

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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In the Matter of	)	
	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 04-227
Competition in the Market for the	)	
Delivery of Video Programming	)	

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**COMMENTS OF VERIZON ON THE ELEVENTH NOTICE OF INQUIRY  
REGARDING COMPETITION IN THE DELIVERY OF VIDEO PROGRAMMING**

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# COMMENTS OF VERIZON ON THE ELEVENTH NOTICE OF INQUIRY REGARDING COMPETITION IN THE DELIVERY OF VIDEO PROGRAMMING<sup>1</sup>

## Introduction and Summary

The Commission can help ensure greater competition both in the broadband market that cable companies continue to dominate *and* in the cable companies' core video market by establishing a deregulatory national broadband policy and by reforming certain aspects of current video regulation. In its *Notice of Inquiry*, the Commission asks specifically, "As the major telephone companies build out their fiber-optic networks to the home, to what extent will they be in a position to offer either DSL or other video services directly to residential subscribers?"<sup>2</sup> Verizon is proud to answer that, with the deployment of fiber to the premises ("FTTP"), Verizon is poised to provide a competitive alternative to traditional cable video offerings, just as it competes today with cable's broadband offerings.<sup>3</sup>

Verizon has announced the location of its first three FTTP deployments – in Keller, Texas and other parts of the Dallas-Fort Worth metroplex; Huntington Beach and other parts of Southern California; and Tampa and other parts of Hillsborough County, Florida. Verizon expects to deploy FTTP in parts of nine states, passing one million premises, by the end of 2004. Using this new FTTP network, Verizon plans to provide video services, voice service and very-

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<sup>1</sup> The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., which are identified in Attachment A hereto.

<sup>2</sup> Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, FCC 04-136, ¶ 72 (FCC rel. June 17, 2004) ("*Notice of Inquiry*").

<sup>3</sup> Commission statistics indicate that cable modem service accounts for about nearly two thirds of mass-market broadband lines, and fully 85% of mass-market lines offering data transmission at more than 200 kbps in both directions. See Industry Analysis & Technology Division Report, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Tables 3 & 4 (FCC Wireline Competition Bureau June 2004).

high-speed broadband Internet access.<sup>4</sup> Significantly, Verizon's all-optical FTTP pathway will enable Verizon to provide video offerings in direct competition with traditional cable companies, and Verizon is seeking local cable television franchises for its video offerings that arguably fall within Title VI of the Communications Act.

It is vitally important, however, that the Commission reform its rules to treat broadband provided by telephone companies like broadband provided by cable companies. The elimination of asymmetrical rules imposed only on telephone companies is critical to the widespread deployment of the next-generation infrastructure needed to provide both improved broadband *and video offerings*. In the short term, the Commission can help remove regulatory barriers to fiber deployment (and hence to increased competition in video offerings) by treating FTTP broadband like cable modem service *at least on an interim basis* until the pending rulemaking proceedings have been completed.

As discussed below, the Commission should also encourage the reform of state and local rules to streamline the franchising process and the repeal of so-called "level playing field" statutes that deter entry by video competitors. In addition, vertically integrated video programmers should be barred from favoring their own affiliates by restricting access to programming for unaffiliated distributors, regardless of whether the programming is distributed terrestrially or via satellite. Finally, the Commission should support the use of open technical standards that do not favor any particular technology or industry group. In particular, the use of

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<sup>4</sup> The high-speed Internet access services offered over this network will provide speeds of up to 30 Mbps – approximately 10 to 20 times faster than current-generation DSL or cable modem services. See Verizon News Release, *Verizon, in Historic First, Begins Large-Scale Rollout of Advanced Fiber-Optic Technology With Keller, Texas, Deployment; Announces Plans for Offering New Services* (May 19, 2004), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85137>.

cable-centric technical standards inhibits the deployment of competitive video offerings via FTTP and satellite systems. These regulatory reforms will create an environment conducive to the deployment of additional broadband *and* video offerings.

