

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 14-16
Competition in the Market for the	)	
Delivery of Video Programming	)	

**COMMENTS OF VERIZON**

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**TABLE OF CONTENTS**

- I. Introduction and Summary.....1
- II. Increased Competition and Innovation in the Video Marketplace Are Benefiting Consumers.....3
  - A. Verizon’s FiOS TV Is One of Many Competitors to Incumbent Cable Systems and Online Programming Services.....4
  - B. Consumers Have Access to More Choices in Video Programming Content and Programming Delivery Platforms.....5
- III. The Commission Should Reform the Broken Retransmission Consent Regime.....9
- IV. The Commission Should Eliminate Technology Mandates That Serve No Purpose in Today’s Competitive Video Marketplace.....12
  - A. The Commission Should Abandon the CableCARD Regime.....13
  - B. The Commission Should Refrain from Adopting Cable Technical Rules for Digital Cable Systems.....15
- V. The Commission Should Allow Over-the-Top Video Distributors to Develop Services Without Legacy Regulations Designed for Other Platforms.....16
- VI. The Commission Should Continue to Enforce Competitive Access to Valuable Programming.....20
- VII. Conclusion.....21

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**I. INTRODUCTION AND SUMMARY.**

Consumers continue to experience substantial benefits from the increasingly competitive marketplace for video programming and video distribution services. Increasing competition among broadcasters, Multichannel Video Programming Distributors (“MVPDs”) and new on-line video services is motivating new sources of content and expansion of the available platforms for viewing video programming even as the viewing habits of U.S. consumers change to take advantage of new choices. These trends will only strengthen as the video marketplace continues to expand the array of choices available to consumers, and as competition among marketplace entrants encourages increased innovation and investment. Increasingly, consumers can access and watch the content of their choice from a variety of sources, viewable over a variety of devices, and accessible in the time and place of consumers’ choosing.

Although consumers are seeing expanded choices in today’s video programming marketplace, the Commission can still act to further these positive developments by eliminating certain rules and policies that are barriers to even more competition among marketplace entrants and even more consumer choices. First, the Commission should reform the broken

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

retransmission consent regime, which today harms consumers through rising prices and more numerous blackouts. Comprehensive reform in this area to move towards a true, market-based approach would best serve consumers, but that type of reform likely requires Congressional action. In the meantime, the Commission has authority to take interim steps to minimize the harm to consumers from this outdated regulatory regime. Certain existing policies and rules designed to achieve goals from another, less-competitive era distort the marketplace for negotiation of content rights between broadcasters and MVPDs. For example, the Commission's network non-duplication and syndicated exclusivity rules give broadcasters an advantage because MVPDs have no alternative sources of desirable content. Such rules should be eliminated. Similarly, the Commission can restore some balance to retransmission consent negotiations by enforcing the statutory requirements to ensure that broadcasters and MVPDs negotiate in good faith. The Commission should also consider additional policies, such as interim carriage, that would allow consumers to still receive programming as negotiations continue on expiring retransmission consent contracts.

Second, the Commission should abandon its CableCARD regime, attempts at implementing a successor regime, and all technology mandates of that ilk. The D.C. Circuit's *vacatur* of the guts of the CableCARD regime is an opportunity for the Commission to rely on the competitive market forces that are already bringing consumers more choices in distribution technologies to view video programming. Consumers increasingly can access and watch video programming from both MVPDs and online video providers in a wide variety of ways and using a range of devices, including their own smart TVs, PCs, tablets and smartphones. And as home networking standards mature and are more widely adopted, the choices available to consumers will only increase. Given that the video marketplace is providing consumers with multiple

alternatives to the cable-operator supplied set-top box, technology mandates are no longer needed. Additionally, adopting technical rules for digital cable systems is not necessary given the lack of recognized problems now that cable systems have primarily shifted to digital technologies.

Third, in order to ensure that competition flourishes for and among the newest marketplace entrants, the Commission should refrain from imposing regulatory requirements on providers of online and over-the-top video programming. Consumers – particularly young consumers – are rapidly adopting these new services, resulting in increased competition. If anything, the Commission should level the playing field by relaxing or removing existing regulatory requirements that are no longer needed on MVPDs to make them more agile in responding to consumer demands and new competitive forces in today’s marketplace for delivery of video programming.

Finally, the Commission should continue to ensure that competitive video providers have reasonable access to the video programming that they need to field a meaningful alternative for consumers. As the Commission has long recognized, the protections provided by the program access rules have been instrumental in enabling competitive providers to obtain reasonable access to valuable, and sometimes must-have, programming within the control of incumbent cable operators. Even as competition continues to grow in the video marketplace, such protections will remain important.

