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

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 06-189
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COMMENTS OF VERIZON ON THE STATUS OF COMPETITION IN THE VIDEO MARKETPLACE

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COMMENTS OF VERIZON[1] ON THE STATUS OF COMPETITION IN THE VIDEO MARKETPLACE

I. INTRODUCTION AND SUMMARY

Since the Commission's last assessment of the status of video competition one year ago, Verizon's video deployment has grown significantly. Today, Verizon offers its innovative new video service known as "FiOS TV" to more than one million households in seven states and hopes to have 175,000 subscribers by the end of this year. Verizon's entry has brought—for the first time in many places—meaningful wireline competition to the video services market. Indeed, Verizon's FiOS TV is the first totally new offering in the video marketplace in over a decade. And consumers have reaped the benefits. Where Verizon has been permitted to provide video service, its entry has brought new video choices, reduced prices, and improved service to consumers.

But significant roadblocks continue to deter wider competitive entry. *First*, the local franchising process remains an obstacle to cable competition. Although

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

Verizon has obtained over 200 franchises to date, it could ultimately need up to 3,300 more franchises.

Abuses in the local franchising process make this undertaking to obtain franchises unnecessarily slow and burdensome. Much like Verizon reported last year, local franchising authorities ("LFAs") continue to demand that Verizon pay unlawful fees, agree to unreasonable build-out requirements, and submit to local regulation of its non-cable services and facilities as conditions of obtaining permission to provide video services. At the same time, the local franchising process takes far too long, regularly consuming fifteen months or more in each LFA.

In 2005 and 2006, eight states enacted laws to streamline the local franchising process. And with the assurance that its video rollouts will not be stalled by an endless franchising process, Verizon has accelerated its FiOS deployment and committed billions of dollars to upgrade its network in several of those states. As a result, more consumers in those states have benefited from video competition, and more households are connected to next-generation broadband networks. With this proof positive that franchising reform brings real results to consumers, the Commission should act now and promulgate rules that will curb abuses in the local franchising process and extend the benefits of competition to consumers throughout the nation.

Second, new entrants need flexibility on the timing of the Commission's set-top box integration ban, which will take effect next July. The Commission can facilitate deployment of new and innovative services by granting Verizon's request for a limited waiver of the ban for systems using hybrid Quadrature Amplitude Modulation/Internet Protocol technology over a fiber-to-the-premises architecture.

Third, cable incumbents are using exclusive access contracts that they obtain from the owners, managers, or developers of multiple dwelling unit ("MDU") properties or other real estate developments to block competitive entry for an increasing number of households. The Commission should take action to address this problem.

Fourth, obtaining access to programming on reasonable terms is important to new providers trying to enter new cable markets. The Commission should extend the prohibition on exclusive program access contracts for a limited time, after which it should sunset absent further Commission action.

Fifth, the Commission should make sure that any technical standards used in other contexts, such as for a downloadable conditional access system or two-way plug-and-play, are technology-neutral and do not favor cable incumbents over competitors using newer technologies.

By taking these steps, the Commission will advance the core objectives of our nation's cable policy: "establish[ing] franchise procedures and standards which encourage the growth and development of cable systems," "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," and "promot[ing] competition in cable communications and minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521. And by facilitating greater video competition, the Commission will further the national policy of encouraging widespread deployment of next-generation broadband networks.

II. VERIZON'S DEPLOYMENT OF FIOS TV

In 2004, Verizon launched a major national initiative to upgrade its traditional telephone network. By deploying advanced fiber-optics all the way to customers' premises, Verizon's new "Fiber-to-the Premises" ("FTTP") network enables Verizon to provide not only improved voice services but also video and high-speed data services to its customers.

Verizon's FTTP initiative represents a major commitment to the nation's communications infrastructure. Verizon expects to invest $18 billion in net capital from 2004 through 2010 in deploying its fiber network. *See* Verizon Provides New Financial and Operational Details on its Fiber Network as Deployment Gains Momentum (Sept. 27, 2006), *available at* http://investor.verizon.com/news/view.aspx?NewsID=773 (hereinafter "Verizon Details on Fiber Network"). This investment promises to bring cutting-edge new broadband technologies to consumers across the nation and to deliver widespread video competition, thus furthering both of the preeminent federal communications policies.

A. Verizon's FTTP Network Uses State-of-the-Art New Technology with Greater Capabilities than Traditional Cable Systems

Verizon's FTTP network uses a unique, state-of-the-art technology that offers more capacity and features than traditional cable systems. Unlike traditional Hybrid Fiber Coaxial ("HFC") cable systems, which connect end users to a fiber plant using standard, conductive coaxial cable, Verizon's network uses a true end-to-end fiber-optic plant.

With an all-fiber network, Verizon is able to carry substantially more video programming than a cable provider using HFC facilities. Verizon's lead offer

currently includes local channels, nearly 200 digital video and music channels, and over 20 high-definition television ("HDTV") channels. This package costs subscribers only $42.99 per month.[2] FiOS TV also offers subscribers nearly 3,000 On Demand titles, a number that will reach over 3,500 in the coming months.

With its enhanced carrying capacity, Verizon is also able to offer unique programming packages tailored to subscribers' interests. For example, Verizon's La Conexión package offers a combination of popular English and Spanish-language channels. Verizon also offers customers 44 premium movie channels through its unique movie package, while its sports package offers subscribers over a dozen different sports channels. In addition, Verizon offers a wide range of international channels.

Verizon is able to offer more programming as well as new interactive features by using a unique combination of Quadrature Amplitude Modulation ("QAM") and Internet Protocol ("IP") technology for transmitting signals across its fiber plant. This "hybrid" approach means that FiOS TV offers the best of both traditional digital cable technology and developing IPTV technology.

