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

In the Matter of	)	
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Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 07-269
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COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY.

Over the four years for which the Commission is now seeking to assess the status of video competition, the video marketplace has experienced a period of dramatic change. As a result of the heavy investments of competitive video providers like Verizon, and the growing popularity of online video distributors like Netflix, Hulu, Apple TV and iTunes, consumers now have more choices for video than ever. Innovation and competition from these providers, as well as by traditional multichannel video programming distributors (MVPDs) and device manufacturers, are untethering consumers from their couches and from traditional service models and devices. Increasingly, consumers can access the content of their choice, in the format of their choice, from the provider of their choice, on the device of their choice, and often both at home or on the go.

The growing competition and fast-paced innovation in the video marketplace does not mean, however, that all impediments to more effective competition have been

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

removed. In the past, the Commission took action to address some obstacles to more widespread competition – such as onerous cable franchising requirements that slowed the rollout of competitive services; exclusive access agreements in multi-dwelling units (MDUs) that foreclosed competition and choice for certain consumers; and abuse of the terrestrial loophole to deny must-have programming to competitive providers. In so doing, the Commission encouraged increased availability of competitive video services and deployment of the associated, next-generation broadband networks. Notwithstanding these efforts, a few similar (and in one case, identical) roadblocks continue to exist, and the Commission should address them in order to encourage the continued growth of competition and the removal of current regulation-based distortions in the video marketplace.

First, the Commission should follow through on its prior actions to prevent cable incumbents from taking advantage of their control over must-have programming – such as regional sports – which can hobble newer competitors and deny consumers the full benefits of video choice. The Commission took an important step last year when it recognized that the terrestrial loophole was not a shield for unfair or anticompetitive practices that harm consumers and competition. Now the Commission should take the next step by ruling on the pending cases focused on seeking access to this programming – including Verizon's pending complaint against Cablevision.[2] The Commission should promptly act on these pending cases concerning the withholding of HD regional sports programming – the archetypical example of unique, non-replicable, must-have

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[2] *See Verizon Telephone Cos. and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Program Access Complaint, File CSR-8185-P (July 7, 2009).

programming – and put an end to practices that have slowed the march of competition and, therefore, harmed consumers.

Second, the regulatory framework governing the relations between broadcasters and video distributors – and the retransmission consent framework in particular – is in need of comprehensive reform. An assortment of regulatory preferences granted to broadcasters both within the statute and in the Commission's regulations tilts the relationship between broadcasters and distributors heavily in broadcasters' favor. As a result, when the parties negotiate retransmission consent arrangements, the outcome increasingly is a last-minute showdown with the distributor being forced to choose between acceding to unreasonable terms – and the specter of increasing rates to consumers – or losing the channel and disrupting service, often during high-profile television or sporting events. To remedy this escalating imbalance and protect consumers, the Commission and other policymakers should seek to remove existing regulation-induced market distortions – including must-carry rights, exclusivity rules, and channel placement preferences – and move more toward a functional commercial marketplace for carriage.

Third, 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, 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 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, 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. Regardless, the same rules should apply to all.

Finally, in addition to these affirmative steps that would remove existing obstacles to more robust video competition, the Commission also should refrain from adopting new regulations that would introduce new distortions into this increasingly competitive and innovative marketplace. At the top of the list should be the Commission's earlier AllVid Proposal, which would have imposed new technology mandates on a subset of the providers in the video marketplace and required certain types of new video devices for accessing both traditional video services and online options.[3] The rapid pace of innovation has removed any purported need for regulation along those lines and made obsolete the approach and the concerns that were underlying the AllVid Proposal. New regulation along these lines – or any other regulation that would single out for disparate treatment a subset of the expanding range of players in the video distribution marketplace – would only distort competition, slow innovation, and harm consumers.

[3] *See Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, 25 FCC Rcd 4275 (2010) ("AllVid Proposal" or "*AllVid NOI*").

II. VIDEO COMPETITION CONTINUES TO TAKE HOLD, AND INNOVATION AND COMPETITION ARE STEADILY INCREASING.

In recent years, Verizon and other competitive video providers have continued to invest heavily in next-generation broadband networks that enable head-to-head video competition with traditional cable operators. While service from two national direct broadcast satellite providers has been available for several years, new competition from competitive wireline providers is bringing the benefits of wireline competition for the first time to most consumers. And consumers increasingly are moving toward "Over the Top" ("OTT") and broadband delivered content. The availability and capabilities of online video services create still more options for consumers as they decide how and from whom to obtain video programming. As a result, all providers are now forced to compete aggressively across a wide range of dimensions, including content, price, technology and customer service.