## **II. INCREASED COMPETITION AND INNOVATION IN THE VIDEO MARKETPLACE ARE BENEFITING CONSUMERS.**

Today, consumers have available and are using a variety of competitive service alternatives to incumbent cable companies and traditional video watching platforms. These include participants in the burgeoning market for delivery of video programming online and

consumer devices that connect to the Internet. As a result, consumers are enjoying more competition among video distributors and more programming choices.

**A. Verizon’s FiOS TV Is One of Many Competitors to Incumbent Cable Systems and Online Programming Services.**

Since its initial deployment in 2005, Verizon has invested billions of dollars to expand the availability of its all-fiber, broadband network and to offer consumers the triple play of video, broadband and telephone services. During 2013, the FiOS footprint expanded to pass 18.6 million premises.<sup>2</sup> Subscribership to Verizon’s FiOS TV service increased to 5.3 million, a year-over-year increase of 11%, representing now a 35% penetration rate among households to which FiOS TV is available. In addition, Verizon FiOS has over 6 million broadband customers, a nearly 40% penetration rate.

During 2013, Verizon subscribers embraced faster broadband speeds for their broadband connections through FiOS Quantum, which provides download speeds ranging from 50 Mbps to 500 Mbps.<sup>3</sup> Over one million FiOS subscribers signed up for Quantum services during 2013, so that at year-end, 46% of FiOS broadband customers have subscribed to FiOS Quantum.<sup>4</sup> These speeds easily support consumers’ thirst for online video.

Verizon is a competitive MVPD in all areas where it has deployed its fiber-optic network to deliver its FiOS TV. In turn, Verizon faces competition from the incumbent cable operators in these areas that offer video, broadband and voice services as well as two national Direct Broadcast Satellite (“DBS”) providers.

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<sup>2</sup> Verizon, “4Q Investor Quarterly – 2013 Fourth Quarter,” at 6 (Jan. 21, 2014), *available at* [http://www.verizon.com/investor/DocServlet?doc=vz\\_bulletin\\_2013\\_4q.pdf](http://www.verizon.com/investor/DocServlet?doc=vz_bulletin_2013_4q.pdf).

<sup>3</sup> *See, e.g.*, Verizon News, “50 Is Fun – Now How About 75?” (Oct. 25, 2013), *available at* [http://newscenter.verizon.com/residential/news-articles/2013/10-25-verizon-fifty-is-fun-how-about-seventy-five-\(1\)/](http://newscenter.verizon.com/residential/news-articles/2013/10-25-verizon-fifty-is-fun-how-about-seventy-five-(1)/).

<sup>4</sup> *See* Verizon News, “Your Never-Ending Thirst for Internet Speed,” (Jan. 27, 2014), *available at* <http://newscenter.verizon.com/residential/news-articles/2014/01-28-verizon-your-never-ending-thirst-for-internet-speed/>.

Verizon also faces competition from online video providers, such as Netflix, Hulu, iTunes, Amazon Video, Apple TV, Roku, YouTube, and others, for some or all of their video programming, as well as cable operators who are offering consumers Internet-based applications to watch video content. In fact, a recent survey by the Consumer Electronics Association reported that 28% of U.S. households receive online video programming on their TVs.<sup>5</sup> The increasing availability of online video providers as a source of video content means that consumers have the ability to “cut the cable” and watch video programming whenever and wherever they want, changing the traditional pay TV model that was based primarily on residential viewing patterns.

**B. Consumers Have Access to More Choices in Video Programming Content and Programming Delivery Platforms.**

With the expansion in competitive video services and platforms on which to access those services has come an explosion of video content, ranging from sports to movies to user-generated content to all manner of other specialized programming that tries to meet consumers’ every interest and entertainment needs. Verizon and other MVPDs now offer hundreds of linear video channels and tens of thousands of movie and TV titles on demand.

During 2013, Verizon continued to increase the FiOS TV programming options that subscribers can access, adding linear channels such as:

- Univision tinovelas, featuring the best novelas from Spanish-language content provider Televisa;<sup>6</sup>
- New national sports networks, Fox Sports 1 and Fox Sports 2, featuring live events, and news, including college football and basketball, NASCAR, soccer and

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<sup>5</sup> CEA News Release, “Only Seven Percent of TV Households Rely on Over-The-Air Signals, According to CEA Study” (July 30, 2013), available at <http://www.ce.org/News/News-Releases/Press-Releases/2013-Press-Releases/Only-Seven-Percent-of-TV-Households-Rely-on-Over-t.aspx>.

<sup>6</sup> See Verizon News, “Verizon Adds Univision Tinovelas to FIOS TV Lineup” (Apr. 25, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/04-verizon-fios-adds-univision-tinovelas/>.

