Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF VERIZON

Michael E. Glover,
Of Counsel

William H. Johnson
William D. Wallace
1320 N. Courthouse Road, 9th Floor
Arlington, VA 22201
(703) 351-3060

Attorneys for Verizon

June 26, 2014

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY……..……..1

II. THE RETRANSMISSION CONSENT REGIME IS BROKEN AND REQUIRES COMPREHENSIVE REFORM……..…….2

III. THE NETWORK NONDUPLICATION AND SYNDICATED PROGRAMMING EXCLUSIVITY RULES ARE NO LONGER NEEDED TO PROTECT THE COMPETITIVE POSITION OF TV BROADCAST STATIONS…….5

IV. ELIMINATING EXCLUSIVE PROGRAMMING PREFERENCES SHOULD BE THE FIRST STEP IN COMPREHENSIVE REFORM OF THE CABLE CARRIAGE REGIME……9

V. CONCLUSION…….12

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

The current retransmission consent regime skews commercial negotiations by providing television broadcast stations with leverage over Multichannel Video Programming Distributors (MVPDs) through various artificial regulatory preferences. The result of this imbalance in negotiations for retransmission fees is harm to consumers through higher cable rates and increasingly frequent service disruptions. The Commission again proposes to eliminate two of these preferences, the network non-duplication and syndicated programming exclusivity rules,[2] which "heighten the leverage" for broadcasters "because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations."[3] It is time for the Commission to eliminate these anti-consumer rules.

Ideally, Congress and the Commission would eliminate all rules that prevent the marketplace for distribution of broadcast station programming from functioning like a normal

[1] The Verizon companies participating in this filing (Verizon) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.
[2] *See* 47 C.F.R. §§ 76.92 *et seq.* (network non-duplication); 47 C.F.R. §§ 76.101 *et seq.* (syndicated programming).
[3] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 13 (2014) (*Retrans. Order* or *Retrans. FNPRM*).

market, including the network non-duplication and syndicated programming exclusivity rules and others that distort negotiations. But eliminating these two sets of rules would be a good start and would encourage parties to retransmission consent negotiations to temper their demands and, by providing potential market-based alternatives, reduce the likelihood of consumer harm in the event negotiations between a broadcast station and MVPD reach an impasse. Accordingly, Verizon supports elimination of these two rules as an important interim step in developing a true, market-based approach to retransmission consent.

II. THE RETRANSMISSION CONSENT REGIME IS BROKEN AND REQUIRES COMPREHENSIVE REFORM.

As Verizon and other commenters have pointed out in this docket,[4] the current retransmission consent regime is resulting in higher cable rates and increased service disruptions, and thereby is not working to benefit consumers. These adverse effects arise in large part because various governmental regulations provide substantial advantages during negotiations to television broadcasters. In the typical market-based context, both sides can seek compensation for their goods and services, and, if those negotiations are unsuccessful, either party can decide to walk away and pursue other distribution sources. However, retransmission consent negotiations are conducted under substantially different dynamics – skewed to advantage broadcast stations –with the results that MVPDs are increasingly paying over-market fees to retransmit broadcast programming and consumers are frequently cut off from desired programming.

Unlike most businesses, broadcast stations enjoy several government-granted preferences that prevent more balanced, market-based negotiations. In addition to guaranteeing broadcasters the right to cable carriage, should they unilaterally decide to assert it, the Commission's rules

[4] *See, e.g.*, Comments of Verizon, MB Dkt. No. 10-71 (May 27, 2011); Comments of AT&T, MB Dkt. No. 10-71 (May 27, 2011).

give broadcasters a number of powerful distribution preferences, including the network non-duplication and syndicated exclusivity rules. Other such preferences include guaranteed placement in the basic tier[5] and protection from deleting a station during the sweeps period even if the retransmission consent agreement has expired,[6] while MVPDs hold no analogous rights. By virtue of these regulatory preferences, normal marketplace dynamics cannot function as they would absent the regulations.

