Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	RM-11728
The Commission's Rules Governing	)	
Practices of Video Programming Vendors	)	

COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY.

As a competitive provider of video distribution services, Verizon seeks to distinguish itself from the cable incumbents and satellite operators against whom it competes and to offer packages that provide more choices and competitive prices for consumers. In its Petition, Mediacom highlights various content vendor practices that make more difficult these goals of enhancing consumer choice and keeping down prices for pay television services.

Costs for video programming keep rising and constitute a significant part of the cost of providing service for Multichannel Video Programming Distributors (MVPDs) like Verizon and Mediacom. Programming vendors' practices – including their unwillingness to enter alternative arrangements for distribution or payment – contribute significantly to higher costs for consumers and to MVPDs' inability to craft more flexible programming packages that have the potential to better meet consumers' needs. Programmers continue to push larger and larger bundles of channels on MVPDs and their customers, with demands to carry much of this programming on widely subscribed-to tiers regardless of the popularity, consumer demand, or actual viewership for particular channels. These practices result in higher prices and less flexibility for MVPDs

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

who may only want to purchase one or more of the most popular or must-have channels and not the entire suite of programming that the programmer is selling. While competitive MVPDs must continue to offer large and varied packages of programming to subscribers, many of the programmers' practices make it difficult to put together more targeted packages that may appeal to certain consumer segments. Moreover, many of these programmers refuse to consider alternative arrangements – such as basing the amount a distributor pays for a particular channel on the extent to which subscribers actually watch the channel – and instead continue with their practice of raising prices and insisting on wide carriage of less popular channels in order for a distributor to get access on reasonable terms to a programmer's popular content.

Video programmers, including broadcasters, have also shown a willingness to engage in other anti-consumer practices in order to increase the leverage on MVPDs with whom they are negotiating and drive up prices for consumers. For example, some programmers have blocked a provider's Internet access customers from accessing content otherwise available for free and unrestricted on the Internet at times when the affiliated broadcaster and MVPD have yet to reach agreement for distribution on the MVPD's video service. Such tactics may also result in purchase of larger and more expensive bundles of programming and make it more difficult for MVPDs to craft flexible or tailored packages for their customers. Consumers end up bearing the brunt of the harm because they must purchase programming that they may not want – and at higher prices. Under the circumstances highlighted in Mediacom's Petition, it is appropriate for the Commission to take a look at this part of the video distribution marketplace and to consider whether there is a need to take steps to address practices by programming vendors that harm competition and consumer choice and ultimately raise prices.

Verizon supports efforts to make must-have programming available on reasonable terms so consumers can enjoy reasonable rates for MVPD services and more choices among programming and providers. Within the scope of its existing authority, the Commission can take certain actions to improve the availability of video programing on reasonable terms, including:

- Strengthening the list of practices deemed not negotiating in good faith under Section 325(b) of the Communications Act, or an unfair practice under Section 628, to include blocking of Internet content, depending upon which broadcaster or programmer is responsible for the blackout.
- Adopting policies using its authority under Section 325(b) to curb practices that drive up consumer prices. Such could include a mandatory standstill, interim carriage and cooling off period for a reasonable period of time, taking effect when retransmission consent contracts expire, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service.
- Enforcing the program access protections in Section 628 against withholding of programming and discriminatory practices, activities or arrangements to ensure incumbent cable companies that own or control programming do not deprive competitors of access to critical programming.

These modest steps could help curb some of the worst abuses by video programmers and help to facilitate MVPDs' ability to offer more attractive and affordable video services to consumers.

II. AS A COMPETITIVE VIDEO PROGRAMMING DISTRIBUTOR, VERIZON NEEDS REASONABLE ACCESS TO MUST-HAVE PROGRAMMING TO COMPETE IN THE VIDEO PROGRAMMING MARKETPLACE.

Verizon began the rollout of its all-fiber FiOS video network in 2004, and it continues to invest in and deploy this network. Verizon's fiber-optic network is available to approximately 70 percent of the premises in its wireline footprint, or more than 19 million premises.[2] Subscribership to Verizon's FiOS TV service has increased to over 5.4 million, representing a 35% penetration rate among households to which FiOS TV is available. In addition, Verizon FiOS has over 6 million broadband customers, a 40% penetration rate.[3]

Verizon is a competitive MVPD in all areas where it has deployed its fiber-optic network to deliver FiOS TV. In turn, Verizon faces competition from the incumbent cable operators in these areas that offer video, broadband and voice services as well as two national Direct Broadcast Satellite (DBS) providers. Consumers can also access video programming from online video providers, such as Netflix, Hulu, iTunes, Amazon Video, Apple TV, Roku, YouTube, and others, as well as cable operators who are offering consumers Internet-based applications to watch video content.[4]

Verizon and most of its cable and DBS competitors now offer hundreds of linear video channels and tens of thousands of movie and TV titles on demand. At the same time, it remains true that much of the most valuable programming – including must-have programming such as

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[2] *See* Verizon, *2014 Investor Quarterly: Second Quarter*, at 6 (July 22, 2014), *available at* http://www.verizon.com/about/investors/quarterly-reports/2q-2014-quarter-earnings-conference-call-webcast/.

