BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

MEDIACOM COMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

Page

SUMMARY

Mediacom has petitioned the Commission to initiate a rulemaking to consider and address certain anti-competitive and anti-consumer practices regularly engaged in by the large media conglomerates that control the most popular non-broadcast and broadcast video programming networks. Mediacom's petition has drawn the support of a broad range of interested parties, including smaller and larger MVPDs, new entrants and established providers, consumer interests, and independent programmers. Opposing Mediacom's petition, not surprisingly, are representatives of the very companies that are the architects and beneficiaries of the practices in question.

Mediacom's petition contained specific evidence of the anti-competitive and anti-consumer impact of the programmers' forced bundling and tiering, unjustified discriminatory pricing, and other obstructionist tactics. As is typical of the programmers, they deny that there is any problem for the Commission to address despite studies, surveys and press reports of consumer dissatisfaction with the size, and high and ever-growing price, of the bundles the programmers force them to buy and despite evidence that the opportunities for independent programmers to provide diverse options for consumers are being stymied by the programmers' practices. In this Reply, Mediacom responds by highlighting specific examples of these practices from comments supporting its petition and from Mediacom's own experience.

It is ironic that the programmers criticize the evidence in the record supporting Mediacom's petition given that it is the programmers' contractual confidentiality requirements that make it difficult for Mediacom and other parties to provide documentation of the programmers' take it or leave it, all or nothing, negotiating tactics. Mediacom would be happy to provide additional documentary and testimonial evidence if the programmers would join in waiving the confidentiality restrictions that stand in the way of the presentation of such evidence.

In the meantime, however, the record in support of Mediacom's petition, with examples such as Viacom's demand that Cablevision pay a billion dollar plus penalty in order to obtain access to Viacom's popular "Core Networks" without having to purchase unwanted "Suite Networks," is without question more than sufficient to warrant the commencement of the requested rulemaking,

The evidence demonstrates not only that the programmers are engaging in the practices Mediacom's petition describes, but also those practices do not, and cannot, promote the core public policy goals of competition, diversity and innovation. It simply is indisputable that it can never be in the public interest for programmers to employ an approach to pricing and negotiation that causes consumers' needs and preferences to go unfulfilled, as is the result, for example, when Viacom relegates MVPDs such as Suddenlink and Cable One to the Hobson's choice of either agreeing to purchase and carry on the most highly-penetrated tiers programming that consumers do not want to watch at prices that consumers do not want to pay or denying those customers access to popular programming that they actually do want. The programmers' practices also negatively impact the goal of making broadband available for all Americans, especially the nation's poorest citizens whose budgets already are strained to the breaking point.

Mediacom also responds to and supplements the record regarding the programmers' claims that their practices actually reduce costs and enable the creation of new programming. Those claims, when subjected to scrutiny, collapse. For example, the conversion of The Disney Channel from a costly premium service to a less expensive expanded basic service turns out not to be the success story for consumers claimed by the programmers. While the five million or so households that were willing to pay for the channel as a premium service enjoyed a big price reduction, tens of millions of other subscribers ended up subsidizing these savings because the addition of the channel to expanded basic raised their monthly subscription fees whether or not the channel was of any interest to them. Cable operators were pressured into acquiescing to the conversion by Disney's tying retransmission consent for the ABC Network's owned and operated broadcast signals to carriage of The Disney Channel on expanded basic. Disney, and other programmers have made billions through their bundling and tiering policies and those billions have come from the pockets of millions of consumers who, if given the choice, would not choose to pay for all or most of the bundled channels but who, in any event, are never given the choice.

These practices are anathema to the public interest in other ways, such as insulating the major programmers from competition from independent programmers. It was only because Suddenlink stood up to Viacom that it had the bandwidth to add a host of new networks, including a number of independently owned and innovative channels. Of course, this came at the price of Suddenlink being unable to offer its customers any of Viacom's more popular channels. The reality is that only a small group of programmers benefit from today's dysfunctional market, not independent programmers, not MVPDs, and certainly not the consumers who do not want to be forced to buy yet another Fox, NBC Sports, or ESPN-branded sports network that simply splits off onto a separate high-priced channel games that used to be available on other channels or another non-sports network relies mostly on "repurposed" programming from other sources.

In addition to coercive bundling, programmers regularly engage in unjustified volume discounting and have begun to enforce their pricing and bundling demands by selectively obstructing the ability of consumers who subscribe to an MVPD's Internet service to access content that the programmer puts online for free to anyone. This tactic is so beyond the pale that even the programmers cannot dream up any public interest justification for it.

Finally, the programmers arguments of last resort consist of mischaracterizations of Mediacom's proposals designed to marginalize its petition. Exaggeration follows exaggeration, with NAB, for example, arguing that Mediacom's petition would "effectively close even a conversation" between a broadcaster and MVPD about the carriage of multicast signals and urging that the petition be "dismissed with prejudice." The Content Companies weigh in with the assertion that Mediacom subscribes to the "nonsensical" view that there should be no differentiation among deals. These arguments are just so much straw in the wind. Mediacom's unbundling proposals would not prevent distributors from discussing the terms of carriage of any programming content. And Mediacom's proposal that programmers be required to justify their discriminatory volume discounts is far from "nonsensical;" instead, it reflects venerable principle underlying Federal and state laws against price discrimination, namely that fair competition requires businesses at the same functional level to stand on equal competitive footing with respect to input prices unless price differentials reflect verifiable differences in direct costs. Nor, contrary to the claims of the programmers, would the adoption of Mediacom's proposals impose mandatory a la carte on programmers and distributors or result in the homogenization of deals struck in a competitive marketplace.

Mediacom's objective is the adoption of specific rules designed to restore balance to a broken marketplace. It has chosen the vehicle of a petition for rulemaking because the issues it raises are inextricably linked and are responsible for an accelerating breakdown in the video programming market. There is no single existing proceeding that would allow the Commission to address these matters in a comprehensive fashion on the basis of an up-to-date record that takes into account the increasing consolidation in the industry, the programmers' current and ever-escalating pricing and packaging demands, the impact of these practices on innovation, and new tactics such as the selective blocking of access to otherwise freely available online content.

Turning to the issue of the Commission's legal authority, Mediacom's petition explained in detail the sources of Commission jurisdiction to adopt the proposed rules, including the application of those rules to non-vertically-integrated programmers. Charter Communications in particular has backed up Mediacom's analysis, while the programmers have relied on arguments that misrepresent the current state of the law and ignore the case made in Mediacom's petition. For example, NAB contends that it is settled law that the Commission lacks authority to regulate the retransmission consent beyond the adoption of rules implementing the good faith negotiation standard. While the Commission has before it arguments regarding the scope of its authority under Section 325, it has not reached a final conclusion on that issue and, indeed, its recent action in regulating joint retransmission consent negotiations specifically rejected the broadcasters' restrictive characterization of the Commission's authority. Mediacom's proposals are fully consistent with national policy favoring actions that will promote the public interest, convenience and necessity by "increasing competition and diversity in the multichannel video programming market" and "spur[ring] the development of communications technologies."

Moreover, the programmers' efforts to rewrite the statutory language, Commission decisions, and appellate rulings cited by Mediacom are unavailing. It is clear that the proposals in Mediacom's petition fall well within the "broad and sweeping" scope of the Commission's authority under Sections 628 and its companion provision, Section 616, both as supplemented by the Commission's ancillary jurisdiction under Section 4(i). Nor is there any merit to the programmers' perfunctory constitutional objections. Mediacom's proposals are entirely content-neutral and thus would be subject to "intermediate scrutiny." That those proposals, which serve several well-established governmental purposes, including the promotion of fair competition in the video marketplace, consumer choice, innovation, and diversity, and which are tailored so that they do not regulate more speech than necessary, would pass constitutional muster.

The Commission should grant Mediacom's petition.

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Mediacom Communications Corporation ("Mediacom") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

In submitting the petition for rulemaking that is the subject of this proceeding, Mediacom has sought to jump-start the Commission's stalled consideration of the negative consequences of certain practices regularly engaged in by large broadcast and non-broadcast video programmers that are significantly hindering competition, innovation and diversity in the video marketplace to the detriment of consumers and the public interest. The opening comments responding to Mediacom's petition reflect a broad consensus of support for the initiation of the requested rulemaking. Much of this support comes from smaller cable operators, but even companies substantially larger than Mediacom have endorsed the petition. Traditional cable operators back the petition as do telco-video and IP video distributors, incumbent operators, new entrants, independent programmers, public interest organizations and consumers. And while not all of these commenters endorse the specific proposals for Commission action put forward by Mediacom, their comments strengthen the already convincing case made by Mediacom that it is both necessary and appropriate for the Commission to address the distortion of the video marketplace caused by the programmers' coercive bundling, unjustified price discrimination, and other obstructionist tactics that are inconsistent with the goal of universal and open access to the Internet and that stymie consumer use of lawful technological innovations.

Standing alone in opposition to Mediacom's petition are – not surprisingly – several of the programmers that have been identified as engaging in the very practices that the Commission needs to examine and reform. Predictably, the programmers confuse their self-interest with the public interest, and instead of engaging in an intellectually honest debate, resort to their usual strategy of denial, *ad hominem* attacks, and distortion of Mediacom's position and of the legal precedent supporting its petition.

The fact that a broad range of organizations with widely differing and often conflicting interests, agendas and perspectives unanimously agree that the problems identified by Mediacom in its petition are just as real and harmful to consumers (and have provided additional evidence that bolsters Mediacom's petition) makes it abundantly clear that the time has come for the Commission to tackle the problematic state of the video programming marketplace in general. The Commission should not be persuaded to avoid that essential task by the distortions and specious arguments presented by a few opponents who just happen to consist entirely of the architects and beneficiaries of the fundamentally flawed wholesale market for pay television content.

DISCUSSION

I. Mediacom's Petition and the Supporting Comments Demonstrate that the Public Interest is Being Harmed by the Programmers' Anti-Consumer and Anti-Competitive Practices.

A. The Record is Clear that the Practices of Large Programmers are Contrary to the Core Public Policy Objectives of Fair Competition, Innovation, and Diversity in the Video Marketplace.