### **Discussion**

#### **I. REMOVING FEDERAL REGULATORY IMPEDIMENTS TO THE DEPLOYMENT OF BROADBAND WOULD FACILITATE INCREASED COMPETITION IN VIDEO OFFERINGS**

Reforming the regulatory treatment of broadband in general, and broadband provided via FTTP in particular, is critical to the widespread deployment of broadband infrastructure on the most efficient basis – and this broadband infrastructure will enable the provision of competitive video offerings. Broadly speaking, two critical sets of issues need to be addressed: (1) The Commission should clarify that broadband infrastructure does not have to be offered on an unbundled basis, and (2) it should adopt a comprehensive, deregulatory national broadband policy. In the short term, the Commission should grant Verizon’s pending petitions for interim regulatory relief for FTTP broadband. Verizon has discussed these issues in considerable detail in other dockets<sup>5</sup> and will therefore address these topics in summary fashion here.

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<sup>5</sup> See, e.g., *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises and Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*, WC Docket No. 04-242 (FCC filed June 28, 2004) (seeking interim relief from *Computer Inquiries* rules and Title II regulation of broadband provided via FTTP); see generally Ex Parte Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (FCC filed Jan. 7, 2004); Comments of Verizon on the Fourth Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54 (FCC filed May 10, 2004); Response of Verizon to Petitions for Reconsideration at 5-30, *Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al.

**A. The Commission Should Clarify That Broadband Facilities Need Not Be Offered on an Unbundled Basis**

In the *Triennial Review Order*,<sup>6</sup> the Commission based its decision not to require unbundling of broadband facilities used to serve mass-market customers on the principle that, “with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements,” both incumbent local exchange carriers (“LECs”) and competing carriers will have strong incentives to deploy new facilities and services so that, in the end, “consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services.”<sup>7</sup> The D.C. Circuit specifically approved this rationale on appeal.<sup>8</sup> Regrettably, the rules adopted in that proceeding do not provide the intended certainty that carriers will be able to benefit from their broadband investments. Three aspects of the *Triennial Review Order* are in particular need of clarification.

*First*, while the order provides that unbundling is not required for certain broadband facilities under section 251 of the Communications Act, a different paragraph of the order seems to construe section 271 as imposing independent unbundling obligations.<sup>9</sup> Yet the Commission itself found that applying unbundling obligations to “next-generation network elements would

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(FCC filed Nov. 6, 2003); Comments of Verizon, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33 et al. (FCC filed May 3, 2002).

<sup>6</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17141, ¶ 272 (2003) (“*Triennial Review Order*”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), petitions for cert. pending, Nos. 04-12, 04-15, and 04-18 (U.S. filed June 30, 2004).

<sup>7</sup> *Id.* at 17141-42, ¶ 272.

<sup>8</sup> See *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004), petitions for cert. pending, Nos. 04-12, 04-15, and 04-18 (U.S. filed June 30, 2004) (“*USTA II*”).

<sup>9</sup> Compare *Triennial Review Order*, 18 FCC Rcd at 16984, ¶ 4, 17142, ¶ 273, 17149, ¶ 288, 17321, ¶ 537, with *id.* at 17384-86, ¶¶ 653-655.

blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706 [of the Telecommunication Act of 1996].”<sup>10</sup>

The Commission should therefore forbear from applying any unbundling requirements for broadband that section 271 might be construed to impose.<sup>11</sup> Any unbundling requirement now would require a significant redesign of integrated fiber network architectures. It would also entail the development of costly new systems and operations practices to manage access at these new access points. All of this would impose tremendous costs, delay, and uncertainty on new broadband investments by Bell Operating Companies, without imposing similar burdens on any of their cable modem and other competitors.

*Second*, the Commission should establish a bright-line rule to distinguish between mass-market and enterprise customers for purposes of its broadband unbundling regulations. The Commission set up different rules for these two groups of customers but did not provide a clear basis for determining which customers belong to which group. What is needed is an objective, bright-line national standard for determining when customers are and are not in the mass market for these purposes, such as the 48-numbers standard that has been proposed by Verizon. Using telephone numbers as the criterion clearly distinguishes small and medium-size businesses from larger enterprise business customers, which have more sophisticated requirements and which, in general, already have access to high-speed connectivity because it is more efficient to deploy

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<sup>10</sup> *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288.

