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

In the Matter of	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198
	)	

COMMENTS OF VERIZON

Michael E. Glover
Of Counsel

Edward Shakin
William H. Johnson
1515 North Court House Rd.
Suite 500
Arlington, VA 22201
(703) 351-3060

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I. INTRODUCTION AND SUMMARY

The Commission consistently has expressed its preference for competition over regulation, noting that "[c]ompetition can protect consumers better than the best-designed and most vigilant regulation."[2] However, the video marketplace is unique because of the incumbent cable operators' legacy of exclusive franchises in many areas, with entry by competitive, fiber-based video providers still in its early stages.

Under these unique circumstances, the Commission should continue its efforts to facilitate competitive video entry and ensure that the legacy of cable incumbents' monopoly franchises does not prevent emerging competition from having the opportunity to take hold. In particular, the Commission should continue removing roadblocks erected by the entrenched incumbent cable operators, including efforts to deny new entrants access to terrestrially-delivered regional sports networks ("RSNs") and the high-definition ("HD") "feeds" of programming that is otherwise covered by the program access rules. The Commission should also adopt a

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

[2] *The Merger of MCI Commc'ns Corp. and British Telecomm. PLC*, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15429 ¶ 204 (1997).

"standstill" requirement that prevents abusive negotiating tactics during the pendency of a program access complaint related to the renewal of a programming contract.

II. ADDITIONAL, NARROWLY TAILORED PROGRAM ACCESS RULES ARE APPROPRIATE TO ENCOURAGE COMPETITION IN LIGHT OF THE UNIQUE HISTORY IN THE VIDEO MARKETPLACE.

Congress adopted the existing program access rules – including the prohibition on exclusive contracts between cable operators and vertically integrated programmers that the Commission recently extended – in the 1992 Cable Act as a limited remedial measure to address a problem unique to the cable industry. Because cable operators historically had exclusive local franchises, the larger multiple system operators had used their monopoly status to extract concessions from programming providers, whether in the form of ownership interests or exclusive contracts or both. These incumbent providers then used their control over popular programming to further entrench themselves by denying new entrants access to that programming in order to handicap their ability to compete.[3]

In order to foster video competition in light of this unique history of abuse, Congress adopted a targeted remedial provision with the aim of preventing such anticompetitive practices until such time as sufficient competition developed to deter these practices in the absence of regulation. S.Rep. No. 102-92, at 28 (1991); H.R. Rep. No. 102-862, at 93 (1992) (Conf. Rep.). As the Commission has put it, the exclusive contract prohibition was designed to "encourage entry into the MVPD market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable

[3] *See, e.g., TV Commc'ns Network, Inc., v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992) (challenging TNT's refusal to sell its programming to competing cable operator), *cert. denied*, 113 S. Ct. 601 (1992); *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992) (challenging refusal by The Learning Channel and ESPN to sell their programming to competing cable operator as part of alleged attempt to prevent overbuilders from entering the cable services market).

competitors."[4] At the same time, Congress and the Commission took several steps to ensure that the regulations they were adopting were narrowly tailored. Further, Congress recognized that regulation, at least in the case of the exclusive contract prohibition, should be in effect only so long as would be necessary to allow competition to take hold, after which time it would sunset. *See* 47 U.S.C. § 548(c)(5).

Today, competition to cable remains limited, and wireline video competition in particular remains rare.[5] However, that situation is changing. Verizon is spending billions of dollars to deploy a broadband network that features a competitive video service called FiOS TV, which brings enormous benefits to consumers and the economy. As Verizon and other wireline providers begin offering competitive video service, they need access to the cable-affiliated programming to which Congress intended to ensure access, including what the Commission has described as "must have" programming such as RSNs, and to the increasingly essential "HD feeds" of programming covered by the program access rules. With access to this programming, the resulting competition from new wireline competitors will benefit consumers through "lower prices, more channels, and a greater diversity of information and entertainment from more

[4] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 22 FCC Rcd 17791, 17794 ¶ 3 (2007) ("*Exclusive Contract Prohibition Extension Order")*; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12125 ¶ 3 (2002) (noting that, in the absence of the exclusivity prohibition, vertically integrated programmers were likely to engage in behavior that "would result in a failure to protect and preserve competition and diversity in the distribution of video programming.").

