Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	
	)	
	)	

REPLY COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY

The Federal Communications Commission's ("Commission") leased access rules do not need to be modified in order to increase the availability of a diverse array of video programming or to ensure that unaffiliated content providers are able to obtain carriage on video providers' systems.[2] Instead, the Commission should continue its efforts to promote wireline competition in the video market, since such competition is the best means by which to increase programming diversity and foster additional carriage opportunities. If the Commission decides to change the existing rules, however, it should carefully consider how new competitors would be impacted by any changes to its leased access rules. These rules were not designed with new entrants in mind, and the Commission should reject any leased access rules that would discourage or burden competitive entry into the video marketplace or continued technological innovation.

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

[2] *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rule Making, MB Docket No. 07-42, FCC 07-18 (rel. June 15, 2007) ("*NPRM*").

Likewise, the Commission's program carriage complaint procedures are working as contemplated, and the Commission should not modify these rules. The Commission should reject requests to adopt mandatory arbitration or set unreasonably short deadlines for the determination of complaints either for program carriage or leased access.

II. THE COMMISSION SHOULD NOT MODIFY THE LEASED ACCESS RULES, AS NO COMPELLING JUSTIFICATION EXISTS FOR DOING SO.

Contrary to the comments of some parties to this proceeding, the Commission's leased access rules do not need to be dramatically revamped to meet Congress's and the Commission's goals regarding programming diversity and carriage.[3] As Congress anticipated, unfettered competition in the marketplace will ensure that consumers can view the programming they desire and that programmers unaffiliated with cable service providers will be able to obtain carriage of their programming.

A. Modifying the Leased Access Rules Is Not the Best Way to Ensure Diversity in Programming.

The wealth of programming carried by video service providers today belies claims that the goals of diversity and carriage access are not being achieved through the marketplace. The Commission itself recently recognized the "pro-competitive trends" in the video marketplace including "an increase in programming networks" and "a decrease in the percentage of popular national and regional networks that are affiliated with cable operators."[4]

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[3] *See* Comments of National Alliance for Media Arts and Culture, et al., MB Dkt. No. 07-42, at 8-9 (Sept. 11, 2007) (arguing that the Commission must revise its leased access rules in order to "facilitate use of leased access channels") ("NAMAC Comments"); Comments of the Community Broadcasters Association, MB Dkt. No. 07-42, at 1 (Sept. 11, 2007) (proposing a "substantial overhaul" of the leased access rules).

[4] *Implementation of the Cable Television Consumer Protection Act of 1991; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order

These pro-competitive trends have been brought about by increased wireline competition in the video market, including Verizon's FiOS TV – a multi-channel video service that competes directly with the video service currently offered by incumbent cable operators. Verizon's FiOS TV is bringing – for the first time in many places – meaningful head-to-head wireline competition to incumbent cable providers, which has resulted in important benefits for consumers in terms of greater video choice, reduced prices, and improved services.

For its part, Verizon's FiOS TV provides a wide variety of programming. Verizon's channel line-up includes not only entertainment, sports, and educational programming, but also more than twenty channels of Spanish language programming, several international channels like TV Japan and TVP Polonia, religious programming like The Word Network, and a broad range of niche programming that consumers desire, like Blackbelt TV for martial arts enthusiasts.[5] Verizon's all-fiber broadband network allows it to continue to introduce new channels and to carry a significant amount of high-definition ("HD") programming. Verizon also has plans to offer more international programming, more HD content, and other services, such as Games-on-Demand, in order to compete against the incumbent cable operators. In addition, the vast majority of this programming is produced by parties unaffiliated with Verizon (or any video service provider), which demonstrates that unaffiliated programming is able to gain carriage

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and Notice of Proposed Rulemaking, MB Dkt. Nos. 07-29, 07-198, FCC 07-169, ¶ 16 (rel. Oct.1, 2007) ("*Exclusive Contract Extension Order*").