Like traditional cable providers, Verizon transmits its digital video services downstream to consumers using QAM technology. But unlike companies using legacy cable technology, Verizon's addition of IP functionality enables a wide range of innovative services. For example, Verizon uses its IP platform to stream video-on-demand ("VOD") to subscribers' homes, a service that allows customers to select and

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[2] This per-month price reflects the current price for new FiOS TV subscribers and reflects the significant value added to FiOS TV service since it was first launched in September 2005. Since that time, Verizon has added more than 20 channels to its lead offer, several HDTV channels, and 2,400 On Demand titles. Verizon has also launched interactive features like its FiOS Widgets and its multi-room DVR. At this price, Verizon offers more channels at prices that are $10 to $20 lower than those of incumbent cable providers in most markets.

watch video services at their convenience. The IP functionality of Verizon's network also permits the company to offer a unique new service called "FiOS TV Widgets" that allow subscribers to check weather and traffic reports directly on their television screens. Unlike traditional cable operators' on-screen traffic and weather, FiOS TV Widgets are interactive and customizable, enabling users to access individually tailored traffic or weather reports, even for areas outside of their geographic viewing area. Future FiOS TV Widgets may include real-time, on-demand sports scores and news or may allow municipalities, schools, and civic organizations to supply information to a "Community Widget" accessible by subscribers in a particular area.

Verizon's IP platform also enables Verizon's Home Media DVR. This service allows up to three televisions in different rooms to access digitally recorded programs on a single server-DVR using IP as the communications medium to transmit the recorded programming. The IP-based nature of the Home Media DVR allows Verizon to integrate a "Media Manager" with the DVR, which allows customers to access pictures and music on their networked home computers. And Verizon is developing services that would allow the sharing of videos and other data even outside the home through personal broadcasting.

Verizon's IP platform is also designed to accommodate additional new interactive features as technology develops. For example, Verizon will use its IP functionality to roll out a Games-on-Demand service that works directly through a set-top box. The network's IP features also will enable Verizon to include additional functionality in its video-on-demand offering, such as high-definition video-on-demand, preview clips accessible to customers before ordering a video, or other DVD-like

features. The IP aspects of FiOS TV will also allow subscribers to personalize their interactive programming guide and perform searches for VOD or other available video content to a much greater extent than is available on traditional cable systems. In addition, the IP features of the network will enable Verizon to create unique two-way viewing services that could allow FiOS TV subscribers to vote in real-time in response to questions posed on news programs or for a contestant in a reality show. And as IPTV technology matures, Verizon also has the flexibility of moving away from QAM toward an all-IP approach.

In addition to innovative video services, Verizon's FTTP network offers ultra high-speed broadband capabilities. Verizon's FiOS data service currently offers download speeds of up to 50 Megabits per second ("Mbps") in some locations and upload speeds of 5 Mbps, which far exceed the broadband offerings of most other providers.

B. Verizon's Entry in the Video Services Market Is Benefiting Consumers

Verizon's FiOS deployment has brought—for the first time in many places—meaningful head-to-head wireline competition to incumbent cable providers. Verizon's FiOS network build-out is on target to pass a total of six million premises by year's end. *See* Verizon Details on Fiber Network, *supra*. By the end of 2010, Verizon plans to pass 18 million premises with its fiber network—over half of the households in its wireline service area. *Id.*

As of the end of the third quarter 2006, Verizon offered video services to 1.2 million premises. *See* Verizon Communications Posts Strong Third-Quarter Results as Organic Growth Initiatives Gain Momentum (Oct. 30, 2006), *available at* http://investor.verizon.com/news/20061030 (hereinafter "Third Quarter Results"). At the

end of the third quarter 2006, Verizon had 118,000 FiOS TV subscribers—a nearly 10% penetration rate. *Id.* Verizon's goal is to have 175,000 video subscribers by the end of the year, making the service available to 1.8 million households. Verizon Details on Fiber Network, *supra*. By the end of the third quarter 2006, Verizon had more than 500,000 FiOS Internet customers, with the service available to 3.8 million premises. Third Quarter Results, *supra*. By the end of the year, Verizon seeks to have 725,000 FiOS Internet subscribers, with the service available to five million premises. Verizon Details on Fiber Network, *supra*.

Verizon's deployment of FiOS is creating important benefits for consumers in terms of greater video choice, reduced prices, and improved service. As the Commission recently noted, in areas where two or more wireline providers compete for customers, subscriber rates are approximately 16% lower. *See 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*, 20 FCC Rcd 2718, 2727 (¶ 29) (2005). A recent economic report likewise observed that "[t]here is very little direct competition in the cable industry, but where there is, consumers generally see both lower prices and additional service offerings." Yale M. Braunstein, School of Information, University of California, Berkeley, *Expected Consumer Benefits from Wired Video Competition in California* at 2 (Apr. 2006).

Data from Verizon's entry into specific local cable markets bear out these national statistics. For example, the American Consumer Institute cited "circumstantial evidence that cable operators have dropped price to coincide with market entry." The American Consumer Institute, *Does Cable Competition Really Work? A Survey of Cable*

TV Subscribers in Texas at 7 (Mar. 2, 2006). According to its survey in Keller, Plano, and Lewisville, Texas, communities that had wireline-based competition for less than six months, "[s]ome consumers stayed with their incumbent provider and reported to have saved, on average, $26.83 per month off their average cable TV bill, as a direct result of competition." *Id.* at 2-3. And in Sarasota and Manatee Counties, Florida, Comcast decided to not raise rates for the first time in a decade, following Verizon's entry in Manatee County and pending franchise negotiations in Sarasota County. "For them to not raise rates," one telecommunications analyst noted, "is historical." L. Mayk, *A Cable TV Rate Shocker: No Boost*, Sarasota Herald-Tribune at A1 (Apr. 26, 2006). In short, video competition works.