Mediacom's petition demonstrated that the practices of the large programmers who control the bulk of popular "must have" programming are harming competition, reducing consumer choices and driving up consumer prices. The comments submitted in support of Mediacom's petition strengthen the already convincing record demonstrating the anti-consumer and anti-competitive effects of the programmers' behavior.

For example, NTCA estimates that "in order to obtain carriage rights for the 10 most widely distributed channels, small MVPDs must contract for, pay for, and distribute 120 to 125 channels, many of which consumers do not want and do not watch."[1] NTCA also describes how the practice of "forced tiering" is the "very antithesis of consumer choice" by making it "impossible for rural MVPDs to offer truly basic, stripped down service tiers that can be offered at very affordable rates and that many subscribers actually desire."[2] The American Cable Association ("ACA"), which has long been a vocal advocate for video marketplace reform, similarly notes that NCTC, the principal buying group representing small and medium-sized MVPDs, "has confronted and been thwarted by [the programmers'] coercive practices in its

[1] Comments of NTCA – The Rural Broadband Association, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of NTCA") at 3.

[2] *Id.* at 5.

attempt to negotiate fair and reasonable master agreements with video programming vendors."[3] These 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."[4]

Nor is it only the smaller distributors and their customers that are being adversely impacted by the large programmers' abuse of their market power. Verizon, a telco-video provider that has roughly five times as many subscribers as Mediacom, explains that despite efforts to reach programming arrangements that allow it to better and more cost-effectively tailor its video programming offerings to what consumers actually want, "many programmers continue their status quo approach that ultimately raises costs and adds programming potentially of less interest to many consumers."[5] And Charter Communications, Inc. ("Charter"), an incumbent cable operator that currently serves approximately four times as many subscribers as Mediacom, describes how programmers are exploiting their market power by demanding "ever increasing compensation and more and more onerous terms for carriage."[6] As a result, "MVPDs who

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[3] Comments of ACA, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of ACA") at 3.

[4] *Id.*

[5] Comments of Verizon, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of Verizon") at 5-6. *See also id.* at 8 ("negotiating distribution rights of cable programming can be encumbered by demands to carry other channels, which can increase the distribution rights of cable programming and result in tiers carrying programming that may be of little interest to most consumers.).

[6] Comments of Charter, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of Charter") at 2.

would prefer to offer smaller or different packages of channels are required to buy and resell numerous unpopular channels that their customers will never watch."[7]

The supporting comments also confirm Mediacom's assertions that besides impeding competition among distributors, limiting consumer choice, and increasing the wholesale and retail cost of video service by forcing the purchase of channels that consumers do not want or watch, the programmers' practices harm competition among content owners and reduce the availability of programming from diverse, innovative sources of content. In its comments, independent programmer BlackBelt TV describes how despite offering innovative martial arts content in 67 countries, it has been unable to break into the U.S. market because the large programmers' coercive bundling of their weak and powerful networks "thwarts the cable operators' ability to program their channel line-ups according to what their viewers would like to see, robs the consumer of choice, and is contrary to the FCC's public interest goals of promoting diversity and independent voices on television."[8]

BlackBelt TV's experiences are echoed in the comments of other independent programmers.[9] They also are reflected in comments filed in earlier Commission proceedings. For example, even as it endorsed the value of retail tiering over *a la carte*, Bloomberg Television explained in response to a 2004 Notice of Inquiry that the ability of the major broadcast networks to tie the availability of popular programming to the carriage of weaker affiliated networks means that "MVPDs must dedicate scarce channel capacity to network-affiliated content, rather

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[7] *Id.*

[8] Letter from Larry Kasanoff, Chairman and CEO, BlackBelt TV, to FCC Chairman Tom Wheeler, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (dated Sept. 29, 2014).

[9] *See, e.g.*, Comments of Rural Media Group, Inc., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) at 1 (explaining that its discussions with mid-size MVPDs "are repeatedly halted due to bundling requirements that force the addition of the conglomerates' networks and use up system capacity that then becomes unavailable to independent programmers").

than letting programmers fairly and freely compete for carriage based on consumer choice and demand. The net result is that independent programmers like [Bloomberg]…have a more difficult time gaining carriage, particularly on the most highly penetrated tiers of service."[10] Court TV sounded a similar theme in a letter addressing ACA's 2005 Petition for Rulemaking for reform of the Commission's retransmission consent rules, stating that "[i]ndependent cable networks like Court TV, that do not have a connection with any broadcast network, are competing on a severely tilted playing field in the distribution landscape and cannot fairly compete for shelf space or license fees, putting them at a severe competitive disadvantage."[11]

The validity of these concerns and the seriousness of the detrimental impact they have on consumers are confirmed in the comments of Public Knowledge: "Large programmers can leverage their popular programming to force distributors to carry their less popular programming, and to bundle it in turn to their subscribers. These bundles raise prices to consumers, and foreclose entry by smaller programmers."[12] As the Commission is aware, Public Knowledge has been monitoring the video marketplace for over a decade, and it does not hesitate to criticize and oppose distributors when it believes warranted. The fact that independent programmers and a consumer-oriented group such as Public Knowledge support Mediacom's description of the current video market and have joined in a call for Commission action is totally

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[10] Comments of Bloomberg Television, *A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed July 15, 2004) at 14.

[11] Letter of Court TV, *Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM-11203 (dated April 18, 2005) at 3. At the time, Court TV was owned by Time Warner Inc. and Liberty Media, but was not included in the bundle of networks sold as a package by either company; rather, it operated as an unaffiliated channel, negotiating affiliation agreements with MVPDs independently using its own personnel. Court TV (renamed TruTV) undoubtedly sings a different tune now that it is wholly-owned by Time Warner Inc. and marketed by Turner as part of the suite of co-owned networks that Turner insists MVPDs must carry on expanded basic.

[12] Comments of Public Knowledge, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of Public Knowledge") at 1.

at odds with the efforts of the programming interests to isolate Mediacom and marginalize its concerns.

While forced bundling and tiering drew the most attention from the commenters supporting Mediacom's petition, the record also demonstrates support for Commission action addressing the programmers' unjustified volume discounting, discriminatory denials of access to otherwise free Internet content, and obstruction of the deployment and use of lawful technological innovations. With respect to the programmers' unjustified price discrimination between different sized distributors, Cox Communications ("Cox") points out that the programmers' volume discounting practices deprive consumers of the price and service quality benefits that are supposed to flow from competition.[13] Unexamined and unrestrained volume discounting creates pressure for more and more consolidation as is demonstrated by the merger application of AT&T and DirecTV, in which the parties candidly acknowledge that the a main motivation for the merger is the reduction in programming costs (nearly $1.6 billion) that will be realized in just the first three years following the merger.[14] Other small and mid-sized operators – and their customers – will be the ones who will have to pay for these price reductions.[15]

ITTA, an association representing mid-sized communications companies that provide video along with other services, provides further confirmation of the validity of Mediacom's observation that volume discounting in the wholesale market for programming does not fall

[13] Comments of Cox Communications, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) at 3.

[14] *Id. citing* Application of AT&T Inc. for Transfer of Control of Satellite Space and Earth Station Authorizations, File No. SAT-T/C-20140611-00060, filed June 11, 2014, Exhibit A, at 36.

[15] *Id. See also 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") at 23 (discussing estimated $250 to $600 million initial programming cost reductions accruing to the parties to the 2002 Comcast/AT&T Broadband merger and the upward pressure those "savings" inevitably placed on smaller and medium-sized distributors and their customers).

within any of the accepted justifications for price discrimination in other industries and disproportionately harms the small and mid-sized MVPDs who serve rural and small markets. Reporting what it has heard from its member companies, ITTA's comments assert that the fees paid for regional sports networks are as much as 50 percent higher than those paid by larger companies, even though "program production and acquisition costs are sunk and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size."[16] ITTA further explains that the Commission's existing case-by-case approach to resolving discrimination complaints "is virtually unusable for smaller and new entrant MVPDs."[17] Similar points are made in the comments of WTA, Charter, and ACA,[18]

Several commenters also reiterate Mediacom's concerns about other anti-consumer and anti-competitive tactics that the programmers' employ to the detriment of the public interest. These include the newest weapon in the arsenal used by programmers to force MVPDs to accept their carriage terms: blocking an MVPD's Internet customers from accessing online content that the programmer otherwise makes available for free on a non-discriminatory basis.[19] The programmers' purpose is twofold: to compel the distributor to give in to the programmers'

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[16] Comments of ITTA, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) at 5.

[17] *Id.* at 6.

[18] *See* Comments of WTA, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of WTA") at 7 (the cost of distribution via broadcast or satellite beams does not increase significantly, if at all, due to the number of eventual recipients); Comments of Charter at 3 (volume discounting skews competition in local markets in favor of the largest competitors and adversely impacts even a company the size of Charter); Comments of ACA at 5 (there is a severe and increasing disparity in prices paid for programming by the largest MVPDs and small and medium-sized companies due to uneconomic volume discounts despite the absence of any significant differences in costs).

[19] As Mediacom noted in its Petition, programmers will also make other unreasonable and unlawful demands in programming agreements that have the effect of blocking consumer access to online content and lawful devices, in violation of the *Carterfone* "right to attach" principle. Mediacom Petition at 13, 17-18. These restrictions could have secondary effects on the market for retail navigation devices that are contrary to the public interest and Commission policy. *See* Comments of Philo, Inc., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) at 4-5.

demands and to punish the programmer for resisting. Of course, the targeted distributor is not the only one harmed; innocent consumers, including broadband consumers who may not even subscribe to the MVPD's video service also are victimized. These consumers – and the public interest – are just collateral damage in the war that the programmers are waging in pursuit of their bundling and pricing demands.[20]

B. The Programmers' Factual and Policy Arguments in Opposition to Mediacom's Petition are Without Merit.

The opponents to Mediacom's petition have trotted out their usual arguments and allegations that do not hold up under close scrutiny, including many that have been discredited in the retransmission consent rulemaking and other proceedings. The programmers begin by denying that there is any problem for the Commission to address, despite the studies, surveys, and press reports of consumer dissatisfaction with the size, and high and ever-growing price, of the bundles they are forced to buy; despite the fact that cord cutting is on the rise; and despite the unanimous opinion of the diverse interests filing comments in support of Mediacom's petition that the marketplace for video programming is seriously broken.