Extent and Location of Video Competition. Verizon introduced its FiOS TV service in October 2005 and has rapidly extended its service (along with its deployment of its all-fiber FiOS network) since that time. As the following chart demonstrates, the reach and adoption of FiOS TV have steadily increased during the period of time covered by this proceeding:

As of:	FiOS TV – Subscribers	FiOS TV – Premises Open for Sale	FiOS TV – Penetration	FiOS – Premises Passed
June 30, 2007	515,000	3.9 million	13 %	7.6 million
Dec. 31, 2007	943,000	5.9 million	16%	9.3 million
June 30, 2008	1.4 million	7.0 million	19.7%	11 million
Dec. 31, 2008	1.9 million	9.2 million	20.8%	12.7 million
June 30, 2009	2.5 million	10.3 million	24.6%	13.8 million
Dec. 31, 2009	2.9 million	11.7 million	24.5%	15.4 million
June 30, 2010	3.2 million	12.4 million	25.9%	15.9 million
Dec. 31, 2010[4]	3.5 million	12.4 million	28%	15.6 million

Source: Verizon Investor Quarterly Bulletins, http://www22.verizon.com/investor/investor.portal.

As of year-end 2010, our FiOS network passed approximately 60 percent of the Verizon domestic, wireline footprint. Over coming years, this network build-out will continue to expand, ultimately passing approximately 18 million premises.

In its *Further Notice of Inquiry*, the Commission seeks granular information about the location of competitive providers' build-out.[5] While the precise contours of a provider's service footprint is competitively sensitive – virtually all of the areas where Verizon sells FiOS TV are already served by an incumbent cable operator and two satellite providers – Verizon already has provided the Commission with extensive information concerning the locations where Verizon competes with its FiOS services.

4 The year-end 2010 numbers reflect the sale of certain FiOS lines to Frontier Communications Corporation on July 1, 2010, thus accounting for the decreased number of premises passed and static number of FiOS TV premises open for sale.

5 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, MB Docket No. 07-269, FCC 11-65, ¶ 12 (Apr. 21, 2011) ("*FNOI*").

Among other things, Verizon registers each of the local franchise areas in which it offers FiOS TV service with the Commission, thus identifying the general communities where Verizon is bringing wireline video competition. Moreover, the Commission has access to more granular information concerning the location of Verizon's FiOS service offerings in the current Form 477 reports (to the census tract level) and NTIA broadband mapping initiative (to the census block level). While there is sometimes a slight lag in Verizon's ability to offer FiOS TV where the FiOS network has been deployed (as reflected in the chart above), Verizon generally intends to offer its FiOS TV service wherever the FiOS network is deployed. Indeed, video service revenue is an essential piece of the business case for this network deployment. Therefore, the data from the Form 477 and the NTIA broadband mapping initiative provide the Commission with a granular view of where Verizon is bringing wireline video competition to consumers.

In all of these areas where Verizon offers its FiOS TV service, it faces stiff competition. Most significant is the competition posed by the incumbent cable operators that vigorously compete in virtually every area that Verizon offers FiOS TV. These providers, who until recent years generally benefitted from actual or *de facto* monopoly franchises in their service territories and who have often taken steps to slow the introduction and spread of wireline video competition, still serve the largest share of video subscribers in most communities. Cable operators compete aggressively with Verizon across a full bundle of voice, Internet, and video services and related applications enabled by their networks. Furthermore, Verizon experiences significant video competition from two satellite providers in all of its FiOS TV areas, and in some locations, from an additional wireline overbuilder (*e.g.*, RCN Telecom Services, LLC).

As a result, the competition facing a relatively new entrant in the video marketplace like Verizon is intense.

