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

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	
	)	

COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY.

The current retransmission consent regime is broken. Unlike a normal marketplace, the existing retransmission consent regime skews commercial negotiations between broadcasters and multichannel video programming distributors (MVPDs) by providing broadcasters with artificial regulatory preferences. But, with the bargaining table in the broadcasters' favor, it is not just MVPDs that are placed at a disadvantage. As the Commission has recognized, MVPDs' subscribers are "innocent bystanders adversely affected" when negotiations break down,[2] as these consumers increasingly have to pay the price for the parties' uneven bargaining power through higher cable rates and actual or threatened service disruptions. Policymakers should take steps to prevent consumers from being held hostage or otherwise harmed as a result of the broken retransmission consent regime.

The unnecessary governmental preferences that exist today distort the marketplace for MVPDs' carriage of broadcast channels, and scrapping the rules that prevent the marketplace for

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

2 *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 17 (2011) ("*NPRM*").

broadcast programming from functioning like a normal marketplace is the best way to remedy the problem. Doing so ultimately will require a holistic approach involving Congress, which maintains oversight over the broadcaster preferences currently embodied in the Communications Act, and other policymakers, including the Copyright Office, which oversees administration of certain licenses for broadcast programming. But, even as the Commission and other policymakers work toward broader reform of regulatory framework addressing the relationship between broadcasters and MVPDs, the Commission should seek to ameliorate the demonstrated problems that have emerged in this area by addressing those regulations that remain within its purview.

For example, the Commission's current network non-duplication and syndicated exclusivity rules prohibit MVPDs from obtaining broadcast signals from alternative sources. Eliminating those rules, as the Commission has proposed,[3] 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 that such negotiations are unsuccessful.

Similarly, the Commission should amend its rules to more effectively enforce the statutory good faith requirements for retransmission consent negotiations. For example, the Commission should provide that a party's refusal to respond in a timely and reasonable manner to proposals on relevant issues should be considered bad faith. And the Commission should provide that the running of advertisements designed to scare – rather than inform – consumers simply to apply pressure to a distributor in advance of the expiration of a contract likewise should be viewed as strong evidence of bad faith.

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[3] *Id*. ¶¶ 42-45.

Various parties have also pointed out that the Commission should take steps to protect consumers in those circumstances when an existing retransmission consent agreement expires and negotiations are ongoing. For example, a standstill or cooling off period could protect consumers from losing the broadcast channels that they expect to receive. Among other things, parties could pursue commercial arbitration during this standstill or cooling off period.

But, until the retransmission consent regime is fixed through these and other reforms, consumers will continue to face higher cable bills and more frequent service disruptions as broadcasters increasingly view retransmission consent fees as a "windfall."[4]

At the same time, the Commission should reject proposals that would further distort, to the detriment of consumers, the already lopsided marketplace. For example, given the risks of unnecessary consumer confusion and frustration, the Commission should not adopt new notice requirements on MVPDs that would apply before the actual expiration of a retransmission consent arrangement. It is common for a renewal arrangement to be reached only shortly before the earlier deal expires. If notices were required 30 days in advance of expirations – as suggested in the *NPRM* – that could result in numerous notices to consumers warning of possible losses of carriage, even in situations where a blackout is highly improbable. *NPRM* ¶ 25. This would unnecessarily alarm consumers, and could drive them to take unnecessary actions, like switching service to another provider. That possibility would also further distort negotiations in favor of broadcasters by ratcheting up the pressure on MVPDs to accept unreasonable terms in order to avoid unnecessary notices that would disrupt MVPDs' relationships with their

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[4] Cynthia Littleton, *Variety*, "Free TV's Found Money: Big Four Eye Possible Windfall In Near Future," http://www.variety.com/index.asp?layout=print_story&articleid=VR1118015443&categoryid=14 (Feb. 19, 2010) (last visited May 27, 2011) ("*Free TV's Found Money*").

subscribers. The Commission should avoid making this or other changes that would hurt, not help what ails the current retransmission consent regime.

II. THE CURRENT RETRANSMISSION CONSENT REGIME IS BROKEN.

The Commission has indicated that its "primary objective" in seeking comments here is to determine "whether and how the Commission rules … are working effectively and, to the extent possible, minimize video programming service disruptions to consumers."[5] Unfortunately, those rules are not working effectively, resulting in higher cable rates and both threatened and actual service disruptions to consumers.

