

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**COMMENTS**



**I. INTRODUCTION**

The American Cable Association (“ACA”) submits these comments in response to the Petition for Rulemaking filed by Mediacom Communications Corporation (“Mediacom”) on July 21, 2014 (“Mediacom Petition” or “Petition”).<sup>1</sup> In its Petition, Mediacom asks the Commission to adopt specific rules to prevent entities that sell video programming to multichannel video programming distributors (“MVPDs”) from engaging in certain unfair and anticompetitive acts and practices. The practices in question are the programmers’: (i) use of coercive tactics to force distributors to purchase and sell an ever-increasing ‘bundle’ of networks, and (ii) reliance on unjustified (and unjustifiable) volume discounts to support discriminatory pricing schemes.<sup>2</sup> The Petition alleges that changes are needed to repair the “broken relationship” between video programming vendors and MVPDs, which is characterized by increasing consolidation leaving

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<sup>1</sup> *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, Mediacom Communications Corporation, RM 11728 (filed Jul. 21, 2014) (“Mediacom Petition”).

<sup>2</sup> Mediacom Petition at 1.

smaller MVPDs at an ever-increasing disadvantage. While there are hundreds of small and medium-sized MVPDs, Mediacom notes that “[c]ontrol of the video programming marketplace today is largely concentrated in the hands of six ‘media giants’ that together own, in whole or in part, well over 125 cable networks, including most of the popular and/or highly penetrated networks, and hold significant sports programming rights. Most of these companies have interests in broadcast networks and/or movie studios.”<sup>3</sup> Moreover, “[f]ive of these six are media giants that are vertically integrated with an MVPD, a broadcast network, and/or a motion picture studio. . . .”<sup>4</sup> To address competitive harms in the marketplace arising from this consolidation, as well as increasing consolidation among the very largest MVPDs, the Petition seeks several reforms of the Commission’s broadcast signal carriage and program access rules.

ACA has long supported the Commission’s efforts to re-examine and update its rules governing retransmission consent and program access and strongly supports consideration of the issues that Mediacom has raised as part of this important undertaking. Although the Commission has several pending rulemakings considering program access and retransmission consent reform, it has not specifically sought comment on the proposals put forth in the Mediacom Petition in any of these.<sup>5</sup> ACA recommends that the issues Mediacom has raised be examined in a new rulemaking as Mediacom has requested.

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<sup>3</sup> *Id.* at i.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 1, 16. Mediacom notes that the Commission has open proceedings in which it could address the bundling and volume discounting practices that are the subject of its Petition. *Id.* at 6 n.7, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007); *Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012). ACA notes that, in addition, the Commission could address the practice of broadcast station online blocking of video content under the retransmission consent good faith rules through a further notice of proposed rulemaking in its pending retransmission consent rulemaking. *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011); *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).

## II. DISCUSSION

### A. The Practices of Video Programmers Identified in the Mediacom Petition are Both Real and Harmful to Competition and Consumers

In its Petition, Mediacom catalogs a number of troubling practices that the largest video programmers and broadcast television station group owners engage in when negotiating affiliation agreements. Mediacom further demonstrates how programmers' forced bundling and packaging practices adversely impact smaller MVPDs and consumers by cramming the expanded basic tier with lightly viewed programming, reducing choice and causing rates to rise.<sup>6</sup> In the attached Declaration, Rich Fickle, Chief Executive Officer and President of the National Cable Television Cooperative ("NCTC") confirms that, as a buying group for over 900 small and medium-sized member MVPDs, NCTC too has confronted and been thwarted by these coercive practices in its attempts to negotiate fair and reasonable master agreements with video programming vendors in the marketplace.<sup>7</sup>

Mr. Fickle describes how programmers insist upon carriage of their weaker, lightly viewed networks in order to gain access to their most popular or "must have" networks, and how this bundling of the desirable and undesirable results in higher prices and reduced choices for MVPD customers.<sup>8</sup> He confirms other practices Mediacom complains of, including tiering and minimum penetration requirements and explains how those practices bloat operators expanded basic tiers and prevent small and medium-sized MVPDs from offering flexible tiers of service that would appeal to the value consumers looking for broadcast stations and a discrete range of the most popular cable programming networks but excluding the most expensive programming.<sup>9</sup>

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<sup>6</sup> Mediacom Petition at 6-16.