For example, NAB argues that there is "not one shred of evidence" that Mediacom or any other MVPD has been subjected to all or nothing, take it or leave it forced bundling and tiering demands while the Content Companies (Disney, Fox, CBS, Time Warner Inc., and Viacom) claim there is no evidence that volume discounting harms the public interest.[21] The

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[20] *See* Comments of Public Knowledge at 8-9 (advocating a ban on selective Internet blocking when used as leverage in carriage negotiations); Comments of ACA at 7 (same); Comments of TDS, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Comments of TDS") at 6 (expressing concern that its experience with a programmer who sent TDS' ISP customers targeted in-bound messages in an effort to create uncertainty regarding the future availability to TDS' video subscribers of the programmer's linear channels may foreshadow the programmer's obstruction of Internet access as a negotiating tactic going forward).

[21] Opposition of the National Association of Broadcasters, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Opposition of NAB")

programmers then attempt to turn reality on its head by claiming that their bundling and discounting practices promote consumer choice, diversity and innovation and that it is Mediacom's proposed reforms, not the programmers' practices, that would harm the public interest.[22] And when all else fails, the programmers simply try to belittle Mediacom's petition, suggesting that it is nothing more than a "warmed over smorgasbord" of proposals "unsuccessfully" submitted in other proceedings and describing Mediacom's position on volume discounting as "nonsensical."[23] None of the programmers' factual and policy arguments (or their *ad hominem* attacks and name calling) can withstand scrutiny.

<u>First</u>, the programmers' criticism of the evidence Mediacom has presented in support of its petition is ironic since it is the programmers, through their use of contractual confidentiality requirements, who make it difficult for Mediacom and other distributors to provide documentation of the programmers' take it or leave it, all or nothing, negotiating tactics. Mediacom, which has joined with other distributors in calling on the programmers to support full disclosure of their pricing demands and carriage terms, would be happy to provide the Commission with documentary and testimonial evidence to further support the record regarding the programmers' tactics if the programmers would join with Mediacom in waiving confidentiality restrictions.[24]

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at 2; Joint Opposition of CBS Corporation, The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., and Viacom, Inc., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) ("Opposition of Content Companies") at 8.

[22] Opposition of NAB at 13, 17-18; Opposition of Content Companies at 8. *See also, e.g.,* Comments of Time Warner Inc., *Review of the Commission's Program Access Rulesand Examination of Programming Tying Arrangements*, MB Docket No. 07-198 (submitted Jan. 4, 2008) at 19-21.

[23] Opposition of Content Companies at 1, 8.

[24] *See* M. Farrell, *Suddenlink: We'll Show Ours If They Show Theirs*, Multichannel News (June 23, 2014), <u>http://www.multichannel.com/news/news-articles/suddenlink-we-ll-show-ours-if-they-show-theirs/375337</u> (describing response of Mediacom and Suddenlink to the call by the broadcast-backed "TVFreedom" organization for an investigation of the "billing and business practices" of the cable and DBS industries).

But even in the face of the difficulties resulting from the programmers' intense efforts to prevent the Commission and the public from learning the truth, Mediacom has supported its petition with substantial evidence. Additional evidence of the accuracy of Mediacom's description of the programmers' practices and their harmful impact on the wholesale and retail video marketplace can be found in the fact that a range of parties with differing interests have gone on the record confirming the validity of that description and presented their own, independent supporting evidence.

The programmers simply ignore the detailed "real-world" illustration included in Mediacom's petition describing how bundling and tiering requirements are restraining Mediacom's ability to provide subscribers in Mediacom's Mason City, IA system with low-cost options that would better meet the needs of the residents of this economically challenged community.[25] Mediacom's petition also cites to statements made on the record by other operators, such as Charter's description of how the per subscriber fees it is charged for some networks is adversely impacted by penetration requirements and to Disney's on-the-record admission that it would not permit operators to carry ESPN2 unless they also carried ESPN.[26]

The evidence of harm to the public interest in Mediacom's petition is bolstered by various supporting comments that give examples of the programmers' coercive bundling and tiering tactics and explain how they harm competition and consumers. TDS and Hargray in

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Press reports regarding the Commission's need for data about programming deals to evaluate pending MVPD mergers indicate that some programmers believe that the Commission cannot be trusted with that data and should be able to access it only through the Department of Justice. *See FCC Wants Contracts in Merger Reviews*, Multichannel News (Oct. 8, 2014), http://www.multichannel.com/fcc-wants-contracts-merger-reviews/384545. Mediacom does not share the programmers' lack of confidence in the Commission but nonetheless would be willing to furnish the evidence on a confidential basis to a trusted third-party satisfactory to the programmers, Mediacom, and the Commission for his or her analysis and non-public report.

[25] Mediacom Petition at 14-16.

[26] *Id.* at 9, 10-11.

particular provide specific evidence regarding triple digit fee increases and bundling demands imposed upon them by certain programmers.[27] Mediacom also directs the Commission's attention to press reports and the views of numerous outside commentators that address the issue of forced bundling and tiering. These include article published last month in the Washington Post entitled "Why You Have to Buy Unwanted Cable Channels" describing how a small, municipally owned cable system's renewal of its ESPN contract contained "two big strings" – the requirement that the system add two new networks.[28] According to the system, "[t]here was no room for discussion and no negotiation."[29] Industry observer J. S. Greenfield is one of a number of analysts who have written about the "broken market for program carriage," pointing out that despite clear consumer desire for smaller bundles of popular channels at lower prices, the competitors on the distribution side all end up offering essentially the same programming choices.[30] Why? Because the imbalance in the market leaves distributors without the ability to substantially change the bundles.[31]

In short, if there is a myth, it is the programmers' claim that no one is "forced" to take a bundle and that distributors are always given alternative purchasing options. The Commission needs to look no further than Cablevision's pending antitrust litigation against Viacom for

[27] Comments of TDS at 4-5; Comments of Hargray, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (filed Sept. 29, 2014) at 5-6 (describing specific bundling and tiering demands of various programmers).

[28] Cecilia Kang, *Why You Have To Buy Unwanted Cable Channels*, Washington Post, page A14 (Sept. 11, 2014).

[29] *Id.*

[30] J.S. Greenfield, "Comcast-TWC and the Broken Market for Program Carriage," CIMC/Greenfield (March 12, 2014), http://cimc-greenfield.com/2014/03/12/comcast-twc-and-the-broken-market-for-program-carriage/.

[31] *Id.*

evidence of how programmers coerce distributors to agree to their demands.[32] As described by Cablevision in its court filings, Viacom initially refused Cablevision's requests for an agreement that only covered Viacom's popular "Core Networks" and did not require carriage of the less valuable "Suite Networks."[33] And when Cablevision persisted in seeking a Core Network only offer, Viacom responded with a rate card that called for Cablevision to pay a **billion-dollar plus** penalty for taking only the Core Networks.[34]

Viacom's "offer" was, of course, no offer at all: the penalty for not subscribing to all of Viacom's networks was more than Cablevision's entire program budget.[35] Based on Mediacom's own experience, the use of unrealistic proposals for unbundled services is a common tactic used by the large programmers to force distributors to capitulate to their demands. If programmers would waive confidentiality restrictions, Mediacom could provide specific examples of behavior similar to Cablevision's experience with Viacom, in some cases backed by written price quotes for unbundled services that show the cost of buying only a few of a programmer's most popular channels exceeding the cost of buying those channels as part of a much larger bundle.

Second, the programmers would have the Commission believe not only that that their bundling and tiering demands are not coercive, but also that those practices actually provide consumers with benefits that would be lost if the Commission adopted the rules proposed by

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[32] *See, e.g.*, Chris Moran, *Sick Of Being Forced To Pay For Channels No One Watches, Cablevision Sues Viacom*, Consumerist (Feb. 26, 2013), http://consumerist.com/2013/02/26/sick-of-being-forced-to-pay-for-channels-no-one-watches-cablevision-sues-viacom/.

[33] Memorandum of Law of Cablevision Systems Corporation and CSC Holdings, LLC in Opposition to Defendant's Motion to Dismiss Plaintiff's Amended Complaint, at 7, *Cablevision Systems Corp. v. Viacom International Inc.*,Case No. 13-01278, (S.D.N.Y filed Oct. 4, 2013).

[34] *Id.*

[35] *Id.*

Mediacom. However, as usual, the programmers have confused their own self-interest with the public interest.

In imposing conditions on the Comcast/NBCU merger, the Commission acknowledged that uncontrolled bundling is not in the public interest.[36] That conclusion is not contingent on whether the programmer is vertically integrated or not. The harms to consumers when a programmer forces a distributor to purchase ever-increasing packages of services that must be offered as part of ever-increasing tiers at ever-increasing prices are the same whether the programmer is Comcast or is Viacom, Disney, Fox, or any other large programmer with the power to threaten to withhold popular programming unless its bundling and tiering demands are accepted.

It can never be in the public interest for consumers' needs and interests to go unmet and, in a properly functioning competitive market, it would be possible for distributors to meet those needs and interests at a reasonable price. Yet, consumers continue to be told they if they want to get the channels they want to watch, they have to buy a big, expensive, pre-configured bundle consisting of far more channels than they want. And if a consumer cannot afford or justify purchasing that package, his or her only option is to "cut the cord" and lose access to the desired channels because the owner refuses to sell them to MVPDs at an economically sensible price. The reality of this dismal choice – one which is far from ideal from the perspective of consumers or public policy – is evidenced by continuing declines in the number of households subscribing to video services and by a Nielsen report issued earlier this year that the number of channels received by the average television household has increased from 129.3 in 2008 to 189 in 2013,

[36] *E.g., Applications of Comcast Corporation, Generql 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, ¶ 57 (2011).

even though consumers consistently have limited their viewing to an average of just 17 channels.[37] This is not a snapshot of a properly functioning competitive market.

