

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

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| In the Matter of |) | |
| |) | |
| Annual Assessment of the Status of |) | MB Docket No. 07-269 |
| Competition in the Market for the |) | |
| Delivery of Video Programming |) | |
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COMMENTS OF VERIZON
ON THE STATUS OF COMPETITION IN THE VIDEO MARKETPLACE

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**COMMENTS OF VERIZON¹ ON THE STATUS OF COMPETITION
IN THE VIDEO MARKETPLACE**

I. INTRODUCTION AND SUMMARY

Furthering long-standing federal communications goals, Verizon and other competitive video providers now are spreading wireline video competition to millions of Americans. In order to encourage that competition and provide consumers with meaningful competitive choices in the video marketplace, the Commission should address three remaining issues of concern. First, the Commission should ensure that competitive providers have access to the “must-have” regional sports programming (including the “HD feed”), regardless of the method chosen by cable incumbents to deliver such programming, so that competitive providers can compete effectively and provide a meaningful choice to consumers. Second, the Commission should ensure parity between video and voice providers in the rules concerning “retention marketing” during the service cancellation process – current rules distort competition in favor of the

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

cable incumbents. Finally, the Commission should ensure that any technical rules and standards governing navigation devices and related technologies further consumers' interests in competitive choice and innovation, and do not entrench cable incumbents by requiring cable-centric technological approaches.

In reliance on the light-touch regulatory approach designed to encourage deployment of broadband, providers have invested billions of dollars – and employed hundreds of thousands of employees – to deploy next-generation broadband networks that are also capable of offering competitive video alternatives to the incumbent cable operators' services. Verizon has been on the forefront of that investment. Since the Commission's last assessment of the status of video competition, Verizon has continued aggressively to deploy the competitive video services that it offers over its next-generation, all-fiber broadband network. Less than five years after embarking on its FiOS fiber-to-the-premises (FTTP) project, Verizon passed 13.2 million homes with this network, offered FiOS TV service to 10.4 million premises, and served 2.2 million subscribers as of March 31, 2009.

Verizon's entry into the video marketplace has brought – for the first time in most places – meaningful wireline competition to the video services market. And consumers have reaped the benefits. Where Verizon competes, its entry has brought new video choices, more competitive pricing, and improved service to consumers. Among other things, Verizon continues to innovate and improve its service by adding more diverse, independent and international programming; increasing the HD programming available to consumers; and rolling out additional more interactive features and technological innovations.

But the benefits to consumers are not limited to video competition. The revenues associated with Verizon's video offering are an integral part of the business case for its massive investments in its FTTP network, which currently passes more than 13 million homes and businesses. Customers who have access to Verizon's video services also have access to Internet access services that already offer speeds of up to 50 megabits per second (Mbps) downstream and up to 20 Mbps upstream. Therefore, any steps that facilitate Verizon's offering of FiOS TV also further important national goals concerning broadband.

While Verizon is leading the industry in deploying next-generation broadband networks and innovative and competitive video services, several impediments still exist that get in the way of more widespread and effective video competition and more meaningful choice for consumers. By doing so, the Commission also could spur the creation and preservation of the significant numbers of jobs that flow the deployment and availability of the broadband networks used to provide competitive video services.

First, the Commission can and should take action now to prevent cable incumbents from denying competitive video providers access to regional sports programming – including the HD format of these programs – that competitors must have in order to provide a fully competitive choice to consumers. As the Commission repeatedly has recognized, regional sports programming and regional sports networks (“RSNs”) are unique and cannot be replicated. Because of the unique nature of regional sports programming, many cable incumbents leveraged their former monopoly franchises and bottleneck control over access to consumers to obtain ownership interests in such “must have” programming, which they continue to exploit in order to handicap

competitive providers. In particular, some cable incumbents seek to undermine Congress's intent in adopting Section 628 by exploiting perceived "loopholes" in the program access rules and by denying access to regional sports programming and their HD feeds on reasonable and nondiscriminatory terms, or on any terms at all. And they do so because they know that many consumers will not consider a video service that lacks the local sports teams – thus preventing such services from being meaningful competitive alternatives for those consumers. The Commission should ensure that all video providers have access to "must have" local sports programming in order to encourage competition and further the meaningful consumer choice that Congress intended to foster by adopting Section 628.

Second, the Commission should ensure parity for traditional telephone companies entering the video space, which will benefit consumers and facilitate their choice of video provider. In particular, in order for the cancellation process for video customers to be just as convenient as for voice customers, the incumbent video provider should be required to accept the service cancellation from a competitive video provider. This will lower the switching costs for customers and thus facilitate competition on the price and quality of the video providers' services. Moreover, in order to encourage fair competition between intermodal competitors across the full range of consumer services, the same ground rules on marketing to cancelling customers should apply in the voice and video contexts. As Verizon has explained previously, consumers are best served when they have all available information about competitive offerings. However, because the Commission has strictly limited marketing to departing *voice* customers, the rules

governing a provider's ability to share such information with *video* customers should be the same.