In addition to this competition from MVPDs, consumers also are increasingly turning to the Internet for some or all of their video programming. Services such as Netflix, Hulu, iTunes, Apple TV, Amazon Video, YouTube and Vuze are available to any consumer with a broadband Internet connection and are increasingly popular. For example, Netflix recently announced that it has over 23 million video subscribers, tying Comcast for the largest video subscription service in the country.[6] Likewise, traditional MVPDs are turning to the Internet to provide additional choices for consumers, including through rapidly growing on-line, on-demand offerings and online content libraries. Demand for OTT video content, in particular, is booming, to the point that OTT revenues may reach $20 billion in 5 years.[7] In one recent example of this trend, Hulu and Miramax announced a multi-year agreement through which consumers can obtain OTT access to the Miramax film library on a variety of different platforms.[8] Given that every FiOS customer has access to robust broadband Internet offerings, these online video services are available to all FiOS customers who choose to subscribe to Internet access service and to use them.

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6 *See* http://ir.netflix.com/results.cfm (follow "2011 Quarterly Earnings" to "Q1 11 Letter to Shareholders") (Apr. 25, 2011) (last visited June 7, 2011); *see also* Tech, Inc., http://technology.inc.com/2011/04/25/netflix-tops-23-million-subscribers/ (Apr. 25, 2011) (last visited June 7, 2011) ("Netflix now has more subscribers than the largest cable TV operator in the U.S.").

7 *See* http://bbpmag.com/wordpress2/2011/06/over-the-top-revenues-to-reach-20-billion-in-2016/ (June 1, 2011) (last visited June 8, 2011).

8 *See* Rapid TV News, http://www.rapidtvnews.com/index.php/2011060212578/hulu-hauls-in-miramax-to-boost-content-proposition.html (June 2, 2011).

Video Prices. While rising content acquisition costs – including as a result of increasing payments related to retransmission consent – have put upward pressure on the price of video services, wireline video competition of the type that Verizon brings yields important benefits to consumers. As the Commission repeatedly has found, head-to-head wireline video competition brings the most benefits to consumers. For example, the Commission's most recent pricing survey stated: "Compared to the overall average price of $52.96 charged by operators in the effective competition communities, average prices were 1.1 percent lower ($52.37) for incumbent operators in communities with a rival operator [and] 9.6 percent lower ($47.86) for rival operators."[9] Moreover, "[p]rices of rival operators in communities where a second operator is present were 8.1 percent lower on average than prices charged by operators providing service in noncompetitive communities," and these prices were "33.3 percent lower on a per channel basis." *Id.* ¶ 18.

While the *FNOI* asks about the availability of detailed pricing information, the reporting of such information is easier said than done. Verizon's pricing for "video" is far from static. Instead, prices and promotions change frequently in response to competitive pressures. Some of these price changes or offerings may be on a wide scale, while others are location-specific or even customer-by-customer offerings to meet or beat competitors' offerings. Moreover, isolating video pricing is made more complex by the prevalence and popularity of bundles that include video and non-video services.

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[9] *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*, Report on Cable Industry Prices, 26 FCC Rcd 1769, ¶ 4 & Chart 2 (2011).

Furthermore, at least in the case of competitive video providers that are not subject to rate regulation, additional, detailed pricing information is not necessary. The prices of Verizon and other competitive video providers are regulated by market forces and ubiquitous competition. In such highly competitive marketplaces, the filing of pricing information can be affirmatively harmful to consumers.[10]

To the extent that the Commission nonetheless decides that it needs pricing information from competitive video providers, it should obtain that information in a targeted way along the lines of its current cable price survey process. For the last several years, Verizon has provided detailed pricing information to the Commission as a part of this process. This information concerning selected Verizon systems provides ample information for the Commission to analyze the effects of Verizon's services on video competition more generally.

If the Commission maintains this approach, however, it would make sense for it to apply to *all* competitive video providers, and not just those that admit that they qualify as "cable operators" for regulatory purposes. As the *FNOI* notes, the Commission so far has not collected price survey data from satellite providers or from AT&T, even as it has required detailed, annual responses from Verizon. *Id.* ¶ 27. There is no basis for this

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10 *See., e.g., Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶ 32 (2007) (noting that a price-reporting regime allows competitors "to counter innovative product and service offerings even before they are made available to the public").

disparate treatment or for burdening some, but not all, competitive video providers with such reporting obligations.

Content Offerings. Increased video competition also brings consumers the benefits of a broader, and more diverse, range of choices for video programming. For example, Verizon currently offers more than 535 channels of digital video programming, including over 130 HD channels. In addition to these linear channels, Verizon also currently offers consumers the choice of over 24,000 video-on-demand titles.