The programmers' practices also negatively impact the goal of making broadband available to all Americans, even the poorest. There is ample evidence of the strong correlation between broadband adoption and income levels.[38] The cable industry has made a major contribution on that front by offering a $9.95 service for low-income families. Unfortunately, the hope that the availability of such a low-priced broadband service will lead to a dramatic increase in adoption by poorer Americans has not yet been realized and, without further action, may never be realized. Although $9.95 a month does not sound like much to most of the parties to this proceeding or the regulators charged with oversight of the communications marketplace, it is a significant amount of money for millions of the nation's less fortunate citizens.

Consider Albany, Georgia, a city of about 30,650 households served by a Mediacom cable system. Approximately 22 percent of those households have annual incomes of less than $15,000 a year, about 36 percent are below $25,000, and around 48 percent are under $35,000. As Bernstein senior analyst Craig Moffett has demonstrated in a detailed analysis, at all of those income levels, there is little or no discretionary income left after paying for necessities like shelter, food, clothing, and health care.[39] Even at $9.95 a month, the decision facing families at

[37] Nielsen, *Changing Channels: Americans View Just 17 Channels Despite Record Number to Choose From* (May 6, 2014), *available at* http://www.nielsen.com/content/corporate/us/en/insights/news/2014/changing-channels-americans-view-just-17-channels-despite-record-number-to-choose-from.html. *See also* Charter Comments at 8 (pointing out that the Commission's 2014 Report on Cable Industry Prices found that the average number of expanded basic channels rose from 71 in 2006 to 160 in 2016, while the average price of expanded basic increased by nearly $20 per month over that period).

[38] A 2011 NTIA study, for example, found that only 43 percent of low-income households have broadband at home. National Telecommunications and Information Administration, *Exploring the Digital Nation: America's Emerging Online Experience*, at 27 (June 2013).

[39] *See* Craig Moffett, *U.S. Telecommunications and Cable & Satellite: The Poverty Problem*, Bernstein Research (May 2012).

the bottom of the income scale who contemplate signing up for television or broadband service is, to borrow Mr. Moffett's words, "often choosing between these services and a third meal."[40]

When low-income families do manage to pull together some spare dollars to spend, they seem to prefer pay television over broadband. While only 43 percent of low-income Americans have broadband at home, nearly two-thirds of the 43.6 million households classified as below the poverty level in 2010 had cable or satellite television.[41] For households that have already chosen to devote scarce dollars to a pay television subscription, it is even harder than it otherwise would be to find money for a broadband subscription. Adding even $9,95 a month for broadband service may entail unacceptable sacrifice. Convincing these families to alter their choices and forego pay television service to free up money for a broadband subscription seems unlikely to meet with much success.

Given these facts, it is likely that creating a low-priced broadband service will not be enough, by itself, to significantly help those on the wrong side of the digital divide to cross over. A better strategy is a two-pronged attack on both the price of broadband service and the price of pay television service. Clearly, if video subscription prices could be reduced by $9.95 a month, it would be easier for low-income consumers to spend that amount on broadband. Unfortunately, the programmers' pricing and bundling policies prevent a reduction of even that modest size for our poorest citizens.

The large programmers' pricing, bundling and tiering practices leave a distributor that wishes to provide its subscribers with a range of reasonably priced options with no meaningful

[40] *Id.*

[41] *See* Robert Rector and Rachel Sheffield, *Understanding Poverty in the United States: Surprising Facts About America's Poor*, The Heritage Foundation (Sept. 13, 2011), http://www.heritage.org/research/reports/2011/09/understanding-poverty-in-the-united-states-surprising-facts-about-americas-poor.

choice but to drop all of the services offered by the programmer instead of keeping only the ones that are most in demand by, or best serve the needs and interests of, those subscribers. As described by Mediacom in its petition, in some of the supporting comments, and elsewhere in these Reply Comments, dropping all of the networks of one of the top programmers can mean financial suicide for the distributor, but even when it survives, the reality is that its customers are deprived of the programmer's most popular channels, as well as the ones that few watch or value.

The outcome of recent negotiations between a number of MVPDs and Viacom offers undeniable evidence of how today's video marketplace is failing consumers. When (as previously discussed) Viacom demanded that Cablevision pay a billion-dollar-plus penalty if it wanted to purchase less than all of Viacom's channels, Cablevision, undoubtedly because of its calculation of the financial loss it would suffer it took the Hobson's Choice of ceasing carriage of all of Viacom's networks, chose to capitulate to Viacom's bundling demands and pursue relief through antitrust litigation based on a tying claim, which is an extremely difficult case to win given the current state of antitrust law. Even if Cablevision's approach eventually results in its obtaining relief, antitrust litigation can drag on for years (Cablevision's complaint was filed over 18 months ago and it is likely that discovery will continue into 2016) and thus offers little solace to consumers and independent networks adversely impacted by coercive bundling practices. Furthermore, bringing a lawsuit with highly uncertain chances of success against the sole supplier of programming that any significant percentage of subscribers values enough to switch providers is a risky proposition, especially for small and mid-sized MVPDs because of the likelihood that the programmer will exact revenge in future negotiations. For many distributors, the cost of litigation alone eliminates it as a feasible option.

All of this leaves most distributors with only two practical choices: accept the entire bundle or carry none of the programmer's channels. In the case of Viacom, a number of cable operators, lacking Cablevision's resources that could be used to support litigation, have concluded that, because of the huge size and constantly escalating cost of the bundle and Viacom's unwillingness to offer its popular networks individually or in smaller bundles on realistic economic terms, the only one of those choices that made any sense at all was to go without any of Viacom's services.

Most of the operators whose customers no longer can receive any Viacom services are small, but even Cable One (with over 730,000 subscribers)[42] and, more recently, Suddenlink (with around 1.2 million subscribers) were unable to persuade Viacom to offer a good faith, reasonable alternative to an all or nothing result.[43] According to a Suddenlink spokesman, when the company sought a license from Viacom covering just those services that are popular with its customers (such as TV Land and Nickelodeon), it was presented with an unjustified and unrealistic proposal that "ended up being more than the price of all their channels combined."[44]

Suddenlink's experience (and that of other MVPDs presented with all or nothing proposals) also illustrates the perniciousness of the programmers' unjustifiably discriminatory pricing. When DirecTV, a much larger distributor than Suddenlink, gave in and accepted Viacom's bundling demands after a nine-day blackout in 2012, the two sides publicly disputed each other's account of the final deal terms, but were in essential agreement that the rate increase

[42] Steve Donohue, *Cable One Preps Replacements for Viacom Channels*, FierceCable (March 31, 2014), http://www.fiercecable.com/story/cable-one-preps-replacements-viacom-channels/2014-03-31.

[43] S. Ramachandran and K. Hagey, *Cable Operator Suddenlink to Drop Viacom TV Channels*, Wall St. Journal (Sept. 30, 2014), *available at* http://online.wsj.com/articles/cable-operator-suddenlink-to-drop-viacom-tv-channels-1412112336.

[44] *Id.*

for the first year was in the neighborhood of 20 percent.[45] In its negotiations with Suddenlink, Viacom reportedly demanded a 50 percent increase.[46] While Mediacom does not know the starting point of each negotiation, it is obvious that price demands go up as the size of the distributor decreases, not on the basis of any demonstrated cost savings, but as a way of offsetting the price breaks given the larger distributors.

Of course, Mediacom does not need to present its own evidence of the programmer's latest weapon of choice to compel distributors to accept the onerous terms being demanded (or to punish them for resisting those demands): selectively blocking access to Web-based content that the programmer otherwise makes available online for free to anyone so that it cannot be received by the Internet-access customers of an MVPD which does not accept a programmer's price and terms for carriage of linear television networks. The fact such blocking occurs is a matter of public record and can easily be confirmed by anyone seeking to access an affected Website using an IP address assigned by the relevant MVPD. This tactic was used by CBS against Time Warner Cable in 2013 and, as has been widely reported, more recently by Viacom against distributors such as Suddenlink and Cable One.[47] When these and other companies refused to give in to Viacom's bundling demands, Viacom did more than simply walk away from the table; it blocked the distributors' ISP customers from accessing content that Viacom otherwise makes available online for free to anyone.

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[45] Mike Farrell, *Dauman: DirecTV Deal Better for Viacom*, Multichannel News (Aug. 3, 2012), http://www.multichannel.com/news/satellite/dauman-directv-deal-better-viacom/301433.

[46] Doni Bloomfield and Lucas Shaw, *Suddenlink to Drop Viacom TV Networks in Dispute Over Fee*, Bloomberg (Oct. 1, 2014), http://www.bloomberg.com/news/2014-09-30/suddenlink-to-drop-viacom-tv-networks-in-dispute-over-fee.html.

[47] Lisa Richwine, *CBS Retaliates, Blocks Online Shows for Time Warner Cable Customers*, Reuters (Aug. 2, 2013), *available at* http://www.reuters.com/article/2013/08/03/us-timewarnercable-cbs-internet-idUSBRE97201F20130803; Mike Farrell, *Viacom Blocks Online Access to CableOne Subs*, Multichannel News (April 30, 2014), http://http//multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283; Mike Farrell, *Viacom Blocks Suddenlink Subs' Online Access To Shows*, Multichannel News (Oct. 1, 2014), http://www.multichannel.com/news/news-articles/viacom-blocks-suddenlink-subs-online-access-shows/384332.

The programmers make no effort in their responses to Mediacom's petition to justify their use of the Internet blocking tactic as somehow protecting or furthering the public interest and it is remarkable that they are allowed to get away with its use in the face of widespread criticism from public officials (including Chairman Wheeler and senior members of Congress).[48] One can readily imagine the howls of outrage and demands for Commission action that would come from the programmers if a distributor, in a contract dispute, tried to enhance its bargaining leverage by interfering with free and open Internet access.