<sup>11</sup> *Cf. Verizon Tel. Cos. v. FCC*, No. 03-1396, slip op. at 10 (D.C. Cir. July 13, 2004) (admonishing the Commission to “grant Verizon’s petition for forbearance [from the broadband unbundling requirements of section 271] or to provide a reasoned explanation for denying it”).

fiber directly to the enterprise location.<sup>12</sup> The Commission should adopt rules that place small and medium-sized businesses – which cable companies have been aggressively targeting with their cable modem offerings<sup>13</sup> – squarely in the mass market. Doing so would encourage carriers to deploy fiber to these customers as part of a generalized deployment, and this is desirable not only because these customers arguably stand to benefit the most from fiber-to-the-premises deployment but also because overall efficiency in the deployment of next-generation networks will increase if carriers cover *entire* neighborhoods with the new technology, including the local businesses interspersed throughout those neighborhoods.

*Third*, while the *Triennial Review Order* provides that, as a general rule, fiber-to-the-premises loops to mass-market customers are not subject to an unbundling obligation, it suggests that those same customers may be subject to unbundling obligations if they are located in multi-unit premises. The Commission should make clear that any multi-unit premises is considered part of the mass market for purposes of FTTP unbundling if the tenants occupying the multi-unit premises are primarily residential, *and*, to the extent that a multi-unit premises cannot be determined to be primarily residential, that any customer in a multi-unit premises who is part of the mass market continues to be classified as a mass-market customer. It would be inconsistent

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<sup>12</sup> Another benefit to using the number of telephone numbers a customer uses, rather than other criteria, to distinguish mass-market customers from enterprise-market customers is that the resulting classification will remain steady and easy to apply even as technology evolves. Using bandwidth as a criterion directly would be counterproductive, since one important goal of deploying fiber to the premises is to *increase* the bandwidth available to mass-market customers. Similarly, given the rapid evolution of broadband technologies, any attempt to create a market definition based on the technologies used by different customers would likely require the Commission to constantly re-visit the definition and to entertain frequent waivers.

<sup>13</sup> See *Broadband Competition: Recent Developments, March 2004*, at 3-4 (summarizing various recent studies of broadband service for small and medium-sized businesses), attachment to Ex Parte Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (FCC filed Mar. 26, 2004).

with the Commission's goal of promoting broadband deployment to the mass market to treat the smaller businesses and residents that occupy multi-unit premises differently from those who occupy single-unit premises.

These three clarifications of the *Triennial Review Order* will go far toward removing regulatory barriers to broadband deployment and competition in the delivery of video programming.

**B. The Commission Should Adopt a Comprehensive, Deregulatory National Broadband Policy**

In addition to clarifying the unbundling rules that will apply to the underlying network, it is critical that the Commission establish a comprehensive, deregulatory policy for the broadband services delivered over these networks. The Commission has cited with apparent approval statements by cable companies that their continued deployment of cable modem service could be delayed or even halted if they were subjected to common-carrier regulations.<sup>14</sup> The much more onerous service unbundling, pricing, tariffing, accounting, and reporting requirements faced by local telephone companies in their provision of broadband have a correspondingly greater potential to affect investment – and this is likely to have a negative impact not only on competitive broadband offerings but also on competitive video offerings provided over the same broadband networks. Given the vibrant and increasing intermodal competition that characterizes the mass-market broadband today, continued imposition of dominant-carrier regulation on telephone companies in their provision of broadband is not only unnecessary but counterproductive. The Commission should therefore declare local telephone companies to be

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<sup>14</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4826, ¶ 47 & n.176 (2002) (“*Cable Modem Declaratory Ruling*”), *aff'd in part and vacated in part on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

non-dominant in their provision of broadband and should lift the regulations that tend to inhibit the major investments needed to increase broadband deployment. To do so is fully consistent with Congress's instruction, in section 706, to use "regulatory forbearance" to "remove barriers to infrastructure investment" in broadband.