- boxing,<sup>7</sup> as well as the Universal Sports Network, airing Olympic, endurance and adventure sports programming in High Definition (“HD”);<sup>8</sup> and,
- FXX, a new entertainment network, aimed chiefly at young adults.<sup>9</sup>

At the same time, it remains true that much of the most valuable programming – including must-have programming such as regional sports programming – is still within the control of the cable incumbents. For example, last year, the Los Angeles Dodgers organization announced creation of a new regional sports network funded principally by Time Warner Cable to carry Dodgers baseball games starting this year; Time Warner Cable was to be the first distributor and responsible for other programming.<sup>10</sup> With the protections of the Commission’s program access rules, competitive providers like Verizon have maintained access to such programming, even while obtaining reasonable prices and terms continues to be a constant challenge.

In addition to expanding the channel lineup available over the traditional TV set-top box installation, during 2013, FiOS subscribers gained broader opportunities to watch live TV in the home on their own devices, without an additional set-top box, through the FiOS TV app, made available for LG and Samsung smart TVs, Smart Blu-ray players and Xbox 360 game consoles. Subscribers with these devices had access to 75 live TV channels and thousands of FlexView on-demand movies and TV shows.<sup>11</sup>

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<sup>7</sup> See Verizon News, “Get Ready Sports Fans – FOX SPORTS 1 & 2 Launch this Weekend” (Aug. 15, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/08-15-verizon-fox-sports-1-launch/>.

<sup>8</sup> See Verizon News, “Universal Sports Network Announces Multi-Year Agreement with Verizon” (Oct. 7, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/10-07-universal-sports-network-announces-multi-year-agreement-with-verizon/>.

<sup>9</sup> See Verizon News, “Comedies, Movies and Dramas Drive the New FXX, Debuting Labor Day on FiOS TV” (Sept. 1, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/09-01-comedies-movies-and-dramas-drive-the-new-fxx-debuting-labor-day-on-fios-tv/>.

<sup>10</sup> See Darren Rovell, “Dodgers Launching Sports TV Network,” ESPN LA (Jan. 29, 2013), available at [http://espn.go.com/los-angeles/mlb/story/\\_/id/8889859/los-angeles-dodgers-launching-regional-sports-tv-network-sportsnet-la](http://espn.go.com/los-angeles/mlb/story/_/id/8889859/los-angeles-dodgers-launching-regional-sports-tv-network-sportsnet-la).

<sup>11</sup> See Verizon News, “FiOS Ups Channel Offerings on Samsung Smart TVs and Blu-ray Players” (Jan. 28, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/01-verizon-samsung-75-channels-fios-smart-tv-blu-ray/>.

Verizon has also released the FiOS Mobile App so that subscribers can watch live and on-demand programming on mobile tablets and smartphones inside and outside the home. Initially, subscribers with Android mobile devices could watch up to 75 channels of live TV at home, including Disney, HBO, TBS, The History Channel and The NFL Network.<sup>12</sup> These devices could also access 40,000 movie and TV videos from FiOS's FlexView library. Availability of the Mobile App expanded to include iPads, iPhones and Kindle devices, and the Verizon Mobile App enabled subscribers to watch, initially, nine live TV channels outside the home.<sup>13</sup> By the end of the year, customers could access up to 91 linear channels in the home with the FiOS Mobile TV application as well as 25 channels outside the home.<sup>14</sup>

This year, Verizon will roll out its Verizon Media Server ("VMS"), an in-home device that will enable third-party devices to discover, access and control the suite of FiOS media services.<sup>15</sup> The VMS, when fully implemented to include an industry standard for home networking, will be capable of accepting requests from and simultaneously streaming high-definition FiOS content to multiple third-party devices over a subscriber's home network, without an additional set-top box.

Verizon is at the forefront of developing new platforms for subscribers to view its FiOS TV service outside the confines of the traditional set-top box. But, the MVPD industry generally is delivering video programming directly to mobile devices, such as tablets and smartphones

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<sup>12</sup> See Verizon News, "Move Over Traditional TV. Android Users Can Stream Live TV & VOD" (June 11, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/06-fios-mobile-app-android-launch/>.

<sup>13</sup> See Verizon News, "Live TV Wherever You Are" (Sept. 20, 2013), available at <http://newscenter.verizon.com/residential/news-articles/2013/09-20-verizon-fios-mobile-app-live-tv/>.

<sup>14</sup> See Verizon News, "FiOS Mobile App Adds 16 More Channels for Out-of-Home, On-The-Go TV Pleasure" (Dec. 5, 2013), available at <http://newscenter.verizon.com/corporate/news-articles/2013/12-05-fios-mobile-app-adds-channels/>.

