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

In the Matter of	)	
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits	)	MM Docket No. 92-264
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	

VERIZON'S PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

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VERIZON'S[1] PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

INTRODUCTION AND SUMMARY

The Commission should clarify that the rules adopted in its recent *Cable Ownership Order* do not apply in any area where two or more wireline video providers compete to provide video service.

As a general matter, in all segments of the communications marketplace, the Commission should continue to rely on competition rather than regulation whenever possible. And where

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

competition is present, regulation generally should go away. Competitive markets consistently prove themselves superior to regulatory fiat in fostering investment and innovation and in protecting consumers' interests and serving their needs.

These observations are particularly true in the video marketplace where many regulations – including those at issue in this proceeding – infringe on a provider's constitutional rights to engage in protected speech. Such regulations – themselves often imposed with the aim of promoting competition or the diversity of information sources – have traditionally been justified on the basis that the cable incumbents historically had bottleneck monopolies that gave them control over the programming the consumers could access. To be sure, there remain situations in which the cable incumbents have used their historic monopoly to try to foreclose access by competing providers, whether by locking up access to key programming or to multiple dwelling unit properties, and where regulatory action is still warranted. But the justification for other regulations such as the ones at issue here is lacking in areas where wireline competition has actually developed, particularly with respect to the new entrants who never possessed bottleneck control in the first place. The First Amendment prohibits the application of such regulations that infringe on the protected speech and editorial choices of competitive providers.

The case for removing regulations where video competition exists applies fully in the context of the rules at issue here. Faced with competition, all providers have a strong incentive to provide the desirable programming that consumers want. Otherwise, their competitors will do so, and they will lose out in the marketplace. In these competitive areas, imposing regulation would only inhibit, rather than promote, the continuing growth of competition. In fact, the Commission's previous rules recognized as much and did not apply to competitive wireline providers, but in the recent order, the Commission surprisingly changed this aspect of its rules with no notice or comment. The Commission should correct this situation and clarify that its rules do not apply to providers in areas with wireline competition, particularly to the new entrants bringing such competition.

ARGUMENT

As a general matter throughout the communications marketplace, where competition is present, regulation is unnecessary and usually affirmatively harmful to consumers. Regulation – and especially rules that restrict the way a provider offers its services – is warranted only in clear cases of demonstrated market failure, and, even then, only when the benefits of government intervention outweigh the costs.[2] When those conditions are absent, directing markets is a job best left to competitive forces, which consistently prove themselves better than regulators at maximizing consumer welfare. In dynamic industries that are undergoing rapid technological change – like most parts of the communications marketplace today – it is particularly difficult for even the most capable regulator to keep up with the market's evolution.[3]

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2 *See, e.g.*, Statement of Commissioner Robert M. McDowell, FCC, Before the H. Subcomm. on Telecommunications and the Internet, H. Comm. on Energy and Commerce, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271487A1.pdf, at 3 (Mar. 14, 2007) ("There are circumstances, however, when the government should address market failure to further the public interest so new entrepreneurial ideas have a chance to compete in the marketplace . . . . Any remedies applied to market failure should be narrowly-tailored, and sunsetted, to maximize freedom for all market players."); Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau*, http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf at 41 (Oct. 1999) ("The Commission's public interest mandate requires it to forbear from regulation and allow market forces to flourish, but to intervene in the event of market failure."); Jerry Hausman, *Internet-Related Services: The Results of Asymmetric Regulation, in Broadband: Should We Regulate High-Speed Internet Access?* 139 (Robert Crandall & James Alleman, eds., Dec. 2002) ("Regulation should be used only in the situation of market failure").

3 *See* Stephen Breyer, *Regulation and Its Reform* 286-87 (1982) ("[B]ecause regulation, once in place, is hard to dismantle, one would like to know whether future technological change is likely to transform an industry that is now a natural monopoly, making it structurally suited to competition."); Alfred E. Kahn, *The Economics of Regulation* 127 (1971) ("In the presence of such rapid change, the natural monopoly of yesterday may be transformed into a natural arena of competition today; and vice versa.").

For the same reasons, even if regulation may at one time have been necessary to protect consumers, after competition develops such regulation generally should go away. Regulation that has outlived its usefulness distorts competition, inhibits innovation and investment, and prevents competitive providers from more efficiently serving consumers.

In light of these fundamental principles, regulations such as those adopted in the recent *Cable Ownership Order*[4] must be tightly cabined to reach no further than is justified, and they should go away where competition makes them unnecessary.

In fact, the video marketplace is a good example of the benefits that flow to consumers, even without regulatory compulsion, where competition exists. Competing providers have every incentive to carry high-quality and diverse sources of information in order to differentiate themselves from, and better compete against, their competitors. And this is particularly true of new wireline entrants who must compete against entrenched, vertically-integrated incumbents, as well as other increasingly significant sources of video programming such as the Internet.