Classifying all broadband services, including stand-alone broadband transmission services, as private-carriage arrangements under Title I of the Communications Act is the most straightforward way to establish a new regulatory regime for these competitive services. Two principal rationales have emerged for classifying services under Title I. The service may be classified as an information service that merely *uses* telecommunications. Or the service may be offered on privately negotiated terms, with the carrier retaining the option not to offer the service indiscriminately to the public at large. The Commission has taken this private-carriage approach in other cases under competitive conditions similar to those now prevailing in broadband, and the results have been upheld in the courts.<sup>15</sup>

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<sup>15</sup> See, e.g., Memorandum Opinion and Order, *AT&T Submarine Sys., Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 13 FCC Rcd 21585, 21587-91, ¶¶ 6-11 (1998) (submarine cables); Memorandum Opinion and Order on Reconsideration, *General Tel. Co. of the Southwest Request for Declaratory Ruling*, 3 FCC Rcd 6778, ¶¶ 7-11 (1988) (for-profit microwave systems interconnected with public switched telephone network); Memorandum Opinion and Order, *NorLight Request for Declaratory Ruling*, 2 FCC Rcd 5167, ¶¶ 12-19 (1987) (interstate fiber optic systems); Declaratory Ruling, *Licensing Under Title III of the Communications Act of 1934, as Amended, of Non-Common Carrier Transmit/Receive Earth Stations Operating With the Intelsat Global Communications Satellite System*, 8 FCC Rcd 1387, 1389-90, ¶¶ 11-19 (1993) (satellite services); Order and Authorization, *Application of Loral/Qualcomm P'shp, L.P. for Authority to Construct, Launch, and Operate Globalstar, a Low Earth Orbit Satellite System To Provide Mobile Satellite Services in the 1610-1626.5 MHz/2483.5-2500 MHz Bands*, 10 FCC Rcd 2333, ¶ 22 (1995) (same).

The Commission has several pending rulemaking proceedings to address broadband regulatory issues. In those proceedings, it should reach two key decisions regarding telephone-company broadband that it has *already* reached for cable modem service:

*First*, as suggested above, the Commission should clarify that broadband providers are free to offer transmission on a private-carriage basis under Title I, rather than a common-carriage basis under Title II.<sup>16</sup> Although the court in *Brand X Internet Services v. FCC*<sup>17</sup> found that cable modem service offered to end users includes a telecommunications service, the court expressly left untouched the Commission's finding in its *Cable Modem Declaratory Ruling* that cable companies may offer transmission to ISPs on a private-carriage basis.<sup>18</sup>

*Second*, the Commission should forbear from imposing such Title II common-carrier requirements as might otherwise apply to broadband. In particular, the Commission should eliminate the requirement that carriers must file tariffs, forbear from any requirement under section 201 that rates for broadband services be justified in terms of the cost of providing service, and waive or forbear from the *Computer II/III* rules for broadband services provided by telephone companies just as it has for cable companies. The Commission should allow local telephone companies the freedom to experiment with non-traditional pricing methods (such as revenue sharing or pricing based on the number of clicks or "eyeballs" delivered to customers) that are already being used by cable modem companies and on the Internet. *Brand X* did not restrict the Commission's authority to decline to impose common-carrier regulations that are

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<sup>16</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4830-31, ¶ 55 (noting that, to the extent that cable providers "elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service").

<sup>17</sup> *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

<sup>18</sup> *Id.* at 1132 n.14 (declining to consider "the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis").

unnecessary and counterproductive.<sup>19</sup> Indeed, the *City of Portland* case, upon which the Ninth Circuit based its *Brand X* decision, expressly recognized “that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a).”<sup>20</sup>

In the *Brand X* case, the disparity in treatment of DSL and cable modem service under the existing regulatory scheme prevented the Commission from defending its cable modem classification on the simple and valid ground that competition in the broadband market makes common-carrier regulation of cable modem service unnecessary. The regulatory reforms discussed above will go far toward eliminating the disparate regulatory treatment of broadband provided by cable companies and broadband provided by telephone companies, and this, in turn, will actually improve the Commission’s chances of ultimately prevailing in its *Brand X* appeal. Furthermore, ending the historic asymmetric regulation of broadband provided by telephone companies will promote the continued development of the broadband market on a competitive basis, with market forces and consumer choices, rather than regulatory fiat, determining winners and losers in the marketplace.