<sup>7</sup> Declaration of Rich Fickle, President and Chief Executive Officer, NCTC, ¶¶ 7-13, attached hereto as Exhibit A ("Fickle Declaration").

<sup>8</sup> *Id.* at ¶ 7.

<sup>9</sup> *Id.* at ¶ 8.

Additionally, Mr. Fickle describes another problematic practice, discussed in Mediacom's Petition – “the blocking of access to video programming the programmer otherwise makes freely available on the Internet.” In other words, “broadband Internet customers of MVPDs with whom [the programmer is] unable to reach satisfactory linear carriage arrangements” are blocked by the programmer from accessing the programmer's content on the Internet that would normally be available to them.<sup>10</sup> This is an “egregious programmer practice aimed at forcing MVPDs to assent to prices they find uneconomic or to bundling and tiering requirements they would prefer not to accept.”<sup>11</sup>

ACA and others have observed that CBS recently blocked broadband subscribers of both Time Warner Cable and Bright House Networks from accessing programming on CBS.com as a blatant means of pressuring Time Warner Cable, who negotiates retransmission consent on behalf of the two companies, to agree to prices, terms and conditions it found uneconomic and that News Corp. had done the same to Cablevision just a few years earlier.<sup>12</sup> The problem is not unique to larger MVPDs, as Mr. Fickle states:

Online blocking happened and is still happening to a number of NCTC members this year after they decided not to opt-in to a renewal agreement with Viacom, as is their right under the terms of their NCTC membership, and to forgo carriage of the Viacom networks on their linear cable service. Viacom then selectively blocked access to the video programming from its cable networks that it otherwise makes available online for free to anyone with an Internet connection on the basis, we believe, of the IP-addresses of subscribers to non-participating MVPDs such as Cable One, Liberty Cablevision of Puerto Rico, Vyve Broadband, ImOn Communications and others.<sup>13</sup>

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<sup>10</sup> *Id.* at ¶ 10.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association at 16-22 (filed July 17, 2014) (“ACA Open Internet Comments”); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Reply Comments of the American Cable Association at 31 (filed Sep. 15, 2014) (“ACA Open Internet Reply Comments”); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Time Warner Cable Inc. at 24-25 (filed July 15, 2014); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Cox Communications, Inc. at 12-13 (filed July 18, 2014); *Protecting and Promoting the Open Internet, Framework for Broadband Internet Service*, GN Docket 14-28, Comments of Bright House Networks at 6 (filed July 15, 2014).

<sup>13</sup> Fickle Declaration, ¶ 10.

In its Petition, Mediacom also highlights the serious price disparities that have grown between the prices the largest MVPDs pay for programming and those paid by small and medium-sized providers. With their sizeable subscriber bases, the largest MVPDs effectively become “must have” MVPDs for programmers and consequently are able to demand and receive the lowest programming prices.<sup>14</sup> As the Petition observes, this system creates “a discriminatory pricing structure for which there neither is nor can be any economic justification.”<sup>15</sup> Mr. Fickle confirms that “there is a severe and increasing disparity in prices paid for programming by the largest MVPDs and small and medium-sized companies such as NCTC members due to uneconomic volume discounts.”<sup>16</sup> In his view, “[t]he problem is that the largest MVPDs demand and receive substantial volume discounts, thereby decreasing their programming costs, while small and medium-sized MVPDs are unable to resist the demands for far higher prices because they lack bargaining leverage. There are no significant differences in costs experienced by the programmer to provide these services to smaller operators. Consequently this large difference in costs creates an unfair competitive disadvantage in market for smaller operators.”<sup>17</sup>

**B. The Issues Raised by Mediacom in its Petition are Worthy of a Rulemaking.**

ACA agrees with Mediacom that the Commission should investigate and seek public comment on the coercive and discriminatory programmer practices described in the Petition and confirmed by Mr. Fickle in the context of a rulemaking.

