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

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	MB Docket No. 10-71
The Commission's Rules Governing	)	
Retransmission Consent	)	

COMMENTS OF VERIZON[1]

I. INTRODUCTION

As demonstrated in the Petition,[2] the current retransmission consent regime is broken. Unlike a normal market, the existing retransmission consent regime skews commercial negotiations by providing broadcasters with artificial regulatory preferences, and the result increasingly is harm to consumers through higher cable rates and service disruptions. The Commission should amend its rules to restore balance to the negotiations between broadcasters and mulitchannel video programming distributors (MVPDs) so that consumers will no longer be held hostage in the negotiation process.

Ideally, policymakers would scrap rules that prevent the marketplace for broadcast programming from functioning like a normal market, such as the rules that prohibit MVPDs from obtaining broadcast signals from alternative sources. Eliminating these rules would encourage the parties to retransmission consent negotiations to temper their demands and, by providing some market-based alternatives, reduce the likelihood of consumer harm in the event such negotiations are unsuccessful.

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

2 Time Warner Cable, *et al.*, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (March 9, 2010) ("Petition").

At the very least, however, the Commission should adopt targeted reforms that ameliorate the demonstrated problems that have emerged in this area. One such reform that would benefit consumers is a standstill requirement that maintains the status quo during negotiations of a new broadcast carriage agreement as long as the MVPD is negotiating in good faith. Because carriage agreements tend to expire during particularly sensitive viewing periods for consumers, this approach would at least incrementally reduce the potential for consumers to become the victims of brinksmanship.

The Commission has the legal authority to reform the current retransmission consent regime. The rule changes requested here are well within the scope of the Commission's express statutory authority under the Communications Act. Until the Commission exercises its authority by adopting the requested reforms, consumers will face higher cable bills and more frequent service disruptions as broadcasters increasingly view retransmission consent fees as a "windfall."[3]

II. THE CURRENT RETRANSMISSION CONSENT REGIME IS BROKEN.

By virtue of the current retransmission consent rules, negotiations for the carriage of broadcast signals do not occur in a normal market. In typical commercial negotiations, either side can seek compensation for its goods and services; if those negotiations are unsuccessful, either party can decide to walk away and pursue other distribution alternatives. But that is not the case in broadcast carriage negotiations.

[3] Cynthia Littleton, "Free TV's Found Money: Big Four Eye Possible Windfall In Near Future," *Variety* (Feb. 19, 2010) ("*Free TV's Found Money*") (available at http://www.variety.com/index.asp?layout=print_story&articleid=VR1118015443&categoryid=14).

Under existing rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations. As the Petition correctly observes, in addition to guaranteeing broadcasters with cable-carriage rights, the Commission's rules give broadcasters "a host of powerful distributions controls," including: (i) network non-duplication, which permits a broadcaster to block a cable operator from importing another affiliate of the same network, even when that other station has consented to carriage; (ii) syndicated exclusivity, which allows a broadcaster providing syndicated programming to prevent a cable operator from carrying that programming as broadcast by an out-of-market station; and (iii) guaranteed placement on a provider's basic service tier. Petition at 7, 12-13 (citing 47 C.F.R. § 76.92(a); 47 C.F.R. § 76.93; 47 C.F.R. § 76.101; 47 C.F.R. § 76.103(a)).

By virtue of these regulatory preferences, normal market dynamics cannot function as they would absent the regulations. As an initial matter, an MVPD generally cannot refuse to carry a broadcaster's programming, given the broadcaster's compulsory carriage ("must carry") rights. And for broadcasters that pursue retransmission consent and then make unreasonable demands, the MVPD cannot pursue effective alternative arrangements to carrying the broadcast signals that are the subject of negotiations because of the broadcaster's network non-duplication and syndicated exclusivity rights. So, for example, the MVPD could not seek an alternative source for a network's programming from a broadcaster in another city that may be willing to sell the programming on different terms because the network non-duplication and syndicated exclusivity rules prevent the MVPD from delivering it to consumers. Thus, an MVPD is generally limited to a single source for this programming that consumers expect to receive.

By preventing true marketplace negotiations, the current retransmission consent rules harm consumers. As several recent episodes have shown, some broadcasters have used the preferences afforded under the current regime to demand increased payments from MVPDs for programming and to threaten to pull - or actually pull - their signal if their demands are not met. These threats of service disruption have coincided with popular events, such as college football bowl games or the Academy Awards. When faced with such demands in this context, MVPDs essentially have two choices. They can consent to such payments, which translates into higher cable bills for consumers. *See* Petition at 25-27 (noting recent economic study which found that "retransmission fees are large and growing, and a significant percentage of these costs are passed on to consumers"). Alternatively, MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of much-demanded programming. And, in the case of competitive providers like Verizon, they risk losing customers to the incumbent operator if they do not accede to the broadcasters' demands.