Third, the Commission should make sure that any technical standards that apply to set-top boxes or other navigation devices neither entrench incumbent providers nor frustrate innovation and the spread of competition. For example, as the video industry creates and introduces standards for two-way plug-and-play, the Commission should encourage solutions that are compatible with video provides of all types – not just the incumbent cable operators – and that are created in industry standards setting bodies that are open to all interested stakeholders. Consumers should not be denied the benefits of new innovations that move beyond traditional cable-centric technology. Nor should the Commission apply existing cable-centric regulations – such as the existing one-way CableCard rules – in a manner that would inhibit continued innovation or additional offerings using new technological approaches, such as IPTV.

By taking these modest but important steps, the Commission will significantly advance the pro-competitive goals of the Cable Act and bring to consumers more competition, more innovative technology, and greater access to the increasing diversity of information sources. *See* 47 U.S.C. § 521. At the same time, the Commission will further the important policy of increasing deployment of next-generation broadband networks, while also creating jobs and stimulating the economy.

II. VERIZON'S DEPLOYMENT OF FIOS

The Commission has adopted a light regulatory touch that has encouraged broadband deployment and video competition and innovation. In reliance on these pro-investment policies, Verizon launched a major national initiative in 2004 to upgrade its traditional telephone network with a next-generation, all-fiber broadband network. By

deploying advanced fiber-optics all the way to customers' premises, Verizon's FTTP network enables customers to receive not only improved voice services but also advanced video services and next-generation broadband services.

Verizon's FTTP initiative represents a major commitment to the nation's communications infrastructure. Verizon expects to invest \$23 billion in capital from 2004 through 2010 in deploying its fiber network. This investment – which will make FTTP available to more than 18 million homes – 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 Technology That Enables Consumers to Get More Diverse Programming, More HD Content, and Additional Innovative Services

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 – or fiber-to-the-node (FTTN) systems that rely on traditional, twisted-pair copper telephone wire to travel carry data between over the last link between a home and a fiber network, Verizon's FiOS network uses a true end-to-end fiber-optic plant that provides consumers the benefits of not only a cutting-edge video service but also robust, next-generation broadband services.

Verizon is able to offer more programming as well as new interactive features by using a unique combination of Quadrature Amplitude Modulation (QAM) – the technology used by most digital cable operators – and Internet Protocol (IP) technology. This “hybrid” approach means that FiOS TV offers the best of both traditional digital cable technology and developing IPTV technology.

With an all-fiber network that has both QAM and IP capabilities, Verizon is able to carry substantially more video programming than a cable provider using HFC facilities or other providers relying on FTTN architecture. Since introducing FiOS TV, Verizon has had the capacity to deliver a full 860 MHz worth of downstream linear, video programming using QAM technology, while using other IP streams travelling over other lasers on its fiber network to deliver its other services, such as video-on-demand, Internet access, or voice. Most cable incumbents, on the other hand, have, at most, 860 MHz over which to deliver their full range of services.

Moreover, after transitioning FiOS TV to an all-digital video service over the course of 2008 – a step required by the Commission in order for Verizon to get a partial waiver of certain set-top box rules – Verizon further increased the capacity available for additional programming, such as additional HD content and more independent, multicultural and international channels. Prior to going “all digital,” Verizon used some portion of its capacity to deliver a simulcast of certain channels in analog format (while also delivering all programming in digital format). Eliminating this analog simulcast freed up considerable additional capacity for other programming. This too marks a noteworthy difference from incumbent cable operators, most of whom still devote a significant amount of their more finite network capacity to analog programming.

Also, from the beginning, Verizon has had the flexibility to offer a wide range of additional programming and services using IP technology traveling over other lasers on its network, without taking capacity away from its linear programming.

Going forward, Verizon will have the flexibility to use this IP technology to add still more channels or to offer additional services, without taking capacity away from its

current video service. This technological approach provides a platform for even more HD programming and for diverse and independent voices that may have trouble obtaining carriage from other providers that are more capacity-constrained.

Verizon's IP functionality also enables a wide range of other 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 watch video services at their convenience. The IP functionality of Verizon's network also permits the company to offer a unique service called "FiOS TV Widgets" that allow subscribers to check local 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. FiOS TV Widgets also enable customers to receive local and national news headlines, daily national sports headlines, community news or daily horoscopes

Verizon's IP platform also enables Verizon's Home Media DVR. This service allows up to six 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. This includes viewing up to three separately recorded programs simultaneously on different TV sets, and the ability to pause recorded programming on one set and continue watching it on another.

The IP-based nature of the Home Media DVR allows Verizon to integrate the DVR with FiOS TV's innovative and interactive media guide (IMG), which also takes advantage of this technology and enables customers to easily find and access content

from TV listings, VOD catalogs, recordings on their DVR, and their personal music and photos. Other features enabled by Verizon's IP-based system include remote DVR management (allowing subscribers to remotely control their DVRs online or through certain Verizon Wireless handsets), free games, a "What's Hot on FiOS TV" feature that provides information on the most-popular programs currently being watched in the region and the most popular VODs, a feature that allows consumers to pause live programming and then return after changing channels, and several different channel sorting options.

Verizon's IP platform also is designed to accommodate additional new interactive features as technology develops. For example, 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.