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<sup>14</sup> See Letter to Marlene Dortch from Catherine Carroll, Vice President – Public Policy & Corporate/Government Affairs, Discovery Communications, Notice of Ex Parte Presentation, MB Docket No. 14-57, at 1 (filed Sep. 4, 2014) (describing undue negotiating leverage an “[MVPD] like post-merger Comcast – one that will control a very significant percentage of the MVPD market – could” exert on video programming vendors).

<sup>15</sup> Mediacom Petition at 19-20.

<sup>16</sup> Fickle Declaration, ¶ 11.

<sup>17</sup> *Id.*

In its Petition, Mediacom proposes four different approaches to ending these practices: (i) an “a la carte programming option” that would require programmers to provide MVPDs with the right to offer on an a la carte basis any video programming not previously carried or based on its price exceeding certain thresholds; (ii) an “unbundling option” at the option of the MVPD that builds on the program access condition imposed on Comcast-NBCU; (iii) a prohibition against blocking of Internet access as a tactic in negotiating programming agreements; and (iv) a prohibition against including restrictions on connection or use of lawful devices in programming agreements.<sup>18</sup>

Mediacom has also requested that the Commission strengthen its program access rules concerning volume discounts by, at the very least, placing “the onus squarely on the programmer to make the same sort of ‘rigorous accounting’ that is required to justify volume discounts under the Robinson-Patman Act.”<sup>19</sup> Among other reforms, Mediacom seeks establishment of “a special relief procedure under which a video programmer may seek the Commission’s advance approval of a specific quantity-based discount, but only upon a concrete and detailed accounting of specific volume-related cost savings equal to the price differential at issue.”<sup>20</sup> Mediacom urges that these proposals would benefit small and medium-sized MVPDs who lack the comparative pricing information necessary to even determine if they are in fact being discriminated against by programming vendors.<sup>21</sup>

ACA believes that all of Mediacom’s proposals are worthy of consideration in a rulemaking. This should be done by establishing a new rulemaking docket for this purpose.<sup>22</sup>

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<sup>18</sup> Mediacom Petition at 16-18.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 24-25.

<sup>21</sup> *Id.* at 25.

<sup>22</sup> Mediacom’s Petition clearly meets the standards for the Commission to launch a rulemaking proceeding. See 47 C.F.R. § 1.407 (“If the Commission determines that the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding, and notice

In particular, ACA agrees with Mediacom that the Commission should put a stop to the relatively new practice of a programmer selective blocking access to content they otherwise make freely available on the Internet to those broadband Internet users served by MVPDs who have been unable to come to terms for linear carriage deals with powerful video programming vendors,<sup>23</sup> and recommends that it do so by any means at its disposal. In the Open Internet rulemaking, ACA asked the Commission to extend Open Internet rules, including the no blocking, no degrading, and the transparency rules to edge providers, particularly those affiliated with the broadcast and cable programming networks, to prevent these providers from blocking access to their freely available online content in instances where they cannot reach an agreement with an MVPD.<sup>24</sup> The Commission can also address this matter in part under its retransmission consent rules and in part under its program access rules. The Commission can adopt a *per se* prohibition against blocking online content owned or controlled by a broadcast television station in connection with retransmission consent negotiations under its good faith negotiation rules.<sup>25</sup> Selective online blocking as a means of leveraging higher retransmission consent prices for broadcast signal transmission is utterly inconsistent with any plausible notion of “good faith.” Furthermore, with respect to online blocking by a cable-affiliated programmer or vertically integrated cable operator, the Commission can establish a rebuttable presumption under its program access rules that such an act has the “purpose or effect” of “significantly hindering or preventing” an MVPD from providing satellite cable programming or satellite

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and public procedure thereon are required or deemed desirable by the Commission, an appropriate notice of proposed rulemaking will be issued.”)