<sup>15</sup> See Steve Donohue, "Verizon to begin deploying FiOS Media Service at end of Q1," FierceCable (Jan. 30, 2014), available at <http://www.fiercecable.com/story/verizon-begin-deploying-fios-media-server-end-q1/2014-01-30/>.

without the MVPD-supplied set-top box through “TV Everywhere” applications.<sup>16</sup> Other MVPDs are likewise focused on providing more linear TV channels and on-demand video to a growing variety of devices, including PCs, game consoles and mobile devices with Android and Apple operating systems.<sup>17</sup>

Other participants in the MVPD industry are implementing alternative video platforms that will allow consumers to access video programming without the traditional set-top box. For example, groups such as the Digital Living Network Alliance (“DLNA”) and Multimedia Over Coax Alliance (“MoCA”) are developing home networking solutions that allow multiple devices in the home to meet consumer demand for access to media content and services across devices.<sup>18</sup> As DLNA has reported to the Commission, its home-networking standard CVP-2 is expected to be published in March 2014, which will allow device certifications on the standard to start in September 2014.<sup>19</sup> The CVP-2 feature on an MVPD’s set-top box will allow the consumers to view the MVPD’s programming stream on their equipment via Internet Protocol (“IP”), fulfilling the Commission’s goal of allowing consumers to rely on equipment other than the cable-operator-supplied set-top box.<sup>20</sup>

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<sup>16</sup> See, e.g., A. Maxwell, *Slowly But Surely, TV Everywhere Is Becoming a Reality*, HomeTheaterReview.com (Aug. 13, 2012), <http://hometheaterreview.com/slowly-but-surely-tv-everywhere-is-becoming-a-reality/> (describing the offerings by major content providers and MVPDs); W. Mossburg, “So Many Ways to Deliver Online Video to Your TV,” Wall Street Journal (Aug. 14, 2013).

<sup>17</sup> See Letter from Michael K. Powell, National Cable & Telecommunications Ass’n, to The Honorable Tom Wheeler, FCC, MB Docket No. 10-91 *et al.*, at 2 (Feb. 5, 2014), attached to Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, MB Docket No. 10-91 *et al.* (Feb. 5, 2014).

<sup>18</sup> See DLNA, Discover the Possibilities, <http://www.dlna.org/consumer-home/The-Possibilities>; Multimedia over Coax Alliance, The Standard for Home Entertainment Networking, <http://www.mocalliance.org/index.php>.

<sup>19</sup> See Letter from Donna Moore, DLNA, to Marlene H. Dortch, FCC, CS Docket No. 97-80 (Feb. 14, 2014). The CVP-2 guidelines were released on March 18, 2014. See Jeff Baumgartner, “DLNA Extends Bridge Between Pay-TV Services and Retail CE Devices,” Multichannel News (Mar. 18, 2014), available at <http://www.multichannel.com/technology/dlna-extends-bridge-between-pay-tv-services-retail-ce-devices/148924>.

<sup>20</sup> See *Implementation of Section 304 of the Telecommunications Act of 1934: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, et al.*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, ¶ 43 (2010) (adopting IP-interface requirement for cable operator-supplied set-top boxes) (“*Third Report and Order*”).

The increase in video programming and platforms to view that content demonstrates that the marketplace for delivery of video programming continued to be highly competitive in 2013, and that consumers are benefiting from investment and innovation among broadcasters, MVPDS and online video providers.

### **III. THE COMMISSION SHOULD REFORM THE BROKEN RETRANSMISSION CONSENT REGIME.**

In the eighteen months since Verizon last filed comments on the market for video programming, the problems and adverse impacts associated with the broken retransmission consent regime have worsened. The current regime not only threatens competition in the video marketplace, it also is having a real and deleterious impact on consumers, who, the Commission recognizes, are the “innocent bystanders adversely affected” by blackouts resulting from stalemates in negotiations between broadcasters and MVPDs.<sup>21</sup> The problem has continued to escalate each year: there were reported more than 120 broadcaster blackouts in 2013, up from just 12 in 2010.<sup>22</sup>

It now appears that both Congress and the Commission are seriously considering reforms to the retransmission consent regime.<sup>23</sup> Verizon will continue to offer its recommendations and guidance as these discussions move forward. However, in an ideal world, policymakers would initiate comprehensive reforms to establish an approach appropriate for the video marketplace of today and tomorrow. Such an approach should take into account the growing array of video

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<sup>21</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 17 (2011) (“*Retrans Consent NPRM*”).

<sup>22</sup> See Mike Reynolds, “American Television Alliance: 2013 Sets Record for Retrans Blackouts,” Multichannel News (Dec. 31, 2013), available at <http://www.multichannel.com/distribution/american-television-alliance-2013-sets-record-retrans-blackouts/147429>.