[3] Verizon's current FiOS Internet offerings range from 25 Mbps to 500 Mbps downstream, with most customers now subscribing to the FiOS Quantum plans that offer download speeds of 50 Mbps or more. In July 2014, Verizon began upgrading FiOS Internet service so new and existing customers receive upload speeds that match their download speeds, at no extra charge. *See* Verizon News Release, *Verizon's FiOS Customers To Receive Upload Speeds That Match Their Current Download, Setting a New Standard for Fast Internet Service and Sharing Content* (July 21, 2014), *available at* http://www.verizon.com/about/news/verizons-fios-customers-receive-upload-speeds-match-their-current-download-setting-new-0/.

[4] *See, e.g.*, Consumer Electronics Ass'n News Release, "Change Is In the Air: U.S. Households Viewing TV Programming only via the Internet are Poised to Surpass those Viewing only via Antenna, Finds New CEA Study," (June 5, 2014) (nearly half of U.S. TV viewing households watched video on portable computer or smartphone in the last year), *available at* http://www.ce.org/News/News-Releases/Press-Releases/2014/OTA-Study_060514.aspx.

regional sports programming – is still within the control of the cable incumbents, broadcasters, and a small number of other big programmers.[5] For example, last year, the Los Angeles Dodgers organization announced creation of a new regional sports network funded principally by Time Warner Cable to carry Dodgers baseball games starting this year; Time Warner Cable was to be the first distributor and responsible for other programming.[6]

In addition to the hundreds of channels on MVPD systems, consumers have access to competing platforms on which they can view the same video programming. The availability of these platforms allows consumers to pick one that suits their viewing preferences, from a typical scheduled MVPD platform to an unstructured and time-shifted on-line platform. In a marketplace with so many options for consumers, MVPDs must put together an attractive and competitive package of video programming by gaining access to must-have programming that consumers can otherwise reach through one, two or more competitors, and to do so at a reasonable price. The practices Mediacom highlights can make this process challenging for MVPDs, as some programmers seek to continuously increase costs and add more and more programming to widely-subscribed-to tiers.[7]

For its FiOS programming, Verizon has pursued efforts to reach programming arrangements that allow us to better and more cost-effectively, tailor our video offerings to what consumers actually want. For example, Verizon has started to implement more innovative programming arrangements primarily with independent and small programmers that base

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[5] *See*, *e.g.*, D. Thompson, "Mad About the Cost of TV? Blame Sports," *The Atlantic* (Apr. 2, 2013), *available at* http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575/; *see also*, *e.g.*, *Verizon Tel. Cos.*, *et al. v. Madison Square Garden, L.P.*, *et al.*, 26 FCC Rcd 13145 (MB), *rev. denied*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011).

[6] *See* D. Rovell, "Dodgers Launching Sports TV Network," ESPN LA (Jan. 29, 2013), *available at* http://espn.go.com/los-angeles/mlb/story/_/id/8889859/los-angeles-dodgers-launching-regional-sports-tv-network-sportsnet-la. *See generally Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, ¶¶ 342-47 (2013) (*Fifteenth Video Competition Report*).

[7] *See* Mediacom Communications Corp., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed July 21, 2014) (*Petition*).

payments for distribution on what consumers are actually watching, rather purchasing an entire suite of channels. Yet, many programmers continue their status quo approach that ultimately raises costs and adds programing potentially of less interest to many consumers.

III. MEDIACOM'S PETITION HIGHLIGHTS MANY OF THE ROADBLOCKS COMPETITVE MVPDS FACE IN GAINING REASONABLE ACCESS TO MUST-HAVE PROGRAMMING.

Other than the costs of network deployment, the cost of content acquisition is the most significant cost that an MVPD incurs in providing a video programming distribution service to its subscribers. Several factors noted in Mediacom's Petition contribute to the high cost of programming, including: (1) must-have programming is generally available only from a single source, and there are now only a handful of those sources for all of the most popular programming; (2) programming owners frequently "package" must-have programming with other programming increasing the overall cost to the MVPD's subscribers; and (3) various governmental preferences give program owners substantial leverage in the negotiation process for some must-have programming.