By virtue of the current retransmission consent regime and other regulations advantaging broadcasters, negotiations for the carriage of broadcast signals do not occur in a normal marketplace. 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.

Under existing rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations. In addition to guaranteeing broadcasters with cable-carriage rights should they unilaterally decide to assert them, the Commission's rules give broadcasters a number of powerful distribution 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

[5] *NPRM* ¶ 1; *see also id.* ¶ 17 ("Our goal in this proceeding is to take appropriate action … to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services.").

carrying that programming as broadcast by an out-of-market station; (iii) guaranteed placement on a provider's basic service tier; and (iv) protections during "sweeps" periods that prevent a cable operator from deleting a station during the sweeps period even if the retransmission consent agreement has expired, while denying analogous protections to MVPDs.[6]

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 if the broadcaster elects to demand compulsory carriage ("must carry"). 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 and curtailing potential alternative sources for many forms of popular programming, 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 generally have coincided with popular events, such as major

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[6] *See* 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);

sporting events or the Academy Awards, thus putting maximum pressure on MVPDs. 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. Indeed, in a May 17, 2011 *ex parte* communication, the American Consumer Institute advised the Commission that, according to the results of an analysis by ConsumerGram, "broadcasters are increasing prices by at least four times the rate of inflation, and have done so over the course of several years."[7] Or, alternatively, the MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of much-demanded programming (often during periods when they are most in demand, such as during popular sporting events). And, in the case of competitive providers like Verizon, the risks are especially great, given the prospect of losing customers to the incumbent operator, or discouraging the interest of potential new customers, if they do not accede to the broadcasters' demands.

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47 C.F.R. § 76.1601.

[7] Ex Parte Letter from Steve Pociask, American Consumer Institute, to Marlene Dortch, FCC, *Petition to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket 10-71, Attachment ("Retransmission Consent: The Evidence of Market Power") at 5 (May 17, 2011). As the American Consumer Institute explained:

> This sustained rate of increase suggests that broadcasters are exerting market power – even over the largest cable TV providers, who should be in the best position to negotiate. This leverage may even be more pronounced in competitive markets, thus undermining the consumer benefits of competition. Based on these data, regulations that provide broadcasters an upper hand in negotiation are no longer needed, and in fact are counterproductive to consumer welfare. Based on the high and rising prices for over-the-air programming, it is clear that distributors are at a disadvantage when it comes to negotiating with broadcasters. This means that consumers are the big losers of retransmission consent – both by potential blackouts and paying higher prices for years to come.

Id.

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. As the Commission has recognized, “disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.”[8]

The Commission has acknowledged several “high profile” examples of such brinksmanship over the past year, including disputes that resulted in millions of cable subscribers being unable to view the baseball National League Championship Series, the first two games of the World Series, a number of NFL regular season games and the first 14 minutes of the Academy Awards.[9] And the Commission is aware “most recently” of other “losses of programming resulting from retransmission carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU-TV, and Full Channel TV and Entravision.”[10] Moreover, there is some indication that the pace of these blackouts is increasing. As the American Television Alliance recently noted, just over four months into 2011, there have already been at least five blackouts as a result of the failure to reach terms on retransmission consent, whereas that number was not reached last year until October.[11]

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8 *NPRM* ¶ 2.

9 *Id.* ¶ 15.

10 *Id.*

11 *See* http://www.americantelevisionalliance.org/press-releases/broadcasters-continue-to-give-viewers-the-blackout-blues/ (May 17, 2011) (last visited May 27, 2011).

In addition, the Commission has acknowledged that consumers also "have been concerned about other high profile retransmission consent negotiations that seemed close to an impasse."[12] And, indeed, there have been several recent situations where consumers nearly lost programming during retransmission consent negotiations, such as Time Warner Cable's dispute with Fox Broadcasting, during which approximately 6 million subscribers almost lost access to the 2010 Sugar Bowl.[13] Even when those disputes have not resulted in actual loss of programming, the Commission rightly is "concerned about the uncertainty that consumers have faced during recent contentious retransmission consent negotiations" and "recognize[s] the consumer harm caused by retransmission consent negotiation impasses and near impasses …."[14]

Such disputes will only continue unless and until the current retransmission consent regime – and, indeed, the regulations governing the relationship between MVPDs and broadcasters more generally – are reformed. As broadcasters seek out additional sources of revenue, retransmission fees are an attractive alternative for broadcasters, which sometimes threaten to withhold programming unless their demands for increased fees are met.[15] 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.