<sup>23</sup> See U.S. House of Representatives Energy & Commerce Committee, “Walden Releases First Draft of STELA Reauthorization” (Mar. 6, 2014) available at <http://energycommerce.house.gov/press-release/walden-releases-first-draft-stela-reauthorization>; Tom Wheeler, FCC Chairman, “Protecting Television Consumers by Protecting Competition” (Mar. 6, 2014), available at <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

choices now available to consumers and should rely on consumer choice and competition to govern the video marketplace in the first instance, with regulation generally reserved for targeted issues. In the event this holistic approach is not available at this time, then Congress and the Commission should work to restore balance to retransmission consent negotiations, and to eliminate the various mandates instituted over the past 20 years that prevent the marketplace for broadcast programming from functioning like a normal competitive market. By eliminating outdated regulations that are no longer needed in today's vibrant video marketplace, broadcasters and MVPDs would be able to negotiate on an equal footing, and the posturing and stalemates would become much less attractive, thereby reducing the likelihood of consumer harm in the event such negotiations are unsuccessful. While the industry awaits true reform, the Commission should at least adopt the targeted reforms noted here to address the problems with the current outdated regime.

In part, the stalemates and blackouts arise from unnecessary governmental preferences that distort the marketplace for video distribution of broadcast (and related) channels. For example, the Commission's network non-duplication and syndicated exclusivity rules prevent a video distributor from importing broadcast programming from alternative sources when negotiations breakdown with a local broadcast station owner. Thus, a broadcaster can negotiate retransmission consent knowing that loss of programming may result in the loss of programming valuable to subscribers, but MVPDs are prohibited by governmental regulations from obtaining such programming from other sources. With such preferences, broadcasters enter retransmission consent negotiations with an upper hand, allowing them to obtain higher fees than those to which they would be entitled if they and their programming were negotiated in a normally functioning marketplace. As Chairman Wheeler recently recognized, the cost of retransmission consent

agreements has “skyrocketed from \$28 million in 2005 to \$2.4 billion in 2012, a nearly 8,600 percent increase in seven years.”<sup>24</sup> SNL Kagan has projected that retransmission consent fees will exceed \$7.5 billion by 2018.<sup>25</sup>

The Commission has proposed to eliminate the network non-duplication and syndicated exclusivity preferences, and that would be an important step in the right direction to fix the artificial imbalance in negotiating strengths resulting from the retransmission consent regime.<sup>26</sup> While rendering a completely level playing field would require action by Congress, which has the authority necessary to change the broadcaster preferences embodied in the Communications Act, and by other policymakers, such as the Copyright Office, simply giving MVPDs an opportunity to seek alternative sources for programming blacked-out by a broadcast station would provide some protections to consumers against service disruptions and increased prices.

In addition to eliminating these regulatory preferences, the Commission should also take additional steps to protect consumers pursuant to its statutory authority “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”<sup>27</sup> First, in keeping with its obligation to prohibit a broadcast station from “failing to negotiate in good faith,”<sup>28</sup> the Commission should amend its rules (47 C.F.R. § 76.65(b)) to strengthen the existing set of obligations defining good faith negotiations. For example, a party’s refusal to respond in a timely and reasonable manner to a proposal on relevant issues should constitute bad faith. And, while informing consumers of potential disputes is warranted, running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not and should be

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<sup>24</sup> Tom Wheeler, FCC Chairman, “Protecting Television Consumers by Protecting Competition” (Mar. 6, 2014), available at <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

<sup>25</sup> See “SNL Kagan Releases Updated Industry Retransmission Fees Projections” (Nov. 22, 2013), available at <http://www.fiercecable.com/press-releases/snl-kagan-releases-updated-industry-retransmission-fee-projections>.

<sup>26</sup> See *Retrans Consent NPRM*, ¶ 42.

<sup>27</sup> 47 U.S.C. § 325(b)(3)(A).

<sup>28</sup> *Id.* § 325(b)(3)(C)(ii).

viewed as not negotiating in good faith. The Commission should also consider finding lack of good faith negotiations when a broadcaster expands a programming blackout to customers of an MVPD's affiliated Internet access services. These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market, and, therefore, such action must be designed only to harm another set of customers who may then place even more pressure on the MVPD.

Second, the Commission has the authority to protect consumers by ensuring "that the rates for the basic [cable] service tier are reasonable."<sup>29</sup> Accordingly, it could adopt specific procedures to reduce the likelihood that negotiations result in a disruption of service to consumers. For example, the Commission should implement a mandatory standstill, interim carriage and cooling off period, taking effect when contracts expire for a reasonable period of time, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service. By taking these modest steps, the Commission can prevent consumers from experiencing widespread disruptions in service and increased cable rates.

#### **IV. THE COMMISSION SHOULD ELIMINATE TECHNOLOGY MANDATES THAT SERVE NO PURPOSE IN TODAY'S COMPETITIVE VIDEO MARKETPLACE.**

Consumers today can view video programming from multiple sources over a variety of platforms, ranging from smart TVs to smartphones, personal computers to game consoles. Accordingly, to the extent technology mandates are designed to allow consumers to mix and match content and technologies, the competitive video marketplace has achieved and is continuing to achieve that goal. Given innovation and competition in today's video marketplace, the Commission should abandon its existing technology mandates and technical rules for video

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<sup>29</sup> *Id.* § 325(b)(3)(A).

distributors and not adopt new mandates unless there is a demonstrated necessity to protect consumers and competition.