<sup>23</sup> Mediacom Petition at 17.

<sup>24</sup> *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014); ACA Open Internet Comments at 15-22; ACA Open Internet Reply Comments at 30-32, 40-41.

<sup>25</sup> See 47 U.S.C. § 325(b)(3)(C); 47 CFR § 76.65 (Good faith and exclusive retransmission consent complaints).

broadcast programming.<sup>26</sup> Accordingly, the Commission should propose and adopt rules governing the online actions of its broadcast licensees and cable-affiliated programmers and put a decisive end to this practice.

### III. CONCLUSION

Mediacom has identified a range of troubling practices by programming vendors in today's media marketplace that warrant careful investigation and consideration by the Commission. ACA encourages the Commission to move forward expeditiously on this request.

Respectfully submitted,

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<sup>26</sup> 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.").

**Exhibit A**

**Declaration of Rich Fickle**

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In the Matter of )  
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Practices of Video Programming Vendors ) RM 11728

**DECLARATION OF RICH FICKLE**

1. My name is Rich Fickle. I am Chief Executive Officer and President of the National Cable Television Cooperative (NCTC). My business address is 11200 Corporate Avenue, Lenexa, Kansas, 66219.

2. I have been with the NCTC since 2011. In my role, I oversee all operations of NCTC, including the negotiation, execution, and renewal of all content agreements with programmers. I have been working in the cable/media industry for over 25 years. Prior to my role at NCTC, I was involved in the negotiation of programming rights for new forms of distribution using advanced technology, and involved in programming-related decisions as a VP for a cable operator.

3. NCTC is a non-profit cooperative purchasing organization for its member companies that own and operate cable systems throughout the United States and its territories. Almost all small and medium-sized multichannel video programming distributors (MVPDs) are members of the NCTC, which currently has approximately 910 member companies serving millions of MVPD subscribers. NCTC member companies differ in size. The largest serves millions of subscribers and the smallest serves tens of subscribers. The median member-size is fewer than 1,500 subscribers. NCTC members include traditional cable companies, traditional telephone companies offering video, municipal video providers, and Indian Tribes offering video service.

4. NCTC functions as a buying group, negotiating standardized master agreements with programmers and technology vendors. NCTC acts as an interface between the vendor and individual MVPDs so that the vendor can deal with a single entity for purposes of negotiating contracts, reporting, managing contracts, billing for payments, collecting payments, and marketing. These acts provide efficiency to the supplier because they reduce the transaction costs of dealing separately with hundreds of small and medium-sized MVPDs so that the costs are comparable to the transaction costs of dealing with a single large MVPD. MVPDs benefit because they receive more competitive rates and better terms and conditions than they would receive through direct deals. NCTC members also benefit by splitting the cost of negotiating and managing these complex agreements.

5. Small and medium-sized MVPDs generally license most of their national cable network programming through the NCTC. NCTC has master agreements with the vast majority of cable networks. The largest four members of the NCTC do not participate extensively in NCTC agreements aside from a few minor programming agreements.

6. All NCTC members compete against larger MVPDs, including the two national direct broadcast satellite providers, DirecTV and DISH Network. Among its members who participate extensively, at least one third of their service areas are also served by another terrestrial MVPD, such as Comcast or Time Warner Cable. As a means to compete, NCTC members often provide superior customer service which is often driven by being locally owned, operated and highly responsive to customer needs. In addition, some members compete by being faster to embrace technology innovation where possible (e.g. fiber-to-the-home and IPTV).

7. A key problem that NCTC has experienced in negotiating programming master agreements is the insistence by larger programmers (the top seven programming companies in terms of aggregated programming costs) that in order to access their most popular networks (the "must have" networks), an MVPD must also purchase any number of lightly viewed

networks (the “don’t want” networks) or else pay stand-alone prices for the must have networks at rates that are cost prohibitive. The seven largest programming conglomerates have significant negotiating power by virtue of each owning several key programming networks which often include high profile sports content. Some of these companies also own interests in national broadcast television networks and regional sports networks that they can leverage against NCTC and individual NCTC members in negotiations. In all cases our members are required to carry weaker networks that ride the coattails of the programmers’ stronger channels. MVPDs and their customers are then forced to take and pay for programming that they do not value or want in order to access the programming that they do want, resulting in higher costs and a higher utilization of bandwidth that otherwise could be used for other content or enhanced broadband.