[5] *See e.g.*, Verizon FiOS TV Washington Metro Channel Lineup, *at* http://www22.verizon.com/NROneRetail/NR/rdonlyres/6D56A468-CDA3-47A8-99DE-6F10E620D7A6/0/VA_WashingtonMetro.pdf.

under the current system.[6] Moreover, as the Commission recently noted, Verizon also adds to programming diversity with the FiOS1 channel that it recently launched, a local television channel for FiOS TV subscribers that offers local weather, traffic, news, sports, and community features.[7]

The diversity of programming available on Verizon's FiOS TV and from other video providers is a direct result of the competitive free-for-all that is shaping up between incumbent cable operators, direct broadcast satellite providers, and new wireline entrants. Consumers demand that video service providers offer a broad array of programming that is interesting, timely, and relevant, and video service providers compete on the type of programming they offer just as much as they do on the basis of price and customer service. This is no surprise. Indeed, when Congress adopted the 1992 Cable Act and the Telecommunications Act of 1996 ("1996 Act"), it expressed a clear preference for competition over regulation, which Congress also recognized was the best way to promote diversity in programming and ensure carriage access.[8] For example, Congress adopted Section 621 in the 1992 Cable Act to encourage the entry of new

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6 *See* Comments of Comcast Corporation, MB Dkt. No. 07-42, at 8-9 (Sept. 11, 2007) ("Comcast Comments"); Comments of Time Warner Cable Inc., MB Dkt. No. 07-42, at 8-9 (Sept. 11, 2007) ("TWC Comments").

7 *Exclusive Contract Extension Order,* ¶ 64, n. 332.

8 *See e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §2(b)(1)-(2), 106 Stat. 1460, 1463 (stating that the policy of Congress in adopting the 1992 Cable Act was to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability"); Preamble, Telecommunications Act of 1996, Pub. L. No. 104-404, 110 Stat 56 (1996) (noting that the purpose of the Telecommunications Act of 1996 was "to promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); *see also* Comcast Comments at 1-2, 6-12.

wireline video competition and adopted Section 628 to ensure that new entrants had reasonable access to cable programming.[9] The 1996 Act further promoted video competition by removing barriers to the provision of video service by telecommunications carriers.[10] The Commission recently has advanced the goal of video competition by streamlining the cable franchising process and extending the program access rules' exclusive contract prohibition.[11] The Commission should continue to take steps that will increase program diversity by fostering video competition, including by addressing the problems, in light of current market conditions, created by exclusive access contracts between video service providers and multiple dwelling unit owners.[12]

As shown by Congress and the Commission's preference for free market solutions over regulation, the leased access requirements were never intended to replace competition as the driving force behind programming diversity or carriage access. Instead, Section 612 was intended as a backstop to ensure that unaffiliated programmers would be able to obtain access to cable operators' systems when cable operators had an incentive to deny carriage to these programmers.[13] Today, however, with the advent of competition, particularly wireline competition, cable operators have every incentive to meet consumers' increasing demand for

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9 47 U.S.C. §§ 541, 548.

10 *See* 47 U.S.C. § 571.

11 *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007); *Exclusive Contract Extension Order*.

12 *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Notice of Proposed Rulemaking, MB Docket No. 07-51, FCC 07-32 (rel. Mar. 27, 2007).

13 *See* TWC Comments at 4.

new, innovative, and varied programming, and, as a result, unaffiliated content providers are able to gain carriage without resorting to leased access by offering programming that is desired by consumers. Indeed, as has been the case for some time, video service providers generally pay content providers for the privilege of carrying their programming – not the other way around. On the other hand, experience has shown that rather than increasing diversity in a meaningful way, leased access time is often used for programming for which there is little consumer demand, such as additional infomercials and home shopping networks.[14]

In addition, content providers today have other avenues for the distribution of content that were not available when the leased access rules were adopted – including online video-streaming and downloads – thus further reducing the need for increased reliance on leased access at this time.

Experience also has revealed that leased access primarily works for certain programming like shop-at-home services or infomercials. The programmers that produce this programming are able to obtain carriage on video providers' systems by using the time to advertise goods and services.[15] But as explained in more detail by other commenters,[16] the leased access business model generally may not work well for other types of programming. Notwithstanding proposals

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14 *See* Comcast Comments at 3 (noting that "leased access is now used in large measure to ensure the delivery of a surfeit of infomercial, home shopping and other limited appeal programming"); Comments of National Cable and Telecommunications Association, MB Dkt. Nos. 07-42, at 4 (Sept. 11, 2007) (commenting that "some of the principal beneficiaries of government-mandated leased access are providers of infomercials and home shopping services, entities that generate revenues during transmissions") ("NCTA Comments").