Verizon uses its innovative and robust FTTP network in order to provide consumers with an extremely attractive competitive alternative to traditional cable or satellite services. Verizon's current lead offer currently includes up to 295 digital video channels, for as low as \$47.99 per month. FiOS TV provides subscribers with access to up to 348 digital channels, including more than 100 HD channels in all of its TV markets. FiOS TV also offers subscribers more than 14,000 VOD titles per month, 70 percent of which are free, and more than 1,200 HD VOD titles.

With its enhanced carrying capacity, Verizon also is able to offer unique programming packages tailored to subscribers' interests, and to carry a wide range of programming, including diverse, independent, multicultural and international channels. For example, Verizon's La Conexión package offers a combination of more than 35

popular English and 25 popular Spanish-language channels for \$39.99 per month.

Verizon also offers customers a “movie package” that includes 45 premium movie channels, and additional premium options.

Verizon also provides a platform for a wide range of diverse, independent programming. For example, from the beginning 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 other niche programmers. Likewise, FiOS TV includes several low power television stations. In addition, Verizon offers a wide range of international and foreign-language channels, including offerings in Arabic, Armenian, Bosnian/Croatian/Serbian, Cambodian, Chinese, Farsi, Filipino, French, German, Hebrew, Hindi, Italian, Japanese, Korean, Polish, Portuguese, Punjabi, Romanian, Russian, Spanish, and Vietnamese. Verizon has a strong incentive to continue to carry a wide range of diverse programming in order to distinguish itself from its entrenched, vertically-integrated cable competitors.

In addition to innovative video services, Verizon’s FTTP network offers ultra high-speed broadband capabilities. Throughout the FiOS footprint, Verizon offers Internet access services with download speeds of up to 50 Mbps and upload speeds of up to 20 Mbps, making Verizon the first major broadband provider to offer service at that level across its service area. Verizon also offers a 20 Mbps symmetrical Internet access service to offer an unparalleled consumer service for end-users who are active gamers or who send lots of content to the web. And given Verizon’s choice of a future-proof, all-fiber network, upgrading to higher speeds and greater capacity in the future will be much easier than for providers relying on copper-based networks – changing electronics on the

ends and increasing capacity deeper into the network does not require digging up streets. In fact, Verizon has announced that it is already testing 100 Mbps Internet access services over the FiOS network.

B. Verizon's FiOS Deployment 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 ahead of schedule and currently passes more than 13 million premises. By the end of next year, Verizon plans to pass 18 million premises with its all-fiber network.

As of March 31, 2009, and just over three years after introducing FiOS TV, Verizon had 2.2 million FiOS TV subscribers as of March 31, 2009. By comparison, Verizon added a million FiOS TV customers in the preceding year, and, just two years earlier, Verizon had only 348,000 subscribers.

Verizon's deployment in big cities also has moved forward and is accelerating. In the last year, Verizon has obtained cable franchises for New York City, Washington, D.C., and Philadelphia, and Verizon has agreed to build out these cities in the coming years. As part of that, Verizon also is aggressively pursuing customers who live in multiple dwelling unit properties (MDUs), such as apartment and condominium buildings.

Verizon's deployment of FiOS is creating greater competitive choice for consumers. As the Commission consistently has found, wireline video competition produces substantial benefits to consumers. For example, the Commission's recent cable pricing report found that “[c]able prices decrease substantially when a second wireline cable operator enters the market.” *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, MM Docket 92-266, 2009 FCC LEXIS 508, ¶ 3 (2009). Consumer also benefit from the competitive pressure that drives video providers to offer additional HD programming and to offer a platform for more diverse and independent channels.

The emergence of wireline video competition is at its early stages, however, and “[r]elatively few consumers have a second wireline alternative,” and the Commission’s most recent video competition report found that “[i]ncumbent cable and DBS operators provide MVPD service to over 97 percent of all MVPD households.” *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, ¶ 169 (2009).

But the customer benefits of Verizon’s FIOS service are not limited to video. As the Commission has recognized, the ability to offer competitive video services also encourages broadband deployment by providing an additional revenue stream to fund network investment. Indeed, the Commission has found that “broadband deployment and video entry are ‘inextricably linked.’” *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*, 22 FCC Rcd 5101, ¶ 51 (2007) (“*Local Franchising Order*”), *aff’d Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

Consumers with access to FiOS have the choice of the next-generation broadband services delivered over this network. Verizon currently offers Internet access services with download speeds of up to 50 Mbps, and up to 20 Mbps upstream. And Verizon is

already testing services of 100 Mbps or more over the FiOS network. By March 31, 2009, Verizon also had 2.8 million FiOS Internet customers, with the service available to more than 10 million homes.

And this increased investment in broadband facilities – particularly next-generation facilities like FiOS – provides enormous consumer benefits. *See, e.g., id.* at ¶ 2 (“We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings”). In addition to the FiOS Internet access services themselves, the presence of these services in the marketplace pushes all broadband providers to compete based on price, speed, availability, and quality. One recent analyst report noted a “trend that began in 2006 and has since expanded [of] . . . the introduction of higher speeds for both standard and premium tiers in markets where cable operators face competition from telco FTTx networks, particularly Verizon’s all-fiber FiOS Network.”² The presence of FiOS requires cable to “once again dip[] into its technology toolkit to remain competitive,” and “as Verizon has rolled out FiOS Internet and TV services in more and more communities, the market has seen an increasing variety of prices and data rates, as cable operators respond to FiOS launches.” *Id.* Of course, “FiOS markets are not without intense competition” and traditional cable operators “are beginning to deploy DOCSIS 3.0 technology that allows them much greater flexibility in terms of matching FiOS data rates.” *Id.* at 39.