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<sup>19</sup> *See, e.g., id.* at 1138 (Thomas, J., concurring) (“Naturally, the FCC may choose to forbear from enforcing these [common carrier] regulations if it determines they are not necessary to promote competition or protect consumers.”).

<sup>20</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000); *see also id.* at 879-80 (“Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters.”).

**C. The Commission Should Grant Verizon's Petitions for Interim Regulatory Relief for FTTP Broadband Pending Completion of the Ongoing Broadband Rulemakings**

In the short term, the Commission can help remove regulatory barriers to fiber deployment (and hence to increased competition in video offerings) by treating FTTP broadband like cable modem service *at least on an interim basis* until the pending rulemaking proceedings have been completed. Although the Commission has not yet specifically addressed the appropriate regulatory treatment for broadband services in the context of the FTTP architecture, it has, in the *Cable Modem Declaratory Ruling*, addressed the appropriate regulatory treatment for broadband services offered by a company that offers high-speed Internet access together with cable video and voice services over its network. The same rules currently applicable to cable modem service providers should apply to their competitors using FTTP, at least while the Commission completes its consideration of the appropriate regulatory framework for broadband in general. To obtain this interim relief, Verizon has filed petitions for declaratory relief or interim waiver or forbearance, which are the subject of WC Docket No. 04-242 (*see supra* note 5). The Commission should act promptly to provide the requested interim relief, since Verizon expects to begin making its first FTTP broadband offering available on a commercial basis in a matter of weeks.

By improving the regulatory environment for telephone-company broadband, the Commission will encourage the deployment of next-generation networks that will stimulate competition in video offerings as well as broadband.

**II. THE FCC SHOULD ENCOURAGE STATE AND LOCAL AUTHORITIES TO REFORM THEIR RULES TO ELIMINATE OBSTACLES TO THE RAPID DEPLOYMENT OF COMPETITIVE VIDEO OFFERINGS**

Consumers would indubitably benefit greatly from increased choices and lower prices for video services, and Verizon and other fiber overbuilders are eager to provide these competitive video offerings. Reforming various state and local rules and practices associated with the franchising process will promote the introduction of added competition to video offerings of incumbent cable companies.

**A. A Streamlined Franchising Process Is Needed**

One way in which the Commission can advance competition in the delivery of video programming is to encourage states and local authorities to adopt a more streamlined process for granting cable franchises. In some cases, the process simply takes too long – inertia, inattentiveness or unresponsiveness can and often do prolong the franchising process excessively. In other cases, the delay in the franchising process is created by statutory formalities that impose waiting periods before a franchise may be granted. Massachusetts is one example where franchising procedures contain procedural hurdles and public notice periods that not only inhibit creative negotiations but also make it impossible to obtain a franchise in less than six months *even if the regulators and all parties agree on all the terms of the franchise*. Obviously, disagreement over terms can lead to even longer delays. Consumers should not have to wait for months to enjoy the benefits of new, competitive video offerings. The Commission should encourage the adoption of streamlined procedures and should encourage local franchising authorities to respond to new entrants' proposals *quickly*.