Verizon's robust channel lineup includes a wide range of independent, diverse, and niche programmers, including many that have struggled to obtain carriage from the large, vertically-integrated cable incumbents. FiOS TV also presents a wide range of foreign language content, including 23 different foreign language packages ranging from Arabic to Vietnamese.[11] FiOS subscribers also have the choice of numerous programming packages to address their particular interests, ranging from movies to sports to Bollywood to Karaoke. *Id.* And Verizon was among the first video providers to offer consumers video programming, including live sporting events, in 3D. (In addition to the line-up information available on Verizon's web site, Verizon also provides detailed information about the precise channels that are included in its line-up as part of its annual Form 325 submissions to the Commission.)

In addition to providing a robust platform for other providers' programming, Verizon also has contributed directly to the diversity of programming by introducing its FiOS 1 channel in the New York City and Washington, DC markets. FiOS 1 provides

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11 *See* http://www22.verizon.com/Residential/FiOSTV/Channels/Channels.htm#.

subscribers with local and hyper-local content, including local news, events, weather, and sports.[12]

Technology. Another consumer benefit from increased video competition is the pressure that it creates to offer consumers improved technology. In the case of Verizon's FiOS TV service, that starts with the network over which the service is delivered. FiOS TV is delivered over Verizon's next-generation broadband network that runs fiber all the way to consumers' homes. In addition to video service, the network is capable of delivering the most robust consumer broadband services on the market. Currently, Verizon offers consumers a variety of service options, with downstream speeds ranging from 15 to 150 Mbps and upstream speeds ranging from 5 to 35 Mbps.

Verizon also has focused heavily on taking full advantage of its next-generation broadband network in order to provide consumers with new and different features as part of the FiOS TV service. From the beginning, the FiOS TV service has offered the benefits of the best of both the QAM technology used by other digital cable operators and of emerging IP-based technology. Thus, like many traditional cable operators, Verizon has delivered linear video channels to consumers using QAM technology. But unlike those providers, Verizon has also offered video-on-demand services and a variety of new features – such as Verizon's widgets – using IP technology. These IP-based services are delivered over separate capacity on the network, thus not taking away from the capacity using QAM technology to deliver linear channels. In contrast, most cable operators must sacrifice channels or engage in compression as they carve off some capacity for use by their video-on-demand and Internet access services. As a result of its advanced

12 *See* http://www.fios1news.com/.

technology, Verizon has been able to simultaneously offer linear channels – including in HD and now 3D – while also offering IP-based features (and its broadband Internet access data speeds). And it has been able to do this without compromising the quality of either and without using the additional compression techniques used by many cable operators to address capacity constraints.

The IP aspects of the FiOS TV services have facilitated a wide range of new features and functionalities that benefit consumers. For example, Verizon introduced Widgets that allow FiOS TV subscribers to access a variety of services and information on their television set. Among other things, these applications allow subscribers to access news, sports scores, weather, and Facebook or Twitter directly on their television sets. As have other app stores in recent years, Verizon's Widget Storefront has continued to grow and offer consumers useful and entertaining new features and functionality.

The IP aspects of Verizon's service also facilitated consumers' ability to have the service be a more integral part of their overall home network. For example, using Verizon's Media Manager, consumers can view on their television photographs that are stored on their home computers. Verizon also was the first video provider to introduce multi-room digital video recorder (DVR) functionality for consumers. And more recently, FiOS TV has evolved to allow subscribers to access their service when they are not at home. For example, subscribers now can remotely program their DVR from a smartphone application or via the Web. They also can use their smartphones as a remote control for their service.

Verizon's new Flex View service – introduced just last year – has further expanded the viewing choices available to consumers. Flex View service lets subscribers download certain video programming to watch on their desktops, laptops, tablets or smartphones, and to coordinate among those different devices. This gives consumers the flexibility to view content anywhere they may be and on the device of their choice. Currently, Flex View includes 2,300 titles from which subscribers can choose.

In addition to Flex View, FiOS TV now includes a TV Online service that allows subscribers to access a wide range of content directly over the Internet. This service currently includes popular programming and movies from HBO, Cinemax, ESPN, CNN, TNT, epix, TBS, Nick and others.