Because the current regime restricts the ability of an MVPD to obtain broadcast signals from alternative sources, consumers are caught in the middle of retransmission consent negotiations and are being used as pawns when agreements expire during sensitive periods. In the latest example of such brinksmanship, just two months ago, more than three million subscribers to one cable provider could not watch the first 15 minutes of this year's Academy Awards due to a carriage dispute with Disney over retransmission consent fees.[4] There are other recent situations where consumers lost or nearly lost programming during retransmission consent negotiations, such as Time Warner Cable's dispute with Fox Broadcasting as a result of which approximately 6 million subscribers almost lost access to the 2010 Sugar Bowl.[5]

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[4] Jonathan Berr, "The Cablevision-Disney Oscar Fight Hints of Things to Come," *Daily Finance* (March 8, 2010) (available at http://www.dailyfinance.com/story/company-news/the-cablevision-disney-oscar-fight-hints-of-things-to-come/19387623/).

[5] "Fox, Time Warner Cable Reach Deal," *USAToday* (Jan. 3, 2010) (available at http://www.usatoday.com/money/media/2009-12-31-fox-time-warner-cable-dispute_N.htm).

Such disputes will only continue unless and until the current retransmission consent regime is reformed. Faced with decreasing advertising revenues, retransmission fees are an attractive source of revenues for broadcasters, which sometimes threaten to withhold programming unless their demands for increased fees are met.[6] And the risks are especially serious for competitive providers like Verizon, which are unlikely to be able to compete effectively against incumbent operators if they lack popular broadcast programming. Additionally, any decision by a broadcaster to "go dark" on a competitive provider's system is less harmful to that broadcaster, since competitive providers generally still have fewer "eyeballs" than incumbent operators.

Whatever rationale may have existed for this regime when it was established almost 20 years ago, the regulatory preferences that prevent normal market-based negotiations are not justified in today's video programming and distribution market. Eliminating these preferences and enabling normal marketplace negotiations would allow an MVPD to obtain broadcast signals from other sources when confronted with unreasonable broadcaster demands and would thereby restore balance to the broadcast carriage negotiation process, giving consumers the benefit of the resulting undistorted commercial negotiations. The Commission should urge Congress to take that step in order to bring consumers the benefits – including lower programming costs – of increased competition for programming.

III. THE COMMISSION SHOULD ADOPT A STANDSTILL REQUIREMENT.

[6] *SNL Kagan Projects Growth in TV Station Ad Revenue in 2010* (Aug. 18, 2009) ("retransmission fee revenue has proven to be a high growth, high margin revenue stream for TV station owners") (available at http://www.snl.com/SNLFinancial/Press_Releases/20090818.aspx#); *Free TV's Found Money* at 1 ("At a time when [the networks] and their local affiliates are facing rising costs, declining viewership and plummeting ad rates, they're suddenly eyeing a possible $1 billion-$2 billion windfall over the next few years").

Although many of the preferences that broadcasters enjoy currently are embodied in the Communications Act, the Commission can and should adopt immediate targeted reforms to better protect consumers from the negative impact from the retransmission consent regime. A critical part of any retransmission consent reform is a standstill requirement that would provide for automatic interim carriage pending completion of renewal negotiations. As Senator Kerry (D-MA) noted in his recent letter to Chairman Genachowski, consumers should not "lose access to a signal over their cable service as long as both parties are negotiating in good faith."[7] Consistent with this approach, the Commission should adopt a standstill requirement that maintains the status quo and allows continued carriage as long as the parties are engaged in good-faith negotiations of a renewal agreement. A standstill requirement would protect consumers and prevent broadcasters from engaging in unfair brinksmanship in renewal negotiations.

The Commission recently adopted a standstill mechanism that allows the status quo to be preserved during the pendency of a program access complaint. *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶¶ 73-75 (2010). As the Commission recognized, a standstill requirement has "several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint," and "limiting the ability of vertically integrated programmers to … withhold[] programming to extract concessions from an MVPD during renewal negotiations." *Id.* ¶ 71.[8]

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[7] Letter from John Kerry, United States Senator, to Julius Genachowski, Chairman, FCC (March 3, 2010) (Attachment A to Petition).

[8] Although the Commission required the complaining party in a program access complaint to show that the grant of a standstill would satisfy four specific criteria, *see id*. ¶ 73, no similar showing should be required in retransmission consent disputes. Unlike cable operators or the

A standstill requirement should apply as long as the MVPD is negotiating in good faith. In addition to other demonstrations of good faith, the Commission should specify that the good faith requirement is satisfied in any instance in which an MVPD has offered to submit the dispute to binding, commercial arbitration. The Commission previously has "strongly encouraged the parties to submit to such arbitration" in retransmission consent disputes.[9] Deeming an offer to arbitrate as demonstrating good faith would create proper arbitration incentives. It would also eliminate unnecessary disputes about whether an MVPD is negotiating in good faith or how negotiations can be brought to a close if an impasse is reached. It would also be an important step towards transforming the relationship between MVPDs and broadcasters to a more normal, market-based relationship.

IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO GRANT THE REQUESTED RELIEF.