Programmers' bundling, unjustified discriminatory pricing, and other coercive tactics simply are not in the public interest. The programmers, of course, argue otherwise, claiming that these practices reduce costs and enable the creation of new programming.[49] What the programmers do not acknowledge is that if their practices are, indeed, producing "cost savings," then those savings are being realized by the programmers themselves, not by distributors or consumers. For example, as support for the proposition that cost savings are being realized, the Content Companies cite comments filed with the Commission by The Walt Disney Company in 2008.[50] In those comments, Disney described internal cost savings realized when it converted The Disney Channel from an *a la carte* premium network to one that distributors are required to carry on expanded basic.[51] The Disney Channel is one of the most costly satellite services and

[48] Joe Flint, *FCC Chairman Expresses Concern About TV Networks Blocking Websites*, Los Angeles Times (May 20, 2014), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fcc-chairman-expresses-concern-about-tv-networks-blocking-websites-20140520-story.html.

[49] Opposition of NAB at 13; Opposition of Content Companies at 8.

[50] Opposition of Content Companies at 8-9, n. 29, citing Comments of The Walt Disney Company, MB Docket No. 07-198 (filed Jan. 4, 2008) ("*Disney 2008 Comments*").

[51] *Disney 2008 Comments* at 66-67.

the move to expanded basic means that in most cable systems over 85 percent of customers must pay for the Disney Channel, whether they watch or not.

In addition, the transformation of The Disney Channel from a premium channel into an expanded basic service was hardly the triumph for consumers that Disney makes it out to be.[52] According to a May 2004 NCTA "White Paper," Disney was offered at an *a la carte price* for \$10 to \$13 versus an expanded basic tier price of \$1-\$2.[53] This dramatic decrease in price represented a savings of between \$45 million and \$60 million for the roughly five million subscribers that who opted to purchase The Disney Channel on an *a la carte* basis;[54] the move cost \$1 to \$2 per month for each of the 75 million or more expanded basic subscribers who did not subscribe to The Disney Channel when it was a premium channel. Clearly, whether moving The Disney Channel from an *a la carte* service to the expanded basic tier really reduced consumer prices depends upon whether one cares about the tens of millions of consumers who declined to subscribe to The Disney Channel when they had a choice and were forced to pay millions of dollars for a channel they apparently did not want to pay for and subsidize a price reduction for the much smaller group of subscribers who wanted the network.[55]

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[52] Disney applied pressure upon distributors to accede to the conversion from a premium service by tying retransmission consent for the ABC Network's owned and operated broadcast station to the distributor's agreement to add The Disney Channel to expanded basic, even in cable systems that were outside the DMAs of those stations. *See, e.g.*, Comments of the American Cable Association, *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120 (filed June 8, 2001) at 7-8.

[53] NCTA, *The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices* (May 2004) *available at* http://heartland.org/sites/default/files/sites/all/modules/custom/heartland_migration/files/pdfs/16363.pdf. The NCTA paper, of course, was written at a time when the cable industry was united in its opposition to mandatory a la carte. Today, after a decade of consolidation and programmer abuses, distributors are much more open to a la carte alternatives, particularly where they are not mandatory.

[54] Comments of The Walt Disney Company, MB Docket No. 04-207 (filed July 15, 2004) ("*Disney 2004 Comments*") at 19.

[55] Whether or not any particular consumer or group of consumers saw a price reduction from the forced move of The Disney Chanel from premium to expanded basic, it is clear that Disney made a lot of money from the move, trading between \$50 million and \$65 million in premium revenues for between \$80 million and \$160 million in expanded basic revenues.

The reality is that the wholesale cost of broadcast stations and the networks carried on the expanded basic or most widely penetrated digital tiers never goes down – or even stays steady. The price goes up every year at rates far in excess of inflation and even more when prices are "reset" upon a renewal. Those increases are compounded because the major cable network owners keep adding even more unwanted networks to their bundles and the big broadcast station groups keep buying stations and upping their retransmission consent fees. One study found that monthly per-subscriber video programming costs for basic and expanded basic channels increased by 67 percent across all MVPDs between 2003 and 2008, four times the rate of inflation.[56] Chairman Wheeler himself has noted that over the seven year period from 2005 to 2012, there was an increase in retransmission consent fees of nearly 8,600 percent.[57] As suggested, if programmers' behavior really is producing "cost reductions" as they claim, consumers are not seeing them.

The programmers also do not admit that to the extent that, as they allege, their practices actually do encourage the creation of programming that merits the prices being demanded, it is at the expense of important public policy goals favoring competition among the producers and wholesalers of programming and the promotion of diverse sources of content.[58] This is because

[56] Steven C. Salop, et. al., *Video Program Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach* (June 1, 2010), at 2, *attached to* Letter of Time Warner Cable, Inc., *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed June 1, 2010),

[57] Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, Official FCC Blog (March 6, 2014), http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition

[58] With regard to the claim that the money collected is used to produce new programming, we can only repeat the question directed at Mediacom by the programmers' opposing Mediacom's petition: Where's the evidence? The *Disney 2008 Comments* cite the experience of the Fox-owned SPEED Channel as an example in support of the proposition that the current system supports the creation of new and better programming. Fox took control of what was then known as Speedvision in the early 2000s and forced it upon distributors through bundling with popular Fox networks and Fox-owned broadcast stations. As usual, all expanded basic customers were required to buy it whether they were interested in auto-racing or not. Although Disney cited SPEED as an example of how consumers benefit from the existing system, in reality the channel attracted relatively few viewers and in 2013 it was effectively shut

only a small group of large programmers benefit from today's dysfunctional market, not independent programmers who are stymied in their efforts to reach those consumers who want and deserve something more creative than yet another Fox, NBC Sports or ESPN branded or managed sports channel or a spin-off of an already existing network that relies on "repurposed" shows and a little original programming from the same handful of studios whose productions are guided by and reflect the same corporate policies, attitudes, values and biases across all commonly-owned channels.

The fact that prices for the networks controlled by the major programmers keep going up and they are able to keep adding more channels to their bundles reflects the fact each one has its own "must-have" networks that enable it to demand channel space without regard to the demands of the other programmers who control their own set of critical networks. When it comes to independent programmer that are trying to broaden distribution of their networks, but lack the clout of the major content owners, the story is much different: The bandwidth hogged by the top programmers leaves little or no room for independent producers. Evidence of this impact of bundling on competition among programmers is illustrated by the fact that because (and only because) it stood up to Viacom, Suddenlink had capacity available to add to its most popular service tiers a host of new networks, including a number of channels created by independent

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down and converted into a general sports network, Fox Sports 1, which – as the reader may have guessed – has been added to the bundle of networks that Fox sells as a package.

With regard to retransmission consent revenues collected by broadcast station owners: while broadcast interests claim that they are reinvested in local stations to increase the quantity and quality of locally produced programming, no evidence to support that claim has ever been presented. Indeed, the publicly available evidence suggests that the parent companies of the big station groups spend the retransmission consent money they collect on acquisitions of additional stations, stock dividends and buy-backs, and uses other than the production of more and better local programs.

programmers such as TheBlaze, RLTV, Comedy.tv, Aspire, Up!, Pivot, and Baby First.[59] As a result of Viacom's intransigence in insisting that Suddenlink buy all of its bundled services, Suddenlink has the bandwidth and budget room to provide these new networks, but that ability comes at the price of being unable to provide Viacom's "Core Services" to subscribers who value them because Viacom will not sell those services to Suddenlink unbundled from its less-popular "Suite Services." No matter how the programmers try to spin it, the bundling and tiering practices that are responsible for this result are not in the public interest.[60]

Third, the programmers' arguments of last resort consist of insults and mischaracterizations of Mediacom's proposals. For example, NAB expresses alarm that Mediacom's "unbundling" proposals would "effectively foreclose even a conversation" between a broadcaster and an MVPD about the carriage of the nearly 1,000 new multicasts launched by broadcasters between 2012 and 2014.[61] NAB's concern is, of course, unfounded. Nothing in Mediacom's proposed rules for addressing coercive bundling would prevent distributors and broadcasters from discussing the carriage of any programming content. They would, however, prevent broadcasters from forcing those channels down distributors' throats without regard to their value to subscribers. Undoubtedly, the prospect of having to compete for carriage on the merits of each channel's content and the reasonableness of its cost instead of forcing carriage by bundling it with must-have content is the real source of NAB's dismay.[62]

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[59] *See, e.g.*, Amarillo Alphabetical Channel Listing, Suddenlink (October 2014), *available at* https://docs.google.com/gview?embedded=true&url=https://ws.suddenlink.com/lineup/fileDownLoad?fd_fileId%3D3834.

[60] The capacity-eating bundling demands of the programmers not only drive up the cost of video service, reduce consumer choice, and insulate the big programmers' from competition, but also tie up bandwidth that would otherwise be available for broadband or other advanced services.

[61] Opposition of NAB at 17.

The Content Companies take a similar approach, claiming that Mediacom has "made no attempt to engage in any serious analysis to support its nonsensical view that there should be no differentiation among deals in competitive markets."[63] As yet another example of irony found throughout the programmers' comments, Mediacom notes that it was only a short time ago that the representatives of one of the Content Companies sat in a Mediacom conference room and told Mediacom that, without exception, every one of a number of MVPDs, both larger and smaller, had entered into renewal contracts with the programmer for its pre-configured bundle of programming services without variations worth noting. It appears that the absence of variation in deals is nonsensical if it would be the outcome of ideas that originate with Mediacaom, but not when it results from the behavior of the programmers.[64]

Mediacom, in fact, has not expressed the view ascribed to it by the Content Companies and does not believe that "there should be no differentiation among deals in competitive markets." The concept that Mediacom stressed in its petition is the venerable one: fair competition requires businesses at the same functional level to stand on equal competitive footing with respect to input prices, unless price differentials reflect verifiable differences in direct costs.[65] This principle is enshrined as part of federal antitrust law in the decades-old Robinson-Patman Act, and in numerous other laws, including state laws prohibiting non-cost-based price discrimination by wholesalers in the sale of a range of products. It is safe to say that

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[62] In addition to forcing carriage of weakly viewed multicasts, the broadcasters use their retransmission consent leverage to give affiliated cable networks a leg up over competing sources of programming. If FOX and an independent programmer each create new channels devoted to the same genre (the "Shoe Channel" and the "Footwear Channel"), it isn't hard to predict which one will succeed in getting carriage and which one won't, regardless of the quality of the content offered.