**A. The Commission Should Abandon the CableCARD Regime.**

The Commission should seize the opportunity presented by the D.C. Circuit's *vacatur* of the CableCARD rules in *EchoStar Satellite v. FCC*,<sup>30</sup> and rely on market forces to bring consumers opportunities to use the devices of their choice to access video programming offered by MVPDs and other video programming distributors. The Commission has already recognized that CableCARD represents a largely failed experiment.<sup>31</sup> And, the statistics bear this out. Although the CableCARD mandate was intended to increase the availability of commercial navigation devices pursuant to Section 629 of the Act, consumer demand for retail devices with CableCARDS has never reached significant levels, hovering around just 1.5% of subscribers for the nine largest cable systems.<sup>32</sup> Meanwhile, more effective solutions for consumer use of commercial equipment with MVPD and other pay TV services are already available – with more becoming available each day – and so, there is no reason to reinstate the CableCARD rules or adopt new replacement equipment mandates, such as AllVid.<sup>33</sup>

As Verizon described above, the marketplace now exhibits rampant innovation that is providing consumers new choices in how, where, and from whom they will receive and watch video programming. Verizon and other video providers are breaking down old technology barriers to deliver to their customers the entertainment experiences they demand – one in which they will increasingly have the freedom to view and interact with content on any device,

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<sup>30</sup> See *EchoStar Satellite v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

<sup>31</sup> *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, ¶¶ 4-11 (2010) (“*Section 304 NOI*”).

<sup>32</sup> See *id.*, ¶ 10; Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, CS Docket No. 97-80 (Jan. 31, 2014) (reporting that counting the nine largest cable incumbents, 45,000,000 operator-supplied set-top boxes with CableCARDS have been deployed versus 606,000 CableCARD-equipped, retail devices).

<sup>33</sup> See *Section 304 NOI*, ¶ 17 *et seq.*

anytime, anywhere. These efforts in the marketplace are achieving the Commission’s goal of “ensur[ing] that video . . . can be received and displayed by devices manufactured by unaffiliated manufacturers.”<sup>34</sup>

The end result of these efforts is that consumers are increasingly using viewing platforms that do not require an MVPD-supplied set-top box. The demand to consume media on multiple devices is driving the marketplace to develop new and innovative ways to make content more accessible. MVPDs, software developers, device manufacturers, and content providers are all working together to develop new ways for consumers to view and interact with content wherever they go on whatever devices they choose. Further technology mandates or other government regulation in this collaborative, dynamic, and rapidly evolving marketplace is clearly unnecessary and would only slow the brisk pace of innovation.

Similarly, interoperability mandates would not necessarily improve the consumer experience.<sup>35</sup> MVPDs use a variety of configurations in their set-top boxes and IP-based applications depending upon the types of services and features they intend to offer, many of which may be designed to distinguish themselves from competitors. Moreover, MVPDs are expanding the types of equipment their subscribers can use to include equipment from completely different sources, like Xbox game consoles. Requiring some form of interoperability would result in “dumbing down” technically-sophisticated devices so that one-size-fits-all. To the extent that interoperable components have value, the Commission should rely on the industry to develop solutions through consensus-based, standards-setting organizations. Relying on such organizations is preferable to regulatory mandates because the output of such organizations can be used throughout the industry for network and device equipment, thereby reducing costs and

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<sup>34</sup> *Third Report and Order*, ¶ 39.

<sup>35</sup> *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Notice of Inquiry, MB Docket No. 14-16, FCC 14-8, ¶ 65 (Jan. 31, 2014).

achieving interoperability across networks both domestically and internationally. Additionally, the procedures used by these organizations offer greater flexibility in responding to evolving consumer needs and dynamic technological developments, as is evidenced in consumer equipment available today to deliver video programming.

In this rapidly changing market, maintaining the CableCARD regime or imposing new technology mandates would yield no benefits to consumers. Such regulatory efforts only distract from other consumer-driven efforts underway that are increasing the device choices available to consumers. Accordingly, the Commission should decline efforts to reinstate the CableCARD rules vacated in *Echostar*,<sup>36</sup> including the IP-networking mandate in 47 C.F.R.

§ 76.640(b)(4)(iii), and it should abandon its efforts to install an AllVid mandate for delivery of video programming to third-party devices. Instead, the Commission should encourage marketplace developments that are already well underway to achieve the goals of Section 629 in ways that the CableCARD rules and any successor regime could not.

