Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors	)))	RM 11728 MB Docket No. 14-___

To: Chief, Media Bureau

JOINT OPPOSITION OF CBS CORPORATION, THE WALT DISNEY COMPANY, TIME WARNER INC., TWENTY FIRST CENTURY FOX, INC., AND VIACOM, INC. ("CONTENT COMPANIES")

INTRODUCTION

In the captioned Petition[1] Mediacom offers a warmed over smorgasbord of proposals that it has served up previously, and unsuccessfully, in a variety of proceedings. Once again, Mediacom's arguments rest on the erroneous proposition that the Commission has both the authority and the justification to tilt the distribution market in cable operators' favor by constraining the ability of content providers to engage in commercial negotiations for carriage of their programming.

The Content Companies have refuted this proposition repeatedly and at length in their submissions in other proceedings,[2] and Mediacom's recycled Petition provides no basis to

[1] Mediacom Communications Corporation, Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors (filed Jul. 21, 2014) ("Mediacom Petition"). This Opposition is timely filed pursuant to the Media Bureau's Public Notice, DA-14-1167 (rel. Aug. 11, 2014).

[2] *See*, *e.g.*, Reply Comments of The Walt Disney Company, 21st Century Fox, Inc., Time Warner Inc., CBS Corporation, Scripps Networks Interactive, Inc., and Viacom Inc., GN Docket No. 14-28 (filed Sept. 15, 2014) ("Content Interests Open Internet Reply"); Letter of CBS Corp., NBCUniversal, News Corp., Time Warner Inc., The Walt Disney Company, and Viacom, Inc., to Secretary, FCC, MB Docket No. 12-203 (filed Oct. 10, 2012) ("Content Interests October 2012 *Ex Parte*"); Reply Comments of The Walt Disney Company, Viacom, Inc., News Corp., Time (continued…)

revisit the issue. Indeed, Mediacom admits that it has made the same arguments repeatedly since "as far back as 2003,"[3] that nothing has changed except that (in Mediacom's view) programmers' and MVPDs' continued ability to negotiate freely the terms and conditions of carriage has made its perceived grievance "worse,"[4] and that the issues raised in the Petition can be, and are being, addressed in pending Commission proceedings.[5] Likewise, Mediacom admits that many of its stated concerns derive from the proposed Comcast/Time Warner Cable and AT&T/DirecTV mergers and would be better addressed in pending Commission proceedings to review them, where Mediacom continues to have ample opportunity to participate.[6] Thus, by its own admission, Mediacom's Petition is a transparent ploy to get still another bite at an apple that it already has gnawed to the core.

It is a clear misuse of the Commission's processes and a waste of its limited resources — not to mention of other parties' time and money — to seek to open still another redundant proceeding. Nonetheless, the Content Companies are compelled to submit these comments in the interest of ensuring a complete record.

In essence, Mediacom asks the Commission to require programmers to charge all MVPDs a uniform fee for each channel, regardless of how broadly the MVPD agrees to distribute the channel or whether the MVPD otherwise provides value to the programmer, such

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Warner Inc., and CBS Corp., MB Docket Nos. 12-68, 07-18, & 05-192 (filed July 23, 2012) ("Content Interests July 2012 Reply"); Letter of Time Warner Inc., Viacom, Inc., and The Walt Disney Company to Secretary, FCC, MB Docket No. 11-131 (filed Jan. 11, 2012) ("Content Interests January 2012 *Ex Parte*"). To the extent an explicit statement is necessary, the Content Companies incorporate by reference these submissions and the sources cited therein.

[3] Mediacom Petition at 3.

[4] *Id*.

[5] *Id*. at 6 & n.7.

[6] *Id*. at 4-5.

as by carrying the programmer's other channels or in other ways. Mediacom's proposals amount to a form of rigid rate regulation reminiscent of the regulations that traditionally governed common carriers' rates. Such regulations fall well outside the limited authority Congress conferred on the Commission to regulate content providers that are vertically integrated with cable operators.[7] Mediacom's plea for the Commission to regulate whether and on what terms independent programmers make their content available online similarly is outside the Commission's jurisdiction.

Moreover, as the Content Companies previously have explained, the very practices Mediacom would prohibit actually benefit consumers by allowing programmers and MVPDs to reach agreements that promote the development of a diverse range of high quality content. Mediacom's proposed restrictions would have the opposite effect. Accordingly, the Commission should dismiss or deny Mediacom's Petition in its entirety.

I. THE COMMISSION HAS NO AUTHORITY TO EXPAND ITS PROGRAM ACCESS RULES BEYOND VERTICALLY INTEGRATED PROGRAMMERS.

Mediacom's request that the Commission impose pervasive regulations on independent programmers' rates and business practices falls well outside any authority Congress has conferred on the Commission. Among other requests, Mediacom asks the Commission to: (1) require programmers to disclose all "the different programming bundles and separate standalone carriage agreements that the programmer has offered to sell during the previous twenty-four months," and to allow any MVPD to select any of those arrangements;[8] and (2) "require that the net effective rate for video programming is the same for all MVPDs,

[7] Mediacom's proposals also fail to acknowledge the First Amendment protections that would justifiably complicate any effort by Congress to regulate content creators under common carrier theories.