[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2617 App. B (2006) (reflecting that subscribership from competitors to cable, other than DBS providers, has either declined or remained flat over the last several years) ("*Twelfth Annual Report*"); Verizon Communications Investor Quarterly 3Q 2007, at 3 (Oct. 29, 2007) (available at http://investor.verizon.com/financial/quarterly/vz/3Q2007/3Q07Bulletin.pdf) (noting that Verizon has approximately 717,000 FiOS video customers).

sources."[6] Once video competition has firmly taken hold, the video marketplace should be allowed to function without unnecessary regulation.

III. THE COMMISSION SHOULD EXTEND THE PROGRAM ACCESS RULES TO ALL VERTICALLY INTEGRATED REGIONAL SPORTS PROGRAMMING AND HIGH-DEFINITION "FEEDS" OF PROGRAMMING OTHERWISE COVERED BY THE PROGRAM ACCESS RULES, EVEN WHEN THIS PROGRAMMING IS DELIVERED TERRESTRIALLY.

In order to encourage the nascent wireline competition and ensure that the unique monopoly history of the video marketplace does not prevent it from taking hold, the Commission should adopt additional, narrowly-tailored measures to ensure that the cable incumbents do not use the "terrestrial loophole" to deny new entrants access to programming that they need in order to compete effectively. In particular, the Commission should put a stop to such anticompetitive conduct by: (1) extending its program access rules to vertically integrated regional sports programming that is delivered terrestrially; and (2) requiring vertically integrated cable operators to provide the HD feeds of all programming that otherwise must be made available under the program access rules, rather than artificially carving out a terrestrially-delivered "HD feed" to evade these rules. Access to RSNs is essential for a video provider seeking to compete against the entrenched incumbent cable operator, since customers demand regional sports programming for which there is no substitute. The same is increasingly true for HD programming, and

[6] *Exclusive Service Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 17 (2007) ("*MDU Order"*); *see also 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, 5126 ¶ 50 (2007) ("*Franchise Reform Order*") (concluding that the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without wireline competition); *see id.* at 5103 ¶ 2 ("competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings"); *Exclusive Contract Prohibition Extension Order*, at 17836-37 ¶ 64 (citing Verizon's investment in local programming in the Washington, D.C. area and its intention to introduce new local programming in other markets).

vertically integrated cable operators should not be permitted to circumvent the program access rules by withholding the HD version of programming that is otherwise subject to those rules.

A. <u>Vertically Integrated Programmers Use Regional Sports Programming and HD Versions of Covered Programming to Implement Anticompetitive Withholding Strategies.</u>

1. <u>Regional Sports Programming</u>

The Commission repeatedly has found that regional sports programming is among the most demanded by video subscribers.[7] It also cannot be duplicated. As the Commission recently observed, there are a "lack of adequate substitutes for regional sports programming" due to "the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[8] Whereas a new entrant may be able to create a competing entertainment or news channel if denied access to such programming, the new entrant cannot replace the games of a popular local team.[9] Because customers insist on having access to their local sports teams for which there is no substitute, competitive video providers are seriously

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[7] *See, e.g., Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corp., Transferee*, 21 FCC Rcd 8203, 8271-72 ¶ 151 (2006) ("*Adelphia Order*") (noting that "there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN"); *Exclusive Contracts Prohibition Extension Order,* at 17816 ¶ 38.

[8] *Adelphia Order*, 21 FCC Rcd at 8258-59 ¶ 124 (quoting *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Ltd., Transferee,* 19 FCC Rcd 473, 535 ¶ 133 (2004)).