**B. The Commission Should Refrain from Adopting Cable Technical Rules for Digital Cable Systems.**

In a proceeding to review the Part 76 cable technical rules,<sup>37</sup> the Commission correctly recognized that many of its technical rules that apply to cable operators – including various signal quality and signal leakage rules – have become outdated and largely irrelevant with the transition from analog to digital cable services. These rules should be eliminated. In considering whether to adopt similar rules for new digital technology, the Commission must first determine whether, and the extent to which, any such regulation remains “necessary or desirable” in light of

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<sup>36</sup> See *Media Bureau Seeks Comment on TiVo Petition for Rulemaking to Reinstate the Commission’s Second Report and Order and Order Implementing Section 629 of the Act and Associated Rules*, Public Notice, 28 FCC Rcd 10840 (2013).

<sup>37</sup> See *Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd 9678 (2012).

today's technology and market conditions.<sup>38</sup> For the most part, the answer is “no,” and the Commission should decline to adopt prescriptive new regulations in the absence of a problem to be addressed.

The Commission recognized in 1992 that future reviews of the cable technical rules would be undertaken *when necessary*, and, therefore, it explicitly declined to reexamine the cable technical standards on a set schedule, instead adopting a periodic, as-needed review process, and stating that it would “closely watch the technical state of the industry and, if necessary, [would] revisit or modify these standards to ensure that a quality signal is delivered to the home.”<sup>39</sup> The industry's shift to digital technology may warrant an examination of whether new rules are necessary or desirable, but they do not in themselves serve as evidence that regulation is necessary to address an underlying harm that has not appeared in two decades. Indeed, there has been no demonstration that the proposed regulations for digital systems are necessary to address any technical or market failure, or any safety issue, and, therefore, the Commission should decline to adopt the proposals. To the extent any digital cable technical rules may be needed, such rules must be properly tailored to digital cable technology, networks and business models rather than attempt to simply replicate rules adopted for analog, monopoly cable operators.

**V. THE COMMISSION SHOULD ALLOW OVER-THE-TOP VIDEO DISTRIBUTORS TO DEVELOP SERVICES WITHOUT LEGACY REGULATIONS DESIGNED FOR OTHER PLATFORMS.**

To promote competition in the marketplace for delivery of video programming, the Commission should keep over-the-top, IP-based video services free of regulatory and technology mandates. While relatively new entrants into the market for delivery of video programming,

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<sup>38</sup> See *Cable Television Technical and Operational Requirements*, Report and Order, 7 FCC Rcd 2021, ¶ 17 (1992), *aff'd in part and modified in part*, Memorandum Opinion and Order, 7 FCC Rcd 8676 (1992).

<sup>39</sup> *Id.*, n.12.

over-the-top, IP-based video services represent a rapidly developing and dynamic market segment.

Numerous such online video services are available today, including Netflix, Hulu Plus, Amazon Prime, Apple, Crackle, VUDU, and YouTube, distributing programming over a variety of platforms, including personal computers, tablets, smartphones, and devices connected to televisions (such as Xbox, Apple TV, or Roku). In addition, providers who offer facilities-based services are increasingly using online platforms to distribute some or all of their linear video programming as well as video on demand. For example, Verizon has partnered with Coinstar to develop Redbox Instant by Verizon that offers a competitive, over-the-top, IP-based video service that lets consumers choose programs from a large library of content. Subscribers are able to access this service over any broadband Internet access service around the country using the devices of their choice.<sup>40</sup>

These online video services are competing to implement technological innovations designed to provide consumers with the best viewing experience on a given platform. They are also experimenting with a variety of business models, as companies attempt to determine the best way to connect viewers to the content they want to watch, where and when they want to watch it. And, they are producing content: Notably during 2013, Netflix distributed *House of Cards* and *Orange Is the New Black*, and Amazon Studios has developed *Alpha House*, among many other offerings from these and other online video distributors.

These efforts by online video providers are attracting a large segment of the U.S. population, particularly, “millennials” (ages 16-34), who are changing the traditional U.S. video viewing patterns. A recent survey of the TV viewing habits of millennials reports that they are

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<sup>40</sup> More information on Redbox Instant by Verizon is available at: <http://www.verizon.com/Support/Residential/Internet/FiOSInternet/General+Support/Essentials+And+Extras/Redbox-Instant/Redbox-Instant.htm>.

three times more likely than non-millennials (ages 35-64) to watch TV online.<sup>41</sup> Indeed, 40% express a preference for TV programs on-line. And, they commonly engage in marathon and binge TV watching, such as watching multiple episodes of a TV series in one sitting, a practice that is facilitated through online video services. Given these viewing preferences, it is not surprising that millennials are much more likely than non-millennials to use devices other than television sets to watch video programming, exactly the platforms over which to watch online video services. These changes in consumers' viewing habits are reflected in increasing data usage for video programming. Sandvine reports that entertainment usage accounts for nearly 70% of download traffic during peak times on fixed broadband lines in North America.<sup>42</sup> Netflix and YouTube together account for over 50% of peak download traffic on fixed broadband lines.<sup>43</sup> At the end of 2013, Netflix reported over 33 million U.S. subscribers to its streaming service.<sup>44</sup>