² Pike & Fisher, “High-Speed Internet Packaging and Pricing Strategies: 5th Edition,” at 9 (Dec. 2008).

In fact, Cablevision has announced that its DOCSIS 3.0 services are now available throughout its footprint.³ Comcast also recently announced that it has deployed DOCSIS 3.0 to approximately 35 percent of its footprint, with a goal to expand this deployment to 65 percent of its markets by the end of 2009.⁴ And, with Verizon's cable franchise agreement in place with the City of New York, Time Warner not surprisingly announced that it will begin rolling out DOCSIS 3.0 services in New York City later this year, with plans to complete the upgrade by the end of 2009.⁵

Regulatory policies that encourage video competition and broadband network investment results in a virtuous cycle that serves multiple communications policy goals, including increase competition and more available and robust broadband services. For example, in 2007 the Commission addressed some recurring problem areas in the local cable franchising process in order to facilitate competitive video entry, finding that prolonged delays caused by local franchising authorities and certain conditions they imposed in processing competitive cable franchise applications amounted in practice to unreasonable refusals to award franchises in violation of 47 U.S.C. § 541(a)(1). *Local Franchising Order*, 22 FCC Rcd 5101, ¶¶ 22-24, 66-67, 82-124. With the benefit of that

³ Press Release, *Cablevision Breaks the Century Mark - Introduces Nation's First 101-Megabits-Per-Second High-Speed Internet Service, Optimum Online Ultra* (April 28, 2009) (available at <http://www.cablevision.com/about/news/article.jsp?d=042809>).

⁴ Comcast Corporation Q1 2009 Earnings Call Transcript (April 30, 2009) (available at <http://seekingalpha.com/article/134349-comcast-corporation-q1-2009-earnings-call-transcript?page=-1>).

⁵ Todd Sprangler, "Time Warner Cable Queues Up DOCSIS 3.0 In NYC," *Multichannel News* (April 30, 2009) (available at http://www.multichannel.com/article/230929-Time_Warner_Cable_Queues_Up_DOCSIS_3_0_In_NYC.php).

order, Verizon has continued to aggressively pursue and obtain the franchises that it needs in order to offer its FiOS TV service in more communities.

Similarly, in 2007 in order to bring the benefits of video competition to the millions of Americans who live in apartments, condominium buildings, and centrally managed developments, the Commission just last year prohibited cable operators from executing or enforcing contractual provisions that grant them the exclusive right to provide video service to multi-dwelling units.⁶ Following the Commission's *MDU Order* – and with the obstacle of exclusive access agreements no longer posing an absolute roadblock to competition at many properties – Verizon now can compete to provide its FiOS TV service to more than one million multi-dwelling units.

In addition to enabling competition that creates new choices for consumers, the removal of barriers to more widespread video competition, which in turn encourages the deployment of next-generation broadband networks, creates or preserves jobs and stimulates the economy during this tough time for the nation's economy. The information and communications technology (ICT) sector accounted for more than half of all jobs created in the United States between April 2007 and April 2008.⁷ While overall employment shrank by 3.8 percent from February 2008 through February 2009, employment in the ICT sector grew by 2.5 percent over that same period. *Id.* Moreover, broadband has a ripple effect on the local communities where it is offered, resulting in additional jobs even outside of the telecommunications sector and increasing the

⁶ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) (“*MDU Order*”), *appeal pending National Cable & Telecommunications Ass'n v. FCC*, Case Nos. 08-1016 & 08-1017 (D.C. Cir.).

⁷ Jeffrey Eisenach, “The Telecom Sector and the Economy: How U.S. Broadband Policies Are Working for America” (Sept. 2008).

competitiveness of the businesses with access to broadband.⁸ In fact, one study indicates that each \$10 billion increase in broadband infrastructure investment produces nearly 500,000 new jobs (including over 260,000 jobs in small businesses), and that for every one-percentage point increase in broadband penetration in a state, employment increases by 0.2 to 0.3 of a percentage point per year (or about 293,000 jobs nationally).⁹

In order to encourage video competition, broadband deployment, and job creation, the Commission should continue to identify and address obstacles to more widespread video competition.

III. COMMISSION ACTION IS NEEDED TO FACILITATE CONSUMER CHOICE AND MORE EFFECTIVE AND WIDESPREAD VIDEO COMPETITION, WHICH WILL IN TURN ENCOURAGE BROADBAND DEPLOYMENT AND JOB CREATION

A. The Commission Should Ensure Access to “Must Have” Local Sports Programming, Including the HD Format of Such Programs.