[9] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8365, Statement of Chairman Kevin J. Martin ("In North Carolina, there is no substitute for Tarheel basketball.").

disadvantaged when a vertically integrated cable operator withholds, or even threatens to withhold, an affiliated RSN.[10]

There is ample evidence that vertically integrated cable operators can and do deny access to RSNs. Verizon experienced this problem firsthand when Cablevision and its vertically integrated programming subsidiary, Rainbow Media Holdings, LLC ("Rainbow"), refused to provide access to regional sports networks in the New York City metropolitan area and New England.[11] Although Verizon was eventually able to obtain the standard definition version of this sports programming after filing a complaint with the Commission, the case illustrates the efforts of vertically integrated cable operators to frustrate competition from new entrants.

Verizon's experience is not unique. The Commission has identified other instances where incumbent cable operators had denied competitors access to vertically integrated RSNs, including in Philadelphia, San Diego, and elsewhere. *Exclusive Contracts Prohibition Order*, at 17823 ¶ 49. Indeed, the Commission has found that "withholding [RSN] programming from rivals can be a profitable strategy for a vertically integrated cable programmer and that such withholding can have a significant impact on subscribership to the rival MVPDs." *Id.* at 17817-19 ¶¶ 39 & 40.

Because of the unique nature of RSNs and because the withholding of an RSN can be a successful strategy for vertically integrated cable operators to handicap new entrants, the Commission should extend the program access rules to vertically integrated RSNs that are delivered terrestrially. Regional sports programming, more so than non-sports programming for

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[10] *Adelphia Order*, 21 FCC Rcd at 8258-59 ¶ 124 (finding that "an MVPD's ability to gain access to RSNs … can be [an] important factor[] in its ability to compete with rivals.").

[11] *See Verizon Telephone Companies and Verizon Servs. Corp. v. Cablevision Sys. Corp. and Rainbow Media Holdings, LLC,* Program Access Complaint, File No. CSR-7010-P (filed March 20, 2006).

which substitutes can be developed or procured, is a particularly attractive means for cable operators to exercise anticompetitive practices. Indeed, of the ten examples of withholding strategies recently identified by the Commission, five involved RSNs. *Id.* at 17823 ¶ 49. Until video competition has been firmly established, the Commission should prohibit vertically integrated, incumbent cable operators from refusing to make RSNs available merely because the programming is delivered terrestrially.[12]

2. **HD Feeds of Covered Programming**

The Commission also should require that vertically integrated programmers make available the terrestrially delivered HD "feeds" of programming that is otherwise subject to the program access rules. This measure is necessary to ensure that competitive providers have a chance to compete effectively for the rapidly growing number of consumers that demand a robust selection of HD programming. More than one-third of American households already have an HD television ("HDTV") set, and HDTV sales are growing at an astonishing 50% per year.[13] By 2011, according to estimates by the Consumer Electronics Association, the number of HDTVs sold in the United States will reach 170 million, which is roughly one set for every two Americans.[14] Faced with consumers' embrace of HD technology, video providers and programmers must be able to keep up with the demand for HD content, which one cable

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[12] In light of recent decisions clarifying what qualifies as a regional sports network, an extension of the program access rules to terrestrially delivered RSNs would be relatively easy to administer. *See, e.g., Comcast Corp., Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, Order (Sept. 25, 2007).

[13] K.C. Neel, *Consumers Get "High" Anxiety: No Clear Picture On High-Definition Do's and Don't*, Multichannel News, Nov. 26, 2007; *see also* Press Release, 30 *Percent of U.S. Households Own an HDTV, CEA Research Finds* (June 26, 2007) (available at http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11309).

[14] *See id.*

executive recently described as "insatiable."[15] Video providers aggressively compete for HD consumers in what one industry analyst has called "an arms race," "the high-definition equivalent of Russian and the United States during the Cold War."[16]

However, vertically integrated programmers are seeking to compete unfairly by withholding from competitive providers the HD version of programming subject to the program access rules by transporting the "HD feed" terrestrially, thus allowing affiliated cable operators to offer a more robust line-up of HD programming. For example, Rainbow continues to refuse to sell Verizon the HD feeds of its RSNs in the New York City metropolitan area, claiming that the HD feeds are terrestrially delivered. At the same time, Rainbow's affiliate, Cablevision, trumpets through its advertising that it is the only source for certain regional sports programming in HD. Allowing a vertically integrated cable operator such as Cablevision to gain a competitive advantage by withholding from new entrants the HD versions of programming otherwise subject to the program access rules undermines the Commission's program access rules and the video competition those rules are intended to encourage.

