BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors	)))	RM - 11728

INTRODUCTION AND SUMMARY

Hargray Communications Group, Inc. ("Hargray") hereby submits these comments in support of Mediacom Communications Corporation's ("Mediacom") above-referenced Petition for Rulemaking. As set forth below, Hargray has firsthand experience with many of the unfair and anticompetitive practices of video programmers identified by Mediacom. Hargray therefore wholeheartedly supports the initiation of a rulemaking proceeding to adopt concrete proposals for addressing these practices, including giving MVPDs the right to purchase and offer certain programming to subscribers a la carte and mandating that programmers justify volume discounts.

BACKGROUND

With about 30,000 subscribers and nearly 350 employees, Hargray is a small and independent provider of cable television, voice, and broadband services throughout the Lowcountry region of South Carolina and the areas surrounding Savannah, Georgia. Hargray's customers represent a broad swath of the South Carolina Lowcountry population, including military personnel, retirees, and those working in the region's vibrant hospitality and manufacturing industries. Hargray was founded in 1949, and over the ensuing 65 years has been a good corporate citizen and top employer in the communities it serves. Hargray invests millions of dollars each year to expand its fiber-rich networks and bringing new, innovative, and affordable broadband services to its customers.

Revenues from video programming services are necessary for Hargray to continue to improve its broadband network and thus compete not only with the much larger MVPDs that operate in Hargray's service area (including national satellite services), but also with other providers of voice and high-speed Internet services. However, the ever-escalating cost of obtaining programming has made it increasingly difficult for Hargray to offer a quality video service that meets its subscribers' needs at affordable prices. This problem is worsening at an extremely rapid pace, with the level of programming expense increases reaching unprecedented and unmanageable levels. In the last 24 months alone, the rates charge by the "big six" owned networks to Hargray have increased 33 percent.

Largely as a result of these cost increases, Hargray has seen a decline in video subscribership of 5 percent over the past twelve months. The principal obstacles to Hargray controlling its costs and holding down prices include (i) take it or leave it demands by programmers that require Hargray, as a condition of obtaining continued access to popular networks, to purchase and carry unwanted and unwatched services at prices that are higher than some successful independent networks and (ii) the fact that, as a small MVPD, Hargray routinely finds itself on the wrong side of programmers' unjustified and discriminatory volume discounting practices.

Action by the Commission is needed to rebalance a video programming marketplace that has been skewed to the benefit of programmers that have taken unfair advantage of the Commission's previous efforts to achieve competitive balance in the market. The time is ripe for the Commission to take up the proposals advanced by Mediacom and put a stop to the coercive, anti-consumer practices of the nation's largest programmers.

DISCUSSION

I. The Commission needs to take concrete action to protect consumers and further the core public interest goals of competition, diversity, and innovation.

The practices identified in Mediacom's Petition for Rulemaking – forced wholesale and retail bundling and discriminatory pricing based on unjustified volume discounts – are antithetical to the promotion of competition, diversity, and innovation. By coercively limiting choices and driving up prices, these practices are impeding the ability of distributors, particularly small distributors such as Hargray, to provide a video programming service that meets the needs and interests of their customers at a reasonable price. The unjustified volume discounts given by programmers to the largest MVPDs end up being paid by the smaller MVPDs that must pay (and charge) more for the same programming than their larger competitors. The ability to compete and innovate is further hindered by forced wholesale and retail bundling requirements, which drive up the cost of service even more. As a consequence of these practices, small distributors also have fewer resources to devote to improving and expanding service to meet the diverse interests of their customers. This is especially concerning for an operator such as Hargray, whose smaller size and more intimate ties to the communities it serves allows it to focus deeply on supporting those communities, and to offer services in areas that are not economically viable for service by other, larger, providers.

The Commission recognized in the Comcast/NBCU merger order that bundling of programming can be harmful to competition and that the public interest and, in particular, the interests of smaller operators and their customers, are at risk from these practices.[1] Moreover, as Mediacom's Petition explains, the harmful effects of these coercive practices – driving up the cost to consumers and hindering the ability of smaller distributors to compete with larger

[1] *Applications of Comcast Corporation, General Electric Company and NBC Universal Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238, ¶¶ 57-58 (2011).