**B. State “Level Playing Field” Statutes Create Barriers to Entry**

The Commission should also urge states to review and revise their so-called “level playing field” (“LPF”) statutes. At least 11 states have these statutes which can inhibit competitive video entry by requiring new entrants to undertake franchising obligations at least as burdensome as those imposed on the incumbent. The negative effects of the statutes on competition may not at first be apparent because, as a general rule, creating a level economic playing field makes eminent sense.<sup>21</sup> The problem is that, as an economic matter, the ostensibly equal burdens required under these laws in fact impose a heavier burden on new entrants than on incumbents, and thus create barriers to entry. As economists Thomas W. Hazlett and George S. Ford explain in a perceptive paper on this issue, “[l]abeling nominally symmetric obligations borne by entrants and incumbents as ‘equal’ burdens ignores the greater likelihood that the residual profits anticipated by the entrant will be insufficient to cover fixed costs, relative to the incumbent that entered without rivals.”<sup>22</sup> Or, to put it another way, “[s]ince the LPF law mandates the matching of any franchise-related capital expenditures, the general result of the LPF law is that incumbents and franchise authorities can force entrants to incur sunk costs considerably in excess of what free market conditions would imply.”<sup>23</sup> This makes it less attractive for new players to enter the market in the first place – a fact confirmed by a cable trade

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<sup>21</sup> Regulators ordinarily cannot distinguish accurately between more and less efficient suppliers, so by imposing asymmetric regulations on competitors, they are likely to promote inefficient outcomes in the marketplace. That is one reason why Verizon supports, for example, bringing to an end the asymmetric regulation of cable modem services and telephone-company broadband services, which are direct competitors.

<sup>22</sup> Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the ‘Level Playing Field’ in Cable TV Franchising Statutes*, 3 *Business & Politics* 21, 24 (2001).

<sup>23</sup> *Id.* at 25.

publication's headline describing the introduction of LPF legislation in California: "California Anti-Competition Bill Pending."<sup>24</sup>

Even when state franchising statutes impose somewhat narrower obligations on new entrants to match incumbents' investment – for example, build-out requirements – the effect can be to deter entry. This is particularly true when the build-out requirements are related in some way to the historical boundaries of political subdivisions that may have no correlation either with the location of a telephone company's wire centers or with the pattern of current population growth. Suppose that a telephone company wishes to deploy FTTP around a wire center that serves multiple political subdivisions, each of which may be served by a different incumbent cable company. If, as a condition of obtaining the necessary franchises, the new entrant is obliged to commit to offer service to all or substantially all of the locations in *each* of the multiple political subdivisions, then the necessary capital expenditure may become astronomical, the deployment may become uneconomical, and, as a result, *no* consumers in those subdivisions will have the benefit of additional choice in video services.

**C. Onerous Customer Service Requirements Can Discourage Deployment of Competitive Video Services**

The Commission can also advance competition in the delivery of video programming by encouraging marketplace solutions to customer service needs. In a competitive environment, when consumers have choice, customer satisfaction will be the basis by which video service providers attract and retain customers. The Commission itself has cited with approval reports

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<sup>24</sup> *California Anti-competition Bill Pending*, Cable TV Franchising, Aug. 31, 1998, at 2.

from the General Accounting Office indicating that increased competition “generally leads to lower cable rates *and improved quality and service* from the incumbent cable operator.”<sup>25</sup>

Ironically, by *requiring* excessively demanding customer service standards on new entrants, local franchising authorities may *impede* the deployment of competitive video offerings. In the one-cable-company world, it is perhaps understandable that local authorities are eager to beef up their customer service standards, particularly where incumbent cable operators have a less than stellar customer service record. But the proliferation of idiosyncratic requirements across different localities creates a very expensive problem for companies attempting to build and operate a network that stretches across the country. Because it is by far more efficient to operate uniform systems, procedures, and technology throughout the network, each local franchising authority’s peculiar customer service items must, as a practical matter, be implemented on a national scale, so that common systems, procedures, and technologies can be maintained on the network nationwide.

Instead of each locality developing its own customer service wish list, the Commission should encourage the elimination of customer service obligations to both *enable* a competitive market for video services and to enable that competitive market to find marketplace solutions to customer service. At the very least, the localities should be encouraged to adopt the customer service standards that the Commission has promulgated in 47 C.F.R. § 76.309. The Commission’s standards represent a readily available standard suitable for nationwide application, and it would be efficient for both local franchising authorities and companies that

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<sup>25</sup> *Notice of Inquiry* ¶ 9 n.7 (emphasis added) (citing U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* at 9-11, GAO-04-8 (Oct. 2003)).

provide video services to adopt those standards rather than to create a patchwork of potentially contradictory requirements.