This competition forces providers to give consumers what they want. Perhaps the best evidence comes from the channel line-ups of competitive wireline providers, which reveal the clear benefits to, and opportunities for, independent programmers as a result of new entry and wireline competition in the video marketplace. From the beginning and without regulatory compulsion, Verizon has negotiated carriage deals with numerous independent programmers such as The America Channel, the NFL Network, and the Hallmark Channel, in addition to a wide range of international and other niche programmers for its FiOS TV service. Likewise, FiOS TV includes several low power television stations, 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

[4] Fourth Report and Order and Further Notice of Proposed Rulemaking, *Commission's Cable Horizontal and Vertical Ownership Limits*, 23 FCC Rcd 2314 (2008) ("*Cable Ownership Order*").

desire, like Blackbelt TV for martial arts enthusiasts.[5] The advanced broadband networks being deployed by many competitive providers also allow them to continue to introduce new and diverse channels and to carry a significant amount of high-definition programming. 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."[6]

Providers carry this increasingly diverse array of programming not because regulations require them to, but because competition and consumer demands leave them no choice. Regulations – and particularly regulations that could directly limit the growth of competitive providers – will inhibit this healthy dynamic and could well have precisely the opposite effect. The competitive free-for-all that is shaping up between incumbent cable operators, satellite providers, online video providers, and new wireline entrants will further these pro-competitive trends and continue to increase the availability of more diverse information sources and other consumer benefits, as long as ill-fitting regulations do not get in the way.

The importance of avoiding unnecessary regulation in competitive markets is all the more true in the context of rules such as those at issue here that directly infringe on protected speech. To the extent courts have sustained such regulations in the past, they have done so only because of cable incumbents' historical bottleneck monopoly over access to consumers. Where two or more

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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.

6 Report and Order and Notice of Proposed Rulemaking, *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*, 22 FCC Rcd 17791, ¶ 16 (2007).

wireline video providers compete in an area, however, there is no such bottleneck control and no legitimate basis for regulations such as those at issue here directly infringing on protected speech.

As an initial matter, it is well established that the First Amendment protects video providers' right to offer video programming services. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Video providers express speech not only through their original programming but also through their editorial decisions over which stations and programs to disseminate. As the Supreme Court has observed, cable providers "communicate messages on a wide variety of topics and in a wide variety of formats," and are thus "entitled to the protection of the speech and press provisions of the First Amendment." *Turner I* at 636. Specifically in the context of the types of rules at issue in this proceeding, the D.C. Circuit has recognized that "[t]he horizontal ownership limit interferes with [video providers'] speech rights by restricting the number of viewers to whom they can speak." *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("*Time Warner II*"); *see also Time Warner Entertainment Co., L.P., v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) ("*Time Warner I*").

To the extent courts have upheld regulations that infringe on video providers' speech, they have done so because of the bottleneck monopolies historically held by the cable incumbents. For example, the Supreme Court in *Turner I* emphasized the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. And the Court noted the "potential for abuse of this private power over a central avenue of communication" held by a cable operator with "bottleneck, or gatekeeper, control." *Id.* at 656-57.

Likewise, in the context of a facial attack on the statutory provision addressing ownership limits in *Time Warner I*, the D.C. Circuit again was heavily influenced by the existence of bottleneck monopoly control in deciding to forego strict scrutiny. The court noted that "[i]n enacting the subscriber limits, the Congress was concerned that cable operators might use that same bottleneck power to exclude other providers of cable programming." *Time Warner I* at 1317; *see also id.* at 1318 ("In *Turner I* this bottleneck power was seen to jeopardize the viability of broadcast television; in this case, it arguably threatens diversity and competition in the provision of cable programming.").

Because this "gatekeeper" or "bottleneck" premise simply is not present where two or more wireline video providers compete in an area, the type of regulations at issue here cannot be sustained in any such area and certainly cannot be sustained as to any competitive entrant. Indeed, because the regulations at issue act as a prohibition on speech between a willing speaker and willing listener, they are subject to strict scrutiny and are facially invalid under that standard.

But, even if the more lenient intermediate scrutiny test applied, application of the Commission's ownership limits to video providers in areas with wireline competition would run afoul of the First Amendment. Even content-neutral regulations that burden speech must "further[] an important or substantial governmental interest; . . . the governmental interest [must be] unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Turner I* at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)). Moreover, in order to satisfy intermediate scrutiny, the Commission would need to show "substantial evidence," *Time Warner II* at 1130 (quoting *Time Warner I* at 1319-20), "demonstrating that the recited harms are real, not merely conjectural." *Time Warner II* at 1130 (quoting *Turner I* at 664). In doing so, "the FCC must show a record that validates the *regulations*, not just the abstract statutory authority." *Id.*

As *Time Warner II* shows, given the absence of bottleneck control, the application of horizontal ownership caps to providers in areas with two or more wireline competitors cannot satisfy intermediate scrutiny because such rules burden substantially more speech than is necessary to further any important governmental interest. The D.C. Circuit noted in that case the "true relevance of competition" in assessing the First Amendment limits on the Commission's ownership rules, and noted that "[i]f an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch." *Time Warner II* at 1134. The court therefore concluded that "in revisiting the horizontal rules the Commission will have to take account of the impact of DBS on [the cable incumbents'] market power." *Id.* As this discussion suggests, the existence of wireline video competition in an area forecloses the application of ownership caps – particularly as applied to new entrants.