MVPDs – are the same whether or not the programmer is vertically integrated with a MVPD.[2] Higher programming costs limit resources regardless of where those costs come from. In Hargray's experience, and as Mediacom demonstrates, the measure of whether a programmer employs these coercive tactics is not whether the programmer is vertically integrated with a MVPD, but whether the programmer is of sufficient size and controls at least one network of "marquee" programming. Indeed, the "big six" media giants highlighted by Mediacom, which include both vertically-integrated and non-vertically-integrated programmers, control 72 channels out of 253 (28%) offered to our subscribers while representing 65% of our monthly expenses. All of these programmers have used aggressive bundling tactics against Hargray during renewals that diminish the overall value of its service and limit options for its subscribers. Additionally, the rates for "big six" owned networks have jumped 33 percent over the past 24 months.

Hargray has sought a measure of relief from the programmers' unfair and coercive bundling and pricing tactics by joining the NCTC. Currently, about 85% of Hargray's programming, by cost, is purchased through NCTC agreements. Although Hargray values its relationship with NCTC, which provides it with numerous benefits in addition to its negotiated programming contracts, programmers still make bundling demands in their negotiations with NCTC and seek to offset the lower volume-discounted prices they offer to large MVPDs through higher prices in NCTC agreements.

II. The standalone option suggested by Mediacom to end forced wholesale and retail bundling should be endorsed by the Commission.

Hargray's experience with bundling. Hargray has experience with the programmers' forced bundling tactics and the harms flowing from such tactics. Disney, Fox, Turner, NBCU,

[2] Mediacom Communications Corporation, Petition for Rulemaking, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728, at 27-28 (filed July 21, 2014) ("*Mediacom Petition*")

and Viacom have all offered Hargray a primary bundle of networks with no options other than to take the bundle or not carry the programming. And in every renewal agreement with the "big six," Hargray has been forced to continue to carry or add networks that it did not want and that its customers do not watch. Recent examples of such bundling include:

- Hargray's renewal agreement with a "big six" programmer, which required that Hargray carry two newly launched networks in expanded basic;
- Hargray's agreement with another "big six" programmer required the launch of a Spanish language network that Hargray had dropped previously due to low viewership and forced Hargray to continue to carry an underperforming network with dismal viewership on Hargray's system; and
- Hargray's renewal with another "big six" programmer tied carriage of a new regional sports network and carriage of a relatively new and unproven news network.

As Mediacom noted in its Petition, these bundling abuses occur not only through mandating carriage of unwanted networks to gain access to marquee programming, but also through tying a bundle of marquee, poorly rated, and newly launched networks to placement on specific and most-highly penetrated tiers.[3] This has the effect of limiting the choices that Hargray can give its customers and increases every subscriber's costs. During Hargray's negotiation with Univision, Univision pulled the rights to Galavison and Telefutura, and refused to renew those networks at any rate unless Hargray moved them from its Spanish language tier to expanded basic. This had the effect of forcing Hargray to deny its expanded basic subscribers the option of not receiving, and paying for, these niche services.

The tactics described above are not unique and are frequently more egregious – Turner, Fox, NBCU, Viacom, and Discovery have all dictated to Hargray the tier on which their bundles of networks must be placed and prohibited Hargray from creating a tier from smaller groupings of channels or offering channels a la carte. Were these types of coercive practices prohibited,

[3] *Id.*, at 10-11.

Hargray would have the ability to provide more customers with more tailored choices of programming that are consistent with what the customers want to purchase.

The programmers' tier placement requirements also increase the price of video service and prevent Hargray from offering more varied price points to satisfy diverse consumer budgets and interests. For example, Hargray carries two networks owned by a "big six" programmer in expanded basic that are ranked 20th and 46th in viewership respectively and cost Hargray approximately $1.00 per subscriber. In addition, the programmer also required that Hargray carry two new networks with minimal viewership on the same tier, which increases the cost to $2.00 per subscriber. This same scenario plays out with every one of the "big six" programmers.

Hargray has attempted to negotiate for single networks and RSNs, but many channels are not made available except as part of a bundle. This includes popular and niche channels from vertically integrated and non-vertically integrated programmers alike, including BET, Disney, Nickelodeon, Nick Jr., MSNBC, Bravo, and the Golf Channel. So, for example, Hargray cannot put together, and customers cannot choose, a "children's tier" that contains only those channels aimed at children.

Hargray's negotiations with Fox over RSNs offer several additional examples of the anticompetitive practices engaged in programmers:

- Hargray had reached an agreement with the YES network on the principal terms of carriage; but after Fox took over management of YES, it rejected those terms because Hargray refused to carry certain other Fox RSNs.

- When Hargray renewed Sports South, Fox imposed an additional 10 percent per subscriber penalty for carriage of that network because Hargray declined to also renew Fox Sports Carolinas.