III. COMMISSION ACTION IS NEEDED TO FACILITATE WIDESPREAD VIDEO COMPETITION

While Verizon's entry has generated important consumer benefits in those communities where it has been permitted to offer video services, direct wireline competition so far has reached only a small number of households in the U.S. To foster greater cable competition, the Commission should address the most significant obstacles confronting new video entrants.

A. The Local Franchising Process Is Impeding Competitive Entry

One obstacle to widespread and rapid entry is the local franchising process. Although Verizon has been able to secure over 200 franchises, this figure represents only about 6% of the up to 3,500 total franchises that it could need. Verizon's experience makes clear that the local franchising system is plagued by long delays and other abuses, all of which burden competitive entry. And these obstacles to offering

video services also discourage the widespread deployment of fiber and advanced broadband networks over which video can be transmitted.

1. The Commission Should Promulgate Franchising Rules that Will Facilitate Competition

To address problems in the local cable franchising system, the Commission should conclude its section 621 proceeding and promulgate rules that facilitate competitive entry. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, 70 Fed. Reg. 73973 (Dec. 14, 2005). The Commission should adopt rules that shorten delays, that confirm that LFAs may not impose expensive demands on new entrants in excess of the Cable Act's 5% franchise fee cap, that preclude anti-competitive build-out requirements, and that affirm that LFAs may not leverage their authority over cable franchises to reach non-cable services and facilities. The Commission should also reiterate that franchising authorities may not regulate the rates of new entrants.

a. The Commission Should Adopt a Time Limit on the Local Franchising Process

Section 621 of the Cable Act prohibits local franchising authorities from "unreasonably refus[ing] to award" a competitive franchise. 47 U.S.C. § 541(a)(1). This provision bars not only unreasonable denials of franchise requests but also the unreasonable withholding of a franchise, as a locality might do through inaction or delay. LFAs routinely refuse to award competitive franchises by unreasonably delaying the grant of a franchise on lawful terms.

As Verizon previously informed the Commission, Verizon's experience shows that while some jurisdictions act quickly on franchise requests, obtaining a

competitive franchise regularly takes fifteen months or more. Of negotiations currently pending (outside of Texas, New Jersey, and California), 74% have been going on for fifteen months or more, and a majority of them (56%) for eighteen months or more. A full 83% of pending negotiations have been under way for one year or more.

As an example of the kinds of delays Verizon has faced, in New York, Verizon negotiated with a consortium of communities for nearly two years (21 months). After reaching a deal with the consortium, one of its members took the position that the agreement was only a framework for the start of discussions, and it took three more months of additional negotiations to reach a final agreement. As another example, it took six negotiation sessions and three public hearings before Verizon could obtain a franchise in one New York town of about 130 households. Such delays are particularly unjustified in the case of a provider like Verizon that already has authority as a telecommunications carrier to construct and upgrade its network.

Franchising delays result from a number of factors: an LFA's insistence on unreasonable and unlawful concessions, a cable incumbent's effort to stall the grant of a competitive franchise, inertia, arcane and lengthy application procedures, or unresponsiveness by the local entity. Whatever their source, long delays remain the rule, not the exception, in local cable franchising.

To prevent these long delays and to give effect to section 621's prohibition against unreasonable refusals to award competitive franchises, the Commission should conclude that LFAs must approve or deny a franchise application within a specified time after a competitive provider initiates negotiations. A four-month deadline is consistent with the Cable Act's franchising scheme, which provides four-month timelines for a

number of LFA decisions. *See* Comments of Verizon on Video Franchising, MB Docket No. 05-311, at 36 (Feb. 13, 2006) (hereinafter "Verizon Comments in Franchise Proceeding") (discussing 47 U.S.C. §§ 546(c)(1), 545(a)(2), 537). That deadline provides an appropriate benchmark for acting on a competitive franchise application.

Experience demonstrates, moreover, that a four-month period is more than enough for an LFA to decide on a franchise request, except where LFAs make demands that exceed the limits of section 621. *See id.* at 13-16 (explaining that Congress intended to limit LFA review to the limited set of factors set out in section 621). New Jersey's new franchising law, for example, requires action on a franchise application within 45 days. Indiana's franchising law requires a decision within 15 days. California prescribes a 44-day period, and Texas, 17 days. And many individual LFAs have granted Verizon a franchise in four months or less. Even a representative of the National Association of Telecommunications Officers and Advisors, an organization of local government officials, informed the Commission at an open agenda meeting in Keller, Texas, that she believed that the franchising process should take no more than six months.

To give effect to this deadline, the Commission also should establish that if an LFA fails to grant or deny a franchise within the specified time period from the initiation of negotiations, the new entrant is permitted to begin offering video service to customers (although negotiations toward a final franchise agreement could continue). Such a requirement would ensure that competitive entrants can quickly bring their video services to market.

b. The Commission Should Confirm that LFAs May Not Condition Franchises on Fees and Demands that Exceed the 5% Franchise Fee Cap

The Commission should also confirm that localities may not require new entrants to make monetary or in-kind contributions that exceed the 5% cap on cable franchise fees established by the Cable Act. As Verizon has previously reported to the Commission, LFAs impede competitive entry by requiring new providers to make expensive concessions as the price of entry into a local cable market. *See, e.g.*, Verizon Comments in Franchise Proceeding, *supra*, at 54-80. For new entrants, these demands are particularly onerous because their costs cannot be spread over an established base of customers. These requirements also impair a new entrant's ability to offer lower prices, which in turn deprives consumers of the benefits of fully free competition.