### **III. THE “TERRESTRIAL LOOPHOLE” IN THE COMMISSION’S PROGRAM ACCESS RULES HAMPERS EFFECTIVE COMPETITION IN VIDEO SERVICES**

Incumbent cable companies have long enjoyed close corporate ties to producers of video programming. Thanks to this vertical integration, programmers affiliated with cable companies either refused to sell their programming to competing distributors like satellite carriers or sold it on discriminatory terms calculated to suppress competition. To put a stop to these discriminatory practices, the 1992 Cable Act contained program access rules that prohibit exclusive contracts between cable companies and affiliated programmers, absent express FCC approval. These rules require that any cable network programming that is at least in part owned by a cable operator and delivered by satellite must be made available to competitors.<sup>26</sup> Exclusive contracts for satellite-delivered programming are possible only when the programmer and the cable operator are not affiliated.

Although these rules were initially set to sunset in 2002, the Commission delayed the sunset date for five years.<sup>27</sup> The FCC found that “marketplace evidence . . . tends to confirm that, where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators. The evidence suggests that the ability to foreclose vertically integrated programming is especially significant in the regional programming market, which may not be covered by the rules if the programming is distributed

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<sup>26</sup> See 47 U.S.C. § 548(c)(2); 47 C.F.R. § 76.1002(c).

<sup>27</sup> See Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, 17 FCC Rcd 12124, 12161, ¶ 80 (2002).

terrestrially.”<sup>28</sup> Nevertheless, although the Commission noted that “terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market,” the Commission in 2002 declined to extend the program access rules to cover terrestrially distributed programming.<sup>29</sup> This loophole remains an issue today, as the Commission’s most recent annual report on video competition makes clear.<sup>30</sup>

Without access to much terrestrially delivered programming – especially “must have” items like regional sports and news programming – new entrants are at a serious disadvantage when competing against incumbent cable companies. Certainly, access to programming is one key factor that overbuilders must consider when planning where to deploy their networks. In order to promote more competitive video offerings, the Commission should extend the program access rules so as to close the loophole for terrestrially delivered programming or, at the very least, should encourage Congress to do so.

#### **IV. THE COMMISSION SHOULD SUPPORT THE USE OF OPEN STANDARDS THAT DO NOT FAVOR ANY PARTICULAR TECHNOLOGY OR INDUSTRY GROUP**

FTTP represents an exciting source of new, facilities-based competition to cable companies, but the technical standards and rules that have been developed by and for cable companies leave Verizon and other FTTP-based competitors at a disadvantage. The question whether to adopt some of these technical standards and rules is currently pending before the

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<sup>28</sup> *Id.* at 12151, ¶ 59 (footnote omitted).

<sup>29</sup> *Id.* at 12158, ¶ 73.

<sup>30</sup> Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* 19 FCC Rcd 1606, 1695, ¶ 149 (2004).

Commission in the “plug and play” proceeding<sup>31</sup> and the “broadcast flag” proceedings.<sup>32</sup> The Commission should adopt technology-neutral standards rather than cable-centric ones to ensure that FTTP and other modes of video services delivery can emerge and compete with traditional cable technology. The issues presented by some of these technical standards are highlighted below.

**DOCSIS.** The Data Over Cable Service Interface Specifications, or “DOCSIS,” is a standard for data transmission over cable networks. DOCSIS was developed by CableLabs and a consortium of North American multi-system cable operators, and it accordingly favors these companies and disadvantages other competitors that use different architectures, such as FTTP or digital broadcast satellite. In particular, DOCSIS 2.0 specifies an upstream path that is not consistent with the IP over Ethernet alternative for upstream transmission developed by the International Electrical and Electronic Engineers (IEEE), an independent accredited and open standards-setting organization. Verizon’s planned FTTP deployment would be able to interface with equipment manufactured to meet the IEEE 802.3i standard, which is an open standard that takes into account the needs of competing technologies. If the Commission were to adopt a DOCSIS-based standard for video equipment interfaces, then set-top boxes, TV sets, and other equipment would require additional costs to connect to FTTP or digital broadcast satellite infrastructures.<sup>33</sup> By forcing competitive providers to incorporate unnecessary and inefficient designs, interfaces, and equipment into future deployments, the Commission would make it more

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<sup>31</sup> *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80 & PP Docket No. 00-67.