As an initial matter, an MVPD generally cannot refuse to carry a broadcaster's programming if the station elects to demand compulsory carriage ("must carry"). And for broadcasters that pursue retransmission consent and then make unreasonable demands, the MVPD cannot pursue effective alternative arrangements to carrying the broadcast programming that is the subject of the negotiations because of the broadcast station's network non-duplication and syndicated exclusivity rights. So, for example, an MVPD cannot seek an alternative source for network programming from an out-of-market broadcaster that may be willing to offer the programming on different terms, because the network non-duplication rules prevent the MVPD from delivering the out-of-market programing to consumers if the local broadcaster asserts these rights. Even if the local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can still block carriage of out-of-market stations with the same programming.[7] Thus, an MVPD is generally limited to a single input for the network or syndicated programming that consumers expect to receive.

By preventing true marketplace negotiations and curtailing potential alternative sources for many forms of popular programming, the current retransmission consent rules harm consumers. As has been noted multiple times in the last few years, some broadcasters have

---

[5] *See* 47 C.F.R. § 76.56(d).
[6] *See* 47 C.F.R. § 76.1601 note 1.
[7] *See Retrans. FNPRM*, ¶ 41 note 140.

relied on the preferences afforded under the current regime to demand increased payments from MVPDs for programming and to threaten to pull – or actually pull – their signal if their demands are not met.

When faced with such demands, MVPDs essentially have two choices. They can pay the higher fees demanded. The result, as Chairman Wheeler recently recognized, is that the costs of retransmission consent agreements have "skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years."[8] SNL Kagan has projected that retransmission consent fees will reach $7.15 billion by 2018.[9] Or, in the alternative, MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of desired programming (often during periods when they are most in demand, such as during popular sporting events). Like the rising retransmission fees, the occurrence of programming disruptions has escalated each year: there were reported more than 120 broadcaster blackouts in 2013, up from just a dozen in 2010.[10] The impact of these threats of service disruption have recently been heightened by broadcasters also blocking Internet access to their programming for the MVPD's customers,[11] spreading the impact to consumers who may not even subscribe to the MVPD's video service.

The current retransmission consent regime thus not only threatens competition in the video marketplace, it also is having a real and deleterious impact on consumers, who, the

---

[8] 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.

[9] 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.

[10] *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.

[11] *See, e.g.*, J. Roettgers, "Viacom blocks online videos in retrans fight, wakes up regulators," *GigaOm* (May 24, 2014), *available at* http://gigaom.com/2014/05/23/comedy-central-mtv-blocked-cable-one-voacom-retrans-fight/; Letter from Marc Lawrence-Apfelbaum, Time Warner Cable Inc. to Marlene H. Dortch, FCC, MB Dkt. No. 10-71 (Oct. 17, 2013).

Commission recognizes, are the "innocent bystanders adversely affected" by blackouts resulting from stalemates in negotiations between broadcasters and MVPDs.[12] And, in the case of competitive MVPDs like Verizon, the risks are especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers, if the MVPD does not accede to the broadcast stations' demands to ensure continued availability of desired programming. Eliminating the leverage provided by the network non-duplication and syndicated exclusivity rules will help ameliorate these harms to consumers and programming distribution services.

III. THE NETWORK NONDUPLICATION AND SYNDICATED PROGRAMMING EXCLUSIVITY RULES ARE NO LONGER NEEDED TO PROTECT THE COMPETITIVE POSITION OF TV BROADCAST STATIONS.

The Commission's network non-duplication and syndicated programming exclusivity rules have the effect of preventing a video distributor from importing broadcast programming from alternative sources when negotiations breakdown with a local broadcast station owner. Thus, a broadcast station can negotiate retransmission consent knowing that a blackout may result in the loss of programming valuable to subscribers, but MVPDs are prohibited by governmental regulations from obtaining such programming from other sources.

For example, pursuant to the network non-duplication rule, an MVPD and its subscribers could lose access to a national network's primetime programming in the event of an impasse with a local network affiliate. Or, in the case of syndicated programming, the MVPD and its subscribers could lose access to syndicated re-runs of popular programming, not available on another local broadcast station. These rules effectively make one broadcast station the sole source of certain programming, and so the station enters into retransmission consent negotiations

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

with an upper hand, allowing it to obtain higher fees than those to which it would be entitled if access to such programming was negotiated in a normally functioning marketplace – with multiple sources competing for distribution over an MVPD's network.