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12 *NPRM* ¶ 16.

13 "Fox, Time Warner Cable Reach Deal," *USAToday*, http://www.usatoday.com/money/media/2009-12-31-fox-time-warner-cable-dispute_N.htm (Jan. 3, 2010) (last visited May 27, 2011).

14 *NPRM* ¶ 16.

15 "SNL Kagan Projects Growth in TV Station Ad Revenue in 2010," http://www1.snl.com/InTheMedia.aspx (follow "SNL Press Releases" to "2009") (Aug. 18, 2009) ("retransmission fee revenue has proven to be a high growth, high margin revenue stream for TV station owners"); *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").

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.

Moreover, whatever rationale may have existed for this regime when it was established almost 20 years ago, it certainly no longer exists today. As the Commission has recognized, "[s]ince Congress enacted the retransmission consent regime in 1992, there have been significant changes in the video programming marketplace."[16] Given these changes, the regulatory and statutory preferences that prevent normal market-based negotiations simply cannot be 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 and other policymakers to take that step in order to bring consumers the benefits – including lower programming costs – of increased competition for programming.

III. WHILE WORKING TOWARD BROADER REFORM, THE COMMISSION SHOULD TAKE INTERIM STEPS TO BRING BALANCE TO RETRANSMISSION CONSENT NEGOTIATIONS AND LESSEN POTENTIAL CONSUMER HARM.

Many of the preferences that broadcasters currently enjoy, such as "must carry" rights, are embodied in the Communications Act.[17] But, even as the Commission works with Congress and other policymakers toward broader reform of the retransmission consent framework, the Commission still can and should adopt immediate targeted reforms to better protect consumers

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16 *NPRM* ¶ 2.

17 *See, e.g.*, 47 U.S.C. §§ 325 and 534.

from the negative impact of the current retransmission consent regime. Indeed, the Commission itself has raised several such specific reforms in the *NPRM*, including with respect to providing more guidance regarding the good faith negotiating requirements and eliminating its own network non-duplication and syndicated exclusivity rules. Moreover, many parties have urged the Commission to require a standstill or cooling off period when retransmission consent agreements expire, so that consumers are not harmed by service disruptions while negotiations continue. Among other things, the parties could pursue commercial arbitration during such a period.

A. The Commission Should Enforce Statutory Good Faith Requirements.

As a first step towards bringing balance back to retransmission consent negotiations, the Commission should more effectively enforce the statutory good faith requirements that, *inter alia*, require broadcasters to negotiate in good faith with MVPDs. These good faith requirements provide at least a small check on the outsized bargaining power broadcasters enjoy under the current regime, and enforcing these requirements may help curb some of the more egregious negotiation tactics.

In connection with these requirements, the Commission specifically has sought comment on whether to include "additional objective good faith negotiation standards."[18] The Commission should do so by adopting its suggestion to deem a negotiating party's refusal to put forth *bona fide* proposals on important issues to be a *per se* violation of the good faith requirements.[19] Similarly, the Commission should consider a party's refusal to respond in a

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18 *NPRM* ¶ 21.

19 *Id*. ¶ 24.

timely and reasonable manner to *bona fide* proposals on relevant issues to be *per se* evidence of bad faith.

In the same vein, the running of advertisements designed to scare – rather than inform – consumers regarding potential programming losses in order to apply pressure to a distributor in advance of the expiration of a contract should be viewed as strong evidence of bad faith. Verizon previously has experienced such practices, with one broadcaster running menacing ads designed to upset customers even though negotiations were ongoing and the existing agreement was not scheduled to expire for at least 60 days. The Commission expressly has recognized that "threatened service disruptions … present a growing inconvenience and source of confusion for consumers."[20] Advertising scare tactics like these only exacerbate the consumer harm, and should be considered evidence of bad faith in negotiations.