<sup>32</sup> *Digital Broadcast Content Protection*, MB Docket No. 02-230.

<sup>33</sup> See Reply Comments of Verizon in Response to Second Further Notice of Proposed Rulemaking at 3-6, *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, PP Docket No. 00-67 (FCC filed Mar. 15, 2004).

difficult and expensive to offer new capabilities and services to consumers. Therefore, the Commission should not compel the use of cable-centric standards, like DOCSIS, in connection with competitors' video offerings.

**Encoding Rules.** In the "plug and play" proceeding, the cable and consumer electronics industries submitted draft encoding rules to the Commission that proposed: (1) a ban on selectable output control, (2) a prohibition on the down-resolution of broadcast programming, and (3) the adoption of caps on copy protection encoding for different categories of MVPD programming. The Commission adopted many of these encoding rules in the *Plug and Play Second Report and Order*.<sup>34</sup> These limits on encoding are problematic and could hamper innovation, especially for non-cable based providers of video services, and especially insofar as they may be construed to limit the use of competing encoding schemes such as MPEG-4, Windows Media Player, etc. Instead of placing limits on the encoding rules for audiovisual content, the Commission should allow each provider of a video offering to choose its own preferred encoding scheme.

**Definition of Digital Cable System.** Section 76.640 of the Commission's rules sets forth technical standards and requirements that must be met by "digital cable systems." For purposes of that section, a "digital cable system" means "a cable system with one or more channels utilizing QAM modulation for transporting programs and services from its headend to receiving devices." 47 C.F.R. § 76.640(a). It appears from this definition that any cable system that uses Quadrature Amplitude Modulation, or "QAM," could, for that reason alone, be deemed a "digital

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<sup>34</sup> See Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd 20885, 20910-18, ¶¶ 58-74 (2003) ("*Plug and Play Second Report and Order*").

cable system” subject to the technical standards described in that section.<sup>35</sup> But these technical standards are focused on traditional cable technology, and not on an all-fiber architecture. In the future, it will be increasingly difficult and inefficient for an FTTP-based system to comply with those technical standards, and imposing those standards will deter future innovations. The Commission has already expressly ruled that “[c]able systems that only pass through 8 VSB broadcast signals shall not be considered digital cable systems.” *Id.* The Commission should likewise clarify that cable systems that rely on FTTP architecture shall not be considered digital cable systems.

If, however, FTTP systems are deemed to be “digital cable systems,” then the Commission should entertain applications for waiver of the technical standards and support obligations in section 76.640 for FTTP systems. Alternatively, the Commission should modify those standards and obligations to take into account architectures and technologies other than those traditionally deployed by cable companies.

### **Conclusion**

To promote the deployment of competitive broadband and video offerings, the Commission should clarify the unbundling rules for broadband in its *Triennial Review Order* and should adopt a comprehensive, deregulatory national policy for broadband. The Commission should encourage the adoption of a streamlined franchising process for new video competitors; it

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<sup>35</sup> See also *Plug and Play Second Report and Order*, 18 FCC Rcd at 20892, ¶ 14 (“In order to ensure that consumer expectations regarding the functionality of digital cable compatible equipment are met, we believe that cable systems carrying at least one digital QAM channel . . . must be considered to be digital cable systems subject to the proposed transmission and support requirements.”)

should close the terrestrial loophole in its program access rules; and it should develop technical rules to reflect open standards that do not favor any particular technology or industry group.

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Respectfully submitted,

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## **ATTACHMENT A**

### **THE VERIZON TELEPHONE COMPANIES**

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Midwest Incorporated d/b/a Verizon Midwest  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.