The Commission notes that the network non-duplication and syndicated exclusivity rules were adopted at a time when a cable company did not need to obtain consent to retransmit a television broadcast station's signal.[13] A broadcast station, however, may have held geographic exclusivity rights in a contract with either a network or syndicator, which it could enforce against an out-of-market station through whatever contractual remedies were available to it. The addition of the Commission's exclusivity rules enabled the station to enforce those rights against the cable company. According to the Commission's theory, enabling broadcast stations to enforce their territorial rights protected their local audience share and advertising revenues against whatever programming the cable operator may have been able to import.[14]

Today, a cable company or other MVPD cannot carry a television station without its permission in electing either must-carry or retransmission consent rights.[15] The television station may still have contracted-for territorial rights to network and/or syndicated programming, which may prevent an out-of-market station from authorizing a cable company to carry the programming within the local station's territory. Accordingly, to the extent that a broadcast station holds territorial rights to transmit network or syndicated programming, it can still enforce those rights against carriage of an out-of-market station – without the Commission's rules.

However, by giving broadcast stations an "extra-contractual" method to enforce their territorial rights against MVPDs, the Commission's rules have the effect of reducing the costs and burden of pursuing whatever territorial rights a television station may hold. The station

---

[13] *See Retrans. FNPRM*, ¶ 58.
[14] *See id.*
[15] *See id.*

simply has to notify the MVPD of its contractual rights, without having to present a case against carriage of out-of-market programming, or to justify denying consumers access to the network or syndicated programming altogether.[16]

Moreover, the Commission's rules allow the local broadcast station to usurp the bargaining rights of an out-of-market broadcast station that may be a competitive alternative or at least a partial substitute for the negotiating MVPD and its subscribers, by precluding the MVPD from negotiating with the out-of-market station. As a result, there is less – or no – competition for the programming for the MVPD seeking to provide network or syndicated programming to its customers. Although this scenario has been in place for over two decades, the Commission recently noted in its *Report and Order* that "'any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement' imposed by Congress."[17] Assuming the Commission has correctly read the Congressional intent behind Section 325(b) of the Communications Act (47 U.S.C. § 325(b)), it appears inapposite for the Commission to maintain these programming preferences that effectively eliminate any competitive negotiation process for alternative sources of programming.

At bottom, this intrusion into the market-based remedies available to the broadcast station primarily disadvantages MVPDs by making it easy for the broadcast station to enforce its contractual rights with a network or syndicator without even turning to its contractual remedies. As result, it is nearly impossible for an MVPD to import an out-of-market station, when the local station withholds consent, assuming, of course, that the out-of-market station could authorize and

---

[16] *See* 47 C.F.R. §§ 76.94, 76.105.

[17] *Retrans. Order*, ¶ 20, *quoting Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 58 (2000).

consent to retransmission.[18] While it is by no means clear that the results for the MVPD would be different if these rules are eliminated, it is clear that the presence of the rules "heightens the leverage" available to the broadcast station in negotiations.

These rules also harm consumers. The Commission has recently recognized that consumers are starting to benefit from the changing video marketplace: "[T]oday consumers may choose among several MVPDs and also may access video programming on the Internet."[19] Yet, while the competitive marketplace offers increased choices for consumers, the Commission's rules can effectively take those choices away. An MVPD that declines to pay increased retransmission consent fees may find itself without desired programming, thereby handicapping its ability to offer a competitive choice to consumers. Or, it may pay the increased fees, resulting in higher cable rates for consumers, perhaps providing a less attractive option for new subscribers. Either way, the options available to consumers may be stifled.

Accordingly, eliminating the network non-duplication and syndicated programming exclusivity rules will potentially inject a competitive factor into the conditions under which MVPDs negotiate retransmission consent with broadcast stations. The parties may still reach impasses, but, at least, the negotiation would be conducted closer to market-based conditions, and the broadcast station may be more hesitant to disrupt programming if it knows that it cannot stop the MVPD from carrying substitute programming, or that it will have to institute litigation to prevent such a result.