First, large programmers, many affiliated with broadcasters or cable incumbents, remain the source of much of the most popular programming, including must-have programming such as regional sports and local broadcast channels. The video programming available to consumers has become increasingly sophisticated and diversified for specific viewer preferences such that certain programming is essential to a competitive video service. An MVPD must be able to package sufficient programming to present an attractive service for the households in its coverage area. Yet, as Mediacom points out, despite the hundreds of programming channels available in the marketplace, almost all of the most popular programming, indeed, almost all programming in the United States, is sourced from just a half dozen program vendors, most of whom control both some broadcast network programming as well as cable channel programming.[8] This concentration of sources gives programming vendors substantial negotiating power over MVPDs seeking to offer a package of programming that will appeal to consumers.

Sports programming in particular is highly desired and significantly expensive in the current video marketplace.[9] An increasing number of regional sports networks (RSNs), affiliated with the same handful of program producers and/or incumbent cable operators, control access to both professional and collegiate sports programming and demand substantial per-subscriber rates for distribution on non-affiliated MPVD networks.[10] Given the importance of local sports programming to many consumers in the area, and the huge popularity of live sports shows generally,[11] an MVPD is often forced to meet these demands in order to put together a competitive bundle of programming to attract and keep subscribers.[12] Yet, some RSNs demand high per-subscriber fees, refusing distribution agreements that would allow the distributor to limit this programming to those subscribers who are interested in watching it. As a result, many cable companies must decline to carry the channel if it means imposing high fees on <u>all</u> subscribers. Notably, Time Warner Cable was asking such high per-subscriber rate for

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[8] *See id.*, at 2; *cf. Fifteenth Video Competition Report*, ¶ 329 (seven companies, six of which are also owners of broadcast stations or a movie studio, account for 95% of television viewing hours in the United States).

[9] *See* D. Thompson, "Mad About the Cost of TV? Blame Sports," *supra* note 5 ("Sports accounts for half of the programming costs of TV"); *Fifteenth Video Competition Report,* ¶ 343 ("broadcast and cable networks . . . pay increasingly large amounts to sports teams for television rights").

[10] *See*, *e.g.*, R. Glier, "Examining the pros and cons of the SEC Network," USA Today (May 31, 2014)(examining market for RSNs in context of new Southeastern Conference sports network owned by ESPN), *available at* http://www.usatoday.com/story/sports/ncaaf/sec/2014/05/31/sec-network-espn-comcast-direct-tv/9812745/.

[11] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶¶ 52-53 (2010) (*Program Access Rules Order*).

[12] *See*, *e.g.*, *Verizon Tel. Cos. v. Madison Square Garden*, 26 FCC Rcd 13145, ¶ 29 ("given the non-replicable nature of the content on the MSG HD and MSG+ HD, Verizon has no ability to formulate a viable competitive response that would allow Verizon to compete for the many subscribers that highly value these [sports] networks").

distribution of the Sports Net LA, which carried the Los Angeles Dodgers' games, that many cable companies simply declined to carry the network.[13]

Also, the Commission has recognized that certain incumbent cable companies – who remain some of the few sources for must-have programming – have a strategic incentive to enter into exclusive contracts with their affiliates to deprive competitors of access to critical programming, for example, during the pendency of a program access complaint.[14] Such strategic withholding can be used to leverage better contract terms in tough negotiations because there are no alternative sources. Even if ultimately successful in a program access complaint, a competitive MVPD could still suffer competitive harm as a result of temporary loss of access to programming that is "both non-replicable and highly valued by consumers."[15]

Second, negotiating distribution rights for specific programming channels can be encumbered by demands to carry other channels, which can increase the rates paid for distribution rights of cable programming and result in tiers carrying programming that may be of little interest to most consumers. However, holding rights to must-have programming can heighten the bargaining strength of programmers in negotiations with an MVPD that wants to field a competitive offering.[16] For example, a program owner may require, directly or indirectly through the economics of pricing, the purchase of a bundle of programming that includes the desired channel or channels, as well as various other less desirable channels that the MVPD

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[13] *See, e.g.*, J. Flint, "The fight over Dodgers between Time Warner Cable, DirecTV is par for the course," LA Times (Apr. 4, 2014) (Time Warner asking such high per-subscriber rate for LA Dodgers network that many cable companies decline to carry the channel), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dodgers-time-warner-cable-directv-20140404-story.html#page=1. Ultimately, Time Warner agreed to allow a local broadcast station to carry the final six games of the Dodgers' regular season. *See* M. James, "Time Warner to Televise Final Six Dodgers Games on Local TV," LA Times (Sept. 15, 2014), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-to-televise-final-six-dodgers-games-on-local-tv-20140915-story.html.