B. The Commission Has Authority to Extend Its Program Access Rules to Vertically Integrated RSNs and HD Feeds of Covered Programming, Even When Such Programming Is Delivered Terrestrially.

The Commission has authority to extend its program access rules to vertically integrated RSNs whether delivered via satellite or terrestrially and should require that vertically integrated

[15] Todd Spangler, *Fitting On the HD Shelf: Programmers Vie for Space as Cable Works to Unlock Bandwidth*, Multichannel News, Dec. 3, 2007; Jonathan Hemingway, *Who's Got the Best HD?: Cable, Satellite, Telcos Claim Top Picture, Channel Selection*, Broadcasting and Cable, Nov. 26, 2007.

[16] Clint Swett, *TV rivals ready to duke it out in HD corral*, Sunday Gazette-Mail, Oct. 21, 2007.

programmers make available HD feeds of programming otherwise subject to the program access rules.

Congress included Section 628 in the 1992 Cable Act in part to encourage video competition even in the face of cable incumbents' pervasive control over popular programming. By adopting Section 628, Congress sought to ensure that vertically integrated programmers could not deny competitive video providers the programming that they need in order to compete effectively.

As the Commission recently observed, "a primary concern underlying Section 628 was fostering competition among cable operators and enhancing consumer choice." *MDU Order*, ¶ 45.[17] In adopting this provision, Congress recognized that consumer choice and video competition could be frustrated if vertically integrated, incumbent cable operators were permitted to use their control over popular programming – much of which was acquired when exclusive franchises and few competitive alternatives gave incumbent cable operators substantial leverage over programmers – to deny competing video providers access to that programming in order to handicap their ability to compete.

In order to prevent anticompetitive practices that could deny access to popular programming, Congress made it "unlawful for a cable operator, [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers." 47 U.S.C. § 548(b).

[17] *See also* 47 U.S.C. § 548(c)(1) (directing the Commission to apply Section 628 "in order to promote the public interest, convenience, and necessity by *increasing competition and diversity in the multichannel video programming market* and the continuing development of communications technologies") (emphasis added).

The statute goes on, in Section 628(c), to detail several specific rules – the "minimum contents of regulations" – that the Commission was to include in its rules to effectuate the prohibition in Section 628(b). These include a requirement that vertically integrated programmers provide competitive providers with access to satellite-delivered programming without discriminating "in the prices, terms, and conditions of sale or delivery," and the prohibition on most exclusive programming contracts between vertically integrated programmers and cable operators. *See id.* § 548(c)(2).

Although the program access rules in Section 628 generally speak to "satellite delivered" programming, the modest extensions to the current rules to cover all vertically-integrated RSNs as well as the HD feeds of otherwise covered programming are within the Commission's ancillary authority because they are necessary to effectuate Section 628 and to further Congress's underlying goals in Section 628. In particular subsequent technological changes – as well as a documented history of abuse by vertically integrated programmers – reveal that the protections of the program access rules are necessary in the context of this programming, even when delivered terrestrially.