In order to encourage the nascent wireline competition and ensure that the unique monopoly history of the video marketplace does not prevent competition from taking hold, the Commission should require that vertically integrated regional sports programming be made available to video competitors. Access to regional sports

⁸ See Robert Crandall, William Lehr and Robert Litan, “The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data” *Issues in Economic Policy* No. 6 (Brookings Institution, July 2007); Robert D. Atkinson, Daniel Castro and Stephen J. Ezell, “The Digital Road to Recovery: A Stimulus Plan to Create Jobs, Boost Productivity and Revitalize America” The Information Technology & Innovation Fund (Jan. 2009); Stephen B. Pociask, TeleNomic Research, LLC “Building a Nationwide Broadband Network: Speeding Job Growth,” New Millenium Research (Feb. 25, 2002).

⁹ Robert Atkinson, et al., “The Digital Road to Recovery: A Stimulus Plan to Create Jobs, Boost Productivity, and Revitalize America,” Information Technology and Innovation Foundation, at 5, 8 (Jan. 2009).

programming and RSNs – including the HD format of that programming – is essential for a video provider seeking to compete effectively against the entrenched incumbent cable operator, since customers demand regional sports programming for which there is no substitute. The Commission’s legal authority to ensure that competitors have access to this “must have” sports programming is clear. When an incumbent withholds access to regional sports programming, it is denying competitors a necessary component to compete for customers, and denying those consumers a meaningful competitive choice. Necessarily, this “significantly hinders or prevents” the competitor from providing any of its programming – including other programming that is delivered by satellite – to these “subscribers or consumers” in violation of 47 U.S.C. § 548(b).

The Commission repeatedly has found that regional sports programming is among the most demanded by video subscribers.¹⁰ It is unique and cannot be duplicated. As the Commission 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

¹⁰ See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelpia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelpia 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) (“*Adelpia 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”); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, ¶ 38 (2007) (“*Exclusive Contracts Prohibition Order*”), *appeal pending Cablevision Systems Corp. v. FCC*, Case Nos. 07-1425 & 07-1487 (D.C. Cir.).

substitute for watching their local and/or favorite team play an important game.”¹¹

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.¹² Because customers insist on having access to their local sports teams for which there is no substitute, competitive video providers are seriously disadvantaged when a vertically integrated cable operator withholds, or even threatens to withhold, an affiliated RSN.¹³

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.¹⁴ Verizon was unable to obtain even the standard definition format of this sports programming until it filed a complaint with the

¹¹ *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)).

¹² *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.”).

¹³ *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.”). As the Commission correctly told the D.C. Circuit last year, “a competitive MVPD cannot readily replicate the content of a cable-owned RSN ... that has earned a substantial level, even decades-worth, of viewer familiarity and goodwill.” *See* Brief of the Federal Communications Commission, *Cablevision Systems Corp. v. FCC*, Case Nos. 07-1425 & 07-1487, at 39 (filed Aug. 13, 2008).

¹⁴ *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).

Commission, and, as discussed further below, Cablevision continues to deny access to this programming in HD format.

Verizon's experience is not unique. For example, according to AT&T, Cox has refused to provide access to its affiliated local sports network featuring San Diego Padres games, which has hampered AT&T's ability to offer a competing video service. *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, Amended Program Access Complaint, CSR-8066-P (filed Oct. 6, 2008). The Commission has identified San Diego as well as Philadelphia as locations where incumbent cable operators have denied competitors access to vertically integrated RSNs. *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, "must have" nature of RSNs, the Commission should require that all video providers have access to vertically integrated RSNs. The withholding of regional sports programming, more so than non-sports programming for which substitutes can be developed or procured, is a particularly attractive means for vertically integrated cable operators to handicap new entrants.

In a variation of this same strategy, some cable incumbents attempt to circumvent the Commission's rules and deny competitors the HD format of regional sports programming by routing that particular format (but not a lower quality version of the same programming) over fiber and arguing that, as a result, the "HD feed" is not covered

by the rules. The cable incumbents' attempt to evade the rules in this way is a transparent effort to handicap competitive providers and denies consumers the ability to take full advantage of the HD capabilities of their televisions.

The cable incumbents who have engaged in these anticompetitive and unfair practices are seizing on the growing importance of HD technology to consumers, particularly in the context of sports programming. As the Commission is aware, consumer demand for a robust selection of HD programming is skyrocketing. More than 45 percent of American households have an HD television set (HDTV), up from less than 20 percent in 2006.¹⁵ Nielsen data show higher levels of sports viewing and engagement in homes with HDTV, with ratings for sports events 20 percent higher in HDTV homes compared to U.S. households as a whole.¹⁶ Therefore, denying access to regional sports programming that is subject to the program access rules in HD format is an attempt to handicap competitive entrants in view of this market trend.

As noted above, Cablevision has taken this approach in an effort to circumvent the program access rules and deny Verizon access to the "HD feed" for the MSG regional sports network in New York City and Buffalo.¹⁷ Even though Cablevision apparently concedes that its sports networks are satellite-delivered and subject to the Commission's rules, it again refuses to provide access to the HD format of this sports programming,

¹⁵ See, e.g., Simon Flannery et al., Morgan Stanley, *Broadband Outlook: Recent Sell-Off an Opportunity in Recurring Revenue Models* at 11, Exhibit 25 (Oct. 17, 2008); Walter Mossberg, *Family Snapshots in the Splendor of HD*, Wall Street Journal, <http://online.wsj.com/article/SB122766053302758377.html> (Nov. 26, 2008).