As an example of the types of demands that Verizon has encountered, Verizon has been required to pay franchise "acceptance fees" that can total over $200,000. LFAs also frequently require Verizon to make enormous payments purportedly slated for public, educational, and governmental ("PEG") access programming and institutional networks ("I-Nets"). In many cases, LFAs demand large financial contributions even though the facilities and equipment needed to develop PEG programming are already available and even though the PEG programs' financial needs are already being satisfied. As recent examples, an LFA in Massachusetts has demanded that Verizon pay $1 million up front for PEG (in addition to ongoing fees), even though the locality already has over $1.7 million in the bank for PEG programs. Many other localities in Massachusetts have demanded that Verizon pay lump sum grants for PEG and I-Net purposes totaling hundreds of thousands of dollars each. In another LFA, Verizon was required to pay ongoing PEG and I-Net fees totaling 3% of gross revenues.

Demands like these are unlawful under the Cable Act. As Verizon explained in its comments filed in the Commission's ongoing section 621 proceeding, the Cable Act prohibits localities from conditioning competitive cable franchises on a provider's agreement to make expensive monetary or in-kind contributions. First, section 622 of the Act generally prohibits localities from imposing fees on providers that exceed 5% of gross cable revenues. *See* 47 U.S.C. § 542(b). The exceptions to this 5% cap are narrow and do not authorize demands for exorbitant cash or in-kind payments. *See id.* § 542(g)(2). Second, section 624 prohibits localities from imposing requirements that do not relate to the establishment or operation of a cable system. *See id.* § 544(b) (authorizing franchise authorities to establish requirements for facilities and equipment "to the extent related to the establishment or operation of a cable system"); *id.* § 544(a) (precluding localities from regulating cable services, facilities, or equipment "except to the extent consistent with this subchapter"). Thus, localities lack authority to require prospective franchisees to fund initiatives that do not relate to this purpose. Third, the Cable Act denies localities the power to require operators to provide any PEG support beyond a reasonable amount of channel capacity. *See* Verizon Comments in Franchise Proceeding, *supra*, at 67-70 (discussing 47 U.S.C. § 531). And it provides that any support that an operator volunteers for needs other than PEG capital costs must count against the 5% franchise fee cap. *Id.* at 68-69 (discussing 47 U.S.C. §§ 531(c), 542(g)(2)(C)). Thus, the Cable Act precludes LFAs from demanding enormous PEG payments of the kind Verizon regularly encounters.

The Commission should promulgate a rule confirming that LFAs may not condition franchises on expensive monetary or in-kind concessions and that all things of

value provided by the operator, with the exception of certain PEG capital costs that the provider volunteers to provide, are franchise fees that count toward the 5% cap.

c. The Commission Should Confirm that LFAs May Not Require New Entrants to Build Their Networks to Cover the LFA's Entire Jurisdiction or the Cable Incumbent's Franchise Area

To facilitate greater cable competition, the Commission also should adopt a rule that confirms that localities are prohibited from requiring new entrants to build their networks to cover the LFA's entire jurisdiction or to match the franchise area of the incumbent provider. Competitive providers should be permitted to define franchise areas that are reasonable and otherwise consistent with the Cable Act.

When Verizon upgrades its network, it typically does so on a wire center basis, generally extending fiber to all premises served by the particular wire center. These wire centers do not neatly correspond, however, to LFA boundaries or to the incumbent's franchise area; in many cases, a wire center may cover only a fraction of those areas. Therefore, a build-out requirement means that Verizon must upgrade numerous wire centers to be able to provide video service anywhere in an LFA's jurisdiction. This problem is exacerbated when, as frequently occurs, a Verizon wire center covers multiple LFAs. In such a case, Verizon might not be able to offer video service to that wire center without triggering build-out requirements in several additional localities.

Burdensome build-out requirements fail to take into account not only wire center boundaries but also other practical considerations that can affect the economic or technical feasibility of deploying new competitive video service. These considerations include such things as an entrant's inability to reach certain areas or customers using

standard technical solutions, its inability to access and use rights-of-way on reasonable terms, density thresholds that are found in most franchises, and the demand and degree of marketplace success experienced by the entrant. Without such limitations, build-out demands on new entrants will deter, if not prevent altogether, competitive entry in many locations.

The Commission has already expressly pre-empted build-out requirements in the telecommunications services market because of their entry-deterring effect. *See, e.g.*, *In re the Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3466 (¶ 13) (1997). In that context, the Commission correctly noted that build-out requirements are "prohibitively expensive" for new entrants, *id.* at 3500 (¶ 81), and that this "financial burden . . . has the effect of prohibiting certain entities from providing telecommunications services," *id.* at 3466 (¶ 13). Echoing these concerns, cable incumbents—who now trumpet the benefits of build-out requirements for new video competitors—vehemently opposed build-out obligations on new telecommunications service providers. For example, in testimony to the Senate in 1994, the president of Comcast stated: "you should not require that every provider must make service available to every household in a state or service region. That is simply unrealistic to expect of new entrants in this market, and it is simply unnecessary." The Communications Act of 1994. Hearings on S. 1822 Before the Senate Commerce Committee (May 18, 1994) (statement of Brian Roberts, President, Comcast Corporation on Local Loop Competition and Universal Service Issues).

The cable industry's observations are equally true for new entrants in the video services market. As Verizon explained in its comments in the Commission's

section 621 proceeding, build-out requirements exponentially increase the costs of entry and in many cases make it uneconomical for a new entrant to provide competitive video services. When incumbent providers agreed to build out their networks, they did so in exchange for a monopoly position in the market. For a new competitor, the costs of build-out can be insurmountable because it has no established customer base over which to spread the costs and because it faces ubiquitous competition from an entrenched provider. As the Department of Justice concluded, "[b]uild-out requirements that impose on an entrant the obligation to serve a geographic area that the entrant had concluded would be uneconomical to reach can lead to the entrant abandoning its plans for the entire area or, if the entrant agrees to the condition, result in competition being less vibrant or efficient." Ex Parte Submission of the Department of Justice, MB Docket No. 05-311, at 12-13 (May 10, 2006); *see also id.* at 12 (arguing that LFAs generally should not be allowed to impose build-out requirements in light of their "significant entry-deterring effects"). For these reasons, burdensome build-out requirements are tantamount to "unreasonabl[e] refus[als] to award" competitive franchises and should be prohibited.