[63] Opposition of Content Companies at 8.

[64] The fact that there is such remarkable uniformity in the channels that diverse MVPDs buy from the major network owners and their placement of those channels is evidence of the truth of the allegations of Mediacom and others about the coercive bundling and tiering practices of those owners.

[65] *See* Mediacom Petition at 19.

the legislators enacting these laws and the government agencies charged with enforcing them do not consider them "nonsensical," and honoring the principle underlying these laws has not resulted in the elimination of differentiation in the deals struck in the affected markets. Those differences, however, have a rational basis in economics rather than reflecting the possession of sufficient raw power to practice unjustified price discrimination.[66]

Besides misrepresenting Mediacom's positions, the programmers' efforts to marginalize Mediacom's proposals have other serious flaws. Contrary to the programmer's proposals (and as demonstrated by Mediacom and the commenters supporting Mediacom's petition), today's video marketplace is not a properly functioning competitive market; if it were, there would be no need for the rules Mediacom is proposing.

That pattern, Mediacom believes, can also be observed with other large programmers. In a truly competitive market, one would expect a programmer's contracts with a wide range of MVPDs of significantly different sizes, market demographics, and other characteristics to demonstrate meaningful variations in the covered networks. One can only conclude, therefore, that what is nonsensical is the Content Companies claims that the market, as it exists today, is competitive and that Mediacom's proposed reforms would render it uncompetitive. The truth is really just the opposite: Except, perhaps, in the case of the very largest MVPDs, the wholesale market for video programming is not competitive because the large video programming vendors have effective monopolies over "must-have" programs while distributors face intense competition. All Mediacom's proposals would do is bring the playing field closer to level.

In addition, as is clearly stated in its petition, Mediacom is not proposing that the Commission mandate *a la carte* carriage of all or any channels, set wholesale or retail pricing, or

[66] Given that the Robinson-Patman Act is commonly identified as an "antitrust" statute, it also is rather perplexing that the Content Companies would characterize a proposal modeled on Robinson-Patman Act principles as "completely antithetical to antitrust principles." Opposition of Content Companies at 5.

eliminate volume discounts where the programmer is able to demonstrate that the discount is justified by an actual, direct cost benefit attributable to the number of customers served. Nor is Mediacom proposing that programmers and distributors cannot strike deals that differ as to a host of variables, including, but by no means limited to, the services carried, the contract term, the breadth and depth of distribution, channel placement, marketing and promotion and overall contract cost.

Distributors will continue to differ in size, resources, competitive pressures and other key characteristics that are relevant to the outcome of business negotiations. Mediacom's modest proposals will not result in the homogenization of the deals actually struck by any given programmer. In fact, the ability of the programmer to force pretty much everyone to buy the same bundle of service on the same fundamental terms already produces homogenous contractual provisions regarding virtually all material terms except price. Instead, Mediacom only seeks the initiation of a rulemaking in which the Commission would consider the adoption of specific rules that would restore balance to the marketplace by giving mid-sized and small distributors at least some prospect of negotiating a deal that makes more sense for them and their customers than buying the programmer's pre-configured, unbreakable bundle at the price that the programmer unilaterally sets based on the more favorable prices it gave to bigger MVPDs and protected with "most favored nations" clauses.[67]

[67] Some programmers present carriage terms to small distributors on a "take it or leave it" basis, and even a distributor of Mediacom's size occasionally is subjected to that kind of treatment. In cases where the programmer is willing to negotiate price, Mediacom believes that the programmer enters the room with its final price already established in its own mind based on the discounts it gave to bigger MVPDs that it needs to recoup and a sometimes complex web of most favored nations protections granted to those larger distributors. In the end, because there is a pre-determined bottom-line price that the programmer will not go below, the outcome of the negotiations is not meaningfully different from the perspective of the distributor than if it had been presented with the bottom-line price on a "take it or leave it" basis.

Finally, notwithstanding the programmers' claims to the contrary, there is nothing improper or wasteful about Mediacom's petition, NAB, for one, goes so far as to make the absurd request that the petition be "dismissed with prejudice,"[68] presumably thereby preventing Mediacom (and through the application of collateral estoppel, any other party) from seeking Commission action regarding the subjects of its petition ever again. Even assuming that dismissal of a petition for rulemaking "with prejudice" is a meaningful concept under the Commission's rules, policies and procedures, it would be unjustified in this case. Contrary to what NAB and the Content Companies imply, the Commission has never acted on, let alone rejected, any of the proposals contained in Mediacom's petition for rulemaking. While Mediacom (as it acknowledged in its petition) has been attempting to get the Commission to address bundling and volume discounting for a number of years, the proceedings in which Mediacom has previously commented – including a proceeding in which the Commission has raised but not answered the question of whether it can and should extend program access-type regulation to non-vertically integrated programmers – are still pending but have been moribund for some time.[69]

Moreover, Mediacom submits that the issues it raises in its petition are inextricably linked, and there is no single proceeding that presents an opportunity to address them all together. By presenting the issues and proposed solutions in the context of a single petition for rulemaking, Mediacom hopes to spur the Commission into acting before distributors and independent programmers are driven from the marketplace by the large programmers' anti-

[68] Opposition of NAB at 3, 18.

[69] *E.g., Inquiry Concerning A La Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207; *Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM 11203; *Revision Of The Commission's Program Access Rules*, MB Docket 12-68.

consumer and anti-competitive tactics and to also ensure that any rules the Commission adopts will be comprehensive.

Mediacom's decision to file the instant petition also is appropriate because the facts and circumstances relevant to the matters raised therein have evolved with changes in the marketplace, and those changes impact the nature and scope of both the problems and their solutions. For example, in the latest rounds of renewal negotiations with MVPDs, many of the big owners of the popular cable networks have insisted on what they call a "reset" of the starting prices for their networks. By "reset," they mean a massive wholesale price increase that makes many MVPDs nostalgically long for the days when they were merely being flailed instead of skinned alive. Of course, the "reset" prices increase every single year during the contract term by amounts far in excess of current levels of inflation. And the programmers continue to play the game of raising their revenues not just through price increases at rates unmatched (to Mediacom's knowledge) in any other business, but also by forcing additional channels onto the expanded basic tier so that the vast majority of the nations' households have to pay for them, whether they want them or not. As noted above, the number of channels received by the average television household has increased from 129.3 in 2008 to 189 in 2013.[70]

Another development alluded to in Mediacom's petition is the increasing concentration in the ownership of broadcast stations and in the ownership of MVPDs.[71] This consolidation can be expected to continue and probably accelerate, engendering further consolidation among content owners, as reflected by Fox's recent attempt to purchase Time Warner Inc. While that particular effort reportedly has been abandoned, there is little doubt that there will soon be other deals that

[70] *Supra* n.37.

[71] Mediacom Petition at 4-5; ACA Comments at 2; ITTA Comments at 2; Charter Comments at 5.

combine programmers.[72] While the participants to these deals routinely allege that the public will benefit from the "synergies" they allegedly provide, further concentration on either side of the market will ultimately mean that most of the nation's television households, which are still served by MVPDs other than the giants created or to be created by past or pending deals, will pay more, will have to buy an even larger number of channels to get the few that they actually want to watch, and will see even less diversity among the producers of televised news, information and entertainment content.

The accelerating breakdown in the retransmission consent marketplace is yet another example of how the marketplace continues to evolve in a way that is antithetical to the public interest. Notwithstanding the pending retransmission consent proceeding, it has been projected that retransmission consent fees will quadruple in the next few years, driven upward in part by demands by the big four broadcast networks that local stations fork over 50 percent or more of the retransmission consent revenues they collect or face revocation of their the network affiliation.[73] This increasing network interference in the market for retransmission consent, together with the out-of-control increases in the price of "free" broadcast television and the

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[72] There is widespread speculation in the MVPD community that Viacom, as a response to the outcome of its carriage disputes with Suddenlink, Cable One, and other smaller cable systems, will seek to bolster its negotiating leverage by recombining with CBS or adding professional sports content to its stable of networks to enhance the "must-have" nature of its programming. *See also* Tomi Kilgore, *Fox's bid for Time Warner means it's time to buy Viacom*, Market Watch (July 21, 2014), http://www.marketwatch.com/story/foxs-bid-for-time-warner-means-its-time-to-buy-viacom-2014-07-16; David Lieberman, *Ready for Media Merger Mania? An Analyst Examines Some Possibilities*, Deadline Hollywood (June 5, 2014), http://deadline.com/2014/06/ready-for-media-merger-mania-an-analyst-examines-some-possibilities-740929/.

[73] Mediacom detailed these developments in comments and reply comments filed jointly with Suddenlink and Insight Communications in the Commission's pending retransmission consent reform proceeding. *See* Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications and Insight Communications, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed May 27, 2011) at 7-12, 20-21; Joint Reply Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications and Insight Communications, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed June 27, 2011) at 6-7.

escalating number of shut-offs are contrary to Congressional intent and detrimental to consumer welfare.

Finally, innovation is another important public policy goal that is being impeded by the practices identified in Mediacom's petition. Apple, Intel and others have reportedly been deterred from offering over-the-top video services to compete with MVPDs' linear television offerings because the programmers refuse to sell their networks to them in any configuration other than the same packages that MVPDs are forced to buy. Furthermore, innovation is harmed when the programmers resort to the tactic of selectively blocking Internet access to their websites to give them even greater leverage in contract negotiations and when bundling consumes bandwidth that MVPDs might otherwise devote to enhancing their Internet access service in order to keep up with rapidly growing broadband usage or for the introduction of new advanced services.

The purpose of the above recap of the problems in the video marketplace that Mediacom and others have been trying to get the Commission to address for years is to show how they are interrelated and getting worse and to demonstrate that the path of just starting, but never completing, proceedings aimed at elements of these problems is not working. Mediacom's petition is not redundant nor is it a "waste" of the Commission's resources. Rather, Mediacom's petition is motivated by its entirely appropriate goal, seconded by a broad range of interests, of getting the Commission to give these matters the renewed, vigorous, and comprehensive attention they so clearly deserve.