¹⁶ Nielsen Special Report, *2008 a Banner Year in Sports*, <http://pl.nielsen.com/site/documents/2008ABannerYearinSportsDecember2008.pdf> at 3-4 (Dec. 2008).

¹⁷ Comments of Verizon, MB Docket No., 07-198, at 8 (Jan. 4, 2008).

presumably based on the terrestrial delivery of that particular format. Remarkably, Cablevision is refusing to provide the programming to Verizon in HD format in Buffalo, even though Cablevision itself is not a cable operator in that area and should have every reason to want to maximize distribution of its programming there. Moreover, Cablevision does provide its regional sports programming in HD format to other cable incumbents against whom it does not directly compete at the same time that it has refused to provide the HD format to Verizon.¹⁸

After withholding this highly desirable and unique regional sports programming, Cablevision has trumpeted in its advertisements the fact that it was the only source for this programming in HD, asserting that Cablevision has the “most hi-def NY sports channels”¹⁹ and has “all the HD games of all 9 New York sports teams!”²⁰ Cablevision’s site for HD sports boasts that it offers “The Whole 9.”²¹

Cablevision’s leadership has not hesitated to admit its motives in denying Verizon and other competitive providers access to the HD. In 2007, around the time Cablevision first denied HD access to Verizon, Cablevision’s Chief Operating Officer Tom Rutledge noted, as the first of three “factors he believed would slow or reverse any subscriber flow

¹⁸ See, e.g., DirecTV Web Site, available at http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=3420007&_DARGS=/DTVAPP/layout/component/topNavSections.jsp.21_A&_DAV=-1&_dynSessConf=5153639675144590846 (last visited July 16, 2008),

¹⁹ Cablevision Corp. website, Interactive Optimum, available at <http://www.optimum.com/io/index.jsp>, (as visited Feb. 11, 2009).

²⁰ Cablevision Corp. website, Interactive Optimum, available at <http://www.optimum.com/io/hdtv/hdtv.jsp>, (as visited Feb. 11, 2009).

²¹ Cablevision Corp. website, Interactive Optimum, available at <http://www.optimum.com/io/hdtv/bandwagon.jsp>, (as visited Feb. 11, 2009).

to FiOS,” that “FiOS’ video product lacks key components, specifically the HD formats of *MSG* and *Fox Sports NY* [now *MSG Plus*], . . . ”²² Again more recently at an analyst conference – and around the time Cablevision again denied Verizon the ability to get HD feeds of its sports programming – Cablevision’s Rutledge again linked his company’s refusal to provide Verizon the “unique” HD regional sports channels to Cablevision’s success in forestalling competition from Verizon’s FiOS. Rutledge explained Cablevision’s strategy as follows:

[W]e have things unique to us. . . . We have our sports channels in high definition. So four of the nine professional sports teams in New York. If you want to see them in HD, you have to get them from us.²³

These statements leave no doubt that Cablevision and other cable incumbents continue to seek out opportunities to evade their program access obligations and obstruct the purposes of Section 628 precisely for the purpose of limiting consumer choice and making it more difficult for new entrants like Verizon to enter the market and compete effectively.

B. The Commission Has Ample Authority Under Section 628(b) To Require Access to “Must Have” Local Sports Programming, Including the HD Format of Such Programs.

The Commission can and should recognize that the unfair and anticompetitive practice of denying access to “must have” local sports programming, including the HD format of such programs, violate Section 628(b). The Commission has already

²² Craig Moffett et al., Bernstein Research, Cablevision (CVC): *Management Commentary Supports Bullish View . . . Capital Intensity Falls, and Margins Rise*, 4 (Apr. 5, 2007) (quoting Mr. Rutledge).

²³ Thomson StreetEvents Final Transcript, *Cablevision Systems Corp. at UBS Global Media and Communications Conference*, at 9 (Dec. 8, 2008) (quoting Mr. Rutledge).

assembled a full record on these issues in at least two proceedings, and it is now time for swift Commission action to eliminate these practices that are plainly aimed at limiting competitive entry.²⁴

With respect to RSNs or HD programming, the Commission has ample authority under Section 628(b) to take action. That section prohibits cable operators and their vertically integrated programmers from engaging in *any* “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 [video provider] from providing satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. § 548(b). The cable incumbents’ shenanigans with respect to RSNs and HD programming is precisely such an unlawful practice.

That regional sports and HD feeds may not be delivered by satellite does not immunize the cable incumbents’ conduct. As the Commission recognized in prohibiting

²⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; 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 and Further Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) (“*Further Notice*”); *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, DA 09-530, CSR-8066-P, ¶ 16 (rel. Mar. 9, 2009), Application for Review pending. In its *Further Notice*, the Commission cited the “serious adverse impact on competition” as a result of the withholding of sports programming in Philadelphia and San Diego, and concluded “that withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market.” *Id.* ¶¶ 115-16. The Commission sought comment on its authority to extend its rules to such programming pursuant to various provisions of the Communications Act, including specifically Section 628(b). *Id.* ¶ 116. Likewise, the Commission sought comment on “whether the program access rules should apply to all feeds of the same programming, including both standard and HD, regardless of whether one feed is delivered terrestrially” and “whether shifting the HD feed . . . to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of Section 628(b).” *Id.* ¶ 117.