Both the Commission and the courts have long recognized that the Commission may exercise ancillary jurisdiction as a basis for adopting measures that are directly ancillary to the Commission's express responsibilities and are necessary to effectuate and further the purposes of those express statutory responsibilities.[18] In *Southwestern Cable,* the first case to recognize this

[18] The Commission has invoked several statutory provisions to support the exercise of limited ancillary jurisdiction in appropriate cases. Section 4(i) of the Communications Act permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 303(r) directs the Commission to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter...." 47 U.S.C. § 303(r). In particular

authority, the Supreme Court affirmed the Commission's regulation of community antenna television ("CATV") services, despite the lack of express statutory provisions governing the regulation of CATV. 392 U.S. at 177-78. After noting the potential for CATV services to undermine the effectiveness of the Commission's rules aimed at facilitating the orderly development of broadcast television, the Court concluded that the Commission possesses authority to take steps that are "reasonably ancillary to the effective performance of the Commission's various responsibilities" and that further the purposes of the Act. *Id.* at 178. The Commission has relied upon its ancillary authority on numerous occasions to adopt rules governing aspects of video service, most recently in prohibiting cable operators from enforcing or executing exclusive access clauses in providing video services to MDUs.[19]

At the same time that it recognized the existence of the Commission's ancillary authority, the Supreme Court also held that the Commission's ancillary authority is limited in its reach. The Court concluded that the Commission possessed authority to "issue such orders, not inconsistent with this (Act), as may be *necessary* in the execution of its functions."[20] Likewise,

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contexts, the Commission has also pointed to Sections 1 and 2(a) of the Communications Act to support the exercise of ancillary jurisdiction to regulate aspects of cable services. *See* 47 U.S.C. §§ 151, 152(a).

[19] *MDU Order* at ¶¶ 52-54, n.167; *see also Telecomm. Servs. Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3700 ¶ 83 (1997) (relying upon ancillary authority to adopt rules for disposition of cable home run wiring in MDUs); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (upholding Commission regulation of cable television systems as a valid exercise of ancillary jurisdiction).

[20] *Southwestern Cable Co.*, 392 U.S. at 181 (emphasis added); *see also United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *NCTA v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act … and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act").

this authority only supports regulation reasonably ancillary to the express statutory provisions that the regulation is intended to further. *Id.* Later cases similarly recognize that the Commission may exercise ancillary jurisdiction, while also holding that this jurisdiction is limited to actions that further an express statutory responsibility.[21]

The Commission's exercise of its ancillary authority to extend the program access rules to terrestrially delivered RSNs and the HD feeds of otherwise covered programming is necessary in order to give full effect to the provisions of Section 628.

First, as a technological matter, the distinction suggested by Section 628 between programming that is "satellite" delivered and programming that is terrestrially delivered has largely gone away. Since Section 628 was adopted in 1992, the availability of fiber over which programming can be delivered terrestrially has increased dramatically.[22] Programming can often be delivered now on a cost-effective, terrestrial basis, solely for the purpose of circumventing the statutory program access rules. As a result, if the Commission does not address terrestrially delivered programming in appropriate cases, cable incumbents have the technological ability now of removing the constraints that Congress and the Commission intended, simply by shifting select programming that otherwise would have been delivered by satellite to terrestrial delivery over available fiber networks.

[21] *See American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing *Southwestern Cable*, 392 U.S. at 177-78); *see also MDU Order*, ¶ 52 (noting that in order for the Commission to exercise its ancillary authority, the regulation "must cover interstate or foreign communications by wire or radio" and "be reasonably ancillary to the Commission's statutory mandated responsibilities").

[22] *Twelfth Annual Report*, at 2524 ¶ 48 ("NCTA states that cable operators have invested almost $100 billion since 1996 to replace coaxial cable with fiber optic technology and install new digital equipment in homes and system headends.").

Second, developments in the video marketplace since the adoption of Section 628 show the need for the Commission to exercise its ancillary authority in a narrowly tailored manner in this context. As discussed above, the cable incumbents' history of abuses aimed at staving off competition is now well documented, including in particular the incumbents' use of the terrestrial loophole to harm new entrants. These practices continue today, with vertically integrated cable operators exploiting their control over RSNs and HD feeds of programming covered by the program access rules in order to protect their position in the video market to the detriment of consumers. Also, while the immediate promise of increased video competition at the time of the adoption of Section 628 came largely from satellite providers – thus explaining the focus on satellite delivered programming – the promise for increased competition now largely comes from wireline competitors to the cable incumbents.