II. THE COMMISSION HAS CLEAR LEGAL AUTHORITY TO ADOPT THE REFORMS PROPOSED BY MEDIACOM

Not unexpectedly, the programmers have challenged the Commission's legal authority to adopt Mediacom's proposals regarding the programmers' forced bundling, unjustified volume discounts, discriminatory obstruction of Internet access and interference with the deployment of lawful technologies. Mediacom's petition, as well as the comments of Charter and others supporting Mediacom's petition, anticipated the programmers' statutory objections and have demonstrated that they are without merit.[74] To the extent that the programmers have raised First Amendment challenges to the proposed rules, those challenges also do not withstand scrutiny.

A. The Programmers' Statutory Objections are Without Merit.

In its petition, Mediacom explained in detail how its proposals (as applied to programmers that are vertically-integrated with an MVPD as well as to large non-vertically-integrated programmers) are consistent with the Communications Act, Commission decisions construing the Act, and court opinions upholding those decisions.[75] The programmers have chosen either to ignore or misrepresent the precedents cited by Mediacom.

For example, both NAB and LIN Media focus their attention on the broadcast industry's oft-stated belief that Section 325 of the Communications Act bars the Commission from engaging in any regulation of retransmission consent agreements beyond the rules adopted in 1994 to implement the "good faith" negotiation standard.[76] Mediacom has on multiple occasions demonstrated why the broadcasters' position is not supported by the language of Section 325, the legislative history of that section, and various Commission and judicial decisions.[77] The broadcasters obviously disagree with Mediacom's arguments, but have never attempted to rebut

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[74] Mediacom Petition at 25-34; Comments of Charter at 10-16. *See also* Comments of ACA at 7 (citing Sections 325 and 628 as bases for Commission jurisdiction to adopt regulations governing programmers' unfair practices).

[75] Mediacom Petition at 25-34.

[76] Opposition of NAB at 9-10; Letter from Rebecca Duke, LIN Television Corporation d/b/a LIN Media, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM 11728 (dated Sept. 29, 2014) ("LIN Letter") at 2-3.

[77] *See e.g.*, Mediacom Petition at n.52 *citing* Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed June 3, 2010) at 32-46.

them point-by-point. Thus, for example, while both NAB and LIN reference statutory language declaring that it is not a violation of the "good faith" negotiation standard for broadcasters "to enter[] into retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs]," neither party is willing to come to grips with the fact that by its terms this provision only applies where "such different terms and conditions are based on competitive marketplace conditions" – a prerequisite that does not describe today's broken and dysfunctional video programming marketplace.[78]

LIN and NAB also assert that Mediacom's proposals would contravene national policy, with LIN quoting from the "Statement of Policy" in the 1992 Cable Act.[79] Yet, none of the provisions that LIN cites – promoting the "availability to the public of a diversity of views and information," relying on the marketplace "to the maximum extent feasible" to achieve that availability, and ensuring that cable operators "do not have undue market power vis-à-vis video programmers and consumers" – are at odds with the Commission's regulation of the unfair practices enumerated by Mediacom in its petition, particularly where there is widespread agreement that these practices are inconsistent with broadcasters' duty to operate in a manner that serves the public interest and with the Commission's obligation to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market" and to "spur the development of communications technologies."[80]

[78] Opposition of NAB at 11; LIN Letter at 3.

[79] LIN Letter at 2.

[80] 47 U.S.C. § 548(a). *See also* 47 U.S.C. § 536 (authorizing the Commission to regulate "program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors"). As defined in Section 601 (47 U.S.C. § 521), the term video programming includes "programming provided by…a television broadcast station." Thus, Sections 628 and 616 are broad enough to provide independent authority to regulate broadcast retransmission consent agreements, whether or not those agreements also cover the carriage of non-broadcast content. *See also* 47 C.F.R. 76.1300(e) (defining the term "video programming vendor" to mean "a person engaged in the production, creation, or wholesale distribution of video programming for sale").

To be sure, the Commission has been reluctant to involve itself too deeply in retransmission consent disputes, but it too has never addressed Mediacom's arguments in detail or made a definitive ruling accepting the broadcasters' position regarding the scope of its authority. Indeed, in its recent decision adopting rules governing joint negotiations for retransmission consent by "Top Four" stations, the Commission expressly rejected arguments by LIN and other broadcasters that Section 325 precluded the Commission from adopting such rules. Instead, the Commission held that Congress has conferred upon it "broad discretion to adopt rules" implementing the statutory retransmission consent regime and that it is therefore "reasonable to conclude that Congress did not identify in the statute every practice or arrangement that might violate that obligation, and instead relied on the Commission to make such determinations."[81] Just as the Commission found that regulating joint negotiations furthered Congress's goal of a competitive marketplace, so too would adoption of the rules proposed by Mediacom.

The Content Companies at least make an attempt to respond to a few of Mediacom's arguments regarding the scope of the Commission's authority. However, that attempt falls flat owing to the Content Companies' misrepresentation of Mediacom's proposals and the case law supporting the Commission's authority to adopt those proposals.

As discussed above, the Content Companies contend that Mediacom is proposing the adoption of a "nonsensical" rule that would prevent "any differentiation between deals in a competitive market" by "requiring programmers to charge all MVPDs a uniform fee for each channel."[82] Such a rule, the Content Companies contend, would unlawfully convert

[81] *Amendment to the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) at ¶¶ 30-31.

[82] Opposition of Content Companies at 2, 8.

programmers into "common carriers" and would effectively "repeal" the statutory provision allowing volume-based discounts that reflect "direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[83]

Mediacom already has demonstrated that the Content Companies are knowingly mischaracterizing the rules Mediacom is asking the Commission to consider.[84] Mediacom's petition plainly states that the rules it has proposed "would not require the Commission to set the prices and terms of video programming at either the wholesale or retail level."[85] With respect to volume discounts, Mediacom seeks only to have the letter of the law enforced; if the programmers can demonstrate that their pricing schedules are justified by actual "cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor," the rules proposed by Mediacom will not present any obstacle to the continuation of their volume discounting practices.[86]

The Content Companies also have mischaracterized the principal court decisions cited and relied on by Mediacom in its petition – the *NCTA* and *Cablevision II* decisions.[87] Those cases found that the "broad and sweeping" language of Section 628 was intended to "create a

[83] *Id.*at 4, 6, n.20.

[84] *See supra* pp.24-27.

[85] Mediacom Petition at 6. LIN also is guilty of mischaracterizing Mediacom's objectives. According to LIN, Mediacom's proposed regulations "include having the FCC require that bundling and volume discounting options for the sale of video programming be prohibited." LIN Letter at 1, n.2. Mediacom is at a loss to find anything in its Petition that would allow LIN to make such a claim. Rather, as previously stated, Mediacom's petition states that its proposed rules would "require only that video programming vendors forego their coercive bundling and unjustified volume discounting strategies and provide all MVPDs with economically rational and non-discriminatory options for meeting the needs and demands of consumers." Mediacom Petition at 6.

[86] As Mediacom pointed out in its petition, the Commission's rules already state that a programmer "may be required to demonstrate that... volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served." Mediacom Petition at 18 *citing* 47 C.F.R. § 76.1002(b)(3) and note. Unfortunately, the Commission has failed to put into place any mechanism for effectively enforcing this standard.

[87] *National Cable Telecommunications Ass'n v. FCC*, 567 F. 3d 659 (D.C. Cir. 2009) ("NCTA"); *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cfu. 20ll) ("Cablevision II").

clear repository of Commission jurisdiction to adopt additional rules and take additional actions" consistent with the stated purposes of that section.[88] According to the Content Companies, however, Mediacom's reliance on these cases is misplaced because Mediacom is proposing rules that fall outside "Congress' core purpose in enacting Section 628" – a purpose that the Content Companies contend is limited to "preventing vertically integrated cable companies from engaging in unfair dealing over programming."[89]

The Content Companies' description of the purposes of Section 628 conflicts with the language and history of that provision as analyzed and construed by the United States Court of Appeals for the District of Columbia Circuit in *NCTA* and *Cablevision II.* Those cases are discussed in some detail in Mediacom's Petition and in Charter's supporting comments and it is not necessary to repeat that discussion in full here.[90] What the Commission, which should need no reminder, must keep in mind is that *NCTA* and *Cablevision II* rejected precisely the type of cramped reading of the scope of Section 628 relied upon by the Content Companies in their comments. Both of those cases emphasized that Section 628 by its plain terms "bars unfair practices 'the purpose *or effect* of which is to *hinder significantly* or prevent *any* multichannel video programming distributor from providing satellite programming...to subscribers or consumers'" (emphasis in original).[91] Moreover, both decisions expressly found that the broad language in Section 628 "comports" with that provision's "similarly expansive" purpose of

[88] *See Cablevision II*, 649 F.3d at 701 citing *Implementation of Sections l2 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition qnd Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 (1993) at ¶¶ 40-41; *NCTA*, 567 F.3d at 664, *citing Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291,299 (D.C.Cir. 2003).

[89] Opposition of Content Companies at 5-6.

[90] Mediacom Petition at 10, 26-30; Comments of Charter at 11-14.

[91] *NCTA*, 567 F.3d at 664; *Cablevision II*, 649 F.3d at 704.

"promot[ing] the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market."[92]

Thus, while the Content Companies argue that Mediacom's proposals, including its proposal that the Commission address the unfair practices of all programmers with market power, not just those that are vertically-integrated with a cable operator, are not sufficiently "tethered" to the purposes of Section 628, there can be no doubt that those proposals are well within the scope of the Commission's authority. The record established by Mediacom's petition and the comments in support of the petition clearly establish that the practices Mediacom is asking the Commission to address have the effect of significantly hindering smaller and medium-sized distributors from providing satellite programming to consumers. They do so by impeding competition in both the wholesale programming market and in the retail distribution market, by denying consumers' choice and pricing them out of the market, by causing the shutdown of all of a programmers' services when the programmer refuses to offer any reasonable alternative to the carriage of the entire bundle, and by depriving targeted consumers of online access to content that is otherwise freely available to the public in order to enforce unfair bundling, tiering and pricing demands.