As part of its effort to meet consumers' growing demands to access the content of their choice on the device and in the location of their choice, Verizon continues to work towards innovative new options for consumers. Among other things, Verizon continues to work with both programmers and consumer electronic manufacturers to allow consumers to access their FiOS TV service directly using tablets and other devices, without being tethered to a traditional set-top box.

Of course, competitors are not standing still, and they have responded to Verizon's innovative offerings with innovations of their own. Likewise, consumers' growing reliance on IP and home network solutions also has prompted consumer electronics manufacturers, online providers like Netflix and Google, and others to increase the choices available to consumers. As a result, smart video devices and the services that they can access are rapidly proliferating. For example, Netflix has rapidly made its way onto a wide range of consumer electronic devices.

Customer Service and Satisfaction. Finally, increased video competition also places pressure on all providers to improve their level of customer service and satisfaction. In fact, FiOS TV was rated #1 in value, overall quality, and customer satisfaction two years in a row according to the 2011 American Customer Satisfaction Index (ACSI) Survey results for the largest subscription TV service providers, and J.D. Power and Associates also ranked Verizon "Highest in Residential Television Service Satisfaction in the East Region," three years in a row.[13] These customer satisfaction measures reflect a focus on customer service that not only directly benefits Verizon's subscribers, but also indirectly benefits all consumers by forcing other providers to improve their own service.

III. THE COMMISSION SHOULD TAKE STEPS TO FURTHER ENCOURAGE VIDEO COMPETITION AND INNOVATION, AND AVOID NEW REGULATIONS THAT WOULD DISTORT COMPETITION OR INHIBIT INNOVATION.

While recent years have demonstrated increased levels of video competition and innovation, there are important steps the Commission and other policymakers should take to accelerate these developments. These include: (1) promptly ruling on pending program access complaints related to must-have, nonreplicable regional sports programming; (2) reforming the retransmission consent framework to remove regulatory distortions that harm consumers; and (3) creating regulatory parity for all providers as they market to and establish service for new subscribers. Likewise, it is important that the Commission *not* take certain steps – such as adopting new technology mandates like the AllVid Proposal – that would inhibit the current positive developments in the video marketplace.

[13] *See* www.theacsi.org, (follow "ACSI Results" to "Scores by Industry" to "Subscription Television Service"); http://businesscenter.jdpower.com/News.aspx (Oct. 6, 2010).

A. The Commission Should Rule on Pending Program Access Complaints.

As the Commission and Congress have already recognized, one of the significant impediments to more widespread video competition traditionally has been competitive providers' access to programming. During the decades in which cable incumbents enjoyed the benefits of monopoly franchises, many of them acquired ownership or control over much of the most popular programming. As new entrants started to enter the picture, these incumbents used their control over this programming to handicap competitors and stave off competition. They knew that, without access to the popular programming that consumers expect and demand, new entrants would have little ability to pose an effective challenge by offering consumers a meaningful choice.

While Congress and the Commission curtailed many of these abusive practices by adopting and implementing Section 628 of the Cable Act, incumbents have continued to look for opportunities to exploit their control over programming to limit more widespread competition. For example, for years, several of the large incumbents sought to exploit a perceived loophole in the program access regulations related to terrestrially-delivered programming. Most notably, providers such as Cablevision, Comcast, and Cox delivered must-have regional sports programming terrestrially, and often denied this programming – or the "HD feed" of the programming – to competitive providers. This programming is nonreplicable and is must-have content for many consumers, thereby representing a particularly powerful competitive weapon for the cable incumbents. Fully aware that many consumers would not consider an alternative video provider that lacked local sports team programming or local sports programming in HD – and indeed touting as much to analysts and in advertisements – the incumbents flouted the program access rules by withholding this must-have programming and arguing that their conduct was immune from the Commission's scrutiny.

The Commission finally and appropriately rejected the primary legal arguments on which the incumbents relied last year, confirming that incumbents' unfair and anticompetitive practices involving the withholding of terrestrially-delivered regional sports programming can run afoul of Section 628(b) of the Act. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("*2010 Program Access Order*"). Unfortunately, now 16 months later, the incumbents continue to resist, prompting a number of pending complaints before the Commission related to these activities.