8. The largest programmers also require MVPDs to comply with specific channel packaging or minimum penetration levels that often are not in line with consumer demand for their services. The result of this common practice is a completely bloated “expanded basic” tier that must be purchased by a very high percentage of the consumers at a relatively high cost if they want cable service. Due to the demands of programmers that certain of their individual networks be offered to a very high percentage of an MVPD’s customers through minimum penetration requirements, smaller packages of “basic channels” that exclude these networks can be offered, but only if the smaller package is subscribed to by a relatively small number of customers. If these smaller packages become too popular, the result will be that not enough of an MVPD’s overall customer base would be subscribing to the programmers’ networks at the required penetration level and the MVPD will be assessed punitive financial penalties.

9. Large programmers often cite “most favored nation” clauses as a reason they cannot offer smaller MVPDs more flexible packages or the flexibility not to carry channels less relevant to certain markets. MVPDs are almost always required to carry high-priced sports content widely even though a relatively small portion of the consumer base is interested in that

content. The cumulative effect is to raise costs to all subscribers and to restrict use of bandwidth for other services not owned by the large programming supplier.

10. Another egregious programmer practice aimed at forcing MVPDs to assent to prices they find uneconomic or to bundling and tiering requirements they would prefer not to accept is the blocking of access to video programming the programmer otherwise makes freely available on the Internet to the broadband Internet customers of MVPDs with whom they are unable to reach satisfactory linear carriage agreements. This practice is purely punitive and there have been several examples of this form of Internet blocking in the past few years. Online blocking happened and is still happening to a number of NCTC members this year after they decided not to opt-in to a renewal agreement with Viacom, as is their right under the terms of their NCTC membership, and to forgo carriage of the Viacom networks on their linear cable service. Viacom then selectively blocked access to the video programming from its cable networks that it otherwise makes available online for free to anyone with an Internet connection on the basis, we believe, of the IP-addresses of subscribers to non-participating MVPDs such as Cable One, Liberty Cablevision of Puerto Rico, Vyve Broadband, ImOn Communications and others.

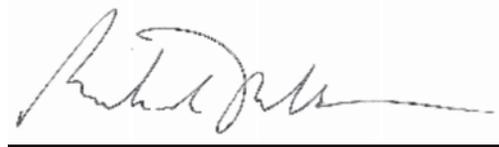
11. Another significant problem that I see in the marketplace is discriminatory pricing. Today there is a severe and increasing disparity in prices paid for programming by the largest MVPDs and small and medium-sized companies such as NCTC members due to uneconomic volume discounts. The problem is that the largest MVPDs demand and receive substantial volume discounts, thereby decreasing their programming costs, while small and medium-sized MVPDs are unable to resist demands for far higher prices because they lack bargaining leverage. There are no significant differences in costs experienced by the programmer to provide these services to smaller operators. Consequently this large difference in costs creates an unfair competitive disadvantage in market for smaller operators.

12. In addition, smaller operators are often faced with less flexible terms for use of new technologies as compared to larger MVPDs. In some cases large programmers try to limit through wholesale agreements the ways in which consumers can view content within rights they have under the copyright laws through the doctrine of "fair use."

13. As a result of increasing industry consolidation among the largest MVPDs, I expect the largest programming/media companies that already have significant bargaining leverage will be able to extract even higher fees and more onerous terms and conditions from the smaller MVPDs in the market as well as NCTC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on September 29, 2014.

A handwritten signature in black ink, appearing to read "Rich Fickle", is written over a horizontal line. The signature is cursive and somewhat stylized.

Rich Fickle