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
	)	
	)	
	)	

REPLY COMMENTS OF VERIZON[1]

The record in this proceeding[2] confirms 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 that newer entrants in the video marketplace whose very presence is alleviating those same concerns should be exempt from any such expansion. In particular, the Commission should not expand its nondiscrimination rule in a way that would permit claims against such providers based on alleged discrimination in favor of programming affiliated with *other* video providers, including the cable incumbents against which they compete head-to-head. Nor should the Commission impose new good faith negotiation obligations on these competitive providers that would interfere with their ability to base carriage decisions on the demands of consumers.

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

[2] See *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").

1. Newer Providers Competing Against Vertically-Integrated Cable Incumbents Should Not Be Subject to Expanded Nondiscrimination Rules.

Newer video 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. There is no evidence – and the record here contains none – to suggest that such providers discriminate in favor of the programming affiliated with their vertically-integrated competitors and against independent programmers.

Although a small number of commenters support broadening the program carriage nondiscrimination rule to apply to programming affiliated with *any* provider, and not just the provider that is the subject of a complaint, these commenters provide no legal, factual, or policy basis for doing so in the case of any provider, much less in the case of new, non-vertically-integrated video providers that compete against the cable incumbents.

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). And aside from speculation about the possibility of "private agreement[s]" among vertically-integrated providers, *see* Media Access Project Comments at 12, the proponents of an expanded nondiscrimination rule provide no evidence to document any practice of collusion or to justify an expanded rule for any video providers.

In any event, even if such a rule could be justified in the case of vertically-integrated cable incumbents that are not competing head-to-head, there is no basis at all for such an expansion in the case of newer providers competing directly against vertically-integrated incumbents. Indeed, the proponents of an expanded nondiscrimination obligation do not even attempt to argue that such providers have entered sweetheart deals for their competitors' affiliated programming to the detriment of independent programmers or explained why the vertically-integrated competitors would do so. And such an argument in any event would be rebutted by the Commission's own conclusions about the continuing need for program access protections in order facilitate competing providers' access to programming owned or controlled by the cable incumbents that they need to field meaningful competitive option for consumers.[3] As the Commission recognized, even obtaining the incumbents' affiliated programming is a significant challenge for newer entrants. There is no reason to believe that such providers can or would discriminate in favor of competitors' programming to the detriment of independent programmers.

The only commenter even attempting to provide a basis for expanding obligations on newer entrants is HDNet, which suggests that independent programmers are disadvantaged to the extent that non-vertically-integrated providers are forced by large programmers into agreements for bundles that include channels they may not otherwise want in order to obtain access to the popular programming that they do need. *See* HDNet Comments at 13. HDNet acknowledges that "[i]n a very real sense, the MVPD may be 'forced' to discriminate by that powerful content provider, which, on a wholesale basis may bundle carriage of its undesirable channels as a condition of acquiring a must-have or highly desirable channel from that content provider on reasonable terms." *Id.* But HDNet suggests that such practices are nonetheless a form of "discrimination" that can make it more difficult for independent programmers to obtain carriage. *Id.*

[3] *See, e.g., Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 (2007); *see also Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010).

HDNet's arguments do not provide any basis for new regulatory obligations on newer providers. At base, its complaints relate more generally to practices within the wholesale marketplace for programming, and are not unique to the concerns animating the program carriage rules. Indeed, HDNet's arguments refer to the practices of "powerful content providers" more generally, *id*. at 11, without regard to whether they are affiliated with any video provider. In any event, HDNet's proposal amounts to punishing the victim by subjecting newer entrants to new program carriage claims based on deals that they may have had little choice but to enter in order to obtain must-have programming from vertically-integrated competitors. As DIRECTV correctly notes, "subjecting such MVPDs to discrimination complaints would be akin to driving the ambulance over a hit-and-run victim." DIRECTV Comments at 11.

In light of the absence of any basis in the record to expand the scope of the nondiscrimination rule to permit claims related to programming affiliate with *other* providers, the Commission should decline to adopt such an expansion. At a minimum, if the Commission does expand the nondiscrimination rule, it should expressly exempt newer entrants that compete head-to-head with the cable incumbents and that own little if any programming of their own.

2. Good Faith Negotiation Obligations Are Unnecessary and Unlawful.

Similarly, the record here provides no basis for new good faith negotiation obligations in the context of program carriage, at least in the case of newer providers. Here too, the record is completely devoid of any evidence that such providers have refused to engage in good faith in negotiations with independent programmers. To the extent an independent programmer offers programming that would be of interest to consumers, newer entrants have every incentive to negotiate with them and to reach reasonable terms for carriage. Indeed, as we indicated in opening comments, Verizon has long carried a wide range of independent and diverse programming over FiOS TV in order to provide an attractive, differentiated offering in competition with the cable incumbents. To the extent a newer provider is not interested in the shows that an independent programmer offers, it is almost certainly because, in its exercise of editorial discretion and pursuant to its business judgment, it has decided that the programming is unlikely to be of significant interest to its subscribers. Providers should not be forced to defend themselves against meritless claims every time that they decide that they are not interested in carrying a particular programmer for such reasons. The program carriage rules were never intended to create a must-carry obligation in the context of independent programming.

In addition to there being no problem to address, good faith negotiation requirements would also be unlawful because Congress did not authorize such a requirement in this context.   As evidenced by the retransmission consent statute, *see* 47 U.S.C. § 325(b)(3)(C), Congress knew full well how to impose good faith negotiation requirements on providers where it deemed them appropriate, yet it did not include such a provision in the program carriage context. There is no basis for the Commission to graft such a requirement onto the regulations in this context where Congress chose not to do so.

3. 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.

Respectfully submitted,

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