Verizon is the party to one such case. Verizon filed its program access complaint in July 2009 based on Cablevision's and Madison Square Garden, L.P.'s withholding of the HD feed of the MSG and MSG+ sports networks. Cablevision has refused to sell the HD versions of these channels to Verizon on any terms, and instead has trumpeted to consumers that it is the only source to see all nine of the local sports teams in HD. Nearly a year ago, Verizon supplemented its complaint as set out in the *2010 Program Access Order* as soon as that order was in effect. Discovery and briefing have been completed, but Cablevision continues to withhold this programming pending a ruling from the Commission.

In order to finally put an end to these abuses and facilitate more meaningful video competition, the Commission should promptly resolve this and other pending program access complaints related to regional sports programming. In Verizon's case, two full seasons of NBA and NHL games have passed since Verizon first filed its complaint. The continued delay has rewarded Cablevision and other bad actors for their bad acts and denied consumers meaningful choice and the full benefits of video competition.

B. Reform of the Broken Retransmission Consent Regime Would Protect Consumers and Benefit Competition.

Another growing problem in the video marketplace is the broken retransmission consent regime. Unlike a normal marketplace, the existing retransmission consent framework – and the other regulations governing the relationship between broadcasters and video distributors – skews commercial negotiations between broadcasters and video providers by providing broadcasters with artificial regulatory preferences. But, with the bargaining table tilted in the broadcasters' favor, it is not just the distributors that are placed at a disadvantage. As the Commission has recognized, subscribers are "innocent bystanders adversely affected" when negotiations break down,[14] 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 video distributors' carriage of broadcast channels. Scrapping the rules that prevent the marketplace for broadcast programming from functioning like a normal marketplace is the best way to remedy the problem. Doing so ultimately will require a

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

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 the regulatory framework addressing the relationship between broadcasters and video distributors, 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 video distributors from obtaining broadcast signals from alternative sources. Eliminating those rules, as the Commission has proposed,[15] 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 similarly should view the running of advertisements designed to scare – rather than inform – consumers (and to apply pressure to a distributor to capitulate) in advance of the expiration of a contract as strong evidence of bad faith.

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15 *Id*. ¶¶ 42-45.

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."[16]

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. Likewise, as a matter of customer convenience, the current process for disconnecting service from an incumbent cable operator is cumbersome and unnecessary, which again favors the incumbents.

In 2008, 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).[17]

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16 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 June 8, 2011).

17 This nondocketed Petition is attached to Ex Parte Letter from Ann Berkowitz, Verizon, to Marlene Dortch, FCC, *Local Number Portability Porting Interval and Validation Requirements*; *Implementation of the Cable Television Consumer Protection*

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.

Commission action on these proposals 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.

However, 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

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and Competition Act of 1992; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, WC Docket No. 07-244, MB Docket Nos. 07-29 & 07-198 (Apr. 24, 2009).

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 reached a different conclusion with respect to departing customers for voice *telephone* service. *See Bright House Networks, LLC, et al. v. Verizon California Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (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,[18] 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

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

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.[19]

D. The Commission Should Also Reject Proposals – Like AllVid – That Would Inhibit Innovation and Competition.

Just as important as the steps the Commission should take to encourage video competition and innovation are the steps that it should forego. As a general matter, as video competition becomes more prevalent, the need for regulation is minimized. New regulation – particularly as applied to competitive providers – can distort competition and inhibit innovation. New technology mandates along the lines of the AllVid Proposal are

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[19] See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 15856, ¶ 21 (2004) (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 Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, ¶¶ 1, 5 (2008).

a good example of the type of regulation that would be affirmatively harmful to video competition and to consumers.

Despite underlying laudable goals, similar prior mandates – such as requirements for CableCards and for 1394 outputs on set-top boxes – have proven to be of little real interest or benefit to consumers or to innovation. In contrast, without any regulatory compulsion, video providers (including facilities-based providers and online providers), consumer electronics manufacturers, and others are engaging in rapid innovation, and consumers are reaping the benefits. Among other things, smart video devices, such as networked TVs, blu-ray players and tablets, are being rapidly embraced by consumers. And video service providers are all rushing to get their services onto these devices as quickly as possible, in order to better meet the growing consumer demand. The result is that consumers have a large and growing number of ways to access and consume video programming, often on multiple devices and from multiple different providers.