[8] Mediacom Petition at 16-17.

regardless of distribution technology, size, or market characteristics," unless a programmer can make a "rigorous accounting … to justify volume discounts" on a cost basis.[9] Mediacom effectively would have the Commission require programmers to offer their channels to MVPDs "indiscriminately and on general terms" from the equivalent of a tariff — in other words, as common carriers.[10] But the Commission has no authority to impose common carriage regulations on independent programmers.[11]

Mediacom also urges the Commission to forbid programmers from: (1) restricting certain broadband providers' networks from accessing the programmers' online content, and (2) negotiating with MVPDs for an agreement that the MVPD will not provide features that alter the playback of programmers' content.[12] In essence, Mediacom's proposal would require the Commission to subject programmers' content to a new, non-statutory compulsory copyright license for online distribution. However, Mediacom does not even attempt to identify under what authority the Commission could impose such requirements — an unsurprising omission, given that no plausible source of such authority exists, as the Content Companies already explained in the Commission's Open Internet proceeding.[13]

Although Mediacom repeatedly cites to an antitrust statute that regulates price discrimination in the sale of "commodities,"[14] Mediacom rightly stops short of suggesting that

[9] Mediacom Petition at 24.

[10] *See Verizon v. FCC*, 740 F. 3d 623, 652 (D.C. Cir. 2014) (noting that if "a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status") (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012)).

[11] *See Verizon*, 740 F.3d at 654.

[12] Mediacom Petition at 13, 17-18.

[13] Content Interests Open Internet Reply at 3-6.

[14] *See* Mediacom Petition at 19, 22, 24 (citing the Robinson-Patman Act, 15 U.S.C. § 13).

the statute confers any authority on the Commission. Moreover, Mediacom's proposal is completely antithetical to antitrust principles; indeed, the pricing system Mediacom envisions would be impermissible if it were the result of a private agreement among competitors. The Commission should not entertain such anti-competitive proposals, even if it had the authority to do so (which it does not).

Mediacom also repeats its well-rehearsed arguments that its proposals are authorized under Sections 616, 628, and/or 325 of the Communications Act. But here, too, and as programmers have demonstrated repeatedly,[15] Mediacom's arguments are unavailing.

Congress adopted Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 expressly to provide the Commission with authority to prevent any "satellite cable programming vendor in which a cable operator has an attributable interest" from engaging in acts, such as entering into exclusive contracts or discriminating in favor of affiliated programmers, that hinder the ability of competing MVPDs to provide programming to their subscribers.[16] The Commission interpreted the statute to apply to terrestrially-delivered programming as well as satellite-delivered programming in order to prevent *vertically integrated cable operators* from circumventing otherwise applicable rules.[17] This interpretation fell within "Congress's core purpose in enacting Section 628" by "preventing vertically integrated cable companies from engaging in unfair dealing over programming."[18] The Commission also has

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[15] *See, e.g.*, Content Interests July 2012 Reply, *supra* n.2, at 2-4; Content Interests January 2012 *Ex Parte*, *supra* n.2, at 2.

[16] *See* 47 U.S.C. § 548(c)(2)(B); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, MB Docket No. 07-198, 25 FCC Rcd 746, 748 (2010) ("*2010 Program Access Order*").

[17] *2010 Program Access Order*, 25 FCC Rcd at 748-50 ¶¶ 3, 7.

[18] *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695, 709-10 (D.C. Cir. 2011).

restricted cable operators from entering into exclusive contracts with multiple dwelling units, relying on the explicit authority conferred by Section 628(b) to prevent unfair practices by cable operators, vertically integrated satellite cable programmers, and satellite broadcast programming vendors.[19] In contrast, Mediacom's proposed restrictions on *independent* programmers' prices and practices lack any tether to Section 628's language or purpose.[20]

Nor does Section 616 — which focuses exclusively on protecting programmers from coercive practices by MVPDs[21] — provide a valid basis for regulations restricting independent programmers' practices.[22] And as Mediacom acknowledges, albeit backhandedly, it is well settled that Section 325 explicitly protects broadcasters' right to reach individualized retransmission consent terms with different MVPDs,[23] and that such terms may include an MVPD's agreement to provide consideration in part through the carriage of a broadcaster's other

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[19] *See Nat'l Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 661-62 (D.C. Cir. 2009).

[20] Moreover, even vertically integrated programmers have a statutory right to tailor their prices, terms, and conditions of carriage to account for "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. § 548(c)(2)(B)(iii). Mediacom effectively asks the Commission to repeal that provision, but the Commission of course has no such authority. *See* Mediacom Petition at 23-24 (arguing that "[t]o the extent that Congress in 1992 created an exception for 'legitimate' volume discounts" the Commission should disregard that statutory exception in today's marketplace).