The D.C. Circuit has made clear that "the Commission's remedial powers [under Section 628]...extend beyond the kinds of unfair-dealing interventions Congress specifically foresaw" when it enacted that provision.[93] Furthermore, the regulations proposed by Mediacom do not

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[92] *NCTA*, 567 F.3d at 664; *Cablevision II*, 649 F.3d at 704-05.

[93] *NCTA*, 567 F.3d at 665; *Cablevision II*, 649 F.3d at 707. The Content Companies claim that nothing in Section 628 allows the Commission to reach non-vertically integrated programmers. Opposition of Content Companies at 5-6. However, cable operators are parties to all of the agreements addressed in Mediacom's proposed rules, just as they were parties to the exclusivity arrangements addressed by the MDU order. In any event, the Commission need not rely solely on Section 628 for its authority. As Mediacom and Charter have explained, Section 616 and Section 628 are companion provisions, both intended to serve the same expansive public interest detailed in Section 628. Mediacom Petition at 31; Comments of Charter at 11-12. Given Section 616's broad delegation of authority to the

"stray so far from the paradigm case" as to render them unreasonable, arbitrary or capricious. Rather, like the rules regulating exclusive service agreements between cable operators (not just vertically-integrated cable operators) and MDUs and the rules extending program access protection to terrestrial programming notwithstanding Section 628's express references to "satellite" programming, the rules proposed by Mediacom clearly serve the "expansive goals" of that section and thus "barely reach[] beyond the paradigm case at all."[94]

B. The Programmers' Constitutional Arguments also are Without Merit.

The programmers also argue, with varying degrees of specificity, that Mediacom's proposals would violate the First Amendment. For example, NAB claims that the proposed rule barring programmers from discriminatorily blocking consumers' online access to content as a negotiating tactic is "constitutionally questionable," and LIN states that such a rule would have "obvious First Amendment problems."[95] Neither party, however, offers any further explanation of how such a narrowly crafted rule aimed at preventing discriminatory anti-competitive behavior would violate the Constitution.[96]

The Content Companies, by incorporating prior pleadings by reference, offer more in the way of an explanation for their Constitutional objections, but with no more success.[97] For

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Commission to regulate "programming agreements and related practices," there can be no doubt that the Commission has the requisite authority to address the unfair, anti-consumer, and anti-competitive practices identified in Mediacom's petition. *See also* Mediacom Petition at 33-34 (discussing Commission's ancillary jurisdiction under Section 4(i)).

[94] *NCTA*, 567 F.3d at 666; *Cablevision II*, 649 F.3d at 709-710.

[95] Opposition of NAB at 3; LIN Letter at 3.

[96] LIN also suggests that "obvious" First Amendment issues are would be raised by regulations aimed at programmers' efforts to prevent consumers from taking advantage of lawful technological innovations. LIN Letter at 3. Again, the "obviousness" of how regulations aimed at promoting the *Carterfone* "right to attach" principles would create a free speech issue is less than obvious. *See generally*, Mediacom Petition at 13, 17-18.

[97] Opposition of Content Companies at 8, n.29.

example, the referenced comments filed by Disney in MB Docket No. 07-198 argue that *a la carte* rules and other proposals to regulate the programmers' bundling and tiering practices would impinge on editorial choices and thus would warrant strict scrutiny.[98] However, the rules suggested by Mediacom are entirely content-neutral. Those rules would not bar any programs from being offered and programmers will have the same rights to develop programming that they have today. Moreover, as Public Knowledge states, "[n]o one is suggesting that video should be available only a la carte."[99] Rather, as Mediacom has repeatedly emphasized in its petition and in these reply comments, the proposals it is asking the Commission to consider are intended to create more rather than fewer options for the way in which programming is made available.

The proper level of scrutiny for the types of content neutral regulations proposed by Mediacom is "intermediate" scrutiny. The Disney pleading referenced by the Content Companies contends that reducing the retail price of cable programming is not an important governmental interest and restricting programmers' options for providing programming will not increase consumers' options for receiving programming.[100]

The constitutionality of regulations adopted in furtherance of the goals of Section 628 and related statutory provisions was addressed in the *Time Warner Entertainment Co.* case in 1996.[101] In that case, the D.C. Circuit held that under the intermediate scrutiny standard, a regulation will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

[98] *Disney 2008 Comments* at 77.

[99] Comments of Public Knowledge at 5.

[100] *Disney 2008 Comments* at 79-81.

[101] *Time Warner Entertainment Co. v. FCC,* 93 F.3d 957 (D.C. Cir. 1996).

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[102]

In *Cablevision II*, the court applied the intermediate scrutiny test to the Commission's regulation of terrestrial programming under Section 628.[103] The court found that the Commission's asserted justification for closing the "terrestrial loophole" – promoting fair competition in the MVPD market – already has been found to represent an important governmental interest.[104] That finding is equally applicable to an analysis of the rules that Mediacom is proposing. Indeed, the rules proposed by Mediacom not only seek to further the same interest in competition as the rules analyzed and approved in *NCTA*, but also are designed to promote other goals that Congress has identified as important governmental interests – the promotion of consumer choice, innovation and diversity. Moreover, the record established by Mediacom's petition and the supporting comments resolve any doubt as to whether the relationship between these interests and the practices Mediacom is asking the Commission to address are real or merely conjectural. They are quite real.

Finally, the rules proposed by Mediacom are tailored so that they do not regulate more speech than necessary. The best evidence of this comes from the programmers' various mischaracterizations of the rules. As pointed out throughout this reply, the rules proposed by Mediacom would <u>not</u> require programmers to charge all MVPDs a uniform fee for each channel, would <u>not</u> subject programmers to "common carrier" regulation, would <u>not</u> compel video programmers to offer online content, would <u>not</u> deny programmers the opportunity to negotiate

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[102] *Id.* at 977-78, *citing Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) and *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[103] *Cabelvision II*, 649 F.3d at 711-12.

[104] *Cabelvision II*,649 F.3d at 712-14, *citing Turner Broad. Sys.*, 512 U.S. at 664. *See also Time Warner Entertainment*, 93 F.3d at 978 (promoting fair competition in the video marketplace is an important governmental interest).

for tier placement, would not "effectively foreclose" conversations between broadcasters (or other programmers) over the carriage of additional channels.[105] Rules that were designed to achieve those results might well regulate more speech than is necessary to further the governmental interests involved. But the rules that Mediacom is proposing are narrowly crafted to create more rather than fewer purchasing options, to address unjustified pricing discrimination, to prevent discriminatory blocking of online access to content as part of a coercive negotiating strategy, to promote consumer use of lawful innovative technologies. As such, these rules easily pass Constitutional muster.

CONCLUSION

Mediacom's petition was generated by the fact that the current business and regulatory environment has made it possible for giant programming conglomerates to develop and grow ever larger and more powerful and engage in practices that are contrary to the public interest. Those giant companies have prospered, and in some cases avoid the full consequences of failed business strategies and weak business units, by squeezing MVPDs and their subscribers for more and more affiliate fees for their non-broadcast networks and broadcast properties. The success of the big programmers has negatively impacted all MVPDs and their subscribers, but has come especially at the expense of non-vertically-integrated cable companies that bring television service and Internet access to millions of Americans in rural areas, towns, and small cities throughout the country and, more importantly, at the expense of tens of millions of consumers, including many who are being priced out of the market for multichannel video service or being

[105] For example, Mediacom's proposal would give distributors the right to offer *a la carte* certain high priced channels, but would not mandate *a la carte* carriage. Where any particular channel is carried in the case of any specific distributor would be a subject to be freely negotiated between the programmer and the distributor, and nothing in Mediacom's proposal would prevent a deal in which the channel winds up on expanded basic or some other specified tier. All Mediacom's proposal would do is make channel placement a matter for negotiation rather than, as today, a matter fiat by the programmer.

forced to continue their subscriptions but forego broadband service or make other sacrifices. It is difficult to see how the practices by some programmers Mediacom has described benefit consumers or how it could possibly be in the public interest to permit the handful of huge corporations that control the most popular programming to continue those practices or grow even bigger and more powerful.

Mediacom believes that the negative consequences of the flaws in the market for video programming are severe and getting worse. Allowing the continuation of the status quo in which programmers demand that virtually all MVPD subscribers purchase even more channels they do not want, raise already exorbitant wholesale affiliate fees at astounding rates, practice unjustifiable price discrimination and engage in tactics intended to punish and coerce distributors that do not bow to their demands would be bad for consumers, contrary to the public interest and inconsistent with the Commission's responsibilities.

Several years ago, the Commission was presented with a petition arguing that there were sound factual, policy, and legal reasons for commencing a rulemaking proceeding to consider reforms to the retransmission consent regime. That petition was backed by a broad range of interests who provided a record of support for Commission action. Standing alone on the other side were the programmers who were engaging in the practices that were in need of reform. Those programmers relied on factual and legal misconceptions in an effort to prevent an examination of their conduct and consideration of appropriate remedies. The Commission properly concluded that the commencement of a rulemaking was warranted. While that proceeding has not yet resulted in comprehensive solutions, it nonetheless has been valuable in producing a better understanding of the issues and the perspectives of all interested parties and preparing the groundwork for effective Commission action as conditions warrant.

Mediacom's petition for rulemaking also presents sound factual, policy, and legal reasons for the Commission to commence a rulemaking to consider reforms that would not be limited to retransmission consent, but would also would address certain anti-consumer and anti-competitive practices that are regularly engaged in by the large programmers and that are distorting the video marketplace. Mediacom's petition has drawn support from a broad range of interests who have provided additional evidentiary support for the commencement of the requested rulemaking. And once again standing alone on the other side, relying on arguments that mischaracterize the facts and the law, are the broadcasters and programmers who are the architects and beneficiaries of the practices at issue. The Commission should follow its own precedent and issue a Notice of Proposed Rulemaking to explore the proposed reforms in greater detail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Penny Evetts, Legal Assistant at Edwards Wildman Palmer LLP, hereby certify that on this 14th day of October 2014, I caused copies of the foregoing "Reply Comments of Mediacom Communications Corporation" to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

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