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

In the Matter of	)	
	)	
Revision of the Commission's Program Carriage Rules	)	MB Docket No. 11-131
	)	
	)	
	)	

COMMENTS OF VERIZON[1]

The Commission appropriately recognizes in the NPRM that any reforms aimed at expanding program carriage protections should be focused on the vertically-integrated, incumbent cable operators that were the cause of concern that Congress intended to address in this context, and not on the newer entrants in the video marketplace whose very presence is alleviating those same concerns.[2] In recent years, new entrants like Verizon have brought consumers, generally for the first time, the benefits of wireline video competition on a wide scale, while also creating new carriage opportunities for independent programmers. These providers, which generally are not vertically integrated to any substantial extent and which compete head-to-head against the vertically-integrated cable incumbents, have every incentive to offer consumers the choice of a diverse package of programming, including any independent programming that would appeal to consumers. In light of these facts, as suggested in the NPRM, the Commission should exempt such

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

2 *Revision of the Commission's Program Carriage Rules*; *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494 (2011) ("NPRM").

providers from any expansions of the program carriage rules, such as new good faith negotiation requirements or a broader discrimination rule that would allow claims based on alleged discrimination in favor of a *different* provider's affiliated programming. Simply put, there is no legal or factual basis for expanded program carriage obligations on the new entrants in the video marketplace that compete against the vertically integrated cable incumbents.

ARGUMENT

I. No Expansion of the Program Carriage Rules Is Justified As To Providers Competing Against Vertically Integrated Incumbents.

In light of the contributions that new entrants are making to expanding the diversity of available programming, the Commission correctly concludes in the NPRM that the new entrants who compete against vertically-integrated cable incumbents should be exempt from any expansion to the existing program carriage rules, including any new rules addressing good faith negotiation requirements or expanding the scope of existing nondiscrimination requirements.

New entrants in the video marketplace – most of whom own or control little programming of their own – have every incentive to carry high-quality and diverse sources of information in order to differentiate themselves from, and better compete against, the entrenched, vertically-integrated incumbents. Such providers must assemble attractive offerings that give consumers the programming that they want, without regard to regulatory mandate or the affiliation of the programming.

This is borne out by the channel line-ups of newer entrants in the video marketplace, which reveal the clear benefits to, and opportunities for, independent programmers as a result of new entry and wireline competition in the video marketplace. Verizon, for example, has negotiated carriage deals with numerous independent programmers such as the NFL Network, the Hallmark Channel, and Wealth TV, in addition to a wide range of international and other niche programmers for its FiOS TV service. In addition to contributing to diverse programming by carrying a wide range of independent and niche programming, providers competing with the vertically-integrated incumbents have also increased competition and diversity by creating their own programming, in some instances. For example, Verizon created the FiOS 1 channel that it carries in the New York and Washington areas to deliver local interest programming, such as local news, traffic, weather, and sports. Such efforts meet consumers' demands and increase the diversity of available programming.

Given the unmitigated benefits both to consumers and independent programmers as a result of new entrants bringing competition to the vertically-integrated cable incumbents, the Commission appropriately recognizes in the NPRM that such providers should be expressly exempted from any expansions to the existing the program carriage rules. First, with respect to the Commission's consideration of new good faith negotiation requirements, the NPRM correctly recognizes that there is no need for new rules on "non-vertically integrated MVPDs with respect to unaffiliated programming vendors," given the lack of any "concerns regarding the negotiating tactics of non-vertically integrated MVPDs" that have been raised. *Id*. ¶ 69. While this conclusion is sound, the Commission should recognize that the same is true in the case of *all* new entrants who compete against the entrenched cable incumbents, and not just those providers that are non-vertically integrated, given their competitive position in the marketplace and the lack of any history of troubles in negotiating with independent programmers. At a minimum, the Commission should recognize that the limitation it suggests would not fall away if a provider engages in some level of vertical integration, such as the development of channels like FiOS 1 that feature local programming. The concerns underlying the program carriage rules do not relate to providers' actions along those lines, and the Commission should avoid rules that would discourage the creation of new and diverse programming by additional providers.

Second, and for similar reasons, the Commission is also correct when it recognizes that it should not expand its program carriage nondiscrimination rule in ways that would enable baseless claims against new or non-vertically-integrated providers. In the NPRM, the Commission asks whether, in the case of vertically-integrated video providers, it should "interpret[] the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of programming vendor's lack of affiliation with another MVPD." *Id.* ¶ 72. As an initial matter, it is not clear that such an expansion is warranted in the case of any video distributors. To the extent that such a rule is premised on fears of collusion between different providers and against all independent programmers, the D.C. Circuit has already rejected the approach of assuming possible collusion, particularly given the substantial First Amendment stakes. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130-31 (D.C. Cir. 2001).

Regardless of whether this type of expansion of the nondiscrimination rule may make sense in the case of vertically-integrated cable incumbents, however, the NPRM is correct in recognizing that there would be *no basis* for such an extension of the rules in the case of providers that are not vertically-integrated or that are offering service in competition with the vertically-integrated cable incumbents that are the target of the rules. As explained above, new entrants like Verizon compete head-to-head with vertically-integrated cable incumbents essentially everywhere that they provide service and have no incentive whatsoever to discriminate *in favor of* these competitors' programming and against independent programmers. In fact, the NPRM acknowledges, in proposing to exempt non-vertically-integrated providers from the expanded rule, that the Commission is "not aware of concerns that a non-vertically integrated MVPD would have an incentive to favor an MVPD-affiliated programming vendor over an unaffiliated programming vendor based on reasons of 'affiliation' as opposed to legitimate business reasons." *Id.* ¶ 72. Such providers should not be obligated to carry – and not subject to complaint proceedings at the Commission for not carrying – programming that their subscribers do not want and they do not wish to carry.

Indeed, if the Commission were to apply expanded program access obligations on new entrants, such obligations could not pass muster under the First Amendment. A video provider undeniably engages in protected speech when it "exercise[s] editorial discretion over which stations or programs to include in its repertoire." *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"). To the extent courts have upheld restraints on cable operators' speech in the past, they have done so either when the regulation is targeted at redressing documented unfair or anticompetitive practices that harm consumers,[3] or when they are based on clearly articulated government interests created by the "bottleneck monopoly power" that incumbent cable providers traditionally enjoyed in most areas. *Turner I*, 512 U.S. at 661. Neither of these bases would provide a permissible basis for expanded program carriage regulation on new providers competing against the entrenched incumbents.

II. Conclusion

Consistent with the NPRM, the Commission should expressly exempt from any expanded program carriage requirements providers that compete against vertically-integrated cable incumbents. There is no factual or legal basis for new regulation of such providers.

[3] *See Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 722 (D.C. Cir. 2011).

Respectfully submitted,

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