In addition to precluding LFAs from imposing onerous build-out requirements—such as those that fail to take into account the economic and technical feasibility of build out—the Commission should confirm that localities cannot require new entrants to serve the LFA's entire jurisdiction. Before the enactment of the Cable Act, the Commission expressly recognized the distinction between an LFA's jurisdictional boundaries and the boundaries of franchising areas within that jurisdiction. *See In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 FCC 2d 141, ¶ 177 (1972). The

Commission noted that "[t]here are a variety of ways to divide up communities" when an LFA decides "the delineation of franchise areas." *Id.* ¶ 180. Congress carried forward this distinction by using "franchise area" in certain provisions of the Cable Act, *e.g.*, 47 U.S.C. § 541(a)(4)(A), and "jurisdiction" in others, *e.g.*, *id.* § 543(a)(1). In addition, the Cable Act's only provision even arguably related to build out—section 621(a)(4)(A)—imposes a *restriction* on franchising authorities by prohibiting LFAs from establishing unreasonable timeframes for a provider to offer service within its "franchise area." *Id.* § 541(a)(4)(A). To advance Congress's pro-competitive objectives, the Commission should interpret the Cable Act as permitting new entrants to define franchise areas that are reasonable and otherwise consistent with the Cable Act.

d. The Commission Should Make Clear that LFAs Cannot Use Their Authority Over Cable Franchising to Regulate Non-Cable Services and Facilities

In addition to imposing unreasonable demands and onerous build-out requirements, some LFAs have thwarted Verizon's entry into the video services market by seeking to condition approval of a cable franchise on the grant of regulatory authority over Verizon's non-cable services and facilities or the payment of fees on those services. In some communities, local officials have sought to leverage their jurisdiction over cable franchising to gain new regulatory powers over video providers' non-cable offerings, such as by regulating broadband Internet access services or regulating the deployment of Verizon's broadband network, notwithstanding Verizon's independent authority to upgrade its existing network. Some LFAs have claimed that once any part of Verizon's multi-use network—which carries voice and data services in addition to video—is used to carry video signals, all of Verizon's services and facilities are subject to local regulation.

These assertions of authority exceed the lawful bounds of localities' franchising authority and threaten to undermine federal broadband policy. In particular, section 621(b) prohibits localities from regulating telecommunications facilities and services. *See* 47 U.S.C. § 541(b)(3)(B)-(D). Further, section 624(b) explicitly bars localities from using the franchising process to "establish requirements for . . . information services," *id.* § 544(b)(1), a term that encompasses Internet access services. Section 622(b) makes clear that localities can impose franchise fees only on a video provider's gross revenues "derived . . . from the operation of the cable system to provide *cable services*." *Id.* § 542(b) (emphasis added). Relying on these provisions, the Commission should confirm that nothing in the Cable Act allows a locality to become a telephone or Internet regulator.

e. The Commission Should Reiterate that States and Localities May Not Regulate the Rates of Competitive Entrants

The Commission should also reiterate that franchising authorities may not regulate cable rates or require tariffs or other rate filings for cable services. Assertions of rate-regulation authority are inconsistent with federal law, for under the Cable Act, a franchising authority may not regulate the rates charged by a cable operator unless it first obtains permission from the Commission to do so. *Id.* § 543(a)(3) & (4). No franchising authorities have obtained permission from the Commission to regulate Verizon's competitive video rates. Nor could they, because such permission is not available when an LFA has "actual knowledge" that the provider is subject to effective competition. *See* 47 C.F.R. § 76.910(b)(4). As a new entrant, Verizon faces effective competition everywhere that it offers service. Also, requiring rates to be tariffed or otherwise filed is beyond the jurisdiction of LFAs and would in any event be bad policy. As the

Commission has previously recognized, a tariffing regime, when imposed in a competitive market, "may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location," thereby rendering it easier for competitors to adjust prices in response to rate changes by each other. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, 20744 (¶ 23) (1996).

The Commission should therefore reiterate that federal law precludes franchising authorities from regulating the rates of new competitive entrants.

2. Curbing Abuses in Franchising Facilitates Competition and Benefits Consumers

Verizon's experience with the local franchising process over the last year demonstrates that regulations curbing abuse and delay in the franchising process, like those discussed above, will produce real benefits for consumers. As the Commission observed in its Notice of Inquiry, eight states have enacted laws streamlining the franchising process (California, Indiana, Kansas, New Jersey, North Carolina, South Carolina, Texas, and Virginia). In many of these states, consumers have seen accelerated investment in video and broadband infrastructure and lower prices.

In New Jersey, for example, the enactment of a new law streamlining the franchise process in that state paved the way for Verizon to move forward with a $1.5 billion investment over the next three years in the construction and deployment of its FTTP network. *See* News Release, "Moving Ahead at the Speed of Light: Verizon's FiOS TV on the Horizon in New Jersey" (Aug. 4, 2006), *available at* http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=30078455.

As a result of this enhanced deployment, Verizon expects to make its video network available to 3.5 million New Jersey residents by the end of 2008. *Id.* Residents in Texas have seen similar results following the passage of a state law reforming the franchise process. That law enabled Verizon to more quickly roll out FiOS TV in the state. *See* News Release, "Verizon Expands FiOS TV to 8 More North Texas Cities" (Sept. 14, 2006), *available at* http://newscenter.verizon.com/press-releases/verizon/2006/verizon-expands-fios-tv-to-8.html. Verizon has expanded the availability of FiOS TV service to eight additional cities in the Dallas-Fort Worth area, and the company is on track to offer its new video service to about 400,000 North Texas households, or about one million potential viewers, by the end of the year. *Id.* And Verizon is constructing a video hub office in Fort Wayne, Indiana to deliver video programming to more than 100,000 households. *See* News Release, "Verizon Announces Initiatives to Boost Broadband Availability in Indiana and Bring Fort Wayne Area Consumers One Step Closer to Real Choice for Cable TV" (Nov. 28, 2006), *available at* http://newscenter.verizon.com/press-releases/verizon/2006/verizon-announces-initiatives.html.