15 *See* NCTA Comments at 4.

16 Comcast Comments at 17-20 (showing that "programmers' efforts to find an audience elsewhere are the result of the limitations inherent in the leased access business model"); NCTA Comments at 4 (commenting that the "economics of leasing, then, account for its limited utility as a tool for traditional programmers").

by some commenters otherwise, however, the Commission cannot and should not be in the business of guaranteeing the success of certain programming by requiring that cable operators provide leased access at highly subsidized rates, regardless of whether there is sufficient consumer demand for such programming and regardless of the impact on other programming that consumers want to watch instead or on other services, including broadband, that may offer more benefits to consumers. In fact, Congress did not intend for the leased access mechanism to guarantee the success of programmers and instead recognized that leased access may well be a dubious business model.[17] Just because that prediction has proven true does not mean that the Commission must, or even may, double down and promote greater reliance on the leased access model at the expense of other diverse programming and innovative services now being offered to consumers. This is particularly true given that Congress's explicit goals – increasing program diversity and promoting carriage access – now are starting to be achieved in a more meaningful manner through growing video competition.

Instead of subsidizing leased access, the Commission should continue to take steps to foster diversity through competition. For example, the Commission should accept Time Warner's proposal that effective competition obviates the need for the Commission to regulate leased access rates, and should remove leased access rate regulation for competitive providers.[18] Rate regulation by the Commission is limited to those situations where the rates for the products or services in question are not constrained by market forces. For providers subject to effective competition under 47 U.S.C. § 623(a) – including all new entrants competing in areas already

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[17] S. Rep. No. 102-92, at 31 (1991) (finding that the "cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use"); *see also* Comcast Comments at 7.

[18] TWC Comments at 25-26.

served by an incumbent – the market will constrain prices, in which case the Commission need not, and cannot, regulate rates, whether for cable programming services or for leased access. As Time Warner correctly points out, such a result is consistent with Congress's stated "preference for competition over regulation."[19]

B. The Leased Access Rules Were Not Designed With New Entrants In Mind, and the Commission Should Be Reluctant to Modify These Rules in Any Way That Would Harm New Entrants or Disadvantage Parties Using More Efficient Networks.

If the Commission makes any changes to its leased access rules, it should ensure that those rules do not harm or disadvantage new entrants – the driving force behind accomplishment of Congress's goals. On their face, the Commission's current rules were not developed with new entrants in mind. For example, in implementing Section 612, the Commission adopted a fee structure that is based on "subscriber revenue per month" received by the cable operator.[20] Because new entrants start with no customers and no revenues, new entrants were clearly not considered when this fee structure was adopted. The Commission must ensure that such rules, or any changes to the rules, do not harm or disadvantage new entrants or undermine the Commission's broader video and broadband goals.

Likewise, the Commission must ensure that its leased access rules do not discourage or punish technological innovation, including the deployment of more efficient networks. New entrants are now offering video services over next generation broadband networks that are designed to provide a range of robust voice, data, and video services in the most efficient manner possible. The networks that make this possible are based on very different technology from the

[19] *Id.* (citing 47 U.S.C. §§ 543(a), 543(a)(2)).

[20] 47 C.F.R. § 76.970(e) (defining the average implicit fee as a function of subscriber revenues per month); *id.* § 76.970(g) (defining the maximum implicit fee).

old cable networks on which the Commission's leased access rules were premised. The Commission should encourage this evolution towards more robust and efficient networks – not saddle them with additional leased access obligations. For example, additional demand for leased access time could result in new entrants being forced to divert network capacity to unwanted programming, rather than offering additional HD content or faster broadband speeds that may be necessary to compete against the incumbent cable operators.

The Commission must be careful, therefore, to consider the impact on new entrants of proposed changes to its leased access rules – an issue largely ignored by commenters. The Communications Act explicitly states that cable operators must be able to set "price, terms, and conditions of [leased access] which are at least sufficient to assure that such use will not adversely affect the operation, financial conditions, or market development of the cable system."[21] This requirement is especially important for new entrants in the video market, which are seeking to compete with entrenched incumbent cable operators, and for whom new regulatory requirements might be disproportionately harmful.