Given the popularity of online video, these services are rapidly becoming significant competitors in garnering consumers for viewing video programming, and are doing so in a primarily unregulated environment, which should be allowed to continue. The Media Bureau has already correctly determined that an over-the-top, IP-based video service provider is not an MVPD, based on its reading of the definitions of MVPD, "channel" and "video programming" in the Communications Act.<sup>45</sup> From a consumer perspective, this decision was also correct because it will encourage competition among these over-the-top providers and between over-the-top and

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<sup>41</sup> Verizon Media Services, "Millennials & Entertainment: Final Report" (Mar. 2014), *available at* [http://www.verizondigitalmedia.com/content/VerizonStudy\\_Digital\\_millennial.pdf](http://www.verizondigitalmedia.com/content/VerizonStudy_Digital_millennial.pdf).

<sup>42</sup> Sandvine, "Global Internet Phenomena Report," at 5 (2H 2013), *available at* <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/2h-2013-global-internet-phenomena-report.pdf>.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> Netflix, Inc., Form 10-K Annual Report, at 19 (Feb. 3, 2014), *available at* <http://ir.netflix.com/sec.cfm>.

<sup>45</sup> See *Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, ¶ 7 (MB 2010).

traditional cable services. To that end, ensuring that online video providers are free of unnecessary regulatory mandates will promote opportunities for consumers to have more choices in the market for video programming. In addition, because over-the-top, IP-based video services require a broadband connection, not imposing unnecessary legacy or new regulations on these providers will encourage consumers to switch to broadband, thereby encouraging more broadband deployment.

While the Media Bureau took the right first step in its *Sky Angel* decision, it is important for the Commission to ensure that that finding applies to *all* such providers. The marketplace for over-the-top, IP-based video services is dynamic and fast-moving, with numerous new entrants and entrance by existing MVPDs. It is essential that all providers be allowed to compete on a level playing field, so that consumers — not regulators — are picking winners and losers in the marketplace. In particular, a provider offering an over-the-top, IP-based service should not be considered an MVPD even if that same provider may be an MVPD for purposes of other, separate services that it offers. Companies that are MVPDs for one service — because they offer consumers a service that integrates multiple channels of video programming with the transmission path over which those services are delivered, and that uses a multipoint distribution service — should be free to enter the marketplace for over-the-top, IP-based video services on the same terms as other online video providers. As long as the over-the-top, IP-based video service is available to consumers separately from the broadband service over which it is transmitted — and *vice versa* — the company should not be deemed an MVPD insofar as it is offering that online service, even though it remains an MVPD insofar as it is offering a separate, integrated, multipoint-distributed video service, such as a cable service. Providing clarity in this

context will help encourage providers to engage in additional innovative marketing strategies as they compete to find the best ways to offer new video programming services to customers.

## **VI. THE COMMISSION SHOULD CONTINUE TO ENFORCE COMPETITIVE ACCESS TO VALUABLE PROGRAMMING.**

The program access protections in Section 628 of the Communications Act (47 U.S.C. § 548) have proven invaluable in ensuring that competitive video providers have access to the programming they need – much of which came under the control of cable incumbents at a much less competitive time – in order to offer a meaningfully competitive alternative MVPD service to consumers. Accordingly, protecting access to such programming, especially must-have content like regional sports network (“RSN”) programming, continues to be important for facilitating today’s growing competition among video programming distributors by ensuring reasonable access to valuable content.

As the Commission has recognized, incumbent cable companies have a strategic incentive to enter into exclusive contracts with their affiliates to deprive competitors of access to critical programming, for example, during the pendency of a program access complaint.<sup>46</sup> Such strategic withholding can be used to leverage better contract terms in tough negotiations or to cause irreparable harm to competitors. Competitive MVPDs can also be injured by losing access to programming that they are currently broadcasting, either because a cable-affiliated network enters a new exclusive deal with its affiliate or because a formerly independent RSN comes under the control of a cable company. Even if ultimately successful in a program access complaint, a competitive MVPD could still suffer from the temporary loss of access to programming that is “both non-replicable and highly valued by consumers.”<sup>47</sup> Therefore, the

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<sup>46</sup> *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 71 n.258 (2010).

<sup>47</sup> *Id.*, ¶ 52.

Commission should be vigilant in protecting reasonable access to programming held by incumbent cable operators, which will in turn preserve for consumers the ability to select from an array of competitive video programming distributors.

## **VII. CONCLUSION.**

For the reasons set forth above, the Commission should find that the today's marketplace for delivery of video programming is increasingly competitive and is providing consumers with increasing choices among providers, equipment, and content. The targeted actions described above would further this dynamic of increased competition, investment, and innovation.

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