This evidence proves that franchising reform works: when franchising is streamlined, competitors accelerate their deployment and consumers benefit. A nationwide policy that expedites the grant of local franchises promises the same results. The Commission should act now to extend the benefits of competition to households across the nation.

B. The Commission Should Grant a Waiver of the Set-Top Box Integration Ban for New Entrants Using FTTP and QAM/IP Technology

The Commission should also facilitate the deployment of new and innovative services and technology by granting a waiver of the set-top box integration

ban for new entrants using new technologies to deliver video services. To ensure that the goal of assuring the commercial availability of navigation equipment does not hinder the broader objective of promoting competition and the introduction of new and innovative video services, Congress required the Commission to waive its regulations

> upon an appropriate showing by a provider of multichannel video programming and other service offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.

47 U.S.C. § 549(c). This waiver provision is intended to prevent "freezing or chilling [in] the development of new technologies and service." *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14816 (¶ 103) (1998).

Verizon's waiver request falls squarely within the scope of this waiver provision. First, unlike incumbent providers who already serve an embedded base of customers, Verizon is rolling out a new service that will bring the benefits of competition to consumers. Second, and also unlike existing cable operators, Verizon's services rely on an advanced new technology that is capable of providing cutting-edge features and services, such as those described above. *See supra*, at 4-7. These differences between Verizon's services and existing legacy cable services make clear that Verizon is "develop[ing] . . . a new or improved" video service within the meaning of section 629(c).

Granting Verizon a waiver is also "necessary to assist the development" of this new and improved service. *See* 47 U.S.C. § 549(c). To comply with the

Commission's integration ban, Verizon would have to divert significant resources that could otherwise be spent developing innovative features for its service. Although developing non-integrated set-top boxes will always require some commitment of resources, that commitment is particularly onerous—and particularly damaging to innovation—in the case of a new video provider like Verizon that is relying on a unique technology to provide video services. This is so because, unlike legacy cable operators, Verizon cannot rely on the standard protocol for separate security developed by the incumbent cable industry. Existing navigation device and manufacturing standards (known as "OpenCable Host 2.0") are based on traditional cable architecture, which differs fundamentally from Verizon's. For example, the current return path for most set-top boxes is based either on radio frequency ("RF") or Data Over Cable Service Interface Specifications ("DOCSIS"), neither of which is compatible with Verizon's technology. As a result of these technological differences, a manufacturer creating a set-top box that could work with Verizon's unique system would have to develop brand new specifications. Diverting the substantial time and investment dollars required for this undertaking will drain resources that could otherwise be used to deploy and improve Verizon's new video service.

At the same time, prohibiting Verizon from placing integrated set-top boxes in service will not advance Congress's objective of assuring competition in the retail market for navigation devices. As explained above, Verizon's network uses a unique combination of QAM and IP functions. Generic set-top boxes produced by consumer electronics manufacturers would work only with the QAM—and not the IP—portion of Verizon's network. Thus, a Verizon subscriber using a generic, non-IP

enabled retail box would not be able to order video-on-demand, display Verizon's interactive programming guide, or access Verizon's new IP services like FiOS Widgets. As a result, there is unlikely to be any real demand among Verizon's consumers for such boxes. In addition, because Verizon is a new entrant with a relatively small current customer base—less than 200,000 compared to the tens of millions subscribing to services offered by cable incumbents—the "critical mass" is lacking that would lead manufacturers to commit the resources necessary to develop a box unique to Verizon's architecture to compete for business from these consumers. And because Verizon already makes available CableCARDS (the commercial name for the point-of-deployment modules used to achieve physical separation), consumer electronics manufacturers already can create equipment that is compatible with the QAM portion of Verizon's FiOS TV service to the same extent that they would if Verizon incorporated physically separate conditional access into its boxes.

For these reasons, the Commission should grant Verizon's request for a waiver of the set-top box integration ban for new entrants using hybrid QAM/IP technology over a fiber-to-the-premises architecture.

C. The Commission Should Address Exclusive Access Arrangements

New video providers face other anti-competitive obstacles to entry. Among these are exclusive access arrangements between cable incumbents and owners, managers, or developers of multiple dwelling unit properties or other real estate developments that grant a cable incumbent the exclusive right to provide services to covered residents. These agreements thwart competition and should be addressed by the Commission.

Under an exclusive access arrangement, a given cable provider is granted the exclusive right to provide service to residents of the covered MDU or development. Thus, residents of these properties have no ability, short of moving, to choose another cable provider. Exclusive access arrangements can last for ten years or longer; some are even perpetual.[3]

Although the Commission previously declined to adopt rules addressing cable providers' exclusive access arrangements in light of a lack of record evidence,[4] the evidence is now clear that such contracts are both widespread and stand as a significant barrier to competition. Indeed, Verizon's experience suggests that these arrangements have increasingly been deployed to stifle newly emerging competitive entry.

Like other competitive entrants,[5] Verizon has encountered exclusive access arrangements in numerous communities across the country. *See* Ex Parte Letter by Verizon, MB Docket No. 05-311, at 3-4 (July 6, 2006) (listing numerous examples of properties that are subject to exclusive access agreements). For example, after attempting

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[3] In the context of telephone services, the Commission has appropriately distinguished exclusive access arrangements from exclusive marketing arrangements, in which an MDU owner agrees to promote the services of a single provider, while permitting other providers access. *See In re Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 22989 (2000) (seeking comments on whether the Commission "should proscribe carriers from entering into contracts that grant them preferences other than exclusive access, such as exclusive marketing or landlord bonuses to tenants that use their services, in some or all situations").