In light of these significant technological and marketplace developments since the adoption of Section 628, the Commission should, as it suggested in the *MDU Order*, "take additional actions to accomplish the *statutory objectives* [in Section 628] should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming." *Id.* ¶¶ 44 & 49 (quoting *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection & Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, ¶¶ 40-41 (1993)) (emphasis added). Here, access to RSNs and HD feeds of programming otherwise covered by the program access rules is critical to a video provider's ability to offer a viable competitive video offering. Consequently, extending the Commission's program access rules to vertically integrated RSNs, regardless of the delivery method, and HD feeds of covered programming is necessary to effectuate Congress's Section 628 goals. This reasonable and narrowly tailored exercise of the Commission's limited ancillary authority would encourage competitive entry and promote competition and diversity in the video programming market.

It also would promote broadband deployment. Under Section 706, the Commission has the express statutory responsibility to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[23] As the Commission previously has observed, because "[c]ompetitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the 'triple play' of voice, data, and video services," revenues from "new entrants' video offerings thus directly affect their roll-out of new broadband services." *Franchise Reform Order*, at 5108 ¶ 13. Thus, according to the Commission, "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated." *Id.* ¶ 62. Thus, prohibiting vertically integrated cable operators from withholding RSNs and covered HD programming – programming that new entrants need in order to compete effectively – would serve the purposes set forth in Section 706 as well as Section 628 and ensure the furtherance of the broad goals of the 1992 Cable Act and the Act generally. *See MDU Order* at ¶ 54.[24]

[23] *See* 47 U.S.C. §157 nt ("The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.").

[24] The Commission previously has declined to address arguments regarding the Commission's ancillary jurisdiction over terrestrially delivered programming. *See Exclusive Contract Prohibition Extension Order*, at 17844 ¶ 78, n.382 (*citing Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822, ¶ 71, n.222 (1998); *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, ¶ 18 (2001) (declining "to exercise ancillary jurisdiction to extend, in the context of a complaint proceeding, program access regulation to terrestrially-delivered programming"). However, the Commission has not ruled out exercising its ancillary jurisdiction to extend its program access

IV. ADOPTION OF A STANDSTILL REQUIREMENT WOULD ENSURE CONTINUED ACCESS TO PROGRAMMING AND DISCOURAGE TEMPORARY FORECLOSURE STRATEGIES.

A vertically integrated programmer currently can engage in abusive tactics in the context of negotiating the renewal of a programming contract, to the detriment of competitors and consumers alike. In particular, in negotiating a program access agreement with a new entrant, a vertically integrated programmer can adopt a temporary foreclosure strategy by withholding or threatening to withhold programming in order to extract a higher price for such programming and/or to induce subscribers to switch to the vertically integrated video provider. *See Adelphia Order*, at 8262 ¶ 129. The result of such a strategy is that new entrants are faced with the prospect of acceding to a vertically integrated programmer's demands, in which case the cost of a customer's cable service will go up, or run the risk of losing customers who do not want to go without the programming they are accustomed to receiving.

Although a new entrant can file a program access complaint, doing so may accomplish little by the time the complaint is resolved, absent a standstill requirement that preserves the status quo during the pendency of a program access complaint. A standstill requirement would ensure that the customers being served by the MVPD alleging a violation of the program access rules can continue to enjoy the programming they are currently receiving while the Commission considers the merits of the provider's allegations. When a complaint is filed, the programming at issue is covered by the program access rules and thus is designated by law as programming that cannot be withheld without Commission permission.

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rules to terrestrially delivered programming based upon a sufficient factual showing of anticompetitive marketplace behavior. Here, a sufficient showing has been made with respect to the withholding by vertically integrated cable operators of RSN programming and HD feeds of programming covered by the program access rules.

The Commission previously has recognized the utility of a standstill requirement when it imposed a similar remedy in the *Adelphia Order* to address temporary foreclosure strategies that the Commission found to be anticompetitive. *Adelphia Order*, at 8275 ¶ 160. The Commission should extend its reasoning by adopting a standstill requirement in all program access complaint proceedings.