B. The Commission Should Eliminate Its Network Non-Duplication and Syndicated Exclusivity Rules.

To further balance consent retransmission negotiations, the Commission should follow through with its proposal to eliminate its network non-duplication and syndicated exclusivity rules. As discussed above, these rules preclude truly market-based retransmission consent negotiations because they generally limit MVPDs to a single source for programming that consumers expect to receive. MVPDs that are faced with unreasonable demands from a particular broadcaster therefore are not allowed to walk away from the negotiating table and seek the relevant signals from an alternative source. The Commission has recognized that these rules provide broadcasters with a significant advantage in negotiations:

> [Under the network non-duplication rules,] a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable

[20] *Id*. ¶ 20.

> system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail. Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.[21]

Indeed, MVPDs generally are at the mercy of a broadcaster, which effectively acts as the only game in town. Accordingly, eliminating those rules and allowing some market-based alternatives would encourage broadcasters to temper their demands. That, in turn, would reduce the likelihood of consumer harm through higher prices or, in the event that negotiations are unsuccessful, actual or threatened programming disruptions.

Of course, even if the Commission adopts these needed reforms, the immediate result may not be a well-functioning marketplace for the carriage of broadcast channels. Among other things, networks may have placed restrictions in their agreements with affiliates based on the existing exclusivity rules. Nonetheless, clearing the books of these market-distorting regulations over time would open the door to potential, alternative sources for popular broadcast programming and alleviate the risk of blackouts.

C. The Commission Should Refrain from Pursuing Other Proposals That Will Further Distort Negotiations or Harm Consumers.

The Commission has raised a number of other potential specific regulatory reforms in the *NPRM*. However, it is unclear whether any of those other proposals, if adopted, would further the Commission's stated goal of "minimiz[ing] video programming service disruptions to consumers,"[22] and some of these proposals would only exacerbate the existing problems.

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21 *Id.* ¶ 42 n.10.

22 *Id.* ¶ 1.

For example, given the risks of unnecessary consumer confusion and frustration, the Commission should not adopt the new notice requirements the *NPRM* contemplates imposing on MVPDs *before* the actual expiration of existing retransmission consent arrangements. It is common for parties to reach a renewal arrangement only shortly before their existing deal expires, such that sending advance notice of the dispute to consumers would be premature and often unnecessary. Indeed, if notices were required 30 days in advance of all expirations, as the *NPRM* suggests, MVPDs would have to provide numerous notices to consumers warning of possible programming losses – even when a blackout is highly unlikely. As the Commission concedes, "such notice can be unnecessarily costly and disruptive when it creates a false alarm, *i.e.*, concern about [programming] disruption that does not come to pass."[23]

There is no need to unnecessarily alarm consumers, particularly when doing so could – as the Commission acknowledges – "induce[] subscribers to switch MVPD providers in anticipation of a service disruption that never takes place."[24] That possibility would only create further pressure on MVPDs to accept unreasonable terms to avoid potential subscriber losses, which would only further distort negotiations in favor of broadcasters. Therefore, at most, MVPDs should be required to provide reasonable notice to consumers only when negotiations reach an impasse and/or when a loss of the channel becomes likely.

Similarly, the Commission's rules regarding "sweeps" periods provide another advantage for broadcasters in negotiations and – rather than extend those rules, as the *NPRM* suggests[25] – they should be eliminated. As the Commission acknowledges, "[t]he sweeps prohibition

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[23] *Id*. ¶ 34.

[24] *Id*.

[25] *Id*. ¶ 41.

generally prevents a cable operator from deleting a station during the sweeps period [even] if the retransmission consent agreement expires during sweeps."[26] This provides a broadcaster with significant leverage during renegotiation of that agreement. To level the playing field, the sweeps prohibition should be scrapped altogether – there is no reason to enshrine such advantages for broadcasters in regulation. Or, at a minimum, the protection should be made reciprocal, such that broadcasters cannot black out programming to MVPDs during sweeps periods. But any other expansion of the sweeps rules would only further distort the market.

V. CONCLUSION.

The best solution for consumers is to comprehensively clear away the statutory and regulatory preferences that prevent normal marketplace negotiations between broadcasters and MVPDs. While the Commission works with Congress and other policymakers on such holistic reform of the existing retransmission consent regime, the Commission can and should undertake targeted reform of its own rules to bring greater balance to negotiations and provide additional protection for consumers, while rejecting proposals that only would further distort the market or threaten higher prices and more service disruptions.

Respectfully submitted,

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[26] *Id.*