[4] In 1997, the Commission expressed its concern that exclusive access arrangements could limit competition and deprive consumers of the opportunity to take advantage of emerging options in the market for cable services, and it solicited comments regarding proposals to limit the enforceability of such arrangements. *See In the Matter of Telecommunications Services Inside Wiring*, 13 FCC Rcd 3659, 3754 (¶ 203) (1997). In 2003, the Commission declined to take any action regarding these arrangements, concluding that there was insufficient evidence in the record to determine "the extent to which exclusive contracts have been utilized," as well as whether "such contracts have thwarted alternative providers' entrance into the MDU market." *In re Telecommunications Services Inside Wiring*, 18 FCC Rcd 1342, 1369 (¶ 69) (Jan. 29, 2003).

[5] *See, e.g.*, Ex Parte Letter on Behalf of SureWest Communications, MB Docket No. 05-311, at 3 (Aug. 22, 2006) (reporting that 10,600 of 40,487 MDU units passed by SureWest's network are locked into exclusive access arrangements with an existing provider, largely with Comcast).

to offer its FiOS service to residents of the River Chase apartment complex in Temple Terrace, Florida, Verizon received a letter from an attorney for Bright House Networks claiming that Bright House enjoyed the exclusive right to provide video services to the property and demanding that Verizon immediately cease and desist all efforts to market its FiOS service to residents. *See id.*, Exhibit A. When Verizon attempted to market FiOS to residents of two apartment complexes located in Plano, Texas, and Carrollton, Texas, it received a letter from an attorney for BDR Broadband, LLC claiming that BDR possessed the exclusive right to provide video services to the two properties. *See id.*, Exhibit B. And when Verizon attempted to negotiate an agreement to offer FiOS to residents of several properties owned by Armiger Management in Maryland, it was informed that the management company had signed an agreement granting Comcast Corporation the exclusive right to install and operate cable facilities. Several other property owners or managers in Maryland have informed Verizon of similar exclusive access provisions in agreements with Comcast.

These are not isolated examples. Verizon recently performed an informal survey of incumbent Bright House's territory in and around Tampa, Florida that showed that exclusive agreements are pervasive. Verizon contacted the owners or managers of all the MDU properties of which it was aware—133 properties comprising 42,040 living units—and asked whether the properties were subject to an exclusive access arrangement. According to the owners and managers, nearly 42% of the surveyed living units (17,622 units in 46 properties) were covered by an exclusive access arrangement with Bright House. Owners or managers in an additional 25 properties, representing 6,531 living units, did not know or would not say whether such an agreement was in effect.

While Verizon's survey was confined to a single location, it confirms that large numbers of consumers will be denied the benefits of competition if incumbent cable providers are able to preclude competitive entry in MDUs and other private developments. With approximately 30-35 percent of the U.S. population residing in MDUs,[6] the impact of the widespread use of these agreements is dramatic.

Verizon's experience also demonstrates that these agreements harm, not help, video competition. Exclusive access arrangements are used almost exclusively by dominant cable providers as a means of keeping out competition. As one example, Comcast has attempted to get MDU owners in the San Francisco area to sign 10-year exclusive access agreements, with automatic five-year renewals unless written notice is given, that would name Comcast as the exclusive provider of all "high-speed data, Internet, multi-channel video programming, and other lawful services and applications that the company may provide now or in the future." According to local press accounts, "Comcast's exclusivity would be clear to building owners only if they take the time to read the contract, which is written in occasionally dense legalese and printed in small text," while a "more plainly written cover letter . . . makes no mention of 10-year exclusivity or specific services." D. Lazarus, *Comcast Throws a Curve in its Broadband Pitch*, San Francisco Chronicle, at C1 (July 19, 2006). The article notes that Comcast also offered gift cards to property managers who returned "unaltered" agreements.

Verizon's experience also shows that incumbent providers often solicit exclusive access agreements while a potential competitor is actively seeking a local

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[6] *See, e.g.*, Robert Currey, Vice Chairman, RCN Corporation, Prepared Statement Before the Senate Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, *Cable and Video: Competitive Choices*, 107th Cong., S. Hrg. 107-248, 2001 C.R. Vol. 147 at D315 (Apr. 4, 2001).

franchise so as to lock out that competitor before it has even started to offer service in the area. For example, an exclusive access contract between Bright House and the River Chase apartment complex in Temple Terrace, Florida was signed in December 2005, just two weeks before Verizon began offering its FiOS TV service in that area. Similarly, Verizon has obtained copies of two exclusive access arrangements by Bright House for two other MDU properties in Tampa, each of which is dated May 17, 2006—just days after Verizon received permission to provide video service there. *See* Ex Parte Letter by Verizon, MB Docket No. 05-311, Attachment B (Aug. 9, 2006). And in Manatee County, Florida, the County's dominant cable provider responded to the entry of a competitor in part by seeking new exclusive access agreements with certain neighborhoods. *See* Comments of Manatee County, MB Docket No. 05-311, at 4 (Jan. 3, 2006).

This evidence makes clear that Commission intervention on exclusive access arrangements is now warranted, at least until such time as video competition is allowed to take hold. The Commission should prohibit video providers from entering into new, or enforcing existing, exclusive access arrangements for a limited period. This period could be extended by the Commission if it finds at the time of the sunset that market conditions justify a longer ban. And as Verizon has previously explained, the Commission has ample authority under the Communications Act to adopt such a measure. *See* Ex Parte Letter by Verizon, MB Docket No. 05-311, at 5-6 (July 6, 2006) (explaining the Commission's statutory authority to address exclusive access agreements).