Verizon further supports the proposal advanced by several other parties that the standstill requirement apply terms ultimately reached by the parties retroactively to the date of the complaint. This approach would lessen any concern that an aggrieved provider would bring a complaint to freeze the status quo indefinitely, and it would give both sides the incentive to negotiate diligently and in good faith and the benefits of their negotiations.

V. THE COMMISSION SHOULD DECLINE INVITATIONS TO SHORTEN THE TERM OF THE EXTENSION OF THE EXCLUSIVE CONTRACT PROHIBITION ON A MARKET-BY-MARKET BASIS.

The Further Notice also asks whether the Commission should establish a procedure that would shorten the term of the extension of the exclusive contract prohibition "if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA." *Exclusive Contract Prohibition Extension Order*, at 17859 ¶ 114. As a general matter, the exclusive contract prohibition will no longer be necessary once wireline video competition has been given a chance to more firmly take hold. At that time, the video marketplace should be allowed to function without regulation.

However, there are both substantive and procedural problems with a system under which the term of the exclusive contract prohibition would be shortened on a market-by-market basis. First, such an approach would frustrate, not encourage, video competition and the development of new programming. In order to acquire unaffiliated programming on reasonable terms, overcome the incentives of vertically integrated programmers to engage in withholding strategies, and justify the development of its own competing programming, a new entrant must obtain sufficient scale by attracting a "critical mass" of subscribers across its entire video platform (or securing a large number of "eyeballs" in industry parlance). A market-by-market approach to the exclusive contract prohibition, however, would make it substantially more difficult for a new entrant to reach this critical mass.

Take, for example, an area in which a new entrant has been able to compete successfully with the exclusive contract prohibition in place. If the prohibition were allowed to sunset in that particular area, the new entrant would again be subject to its vertically integrated competitor's withholding strategies, and would stand to lose customers due to the incumbent cable operator's ability to offer popular programming from its vertically integrated affiliate on an exclusive basis. While the exclusive contract prohibition would remain in place in less competitive markets, on a national basis, the new entrant would continue to struggle to reach the critical mass of total subscribers necessary to compete successfully, obtain programming on reasonable terms, and justify the development of new programming – a result contrary to Congress's desire to promote programming diversity. *See* 47 U.S.C. § 628(a).

Second, a market-by-market approach would create procedural difficulties. Other than for RSNs, most programming agreements are national in scope, and when Verizon purchases programming from a vertically integrated cable operator, it generally does so for all of the areas in which Verizon is providing video service. Allowing a vertically integrated cable operator to enter into an exclusive contract in a particular market that may be sufficiently competitive but not in another market that does not enjoy the same level of competition would require the negotiation of programming agreements on an inefficient, market-by-market basis. It could also add uncertainty to existing programming contracts or to future contracts negotiated under the current rules.

Additionally, developing an appropriate "competition" test on a market-by-market basis in this context would be a complex and potentially burdensome exercise for the Commission and the industry. Indeed, the Commission noted the "burden of individualized adjudications and measurements" in rejecting a similar proposal to prohibit exclusive access arrangements for video services in MDUs "until 'effective competition' is found to exist in an area, or until some other measure of competition is shown." *MDU Order,* ¶ 39.

In light of the fact that the Commission will be required to revisit the need for these rules again in less than five years, there is no reason for it to create this additional uncertainty and complexity to its rules by adopting a market-by-market competition test.

VI. CONCLUSION

For the foregoing reasons, the Commission should extend its program access rules to all regional sports programming, require that vertically integrated programmers make available high-definition feeds of programming otherwise subject to the program access rules, and adopt a standstill requirement for program access complaints.

Respectfully submitted,

/s/ Edward Shakin

Edward Shakin
William H. Johnson
1515 North Court House Rd.
Suite 500
Arlington, VA 22201
(703) 351-3060

Michael E. Glover
Of Counsel