- Tier placement mandates by Fox prevented Hargray from separately offering Fox Sports Carolinas to those customers who offered to pay a separate monthly charge for the network to access Atlanta Braves' games. Regardless of what rate Hargray offered, Fox would not allow placement of that RSN on any tier other than expanded basic, which eliminated Hargray's ability to offer this channel

> only to those customers with a particular interest in the Atlanta Braves or sports more generally.

These coercive packaging and pricing practices mean that, even when a network is offered individually, MVPDs are left with only two costly options, either (1) accepting a bundle of programming at a lower cost per network, but higher overall cost because of the forced purchase and carriage of a plethora of additional and unwanted bundled networks; or (2) in a few instances, pay a significant penalty to carry only the networks that the MVPD and its customers want. Under both scenarios, the cost of video service increases and, because of tier placement mandates, that cost is borne by all subscribers regardless of what networks the subscriber actually wants or watches.

Proposed solutions. Mediacom's Petition noted that the FCC imposed a "standalone" offer condition on Comcast/NBCU that is not sufficient to address the problems caused by forced wholesale and retail bundling.[4] The approach taken by the Commission requires that only broadcast stations and RSNs be made available on a true standalone basis. However, the major programmers all have other types of "marquee" programming that they can and do use to anchor large bundles containing otherwise unwanted channels.

What is needed is an approach, such as that proposed by Mediacom, that provides a true standalone option to all MVPDs with respect to the programming most valued by consumers: the right to purchase and offer to subscribers programming a la carte, where the particular programming (i) was not carried by such MVPD as of January 1, 2014; or (ii) has a per subscriber cost to the MVPD that puts it in terms of price within the top 20% of the programming carried by the MVPD on its basic/expanded basic tier; or (iii) is the subject of a price increase in excess of the inflation rate for the preceding calendar year. Hargray also supports Mediacom's alternative proposal for adopting rules that build on the conditions in the

[4] *Id.*, at 16-17.

Comcast/NBCU merger order by requiring that video programmers provide MVPDs with (a) standalone offers to purchase and sell to consumers any of the broadcast and non-broadcast programming services controlled by the programmer; (b) the same package of networks covered by the MVPD's previous agreement with the programmer; and/or (c) any bundle or individual channel offered for sale by the programmer in the previous twenty-four months.

III. The Commission should make all programmers justify their volume discounts.

Hargray's experience with volume discounting. No one denies that programmers routinely offer their larger customers volume discounts that are then made up by charging higher prices to smaller MVPDs. Such discriminatory pricing schedules are supposed to be illegal under the Cable Act unless they can be justified on the basis of actual economic benefits directly and reasonably attributable to the number of subscribers served.[5] However, as Mediacom's Petition demonstrates, in practice the Commission freely allows programmers to offer volume discounts without having to justify them.[6]

Hargray, as a smaller distributor, pays higher prices for programming than the larger MVPDs (including the two national satellite distributors) that it competes against. This is true whether Hargray negotiates on its own or through NCTC. Moreover, when these higher prices are combined with minimum penetration requirements, the effect is to force Hargray to migrate services (and customers) to its most highly penetrated tiers. The result is that Hargray pays more than other distributors providing the exact same services and its customers have less choice.

Proposed solutions. Hargray is unaware of any "legitimate economic benefit reasonably attributable to the number of subscribers served by the distributor" for giving lower per subscriber rates to large MVPDs. The harm to competition and consumers is the same when unjustified volume discounts are used by vertically and non-vertically integrated programmers.

[5] *Id.*, at 18.
[6] *Id.*, at 18-24.

Under the circumstances, it is incumbent on the Commission to address these harms globally, by adopting rules that give effect to the statutory ban on discriminatory pricing. In particular, Hargray endorses Mediacom's proposal for the adoption of rules (1) requiring that all programmers justify their volume discounts; (2) requiring that the net effective rate for video programming is the same for all MVPDs; and (3) requiring disclosure of the net effective rates that various MVPDs actually pay. Doing so will enhance competition and bring better and more innovative services to the public across the country.

CONCLUSION

The Commission is tasked with preserving and supporting competition in the delivery of video programming and other communications, including high speed data. The increased costs for video programming and reduced consumer choice attributable to the large programmers' forced bundling and unjustified volume discounts directly and negatively impacts small MVPDs' ability to compete with their larger counterparts in the provision of video, voice, and high speed data services. Thus, for the reasons stated above, the Commission should adopt a Notice of Proposed Rulemaking based on Mediacom's Petition with the goal of eliminating programmers' anti-competitive bundling and unjustified volume discounting practices.

Respectfully submitted,

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September 29, 2014

AM 37434442.3