Indeed, the court's rejection of the vertical ownership rules in that same case further reinforces the impermissible burden on video providers facing competition. The cable incumbents had challenged the Commission's "refusal to exempt MVPDs that are subject to effective competition." *Id.* at 1138. Noting the ease with which the Commission could have exempted such providers (*i.e.*, incumbent cable operators subject to effective competition) from its rules, and the burdens on protected speech of not doing so, the court held that "the FCC has failed to justify its vertical limit as not burdening substantially more speech than necessary." *Id.* at 1139. This is all the more true in the context of new entrants who have never possessed bottleneck control justifying the regulation of their speech.

Moreover, declining to apply restrictions such as those at issue here in areas with competing wireline providers (and, at a minimum, declining to apply them to new entrants), would further Congress's overriding interest in "enhanc[ing] effective competition." 47 U.S.C. § 533(f)(1). At the time that Congress adopted this provision, it was faced with situation of an increasingly concentrated video marketplace, predominantly made up of vertically-integrated, monopoly cable operators with bottleneck control who were generally shielded from competition by exclusive and de facto exclusive franchises.[7] These operators had exhibited a history of abuses aimed at entrenching themselves, favoring their affiliated programming, and extracting concessions from independent programmers

In response to this situation, Congress adopted a number of provisions in the 1992 Cable Act aimed at ensuring that the incumbent cable operators did not exploit their bottleneck control to foreclose video competition. For example, Congress amended Section 621(a)(1) in order to encourage the entry of new wireline video competition and adopted Section 628 to ensure that new entrants had reasonable access to cable programming.[8] In all of its efforts, however, Congress's "principal objective . . . was to foster competition in the acquisition and delivery of multi-channel video programming by encouraging the development of alternative and new technologies, including cable and non-cable systems."[9] And as the Commission has recognized, "Congress evidenced a preference for competition over regulation in order to achieve this objective, believing that the presence of alternative cable and non-cable MVPDs would constrain cable operators' market power in the acquisition and distribution of multi-channel video programming, as well as improve their service and programming quality and curb their subscription rate increases." *Id.*

Consistent with this overall theme, in the context of cable ownership rules, Congress directly expressed that its goal was to "enhance effective competition," 47 U.S.C. § 533(f)(1), included

7 *See Turner I* at 634 (noting Congress' concern with effects of "vertical integration" and "horizontal concentration" when it adopted the 1992 Cable Act).

8 47 U.S.C. §§ 541, 548. Later, the 1996 Act further promoted video competition by removing barriers to the provision of video service by telecommunications carriers. *See* 47 U.S.C. § 571.

9 Second Further Notice of Proposed Rulemaking, *Commission's Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rcd 9374, ¶ 19 (2005).

several "public interest objectives" for the Commission to consider that further emphasized the preference for competition, the intended, limited scope of any regulations, and the requirement that Commission "make such rules and regulations reflect the dynamic nature of the communications marketplace." 47 U.S.C. § 533(f)(2).

Indeed, the D.C. Circuit previously concluded that the Commission exceeded its statutory authority by failing to adequately account for Congress' pro-competitive purpose, even in the case of the incumbent cable operators. *Time Warner II* at 1136. In doing so, the court held that the express purpose in this section of promoting competition "sharply confines the [Commission's] authority to regulate solely in the interest of diversity." *Id.* This limitation on the Commission's authority is all the more substantial in the case of new entrants who, by their very existence, promote competition *and* provide alternative platforms for independent and diverse programmers.

Finally, the Commission itself has previously recognized that any restrictions should not apply to competitive entrants. Specifically, in order to prevent any disincentive for direct competition by new entrants (or even by incumbents entering new areas), the Commission previously included an "overbuild exception" in the cable ownership rules, noting that limits should apply to "only those cable subscribers . . . serve[d] through incumbent cable franchises." *Time Warner II* at 1136. In doing so, the Commission concluded – correctly – that "the benefits of not counting customers served via overbuilding outweigh any potential anticompetitive impact on the programming marketplace."[10]

In a few short sentences in its recent order, however, the Commission retreated from this pro-competitive policy. *See Cable Ownership Order* ¶ 86. In doing so, the Commission failed to

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10 Third Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules*, 14 FCC Rcd 19014, ¶¶ 33-34 (1999).

provide adequate notice of this change or an opportunity for parties to fully address the impact of its revised rules in situations in areas where wireline competition exists. The Commission should correct this step by clarifying that its ownership rules do not apply in such areas.

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