[21] *See* 47 U.S.C. § 536.

[22] *See* Content Interests January 2012 *Ex Parte, supra* n.2, at 1 & n.3 (noting that Section 616's legislative history limits provision's definition of "affiliation" to programmers that are vertically integrated with MVPDs).

[23] 47 U.S.C. § 325(b)(3)(C)(ii) ("[I]t shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.").

programming.[24] Mediacom's assertion that these determinations should be ignored or revisited based on an alleged lack of competition in the market for video programming is squarely at odds with the well-documented realities of today's dynamic video marketplace,[25] in addition to being foreclosed by the plain language of Section 325. Finally, because the proposed restrictions on independent programmers lack a reasonable relationship to any of the statutory sources of authority Mediacom cites, Mediacom's attempt to ground those restrictions in the Commission's ancillary authority also must fail.[26]

The Communications Act does not authorize the Commission to regulate the prices and practices of independent programmers in the way Mediacom desires, no matter how many times or how imploringly Mediacom asserts the contrary.

II. MEDIACOM'S PROPOSALS WOULD HARM PROGRAMMERS' ABILITY TO INVEST IN THE WIDE VARIETY OF HIGH QUALITY CONTENT CONSUMERS DEMAND.

Even if the Commission had the authority to enact Mediacom's proposals — which it does not — there is no policy basis for doing so. Mediacom alleges that "[p]rogrammers that control must-have programming … can play competing MVPDs against

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[24] Mediacom Petition at 33 (citing *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, at ¶ 56 (2000)).

[25] *See, e.g.*, Content Interests October 2012 *Ex Parte*, *supra* n.2, at 2 (noting consumer access to "unprecedented and growing array of options for accessing and experiencing video content"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10662 (2013) (noting that although some top-rated networks obtain relatively high carriage fees, other established networks may receive only pennies per month per subscriber).

[26] *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) (noting that any exercise of ancillary authority must be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities").

one another" in order to "distort fair competition and harm consumers,"[27] but this argument ignores the realities of programmers' business model. Programmers' overriding incentive is to obtain the widest possible distribution of their content. Mediacom also contends that some smaller operators may pay different rates than other operators,[28] but Mediacom makes no attempt to engage in any serious analysis to support its nonsensical view that there should be no differentiation among deals in a competitive market, regardless of the variables which may come into play in negotiations with different entities.

Setting aside Mediacom's desire to avoid the operation of market economics in its negotiations with programmers, Mediacom offers no evidence that the public interest is harmed when programmers and MVPDs freely negotiate different terms and conditions based on the unique considerations of each individual deal. To the contrary, content creators and programmers are able to invest in high-quality content and innovative new ways to access it precisely because they have the flexibility to enter into a variety of distribution arrangements. As programmers previously have detailed, these arrangements not only lead to reduced costs and expanded consumer access to programming, but also are protected by statutory and constitutional considerations.[29]

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[27] Mediacom Petition at 28; *see also* Comments of Mediacom Communications Corporation, MB Docket Nos. 12-68, 07-18, 05-192, at 17-21 (filed June 22, 2012) (arguing that "[t]hrough their control of must-have programming, programmers can play competing MVPDs against one another" to the detriment of consumers and the public interest).

[28] Mediacom Petition at 3, 20, 22.

[29] *See, e.g.*, Comments of Time Warner Inc., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, at 6-12 & 19-22 (submitted Jan. 4, 2008) (explaining that, among other matters, packaging may increase programming available to the public, is outside Commission authority in the program-access context, is fundamentally different from tying as understood in antitrust context, and is protected by First Amendment considerations); Comments of The Walt Disney Company, MB Docket No. 07-198, at 9-42 & 72-83 (submitted Jan. 4, 2008) (addressing, *inter alia*, limits on Commission (continued…)

CONCLUSION

Mediacom's Petition asks the Commission to set off — again — down a well-trodden path littered with discredited proposals and arguments. The Commission should decline the invitation and deny or dismiss the Petition.[30]

Respectfully submitted,

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authority on pages 9-20, the public interest benefits of packaging on pages 21-42, with attached study relating to same, and First Amendment considerations on pages 72-83); Comments of Fox Entertainment Group, Inc., and Fox Television Holdings, Inc., MB Docket No. 07-198, at 21-25 (submitted Jan. 4, 2008); Comments of Viacom Inc., MB Docket No. 07-198, at 9-15 (submitted Jan. 4, 2008). Many of these comments also refer to earlier filings and studies that offer similar evidence and conclusions. To the extent an explicit statement is necessary, the Content Companies incorporate by reference these comments and the sources cited therein.

[30] *See* 47 C.F.R. § 1.401(e) (allowing for dismissal of petitions that are "repetitive" or otherwise "plainly do not warrant consideration by the Commission").

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