The plain language of section 325(b)(3)(A) provides the Commission with ample legal authority to grant the requested relief. *See* 47 U.S.C. § 325(b)(3)(A). This statutory provision expressly authorizes the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." *Id.* The Petition asks the Commission to adopt new rules governing broadcasters' exercise of their retransmission

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other programming vendors subject to the Commission's program access rules, *see generally* 47 C.F.R. § 76.1001, broadcasters receive numerous public benefits – including the right to demand must-carry – and also have various "public interest obligations." *FCC Launches Examination Of The Future Of Media And Information Needs Of Communities In A Digital Age; Comment Sought*, Public Notice, 25 FCC Rcd 384, ¶ 19 (2010); *see generally, Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd 10660 (1996); *id*. ¶ 7 ("requiring broadcasters to serve the educational and informational needs of their child audience was clearly within the scope of the long recognized obligation of broadcasters to serve the public interest"). As a result, the equities in the retransmission consent context obviate the need for any heightened showing as a prerequisite to the imposition of a standstill requirement.

[9] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, ¶ 213 (2009).

consent rights, and thus the requested relief falls well within the scope of the agency's express authority under section 325(b)(3)(A).

Beyond section 325(b)(3)(A)'s express grant of authority to the Commission, this provision also includes specific mandates that compel the agency to act. In regulating a broadcaster's exercise of its retransmission consent rights, Congress stated that the FCC "*shall* consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and *shall* . . . ensure that the rates for the basic service tier are reasonable." 47 U.S.C. § 325(b)(3)(A) (emphasis added). As noted in the Petition, there is substantial evidence that the current retransmission consent regime fails to protect consumers who face increases in basic cable rates due to unreasonable demands by broadcasters for inflated retransmission fees.[10] Thus, in light of section 325(b)(3)(A)'s mandatory language,[11] the Commission has an affirmative obligation to modify its rules to ensure reasonable basic cable rates.[12]

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10 *See* Petition at 5, 15, 19-20, 32, 38 (discussing threats to pull signals, programming fee hikes, and other practices that have a significant and adverse impact on basic cable rates).

11 *See, e.g., Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

12 When first implementing the 1992 Cable Act, the FCC determined that Congress did not intend for the agency to micromanage the retransmission consent process by directly setting the prices between cable companies and broadcasters, but at the same time it recognized that "Section 325(b)(3)(A) directs the Commission to consider . . . the impact that retransmission consent may have on cable basic service tier rates and to ensure that our retransmission consent regulations do not conflict with our obligation ... to ensure that the rates for basic service tier are reasonable." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 176 (1993) (internal citation omitted).

Moreover, prior decisions confirm the FCC's authority to adopt rules that address the concerns raised in the Petition.[13] As noted in the Petition, the FCC previously has exercised its statutory authority to grant this type of relief.[14] And the legislative history of section 325(b)(3)(A) underscores that Congress intended the Commission to have the requisite authority to adopt dispute resolution mechanisms and interim carriage rules. The pertinent sections of the Senate floor debates make clear that the FCC could establish procedures "to resolve disputes between cable operators and broadcasters …."[15]

Granting the requested relief also would further Congress's purposes in enacting section 325(b)(3)(A). As an administrative agency, the FCC must act – and must implement its statutory responsibilities – in a manner consistent with statutory purposes.[16] Here, Congress did not enact section 325(b)(3)(A) to allow broadcasters to obtain windfall profits and disrupt service. Rather, Congress wanted to ensure that consumers could continue to access network programming, enjoy the benefits of localism and viewpoint diversity, and do so at reasonable rates.[17] As the Petition

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13 Petition at 31, 36.

14 *See* Petition at 31 (citing *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 222 (2004) (requiring compulsory arbitration and interim carriage while arbitration is pending)).

15 *See* 138 Cong. Rec. S666-01 at S667 (Jan. 30, 1992) (Sen. Levin).

16 *See, e.g.*, *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985) (recognizing that the judiciary must "reject administrative agency actions which exceed the agency's statutory mandate or frustrate congressional intent"); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (stating that courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement").

17 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (stating that the purpose of the 1992 Cable Act was to "promote the availability to the public of a diversity of views and information through cable television and

makes clear, however, the current retransmission regime threatens these goals, and the FCC must now act to ensure that its rules further the intended purposes of section 325(b)(3)(A).

V. CONCLUSION

Although the best solution for consumers would be to clear away regulatory preferences that prevent normal marketplace negotiations between broadcasters and MVPDs, the Commission should provide additional protection for consumers under the current retransmission regime by ensuring continued carriage while good faith negotiations continue.

Respectfully submitted,

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other video distribution media"); *see also* 138 Cong. Rec. S642-01 at S643 ("universal availability of local broadcast signals is a major goal of this legislation [and it is designed] . . . to ensure that local stations remain viable well into the future to continue to provide local service to cable subscribers and nonsubscribers alike") (Jan. 30, 1992) (Sen. Inouye); *see also* 138 Cong. Rec. S14600-03 at S14615-16 ("I want to get it on the record, to make this clear as a matter of legislative history. As the committee explained, if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.") (Sept. 22, 1992) (Sen. Lautenberg); *see also* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 (recognizing the public interest in protecting the availability of network programming); *see also* Petition at 3 (discussing the purposes underlying Section 325(b)(3)(a)).