D. Competition Requires Effective Program Access Regulation

In addition to franchising requirements and exclusive access deals, new entrants face the additional hurdle of obtaining popular video programming on fair and reasonable terms. To protect competitive providers' ability to purchase this programming, Congress and the Commission prohibited exclusive contracts between cable companies and their affiliated video programmers. *See* 47 U.S.C. § 548(c)(2); 47 C.F.R. § 76.1002(c). With nascent wireline competition only now beginning to emerge, it is critical that the Commission ensure continued access during the period that new providers are entering so that competition can take hold.

Incumbent cable companies have long enjoyed close corporate ties to producers of video programming. Because of their vertically integrated structures, programmers affiliated with cable companies have a strong incentive to prevent new video entrants from obtaining the popular programming they need to attract subscribers away from the programmer's cable affiliate. Video programmers have acted on this incentive by refusing to sell their programming to competing distributors (such as wireline competitors like Verizon or satellite carriers) or by selling that programming on discriminatory terms.

To prevent these anti-competitive practices, Congress prohibited exclusive contracts between cable companies and affiliated programmers for a period of years, absent express Commission approval. *See* 47 U.S.C. § 548(c)(2)(D), (c)(5). This prohibition required that any cable network programming that is at least in part owned by a cable operator and delivered via satellite be made available to competitors.

As required by statute, in 2002 the Commission assessed whether that prohibition should continue to apply, and it concluded that it should. *See In re*

Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 17 FCC Rcd 12124, 12124 (¶ 1) (2002). The Commission found that "the concern on which Congress based the program access provisions—that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected—persists in the current marketplace." *Id.* at 12153 (¶ 65). The Commission concluded that its exclusive-contract ban should continue until October 2007, at which time the Commission would assess whether "circumstances in the video programming marketplace indicate that the prohibition continues to be necessary within the meaning of the statute." *Id.* at 12161 (¶ 80).

As the Commission begins to consider extending its program access rules, it is clear that the prohibition against exclusive programming contracts remains necessary. To begin with, incumbent cable providers continue to dominate overwhelmingly the market for video services, and this position gives affiliated video programmers both the continued incentive and the ability to deny rival video entrants the programming they need to attract customers. In addition, access to programming remains an issue for new entrants, particularly when it comes to regional sports networks. In light of these circumstances, the Commission should extend its rules for a limited period of years so that competition can take hold. These rules should then sunset, absent affirmative Commission action extending the prohibition.

E. Technical Standards Should Spur Innovation and Treat All Cable Providers Equally, Regardless of the Technology They Use

A thriving competitive marketplace for cable services also depends on fair and competitively neutral technical standards. Most significantly, the rules and standards governing navigation devices and related technologies, if based on traditional cable technology, threaten to further entrench cable monopolists and stall competition. As the Commission confronts questions involving a downloadable conditional access system ("DCAS"), two-way plug-and-play standards, and other issues, it should adopt technology-neutral standards, rather than cable-centric ones, that allow FTTP and other modes of delivering video services to compete fairly with traditional cable providers.

A cable-centric approach would frustrate video competition in at least two ways. First, given the large embedded base of subscribers to the cable incumbents, cable-based standards will encourage consumer electronics manufacturers to develop products that are compatible only with the dominant cable operators' technology. As a result, many consumers who purchase equipment using those standards will be resistant to signing up for service from a provider that uses an incompatible standard. For example, a purchaser of a high-end television set that incorporates navigation functionalities and permits downloadable security would be unlikely to switch to Verizon if that meant giving up those features or relying on another piece of navigation or security equipment. In addition, customers wishing to subscribe to a competitor video service that relies on alternative technologies will face additional costs if they have to purchase or lease two separate pieces of equipment—additional costs they would not have to incur if they stay with the incumbent provider.

Second, cable-centric standards will impose additional and unnecessary costs on new video providers that are trying to break into cable markets served by a dominant provider. If the Commission adopts cable-centered standards, new entrants will be forced to either re-engineer their networks (as Verizon did to accommodate one-way plug-and-play) or to offer two, physically separate pieces of equipment to permit decryption and navigation on their video networks. Either of these options is costly, and will hinder new entrants' ability to compete for new customers and inhibit innovation.

To avoid the anti-competitive effects of cable-centric standards, the Commission should decline to rely on CableLabs, an organization created by and for the cable industry. Given CableLabs' dedication to serving the needs of incumbent cable providers, its determinations regarding technologies that affect new entrants cannot be considered neutral or impartial. Instead, the Commission must ensure that technical standards are technology—and platform—agnostic and that they do not disadvantage providers who compete using innovative technological approaches.

For example, Verizon has discussed the characteristics of an "open" DCAS approach that would be compatible with all competing platforms and that, consequently, would benefit consumers and manufacturers. *See* Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, at 26-32 (July 10, 2006). In response, a broad range of commenters expressed support for this open standards approach. For example, numerous information technology companies—including Hewlett-Packard, Intel, Sony, and Dell—have expressed their agreement with Verizon's concerns over a non-open DCAS system, noting that the proposal offered by the cable industry "has nothing to do with conditional

access and everything to do with competitive leverage and establishing complete control over consumer devices." Comments of Hewlett-Packard Company, Intel Corporation, Sony Electronics Inc. and Dell Inc. Regarding Verizon's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CS Docket No. 97-80, CSR-7042-Z, at 5 (September 19, 2006). These companies note that "Open DCAS would meet the needs of service providers, device manufacturers and consumers." *Id.* It appears that only cable incumbents, who are seeking to protect their overwhelmingly dominant position in the market, object to open standards.

IV. CONCLUSION

Consistent with these comments, the Commission should take action to remove barriers to entry and foster robust competition for video services.

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