In a dynamic marketplace such as this, new regulation could not possibly keep pace with or predict what would best serve consumers interests. Indeed, even in the year since the Commission first released its AllVid Proposal, the marketplace has progressed to such an extent that the contemplated hardware-based technology mandates now seem outdated and anachronistic.

Moreover, to the extent that any new requirements along these lines were to only apply to one subset of the video marketplace – such as facilities-based video distributors of programming – such requirements would not only inhibit technological innovation but would also introduce new distortions into the marketplace. Netflix – with its 23 million subscribers – and other online video providers would gain artificial competitive advantages by being free from such regulation, while Verizon and other video distributors likely would be slowed in their ability to experiment and introduce new services and features to subscribers if they were required to force their services through the proposed one-size-fits-all mandate.

Some of the suggestions for an AllVid solution also would go well beyond the scope of Section 629 and raise additional concerns. For example, the Commission's *AllVid NOI* suggested as one possibility that the AllVid framework would allow retail devices to select from the full array of services that MVPDs offer and use those services in any manner. If implemented in this manner, the AllVid solution would require video distributors to "unbundle" their video services and make the component parts available to other providers on a disaggregated basis – something the text of Section 629 neither contemplates nor authorizes and that would raise serious First Amendment concerns.

The Commission should avoid these problems and encourage competition and innovation by staying its hand with respect to AllVid and other technology mandates. Doing so would allow this dynamic marketplace to continue to evolve in response to consumer demand – not regulatory central planning.

IV. THE COMMISSION SHOULD AVOID UNNECESSARY DATA REPORTING.

As the Commission considers its request for data to complete its annual video competition reports, it must be sensitive to the costs and burdens attendant to providing such data. The Commission's *FNOI* seeks voluminous data on all aspects of video providers' businesses, ranging from availability, to pricing, to marketing plans, to technology, and more. Rather than engaging in this type of broad inquiry, the

Commission should take a targeted approach to assessing the "status of competition in the market for the delivery of video programming" by making full use of the numerous data sources already available to it – including through its numerous, existing reporting requirements on video and broadband providers and through existing third party sources.

A more restrained and less burdensome approach would not only suffice for purposes of meeting the Commission's annual reporting obligation, but also would be more consistent with the requirement that the Commission minimize the burdens of its regulatory activities. As President Obama recognized in January, and Chairman Genachowski subsequently echoed, the regulatory system should "promot[e] economic growth, innovation, competitiveness, and job creation . . . .[and] use the best, most innovative, and least burdensome tools for achieving regulatory ends."[20]

To further those interests, the Commission and other federal agencies may take action only "upon a reasoned determination that its benefits justify its costs" and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulation." *Executive Order* § 1(b). Similarly, as the Chairman has recognized, avoiding unnecessary and costly "red tape" and "remov[ing] barriers and eas[ing] the regulatory burden, where possible," are important steps that the Commission can take to encourage broadband investment and deployment, and the associated increase in video competition. *Genachowski Speech* at 2.

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[20] President Barack Obama, Executive Order 13563 § 1, 76 FR 3821 (2011) ("*Executive Order*"); Chairman Genachowski, "Prepared Remarks of Chairman Julius Genachowski at the Broadband Acceleration Conference," http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf, at 4 (Feb. 9, 2011) ("*Genachowski Speech*").

This recognition of the need to account for the costs and burdens of regulation is also reflected in the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*. Before engaging in a data collection, the Commission is required to certify, among other things, that the collection "is necessary for the proper performance of the functions of the agency, including that the information has *practical utility*" and that the "information is not unnecessarily duplicative of information otherwise reasonably accessible to the agency." *Id*. § 3506(c)(3). The Commission also is required to certify that the collection "reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency." *Id.*

To satisfy these standards in the context of this proceeding, the Commission should refrain from an intrusive and burdensome inquiry and instead should tailor its requests for information to those that would have "practical utility" in assessing the status of video competition. Likewise, the Commission should take full advantage of its existing data collection efforts and of the availability of data from other agencies or public sources, before seeking additional data from video providers.

V. CONCLUSION.

Video competition and innovation continue to spread at a rapid pace. While the Commission should address a few, lingering concerns that continue to harm the video marketplace, it should also be careful not to introduce new distortions as a result of unnecessary regulation.

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Respectfully submitted,

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