---

[18] *See Retrans. FNPRM*, ¶ 58 ("given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported . . . and . . . contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal").
[19] *Id.*, ¶ 60.

IV. ELIMINATING EXCLUSIVE PROGRAMMING PREFERENCES SHOULD BE THE FIRST STEP IN COMPREHENSIVE REFORM OF THE CABLE CARRIAGE REGIME.

Given the consumer harms that have developed from the current retransmission consent regime, ideally, policymakers would initiate comprehensive reforms to establish a different approach, appropriate for the video marketplace of today and tomorrow. Such an approach should take into account the growing array of video 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.[20] In pursuit of this holistic approach, Congress and the Commission should work to restore balance to retransmission consent negotiations, and to eliminate the 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, broadcast stations and MVPDs would be able to negotiate on an equal footing, and the current impulse toward posturing and stalemates would become much less attractive, thereby reducing the likelihood of consumer harm in the event such negotiations are unsuccessful.

Verizon supports the Commission's efforts in moving forward with targeted reforms while a more comprehensive approach is considered to address the problems with the current regime. Eliminating the network non-duplication and syndicated programming exclusivity preferences would be an important step in the right direction to fix the artificial imbalance in negotiating strengths resulting from the preferences available to broadcast stations in the current retransmission consent regime. While rendering a completely level playing field would require action by Congress, which has the authority necessary to change the broadcast station preferences embodied in the Communications Act, and by other policymakers, such as the

[20] *See, e.g.,* Comments of Verizon, MB Dkt. 14-16, at 3-9 (Mar. 21, 2014).

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.

Meanwhile, the Commission should continue to pursue additional steps to level the playing field in retransmission consent negotiations pursuant to its statutory authority "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[21] In keeping with its obligation to prohibit a broadcast station from "failing to negotiate in good faith,"[22] 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, negotiating in good faith should require engaging in negotiations at least 60 or 90 days before the expiration of the current agreement, and a party's refusal to respond in a timely and reasonable manner to a proposal on relevant issues should constitute bad faith. Moreover, during negotiations, informing consumers of potential disputes may be warranted, but, running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not, and should be viewed as not negotiating in good faith.

Additionally, recent tactics by broadcast stations demonstrate that even elimination of preferences such as the programming exclusivity rules may not be sufficient to restore balance to the negotiating table. As noted above, broadcasters have expanded program blackouts to include access to programming by 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, may not be able to access substitute broadcast station programming if it were available. Therefore, blacking out Internet access must be designed to harm another set

[21] 47 U.S.C. § 325(b)(3)(A).
[22] *Id.* § 325(b)(3)(C)(ii).

of customers who may then place pressure on the MVPD to accede to the broadcast station's demands, and should be deemed a failure to negotiate in good faith.

The Commission also has the authority to protect consumers by ensuring "that the rates for the basic [cable] service tier are reasonable."[23] 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. Such a step would be consistent with elimination of the network non-duplication and syndicated programming exclusivity rules because it would reflect the Commission's view that consumers should not be held hostage to retransmission consent negotiations, but rather should have access to desired programming even while a broadcast station and MVPD hammer out their differences on the terms and conditions of carriage.

Ultimately, comprehensive reform of the retransmission consent regime should ensure that consumers have competitive options and maintain access to desired programming. Until such reform becomes a reality, the targeted measures noted above can help repair the broken retransmission consent regime and protect consumers from blackouts and increased cable rates.

[23] *Id.* § 325(b)(3)(A).

V. CONCLUSION.

For the reasons set forth above, the Commission should find the public interest demands that it eliminate its network non-duplication and syndicated programming exclusivity rules.

Respectfully submitted,

Michael E. Glover,
Of Counsel

_/s/ *William H. Johnson*___
William H. Johnson
William D. Wallace
1320 N. Courthouse Road, 9th Floor
Arlington, VA 22201
(703) 351-3060

Attorneys for Verizon

June 26, 2014