[14] *See Program Access Rules Order*, ¶ 71 n.258; *cf. The Regional Sports Network Marketplace*, Report, 27 FCC Rcd 154, ¶18 (2012) (noting FCC finding that vertical integration of cable distribution platforms with programming increases incentive of program owners to discriminate or foreclose against competitive MVPDs.)

[15] *Program Access Rules Order*, ¶ 52.

[16] *See Petition*, at 7-13.

might not otherwise choose to pursue. While offering a large and diverse array of programming is generally important for competitive MVPDs, "bundle inflation" limits their discretion in selecting what they feel is the best lineup or package of channels for their subscribers. Attempting to select only the most popular channels, rather than the entire suite, is frequently met with uneconomic pricing for the selected channels.[17] And alternative pricing arrangements – such as Verizon's proposal to base costs on viewership rather than the MVPD's subscriber base – are usually not viewed with favor. MVPDs can lose even more discretion when the program owner demands placement of the programming in certain basic service tiers.

Third, owners and distributors of broadcast network programming have additional advantages heightened by various regulatory preferences that distort the marketplace for video programming. For the past 20-plus years, MVPDs have had to pay for carriage of over-the-air broadcast programming, either through the compulsory license fees for those stations that exercise "must carry" rights or through payments negotiated through the retransmission consent regime.[18] In other proceedings, Verizon has detailed the perils of negotiating retransmission consent agreements arising from the fact that the Commission's rules implementing the retransmission consent regime give broadcasters a number of powerful distribution preferences, including, for example, the network non-duplication and syndicated exclusivity rules.[19] Other such preferences include guaranteed placement in the basic tier[20] and protection from deleting a station during the sweeps period even if the retransmission consent agreement has expired.[21] MVPDs hold no analogous bargaining rights.

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[17] *See id.*, at 8-9.
[18] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 58 (2014) (*Retrans. Order & FNPRM*).
[19] *See* Comments of Verizon, MB Docket No. 10-71 (filed June 26, 2014).
[20] *See* 47 C.F.R. § 76.56(d).
[21] *See* 47 C.F.R. § 76.1601 note 1.

By virtue of these regulatory preferences, normal marketplace dynamics often do not function as they would absent the regulations. 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. Even if the local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can still block carriage of out-of-market stations with the same programming.[22] Thus, an MVPD is generally limited to a single input for the network or syndicated programming that consumers expect to receive.

As has been noted multiple times in the last few years, some broadcasters have relied on the preferences afforded under the current regime to demand increased payment for must-have broadcast programming and to threaten to pull – or actually pull – their signals if their demands are not met. When faced with such demands, MVPDs essentially have two choices. They can pay the higher fees demanded. The result, as Chairman Wheeler recently recognized, is that the costs of retransmission consent agreements have "skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years."[23] SNL Kagan has projected that retransmission consent fees will reach $7.15 billion by 2018.[24] Or, in the alternative, MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of desired programming (often during periods when they are most in demand, such as during popular sporting events).

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22 *Retrans. Order & FNPRM*, ¶ 41 note 140.
23 Tom Wheeler, FCC Chairman, "Protecting Television Consumers by Protecting Competition" (Mar. 6, 2014), *available at* http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.
24 *See* "SNL Kagan Releases Updated Industry Retransmission Fees Projections" (Nov. 22, 2013), *available at* http://www.fiercecable.com/press-releases/snl-kagan-releases-updated-industry-retransmission-fee-projections.

Mediacom details how the outcome of failed negotiations can result in loss of programming, which can severely impact an MPVD.[25] The occurrence of programming disruptions keeps escalating: there were reported more than 120 broadcaster blackouts in 2013, up from just a dozen in 2010.[26] As Mediacom also notes, the impact of these threats of service disruption have recently been heightened by programmers also blocking Internet access to their programming for the MVPD's customers when those customers seek to access it over the Internet,[27] spreading the impact to consumers who may not even subscribe to the MVPD's video service. Broadcasters are not alone in using this tactic; this year there have been instances where a cable programmer blacked out programming for an MVPD's subscribers during negotiations for distribution of non-broadcast channel programming.[28] In the case of competitive MVPDs like Verizon, the risks of such program disruptions are especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers, if the MVPD does not accede to the broadcast station's or other programmer's demands to ensure continued availability of desired programming.