exclusive access arrangements for multiple dwelling unit properties, Section 628(b) is not just about providers' access to programming – much less satellite delivered programming. *MDU Order*, ¶¶ 43-43. Instead, this prohibition reaches any of cable operator's "unfair methods of competition or unfair or deceptive acts or practices" that "hinder significantly or prevent" a MVPD competitor from providing any satellite delivered programming "to subscribers or consumers." *Id.* In the *MDU Order*, the Commission concluded that the "broad, plain language of the statutory prohibition" reaches "any practices that unfairly deny MVPDs the ability to provide [covered] programming to consumers." *Id.* ¶ 44; *see also id.* ¶ 46 (noting that Commission's interpretation would allow it to address "an anticompetitive cable practice that has erected a barrier to the provision of competitive video services"). This view was confirmed by legislative history showing that a "primary concern underlying Section 628 was fostering competition among cable operators and enhancing consumer choice." *Id.* ¶ 45.

The reason for this is straightforward and follows from the plain language of the statute. As discussed above, many subscribers consider regional sports programming essential and would not switch to a competitive video provider that does not carry such programming. Therefore, when the incumbent withholds regional sports, it is denying competitors a necessary component to compete for such customers, and denying those consumers a meaningful competitive choice. Necessarily, this "significantly hinders or prevents" the competitor to provide *any* of its programming – including other programming that is delivered by satellite – to these "subscribers or consumers." 47 U.S.C. § 548(b).

As the Commission recently explained to the Court of Appeals for the D.C.

Circuit, in support of its *MDU Order*:

It is noteworthy, as well, that Congress focused in section 628(b) on the denial of programming to ‘consumers’ in addition to ‘subscribers.’ ... [B]y referring as well to ‘consumers,’ Congress also focused on competitors’ ability to provide programming to those (like MDU residents) who are not yet subscribers – a concern that ... is directly implicated by restrictions (such as exclusive access agreements) that prevent MVPDs from competing to convert consumers into subscribers.

See Brief of the Federal Communications Commission, *National Cable &*

Telecommunications Ass’n v. FCC, Case Nos. 08-1016 & 08-1017, at 20 (filed July 25, 2008). The Commission’s reasoning applies equally here. Just as exclusive access agreements violate Section 628(b) by preventing MVPDs from competing to convert consumers into subscribers, the same is true for restrictions on access to RSNs and HD programming.²⁵

As for HD feeds, the Commission also should recognize that nothing in the program access rules permits vertically integrated cable incumbents to pick and choose certain (lower quality) formats of programming covered by the rules to make available to competitive providers, and deny other (higher quality) formats. Allowing such practices would allow incumbents to effectively nullify the program access rules.

The Commission has before it at least two vehicles to address this important issue, and should act promptly to prevent further harm to consumers and video competition.

²⁵ The Commission has long recognized that incumbents may violate Section 628(b) when they seek to evade the specific prohibitions of Section 628(c) by “moving programming from satellite to terrestrial delivery” in an effort to “preclude[] competitive MVPDs from providing satellite cable programming.” *DirectTV v. Comcast*, 15 FCC Rcd 22802, ¶ 13 (2000). Cable incumbents’ efforts to evade their statutory obligations by placing RSNs or the HD format of covered programming onto alternative feeds is precisely the type of unfair or deceptive practice that the Commission has not hesitated to prohibit.

C. **Cancellation and Retention Marketing Rules Should Apply Fairly Across the Range of Competing Services**

Traditional cable companies and telephone companies compete directly for the provision of the “triple play” of services. As a result, there should be parity for the regulatory rules under which they operate. However, there are different rules in place today with respect to the service cancellation process and the marketing that is permitted while a request to cancel is pending, which distorts competition in favor of the cable incumbents. It also is a matter of customer convenience, as the current process for disconnecting service from an incumbent cable operator is cumbersome and unnecessary.

Last year, Verizon sought to facilitate the ability of customers to switch video providers by asking the Commission to declare that cable incumbents must accept disconnect orders from the new provider acting as the authorized agent for the customer. *See Petition of Verizon for Declaratory Ruling Confirming That Incumbent Cable Companies Must Accept Subscriber Cancellation Orders When Delivered by Competitive Multichannel Video Programming Distributors as Lawful Agents* (filed Mar. 26, 2008). Verizon also asked the Commission to confirm that the same marketing rules apply to incumbent cable operators as apply to incumbent telephone companies while a disconnect order is pending. The Commission has yet to act on Verizon’s petition.

Commission action is necessary because the existing procedures for submitting disconnect orders when customers choose to change telephone and video providers are very different and confusing to customers. From the customer’s perspective, the process to switch *telephone* providers is simple. Over ten years ago, the industry, with Commission approval, established procedures through which the new provider can submit a disconnect order as the authorized agent for the customer and the old provider

must promptly cancel that customer's service. Once a customer agrees to accept service from the new provider, the customer need not do anything more. These practices have proven to work well, enhancing customer convenience while facilitating the ability of competitive carriers to transfer customers between them.

