadcasters and MVPDs negotiate on relatively equal footing, thereby discouraging stalemates and reducing the likelihood of consumer harm in the event negotiations are unsuccessful.

For example, the Commission should consider finding a lack of good faith negotiations when a broadcaster demands that an MVPD carry a bundle of affiliated programming channels to obtain retransmission consent for the broadcast station signal. These demands usually do not include an economically viable alternative for carrying just the broadcast station signal, resulting in increased costs for retransmission consent generally, increased costs to consumers, and prolonged bargaining between the parties. Similarly, the Commission should find a broadcaster is not negotiating in good faith if it expands a programming blackout to customers of an MVPD's affiliated Internet access services. These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market that does not receive the broadcast station.

The Commission can address these abuses under the existing rules by finding that in these cases the broadcaster is simply not negotiating retransmission consent for the broadcast

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[19] *See* FCC Chairman Tom Wheeler, "An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules," FCC Blog (July 14, 2016) ("*Wheeler Blog*"), *available at* https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules.

[20] 47 U.S.C. § 325(b)(3)(C)(ii).

station signal,[21] or is "acting in a manner that unreasonably delays retransmission consent negotiations."[22] The Commission should also consider whether such negotiating tactics reflect a lack of good faith under the "totality of the circumstances" test, particularly when a broadcaster simply does not grant an MVPD the opportunity to obtain the broadcast station programming at reasonable rates and conditions.[23] In short, the Commission should make good on Chairman Wheeler's commitment not to "turn a blind eye to disputes" and to ensure that broadcasters "take seriously their responsibility to consumers, who expect to watch their preferred broadcast programming without interruption."[24]

Retransmission consent negotiations have grown more complicated since the Commission adopted the current negotiating framework. Working within the existing rules demands that the Commission recognize that tactics such as forced bundling and blocking Internet access impede reaching fair carriage agreements as much as "refus[ing] … to meet and negotiate … at reasonable times and locations."[25]

V. THE COMMISSION SHOULD ENSURE THE REASONABLE AVAILABILTY OF VALUABLE PROGRAMMING TO COMPETITIVE MVPDS.

The program access protections in Section 628 of the Communications Act (47 U.S.C. § 548) have proven invaluable in ensuring that competitive video providers gain access to the programming they need – much of which fell under the control of cable incumbents at a much less competitive time – in order to offer truly alternative services to consumers. Protecting access to such programming, especially must-have content like regional sports networks (RSNs),

[21] 47 C.F.R. § 76.65(b)(1)(i).
[22] *Id.* § 76.65(b)(1)(iii).
[23] *See* 47 C.F.R. § 76.65(b)(2).
[24] *Wheeler Blog*.
[25] 47 C.F.R. § 76.65(b)(1)(iii).

continues to be important for facilitating today's growing competition among video programming distributors.[26]

Vertically-integrated cable companies may have a strategic incentive to deprive competitors of access to popular and must-have programming on reasonable terms and conditions by discriminating in pricing of affiliated content or depriving competitors of access to such content, for example, during the pendency of a program access complaint.[27] As the Commission has noted, an "integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete."[28]

Cable programmers can use strategic withholding, for example, to leverage better contract terms in tough negotiations or to cause irreparable harm to competitors. Discrimination among MVPDs in the terms or conditions for carriage of desired programming through bundling with other less desired channels may make it difficult for competitive video providers to offer smaller and more tailored video packages, and force consumers to pay for large packages that may include programming they do not want to watch.[29] The program access rules help address such practices used by programmers to make it more difficult for MVPDs to offer differentiated packages of programming to consumers, such as niche service offerings like Verizon's Custom TV packs.

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[26] *See* Comments of ITTA at 6-7.

[27] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶¶ 26, 71 n.258 (2010) ("*Program Access Order").*

[28] *Id.* ¶ 26 (quoting *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 117 (2006)).

[29] *See* Comments of NTCA at 8-11.

Cable-affiliated programmers can also harm competitive MVPDs by withdrawing access to programming that the MVPD distributes, because either a cable-affiliated network enters a new exclusive deal with its affiliate or a cable company acquires control of a formerly independent RSN. Even if a competitive MVPD ultimately prevails in a program access complaint, it could still suffer from the temporary (and potentially long-term) loss of access to RSN programming that is "both non-replicable and highly valued by consumers."[30] The Commission has consistently recognized that withholding cable-affiliated RSN programming significantly hinders competitors and thereby "harm[s] consumers by limiting competition in the video distribution market"[31] and by "imped[ing] the ability of an MVPD to provide broadband services" in the market.[32] These findings strongly support adopting rebuttable presumptions that an exclusive contract for a cable-affiliated RSN is an "unfair act" under Section 628(b) (whether it is terrestrially-delivered or satellite-delivered) and that complainants challenging an exclusive contract for a cable-affiliated RSN are entitled to a standstill of the existing contract for that RSN.[33]

The Commission must effectively implement and enforce the program access rules to help address and curb these abuses by cable-affiliated programmers and to facilitate additional choices that benefit consumers. The Commission should consider expanding the rules to ensure competitive MVPDs have access to must-have programming such as RSNs.

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[30] *Program Access Order*, ¶ 52.

[31] *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 32 & n.159 (2011).

[32] *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Order, 26 FCC Rcd 13145, ¶ 38 (MB 2011).

[33] *See Revision of the Commission's Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18, 05-192; Further Notice of Proposed Rulemaking in MB Docket No. 12-68; and Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605, ¶¶ 74-79 (2012).

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