IV. THE COMMISSION SHOULD CONSIDER STEPS TO IMPROVE REASONABLE ACCESS TO VIDEO PROGRAMMING.

The Commission can take several steps to improve MVPDs' access to video programming. For example, the Commission has proposed to eliminate the network non-duplication and syndicated exclusivity preferences.[29] Elimination of these rules would be an

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[25] *See Petition*, at 13.
[26] *See* Mike Reynolds, "American Television Alliance: 2013 Sets Record for Retrans Blackouts," Multichannel News (Dec. 31, 2013), *available at* http://www.multichannel.com/distribution/american-television-alliance-2013-sets-record-retrans-blackouts/147429.
[27] *See, e.g.*, Letter from Marc Lawrence-Apfelbaum, Time Warner Cable Inc. to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed Oct. 17, 2013) (detailing blackout of CBS owned and operated stations against Time Warner Cable customers in New York, Dallas, Los Angeles and other areas).
[28] *See, e.g.*, M. Farrell, "Viacom Blocks Online Access to CableOne Subs," Multichannel News (Apr. 30, 2014), *available at* http://www.multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283.
[29] *See Retrans. Order & FPRM*, ¶¶ 55 *et seq.*

important step in the right direction to fix the artificial imbalance in negotiating strengths resulting from the retransmission consent regime. By providing MVPDs with an opportunity to seek alternative sources for programming blacked-out by a broadcast station, the Commission would help protect consumers against service disruptions and increased prices.

In addition, the Commission can take steps to protect consumers pursuant to its statutory authority in Section 325(b) of the Act "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[30] First, in keeping with its obligation to prohibit a broadcast station from "failing to negotiate in good faith,"[31] the Commission should amend its rules (47 C.F.R. § 76.65(b)) to strengthen the existing set of obligations defining good faith negotiations. For example, a party's refusal to respond in a timely and reasonable manner to a proposal on relevant issues should constitute bad faith. And, while informing consumers of potential disputes is warranted, running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not and should be viewed as not negotiating in good faith. The Commission should also consider finding lack of good faith negotiations when a broadcaster expands a programming blackout to customers of an MVPD's affiliated Internet access services.[32] These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market, and, therefore, such action must be designed only to harm another set of customers who may then place even more pressure on the MVPD to accede to the broadcaster's demands.

The Commission also has the authority to protect consumers by ensuring "that the rates for the basic [cable] service tier are reasonable."[33] Accordingly, it could adopt specific

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[30] 47 U.S.C. § 325(b)(3)(A).
[31] *Id.* § 325(b)(3)(C)(ii).
[32] *See Petition*, at 17.
[33] 47 U.S.C. § 325(b)(3)(A).

procedures to reduce the likelihood that negotiations result in a disruption of service to consumers. For example, the Commission should implement a mandatory standstill, interim carriage and cooling off period, taking effect when contracts expire for a reasonable period of time, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service. By taking these modest steps under Section 325(b), the Commission can prevent consumers from experiencing widespread disruptions in service and increased cable rates.

The program access protections in Section 628 of the Communications Act (47 U.S.C. § 548) provide another source for the Commission to protect consumers by ensuring that competitive MVPDs have access to the programming their customers demand – much of which remains under the control of cable incumbents – in order to offer a meaningfully competitive alternative MVPD service to consumers. As the Commission has already recognized, protecting access to such programming, especially must-have content like regional sports network programming, continues to be important for facilitating today's growing competition among video programming distributors.[34] Therefore, as a general matter, the Commission should be vigilant in protecting reasonable access to programing held by incumbent cable operators, which will in turn preserve for consumers the ability to select from an array of competitive video programming distributors.

In terms of specifics, there have been changes in the dynamics of the video marketplace that the Commission should consider incorporating into its evaluation of program access complaints based on discrimination. For example, much of the same programming delivered via satellite or by terrestrial means is also delivered over the Internet. If a programming vendor withheld content otherwise available on the Internet from an MVPD's customers, that could be

[34] *See Program Access Rules Order*, ¶¶ 52-55.

deemed an “unfair practice” under the Commission’s program access rules.[35] The Commission should consider these and other proposals that could help keep costs for must-have programming reasonable and increase flexibility in consumer choices.

V. CONCLUSION.

The Commission should find that the targeted actions described above would increase competition in marketplace for video programming, and should consider implementing such actions in the context of a new rulemaking.

Respectfully submitted,

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[35] *See* 47 C.F.R. §§ 76.1001; 76.1002.