The process to switch *video* providers is far more cumbersome for a consumer. Cable incumbents do not accept disconnect orders from the new provider; instead, they require the customer to contact them directly to cancel service after choosing a new video provider. The incumbent cable operators' refusal to accept the subscriber's cancellation from the competitive provider causes substantial inconvenience to the customer, unnecessarily extends the time necessary to convert the customer to the new service, and interferes with the ability of the new provider to compete. It also fundamentally tilts the competitive playing field in favor of cable incumbents that benefit from the streamlined processes applicable when they win a telephone customer but refuse to do the same with respect to video services.

Likewise, although Verizon remains convinced that all consumers receive the greatest benefit when they are able to receive complete information about all the competitive options available to them, the Commission has reached a different conclusion with respect to departing customers for voice *telephone* service. *See In the Matter of Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, 23 FCC Rcd 10704 (June 23, 2008). As a result, Verizon's ability to market to departing customers is strictly limited, but cable incumbents can engage in aggressive retention marketing when the customer calls to schedule the cancellation of the service and throughout the period that the change is being effected. In fact, due to the different cancellation processes for video

and voice described above, cable providers have the ability to speak live and market to *all* of their customers before canceling service; by contrast, voice providers must cancel service regardless of whether they speak to their customers.

While all voice providers must abide by the same marketing rules for voice service, in today's marketplace where telephone companies and cable incumbents sell the same bundles of services to an increasing number of customers,²⁶ the rules do not affect cable incumbents and telephone companies equally. Telephone companies' retention marketing efforts would most frequently be directed at departing *voice* customers; cable's retention marketing efforts at departing *video* customers. While many customers switching voice service from traditional telephone companies do not purchase other services from that company, only a miniscule percentage of cable incumbents' voice customers are voice-only. Thus, customers departing from telephone companies typically cannot receive retention offers while customers departing from cable companies typically can – even though both companies would be attempting to sell the same bundle of voice, video, and broadband services. While Verizon still believes that customers benefit from having all available information about competitive offerings, the same rules should apply to all.²⁷

²⁶ A recent study showed that almost two-thirds of households in 2008 purchase multiple services from one provider. See IDC, *U.S. Service Provider Churn Synopsis* at 15 (Jan. 2008).

²⁷ See *MDU Order* ¶ 21 (the effect of maintaining disparities between the regulation of video and voice services will be to “reduce competition in the provision of triple play services and result in inefficient use of communications facilities”). When it prohibited telecommunications carriers from entering into exclusive access contracts with residential multiple tenant environment owners, the Commission noted that doing so was necessary “to create parity for the provision of telecommunications services to customers,” reasoning that “the importance of regulatory parity is particularly compelling” in “an environment of increasingly competitive bundled service offerings.” *Promotion of*

C. Technical Standards Should Encourage Competition and Innovation

A thriving video marketplace depends on fair and competitively neutral technical standards that promote competition and innovation. Most significantly, the rules and standards governing navigation devices and related technologies should not be permitted to further entrench cable incumbents or to stall competition or deny consumers the benefits of innovative new technologies that enable additional programming or other services by requiring providers to comply with traditional cable-centric technologies.

In order to encourage competition and innovation, the Commission's policies related to navigation devices and related technologies should encourage the creation of technical approaches that are compatible with all video providers, regardless of the platform or technological approach that they use to deliver video. The Commission should encourage the development of such pro-consumer standards through industry standards setting bodies – such as the Alliance for Telecommunications Industry Solutions (ATIS) – that are open to all parts of the industry and to other stakeholders.

While the Commission should not mandate any particular standards or technological approach, in no event should the Commission mandate technical standards that are based on the technological approach of the cable incumbents. A cable-centric approach would frustrate video competition and continued innovation 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

Competitive Networks in Local Telecommunications Markets, Report and Order, 23 FCC Rcd 5385 (2008).

signing up for service from a provider that uses a different 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 competing 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 remain with the incumbent provider.

Second, cable-centric standards would 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.

The solution is for the industry to create standards for bidirectional navigation devices that work and support consumers' interactivity with the services of *all* providers, regardless of platform or technology. Work on standards that are compatible with all types of video providers already is underway through open industry efforts, including within ATIS – an ANSI-accredited, industry standards-setting body open to any party. In fact, CableLabs joined ATIS as an affiliate member just this month, and its participation in that forum could assist in the development of all-provider, bidirectional standards. The Commission should endorse and encourage those efforts.

Similarly, the Commission should ensure that existing navigation device rules that were written to address cable-centric technology – such as the one-way CableCard rules – do not get in the way of innovation. For example, those rules do not contemplate or address alternative technological approaches to delivering video programming, such as the use of IPTV. The Commission should nonetheless encourage providers to develop and deploy such innovative technological approaches that could bring consumers additional choices in programming – including more HD and more diverse, independent or niche programming – or that could facilitate new, interactive services.

The interests of consumers and the goals of Section 629 will best be served by appropriate two-way standards that work for all video providers and that encourage competition and innovation. The Commission should encourage the industry to work diligently on the development of such standards and should make sure that its existing rules do not hamper competition choice or continued innovation.

IV. CONCLUSION

Consistent with these comments, the Commission should take action to remove barriers to entry and foster robust competition for video services and deployment of next-generation broadband networks.

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