III. <u>NO NEED EXISTS FOR THE COMMISSION TO MODIFY ITS PROGRAM CARRIAGE OR LEASED ACCESS COMPLAINT PROCEDURES</u>.

The Commission should not change its program carriage complaints process by, among other things, adopting unreasonably short deadlines to expedite the complaint process or mandating that the parties submit to arbitration in the event of a dispute, as some commenters have proposed.[22] The Commission's existing processes are sufficient to resolve the limited

[21] 47 U.S.C. 532(c)(1).

[22] *See* NAMAC Comments at 17-18 (arguing that "leased access programmers should have the right to seek arbitration rather than rely on the Commission's enforcement staff"); Comments of NFL Enterprises, MB Dkt. No. 07-42, at 7-8 (Sept. 11, 2007) (proposing that

number of disputes that have arisen to date, and there is presently no need to change these processes.

As a threshold matter, the Commission has not experienced a large number of complaints regarding program carriage. Commenters in this proceeding note the limited number of complaints that have arisen to date, which have been resolved either through the Commission's existing complaint procedures or through additional negotiation between the parties.[23] There is no evidence that complaint procedures in place today are not adequate to resolve any disputes that have arisen or may arise in the future.[24] Absent evidence that the current system is not working to effectively resolve complaints, the Commission should be reluctant to change that system.

The Commission also should not adopt a mandatory arbitration mechanism for program carriage or leased access disputes.[25] The Commission recently considered mandatory arbitration in the related program access context and rightly rejected such an approach, reasoning that it was unclear what type of disputes "lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance" and finding that parties were free to engage in arbitration voluntarily should both parties agree to it.[26] The same reasoning applies equally in this context. Moreover, as other commenters noted, the

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independent programmers be able to "initiate binding arbitration when they believe that an MVPD is discriminating against them or has failed to negotiate in good faith.")

23 Comcast Comments at 28-32.

24 *NPRM*, ¶¶ 14-18.

25 *NPRM*, ¶ 19.

26 *Exclusive Contract Extension Order*, ¶ 112.

Commission cannot require parties to engage in arbitration under the Administrative Dispute Resolution Act, which contemplates mutual agreement between the parties, not unilateral imposition of arbitration by a federal agency.[27] The Commission should follow its own precedent and should not adopt mandatory arbitration for program carriage disputes.

The Commission also should reject proposals that the Commission adopt a 90-day "shot-clock" to decide complaints[28] or impose unreasonably stringent deadlines on the Commission's complaint process. Section 616 already requires the expedited resolution of program carriage complaints under appropriate circumstances.[29] As the Commission recognized in the *Exclusive Contract Extension Order*, however, adopting a one-size-fits-all deadline for deciding complaints or expediting the complaint process could lead to a number of negative side effects. The Commission noted that it "agree[d] that program access complaints should be resolved in a timely manner, but the time frames for resolving complaints must be realistic."[30] The Commission also noted that unreasonably short deadlines for ruling on complaints were undesirable given "the Commission's limited resources and overall statutory duties." *Id.* ¶ 108. Moreover, the Commission noted that adopting a single time limit would likely require the Commission to "adopt a longer time limit than would be necessary in many cases" and that adopting an expedited complaint process could also "lead to increased litigation costs if the parties are required to hire additional staff and counsel in attempting to meet unrealistic deadlines." *Id.* ¶¶ 107-108.

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27 TWC Comments at 34-36.

28 NAMAC Comments at 17.

29 47 U.S.C. § 536(a)(4).

30 *Exclusive Contract Extension Order*, ¶ 107.

The Commission's concerns about establishing stringent timeframes for resolving complaints apply equally to program carriage and leased access complaints. Indeed, as one commenter noted, an expedited process for program carriage complaints could be even harder to implement than for program access complaints.[31] Thus, the Commission should decline the invitation to adopt stringent complaint deadlines or an expedited complaint process.

CONCLUSION

The comments in this proceeding demonstrate that no compelling justification exists for the Commission to change the existing leased access rules or modify the complaint procedures applicable to program carriage or leased access disputes.

Respectfully submitted,

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31 Comcast Comments at 31.